INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF BREWER CARÍAS *v.* VENEZUELA

JUDMENT OF MAY 26, 2014

(Preliminary objections)

In the case of *Allan Randolph Brewer Carías v. the Bolivarian Republic of Venezuela,*

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), composed of the following judges:[1]

Humberto Antonio Sierra Porto, President
Roberto F. Caldas, Vice President
Manuel E. Ventura Robles, Judge
Diego García-Sayán, Judge
Alberto Pérez Pérez, Judge, and
Eduardo Ferrer Mac-Gregor Poisot, Judge

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

in accordance with Articles 62(3) of the American Convention on Human Rights (hereinafter also "the American Convention" or "the Convention") and Articles 31, 32, 42, 65 and 67 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), delivers this judgment structured as follows:

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[1] On July 11, 2012, Judge Eduardo Vio Grossi recused himself from taking part in this case pursuant to the provisions of Article 19(2) of the Court's Statute and Article 21 of its Rules of Procedure; his recusal was accepted by the President of the Court in consultation with the other judges.

Table of contents

I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On March 7, 2012, under the provisions of Articles 51 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted the case of "Allan R[andolph] Brewer Carías"[2] against the Bolivarian Republic of Venezuela (hereinafter "the State" or "Venezuela") to the jurisdiction of the Inter-American Court (hereinafter "submission brief"). The case relates to "the [presumed] lack of judicial guarantees and judicial protection in the proceedings brought against the constitutional lawyer, Allan R. Brewer Carías for the crime of conspiracy to change the Constitution by violent means, in the context of the events of April 11 to 13, 2002; in particular his supposed participation in the drafting of the so-called 'Carmona Decree' ordering the dissolution of the public authorities and the establishment of a 'government of democratic transition.'" The Commission concluded that "the fact that three temporary judges were responsible for hearing the preliminary stage of the criminal proceedings in itself constituted a violation of judicial guarantees." The Commission also considered that, in this case, "the fact that one of the temporary judges was suspended and replaced two days after having filed a complaint for failure to comply with an order he had issued requiring that the accused be given access to the complete file on his case, together with the rules and practices in Venezuela regarding the appointment, dismissal, and provisional status of judges, constituted violations of the guarantees of judicial independence and impartiality and contravened the right to judicial protection." Lastly, the Commission considered that "not being able to make photocopies of the file and to access it in its entirety violated the [presumed] victim's right to have adequate means for preparing his defense."

2. *Proceedings before the Commission.* The proceedings before the Commission were as follows:

a) *Petition.* On January 24, 2007, Pedro Nikken, Helio Bicudo, Claudio Grossman, Juan E. Méndez, Douglass Cassel and Héctor Faúndez Ledesma (hereinafter "the representatives") submitted the initial petition.

b) *Admissibility Report.* On September 8, 2009, the Commission approved Admissibility Report No. 97/09,[3] in which it concluded that "the […] case met the requirements for admissibility set out in Articles 46 and 47 of the American Convention as regards claims related to Articles 1, 2, 8, 13 and 25, while that the claims under Articles 7, 11, 22 and 24 are inadmissible."

c) *Merits Report.* On November 3, 2011, the Commission approved Merits Report No. 171/11,[4] pursuant to Article 50 of the Convention (hereinafter also "the Merits Report" or "Report No. 171/11"), in which it reached a series of conclusions and made several recommendations to the State:

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[2] Allan Brewer Carías is an expert in constitutional law. He has been an alternate Senator, Minister, and member of the 1999 National Constituent Assembly. Curriculum Vitae of Allan R. Brewer Carías (file of annexes to the report of the Commission, appendix, tome V, folios 1770 to 1922).

[3] *Cf.* Admissibility Report No. 97/09, Petition 84-07, Allan R. Brewer Carías, Venezuela, September 8, 2009 (file of annexes to the report, appendix, tome IV, folios 3607 to 3632).

[4] *Cf.* Merits Report No. 171/11, Case of 12.724, Allan R. Brewer Carías, Venezuela, November 3, 2011 (Merits Report, tome I, folios 6 to 46).

a. *Conclusions.* The Commission concluded that the State was "responsible for the violation of the rights of Allan R. Brewer Carías established in Articles 8 and 25 of the American Convention, in relation to its Articles 1(1) and 2. However, the Commission concluded that the State was "not responsible for the violation of the right established in Article 13 of the American Convention."

b. *Recommendations*. Consequently, the Commission made a series of recommendations to the State:

1. That [it] adopt measures to ensure the independence of the judiciary, with reforms to strengthen the procedures whereby judges and prosecutors are appointed and removed, to affirm their tenure in those positions, and to eliminate the temporary status of the vast majority of judges and prosecutors, in order to uphold the rights to judicial protection and to a fair trial established in the American Convention.

2. Should the criminal proceedings against Allan Brewer Carías continue, that [it] establish the conditions necessary to ensure that the trial is conducted in accordance with the guarantees and standards enshrined in Articles 8 and 25 of the American Convention.

3. That [it] make appropriate reparation for the human rights violations established in the report, in both their material and moral dimensions.

d) *Notification of the State.* The Merits Report was notified to the State on December 7, 2011, granting it two months to provide information on compliance with the recommendations. On February 7, 2012, the State presented a communication that provided no information on compliance with the Commission's recommendations, and that questioned the conclusions of the Merits Report.

e) *Submission to the Court.* On March 7, 2012, the Commission submitted the case to the Court in view of "the need to obtain justice for the victim, the nature and gravity of the violations found, and the failure of the State to carry out the recommendations." In particular, the Commission indicated that it submitted "all the facts and human rights violations set out in Merits Report 171/11, and ask[ed] the Court to adjudicate and declare the international responsibility of the State of Venezuela for the [presumed] violation of the rights established in Articles 8 and 25 of the American Convention, in relation to Articles 1(1) and 2, with regard to Allan R. Brewer Carías."

f) The Commission designated Commissioner Felipe González and the Executive Secretary of the Commission at the time, Santiago A. Canton, as its delegates, and Elizabeth Abi-Mershed, Deputy Executive Secretary, Tatiana Gos, Lilly Ching and Karin Mansel, lawyers of the Commission's Executive Secretariat, as legal advisers.

II
PROCEEDINGS BEFORE THE COURT

3. *Notification of the State and the representative.* The submission of the case was notified to the State and to the representatives on May 4, 2012.

4. *Brief with motions, arguments and evidence.* On July 7, 2012, the representatives submitted their brief with motions, arguments and evidence (hereinafter "motions and arguments brief") to the Court. The representatives agreed, in substance, with the Commission's arguments and asked the Court to declare that the State was internationally responsible for the violation of Articles 8, 25, 1(1) and 2 alleged by the Commission; they also asked that the Court declare the violation of Articles 7, 11, 13, 22 and 24 of the Convention, with regard to the presumed victim.

5. *Answering brief.* On November 12, 2012, the State submitted to the Court its brief with preliminary objections, answering the submission of the case, and with observations on the motions and arguments brief (hereinafter "answering brief"). In addition, the State designated Germán Saltrón Negretti as its Agent. One of the preliminary objections referred to "the lack of impartiality" of certain judges of the Court and its Secretary.

6. On November 23, 2012, the acting President of the Court issued an Order in which, *inter alia,* he decided that the allegation of lack of impartiality submitted by the State as a preliminary objection was not a preliminary objection and was unfounded.[5]

7. *Observations on the preliminary objections.* On March 5 and 6, 2013, the Commission and the representatives of the presumed victim, respectively, presented their observations on the preliminary objections filed by the State.

8. *Public hearing.* In an Order of the President of the Court (hereinafter "the President") of July 31, 2013, the parties were summoned to a public hearing on the case and the testimony to be provided by affidavit or in the oral proceeding was established.[6] The representatives contested this order for several reasons that were rejected by the Court in plenary.[7] The public hearing was held on September 3 and 4, 2013, during the 100th regular session of the Court, which took place at its seat.[8] During this hearing, the Court requested the parties to present certain additional helpful information and documentation.

9. The Court also received 34 *amicus curiae* briefs presented by: (1) Rubén Hernández Valle, President of the *Instituto Costarricense de Derecho Constitucional*; (2) the *Asociación Dominicana de Derecho Administrativo*;[9] (3) Leo Zwaak, Diana Contreras Garduño, Lubomira Kostova, Tomas Königs and Annick Pijnenburg, on behalf of the Netherlands

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[5] *Cf. Case of Brewer Carías v. Venezuela*. Order of the acting President of the Inter-American Court, Judge Alberto Pérez Pérez, of November 23, 2012. Available at: http://www.corteidh.or.cr/docs/asuntos/brewer_23_11_12.pdf

[6] *Cf. Case of Brewer Carías v. Venezuela*. Order of the President of the Inter-American Court of July 31, 2013. Available at: http://www.corteidh.or.cr/docs/asuntos/brewer_31_07_13.pdf.

[7] *Cf. Case of Brewer Carías v. Venezuela*. Order of the Inter-American Court of August 20, 2013. Available at: http://www.corteidh.or.cr/docs/asuntos/brewer_20_08_13.pdf

[8] There appeared at this hearing: (a) for the Inter-American Commission: Felipe González, Commissioner, and Silvia Serrano Guzmán, Adviser; (b) for the representatives of the presumed victim: Pedro Nikken, Héctor Faúndez Ledesma, Juan E. Méndez, Douglas Cassel and Claudio Grossman, representatives, and Claudia Nikken García and Caterina Balasso Tejera, legal advisers, and (c) for the Bolivarian Republic of Venezuela: Germán Saltrón Negretti, Agent of the State for Human Rights; Manuel Galindo, Attorney General of the Bolivarian Republic of Venezuela; Branggela Betancourt, Coordinator of Criminal Matters of the Office of the Attorney General; Luis Britto García, External Adviser of the State Human Rights Agency; María Alejandra Díaz, External Adviser of the State Human Rights Agency; Manuel García, lawyer of the State Human Rights Agency, and Elbana Bellorín, Internationalist.

[9] The brief was signed by Olivo A. Rodríguez Huertas, President of the *Asociación Dominicana de Derecho Administrativo*.

Institute of Human Rights (SIM) of the University of Utrecht; (4) Amira Esquivel Utreras; (5) Luciano Parejo Alfonso; (6) Libardo Rodríguez Rodríguez; (7) Gladys Camacho Cépeda; (8) Osvaldo Alfredo Gozaíni and Pablo Luis Manili, President and Secretary General of the *Asociación Argentina de Derecho Procesal Constitucional*; (9) Venezuelan Public law professors;[10] (10) Giuseppe F. Ferrari; (11) José Alberto Álvarez, Fernando Saenger, Renaldy Gutiérrez and Dante Figueroa, on behalf of the Inter-American Bar Association (IABA) and of themselves;[11] (12) Agustín E. de Asís Roig; (13) Ana Giacommette Ferrer, President of the *Centro Colombiano de Derecho Procesal Constitucional*; (14) Jaime Rodríguez-Arana; (15) Víctor Rafael Hernández Mendible; (16) Eduardo Jorge Prats; (17) Asdrúbal Aguiar Aranguren, as President of the Executive Committee of the *Observatorio Iberoamericano de la Democracia* and on behalf of himself; (18) Marta Franch Saguer; (19) Javier Barnes; (20) Miriam Mabel Ivanega; (21) Jose Luis Benavides; (22) Luis Enrique Chase Plate; (23) Diana Arteaga Macías; (24) José Luis Meilán Gil; (25) the New York City Bar Association[12] (26) Enrique Rojas Franco, President of the *Asociación Iberoamericana de Derecho Público y Administrativo Profesor Jesús González Pérez*; (27) Pablo Ángel Gutiérrez Colantuono and Henry Rafael Henríquez Machado; (28) Jorge Luis Suárez Mejías, Profesor of the *Universidad Católica Andrés Bello*; (29) José René Olivos Campos, President of the *Asociación Mexicana de Derecho Administrativo*; (30) Pedro José Jorge Coviello, Professor of the *Universidad Católica Argentina*; (31) Carlos Eduardo Herrera Maldonado; (32) Humberto Prado Sifontes;[13] (33) Jorge Raúl Silvero Salgueiro, and (34) Helena Kennedy and Sternford Moyo, Co-Presidents of the International Bar Association's Human Rights Institute.

10. On September 24, 2013, Isaac Augusto Damsky and Gregorio Alberto Flax forwarded an *amicus curiae* brief. In view of the fact that the public hearing had been held on September 3 and 4, 2013, and, consequently, the time frame for submitting *amicus curiae* had expired on September 19, on the instructions of the President of the Court, the authors were advised that this brief could not be considered by the Court or incorporated into the case file.

11. *Final written arguments and observations.* On October 4, 2013, the representatives of the presumed victim forwarded their final written arguments and annexes, and the Commission presented its final written observations. In addition, on October 4, 2013, the State submitted its brief with final arguments, in which it responded to the Court's request for helpful evidence. On October 10, 2013, the State presented the annexes to the brief with final arguments and included, as annex 4, an "appendix to the final document presented by the State." The Court notes that this annex contains arguments that were provided within the time frame for the presentation of annexes, but not within the non-

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[10] The brief was signed by: Juan Domingo Alfonso, Jesús María Alvarado, Ricardo Antela Garrido, Tomás A. Arias Castillo, Carlos M. Ayala Corao, José Vicente Haro, Luis Herrera Orellana, Jorge Hiriakidis Longhi, Gustavo J. Linares Benzo, Laura Louza, José A. Muci Borjas, Rafael J. Chavero Gazdik, Roman J. Duque Corredor, Gerardo Fernández V., Oscar Ghersi Rassi, Freddy J. Orlando, Andrea Isabel Rondón G., Carlos Weffe H., and Enrique J. Sánchez Falcón. The followed persons endorsed this brief: Rogelio Pérez Perdomo, Gustavo Tarre Briceño, Henrique Meier, Humberto Njaim, Dean of the Faculty of Juridical and Political Studies of the *Universidad Metropolitana*, Ana Elvira Araujo García, José Ignacio Hernández G., Flavia Pesci-Feltri Scassellati-Sforzolini, Armando Rodríguez García, Alberto Blanco-Uribe Quintero, Serviliano Abache Carvajal and Antonio Silva Aranguren.

[11] José Alberto Álvarez is President of the Inter-American Bar Association (IABA), Fernando Saenger is President of the IABA Constitutional Law Committee, Renaldy Gutiérrez is a former President of the IABA, and Dante Figueroa is a former Secretary General of the IABA.

[12] The brief was presented by Werner F. Ahlers, Tiasha Palikovic, Andrew L. Frey, Allison Levine Stillman and Gretta L. Walters on behalf of the New York City Bar Association. The brief was signed by Werner F. Ahlers.

[13] The brief was signed by Humberto Prado Sifontes, National Coordinator of the Human Rights Committee of the Venezuelan *Federación de Colegios de Abogados* and some members of regional human rights committees of the lawyers' professional associations.

extendible time frame for the presentation of the brief with final arguments. Hence, the Court considers that these arguments are inadmissible, because they were time-barred.

12. On October 25, 2013, the Secretariat of the Court, on the instructions of the President of the Court, granted the representatives, the State, and the Commission until November 15, 2013, to submit any observations they deemed pertinent, exclusively on the briefs and annexes presented by the State and the representatives on October 4, 2013.

13. *Observations of the representative, the State, and the Commission.* On November 13, 2013, the representatives of the presumed victim forwarded their brief with observations on the answers provided by the State in its brief with final arguments of October 4, 2013, to the questions posed by the Court during the public hearing, as well as on the annexes to this brief presented by the State on October 10, 2013. The Commission and the State did not submit observations.

III
PRELIMINARY OBJECTIONS

14. In its brief answering the Merits Report, the State presented the following arguments as "preliminary objections": (i) a challenge of the judges and the Secretary of the Court; (ii) the rejection of the recusal presented by Judge Eduardo Vio Grossi in order not to participate in the proceedings, and (iii) the presumed failure to exhaust domestic remedies.

A. The "preliminary objections" presented by the State challenging some judges and the Secretary of the Court, and rejecting the recusal presented by Judge Eduardo Vio Grossi

15. Regarding the so-called "preliminary objections" presented by the State challenging five of the judges and the Secretary of the Court, and rejecting the recusal of Judge Eduardo Vio Grossi, the President, in an Order of November 23, 2012,[14] decided that "the allegations of the lack of impartiality of some of the judges of the Court in the performance of their functions, and the supposed pressure exercised on one of the judges to recuse himself from hearing this case, presented by the State of Venezuela as a preliminary objection did not constitute a preliminary objection." This was because he considered that "the State's allegation of lack of impartiality was unfounded in relation to Judges Diego García-Sayán, Manuel Ventura Robles, Leonardo A. Franco, Margarette May Macaulay and Rhadys Abreu Blondet, who have not incurred in any of the statutory causes for disqualification or carried out any action that would allow their impartiality to be questioned," and found "inadmissible and unfounded the State's allegations with regard to the supposed lack of impartiality of Pablo Saavedra Alessandri, the Court's Secretary."

16. Furthermore, in an Order of November 29, 2012,[15] the Court had decided "[t]o confirm that the recusal of Judge Eduardo Vio Grossi […] was presented to the President of

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[14] *Cf. Case of Brewer Carías v. Venezuela*. Order of the acting President of the Inter-American Court, Judge Alberto Pérez Pérez, of November 23, 2012. Available at: http://www.corteidh.or.cr/docs/asuntos/brewer_23_11_12.pdf

[15] Judge Vio Grossi indicated that "in the 1980s, [he] was a professor of the Public Law Institute of the Faculty of Legal and Political Sciences of the *Universidad Central de Venezuela*, of which Mr. Brewer Carías was the Director," so that he "had a professional and work-related relationship with him." Judge Vio Grossi added that, "[e]ven though all that was some time ago, [he] would not want this fact to give rise to any doubt, however minimal, with regard to the impartiality of both [him]self, and especially of the Court." On November 12, 2012, the State, in its brief answering the Merits Report and the motions and arguments brief, indicated that it "reject[ed]"

the Court and accepted by him, in consultation with the other judges, in accordance with the statutory and regulatory provisions that regulate this matter" and considered "inadmissible the State's arguments concerning the alleged failure to provide grounds for the reason given by Judge Vio Grossi to recuse himself, as well as those relating to the State's 'rejection' of the said excuse claiming that Judge Eduardo Vio Grossi was obliged to hear the case." Consequently, the objections presented by the State in this regard have already been decided.

B. The preliminary objection of failure to exhaust domestic remedies

B.1. Arguments of the State, the Commission, and the representative

17. The State argued that "the supposed victim has not filed and exhausted the remedies established in domestic law, before resorting to the inter-American system" and that "the petitioners did not exercise and exhaust the remedies established in Venezuelan law in order to assert their claims and obtain the judicial protection of the rights they considered had been violated." In this regard, it argued the existence of "the remedies corresponding to the intermediate stage established in the Organic Code of Criminal Procedure; also, the exhaustion of the trial stage, if applicable, as well as [the existence of] effective remedies, [such as] the appeals against decisions, against final judgments, for reconsideration, for cassation, [and] for review." As possible remedies, the State indicated the remedies mentioned in article 328 of the Organic Code of Criminal Procedure in force (hereinafter "OCCP"), the remedy of appeal (article 453 of the OCCP), the remedy of cassation (article 459 of the OCCP), and the appeal for review (article 470 of the OCCP). It added that "[t]he effectiveness of these remedies would, if applicable, achieve the results desired by the petitioners"; moreover "the Venezuelan system of justice includes appropriate mechanisms consonant with the right of defense."

18. The State also argued that "there is no human rights violation in a trial that never started because the petitioner left the country." Regarding the preliminary hearing, the State argued that "the absence of Mr. Brewer Carías has made it impossible to hold the preliminary hearing, [which] has prevented the exercise of the actions established in the Organic Code of Criminal Procedure that enable the parties to the proceedings to assert their rights." The State argued that "[i]t should be repeated that it is essential to hold the preliminary hearing so that the criminal proceedings may continue; moreover, the case may be decided in his favor." It indicated that this "is the opportunity granted to the accused to deny, contest, and argue the facts and the law, to reply, make a rejoinder or a rebuttal, and speak with defense counsel at all times without this entailing the suspension of the hearing." In addition, it considered it "unusual to claim that the judge can decide the request for a declaration of nullity without the presence of the accused, and that the preliminary hearing can be held subsequently, [because] this would result in a major violation of due process and of the rights of Mr. Brewer Carías."

19. Consequently, it argued that the request for annulment filed by the representatives of Mr. Brewer Carías is "the response to the charges, and the requests made in it are the logical consequence of the arguments put forward by the defense counsel and not

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the recusal presented by Judge Vio Grossi." On November 29, 2012, the Court in plenary decided to confirm that Judge Eduardo Vio Grossi's recusal from hearing the case of *Brewer Carías v. Venezuela* had been presented to the President of the Court at the time and accepted by him, in consultation with the other judges, pursuant to the statutory and regulatory provisions that regulate this matter. See, in this respect: *Case of Brewer Carías v. Venezuela*. Order of the Inter-American Court of Human Rights of November 29, 2012. Available at: http://www.corteidh.or.cr/docs/asuntos/brewer_29_11_12.pdf

autonomous petitions that can be decided in the absence of the accused, at a time other than the preliminary hearing, because the annulment of the indictment – requested by the defense counsel of [Mr.] Brewer Carías – does not relate to incidental matters that violate his rights, but is a request that relates to the merits and the essence of the preliminary hearing and, therefore, must be decided in the presence of the parties so as not to violate due process." The State argued that, "consequently, the request of the defense counsel of [Mr.] Brewer Carías, and also those of the prosecution in the indictment brief, have not been decided, not because it is sought to violate [Mr. Brewer's] rights, or because it is intended to postpone the proceedings, or because the Venezuelan State is delaying matters, but because, while this person is absent, removed from the criminal proceedings, a fugitive from Venezuelan justice, it is not possible to session and decide on the petitions of the parties, because all the parties must be present and, furthermore, the requests relate to decisions concerning the merits of the case." The State also argued that the representatives "seek […] to violate the principle of complementarity […], adducing political persecution, which does not exist, and arguing that, since they exercised some remedies – not all of them – which were not decided in their favor, they have already exhausted the domestic remedies." In the final written arguments, the State reiterated the arguments included in the answering brief and requested that the Court "declare the inadmissibility of the request made by the defense counsel of [Mr.] Brewer Carías, because it is not in keeping with the parameters established in Article 46(1)(a) of the American Convention […], as the domestic remedies described by the State have not been exhausted."

20. In its brief with observations on the preliminary objections, the Commission considered that "the arguments submitted to the Court by the State do not differ substantively from those submitted to the [Commission] during the admissibility stage." Consequently, it indicated that "in Admissibility Report 97/09, it had ruled on the admissibility requirements established in the American Convention, including that of the exhaustion of domestic remedies. This ruling was based on the information available at that time, as well as on the application of Articles 46(1) and 46(2)(b) and (c) of the Convention." The Commission emphasized that the conclusions at the admissibility stage "were reached using the applicable *prima facie* standard of assessment."

21. Regarding the exception established in Article 46(2)(c) of the Convention, the Commission argued that "it had no evidence to attribute to the State an unwarranted delay in deciding the criminal proceedings as a whole, because the physical absence of the accused would prevent holding the preliminary hearing and other procedural actions relating to his trial." However, the Commission argued that "the failure to decide the appeal for a declaration of nullity filed on November 8, 2005, by the defense counsel of Mr. Brewer Carías was 'evidence of a delay that could be attributed to the State as regards deciding the claims relating to due process that were filed during the proceedings." In this regard, the Commission emphasized that "during the admissibility stage, […] the State failed to provide a satisfactory explanation of the reasons that prevented the domestic judicial authorities from ruling on the arguments that supported the appeal for a declaration of nullity owing to the absence of Mr. Brewer Carías."

22. Second, regarding the presumed failure to exhaust domestic remedies "in view of the supposed violation of the presumption of innocence owing to declarations made by members of the judiciary about the guilt of Mr. Brewer Carías, as well as the alleged violation of independence and impartiality owing to the provisional status of judges and prosecutors involved in the trial," the Commission stated that "these arguments were presented to the domestic judicial authorities in the request for annulment regarding which a delay that could be attributed to the State had already been determined." The Commission also analyzed these arguments under Article 46(2)(c) of the Convention,

"specifying that the lapse of more than three years in deciding it is a factor that meets the requirements of the exception established owing to an unwarranted delay." The Commission accorded "special relevance in its analysis to the problem of the provisional status of the judges and prosecutors, as well as to the risk this problems signified to ensuring the guarantees of independence and impartiality to which the accused are entitled and which, evidently, constitute the institutional presumption ensuring that the individual has appropriate and effective remedies that they must exhaust." In this regard, the Commission considered that "the State ha[d] not presented to the Commission information on the existence of adequate remedies to contest the assignment or removal of judges in this situation." Furthermore, the Commission indicated that remedies such as recusal "are not appropriate to contest the temporary status of judges assigned to the proceedings or their removal owing to their actions." Thus, the Commission found that "the removal of several temporary judges in this case, following the adoption of decisions concerning the presumed victim's situation, may have affected his access to the remedies of the domestic jurisdiction and, therefore, this aspect of the demand for the requirement in question should be exempted."

23. In its final written observations, the Commission indicated that the State "had mentioned, in abstract, the procedural stages and the respective remedies regulated in the Organic Code of Criminal Procedure, which would be relevant if the representatives' arguments referred merely to the inexistence of remedies. However, the issues raised in this case are of a structural nature and respond to an actual situation of the Judiciary that goes far beyond the abstract regulation of the criminal proceedings."

24. The representatives asked that: (i) "the challenge of the Court's judges and its Secretary be rejected, and also the contestation of the recusal of Judge Eduardo Vio Grossi, because these two elements had been cited erroneously as preliminary objections and because the Inter-American Court had decided these issues previously," and (ii) "the objection of failure to exhaust domestic remedies be rejected." In this regard, they argued that the latter objection was "time-barred because it had not been cited appropriately at the first proper procedural opportunity before the Inter-American Commission." They added that this objection should be rejected "additionally and subsidiarily, owing to the failure to comply with the rules on the distribution of the burden of proof imposed on the State, when citing the preliminary objection of failure to exhaust domestic remedies, [because it had not] indicated: (a) the domestic remedies that should have been exhausted, and (b) the effectiveness of those remedies. […] Additionally and subsidiarily, because Mr. Brewer Carías was not obliged to exhaust domestic remedies based on Article 46(2) of the American Convention. […] In addition to the above, because Mr. Brewer Carías had exhausted all the remedies to defend himself that were actually available."

25. The representatives argued that the presumed victim had "repeatedly approached the temporary supervisory judge and the Appeals Court to request the re-establishment of his rights." They also indicated that, when answering the charges, the violation of the judicial guarantees of Mr. Brewer Carías had been denounced, requesting "a declaration of the nullity of the proceedings in view of the said violations." They indicated that this request for annulment had not been decided "to date," which "made it impossible that the said request for annulment could be effective."

26. The representatives argued that, in this case, what is being contested "is an investigation and criminal charges that are absolutely groundless, and that form part of a moral and political lynching"; consequently, "there is no sense in speculating about an eventual remedy of appeal or even of cassation; [because] those remedies w[ould] be appropriate for other matters." They also indicated that "the State's arguments imply that

the [presumed] victim cannot obtain the protection ensured to him by the Constitution and the Convention, without first abandoning his right to personal liberty and delivering himself up to those who are persecuting him, and who would immediately execute the illegal arrest warrant that has been issued against" Mr. Brewer Carías. They added that "the State seeks that, in order to be able to exhaust the domestic remedies, [Mr.] Brewer must sacrifice his personal liberty, submitting to the discretion of courts that lack independence and impartiality, and to the inhuman and degrading treatment resulting from detention in prisons without natural light and without ventilation, as the Court has had the occasion to verify." They indicated that Mr. Brewer cannot be reproached for "protecting that liberty himself by being outside the country and delaying his return, because the State has denied him that protection and has threatened him." They stated that Mr. Brewer feels "a justified fear that the exercise of the jurisdictional remedies may jeopardize the exercise of his rights."

27. Regarding the absence of the presumed victim at the preliminary hearing, the representatives argued that this did not prevent deciding the request for annulment, considering that the right of the accused not to be tried *in absentia* is "a procedural guarantee that must always be understood in favor of the accused and never against him." They argued that "the procedural actions that cannot be conducted without the presence [of the presumed victim] are those that relate to his trial, which include the preliminary hearing and the oral and public hearing, [and this] does not preclude conducting numerous other judicial actions that do not entail trying him *in absentia*, [such as] the request for the annulment of all the proceedings to date." They cited article 327 and the following articles of the OCCP in order to determine the procedural actions that must be decided in the preliminary hearing and, consequently, with the "essential" presence of the accused, reiterating that the request for annulment owing to violation of procedural guarantees must be decided without the need to hold the said hearing and without requiring the presence of the accused.

28. The representatives also argued that "the only available judicial remedy against the massive violation of the right to due process" was that of absolute nullity based on the unconstitutionality of the judicial proceedings under article 191 of the OCCP. In this regard, they indicated that the law did not establish a time frame for deciding the filing of the said remedy; hence, they stated that the judicial authority should have proceeded in accordance with the general provision established in article 177 of the said Code, and issued a ruling within three days of the filing of the remedy. Accordingly, they concluded that, when the motions and arguments brief was presented, there had been an unwarranted delay of seven years. They contested the State's argument that the remedy had not been decided because it had to be decided during the preliminary hearing, since more than three years had passed without this having been held for reasons that presumably were not related to the presumed victim's absence; a lapse that they considered had "delayed without justification" the decision on the remedy. They also argued that "the general rule contained in article 177 of the OCCP is entirely congruent with the principle of the pre-eminence of human rights […], which imposes on all judges the unavoidable obligation of ruling on the petitions relating to such rights, without delay and with prevalence over any other matter."

29. The representatives considered that, although the request for a declaration of absolute nullity complies, in theory, with the requirements established in Article 25 of the Convention (simple, prompt and effective), in the specific case, "and in the context of a judiciary that lacks the impartiality to decide," there has been a "denial of justice," because seven years have passed (at the time the motions and arguments brief was submitted) since it was filed, without even a start having been made on processing it. The representatives argued that the said remedy constitutes "the *amparo* [remedy of protection]

in criminal procedural matters" and, thus, "if a decision on the remedy of *amparo* has to await the preliminary hearing, which can be delayed indefinitely, […] the remedy could not be considered simple and prompt; and if the decision on it was conditioned to Mr. Brewer Carías giving himself up to his persecutors and being deprived of his liberty, international human rights law and, in particular the Convention, would not allow it to be considered an effective remedy.

30. Regarding the request for annulment, the representatives added that this can be filed by any of the parties in relation to the actions of prosecutors or judges that may have violated constitutional rights, at any stage of the proceedings, provided that this was before the final judgment was delivered and, according to article 177 of the OCCP, the judicial authority must take a decision within three days. They also referred to the case law of the Criminal Cassation Chamber of the Supreme Court of Justice establishing that, under the open system established in the Code, the request for annulment "can be filed by the parties or applied, *ex officio,* at any stage or level of the proceedings by the person who is hearing the case." Furthermore, the representatives established that "there is no legal restriction [indicating that the annulment] can only be decided exclusively at a precise and specific procedural opportunity, [such as] during the preliminary hearing." They added that "whatever position is adopted with regard to the time frame that the judge has to decide a request for annulment of the actions of the prosecutor based on unconstitutionality, the conclusion is the same, because all the possibilities lead to the same conclusion: that a lapse of eight years without a decision is unreasonable and, therefore, constitutes unwarranted delay." This is because: (i) the supervisory judge should have decided the request for annulment that was filed within the following three days, and (ii) "making a ruling on complaints of serious violations of due process subject to the uncertain time frame of the execution of a procedural action, the legal purpose of which is not to hear and decide these complaints, is unreasonable and harms the right that such violations are decided by a simple, prompt and effective remedy."

31. They also argued that, in the case file there was no "judicial decision of any kind in which the supervisory judge has expressed the impossibility of holding the preliminary hearing owing to the absence of [Mr.] Brewer Carías." They stated that the hearing had been postponed on several occasion for different reasons other than the presumed victim's failure to appear.

32. The representatives added that the Commission's decision to conclude that Article 25(1) of the Convention had not been violated was based on an erroneous interpretation of the Organic Code of Criminal Procedure and of the Venezuelan Constitution. In this regard, they argued that the case law of the Superior Court of Justice cited in the Commission's report "is contrary to the assessment [made by the Commission] about the moment for deciding the request for annulment," because, according to that court, "if the appeal for a declaration of nullity is filed in the intermediate stage, the judge must decide it either before the preliminary hearing, or as a result of that hearing, varying according to the constitutional harm that is alleged, and it only indicated that it would be 'preferable' for the decision on the request for annulment at the intermediate stage to be adopted during the preliminary hearing." They also stated that the October 2009 judgment of the Constitutional Chamber, which was cited by the Commission, "refers to a totally different and specific situation relating to the exercise of an action for *amparo*"; that is, in a precise context and only in order to declare inadmissible the action *amparo*. They indicated that "even if this was true, it would show that domestic law ran counter to Venezuela's obligations under the Convention and international law." In this regard, they argued that "submitting […] the decision on nullity […] to the holding of a constitutional hearing would eliminate from the request for annulment the requirements of being simple and prompt." They considered that

the requirement of simplicity is not fulfilled "because it is conditioned to a more complex procedure, such as the preliminary hearing of the criminal proceedings, […] in which different issues of a diverse nature must be decided," so that "it is neither reasonable nor proportionate for the purpose of that protection." They also argued that the request for annulment is not a prompt remedy, concluding that the time that has passed without the said hearing being held and, consequently, a decision being taken on the remedy filed, is "sufficient to invoke an unwarranted delay in deciding the remedy filed." They stated that the appeal for a declaration of nullity would not be effective either, because "it was subject to the illegitimate condition that Mr. Brewer Carías, a victim of political persecution, prosecuted for a political offense, give himself up to those who are persecuting him."

33. Furthermore they argued that, in the specific case, all the conditions had been met for the "ineffective remedy" developed in the Court's case law, namely: (i) the remedy was "illusory" owing to "the general conditions in the country" described in their brief relating to the presumed lack of independence and impartiality of the judicial and prosecution authorities and owing to "the particular circumstances of this case," which were the alleged "vicious persecution of all the branches of the public powers against the [presumed] victim"; (ii) the "uselessness" of the remedies owing to the alleged lack of independence of the judicial authorities to decide with impartiality," and (iii) the "creation of a context of denial of justice as a result of the unwarranted delay in the decision on nullity."

34. In addition, and with regard to the exceptions established in Article 46(2) of the Convention, they argued that: (i) the context of the alleged structural situation of the provisional status of judges and prosecutors in Venezuela, as well as "[t]he reiterated and persistent violation of the right to an independent and impartial judge in the proceedings against [Mr.] Brewer Carías, which the State has not denied, prove that the [presumed] victim was denied due process of law, which constitutes the first exception to the requirement of the exhaustion of domestic remedies before having recourse to the international protection of human rights (Art. 46(2)(a) [of the Convention])"; (ii) "[t]he persistent and arbitrary refusal of the Public Prosecution Service and of the different judges who have heard the criminal case instituted against [Mr.] Brewer Carías to admit and to process the evidence and remedies requested by the [presumed] victim's lawyers, in order to defend him adequately in the terms of Article 8 of the Convention, constitutes the second exception to the requirement of the exhaustion of domestic remedies before having recourse to the international protection of human rights (Art. 46(2)(b) [of the Convention])", and (iii) "[t]he circumstance that the request for the annulment of all the proceedings, filed on November 8, 2005, has not been decided to date constitutes the unwarranted delay and, thus, the third exception to the requirement of the exhaustion of domestic remedies before having recourse to the international protection of human rights (Art. 46(2)(c)" of the Convention.

35. The Court will now indicate the facts it considers relevant in order to take a decision on the objection of prior exhaustion of domestic remedies. It will describe these facts in the following order: (1) background to the short-lived overthrow of the President of the Republic in April 2002 and the reactions to that event, and (2) the criminal proceedings against Mr. Brewer Carías.

B.2. Determination of the pertinent facts to decide the preliminary objection on the failure to exhaust domestic remedies

B.2.1. Background

B.2.1.1. From the end of 2001 to April 2002

36. Between December 2001 and April 2002 a social movement arose against different policies of the Venezuelan Government.[16] The public protest gradually increased during the first three months of 2002,[17] and led to the short-lived overthrow of the President at the time, Hugo Chávez Frías.[18]

B.2.1.2. April 11, 12 and 13, 2002

37. On April 11, 2002, the commanders of the Army Forces stated that they withdrew their recognition of the authority of the President of the Republic and, the following day, General Lucas Rincón informed the population that "the President of the Republic has been asked to resign and has accepted."[19]

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[16] IACHR. Report on the Situation of Human Rights in Venezuela, 2003 OEA/Ser.L/V/II.118. Doc. 4 rev. 1, October 24, 2003, Executive Summary, para. 4. "The political climate in Venezuela has shown a marked tendency to radicalization, which became accentuated in the early months of 2002 and culminated in a breakdown of the constitutional order on April 11, with its subsequent restoration on April 14 of that year." Available at: http://www.cidh.org/countryrep/Venezuela2003eng/summary.htm; transcript of sessions of the "Special Political Committee to investigate the events that occurred on April 11, 12, 13 and 14, 2002," of the National Assembly of the Bolivarian Republic of Venezuela (file of the answering brief, annex 1, exhibit 6, folios 10419 to 10450), and extract from "*Los documentos del Golpe*" of the Ombudsman's Foundation (file of annexes to the answering brief, annex 1, exhibit 6, folios 10704 to 10709).

[17] *Cf.* OAS. Resolution of the General Assembly, Declaration on democracy in Venezuela, AG/DEC. 28 (XXXII-O/02), June 4, 2002 (file of the answering brief, annex 1, exhibit 2, folios 9258 and 9259); OAS. Resolution of the Permanent Council, Support for the democratic institutional structure in Venezuela and the facilitation efforts of the OAS Secretary General, OEA/Ser.G CP/RES.833 (1349/02) corr.1, December 16, 2002, Available at: http://www.oas.org/36ag/english/doc_referencia/cpres833_02.pdf; OAS. Resolution of the General Assembly, Support for democracy in Venezuela, AG/RES. 1 (XXIX-E/02), April 18, 2002. Available at: www.oas.org/consejo/sp/AG/Documentos/AGE-1-29-02%20espanol.doc; OAS. Resolution of the Permanent Council (CP), Support for the process of dialogue in Venezuela, OEA/Ser.G CP/RES. 821 (1329/02), August 14, 2002. Available at: http://www.oas.org/consejo/resolutions/res821.asp. Newspaper articles: "*No fue un golpe*" in "Panorama" on April 13, 2002 (file of annexes to the answering brief, annex 1, exhibit 2, folio 8879); "*PDVSA suspende envíos a Cuba*" in "Panorama" on April 13, 2002 (file of annexes to the answering brief, annex 1, exhibit 2, folio 8879); "*¿Cómo se fraguó la renuncia de Hugo Chávez*" in "El Nacional" on April 13, 2002 (file of annexes to the answering brief, annex 1, exhibit 7, folio 11185); "*EEUU conocía desde febrero los planes para derrocar a Chávez*" in El Mundo" on April 16, 2002 (file of annexes to the answering brief, annex 1, exhibit 3, folio 9198 and 9199); "*EEUU admite que hubo encuentros con Carmona pero niega su implicación en la trama golpista*" in "El Mundo" on April 17, 2002 (file of annexes to the answering brief, annex 1, exhibit 3, folio 9196 and 9197); "*Los 'demócratas' del 11 de abril y sus asesores*" in "Granma" on April 25, 2002 (file of annexes to the answering brief, annex 1, exhibit 3, folio 9184); "*Al país se le tendió una trampa*" in "El Nacional" on April 27, 2002 (file of annexes to the answering brief, annex 1, exhibit 7, folio 11187); "*¿Hasta cuándo?"* in "Panorama" on May 7, 2002 (file of annexes to the answering brief, annex 1, exhibit 2, folio 8881); "*Autores intelectuales están libre*" in "Panorama" on May 7, 2002 (file of annexes to the answering brief, annex 1, exhibit 2, folio 8882), "*Crónica de una guerra civil anunciada*" in "El Universal" on May 7, 2002 (file of annexes to the answering brief, annex 1, exhibit 2, folio 8883); "*De verdad verdad son verdaderas*" in "Panorama" on May 14, 2002 (file of annexes to the answering brief, annex 1, exhibit 2, folio 8886); "*EEUU abre averiguación sobre complicidad golpista*" in "Panorama" on May 15, 2002 (file of annexes to the answering brief, annex 1, exhibit 2, folio 8890); "*Chávez: Hemos abortado un golpe de Estado*" in "Globovisión" on October 6, 2002 (file of annexes to the answering brief, annex 1, exhibit 4, folio 10043), and "*El Presidente de Venezuela crea plan antigolpe*" in "El Tiempo" on October 9, 2002 (file of annexes to the answering brief, annex 1, exhibit 4, folios 10044 to 10046).

[18] Newspaper article "*Carmona Estanga: He sido opositor pero conspirador nunca*" in "El Nacional" on May 3, 2002; "*Cronología de movilizaciones realizadas por la oposición hasta el 25 de marzo de 2002 y proyecciones de las futuras manifestaciones hasta el 15 de abril de 2002*" (file of annexes to the answering brief, annex 1, exhibit 1, folios 8497 to 8522); annexes sent by the Prosecutor General on the events of April 11, 12 and 13, 2002 (file of annexes to the answering brief, annex 1, exhibit 1, folios 8634 to 8643 – continues in exhibit 2, folios 8644 to 8659), and publication "*Verdades, mentiras y videos. Lo más relevante de las interpelaciones en la Asamblea Nacional sobre los sucesos de abril*" in "Libros El Nacional," 2002 (file of annexes to the motions and arguments brief, tome VII, folios 7809 to 7857).

[19] *Cf.* Newspaper article "*Tres Presidentes en dos días"* in "eluniversal.com" of April 12, 2002 (file of the answering brief, annex 1, exhibit 1, folio 8232) and Document prepared by the Latin American Parliament,

38. According to the version of the events provided by Mr. Brewer Carías – because the State's version differs from this (*infra* para. 62) – during the early hours of April 12, 2002, Pedro Carmona Estanga, one of the leaders of the civil protests, had contacted him and "sent a vehicle to collect him from his home."[20] Mr. Brewer Carías affirms that he was taken to "Fort Tiuna," the headquarters of the Ministry of Defense and of the General Command of the Army, and that, once there, Mr. Carmona had asked him to examine a document that he had been handed on his arrival; to this end, he was introduced to two young lawyers, Daniel Romero and José Gregorio Vásquez, who were the persons who had shown him the document.[21] The said document would later be known as the "Carmona Decree" and it ordered the "reorganization of the public authorities" and the establishment of a "government of democratic transition."[22] Subsequently, Mr. Brewer stated that, since he was unable to meet with Mr. Carmona in order to give him his opinion on the document, he left "Fort Tiuna" and returned home.[23]

39. That same day, Mr. Carmona Estanga did, in fact, "announce the dissolution of the public authorities and the establishment of 'government of democratic transition,' among other measures,"[24] reading the so-called "Carmona Decree." Among other matters, this decree established the following:[25]

> 1. A government of democratic transition and national unity is established. Pedro Carmona Estanga is designated […] President of the Republic of Venezuela, and hereby becomes the head of State immediately […]. The President of the Republic, in a meeting of the Council of Ministers, is authorized to make the decisions with general effects that are necessary to ensure the most appropriate execution of this decree […].
> 2. The name of the Republic of Venezuela is re-established […].
> 3. The members of the National Assembly and their substitutes are suspended from office […].
> 7. The President of the Republic, in a meeting of the Council of Ministers, may remove and designate temporarily the heads of the organs of the national, state and municipal public authorities, in order to guarantee the democratic institutional framework […].
> 8. The reorganization of the public authorities is decreed […], and to this end, the President and other justices of the Supreme Court of Justice, the Prosecutor General, the Comptroller General, the Ombudsman, and the members of the National Electoral Council are removed from their functions that they were performing illegally. […]

Venezuelan Parliamentary Group, Political Affairs Committee, entitled "*Responsabilidades que sobre el control de orden público tienen las autoridades de la alcaldía del distrito metropolitano de Caracas en relación a los hechos acaecidos el día 11 de abril de 2002*" dated April 15, 2002 (file of the answering brief, annex 1, exhibit 2, folios 8903 to 8911).

[20] Statement made by Mr. Brewer Carías on June 3, 2002, before the Sixth Prosecutor (file of annexes to the answering brief, annex 1, exhibit 2, folio 8986); statement made by Mr. Brewer Carías during the public hearing held in this case, and testimony of Edgar Jose López Albujas before the Sixth Prosecutor on April 21, 2005 (file of annexes to the answering brief, annex 1, exhibit 9, folio 12336).

[21] Statement made by Mr. Brewer Carías on June 3, 2002, before the Sixth Prosecutor (file of annexes to the answering brief, annex 1, exhibit 2, folio 8988).

[22] Indictment of Mr. Brewer Carías of January 27, 2005 (file of annexes to the Merits Report, tome I, folio 57).

[23] "Amid the reigning confusion, I asked Carmona's assistants to solve my problem of transport in order to leave Fort Tiuna, and they found me a truck […]. I arrived home at dawn." Statement made by Mr. Brewer Carías on June 3, 2002, before the Sixth Prosecutor (file of annexes to the answering brief, annex 1, exhibit 2, folio 8991).

[24] *Cf.* IACHR, Report on the Situation of Human Rights in Venezuela, 2003. OEA/Ser.L/V/II.118. Doc. 4 rev. 1, October 24, 2003, para. 7. Available at: http://www.cidh.org/countryrep/Venezuela2003eng/introduction.htm "[T]he Commission issued a press release on April 13, 2002, in which it expressed, *inter alia,* its strong condemnation of the acts of violence and its regret that the most senior authorities were removed from public office, and cautioned that these acts represented a breach of constitutional order.

[25] Indictment of Mr. Brewer Carías of January 27, 2005 (file of annexes to the Merits Report, tome I, folio 57).

40. On April 14, 2002, "Hugo Chávez was reinstated as President of the Republic."[26]

B.2.1.3. Reactions to the events of April 11, 12 and 13, 2002

41. The events that took place on April 12 and 13, 2002, were considered by the Permanent Council and the General Assembly of the Organization of American States to be "an abrupt interruption of the democratic and constitutional order [in Venezuela]."[27]

42. Meanwhile, the media reported that Mr. Brewer Carías had been at "Fort Tiuna" during the early morning hours of April 12, 2002, and linked him to the drafting of the so-called "Carmona Decree." Mr. Brewer Carías admitted that he had been at "Fort Tiuna";[28] however, in several press conferences and in his statement before this Court, he denied having participated in the drafting of the said decree.[29]

43. On April 26, 2002, the National Assembly appointed a "Special Parliamentary Committee to investigate the events of April 2002." The report issued by this Committee "urge[d] the citizen power to investigate and determine the responsibilities of individuals [...] who, although they were not entitled to carry out public functions, collaborated actively in the conspiracy and the coup d'état. Mr. Brewer Carías was included on the list of persons who should be investigated because, according to the Parliamentary Committee "his participation in the planning and execution of the coup d'état was proved."[30]

B.2.2. Facts relating to the criminal proceedings

B.2.2.1. Investigation of Pedro Carmona and the events that occurred on April 11, 12 and 13, 2002

44. To determine the responsibilities of those involved in the events that took place in April 2002, on April 13, 2002, the prosecutor of the national Public Prosecution Service with special competence for banks, insurance and capital markets opened an investigation into the events of April 11, 12 and 13, 2002.[31]

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[26] IACHR. Report on the Situation of Human Rights in Venezuela, 2003.

[27] OAS. Resolution of the Permanent Council, Current Situation in Venezuela OEA/Ser.G. CP/doc. 3616/02. May 28, 2002 Available at: http:// www.scm.oas.org/idms_public/english/hist_02/cp09974e06.doc.

[28] Statement made by Mr. Brewer Carías on June 3, 2002, before the Sixth Prosecutor (file of annexes to the answering brief, annex 1, exhibit 2, folio 8986) and statement made by Mr. Brewer Carías during the public hearing held in this case.

[29] Testimony of Edgar Jose López Albujas before the Sixth Prosecutor on April 21, 2005 (file of annexes to the answering brief, exhibit 9, folio 12334); newspaper articles "*Allan Brewer Carías responde a las acusaciones: No redacté el decreto de Carmona Estanga*" in "El Globo" on April 17, 2002 (file of annexes to the answering brief, annex 1, exhibit 15, folio 15332); "*Brewer Carías se desmarca de Pedro Carmona Estanga*" in "País" on April 17, 2002 (file of annexes to the answering brief, annex 1, exhibit 15, folio 15333); "Brewer Carías: no sé quién redactó el Carmona Decree" in "El Nuevo País" on April 17, 2002 (file of annexes to the answering brief, annex 1, exhibit 15, folio 15335); "*Brewer-Carías niega haber redactado el decreto*" in "El Universal" on April 17, 2002 (file of annexes to the answering brief, annex 1, exhibit 15, folio 15337); Book "*En mi propia defensa. Respuesta preparada con la asistencia de mis defensores Rafael Odremán and León Henrique Cottin contra la infundada acusación fiscal por el supuesto delito de conspiración*" by Allan Brewer Carías, Editorial Jurídica Venezolana, Caracas, 2006 (file of annexes to the Merits Report, tome I, folios 77 to 660), and statement made by Mr. Brewer Carías during the public hearing held in this case.

[30] Report of the Special Parliamentary Committee to investigate the events of April 2002**,** Caracas, July 2002 (file of annexes to the Merits Report, tome II, folio 937).

[31] Order of the Sixth Prosecutor of April 13, 2002 (file of annexes to the answering brief, exhibit 1, folio

45. Between 2002 and 2005 at least four provisional prosecutors investigated the events related to the events of April 11, 12 and 13, 2002, including those concerning the drafting of the "Carmona Decree." Initially, provisional prosecutor José Benigno Rojas was in charge of the investigation;[32] he was then substituted by provisional prosecutor Danilo Anderson[33] and, on August 28, 2002, the investigation was taken over by Luisa Ortega Díaz as substitute for the Sixth Prosecutor of the Public Prosecution Service at the National Level.[34]

46. On May 10, 2002, Mr. Brewer was summoned "to an interview [on May 15, 2002,] in connection with the investigation" conducted against Pedro Carmona.[35]

47. On May 22, 2002, Ángel Alberto Bellorín, a colonel on active duty with the Venezuelan Army, filed a complaint before the Prosecutor General in which he indicated that "it is a well-known fact, widely reported by the media"[36] that Mr. Brewer Carías and three other persons were the authors of the "Carmona Decree," and referred to the supposed authors "as experts in constitutional matters."[37]

48. On June 3, 2002, Mr. Brewer Carías "appeared in answer to a summons" before the prosecutor responsible for the proceedings.[38] On July 9, 2002, a witness, Jorge Olavarría,[39] submitted a brief to prosecutor Rojas in which he indicated that he could "confirm that [Mr.] Brewer did not draw up that document."[40]

49. On October 5, 2003, four members of the National Assembly filed another complaint against Mr. Brewer and three other persons for supposedly being "those who conceived and executed the elaboration, drafting and announcement to the country of the […] Carmona Decree."[41]

50. Twenty-fifth temporary Judge Josefina Gómez Sosa was initially assigned during this stage of the proceedings, at which time Mr. Brewer had not yet been charged. On December

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8214).

[32] Order of the Sixth Prosecutor of April 13, 2002, folio 8214.

[33] Order of the Sixth Prosecutor of September 15, 2004 (file of annexes to the answering brief, exhibit 6, folio 10547).

[34] Public Prosecution Service decision No. 539 of August 28, 2002, issued by the Prosecutor General (file of annexes to the motions and arguments brief, tome III, folio 5270).

[35] Summons of May 10, 2002 (file of annexes to the answering brief, exhibit 2, folio 8742).

[36] Complaint filed by Ángel Bellorín on May 22, 2002 (file of annexes to the Merits Report, tome II, folios 940 to 975), and testimony of witness Ángel Bellorín during the public hearing held in this case.

[37] Complaint filed by Ángel Bellorín on May 22, 2002, folios 940 to 975.

[38] Statement made by Mr. Brewer Carías on June 3, 2002, before the Sixth Prosecutor (file of annexes to the answering brief, exhibit 2, folios 8986 to 8998).

[39] Jorge Olavarría was a member of the 1999 Venezuelan Constituent Assembly. On April 10, he met with Mr. Brewer Carías in his office. Mr. Brewer stated that "at the start of the meeting […] two young lawyers arrived" with a draft of what would be the "Carmona Decree." Mr. Olavarría asserted that he and Mr. Brewer observed the "unconstitutionality and the violation of the Inter-American Democratic Charter" that this document implied. "*En mi propia defensa. Respuesta preparada con la asistencia de mis defensores Rafael Odremán and León Henrique Cottin contra la infundada acusación fiscal por el supuesto delito de conspiración*" by Allan Brewer Carías, Editorial Jurídica Venezolana, Caracas, 2006 (file of annexes to the Merits Report, tome I, folio 98).

[40] Brief of Jorge Olavarría submitted to the Prosecutor General on July 9, 2002 (file of annexes to the motions and arguments brief, tome IV, folios 6148 and 6149).

[41] Complaint of October 5, 2003 (file of annexes to the answering brief, exhibit 6, folios 10691 and 10692).

17, 2004, this Judge, at the request of the Sixth Provisional Prosecutor, issued an order prohibiting 27 individuals who had been indicted from leaving the country; however, this did not include Mr. Brewer Carías.[42] The order was appealed before the Tenth Chamber of the Court of Appeal and, on January 31, 2005, the Chamber revoked it. On February 3, 2005, the judges of the Court of Appeal who had voted to annul the appealed order were suspended from their functions by the Judicial Commission of the Supreme Court of Justice.[43] Temporary Judge Gómez Sosa was also suspended from her functions because she had not provided sufficient grounds for the order prohibiting the departure from the country, and she was replaced by Judge Manuel Bognanno.[44]

B.2.2.2. Accusation against Mr. Brewer Carías at the investigation stage

51. On January 13, 2005, Mr. Brewer Carías was summoned again by the prosecutor responsible for the case on "January 20, 2005, […] in order to accuse him of the facts that the prosecutor [was] investigating."[45]

52. The accusation (*imputación*) against Mr. Brewer Carías was made on January 27, 2005, based on his presumed "participation in the drafting and elaboration of the Act constituting the Government of Democratic Transition and National Unity."[46] This conduct was established and penalized under the offense of "conspiracy to change the Constitution by violent means" established in article 144, paragraph 2, of the Venezuelan Criminal Code,[47] in force at the time. As grounds for the accusation, the prosecutor took into account, *inter alia*: (i) the "Carmona Decree"; (ii) the complaint filed by Ángel Alberto Bellorín; (iii) the different newspaper articles and television programs that had referred to Mr. Brewer as the author of the Decree; (iv) the July 9, 2002, interview with Jorge Olavarría; (v) the content of the book "*Mi testimonio ante la historia*" by Pedro Carmona, and (vi) Mr. Brewer's interview with the prosecutor on June 3, 2002.

53. On February 14, 2005, Mr. Brewer appointed José Rafael Odreman Ledezama and León Henrique Cottin as his defense counsel in the criminal proceedings.[48]

54. On May 4, 2005, the defense counsel filed a brief before the Twenty-fifth Judge in which they described the presumed irregularities that, in their opinion, had occurred in the proceedings, such as the refusal to obtain several testimonies and the transcript of some videos.[49] On May 11, 2005, the Twenty-fifth Judge, Manuel Bognanno, ordered the Sixth

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42 Decision No. 2005-0015 of the Supreme Court of Justice of Caracas of February 3, 2005 (file of annexes to the motions and arguments brief, tome VI, folio 7097).

43 Decision No. 2005-0015 of the Supreme Court of Justice of Caracas, folio 7098.

44 Decision No. 2005-0015 of the Supreme Court of Justice of Caracas, folio 7098.

45 Summons of January 13, 2005 (file of annexes to the answering brief, exhibit 7, folio 11066).

46 Imputation of Mr. Brewer Carías by the Sixth Prosecutor on January 27, 2005 (file of annexes to the Merits Report, tome I, folio 51).

47 Article 144, paragraph 2, of the Criminal Code establishes: "Those who, without the purpose of changing the Republic political structure that the Nation has given itself, conspire or rise up to change the Constitution by violent means shall be punished with twelve to twenty-four years' imprisonment. Those who commit the acts referred to in the preceding paragraphs with regard to the governors of the states, the legislative assemblies and the constitutions of the states shall incur half the said punishment, and those who commit such acts against the presidents of the municipal councils shall incur one-third of that punishment." Criminal Code of Venezuela in force at January 27, 2005. Available at: http://gobiernoenlinea.gob.ve/home/archivos/CodigoPenal.pdf

48 Decision of February 14, 2005 (file of annexes to the answering brief, exhibit 7, folio 11286).

49 Brief May 4, 2005, of the defense counsel of Mr. Brewer Carías addressed to the Twenty-fifth Supervisory Judge (file of annexes to the Merits Report, tome II, folios 1035 to 1058).

Provisional prosecutor to allow the defense counsel and Mr. Brewer "immediate access [to the case file], providing them with copies of the case file or videos that ha[d] been requested and, if necessary, owing to the size of the case file and the space, to provide them with a larger physical area to the present one, to study the file."[50] In addition, at that time the Twenty-fifth Judge indicated "[r]egarding a ruling of the court on the pertinence or usefulness of the evidence, both that offered by the Public Prosecution Service and that offered by the defense, this corresponds to a future stage; currently the case is at the investigation stage, […] and, on this occasion, it is not in order […] to make a ruling on the pertinence, necessity or usefulness of any type of evidence offered by the parties. Furthermore, […] the refusal of the Public Prosecution Service to gather certain evidence, does not constitute an impediment for the defense to offer it subsequently, pursuant to the established procedure and means."[51] The decision of May 11, 2005, was declared absolutely null on July 6, 2005, by the Court of Appeal, which ordered another supervisory judge to rule on the brief of the defense.[52] This was because it considered that the Twenty-fifth Judge had not taken into account in his decision "the reasons given by the Public Prosecution Service to refuse the interviews, […] so that the adversarial principle had been violated."[53]

55. On May 30, 2005, the Sixth Provisional Prosecutor had asked the Ninth Chamber of the Court of Appeal to nullify the decision of the Twenty-fifth Judge, because the brief filed by the defense counsel had not been notified, so that he had been unable to present a defense.[54] The prosecutor indicated that the defense counsel of Mr. Brewer Carías had been able to examine the case file during all the proceedings since his accusation and that the corresponding records existed with this information. In addition, the prosecutor indicated that "almost all the numerous pieces of evidence requested by the defense counsel have been agreed to; consequently, it is also false that the petition to obtain evidence has been disregarded."[55]

56. On June 3, 2005, "Guaicaipuro Lameda's defense counsel asked the court to establish a time frame for the Public Prosecution Service to present its final decision." In response to this request, on June 10, 2005, the Twenty-fifth Judge "sent a note to the Sixth National Prosecutor requesting a report on the actual status of the case, [and that he should forward the case file], emphasizing that both instructions were in order to verify the time frame and the admissibility of the request that had been made."[56] On June 27, 2005, the Sixth Prosecutor asked the judge "to indicate […] the rule on which he had based his request, imposing on the Public Prosecution Service the obligation to provide information on and forward the proceedings that were being conducted before it."[57] The Twenty-fifth Judge

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50 Decision of the Twenty-fifth Judge of May 11, 2005 (file of annexes to the report, tome III, folio 1076).

51 Decision of the Twenty-fifth Judge of May 11, 2005, folio 1078.

52 Decision of July 6, 2005, of the Ninth Chamber of the Court of Appeal deciding the appeal against the decision of the Twenty-fifth Supervising Court of May 11, 2005 (file of annexes to the Merits Report, tome III, folios 1082 to 1098).

53 Decision of July 6, 2005, of the Ninth Chamber of the Court of Appeal deciding the appeal against the decision of the Twenty-fifth Supervising Court of May 11, 2005 (file of annexes to the Merits Report, tome III, folio 1095).

54 Request for annulment of the Sixth Prosecutor of May 30, 2005 (file of annexes to the Merits Report, tome III, folios 1101 to 1140).

55 Request for annulment of the Provisional Prosecutor of June 30, 2005 (file of annexes to the answering brief, annex 1, exhibit 10, folio 12865).

56 Note No. 632-05 of June 27, 2005, of the Twenty-fifth Judge (file of annexes to the Merits Report, tome III, folios 1139 and 1140).

57 Brief of the Sixth Prosecutor of June 27, 2005, addressed to the Twenty-fifth Supervisory Judge (file of annexes to the Merits Report, tome III, folio 1137).

forwarded this information to the Superior Prosecutor of the Public Prosecution Service of the Metropolitan Area of Caracas that same day.[58] On June 29, 2005, the appointment of the Twenty-fifth Judge, Manuel Bognanno, was annulled,[59] and he was replaced by Judge José Alonso Dugarte Ramos in the First Instance Court of the Criminal Judicial Circuit - Metropolitan Area of Caracas[60].

57. On August 10, 2005, the defense filed another brief before the Twenty-fifth Judge insisting on the admission of the testimonies offered, on the technical transcription of the videos, and on compliance with the decision of the Court of Appeal of July 6, 2005.[61]

58. Mr. Brewer Carías left Venezuela on September 29, 2005,[62] and, on May 10, 2006, his defense counsel informed the supervisory judge that Mr. Brewer Carías would not return until "the conditions were appropriate to obtain an impartial trial that respected his judicial guarantees" (*infra* para. 73).

59. On October 4, 2005, Mr. Brewer's defense filed before the Twenty-fifth Court a request for the annulment "of all the actions taken by the Public Prosecution Service" as a result of a book published by the Prosecutor General entitled "*Abril comienza en octubre*" in which the latter had referred to "certain statements by someone according to which Mr. Brewer was the author of the "Carmona Decree." This request for annulment has still not been decided (*infra* para. 92).

60. On October 20, 2005, the Twenty-fifth Judge issued a decision in which:[63] (i) he once again refused the request for a transcript of all the videos, as well as the statements of four witnesses offered by the defense, and (ii) refused the request for the testimony of Mr. Carmona Estanga, because he considered that since the latter had been accused in the case, his testimony would have no probative value. The defense appealed this decision on October 28, 2005.[64]

B.2.2.3. Indictment of Mr. Brewer Carías

61. On October 21, 2005, the Sixth Provisional Prosecutor formally indicted Mr. Brewer Carías and two other persons accused of presumed participation in "the perpetration of the

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[58] Note No. 632-05 of June 27, 2005, of the Twenty-fifth Judge (file of annexes to the Merits Report, tome III, folio 1139 and 1140).

[59] Ruling of the Supreme Court of Justice of June 29, 2005 (file of annexes to the motions and arguments brief, tome VI, folio 7105). This ruling indicated: "the appointments of the following professionals are annulled […]: the lawyer, Manuel Antonio Bognanno […], temporary judge of the First Instance Court of the Criminal Judicial Circuit […], owing to observations made to this office."

[60] Table of appointments made by the Executive Directorate of the Judiciary dated June 29, 2005 (file of annexes to the Merits Report, tome III, folio 1142).

[61] Brief submitted by the defense on August 10, 2005, to the Twenty-fifth Supervisory Judge (file of annexes to the Merits Report, tome III, folios 1148 to 1196).

[62] Note of the Immigration and Border Areas Directorate of the Ministry of the Interior and Justice of March 16, 2006, indicating that the Immigration Identification System had recorded the departure of Mr. Brewer Carías (file of annexes to the answering brief, exhibit 20, folio 17454).

[63] Decision of the Twenty-fifth Supervisory Judge of October 20, 2005 (file of annexes to the Merits Report, tome III, folios 1234 to 1238).

[64] Appeal by the defense before the Twenty-fifth Supervisory Judge received on October 28, 2005 (file of annexes to the Merits Report, tome IV, folios 1636 to 1700).

offense of conspiracy to change the Constitution by violent means," so that, "consequently, the prosecution of these persons" would ensue."[65] The indictment included:

a) A "clear, precise and detailed account of the illegal act attributed to [Mr.] Brewer Carías";[66]
b) The grounds for the accusation, with a list of the evidence used to draw up the charges;
c) The applicable legal provision, and
d) An "offer of evidence [to the judge]."

62. Regarding the first point, the prosecutor mentioned the following elements that presumably proved Mr. Brewer's criminal responsibility:

a) On "April 10, 2002, at 6 p.m., [Mr.] Brewer Carías [allegedly] met with José Gregorio Vásquez López and Jorge Olavarría, among others, in the latter's office, […] in order to discuss what would become the 'Decree constituting a Government of Democratic Transition and National Unity";
b) "During this meeting, a draft decree was [allegedly] submitted to [Mr.] Brewer Carías for discussion […]. […] The draft [was] examined and discussed by [Mr.] Brewer Carías, who [allegedly] underscored the poor quality of the drafting, but never indicated […] that it was not the appropriate procedure […] to change the Constitution";
c) On "April 11, 2002, at 9 a.m., a ceremony was held on a platform set up in front of the PDVSA building, and [Mr.] Brewer Carías was among those present. [He had] momentarily left the march and went [to be interviewed], stating that, once the interview was over, he would rejoin the march";
d) "Letters of resignation and dismissal [had been prepared, […] and documents had been drawn up, and the investigation revealed that [Mr.] Brewer Carías was one of the persons [supposedly] responsible for drafting these legal instruments";
e) On April 11, at Fort Tiuna, Mr. Brewer Carías had "again examined the document that he had discussed two days previously" and had "drafted what would be the letter of resignation of the President of the Republic and [had] given advice on how the new government should proceed; [he had] provided instructions and suggestions on how to implement the said decree";
f) On the morning of April 12, 2002, Mr. Brewer Carías had been interviewed during the program *CMT Noticias* and, from there, he had driven "to the Miraflores Palace" where he had presumably met with Pedro Carmona, and
g) During the evening of April 12, 2002, he alleged "telephoned José Gregorio Vásquez López […] who […] was allegedly in a meeting with Pedro Carmona […], planning the new government's strategies."

63. With regard to the second point, the prosecutor had prepared a list of the evidence together with the arguments used to substantiate the charges against Mr. Brewer Carías.[67]

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[65] Indictment of October 21, 2005 (file of annexes to the answering brief, annex 1, exhibit 13, folios 14193 to 14351).

[66] Indictment of October 21, 2005 (file of annexes to the answering brief, annex 1, exhibit 13, folios 14196 to 14202).

[67] Indictment of October 21, 2005 (file of annexes to the answering brief, annex 1, exhibit 13, folios 14209 to 14274). The indictment includes 31 probative elements in addition to those established in the accusation and, in "Chapter III," on "grounds for the accusation indicating the evidence that emerges from the investigation against […] Allan Brewer Carías," describes 54 "probative elements" for the indictment: (A) content of the "Decree constituting a Government of Democratic Transition and National Unity"; (B) two criminal complaints against Allan Brewer Carías filed before the Public Prosecution Service; (C) two briefs filed by Allan Brewer Carías; (D) 19

64. As regards the applicable legal provision, the prosecutor stated that the acts that Mr. Brewer was accused of were subsumed in the offense of "conspiracy to change the Constitution by violent means"; thus, he concluded that "the evidence listed […] leads to certainty that the accused […] conspired to change the Constitution by violent means […], so that, in the prosecutor's opinion, the grounds exist to request his public prosecution."[68]

65. In addition, in the indictment, the Sixth Provisional Prosecutor requested that the court order "the preventive deprivation of liberty" of Mr. Brewer Carías and the other two accused. As grounds for this, the prosecutor stated that since the "illegal act was punishable by imprisonment, and the criminal action was not subject to a statute of limitations, and that there was evidence to consider that the accused […] are authors of, or participants in, the perpetration of the offense of conspiracy to change the Constitution by violent means, […] and [there is] a reasonable presumption of danger of flight based on the severity of the punishment that could be imposed (18 years' imprisonment), as well as on the ability of the accused to leave the country because they have sufficient financial resources."[69]

66. On October 24, 2005 the Twenty-fifth Judge agreed to hold the preliminary hearing on November 17, 2005.[70] The same day, Mr. Brewer's defense requested a non-certified copy of the indictment;[71] and this was accepted and ordered on October 26, 2005.[72]

67. On October 26, 2005, the defense asked the Twenty-fifth Judge to guarantee the right of Mr. Brewer Carías "to stand trial a free man" and also asked for "an advance declaration of the inadmissibility of preventive detention," since Mr. Brewer did not represent a danger to the public, was employed and active in the academic sphere, and with residence and roots in the country.[73]

68. On November 8, 2005, the defense submitted a brief to the Twenty-fifth Judge responding to the indictment and rejecting "all aspects, both factual and legal, of the accusation." Among other matters, they requested the annulment of all the records that formed part of the investigation and presented objections to the indictment (*infra* paras. 93 and 94).

69. On November 15, 2005, the Court of Appeal of the Judicial Circuit requested the Twenty-fifth Judge to forward the indictment drawn up against Mr. Brewer, "in order to

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newspaper articles or statements to the press regarding which the prosecution conducted seven interviews with journalists concerning what was mentioned or written; (E) 17 testimonial statements made before the Public Prosecution Service; (F) four videos; (G) two investigation procedures carried out by the prosecution on a video and on telephone calls made by the presumed victim on April 12, 2002; (H) report of the Special Parliamentary Committee to investigate the events of April 2002; (I) two inquiries of the Special Committee of the National Assembly; (J) three articles or books, and (K) one letter signed by Isaac Perez Recao.

[68] Indictment of October 21, 2005 (file of annexes to the answering brief, annex 1, exhibit 13, folio 14325).

[69] Indictment of October 21, 2005 (file of annexes to the answering brief, annex 1, exhibit 13, folio 14344).

[70] Order of the Twenty-fifth Judge of October 24, 2005 (file of annexes to the answering brief, annex 1, exhibit 13, folio 14386).

[71] Request by the defense of October 24, 2005 (file of annexes to the answering brief, annex 1, exhibit 13, folio 14357).

[72] Order of the Twenty-fifth Judge of October 26, 2005 (file of annexes to the answering brief, annex 1, exhibit 14, folio 14424).

[73] The defense's appeal against the indictment filed before the Twenty-fifth Supervisory Judge and received on October 28, 2005 (file of annexes to the Merits Report, tome III, folios 1401 to 1412).

decide whether or not the remedy of appeal filed by [his] lawyers was admissible,"[74] and the judge did this on November 17, that year.[75]

70. On November 16, 2005, the defense recused the Twenty-fifth Judge; consequently, the preliminary hearing scheduled for November 17, 2005, was not held.[76] This recusal was based on the fact that the Twenty-fifth Judge had incurred in a cause for disqualification, because, on October 20, 2005, he had ruled on the decision to refuse the testimony of Pedro Carmona. Therefore, on that occasion, the defense argued that, since the judge had "issued an opinion on a crucial issue in these proceedings, which was the refusal to obtain very important evidence for the defense of [Mr.] Brewer Carías that could lead to excluding the latter's criminal responsibility, […] this disqualified him […] from continuing to hear these proceedings."[77] The Court of Appeal of the Judicial Circuit (Tenth Chamber) declared the recusal inadmissible on January 30, 2006, because it considered that "a ruling on the admissibility or inadmissibility of evidence submitted prior to trial does not entail prejudging a person's guilt or innocence."[78]

71. Once his recusal had been decided, on February 7, 2006, the Twenty-fifth Judge decided to set March 7, 2006, as the new date for the preliminary hearing.[79] The defense submitted an extra-procedural statement by Pedro Carmona on March 1, 2006, and asked that it be admitted as evidence in the proceedings.[80] On March 7, 2006, "the failure to appear of [Mr.] Brewer Carías [was recorded and,] added to this, the Twenty-fifth Judge [was] on leave, and the Twenty-fourth Supervisory Judge headed the court […]; accordingly, it was agreed to postpone [the preliminary hearing] until April 4, 2006."[81] On April 10, 2006, the Twenty-fifth Judge again postponed the preliminary hearing until May 10, 2006, because he had been challenged by another of the individuals indicted in the proceedings.[82] This new recusal was declared inadmissible on April 26, 2006.[83]

B.2.2.4. The preventive detention order

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74 Order of the Twenty-fifth Court of November 15, 2005 (file of annexes to the answering brief, annex 1, exhibit 16, folio 15792).

75 Order of the Court of Appeal of the Judicial Circuit of November 17, 2005 (file of annexes to the answering brief, annex 1, exhibit 16, folio 15799).

76 Record of the Twenty-fifth Court of November 17, 2005 (file of annexes to the answering brief, annex 1, exhibit 16, folio 15805).

77 Ruling of the Contingent Court of the Court of Appeal of the Criminal Judicial Circuit of the Metropolitan Area of Caracas (file of annexes to the answering brief, annex 1, exhibit 18, folio 16680).

78 Ruling of the Contingent Court of the Court of Appeal of the Criminal Judicial Circuit of the Metropolitan Area of Caracas (file of annexes to the answering brief, annex 1, exhibit 18, folio 16680).

79 Order of February 7, 2006, of the Twenty-fifth Judge (file of annexes to the answering brief, annex 1, exhibit 18, folio 16720).

80 Brief submitted by Mr. Brewer's defense to the Twenty-fifth Supervisory Judge on March 1, 2006, together with the extra-procedural statement made by Pedro Carmona Estanga (file of annexes to the answering brief, annex 1, exhibit 18, folios 16833 to 16848).

81 Record of the Twenty-fifth Court for March 7, 2006 (file of annexes to the answering brief, annex 1, exhibit 18, folio 16874).

82 Record of the Twenty-fifth Court for April 10, 2006 (file of annexes to the answering brief, annex 1, exhibit 18, folio 16942).

83 Ruling of the Fourth Incidental Chamber of the Court of Appeal of the Criminal Judicial Circuit of the Metropolitan Area of Caracas (file of annexes to the answering brief, annex 1, exhibit 19, folio 17249).

72. On May 9, 2006, the Twenty-fifth Judge ordered a verification of "the migratory movements of [Mr.] Brewer Carías,"[84] because he considered that "in view of the results of the notices served on [Mr.] Brewer Carías by the Clerk of the Court's Office, it was pertinent to make the following observations: the parties must appear in person at the preliminary hearing which is an intermediate stage; otherwise, the hearing must be postponed until all the necessary parties are present in person. However, […] the repeated postponements of the preliminary hearing owing to the failure of the parties to appear without justification results in an abuse of the right to stand trial as free men by those who fail to appear […]. A logical deductive inference from the results of the efforts to serve notice to [Mr.] Brewer Carías, lead this court to consider, reasonably, that there is uncertainty as regards his presence in the country, and this would indicate the impossibility of his appearing in person at the preliminary hearing. This is a reasonable consideration of this judge based on the results of the notifications carried out on reiterated occasions. This situation would negate the right of the other accused to obtain promptly from the jurisdictional organs the decisions that must be taken at the preliminary hearing during this intermediate stage."[85] On this basis, the Twenty-fifth Judge also decided to delay the hearing until June 20, 2006.

73. On May 10, 2006, the defense counsel of Mr. Brewer Carías informed the Twenty-fifth Judge that the latter would not return to the country because he considered that:[86] (i) "the actions of the Public Prosecution Service in this case have represented evident official political persecution against him"; (ii) the Prosecutor General himself […] ha[d] directly violated the guarantee of the presumption of innocence by condemning him publicly in advance with the publication of the book '*Abril comienza en octubre*'"; (iii) "in response to the opportune claim filed before the court, he had only received negative responses [and] these negative and frequently delayed responses from the jurisdictional organ ha[d], in turn, constituted fresh violations of his constitutional guarantees"; (iv) "his right to obtain the dismissal of the case in the intermediate stage of the proceedings had been curtailed"; (v) "all of this represented the denial of accessible, impartial, appropriate, transparent, autonomous, independent, responsible, equitable and expedite justice"; (vi) "the indictment is, in itself, already a sentence designed to punish his political and ideological criticism of the project intended to subjugate Venezuela," and (vii) he had "been appointed associate professor of the law school of Columbia University" in the United States of America, and had accepted this position. Lastly, he stated that he had "taken the decision to wait until the conditions were appropriate to obtain an impartial trial, that respected his judicial guarantees; [he therefore informed the court] so that it could take the pertinent decision and continue the proceedings, in order not to cause any delay, or prejudice the other accused."

74. On June 2, 2006, the Sixth Prosecutor again asked the judge to order the preventive detention of Mr. Brewer Carías, stating that the brief presented by the defense counsel on May 10, 2006, "reveal[ed] that the accused [… was] outside the country and that he d[id] not intend to return, so that it [was] necessary to conclude that his intention [was] not to submit to the criminal proceedings [and that], consequently, the accused w[ould] not attend the preliminary hearing set for June 20, 2006."[87] On June 15, 2006, the Twenty-fifth Court

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[84] Ruling of the Twenty-fifth Court of May 9, 2006 (file of annexes to the answering brief, annex 1, exhibit 19, folios 17305 to 17307).

[85] Ruling of the Twenty-fifth Court of May 9, 2006 (file of annexes to the answering brief, annex 1, exhibit 19, folios 17305 to 17307).

[86] Brief of the defense of May 10, 2006 (file of annexes to the answering brief, annex 1, exhibit 19, folios 17320 to 17322).

[87] Brief of June 2, 2006, submitted to the judge by the prosecutor (file of annexes to the Merits Report, tome IV, folios 1433 to 1436).

agreed to issue the warrant for the arrest of Mr. Brewer Carías,[88] having decreed the measure of judicial preventive detention. The reasons given by the judge in this decision were, *inter alia*, that: (i) "[Mr.] Brewer Carías had clearly expressed his intention not to submit to criminal prosecution; hence his intention of avoiding the administration of justice was evident"; (ii) "a wrongful act existed that warranted imprisonment (from 12 to 24 years), and the action had evidently not prescribed," and (iii) "based on the facts revealed by the investigation that have been provided as evidence by the Public Prosecution Service, the presumably wrongful acts or conduct that is attributed to the accused are subsumed in the illegal act defined by the offense of conspiracy to change the Constitution by violent means." On the same date, certified copies of this decision were sent to the Director of the Scientific, Criminal and Criminalistics Investigations Unit.[89] The warrant has not been executed because, to date, Mr. Brewer Carías remains abroad.

B.2.2.5. Continuation of the proceedings after the preventive detention order

75. On February 22, 2007, the defense counsel of José Gregorio Vásquez, who had been charged together with Mr. Brewer Carías, advised the Twenty-fifth Court that "[t]he order for the preventive detention of [Mr.] Brewer Carías, and the impossibility of executing this order because he was abroad […], made it necessary for this Supervisory Court, following the preliminary hearing, […] to take a decision on separating the case against [Mr.] Brewer Carías because, in order to try this person, it might be necessary to take special measures to be determined by the Court."[90] On March 7, 2007, the Twenty-fifth Judge decided not to separate the case, "because this court will rule [on that issue] during the preliminary hearing, which has already been scheduled."[91] Mr. Vásquez appealed this decision on March 23, 2007,[92] and his appeal was granted by the Court of Appeal, which decided to annul the decision of March 7, and ordered that a new decision be issued.[93] Accordingly, on July 20, 2007, the said judge again decided not to separate the case, indicating that:[94]

> "In the case in question, the preliminary hearing has not been postponed owing to the failure to appear of [Mr.] Brewer Carías; to the contrary, the different delays noted in the records of this case file have been due to the numerous requests filed by the different defense counsel of those accused.
> […]
> The binding judgment of the Constitutional Chamber of the Supreme Court of Justice […] of December 22, 2003, should be emphasized, which states that when there are several parties to a criminal proceeding, and one of them is absent for different circumstances, the proceedings must be suspended until all these persons are present for the said proceeding.
> […]

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88 Decision of the Twenty-fifth Court of June 15, 2006 (file of annexes to the answering brief, annex 1, exhibit 20, folio 17435).

89 Note of the Twenty-fifth Court of June 15, 2006 (file of annexes to the answering brief, annex 1, exhibit 20, folio 17493).

90 Brief of the defense counsel of José Gregorio Vásquez submitted to the Twenty-fifth Court on February 22, 2007 (file of annexes to the answering brief, annex 1, exhibit 21, folios 18319 and 18320).

91 Decision of the Twenty-fifth Court of June 15, 2006 (file of annexes to the answering brief, annex 1, exhibit 20, folio 18413).

92 Brief of the defense counsel of José Gregorio Vásquez submitted to the Twenty-fifth Court on March 23, 2007 (file of annexes to the answering brief, annex 1, exhibit 22, folios 18531 and 18538).

93 Ruling of the Twenty-fifth Court of the Judicial Circuit of the Metropolitan Area of Caracas of July 20, 2007 on the brief submitted by the defense counsel of José Gregorio Vásquez (file of annexes to the motions and arguments brief, tome v, folios 6832 to 6838).

94 Ruling of the Twenty-fifth Court of the Judicial Circuit of the Metropolitan Area of Caracas of July 20, 2007 on the brief submitted by the defense counsel of José Gregorio Vásquez (file of annexes to the motions and arguments brief, tome v, folios 6832 to 6838).

> The diverse postponements of the said hearing have not been based on the absence of the above-mentioned accused who is a fugitive from justice; to the contrary, they are the result of the innumerable requests for delays by the defense counsel themselves."

B.3. Considerations of the Court

76. Based on arguments presented by the parties and the Commission, the Court finds it necessary to analyze: (a) whether the objection concerning exhaustion of domestic remedies was presented at the proper procedural stage; (b) whether the appropriate and effective remedies were filed to redress the alleged violation of rights, and (c) whether the exceptions to the prior exhaustion of domestic remedies are admissible.

B.3.1. Presentation of the objection at the proper procedural stage

77. This Court has affirmed consistently that an objection to the exercise of the Court's jurisdiction based on the supposed failure to exhaust domestic remedies must be filed at the proper procedural stage;[95] that is, during the admissibility stage before the Commission.[96] Therefore, first, the State should have defined clearly before the Commission, during the admissibility stage of this case, the remedies that, in its opinion, had not been exhausted. Furthermore, the arguments substantiating the preliminary objection filed by the State before the Commission during the admissibility stage must coincide with those adduced before the Court.[97]

78. In this regard, the Court notes that, in the proceedings before the Commission, the State, in its brief of August 25, 2009, answering the petition, indicated that "[t]he petitioners acknowledge[d] that they ha[d] not exhausted the domestic remedies [and that] it was evident that the petition [was] inadmissible."[98]

79. In this brief, the State alleged that the argument that Mr. Brewer Carías could, "in no way be the author of the April 12 decree," and the allegation of the "unfounded accusation filed against [Mr.] Brewer Carías, in a brief of January 27, 2005," suppose that the Commission should decide whether or not the accusation was unfounded, when this was incumbent on the Venezuelan courts. The State argued that the factual and legal arguments presented by the petitioners should be decided by the courts of the Bolivarian Republic of Venezuela and that, to this end, Mr. Brewer Carías should resolve his situation before the Venezuelan courts.

80. Furthermore, in this brief, the State argued that the petitioners had not exhausted the domestic remedies since the criminal proceedings being held against Mr. Brewer Carías remained at an intermediate stage because he had left Venezuela and could not be tried *in absentia*. On that occasion, it argued that, consequently, the proceedings had not reached the trial stage, that "the oral and public hearing had not been held; the admission of

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[95] *Case of Velásquez Rodríguez v. Honduras. Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, para. 88, and *Case of Liakat Ali Alibux v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of January 30, 2014. Series C No. 276, para. 14.

[96] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, paras. 84 and 85, and *Case of Liakat Ali Alibux v. Suriname*, para. 14.

[97] *Cf. Case of Furlan and family members v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012 Series C No. 246, para. 29.

[98] The State's brief of August 31, 2009, before the Commission (annexes to the brief with observations of the presumed victim's representatives on the preliminary objection filed by the State, tome 1, folio 21873).

evidence had not started, [and] a first instance judgment ha[d not been delivered that would enable him to file a]n appeal against the judgment, against the final judgment, for annulment, cassation, review, *amparo*, and [finally,] for constitutional review by the Constitutional Chamber of the Republic of Venezuela."[99]

81. Consequently, the Court considers that the State presented the preliminary objection of failure to exhaust domestic remedies at the appropriate procedural stage in the proceedings before the Commission, based on the argument that the failure to exhaust domestic remedies was constituted because the criminal proceedings against Mr. Brewer Carías had not concluded and there were stages during which it was possible to debate the alleged irregularities, and specific remedies that could be filed within the framework of the criminal proceedings.

82. In its Admissibility Report, the Commission focused its analysis on determining whether the exceptions to the exhaustion of domestic remedies were admissible. However, the representatives indicated that sufficient remedies had been exhausted to comply with the requirement of Article 46(1); consequently, the Court will rule on this argument.

B.3.2. Presentation of appropriate and effective remedies to exhaust the domestic jurisdiction

83. Article 46(1)(a) of the American Convention stipulates that, in order to determine the admissibility of a petition or communication lodged before the Inter-American Commission in accordance with Articles 44 or 45 of the Convention, it is necessary that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.[100] The Court recalls that the rule of prior exhaustion of domestic remedies was conceived in the interests of the State, because it seeks to exempt the latter from responding before an international organ for acts attributed to it before it has had the opportunity to remedy them by its own means.[101] This signifies that such remedies should not only exist formally, but they must also be adequate and effective owing to the exceptions established in Article 46(2) of the Convention.[102]

84. When the State alleges the failure to exhaust domestic remedies, it must at the same time describe the remedies that should be exhausted and their effectiveness. Based on the burden of proof applicable to this matter, the State that argues the failure to exhaust domestic remedies must indicate the domestic remedies that should be exhausted and provide evidence of their effectiveness. In this regard, the Court reiterates that, for more than two decades, its interpretation of Article 46(1)(a) of the Convention has been in keeping with international law[103] and that, pursuant to its case law[104] and international

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[99] The State's brief of August 31, 2009, before the Commission (annexes to the brief with observations of the presumed victim's representatives on the preliminary objection filed by the State, tome 1, folio 21873).

[100] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, para. 85, and *Case of Liakat Ali Alibux v. Suriname*, para. 14.

[101] *Cf. Case of Velásquez Rodríguez v. Honduras*. *Merits*. Judgment of July 29, 1988. Series C No. 4, para. 61, and *Case of Liakat Ali Alibux v. Suriname*, para. 15.

[102] *Cf. Case of Velásquez Rodríguez v. Honduras*. *Merits*, para. 63, and *Case of Liakat Ali Alibux v. Suriname*, para. 15.

[103] *Cf. Case of Reverón Trujillo v. Venezuela*. *Preliminary objection, merits, reparations and costs*. Judgment of June 30, 2009. Series C No. 197, para. 22, and *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 22, 2013. Series C No. 265, para. 47.

jurisprudence,[105] it is not the task of the Court, or of the Commission, to identify *ex officio* the remedies that remain to be exhausted. The Court stresses that it is not incumbent on the international organs to rectify a lack of precision in the State's arguments.[106]

85. In the instant case, the State argued that the criminal proceedings had not advanced owing to the absence of Mr. Brewer Carías and, moreover, that the appeals for a declaration of nullity could not be decided without his presence. Therefore, it argued that the conclusion of the criminal proceedings and the presentation of remedies such as appeal, cassation or review constituted appropriate remedies for the presumed victim (*supra* paras. 17 and 18).

86. The Court also recalls that, as of its first case, it established that the appropriateness of the remedies means that the function of these remedies, under domestic law, is appropriate to protect the legal right that has been violated:

> Numerous remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. This is indicated by the principle that a norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable. For example, a civil proceeding specifically cited by the Government, such as a presumptive finding of death based on disappearance, the purpose of which is to allow heirs to dispose of the estate of the person presumed deceased or to allow the spouse to remarry, is not an adequate remedy for finding a person or for obtaining his release, if he has been detained.[107]

87. While, with regard to the effectiveness of the remedies, the Court has established that:

> 66. A remedy must also be effective - that is, capable of producing the result for which it was designed. Procedural requirements can make the remedy of *habeas corpus* ineffective: if it is powerless to compel the authorities, if it presents a danger to those who invoke it, or if it is not applied impartially.
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> 67. **On the other hand, contrary to the Commission's argument, the mere fact that a domestic remedy does not produce a result favorable to the petitioner does not in and of itself demonstrate the inexistence or exhaustion of all effective domestic remedies. For example, the petitioner may not have invoked the appropriate remedy in a timely fashion**[108] (bold added).

88. The case submitted to the Court has special characteristics because: (i) the proceedings are at an intermediate stage (*infra* paras. 95 to 97), and (ii) the main obstacle to the advance of the proceedings is the absence of Mr. Brewer Carías (*infra* paras. 138 to 143). In this regard, the Court considers that in this case, in which the preliminary hearing and, at least, a first instance decision are still pending, it is not possible to rule on the presumed violation of judicial guarantees, because there is still no certainty about how the proceedings will go forward and whether many of the allegations made may be rectified at

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104 *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, para. 88, and *Case of Furlan and family members v. Argentina*, para. 25.

105 *Cf.* European Court of Human Rights (hereinafter "ECHR"), *Case of Deweer v. Belgium* (No. 6903/75), Judgment of 27 February 1980, para. 26; *Case of Foti and Others v. Italy* (No.7604/76; 7719/76; 7781/77; 7913/77), Judgment of 10 December 1982, para. 48, and *Case of de Jong, Baljet and van den Brink v. The Netherlands* (No. 8805/79 8806/79 9242/81), Judgment of 22 May 1984, para. 36.

106 *Cf. Case of Reverón Trujillo v. Venezuela*, para. 23, and *Case of Liakat Ali Alibux v. Suriname*, para. 16. See also: ECHR, ***Case of Bozano*** *v.* ***France***, Judgment of 18 December 1986, para. 46.

107 *Case of Velásquez Rodríguez v. Honduras*. *Merits*, para. 64.

108 *Case of Velásquez Rodríguez v. Honduras*. *Merits*, para. 66 and 67.

the domestic level. And this is without prejudice to the possible analysis of the alleged unwarranted delay or the reasonable time (*infra* para. 143).

89. Similarly, the Court has indicated that requests filed by the defense, such as applications for a declaration of nullity based on failure to comply with legal forms and conditions, or the annulment of an expertise offered by the Public Prosecution Service cannot signify that domestic remedies have been exhausted.[109] Indeed, in the case of *Diaz Peña v. Venezuela*, the Court concluded, *inter alia*, that "the appropriate remedy in this regard was the appeal against the judgment delivered at the conclusion of the trial, without prejudice to the possibility of filing an objection owing to the excessive duration of the proceedings."[110]

90. In this regard, the Court notes that, in the context of the criminal proceedings conducted against Mr. Brewer Carías, his defense presented various briefs relating to the alleged guarantees that they considered had been violated. Thus, the accusation against Mr. Brewer Carías occurred on January 27, 2005, owing to his presumed "participation in the drafting and elaboration of the Act constituting the Government of Democratic Transition and National Unity" (*supra* para. 52). The representatives argued that, following this accusation, they had filed other "remedies" during the prosecutor's investigation, and that "their uselessness was revealed continually owing to the Public Prosecution Service's [alleged] arbitrary measures and [presumed] systematic manipulation. In the context of the observations made when determining the pertinent facts to decide the preliminary objection, these briefs were as follows:

i) On May 4, 2005, a brief was filed setting out the presumed irregularities that it was considered had occurred during the proceedings, such as the rejection of some of the testimonies requested as well as the transcription of the video (*supra* para. 54);

ii) On August 10, 2005, the defense presented another brief to the Twenty-fifth Judge insisting on the admission of the testimonies offered, the technical transcription of the videos, and compliance with the July 6, 2005, decision of the Court of Appeal in which that court had ordered a different supervisory judge to rule on the brief filed on May 4, 2005 (*supra* para. 57);

iii) On October 26, 2005, the defense asked the Twenty-fifth Judge to guarantee the right of Mr. Brewer Carías "to stand trial as a free man" and also asked for "the pre-trial declaration of the inadmissibility of preventive detention," since Mr. Brewer did not represent a danger to the public, was employed and active in the academic sphere, and with residence and roots in the country (*supra* para. 67);

iv) On October 28, 2005, the defense appealed a decision of October 20, 2005, which: (a) again rejected the request for the transcription of all the videos, as well as the testimony of four witnesses offered by the defense, and (b) denied the request for a statement from Mr. Carmona Estanga, because it considered that, since he was one of the accused in the case, his statement would have no probative value (*supra* para. 60);

v) The defense Mr. Brewer Carías filed an appeal against the note sent to INTERPOL by the Twenty-fifth Court on September 17, 2007,[111] and requested its annulment;

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[109] *Case of Díaz Peña v. Venezuela.* Judgment of June 26, 2012. Series C No. 244, para. 124.

[110] *Case of Díaz Peña v. Venezuela*, para. 124.

[111] Note of the Twenty-fifth Court to INTERPOL of September 17, 2007 (file of annexes to the answering brief, annex 1, exhibit 23, folios 19387 to 19396).

however, on October 29, 2007, the appeal was declared inadmissible by a decision of the Eighth Chamber of the Court of Appeal of the Criminal Judicial Circuit of the Metropolitan Area of Caracas, which declared that "actions can be taken during the criminal proceedings that require the presence of the accused, one of these being the remedy of appeal,"[112] and

vi) On January 11, 2008, the representatives of Mr. Brewer Carías filed a request for dismissal before the Twenty-fifth Judge based on Decree No. 5,789,[113] which declared that amnesty was granted to "all those persons who, in conflict with the established order, and who at this date are in compliance with the law and have submitted to criminal proceedings, and who have been prosecuted and convicted for committing the following acts: […] the drafting of the April (12,) 2002, Decree of the Government *de facto*."[114]

91. In addition, the defense filed two briefs in which it requested the annulment of the proceedings at that date. In the Organic Code of Criminal Procedure, the causes of nullity are established in chapter II, articles 190 and 191, which establish that:

> Article 190 – Principle: acts that contravene or disregard the forms and conditions established in this Code, the Constitution of the Bolivarian Republic of Venezuela, the law, and the international treaties, conventions and agreements signed by the Republic, cannot be used as grounds for a judicial decision, using them as presumptions for this decision, unless the defect has been rectified or authorized.
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> Article 191 – Absolute nullities: absolute nullities shall be those concerning the intervention, assistance and representation of the accused in the cases and ways established by this Code, or those that involve disregard or violation of fundamental rights and guarantees established in this Code, the Constitution of the Bolivarian Republic of Venezuela, the law, and international treaties, conventions and agreements signed by the Republic.[115]

92. The defense counsel filed the first request for a declaration of nullity before the Twenty-fifth Court on October 4, 2005 (*supra* para. 59). They requested the annulment "of all the actions taken by the Public Prosecution Service."[116] The grounds for this appeal were: (i) "[t]he […] Prosecutor General […] ha[d] published a book entitled '*Abril comienza en octubre*'"; (ii) in this book, the Prosecutor General had referred to certain statements provided by an individual according to which Mr. Brewer was the author of the "Carmona Decree"; (iii) "in his book, the Prosecutor General considered proved, admitted, affirmed […] that the person [they] represent supposedly had been in a meeting that he had not attended, had been drafting – together with other persons with whom he had never met – a document that he did not draft"; (iv) "the publication, and the reference to [Mr.] Brewer Carías – to a case in which the Prosecution Service had brought charges against him – that the Prosecutor General makes […] in his book […] constitutes a clear and flagrant violation of the right to the presumption of innocence of the person [they] are defending, as well as of all the principles of a criminal proceeding"; (v) "[i]t would be naïve for the Prosecutor

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[112] Ruling of the Court of Appeal of the Criminal Judicial Circuit of the Metropolitan Area of Caracas, Eighth Chamber of October 29, 2007. "Under out criminal procedure, there are actions that require the presence of the accused, and the remedy of appeal is one of them" (file of annexes to the Merits Report, tome IV, folio 6859).

[113] Brief of the defense of January 11, 2008 (file of annexes to the answering brief, annex 1, exhibit 25, folios 20001 to 20012).

[114] Decree No. 5,789 of December 31, 2007 (file of annexes to the report, tome IV, folios 1581 to 1587).

[115] Articles 190 and 191 of the Organic Code of Criminal Procedure of Venezuela (file of annexes to the answering brief, tome I, folio 20631).

[116] Brief of October 7, 2005, filed by the defense before the Twenty-fifth Judge (file of annexes to the answering brief, annex 1, exhibit 13, folios 14107 to 14128).

General […] to shield and excuse his […] conduct by affirming that what appears published under his signature is a reference to what Rafael Poleo said"; (vi) "the investigation of this case has been conducted by an entity headed by a person who is totally biased," and (vii) "the right of defense, to the presumption of innocence, and to due process, all of which are of constitutional rank, [had been violated], which resulted in the nullity of all the actions taken by the Public Prosecution Service."

93. The second brief – consisting of 523 pages – was presented to the Twenty-fifth Judge by the defense on November 8, 2005, in response to the indictment of October 21, 2005 (*supra* para. 68). In this brief, the defense rejected "all aspects, both factual and legal, of the charges." On that occasion, the defense requested that:[117] (i) "the nullity be declared of all the measures taken in the investigation conducted by the Public Prosecution Service, as well as the concluding decision"; (ii) "the objections filed be declared admissible"; (iii) "the evidence offered by the Public Prosecution Service be rejected"; (iv) "all the evidence that [… they had] offered be admitted," and (v) "Mr. Brewer be allowed to stand trial a free man." The request for absolute nullity was founded above all on:

i) The refusal to carry out the measures requested by the defense;
ii) The alleged violation of the right of defense and the principle of the presumption of innocence by presumably reversing the burden of proof and using hearsay;
iii) The supposed violation of the right of defense and the adversarial principle related to "investigative measures based on media reports;
iv) The alleged lack of a prompt decision on the request for annulment filed on October 4, 2005, and
v) The presumed violation of the guarantee of an ordinary judge.

94. In addition to the requests for a declaration of nullity, this 523-page brief contained the following objections to the indictment: (i) the action was supposedly "taken illegally owing to the absence of formal requirements for filing the indictment," and (ii) the alleged "action had been taken illegally because it was based on an act that was not a criminal offense."[118] As ground for the requests, the defense argued: (i) the presumed "inexistence in this case of the so-called 'well-known act of communication' required by the legal doctrine of the constitutional chamber in order to justify criminal charges"; (ii) the alleged "unfounded accusation and the [supposed] inexistence in this case of the offense of conspiracy"; (iii) a detailed analysis of each of the supposed "probative element" used by the Public Prosecution Service in the indictment; (iv) the actions of Mr. Brewer, "as a lawyer during the months prior to April 12, 2002, and on that day," and (v) "the non-liability of the lawyer in the exercise of his profession." In addition, the defense presented arguments related to the reasons why it had asked that the evidence requested by the Public Prosecution Service be rejected, and the evidence that it wished to offer during the trial.

95. In order to decide whether these briefs represent adequate remedies, the Court notes that, in this case, the preparatory stage has been completed; in other words, the

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[117] The defense's brief filed before the Twenty-fifth Court on November 8, 2005 (file of annexes to the answering brief, annex 1, exhibit 15, folio 15195).

[118] On this point, Mr. Brewer's defense counsel indicated, *inter alia*, that the prosecutor had "accepted, erroneously in our opinion, that the said decree for a transitional government of April 12, 2002, had "entered into force," disregarding and changing "violently the Constitution of December 30, 1999," which "legally speaking is not correct. Under Venezuela's Constitution and law no decree of a supposed transitional government could have entered into force on April 12 and, on that date, the 1999 Constitution was not changed, because this act never began to take effect or enter into force, among other factors, because it was never published in any way in the Official Gazette of the Bolivarian Republic of Venezuela" (file of annexes to the answering brief of the State, annex 1, exhibit 14, folio 14850).

investigation stage has concluded,[119] culminating in the indictment of the accused.[120] On October 21, 2005, the Sixth Prosecutor filed charges so that the court would proceed, "consequently, to try the individuals."[121] According to the Organic Code of Criminal Procedure the following stage is the so-called "intermediate" stage, which consists, above all, of the preliminary hearing.[122] This stage may end with the dismissal of the case or with a decision to begin the trial. If the latter is ordered, the third stage of the proceedings initiates; namely, the oral trial, and the remedies that can be filed, such as the appeal and cassation. In addition, article 125 of the OCCP establishes that one of the rights of the accused is "[n]ot to be tried *in absentia*, with the exceptions established in the Constitution of the Republic."[123]

96. Bearing in mind the above, in this case, as indicated in the description of the stages of the applicable criminal proceedings (*supra* para. 95), the proceedings against Mr. Brewer Carías are still at the intermediate stage, because the preliminary hearing has not been held yet and, consequently, the oral trial has not taken place; hence, the Court notes that the criminal proceedings are at an early stage. This means that it is not possible to analyze the negative impact that a decision could have if taken at in the early stages when such decisions may be rectified or corrected by means of the remedies or actions established in domestic law.

97. Owing to the early stage that the proceedings were at, the defense counsel of Mr. Brewer Carías filed the different requests for a declaration of nullity and for other measures mentioned previously (*supra* para. 90). However, they did not file the remedies that the State indicated were appropriate; namely, the remedy of appeal established in articles 451 to 458 of the OCCP,[124] the remedy of cassation indicated in articles 459 to 469 of the OCCP,[125] and the appeal for review indicated in articles 470 to 477 of the OCCP.[126] In this regard, the State alleged the existence of "[t]he remedies corresponding to the intermediate stage established in the Organic Code of Criminal Procedure; also, the completion of the trial stage, if applicable, as well as [the existence of] effective remedies, [such as] the appeal against decisions, against final judgments, for reconsideration, of cassation, [and] for review."

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[119] Article 280 of the OCCP establishes that "[t]he purpose of this stage if to prepare the oral and public trial, by investigating the truth and gathering all the evidence that will provide grounds for the indictment by the prosecutor and the defense of the accused" (file of annexes to the answering brief, tome I, folio 20636).

[120] Among the actions that conclude the preparatory stage, article 326 of the 2001 OCCP refers to the submission of the indictment to the supervisory court by the Public Prosecution Service, "when the Public Prosecution Service considers that the investigation [has] provided real grounds to try the accused" (file of annexes to the answering brief, tome I, folio 20638).

[121] Indictment of October 21, 2005 (file of the answering brief, annex 1, exhibit 13, folio 14193 to 14351).

[122] Article 327 of the OCCP indicates: "preliminary hearing – once the indictment has been presented, the judge shall summon the parties to the oral hearing" (file of annexes to the answering brief, tome I, folio 20638).

[123] Article 125 of the OCCP (file of annexes to the answering brief, tome I, folio 20628).

[124] Article 453 of the OCCP establishes that: "[t]he remedy of appeal shall be admissible against the final judgment delivered in the oral trial" (file of annexes to the answering brief, tome I, folio 20645).

[125] Article 459 of the OCCP indicates that: "[t]he remedy of cassation may only be filed against the judgments of the courts of appeal that decide the appeal without ordering the holding of a new oral trial when the Public Prosecution Service has requested in the indictment, or the victim in his complaint, a sentence to imprisonment for a maximum of more than four years; or the judgment includes a sentence to imprisonment in excess of this limit, when the Public Prosecution Service or the complainant have requested the application of lower punishments than those indicated. In addition, the decisions of the courts of appeal that confirm the proceedings or that enable their continuation may be contested" (file of annexes to the answering brief, tome I, folio 20646).

[126] Article 470 of the OCCP indicates that: "[t]he review shall be admissible against the final judgment, at all times and only in favor of the accused" (file of annexes to the answering brief, tome I, folio 20647).

98. When a specific proceeding has stages during which it is possible to correct or to rectify certain kinds of irregularities, States should be able to take advantage of the said procedural stages to rectify the alleged irregularities in the domestic sphere, without prejudice to the possible analysis required of the exception to the prior exhaustion of domestic remedies established in Article 46(2) of the Convention. It is precisely following the conclusion of an intermediate stage, or during the trial, that the existence of the said irregularities may be declared and the annulment of the entire proceedings or their restructuring as pertinent be admissible. This has greater relevance in the instant case when it is considered that the requests for a declaration of nullity referred to some of the arguments that have been presented before this Court concerning the presumed violation of judicial independence and impartiality, the right of defense, disputes regarding the evidence that had been rejected, possibilities of cross-examination or being present during certain testimonies, or amendments to the charges, among other judicial guarantees.

99. Based on the above, the Court considers that the representatives' arguments that the said briefs were adequate and sufficient to satisfy the requirement established in Article 46(1)(a) of the American Convention are not admissible. In addition, in the specific context of the disputes on admissibility in this case, and owing to the stage that the proceedings are at, it is not possible to determine the effectiveness of the remedies indicated by the State because, to date, they have not been used. Given that the Commission focused its analysis of admissibility on the exceptions to the exhaustion of domestic remedies, the Court will now analyze whether the said exceptions are admissible in this case.

B.3.3 Exceptions to prior exhaustion of domestic remedies (Article 46(2) of the American Convention)

100. Article 46(2) of the Convention establishes that the requirement of prior exhaustion of domestic remedies is not applicable when: (a) the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them, or (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies. In this regard, the Court has indicated that it is not necessary to exhaust ineffective remedies:

> [F]or such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unwarranted delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy.[127]

101. The Court agrees with the Inter-American Commission's observation in the Admissibility Report in this case that the citing of the exceptions to the rule of the exhaustion of domestic remedies established in Article 46(2) of the Convention is closely related to the determination of possible violations of certain rights recognized in this

[127] "Judicial Guarantees in States of Emergency (Arts. 27.2 25 and 8 of the American Convention on Human Rights)". Advisory Opinion OC–9/87 of October 6, 1987. Series A No. 9, para. 24.

instrument, such as the guarantee of access to justice. Owing to its nature and purpose, Article 46(2) of the American Convention is a norm with an autonomous content *vis-à-vis* the substantive norms of the Convention. Therefore, the determination of whether the exceptions to the rule of prior exhaustion of domestic remedies is applicable to the case in question must be made before and separately from the analysis of the merits of the matter, because the standard of assessment differs from the one used to determine the presumed violation of Articles 8 and 25 of the Convention. Consequently, the Court will not begin to examine the merits of this case now, but rather will proceed to assess, exclusively, the information required to determine the admissibility of the exceptions to the exhaustion of the remedies, within the framework of its case law according to which this issue is "merely a matter of admissibility."[128]

102. Nevertheless, it is pertinent to recall that when the Commission's decisions in relation to the proceedings before it are alleged as a preliminary objection, the Court has maintained that the Inter-American Commission has autonomy and independence in the exercise of its mandate as established in the American Convention, and particularly in the exercise of its functions in the proceedings concerning the processing of individual petitions established in Articles 44 to 51 of the Convention.[129] However, in matters that it is examining, the Court has the authority to examine the legality of the Commission's actions;[130] although this does not necessarily mean reviewing the proceedings conducted before the latter,[131] unless there has been a serious error that violates the parties' right of defense.[132] Lastly, the party affirming that an action of the Commission during the proceedings before it has been irregular, affecting their right of defense, must prove this prejudice.[133] In this regard, a complaint or difference of opinions in relation to the actions of the Inter-American Commission is not sufficient.[134] Taking the foregoing into account, the Court will now examine each of the exceptions established in Article 46(2) of the American Convention separately.

B.3.3.1 The domestic legislation of the State does not afford due process of law for the protection of the right or rights that have allegedly been violated (Article 46(2)(a)

103. The Court has noted that the representatives argued that a structural problem existed which allegedly affected the independence and impartiality of the Judiciary and that could be summarized as the subjection of the Judicial Branch to the Executive Branch (*supra* para. 34).

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128 Similarly, *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, para. 88 and *Case of Salvador Chiriboga v. Ecuador. Preliminary objection and merits.* Judgment of May 6, 2008. Series C. No. 179, para. 40.

129 *Cf. Control of Due Process in the Exercise of the Powers of the Inter-American Commission on Human Rights* (Arts. 41 and 44 of the American Convention on Human Rights). Advisory Opinion OC-19/05 of November 28, 2005. Series A No. 19, first operative paragraph, and *Case of Mémoli v. Argentina*, paras. 25 and 49.

130 *Cf. Control of Due Process in the Exercise of the Powers of the Inter-American Commission on Human Rights (Arts. 41 and 44 of the American Convention on Human Rights).* Advisory Opinion OC-19/05, third operative paragraph, and *Case of Mémoli v. Argentina*, paras. 25 and 49.

131 *Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 24, 2006. Series C No. 158, para. 66, and *Case of Mémoli v. Argentina*, paras. 25 and 49.

132 *Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, para. 66, and *Case of Mémoli v. Argentina*, paras. 25 and 49.

133 *Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, para. 66, and *Case of Mémoli v. Argentina*, paras. 27 and 49.

134 *Cf. Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of August 6, 2008. Series C No. 184, para. 42, and *Case of Mémoli v. Argentina*, paras. 27 and 49.

104. In its Admissibility Report, the Inter-American Commission considered that it was not admissible to apply the exception established in Article 46(2)(a) for the following reasons: [135]

> 90. The petitioners consider that in cases of political persecution, international law is on the side of one who seeks protection from the State in question. It indicates that this is the ultimate basis of asylum and refuge as legal institutions, and they cite the principle of *non-refoulement*. The Commission understands, however, that Allan Brewer Carías is not abroad with refugee status. The Commission considers that an eventual analysis of the allegations of political persecution or of the factors that would have affected his right to due process should be done during the stage on the merits.
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> 91. As for the petitioner's argument regarding the illusory nature of domestic remedies due to the lack of independence and impartiality of the Judiciary, the petitioners base their argument on the election of the Supreme Court of Justice not having been done in keeping with the Constitution; that the reform of the Organic Law of the Supreme Court of Justice of 2002 established the election of judges by simple majority, and that those justices who do not follow the government line have been removed or "retired." […]
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> 92. While the [Inter-American Commission] has expressed its concern over factors that may affect the impartiality and independence of some public servants working in the Public Prosecution Service and the Judiciary in Venezuela on several occasions, **the nature of contentious proceedings requires that the petitioners present concrete arguments on the impact on the judicial proceedings related to the claim. Generic mentions of the context are not sufficient *per se* to justify the citing of that objection** (bold added).

105. Although it is true that, in its arguments before this Court, the Inter-American Commission has insisted that the "problem posed in this case is structural and responds to a *de facto* situation of the Judiciary that far exceeds the abstract regulation of the criminal proceedings," the Court has no evidence that contradicts the Inter-American Commission's decision in its Admissibility Report regarding the inadmissibility of the requirement established in Article 46(1)(a) of the Convention. In this regard, the Court considers that the direct application of the exception contained in Article 46(2)(a) of the Convention cannot be derived from an alleged structural context of the provisional status of the judiciary, because this would mean that, based on a general argument on the lack of independence and impartiality of the judiciary, it was not necessary to comply with the requirement of prior exhaustion of domestic remedies.

B.3.3.2. The party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them (Article 46(2)(b)

106. The representatives argued that, by supposedly conditioning, "arbitrarily and illegally," the processing of the request for annulment to the appearance of the presumed victim, based on a court order contrary to the Convention, Mr. Brewer Carías was prevented from having access to the domestic remedies, to which was added "a well-founded fear" that the exercise of the remedies would increase the persecution to which he had supposedly been subjected (*supra* para. 34).

107. In its Admissibility Report, the Inter-American Commission considered that the exception established in Article 46(2)(b) was admissible in this case for the following reasons: [136]

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[135] Admissibility Report No. 97/09, Petition 84-07, Allan R. Brewer Carías, Venezuela, September 8, 2009 (file of annexes to the report, appendix, tome IV, folio 3629).

[136] Admissibility report No. 97/09, Petition 84-07, Allan R. Brewer Carías, Venezuela, September 8, 2009 (file of annexes to the report, appendix, tome IV, folios 3629 and 3630).

> 93. […] In the present case, the petitioners allege that factors such as the provisional status of the judges and prosecutors involved in the case have caused them to be subject to removal without a proceeding, a situation that affects the guarantees of impartiality and independence.
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> 94. Specifically, the petitioners allege that at the request of the Sixth Prosecutor, the Twenty-fifth Supervisory Judge **issued the order barring Allan Brewer Carías from leaving the country**. That order was appealed before the Tenth Chamber of the Court of Appeal. On January 31, 2005, the Appeals Chamber revoked the order barring Brewer Carías from leaving the country. On February 3, 2005, the Judicial Commission of the Supreme Court of Justice suspended the judges of the Court of Appeal who had voted in favor of the nullity of the decision appealed, as well as Temporary Judge Josefina Gómez Sosa, for not having indicated sufficient grounds to support the order prohibiting departure from the country. Judge Gómez Sosa was replaced by Supervisory Judge Manuel Bognanno, also temporary. The petitioners allege that Judge Bognanno was suspended from office on June 29, 2005, **after notifying the Superior Prosecutor on June 27, 2005, of alleged irregularities in the investigation conducted by the Sixth Prosecutor**. In other words, the petitioners allege that the judges who supervise guarantees and who ruled in favor of the defense or sought to rectify violations of due process allegedly committed during the investigation phase were replaced.
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> 95. The Commission observes that, in response to the allegations made by the petitioners, the State has not indicated the most effective remedies to question the assignment or removal of judges. In fact, it should be pointed out that the remedies usually available to the defense, such as recusal, are not suitable to question the provisional appointments of judges assigned to the proceedings or their removal because of their performance. The Commission finds that the removal of several provisional judges in the present case, **after rendering decisions regarding the situation of the alleged victim**, may have affected his access to domestic remedies and, therefore, this aspect of the claim should be exempt from the requirement being analyzed (bold added).

108. In this regard, the Court considers that, although the determinations made by the Commission in its Admissibility Report are determinations *prima facie*, it is an error for the Commission to have considered that the decisions adopted with regard to some of the temporary and provisional judges who intervened in the proceedings were directly related to Mr. Brewer.

109. Indeed, the Court underscores that Mr. Brewer Carías has been charged in proceedings in which other individuals who supposedly took part in the events of April 2002 have been accused. The suspension of the supervisory judge and of two members of the Chamber who declared the nullity of the prohibition to leave the country of some of the accused in the proceedings was related to an alleged irregularity in decisions concerning some of the accused, but not Mr. Brewer (*supra* para. 50), who, at that time, had not been accused.[137]

110. Moreover, although the Admissibility Report mentioned that the appointment of the supervisory judge Manuel Bognanno was annulled as a result of the alleged irregularities committed by the Sixth Prosecutor, the Court notes that the dispute that occurred on June 27, 2005, between the Sixth Prosecutor and Judge Bognanno was related to a request by the defense counsel of another of those accused in the proceedings; in other words, an accused who was not Mr. Brewer (*supra* para. 56). Thus, even *prima facie*, it is not possible to establish a direct causal link between the decision to annul the appointment of Judge Bognanno on June 29, 2005 (*supra* para. 56), and an action carried out by a judge "with regard to the situation of the presumed victim," as mentioned in the Admissibility Report.

111. Also, in relation to the discussions as to whether this exception was admissible, the Court reiterates that the actual procedural stage of this case (*supra* paras. 96 to 98) does

[137] In this regard, the Commission, in its Merits Report stated that "Admissibility Report No. 97/09 wrongly indicated that the ban on leaving the country included Allan Brewer Carías. In the merits procedural stage it was determined that this ban was not issued against Allan Brewer Carías but against other individuals investigated for their alleged participation in those facts." Merits Report No. 171/11, Case 12,724, Allan R. Brewer Carías, Venezuela, November 3, 2011 (Merits Report, tome I, folio 28).

not allow a *prima facie* conclusion to be reached regarding the impact of the provisional status on the guarantee of judicial independence in order to establish that an exception to the exhaustion of domestic remedies is admissible based Article 46(2)(b) of the Convention. This is because not even one first instance decision exists in which it is possible to assess the real impact that the provisional status of the judges could have had on the proceedings, an aspect that represents an important difference with previous cases that the Court has heard on this issue in Venezuela. Indeed, in those case, at least a first instance decision had been issued and, in some of them, decisions on the appeals.[138] Furthermore, the victims in those cases had been judges who were removed, contrary to this case in which the presumed victim is the accused.

112. In proceedings held under the rules of the adversarial system, such as this case, during the trial stage or during appeal proceedings, any defects or violations that the domestic judges consider pertinent can be corrected. It should be emphasized that, in the second request for annulment filed by Mr. Brewer's defense counsel, it was argued that the problems associated with the way in which the appointment of some provisional judges who intervened in the proceedings was annulled allegedly affected his guarantee of being tried by an ordinary judge, because "their autonomy, independence and impartiality" had not been guaranteed."[139] The Court considers that, if the domestic judges had intervened to decide this argument, it would have been possible to determine more clearly whether or not the provisional status had such an impact that the exception established in Article 46(2)(b) would have applied and, if so, to analyze the merits of the case.

113. Based on the foregoing, the Court finds that the exception established in Article 46(2)(b) of the American Convention is not applicable.

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[138] In the case of *Apitz Barbera et al.,* the Court analyzed the disciplinary proceeding that led to the removal of three of the five judges who, at the time, composed the second most important court of Venezuela. The victims presented an application for *amparo* against the decision ordering the suspension of two of the judges, an appeal to a higher court against the decision ordering the removal, and an appeal for annulment and preventive measure of protection against the sanction of removal from office. *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182.

The case of *Reverón Trujillo* related to a provisional judge whose removal from office was annulled, but without this declaration involving her reinstatement in her functions owing to her provisional status. The Commission for the Restructuring and Operation of the Judicial System dismissed her considering that she had committed disciplinary faults related to the abuse of authority and lack of diligence. Ms. Reverón Trujillo filed an appeal for annulment of this ruling. The Political and Administrative Chamber of that court declared the nullity of the sanction of dismissal. However, it did not order that she be reinstated in her post, or payment of the salaries she had failed to perceive. *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of June 30, 2009. Series C No. 197.

Lastly, in the case of *Chocrón Chocrón,* the Court declared that the State was internationally responsible for having annulled Ms. Chocrón Chocrón's appointment as a temporary judge, without guaranteeing her a minimum stability in the exercise of this function, a reasoned decision on her removal, and her rights of defense and to an effective remedy. Ms. Chocrón Chocrón had been appointed "on a temporary basis" by the Judicial Committee of the Supreme Electoral Tribunal. Three months after her appointment, the Judicial Committee met and decided to annul her appointment based on certain observations that had been made to the judges, members of that Committee. Consequently, an administrative appeal for review was filed before the Judicial Committee and also a contentious administrative appeal for a declaration of nullity based on unconstitutionality and illegality, together with an application for *amparo* before the Political and Administrative Chamber of the Supreme Electoral Tribunal. Both bodies declared the appeals "inadmissible." *Case of Chocrón Chocrón v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2011. Series C No. 227.

[139] Brief of the defense submitted to the Twenty-fifth Court on November 8, 2005 (file of annexes to the answering brief, annex 1, exhibit 15, folio 14783).

B.3.3.3. There has been unwarranted delay in rendering a final judgment under the aforementioned remedies (article 46(2)(c)

114. The representatives argued that the delay in deciding the requests for annulment was unwarranted under domestic and international law (*supra* para. 34).

115. Even though the Court has previously decided that requests for annulment were not appropriate remedies, it is pertinent to analyze the exception of "unwarranted delay," because the Commission accepted the exhaustion of domestic remedies based on this exception. In fact, in its Admissibility Report, the Inter-American Commission considered that this exception was admissible in light of the following considerations:[140]

> 87. In this respect, the Commission observes that while the motion for nullity filed on November 8, 2005, could have been resolved without the presence of Allan Brewer Carías, the physical absence of the accused in fact impeded the holding of the preliminary hearing and other procedural acts related to his trial, **as a result, the Commission does not have elements to attribute to the State an unwarranted delay in the decision** regarding the criminal proceedings as a whole. The Commission notes, **however, that the lack of resolution of the request for annulment is an indication of delay attributable to the State** with regard to the resolution of the claims concerning due process which were included in the same appeal.
>
> 88. As for the application of the exception to the requirement of prior exhaustion of domestic remedies provided for in Article 46(2)(b) of the Convention, the petitioners allege that Allan Brewer Carías has been impeded from using the remedies that should be available to the defense in a criminal proceeding, which were arbitrarily disregarded by the Public Prosecution Service and by the judicial system. The petitioners allege that Allan Brewer Carías has not been allowed to have access to domestic remedies considering that there has apparently been a violation of the principle of presumption of innocence in his case in light of statements by members of the Judiciary on the alleged guilt of the accused; that the provisional status of prosecutors and judges involved in the case may have affected their independence and impartiality. In addition, they refer to the impairment of due process guarantees related to the exercise of the defense at trial, such as the right to examine and offer witnesses as well as to have access to the file in conditions that make it possible to prepare the defense of the accused satisfactorily. They argue that these alleged violations of access to judicial remedies with due guarantees were questioned before the courts by means of the motion for nullity filed on November 8, 2005, which has not been resolved.
>
> 89. The Commission notes that the claims mentioned in the preceding paragraph were filed in the domestic courts together with the request for annulment and, consequently, must be analyzed in that context and the analysis *supra* in accordance with Article 46(2)(c). As it has been already pointed out with regard to that appeal, there has been a delay in issuing a decision, and the Commission considers that **the lapse of more than three years in deciding this appeal is a factor that falls within the framework of the exception to the exhaustion of domestic remedies due to an unwarranted delay** (bold and underlining added).

116. In this case, the parties disagree as to whether the exception contained in Article 46(2)(c) is applicable; in other words, whether there has been an unwarranted delay. This disagreement has also focused on determining whether the request for annulment can only be decided during the preliminary hearing in the presence of Mr. Brewer Carías, or whether the request can be decided without his presence, independently of the preliminary hearing.

117. In order to decide whether the acceptance of this exception to the exhaustion of domestic remedies signified a serious error that violated the State's right of defense, the

[140] Admissibility report No. 97/09, Petition 84-07, Allan R. Brewer Carías, Venezuela, September 8, 2009 (file of annexes to the report, appendix, tome IV, folios 3628 and 3629).

Court will examine the dispute between the parties with regard to: (i) the time frame and the procedural stage established in domestic law for deciding requests for annulment, and (ii) the need for the presence of the accused at the preliminary hearing, and the reasons why the hearing was postponed.

B.3.3.3.1. Time frame and procedural stage established in domestic law for deciding requests for annulment

118. To determine whether there was an unwarranted delay in deciding the two requests for annulment, the Court deems it pertinent to decide the dispute between the parties concerning the time frame and procedural stage established in Venezuelan law. In this regard, the parties are in disagreement as to whether these requests should be decided by the judge in charge of the case within three days or whether, to the contrary, the request should be examined and decided during the preliminary hearing.

119. The representatives substantiated their assertion that the annulment must be decided within three days based on article 177 of the OCCP which establishes that:[141]

> Court orders and final judgments following an oral hearing shall be issued immediately after the hearing has concluded. In the case of written proceedings, the decisions shall be issued within the following three days (underlining added).

120. Meanwhile, the State's argument, according to which it was necessary to wait until the preliminary hearing in order to decide on the said requests, is based on article 330 of the OCCP, which indicates:[142]

> **Decision.** Once the hearing has concluded, the judge shall decide, in the presence of the parties, the following questions, as applicable:
>
> 1. If there are formal defects in the charges brought by the prosecutor or by the complainant, these can be rectified immediately or during this hearing; a request may be made to suspend the hearing, if necessary, and to continue as soon as possible;
>
> 2. To admit the charges of the Public Prosecution Service or of the complainant, totally or partially, and to order the opening of the trial; the judge may give the facts a provisional legal definition distinct from the one in the charges brought by the prosecutor or the victim;
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> 3. To order the dismissal of the case, if he considers that any of the cause established by law exist;
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> 4. To decide the objections filed;
>
> 5. To decide preventive measures;
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> 6. To rule in accordance with the procedure based on the admission of the facts;
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> 7. To approve reparation agreements;
>
> 8. To decide the conditional suspension of the proceedings;
>
> 9. To decide on the legality, lawfulness, pertinence and need of the evidence offered to the oral proceeding.

121. To defend their positions, the parties presented several witnesses and expert witnesses on this point. For example, Mr. Brewer stated during the public hearing that:[143]

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141 Article 177 of the OCCP (file of annexes to the answering brief, tome I, folio 20631).

142 Article 130 of the OCCP (file of annexes to the answering brief, tome I, folio 20629).

143 Statement made by Mr. Brewer Carías during the public hearing held in this case.

> The State is obliged to decide the request for annulment before the preliminary hearing, because that decision will determine whether or not the proceedings are free of constitutional violations. Once the decision on annulment has been taken, the preliminary hearing can then be convened if the request for annulment is declared inadmissible. This is the situation of the proceedings at the present time; paralyzed by the State because the judge has not decided the request for annulment which is the only one that exists and there is no other remedy, and this is why the preliminary hearing cannot be convened.

122. In addition, expert witness Ollarves Irazábal indicated that:[144]

> The time frame for deciding it is clearly identified in our laws in the Organic Code of Criminal Procedure; it is three days; this is for absolute nullities, nullities that violate the essential content of human rights, the constitutional rights and guarantees that cannot be ratified or rectified.
> […]
> Relative nullities, nullities that can be rectified, refer to the nullity that may be involved in the requirements established in article 326 relating to the charges. And, in the case of absolute nullities, these cannot be rectified and must be decided within a definite time frame of three days as the Constitutional Chamber has repeatedly indicated.

123. Meanwhile, witness Castellanos stated that:[145]

> Nullity as such is not a remedy, but rather a prerogative of all the parties who intervene in a criminal proceeding in order to denounce the violation of constitutional prerogatives that apply in their favor. The request for a declaration of nullity is filed in the intermediate stage […], but also in the context of the brief with objections and offer of evidence, which are essentially a form of answering the charges, this request for annulment, together with the other claims must be decided during the preliminary hearing.
> […]
> This nullity was requested in the context of the exercise of the burden that falls on the defense to react to the charges, and the only way that the court has to rule on this request for annulment, which was requested in the brief filed by the defense, is during the preliminary hearing, because the request for annulment is analyzed in that brief and […] a similarity exists between the presentation made by the defense, for example, when filing the objections, but it is also cited in the request for annulment. A ruling on nullity would mean that the judge would be making an early ruling on the merits during the preliminary hearing.

124. The parties also referred to case law of the Supreme Court that would support their theses. Thus, for example, expert witness Ollarves Irazábal provided the Court with several judgments of the Supreme Court that reveal the complexity of this matter. In one of these judgments, on February 14, 2002, the Constitutional Chamber of the Supreme Court[146] indicated that:

> During the preparatory and intermediate stages of criminal proceedings, the supervisory judge shall ensure that the procedural guarantees are respected, but the Organic Code of Criminal Procedure does not indicate the procedural occasion for filing and deciding violations of such guarantees […].
> Since the law is silent on this point, how should the supervisory judge deal with a request for annulment? In the opinion of this Chamber, it depends on the procedural stage at which the request is filed, and if it is filed in the intermediate stage, the judge can decide it either before the preliminary hearing or as a result of that hearing, varying according to the constitutional violation that has been alleged, because there are violations that it is not urgent to decide, because they do not harm the legal situation of the parties immediately or irreparably.
> […]
> If a request for annulment is filed, the supervisory judge – based on the urgency in view of the type of violation, and given the silence of the law – may, before ordering that the case go to trial, and at any time before that act, rule on it, even though it is preferable that this is done during the preliminary hearing.[…]

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144 Statement made by expert witness Jesús Ollarves Irazábal during the public hearing held in this case.

145 Statement made by witness Néstor Castellanos during the public hearing held in this case.

146 Judgment of the Constitutional Chamber of the Supreme Court of February 14, 2002 (Merits Report, tome VII, folio 3167). Similarly, in its Merits Report, the Commission cited another decision of the Constitutional Chamber of the Supreme Court of Justice. File No. 07-0827. Decision of July 20, 2007.

> However, when requests for annulment coincide with the purpose of the preliminary questions, they must be decided at the same time as the preliminary questions; that is, during the preliminary hearing, which also guarantees the right of defense of all the parties to the proceedings and complies with the adversarial principle.

125. Another judgment of the Constitutional Chamber of February 6, 2003, establishes, to the contrary,[147] that:

> The Chamber observes that the plaintiff founded his claim on the alleged violation of a right that, as in the case of due process, is guaranteed under articles 49 and 257 of the Constitution. [… T]he plaintiff had a pre-existing procedural measure, which was just as, or more, appropriate, expedite, brief and simple as the application for *amparo,* which was the request for a declaration of nullity of the decision against which he has exercised this present protective action, pursuant to article 212 of the said Code; a claim that must be decided, even as a mere matter of law, by a ruling that must be issued within the three-day period established in article 194 (now 177) of the procedural code. It is worth noting that, in temporal terms, this request for a declaration of absolute nullity should have been substantiated and decided within a time frame that is ostensibly less than the one established by law in relation to the *amparo* procedure.

126. Moreover, in its Merits Report, the Commission cited a recent judgment according to which:

> […] the ruling sought by the plaintiff for the declaration of nullity of the prosecutor's charges may only be given at the preliminary hearing, which has not taken place due to the defendant's failure to appear. […] Regarding the failure to rule on requests for '…joinders, annulments, and amended pleadings…,' in this Chamber's opinion such requests should be decided at the preliminary hearing, as stipulated in article 330 of the Organic Code of Criminal Procedure; for that reason, the purported threat to or violation of constitutional rights alleged by the plaintiff is not actionable by the Fourth Supervisory Court […], because the said court may only rule on the accused's request at the preliminary hearing.[148]

127. In addition, mention was made of judgments establishing that it was not possible to wait until the preliminary hearing to review measures of preventive detention, but these judgments did not refer to requests for annulment.[149]

128. In particular, in its Merits Report, the Commission indicated in this regard that "the presence of the accused is required at the preliminary hearing so that this hearing can be held and for the judge, on that occasion, to decide the request for a declaration of nullity filed by the defendant's defense counsel" and that, owing to the need for the presence of the accused, the Commission found that "there was no violation of Article 25(1) of the American Convention, in relation to Article 1(1) thereof, with regard to Allan Brewer Carías." However, it its Admissibility Report, it had alleged that "the failure to decide the appeal for annulment is an indication of delay that can be attributed to the State with regard to the deciding of the claims concerning due process that were included in the appeal."[150] It had also argued that "the claims […] filed in the domestic courts together with the appeal for

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147 Judgment of the Constitutional Chamber of the Supreme Court of February 6, 2003 (Merits Report, tome VII, folio 3234).

148 Judgment of the Constitutional Chamber of the Supreme Court of Justice of October 19, 2009. See also, judgment of the Incidental Chamber of the Court of Appeal of the Criminal Judicial Circuit of the State of Sucre of October 19, 2008 (Merits Report, tome I, folio 44).

149 Judgment of the Constitutional Chamber of the Supreme Court of July 22, 2004 (Merits Report, tome VII, folios 3251 to 3257); Judgment of the Constitutional Chamber of the Supreme Court of November 4, 2003 (Merits Report, tome VII, folios 3245 to 3250); Judgment of the Constitutional Chamber of the Supreme Court of May 16, 2003 (Merits Report, tome VII, folios 3238 to 3243), and Judgment of the Constitutional Chamber of the Supreme Court of May 11, 2011 (Merits Report, tome VII, folios 3327 to 3336).

150 Admissibility report No. 97/09, Petition 84-07, Allan R. Brewer Carías, Venezuela, September 8, 2009, para. 87, folio 3628.

annulment […] must be analyzed in that context and […] in accordance with Article 46(2)(c) [because] there [was] a delay in issuing the respective decision, and […] the lapse of more than three years in deciding this appeal is a factor that falls within the framework of the exception to the exhaustion of domestic remedies due to an unwarranted delay."[151]

129. Subsequently, in its final written observations before the Court, the Inter-American Commission took "note of the distinction between the different types of nullity under the Venezuelan Code of Criminal Procedure" and that "the nullity presented by Mr. Brewer Carías was not a request for annulment of the charges, but of all the previous proceedings and based on reasons of fundamental rights," with the consequence that "the requests for annulment at the intermediate stage – such as in this specific case – can be decided either before the preliminary hearing or after it, depending on their nature." Thus, the Commission considered that "pursuant to Venezuela's domestic law, it was not obligatory to await the preliminary hearing in order to decide the request for annulment."

130. Taking the foregoing into consideration, the Court notes that there are two interpretations of the procedural stage at which the requests for annulment that have been submitted should be decided. Despite this, there are elements related to the content of the appeal that allow the following considerations to be made.

131. First, the Court notes that the judgments provided by the representatives in support of their arguments refer to specific requests concerning particular procedural actions that differ from the brief requesting the annulment of all the proceedings presented by the defense of Mr. Brewer Carías. In fact, they are judgments that refer to specific requests relating to particular procedural actions that did not involve the annulment of all previous the proceedings.[152] This type of request can be decided within the three days indicated in article 177 of the OCCP, contrary to an appeal of 523 pages, 90 of which focus on requesting the annulment of all the proceedings up until that date.

132. In addition, the Court takes into account that the Supreme Court of Justice has established that the procedural stage for deciding briefs that request annulments depends on when they were filed and on the type of arguments they include. Specifically, the Supreme Court has indicated that, if the request for annulment coincides with the preliminary questions, this request must be decided together with the preliminary questions during the preliminary hearing (*supra* para. 124). The Court stresses that the 523-page brief included arguments concerning, among other matters, the non-liability of the lawyer in the exercise of his profession, and gave details of disputes that are not only procedural, but involve substantive aspects concerning the merits and criminal liability, as well as requests

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[151] Admissibility report No. 97/09, Petition 84-07, Allan R. Brewer Carías, Venezuela, September 8, 2009, para. 89, folio 3629.

[152] Indeed, these are judgments where a specific type of absolute nullity must be decided "within a time frame that is ostensibly less than the one established by law in relation to the *amparo* procedure (judgment No. 100 of the Constitutional Chamber of the Supreme Court of February 6, 2003: Case of *Leonardo Rodríguez Carabalí*, Merits Report, tome IV, folio 4581); the presumed omission of a ruling on the request for absolute annulment (judgment of the Constitutional Chamber of the Supreme Court of May 11, 2011, Merits Report, tome VII); the postponement of decisions on requests by the defense until the preliminary hearing (judgment No. 1198 of the Constitutional Chamber of the Supreme Court of February 6, 2003: Case of *Luis Enrique Guevara Medina*, Merits Report, tome IV, folio 4582); the appeal for review of a preventive measure of deprivation of liberty (judgment of the Constitutional Chamber of the Supreme Court of July 22, 2004, Merits Report, tome VII, folios 3251 to 3257); irregularities in the substitution of defense counsel by a public defender appointed by a judge (judgment No. 2161 of the Constitutional Chamber of the Supreme Court of September 5, 2002, Merits Report, tome IV, folio 4583), and the inadmissibility of a joint application for constitutional *amparo* and for a declaration of nullity (judgment No. 349 of the Constitutional Chamber of the Supreme Court of February 26, 2002, Merits Report, tome IV, folio 4583).

related to the defense's rejection of the evidence offered by the Public Prosecution Service and requiring the admission of evidence that the defense wished to offer during the trial. Indeed, in the brief answering the accusation, the defense, as a "final petition" requested that the court "declare the nullity of all the actions taken in the investigation conducted by the Public Prosecution Service; secondly, [… that it] admit the objections filed against the charges […, that the evidence offered by the Public Prosecution Service [be] rejected, that all the evidence they ha[d] offered [be] admitted [… and] that the [the defendant] stand trial a free man."[153] This means that it can be found reasonable that it was not considered possible to respond to this brief and the matters it contained relating to the merits before the preliminary hearing and that a fragmented analysis of the brief, as requested by the representatives, could be considered inadmissible.

133. Taking the above into account, and given the content, characteristics, complexity, and length of the brief presented on November 8, 2005, the Court considers that the requests for annulment are not of the type that must be decided within the three-day period indicated in article 177 of the OCCP.

B.3.3.3.2. Need for the presence of the accused at the preliminary hearing and reasons why the hearing was postponed

134. The Court considers that, under many procedural systems, the presence of the accused is an essential requirement for the regular and legal implementation of the proceedings. The Convention itself reflects this requirement. In this regard, Article 7(5) of the Convention establishes that "release may be subject to guarantees to assure his appearance for trial," so that States are authorized to establish domestic laws to ensure the appearance of the accused. As can be seen, one of the most important objectives of preventive detention, which is only admissible on an exceptional basis, is to ensure the appearance of the accused at his trial, in order to guarantee the criminal jurisdiction and help combat impunity. It also constitutes a guarantee for the implementation of the proceedings. Furthermore, Venezuela has established the prohibition of a trial *in absentia* by law (*supra* para. 95).

135. In its report on the use of pre-trial detention in the Americas,[154] the Commission established that the legitimate and permissible objectives of preventive detention must be of a procedural nature, such as to avoid the danger of flight, or the obstruction of the proceedings, and that preventive detention should only be used when there are no other means of ensuring the presence of the accused during the trial or preventing the alteration of evidence.[155]

136. Regarding whether the accused must be present at the preliminary hearing in order for this hearing to be held, there is a consensus among the parties on this point. Indeed the representatives have indicated that "the preliminary hearing cannot be held in the absence

[153] Brief of the defense filed before the Twenty-fifth Court on November 8, 2005 (file of annexes to the answering brief, annex 1, exhibit 15, folios 15194 and 15195).

[154] Report on the Use of Pre-trial Detention in the Americas, OEA/Ser.L/V/II. Doc.46/13, December 30, 2013. Available at: http:// http://www.oas.org/en/iachr/pdl/reports/pdfs/Report-PD-2013-en.pdf

[155] In this report (para. 206), the Commission also indicated that "[t]he judge must specify the concrete circumstances in the proceedings that lead to the reasonable conclusion that there is still a real risk of flight, or identify the evidence that still needs to be gathered and explain why it would be impossible to do so with the accused at large. This obligation is based on the need for current circumstances to determine the State's interest in maintaining the pretrial detention. This requirement is not met when the judicial authorities systematically reject review requests by, for example, merely invoking legal assumptions related to flight risk or any other provisions that, in one way or another, require that the measure be maintained."

of the accused, because it is part of the trial" and that "the presence of the accused is essential." In addition, Mr. Brewer's defense counsel acknowledged this during the criminal proceedings when he stated that "the only occasion on which [Mr.] Brewer Carías had the procedural obligation to appear in person at a judicial act was the preliminary hearing."[156] Based on the fact that the presence of Mr. Brewer Carías was necessary in order to hold the preliminary hearing, the parties were in dispute as to whether the postponement of this could be attributed to Mr. Brewer's absence, or whether it was due to circumstances beyond his control.

137. In this regard, the representatives have argued throughout the proceedings that the State "has been unable to present […] any proof of even one case in which the preliminary hearing has been postponed due to the failure to appear of Mr. Brewer Carías." The representatives founded their assertion on the judicial decision of the Twenty-fifth Court of July 20, 2007,[157] responding to the request to separate Mr. Brewer from the case, owing to "the impossibility of executing this measure because he was abroad," presented by another of those accused in the proceedings, who was also awaiting the holding of the preliminary hearing. On that occasion, in the reasoning of his decision not to separate the case, the judge stated that:

> "In the case in question, the preliminary hearing has not been delayed by the failure to appear of [Mr.] Brewer Carías; to the contrary, the different postponements that appear in the records of this case file have been due to the numerous requests filed by the different defense counsel of the defendants."

138. Although the Twenty-fifth Court made this assertion in which, in general, it indicated that none of the postponements had been caused by Mr. Brewer's absence, a review of the case file of the criminal proceedings provided to this Court reveals the contrary. In fact, the first summons to hold the preliminary hearing set this for November 17, 2005,[158] a date on which Mr. Brewer Carías had already left the country (*supra* para. 58). After this, and up until the preventive detention order was issued against Mr. Brewer, the preliminary hearing was delayed or postponed five times,[159] and on three of these occasions, this postponement was directly related to the actions of Mr. Brewer or his defense counsel. The first time, the defense recused the Twenty-fifth Judge on November 16, 2005; thus, the preliminary hearing scheduled for November 17, 2005, was not held.[160] Second, on March 7, 2006, it was recorded that "[Mr.] Brewer Carías failed to appear and, added to this, the Twenty-fifth Judge [was] on leave, and the Twenty-fourth Supervisory Judge headed the court […]; accordingly, it was agreed to postpone [the preliminary hearing] until April 4, 2006."[161]

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156 Ruling of the Twenty-fifth Supervisory Judge of First Instance of the Criminal Judicial Circuit of the Metropolitan Area of Caracas of January 25, 2008 (file of annexes to the motions and arguments brief, tome V, folios 6893 to 6910).

157 Ruling of the Twenty-fifth Court of July 20, 2007, on the brief filed by the defense counsel of José Gregorio Vásquez (file of annexes to the motions and arguments brief, tome v, folios 6832 to 6838).

158 Order of the Twenty-fifth Judge of October 24, 2005 (file of annexes to the answering brief, annex 1, exhibit 13, folio 14386).

159 Record of the Twenty-fifth Court of November 17, 2005 (file of annexes to the answering brief, annex 1, exhibit 16, folio 15805); Order of February 7, 2006 of the Twenty-fifth Judge (file of annexes to the answering brief, annex 1, exhibit 18, folio 16720); Record of the Twenty-fifth Court of March 7, 2006 (file of annexes to the answering brief, annex 1, exhibit 18, folio 16874); Record of the Twenty-fifth Court of April 10, 2006 (file of annexes to the answering brief, annex 1, exhibit 18, folio 16942), and Ruling of the Twenty-fifth Court of May 9, 2006 (file of annexes to the answering brief, annex 1, exhibit 19, folios 17305 to 17307).

160 Record of the Twenty-fifth Court of November 17, 2005 (file of annexes to the answering brief, annex 1, exhibit 16, folio 15805).

161 Record of the Twenty-fifth Court of March 7, 2006 (file of annexes to the answering brief, annex 1, exhibit 18, folio 16874).

139. Lastly, on May 9, 2006, the Twenty-fifth Judge ordered a verification of "the migratory movements of [Mr.] Brewer Carías,"[162] because he considered that "in view of the results of the notices served on [Mr.] Brewer Carías by the Clerk of the Court's Office, it was pertinent to make the following observations: […] A logical deductive inference from the results of the efforts to serve notice to [Mr.] Brewer Carías, lead this court to consider, reasonably, that there is uncertainty as regards his presence in the country, and this would indicate the impossibility of his appearing in person at the preliminary hearing. This is a reasonable consideration of this judge based on the results of the notifications carried out on reiterated occasions. This situation would negate the right of the other accused to obtain promptly from the jurisdictional organs the decisions that must be taken at the preliminary hearing during this intermediate stage" (underlining added). Based on the foregoing, the Twenty-fifth Judge also decided to postpone the hearing until June 20, 2006.

140. On May 10, 2006, the defense counsel of Mr. Brewer Carías advised the Twenty-fifth Judge that Mr. Brewer would not return to the country because he considered that:[163] (i) "the actions of the Public Prosecution Service in this case had clearly constituted official political persecution against him"; (ii) the Prosecutor General himself […] ha[d] directly violated his guarantee of the presumption of innocence, by publicly condemning him in advance of a trial, with the publication of the book *'Abril comienza en octubre'*"; (iii) "in response to the opportune appeal filed before the court, he had only obtained negative responses [and] these negative and frequently delayed responses from the jurisdictional organ ha[d], in turn, constituted new violations of his constitutional guarantees"; (iv) "his right to obtain the dismissal of the case in the intermediate stage of the proceedings had been curtailed"; (v) all of this represented the denial of accessible, impartial, appropriate, transparent, autonomous, independent, responsible, equitable and expedite justice," and (vi) the indictment was, in itself, already a sentence designed to punish his political and ideological criticism of the project intended to subjugate Venezuela."

141. Lastly, he stated that:

> "Faced with these two situations; on the one hand the systematic and massive violation of his constitutional guarantees and rights of defense, access to the evidence, equality between the parties, the presumption of innocence, the ordinary judge, effective judicial protection, to stand trial as a free man, in sum, of due process of law and, on the other hand, that […] Columbia University has offered him the opportunity to realize a long-standing professional goal, which is to become one of its professors, he had taken the decision to wait until conditions are appropriate to obtain an impartial trial that respects his judicial guarantees, [and he therefore advised the court] so that it could take the decision it considered appropriate and continue the proceedings in order not to cause any delay or prejudice to the other defendants."

142. Following this, on June 15, 2006, the Twenty-fifth Court issued the arrest warrant against Mr. Brewer Carías. As of that time, the hearing was again postponed on thirteen occasions.[164] And, on those occasions, only once was Mr. Brewer mentioned explicitly;

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[162] Ruling of the Twenty-fifth Court of May 9, 2006 (file of annexes to the answering brief, annex 1, exhibit 19, folios 17305 to 17307).

[163] Brief of the defense of May 10, 2006 (file of annexes to the answering brief, annex 1, exhibit 19, folios 17320 to 17322).

[164] Record of the Twenty-fifth Court of June 20, 2006 (file of annexes to the answering brief, annex 1, exhibit 20, folio 17435); Record of the Twenty-fifth Court of July 27, 2006 (file of annexes to the answering brief, annex 1, exhibit 20, folio 17586); Record of the Twenty-fifth Court of September 18, 2006 (file of annexes to the answering brief, annex 1, exhibit 20, folio 17711); Record of the Twenty-fifth Court of November 7, 2006 (file of annexes to the answering brief, annex 1, exhibit 20, folio 17914); Record of the Twenty-fifth Court of December 13, 2006 (file of annexes to the answering brief, annex 1, exhibit 21, folio 17982); Record of the Twenty-fifth Court of January 25, 2007 (file of annexes to the answering brief, annex 1, exhibit 21, folio 18174); Record of the Twenty-fifth

specifically on October 25, 2007, the hearing was postponed, because the court was awaiting the "appeal filed by the legal representative of [Mr.] Brewer Carías" against the note sent to INTERPOL.[165]

143. Based on this information, it should be underlined that the case file contains proof that Mr. Brewer Carías left Venezuela on September 29, 2005 (*supra* para. 58); in other words, before formal charges had been brought against him and before the first summons to the preliminary hearing had been issued to the parties (*supra* para. 66). Hence, Mr. Brewer Carías would not have been able to attend that hearing. Consequently, his absence has meant that it has not been possible to hold the preliminary hearing against him, so that it can be affirmed that the delay in deciding the requests for annulment could be attributed to his decision not to submit to the proceedings, and has an impact on the analysis of the unwarranted delay or reasonable time. Consequently, there in a contradiction in the fact that the Commission's Admissibility Report considered that an unwarranted delay could not be attributed to the State, but found, to the contrary, that the failure to decide the request for annulment was an indication of delay that could be attributed to the State.

B.3.4. Conclusion concerning the preliminary objection of failure to exhaust domestic remedies

144. Taking into account the preceding considerations, the Court admits the preliminary objection, because it considers that, in this case, the appropriate and effective remedies were not exhausted, and that the exception to the requirement of prior exhaustion of the said remedies was not admissible. Consequently, it is not in order to proceed to the analysis of the merits.

IV
OPERATIVE PARAGRAPHS

THEREFORE,

THE COURT

DECLARES:

By four votes to two,

1. That in the instant case the domestic remedies were not exhausted, in accordance with paragraphs 77 to 144 of this Judgment.

DECIDES:

Court of February 23, 2007 (file of annexes to the answering brief, annex 1, exhibit 21, folio 18325); Record of the Twenty-fifth Court of March 26, 2007 (file of annexes to the answering brief, annex 1, exhibit 22, folio 18579); Record of the Twenty-fifth Court of May 4, 2007 (file of annexes to the answering brief, annex 1, exhibit 23, folio 18963); Record of the Twenty-fifth Court of June 27, 2007 (file of annexes to the answering brief, annex 1, exhibit 23, folio 19185); Record of the Twenty-fifth Court of July 31, 2007 (file of annexes to the answering brief, annex 1, exhibit 23, folio 19304); Record of the Twenty-fifth Court of September 27, 2007 (file of annexes to the answering brief, annex 1, exhibit 24, folio 19430), and Record of the Twenty-fifth Court of November 29, 2007 (file of annexes to the answering brief, annex 1, exhibit 24, folio 19643).

[165] Record of the Twenty-fifth Court of November 29, 2007 (file of annexes to the answering brief, annex 1, exhibit 24, folio 19643).

By four votes to two,

2. To admit the preliminary objection filed by the State concerning the failure to exhaust domestic remedies, in accordance with paragraphs 77 to 144 of this Judgment.

AND DETERMINES:

By four votes to two,

3. To close the case file.

Judges Manuel E. Ventura Robles and Eduardo Ferrer Mac-Gregor Poisot advised the Court of their joint dissenting opinions, which is attached to the Judgment.

Done, at San José, Costa Rica, on May 26, 2014, in the Spanish language.

Humberto Antonio Sierra Porto
President

Roberto F. Caldas

Manuel E. Ventura Robles

Diego García-Sayán

Alberto Pérez Pérez

Eduardo Ferrer Mac-Gregor Poisot

Pablo Saavedra Alessandri
Secretary

So ordered,

Humberto Antonio Sierra Porto
President

Pablo Saavedra Alessandri
Secretary

JOINT DISSENTING OPINION OF JUDGES
MANUEL E. VENTURA ROBLES AND EDUARDO FERRER MAC-GREGOR POISOT

CASE OF BREWER CARÍAS V. VENEZUELA
JUDGMENT OF MAY 26, 2014
(*Preliminary objections*)

1. This dissenting opinion in the case of *Brewer Carías v. Venezuela* is issued for the reasons to be described below, based on which the authors are in disagreement with the operative paragraphs of the Judgment adopted by a majority of four votes (hereinafter "the Judgment" or "the majority opinion"), in which the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court") admits the preliminary objection filed by the State concerning the failure to exhaust domestic remedies and, thus, orders that the file of this case be archived.

2. We observe with concern that, for the first time in its history, the Court does not proceed to examine the merits of a litigation because it finds admissible a preliminary objection of failure to exhaust domestic remedies,[1] related in this case to Articles 8 and 25 of the American Convention on Human Rights (hereinafter "the American Convention," "the Pact of San José de Costa Rica" or "the ACHR"). In addition, as analyzed below, the Judgment includes some considerations that, in our opinion, are not only contrary to the Inter-American Court's case law, but also represent a dangerous precedent for the inter-American system for the protection of human rights as a whole, to the detriment of the right of access to justice, and the individual.[2]

3. The special interest that this case has aroused in civil society should also be stressed, since 33 *amicus curiae* briefs have been received from renowned international jurists, as well as from legal and professional institutions and non-governmental organizations and associations of the Americas and Europe, concerning different issues relating to the litigation,[3] such as the rule of law, judicial guarantees, due process of law, judicial independence, the provisional nature of the judges, and the practice of law. All

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[1] On only three previous occasions in the more than 26 years of its contentious jurisdiction, the Inter-American Court has not examined the merits of the dispute submitted to it for different reasons: the first, owing to the expiry of the time frame for the presentation of the application by the Inter-American Commission (*Case of Cayara v. Peru. Preliminary objections*. Judgment of February 3, 1993. Series C No. 14); the second, due to the discontinuance of the action, decided by the Inter-American Commission on Human Rights (*Case of Maqueda v. Argentina*. *Preliminary objections.* Order of January 17, 1995. Series C No. 18), and third, owing to the lack of competence *ratione temporis* of the Inter-American Court (*Case of Alfonso Martín del Campo Dodd v. Mexico*. *Preliminary objections*. Judgment of September 3, 2004. Series C No. 113).

[2] It should not be forgotten that the international system must be understood as a whole, an essential principle indicated by Article 29 of the Pact of San José, which imposes a framework of protection that always gives preference to the most favorable interpretation, which constitutes the "cornerstone of the protection of the whole inter-American system." *Cf. Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2009. Series C No. 209, para. 24.

[3] The names of the persons, institutions and associations that submitted *amici curiae,* appear in para. 9 of the Judgment.

these *amici curiae* coincide in indicating different violations of Mr. Brewer's rights under the Convention.

4. For greater clarity, we will divide this opinion into the following sections: (1) Subject of the dispute (paras. 5 to 32); (2) Dissent (paras. 33 to 119), and (3) Defense of the rule of law and the exercise of the legal profession (paras. 120-125).

1. Subject of the dispute

5. Regarding the preliminary objection filed by the State, as indicated in the Judgment, the main dispute between the parties arises from the different judicial actions filed by the representatives of the victims during the processing of the domestic criminal proceedings; in particular, the filing of two applications for a declaration of the absolute nullity of all the measures taken in the preliminary investigation and the proceedings instituted against the lawyer, Allan Brewer Carías.

6. This dispute stems from: (i) whether the requests for annulment were appropriate and effective remedies to exhaust the domestic jurisdiction; (ii) the procedural stage at which the requests for annulment should be decided; (iii) whether the presumed victim was prevented from exhausting the domestic remedies, and (iv) whether the delay in deciding the said remedies could be attributed to the presumed victim.

7. The first dispute focuses on whether the two requests for annulment filed by the representatives of Mr. Brewer Carías can be considered appropriate and effective remedies to comply with the requirement of exhaustion of the remedies of the domestic jurisdiction.

8. Regarding the second dispute, the parties disagree as to whether the requests for annulment should have been decided by the judge in charge of the case within three days of their presentation or whether, to the contrary, this request should be examined and decided during the preliminary hearing.

9. As regards the third dispute, the disagreement relates to whether an impediment existed that prevented Allan Brewer Carías from exhausting the remedies of the domestic jurisdiction, a matter related to the provisional nature of judges in Venezuela, as well as to the impartiality and independence of that country's judges and prosecutors.

10. In relation to the fourth dispute, the disagreement refers to whether the said requests for annulment should or could be decided even in the absence of the accused. There is consensus between the parties that, in order to hold the preliminary hearing, the accused must be present. Indeed, the representatives have indicated that "the preliminary hearing cannot be held in the absence of the accused, because it is part of the trial" and that "the presence of the accused is essential." Based on the fact that the presence of Mr. Brewer Carías was necessary in order to hold the preliminary hearing, the parties disagree on whether the request for annulment that had been filed should be decided before the preliminary hearing or, to the contrary, at the end of that procedural stage.

1.1 Position of the State

11. In this regard, the State argued the existence of "[t]he remedies corresponding to the intermediate stage established in the Organic Code of Criminal Procedure; also, the exhaustion of the trial stage, if appropriate, as well as [the existence of] effective remedies, [such as] the appeals against decisions, against final judgments, for reconsideration, for cassation, [and] for review." As possible remedies, the State indicated the remedies

mentioned in article 328 of the Organic Code of Criminal Procedure in force (hereinafter "the OCCP") of September 4, 2009, the remedy of appeal (article 453 of the Organic Code of Criminal Procedure), the remedy of cassation (article 459 of the Organic Code of Criminal Procedure), and the appeal for review (article 470 of the Organic Code of Criminal Procedure).

12. The State also argued that "the absence of Allan Brewer Carías has made it impossible to hold the preliminary hearing, [which] has prevented the exercise of the actions established in the Organic Code of Criminal Procedure that enable the parties to the proceedings to assert their rights." It argued that this "is the opportunity granted to the accused to deny, contest and argue the facts and the law, to reply, make a rejoinder or a rebuttal, speak with defense counsel at all times, without this entailing the suspension of the hearing." Furthermore, it considered it "unusual to claim that the judge can decide the request for a declaration of nullity without the presence of the accused, and that the preliminary hearing can be held subsequently, [because] this would result in a major violation of due process and of the rights of Allan Brewer Carías."

13. The State alleged that the criminal proceedings had not progressed owing to the absence of Mr. Brewer Carías, and that, without his presence, the request for annulment could not be decided. Therefore, it argued that the completion of the criminal proceedings and the presentation of remedies such as an appeal, cassation or review represented the appropriate remedies for the presumed victim.

14. In addition, the State argued that "there is no human rights violation in a trial that never started because the petitioner left the country" and that "the OCCP and the case law of our Supreme Court of Justice have determined that the request for annulment filed by the lawyers of Mr. Brewer Carías must be decided during the preliminary hearing."

1.2 Position of the representatives

15. For their part, the representatives of the presumed victim argued that "the only available judicial remedy against the massive violation of the right to due process" was that of absolute nullity based on the unconstitutionality of the judicial proceedings under article 191 of the Organic Code of Criminal Procedure. In addition, they contested the State's argument that the remedy had not be decided because it had to be decided during the preliminary hearing, since more than three years had passed without this having been held for reasons that presumably were not related to the presumed victim's absence, a lapse that they considered had "delayed without justification" the decision on the remedy.

16. The representatives considered that, although the request for a declaration of absolute nullity complies, in theory, with the requirements established in Article 25 of the American Convention (simple, prompt and effective), in the specific case, "and in the context of a judiciary that lacks the impartiality to decide," there has been a "denial of justice," because seven years have passed (at the time the motions, arguments and evidence brief was submitted to the Inter-American Court) since it was filed without even a start having been made on processing it.

17. The representatives argued, also, that this remedy constitutes "the *amparo* remedy in criminal procedural matters," and thus, "if a decision on the remedy of *amparo* has to await the preliminary hearing, which can be delayed indefinitely […], the remedy could not be considered simple and prompt; and if the decision on it was conditioned to [Mr.] Brewer Carías giving himself up to his persecutors and being deprived of his liberty, international

human rights law and, in particular the Convention, would not allow it to be considered an effective remedy."

18. In addition, the representatives argued, with regard to the presumed victim's absence from the preliminary hearing, that this did not prevent deciding the request for annulment, considering that the right of the accused not to be tried *in absentia* is "a procedural guarantee that must always be understood in favor of the accused and never against him." They added that "the procedural actions that cannot be conducted without the presence [of the presumed victim] are those that relate to his trial, which include the preliminary hearing and the oral and public hearing [and this] does not preclude conducting numerous other judicial actions that do not entail trying him *in absentia,* [such as] the request for the annulment of all the proceedings to date." Based on article 327 and the following articles of the Organic Code of Criminal Procedure, they repeated that the request for annulment owing to the violation of procedural guarantees must be decided without the need to hold the said hearing and without requiring the presence of the accused.

19. They also argued that, in the case file, there is no "judicial decision or order of any kind in which the supervisory judge has expressed the impossibility of holding the preliminary hearing owing to the absence of [Mr.] Brewer Carías."

20. The representatives concluded that: (i) the context of the alleged structural situation of the provisional nature of judges and prosecutors in Venezuela, as well as "[t]he reiterated and persistent violation of the right to an independent and impartial judge in the proceedings against Mr. Brewer Carías, which the State has not denied, prove that the [presumed] victim was denied due process of law, which constitutes the first exception to the requirement of the exhaustion of domestic remedies before having recourse to the international protection of human rights (Art. 46(2)(a) [of the Convention])"; (ii) "[t]he persistent and arbitrary refusal of the Public Prosecution Service and of the different judges who have heard the criminal case instituted against [Mr.] Brewer Carías to admit and to process the evidence and remedies requested by the victim's lawyers in order to defend him adequately in the terms of Article 8 of the Convention, constitutes the second exception to the requirement of the exhaustion of domestic remedies before having recourse to the international protection of human rights (Art. 46(2)(b) [of the Convention]),," and (iii) "[t]he circumstance that the request for the annulment of all the proceedings, filed on November 8, 2005, has not been decided to date, constitutes the unwarranted delay and, thus, the third exception to the requirement of the exhaustion of domestic remedies before having recourse to the international protection of human rights (Art. 46(2)(c))."

21. Furthermore, the case file before the Venezuela courts in this case reveals that the defense filed two briefs in which they requested the annulment of the proceedings.[4] The first on October 4, 2005, on the grounds that: "the Prosecutor General had published a book entitled '*Abril comienza en octubre,'*" in which he referred to certain statements provided by

[4] In the Organic Code of Criminal Procedure nullities are established in Chapter II, articles 190 and 191 (file of annexes to the answering brief, folio 20631). Article 190. Principle: the proceedings conducted that contravene or disregard the forms and conditions established in this Code, the Constitution of the Bolivarian Republic of Venezuela, the law, and international treaties, conventions and agreement signed by the Republic may not be taken into consideration in order to provide grounds for a judicial decision, unless the defect has been rectified and authenticated.

Article 191. Absolute nullities: absolute nullities shall be considered those concerning the intervention, assistance and representation of the accused in the cases and forms that this Code establishes, or those that entail non-observance or violation of fundamental rights and guarantees established in this Code, the Constitution of the Bolivarian Republic of Venezuela, the law, and international treaties, conventions and agreement signed by the Republic.

an individual according to which Mr. Brewer was the author of the "Carmona Decree." Accordingly, in this brief, the representatives of Mr. Brewer Carías considered that "the investigation of this case has been conducted by an entity, headed by a person who is totally biased" and that, consequently, "the right of defense, to the presumption of innocence and […] to due process, all of a constitutional rank, [had been violated], which resulted in the nullity of all the actions taken by the Public Prosecution Service," and asked the judge "to exercise real control over the proceedings," because "the violations in which the Public Prosecution Service has incurred lead to the absolute nullity of all the proceedings because they entail violations of the constitutional rights and guarantees of the person we represent, as established in article 191 del OCCP."

1.3 Position of the Inter-American Commission on Human Rights

22. For its part, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") accorded "special relevance in its analysis to the problem of the provisional status of the judges and prosecutors, as well as to the risk that this problem signified to ensuring the guarantees of independence and impartiality to which the accused are entitled and which, evidently, constitute the institutional presumption ensuring that the individual has appropriate and effective remedies that they must exhaust." It added that the problem posed in this case is of a structural nature and responds to a *de facto* situation of the judiciary that goes far beyond the abstract regulation of the criminal proceedings.

23. In this regard, the Commission emphasized that "during the admissibility stage […] the State failed to provide a satisfactory explanation of the reasons under domestic law that prevented the judicial authorities from ruling on the arguments that supported the appeal for a declaration of nullity owing to the absence of Mr. Brewer Carías."

24. The Commission also indicated that the failure to decide the appeal for a declaration of nullity was evidence of a delay that can be attributed to the State as regards deciding the claims relating to the due process that were filed during the proceedings, and that the claims filed in the domestic jurisdiction with the request for annulment must be analyzed in the context of this and under Article 46(2)(c), because there had been a delay in the respective decision, and that the lapse of more than three years in deciding the remedy was a factor that met the requirements of the exception established owing to an unwarranted delay.[5] Thus, the Commission considered that, "pursuant to Venezuela's domestic law, it was not obligatory to await the preliminary hearing in order to decide the request for annulment."

1.4 Majority opinion with regard to the preliminary objection of exhaustion of domestic remedies

25. In view of the disagreement described above, in the Judgment it was considered that, in this case, in which the preliminary hearing and a decision, at least, of first instance are still pending, it was not possible to rule on the presumed violation of judicial guarantees, because there was no certainty yet about how the proceedings would proceed and whether many of the allegations presented could be resolved at the domestic level.[6]

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[5] Admissibility Report No. 97/09, Petition 84-07, Allan R. Brewer Carías, Venezuela, September 8, 2009, para. 89 (file of annexes to the report, appendix, tome IV, folio 3629).

[6] *Cf.* para. 89 of the Judgment.

26. Regarding the dispute as to whether the requests for annulment presented by the defense counsel of Mr. Brewer Carías were appropriate and effective remedies, the majority opinion considered that the proceedings against Mr. Brewer Carías were still at an intermediate stage, because the preliminary hearing had not been held and, consequently, the oral trial had not commenced, so that, in the Judgment, it was noted that the criminal proceedings were at an "early stage" (the first time in the Court's history that this concept has been used). Consequently, the majority opinion found that, in these circumstances, it was not possible to analyze the negative impact that a decision could have if taken in the early stages of the proceedings, because such decisions could be corrected by domestic actions or remedies.[7]

27. The majority opinion also considered that the direct application of the exception contained in Article 46(2)(a) of the American Convention cannot be derived from an alleged structural context of the provisional nature of the judiciary, because this would mean that, based on a general argument on the lack of independence and impartiality of the judiciary, it was not necessary to comply with the requirement of prior exhaustion of domestic remedies.[8]

28. Furthermore, the Judgment indicated that the actual procedural stage of this case does not allow a *prima facie* conclusion to be reached regarding the impact of the provisional status on the guarantee of judicial independence in order to establish that an exception to the exhaustion of domestic remedies is admissible based on Article 46(2)(b) of the American Convention and, consequently, that this exception was not applicable in the instant case.[9]

29. Bearing in mind the disagreement indicated above with regard to the moment at which requests for annulment should be decided, it was noted in the Judgment that there are two interpretations of the procedural stage at which requests for annulment should be decided. The representatives supported the assertion that nullity should be decided within three days by considering that article 177 of the Organic Code of Criminal Procedure was applicable; while the State's argument that it was necessary to wait until the preliminary hearing in order to decide on the said requests was based on article 330 of this Code. In defense and substantiation of their positions in this regard, the parties presented several witnesses and expert witnesses on this point, as well as case law that validated both positions.[10]

30. Nevertheless, the Court decided in favor of the State's thesis by considering that, based on the content, characteristics, complexity and length of the brief filed on November 8, 2005, the requests for annulment were not the type of request that should be decided within the three-day time frame indicated in article 177 of the said Organic Code of Criminal Procedure.[11]

31. In addition, the majority opinion concluded that the absence of the presumed victim has resulted in the preliminary hearing not being held; hence, it is possible to affirm that the delay in deciding the requests for annulment could be attributed to his decision not to

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7 *Cf.* para. 97 of the Judgment.

8 *Cf.* para. 105 of the Judgment.

9 *Cf.* paras. 111 and 112 of the Judgment.

10 *Cf.* paras. 118 to 127 of the Judgment.

11 *Cf.* paras. 130 to 133 of the Judgment.

submit to the proceedings and has an impact on the analysis of the unwarranted delay or reasonable time.

32. Thus, in the Judgment, the Court admitted the preliminary objection presented by the Venezuelan State, because it considered that, in this case, the appropriate and effective remedies were not exhausted and that the exceptions to the requirement of prior exhaustion of domestic remedies were not admissible. Consequently, it decided that it was not in order to proceed to analyze the merits.

2. Dissent

33. Our dissent stems specifically from the considerations made in the Judgment concerning: (1) the filing of the appropriate and effective remedies to exhaust the domestic jurisdiction (Art. 46(1)(a), of the ACHR), and (2) the exceptions to the rule of prior exhaustion of domestic remedies (Art. 46(2) of the ACHR). We will now set out our considerations in this regard.

2.1 Filing of the appropriate and effective remedies to exhaust the domestic jurisdiction

34. The majority opinion has considered that the two requests for a declaration of absolute nullity filed by the representatives of Mr. Brewer Carías in the criminal proceedings do not constitute an appropriate remedy to exhaust the domestic jurisdiction, because the representatives did not file the remedies that the State indicated were appropriate; namely, the remedy of appeal established in article 453 of the Organic Code of Criminal Procedure, the remedy of cassation indicated in article 459 of the Code, and the appeal for review indicated in article 470 of the said Code, among others.

35. In addition, in the Judgment, it was indicated that the criminal proceedings instituted against Mr. Brewer Carías were at an "early stage," because the preliminary hearing and a decision, at least, in first instance were pending. According to the majority opinion, this means that it is not possible to analyze the negative impact that a decision may have if it occurs during the early stages of the proceedings, when these decisions may be amended or rectified by remedies or actions stipulated in domestic law.

2.1.a The filing of the objection at the appropriate procedural stage

36. First, we should indicate that it should not be forgotten that at the admissibility stage, during the proceedings before the Inter-American Commission, the State did not in fact specify the effective and appropriate remedies, but merely indicated, in general, that no first instance judgment had been delivered that would make it possible to file the remedies of appeal of decisions, appeal of the final judgment, revocation, cassation, review of the facts in a criminal matter, *amparo* and constitutional review. All the State really did was to mention all the remedies available at the different stages of the proceedings, but it did not refer, specifically, to appeals for a declaration of nullity, and to whether these were appropriate and effective remedies.[12]

37. We should recall that the burden of proof lies with the defendant State. Indeed, it has been the Court's consistent case law that an objection to the exercise of its jurisdiction based on the supposed failure to exhaust domestic remedies must be presented at the

[12] Briefs of the State of August 25 and 31, 2009, before the Inter-American Commission.

opportune procedural stage;[13] namely, during the initial stages of the admissibility procedure before the Commission.[14] Consequently, it is understood that, following this opportune procedural stage, the principle of procedural preclusion comes into effect.[15] Furthermore, when arguing the failure to exhaust domestic remedies, the State must indicate on that occasion the remedies that must be exhausted and their effectiveness.[16] The Inter-American Court has found that the interpretation it has given to Article 46(1)(a) of the American Convention for more than two decades is in keeping with international law.[17]

38. As the Inter-American Court has stated consistently, "for a preliminary objection of the failure to exhaust domestic remedies to be admissible, the State that presents this objection must specify the domestic remedies that have not yet been exhausted, and prove that these remedies are available and were adequate, appropriate and effective"[18] *(underlining added).*

39. In this specific case, during the admissibility stage before the Inter-American Commission, the State did not make any observation on the requests for a declaration of the absolute nullity of the proceedings based on violations of fundamental rights – dated October 4 and November 8, 2005 – or, in particular, indicate why the said remedies are not adequate, appropriate and effective; merely indicating, in general, all the remedies that exist in criminal proceedings under Venezuelan law. Consequently, we consider that it is evident that the Court's consistent case on this matter should have been followed, because "when arguing the failure to exhaust domestic remedies, the State must indicate at the proper opportunity, the remedies that must be exhausted and their effectiveness.[19] Thus, it is not the task of the Court, or of the Commission, to identify, *ex officio,* the domestic remedies that remain to be exhausted. The Court emphasizes that it is not incumbent on the international organs to rectify the lack of precision of the State's arguments."[20]

2.1.b The appropriateness of the remedies in this case

40. Second, regarding the majority opinion that appeals for a declaration of nullity are not appropriate remedies, we observe, first, that the representatives of Allan Brewer Carías

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[13] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, para. 88, and *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 22, 2013. Series C No. 265, para. 47.

[14] *Cf. Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of July 2, 2004. Series C No. 107, para. 81, and *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 22, 2013. Series C No. 265, para. 47.

[15] *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 22, 2013. Series C No. 265, para. 47.

[16] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, paras. 88 and 91, and *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 22, 2013. Series C No. 265, paras.46 and 47.

[17] *Case of the Santo Domingo Massacre v. Colombia. Preliminary objections, merits and reparations.* Judgment of November 30, 2012. Series C No. 259, para. 34.

[18] *Cf. Case of Velásquez Rodríguez. v. Honduras. Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, paras. 88 and 91, and *Case of Mémoli, Preliminary objections, merits, reparations and costs.* Judgment of August 22, 2013. Series C No. 265, paras. 46 and 47.

[19] *Cf. Case of Velásquez Rodríguez. Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, para. 88, and *Case of Mémoli v. Argentina, Preliminary objections, merits, reparations and costs.* Judgment of August 22, 2013. Series C No. 1, para. 47.

[20] *Cf. Case of Reverón Trujillo v. Venezuela*. *Preliminary objection, merits, reparations and costs*. Judgment of June 30, 2009. Series C No. 197, para. 23, and *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2012 Series C No. 257, para. 23.

filed two requests for the absolute nullity of the proceedings. The first, on October 4, 2005[21] — at the "preparatory stage" — was not even processed and, even less, decided. The second request for annulment, dated November 8, 2005,[22] filed in response to the prosecutor's indictment (the moment at which the "intermediate stage" commences) contested, among other matters, the fact that the first request for annulment had not been processed and decided. This second request for annulment was not processed or decided either, as can be seen from the case file.[23]

41. Thus it is evident that these requests for annulment, which, at that procedural stage, represented the appropriate and effective remedy in light of the Inter-American Court's consistent case law, were neither processed nor decided. All things considered, suggesting that it was necessary to wait until the preliminary hearing and the whole of the proceedings had been held before contesting the first instance judgment constitutes an unwarranted delay from the point of view of international law, if it is taken into account that more than seven years have passed.

42. As the representatives indicated — an opinion that we share — the request for annulment represents, by its nature, "the remedy of *amparo* in criminal procedural matters"; therefore "if a decision on the remedy of *amparo* has to await the preliminary hearing, which can be delayed indefinitely, […] the remedy could not be considered simple and prompt." In this regard, as can be seen in the case file, a judgment of the Venezuelan Constitutional Chamber of February 6, 2003, indicates that:[24]

> […] T]he plaintiff had a pre-existing procedural measures, which was just as, or more, appropriate, expedite, brief and simple as the application for *amparo*, which was the request for a declaration of nullity of the decision against which he has exercised the present protective action pursuant to article 212 of the said Code; a claim that must be decided, even as a mere matter of law, by a ruling that must be issued within the three-day period established in article 194 (now 177) of the procedural code. It is worth noting that, in temporal terms, this request for a declaration of absolute nullity should have been substantiated and decided within a time frame that is ostensibly less than the one established by law in relation to the *amparo* procedure *(underlining added).*

43. In other words, the application for a declaration of the absolute nullity of all the proceedings in cases of violation of due process that involve fundamental rights, as in the case of *amparo* in criminal matters, must, in accordance with Article 25 of the American Convention, be an effective, simple and prompt remedy before the competent judges or courts, that provides protection against acts that violate the fundamental rights recognized by the Constitution, the law or the Convention.

44. Based on the foregoing considerations, it is clear, in our opinion, that the requests for annulment filed by Mr. Brewer's representatives in the domestic criminal proceedings

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[21] The appeal for a declaration of nullity of all the investigation proceedings was signed on October 4, 2005, and, according to the information in the case file, "filed yesterday, October 6, before the 25th Supervisory Judge"; it is stamped "received" on October 7 that year. *Cf.* File of annexes to the answering brief of the State, folio 1407.

[22] According to the case file, the second appeal for annulment was signed on November 8, 2005, and it was decided "to open a new exhibit to be entitled Thirtieth (30th) EXHIBIT" of "Two hundred and seventy-two (272) folios, including this decision," by a ruling of the Twenty-fifth First Instance Supervisory Court of the Criminal Judicial Circuit of the Metropolitan Area of Caracas. *Cf.* file of annexes to the State's answering brief, folio 14675.

[23] The State provided the Inter-American Court with a copy of the entire case file of the domestic criminal proceedings. It can be seen that there is no judicial decision or order that even admits for processing the briefs on the absolute nullity of the proceedings filed by the representatives of the presumed victims.

[24] Transcript of the relevant part in para. 125 of the Judgment.

represented appropriate and effective remedies, even more effective than a remedy of *amparo* in the specific case – according to the case law of the Constitutional Chamber cited above.[25] And this is, regardless of the fact that, in the specific case, when analyzing the merits, it was possible to observe that these requests for annulment were not even processed by the State. In addition, the arguments and consideration on this aspect should have been interpreted by the Court pursuant to Article 29 of the American Convention, which establishes an interpretation that is preferentially *pro homine*. Indeed, as Inter-American Court has established:[26]

> "It must be stressed that the international protection system should be understood as a whole, a principle established in Article 29 of the American Convention, which imposes a framework of protection that always give preference to the interpretation or the norm that is more favorable to the rights of the individual, the keystone for protection of the whole inter-American system. In this regard, the adoption of a restrictive interpretation of the scope of this Court's competence would not only run counter to the object and purpose of the Convention, but would also impair the practical effects of the treaty itself and the guarantee of protection that it establishes, with negative consequences for the presumed victim in the exercise of his right of access to justice" *(underlining added).*

45. Hence, by failing to show which specific remedy was the appropriate one, or to verify fully the State's argument that the remedy filed was inappropriate, the preliminary objection of failure to exhaust domestic remedies should not even have been examined.

2.1.c Regarding the so-called "early stage" as an alleged new element in the rule of exhaustion of domestic remedies

46. Third, we do not consider admissible the majority opinion that the criminal proceedings are still at an "early stage" (a new concept created in the Judgment and in case law), and that this means that it is not possible to analyze the negative impact that a decision may have, because decisions can be amended or rectified by means of the remedies or actions established in domestic law at later stages.

47. This consideration runs counter to the case law of the Inter-American Court over the more than 26 years of its contentious jurisdiction since its first decision on the issue of exhaustion of domestic remedies in the case of *Velásquez Rodríguez v. Honduras,*[27] thus creating a disturbing precedent contrary to its own case law and the right of access to justice in the inter-American system.

48. Indeed, in its first contentious case, the 1987 case of *Velásquez Rodríguez*, the Court found as follows:

> 91. The rule of prior exhaustion of domestic remedies under international human rights law has certain implications that are present in the Convention. Under the Convention, States Parties have the obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1)), all in keeping with the general obligation of such States to ensure the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1). Thus, when certain exceptions to the

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[25] See *supra*, para. 42 of this joint dissenting opinion.

[26] *Cf. Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2009. Series C No. 209, para. 24.

[27] *Case of Velásquez Rodríguez v. Honduras*. Preliminary objections. Judgment of June 26, 1987. Series C No. 1.

> rule of non-exhaustion of domestic remedies are invoked, such as the ineffectiveness of such remedies or the lack of due process of law, not only is it contended that the victim is under no obligation to pursue such remedies, but, indirectly, the State in question is also charged with a new violation of the obligations assumed under the Convention. **Thus, the question of domestic remedies is closely tied to the merits of the case** (underlining and bold added).

49. The Judgment refers to the *case of Velázquez Rodríguez* where it is worth underscoring that, although the Court recognized that "the mere fact that a domestic remedy does not produce a favorable result for the petitioner does not, in itself, demonstrate the inexistence or exhaustion of all effective domestic remedies; because, for example, the petitioner may not have invoked the appropriate remedy in a timely fashion."[28] This precedent also adds that:

> "68. It is a different matter […] when it is shown that remedies are denied for trivial reasons or without an examination of the merits, of if there is proof of the existence of a practice or policy ordered or tolerated by the Government, the effect of which is to impede certain persons from invoking domestic remedies that would normally be available to others. In such cases, resort to those remedies becomes a senseless formality. The exceptions of Article 46(2) would be fully applicable in those situations and would waive the obligation to exhaust domestic remedies that, I practice, cannot accomplish their objective"[29] (underlining added).

50. In this case, the representatives of Mr. Brewer used the means of contestation established in Venezuelan law – application for a declaration of absolute nullity – in order to guarantee his fundamental rights in the criminal proceedings. In the Judgment, it is affirmed that the Venezuelan criminal proceedings instituted against Mr. Brewer Carías are at an "early stage," so that other domestic remedies remained pending at later stages that could have ensured his rights. In the words of the majority opinion:

> "[I]n this case, in which the preliminary hearing and, at least, a first instance decision are still pending, it is not possible to rule on the presumed violation of judicial guarantees, because there is still no certainty about how the proceedings will go forward and whether many of the allegations made may be rectified at the domestic level. And this is without prejudice to the possible analysis of the alleged unwarranted delay or the reasonable time," taking into consideration that "the proceedings against Mr. Brewer Carías are still at the intermediate stage, because the preliminary hearing has not been held yet and, consequently, the oral trial has not taken place; hence, the Court notes that the criminal proceedings are at an early stage. This means that it is not possible to analyze the negative impact that a decision could have if taken at in the early stages when such decisions may be amended or rectified by means of the remedies or actions established in domestic law"[30] *(underlining added).*

51. In addition, regarding the remedies during the intermediate stage and the oral trial, the majority opinion stated that:

> "Owing to the early stage that the proceedings were at, the defense counsel of Mr. Brewer Carías filed the different requests for a declaration of nullity […]. However, they did not file the remedies that the State indicated were appropriate; namely, the remedy of appeal established in articles 451 to 458 of the OCCP, the remedy of cassation indicated in articles 459 to 469 of the OCCP, and the appeal for review indicated in articles 470 to 477 of the OCCP. In this regard, the State alleged the existence of "[t]he remedies

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[28] *Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 1, para. 67.

[29] *Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 1, para. 68.

[30] Paras. 88 and 96 of the Judgment.

> corresponding to the intermediate stage established in the Organic Code of Criminal Procedure; also, the completion of the trial stage, if applicable, as well as [the existence of] effective remedies, [such as] the appeal against decisions, against final judgments, for reconsideration, of cassation, [and] for review"[31] *(underlining added).*

52. In the *Case of Díaz Peña v. Venezuela* — which is cited in the Judgment[32] — the Court indicated that "requests filed by the defense, such as applications for a declaration of nullity based on failure to comply with legal forms and conditions, or the annulment of an expertise offered by the Public Prosecution Service, cannot signify that domestic remedies have been exhausted"[33] and "the appropriate remedy in this regard was the appeal against the judgment delivered at the conclusion of the trial, without prejudice to the possibility of filing an objection owing to the excessive duration of the proceedings." First, the precedent created in the *Case of Díaz Peña* represented an isolated precedent that has not been used subsequently; second, contrary to the said precedent where an application for *amparo* had been filed and, therefore, it was found that the appeal had exhausted the domestic remedies, in the case *sub judice,* owing to the procedural stage of the criminal proceedings against Allan Brewer Carías, the requests for annulment that were filed were those that had to be exhausted in order to rectify the violations that had occurred during the preliminary investigation stage. Evidently, since the requests for annulment were not processed and, especially as no decision was taken on them, it was not possible to accede to the remedies established by Venezuelan law for the intermediate stage and during the oral trial.

53. Furthermore, it should not be ignored that the State did not, in fact, contest the effectiveness of the applications for a declaration of nullity, since it merely indicated that "[t]he remedies corresponding to the intermediate stage established in the Organic Code of Criminal Procedure; also, the exhaustion of the trial stage, if applicable, as well as [the existence of] effective remedies, [such as] the appeals against decisions, against final judgments, for reconsideration, for cassation, [and] for review."[34] In other words, regarding the requests for annulment that were filed, the State did not indicate that they were not appropriate and effective remedies that should be exhausted, but rather, to the contrary, merely indicated the pending remedies that should be exhausted at later stages.

54. As we have mentioned – see *supra* paras. 40 to 44 of this opinion – we consider that the two requests for annulment filed by the defense counsel of Mr. Brewer Carías were clearly the appropriate, adequate and effective remedies that had to be exhausted at the procedural stage that the criminal proceedings had reached at that time, because their purpose was to remedy the fundamental rights that had been violated during the investigation stage. Therefore, as neither of the two requests for annulment filed in 2005 have even been processed, it is evident, in our opinion, that from the perspective of international law the applicable exception in Article 46(2)(c) of the American Convention has been constituted.

55. In this regard, the case law of the Inter-American Court has been consistent when analyzing the application of the exceptions established in Article 42(6) of the Convention. In some cases, it has rejected the preliminary objection or has determined that questions relating to the exhaustion and effectiveness of the applicable domestic remedies must be

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[31] Para. 97 of the Judgment.

[32] Para. 89 of the Judgment.

[33] *Cf. Case of Díaz Peña v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of June 26, 2012, Series C No. 244, para. 90 and 124.

[34] Para. 17 of the Judgment.

decided together with the substantive matters. Thus, the application of the exception to the exhaustion of domestic remedies has been considered *as a whole,*[35] owing to an unwarranted delay during the investigations or proceedings,[36] and the absence of adequate and effective remedies.[37] The Court even indicated in the *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil* that "[a]t the time the Commission issued its Report [on Admissibility], more than 19 years ha[d] passed since the filing of [the ordinary action and] there had been no final decision on the merits in the domestic sphere. Therefore, the Commission concluded that the delay in the proceedings could not be considered reasonable"; hence, "the Court [did] not find evidence to change […] the decision taken by the Inter-American Commission. Added to this, […] the Court observe[d] that the State's arguments concerning the effectiveness of the remedy and the inexistence of an unwarranted delay in the ordinary action relate[d] to matters with regard to the merits of the case, because they contested the arguments concerning the presumed violation of Articles 8, 13 and 25 of the American Convention" (underlining added). Consequently [both the Commission and the Court] considered that it was not possible to require the exhaustion of domestic remedies and applied Article 46(2)(c) of the Convention to the case.[38]

56. The new theory of the "early stage" used in this Judgment represents a step backwards that affects the whole of the inter-American system as regards the matters before the Inter-American Commission and the cases pending the decision of the Court, because it has negative consequences for the presumed victims in the exercise of the right of access to justice. Accepting that, at the "early stages" of the proceedings, no violations can be determined (because they could eventually be remedied at subsequent stages), creates a precedent that would entail ranking the severity of the violations based on the stage of the proceedings. Moreover, since it is due to the State itself that the domestic remedies have not been exhausted in this case, because it did not even process the requests – of October 4 and November 8, 2005 – for the annulment of the proceedings due to the violation of fundamental rights. Consequently, admitting the preliminary objection is contrary to the Inter-American Court's criteria since the *Case of Velásquez Rodríguez* in which it considered that:

> "If the Court, then, were to sustain the Government's objection and declare that effective judicial remedies are available, it would be prejudging the merits without having heard the evidence and arguments of the Commission or those of the Government. If, on the

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[35] *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 95; *Case of Fairén Garbi and Solís Corrales v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 2, para. 94, and *Case of Godínez Cruz v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 3, para. 97.

[36] *Case of Genie Lacayo v. Nicaragua. Preliminary objections*. Judgment of January 27, 1995. Series C No. 21, paras. 29, 30 and 31; *Case of Las Palmeras v. Colombia. Preliminary objections.* Judgment of February 4, 2000. Series C No. 67, paras. 38 and 39; *Case of Juan Humberto Sánchez v. Honduras.* Judgment of June 7, 2003. Series C No. 99, para. 68 and 69; *Case of Heliodoro Portugal v. Panama*. Preliminary objections, merits, reparations and costs. Judgment of August 12, 2008. Series C No. 186, para. 19 and 20; *Case of Ríos et al. v. Venezuela*. *Preliminary objections, merits, reparations and costs*. Judgment of January 28, 2009. Series C No. 194, para. 39; *Case of Anzualdo Castro v. Peru.* Preliminary objection, merits, reparations and costs. Judgment of September 22, 2009. Series C No. 202, para. 19; *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of November 24, 2010. Series C No. 219, para. 42, and *Case of Osorio Rivera v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 26, 2013, Series C No. 275, para. 23.

[37] *Case of Díaz Peña v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of June 26, 2012, Series C No. 244, para. 126.

[38] *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2010. Series C No. 219, para. 42.

> other hand, the Court were to declare that all effective domestic remedies had been exhausted or did not exist, it would be prejudging the merits in a manner detrimental to the State."[39]

57. In addition, regarding the expression used in this Judgment concerning the analysis of "merely a matter of admissibility,"[40] the Court, in its consistent case law, has understood that:

> First, the Court has indicated that the failure to exhaust remedies is merely a matter of admissibility and that the State that alleges this must indicate the domestic remedies that must be exhausted, and also prove that these remedies are effective.[41] Second, to be timely, the objection asserting the non-exhaustion of domestic remedies must be made in the first measure taken by the State during the proceedings before the Commission; to the contrary, it is presumed that the State has tacitly waived presenting this argument. Third, the defendant State may expressly or tacitly waive citing the failure to exhaust domestic remedies[42] *(underlining added).*

58. In this case, the matters of "mere admissibility," as has been understood by this Court's case law, refer to the presentation and indication at the appropriate procedural stage of the proceedings before the Inter-American Commission. However, such matters cannot be analyzed independently of the substantive matters, especially when allegations of presumed violations of due process and judicial guarantees are involved because, as the Commission indicated, "the exceptions to the rule of exhaustion of domestic remedies established in Article 46(2) of the Convention are closely related to the determination of possible violations of certain rights recognized therein, such as the guarantees of access to justice."[43]

59. Separating the aspects that relate strictly to admissibility from those on merits, as the Judgment seeks to do, is a contrived issue in this case because, in order to decide whether the exceptions to the rule of the exhaustion of domestic remedies apply, it is unavoidable to analyze substantive aspects related to "due process of law," "access to remedies under domestic law" or to the "unwarranted delay" in such remedies, exceptions established in paragraphs (a), (b) and (c) of Article 46(2), closely related to the rights established in Articles 8 and 25 of the Pact of San José, which motivated specific arguments by the parties, and their dispute.

60. In this regard, in the *Case of Salvador Chiriboga v. Ecuador,* owing to the fact that the Commission's filing of remedies in the proceedings before the inter-American system was directly related to the merits, the Inter-American Court decided, as it has in many cases, that "[t]he argument related to the unwarranted delay in some of the judicial proceedings instituted by the Salvador Chiriboga brothers and the State, […] would be

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[39] *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 95.

[40] *Cf.* para. 101 of the Judgment.

[41] *Case of Velásquez Rodríguez v. Honduras. Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, para. 88; *Case of Nogueira Carvalho et al. v. Brazil. Preliminary objections and merits.* Judgment of November 28, 2006. Series C No. 161, para. 51, and *Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs.* Judgment of September 26, 2006. Series C No. 154, para. 64.

[42] *Case of Velásquez Rodríguez v. Honduras. Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, para. 88; *Case of Nogueira Carvalho et al. v. Brazil. Preliminary objections and merits.* Judgment of November 28, 2006. Series C No. 161, para. 51, and *Case of Almonacid Arellano et al. v. Chile.* Judgment of September 26, 2006. Series C No. 154, para. 64.

[43] Para. 101 of the Judgment.

analyzed by the Court when examining the presumed violation of Articles 8 and 25 of the Convention."[44]

61. Similarly, in the case of *Heliodoro Portugal v. Panama*[45] for example, the Court considered that:

> "19. Based on the above, the arguments of the parties and the evidence provided in these proceedings, the Court observes that the State's arguments on the alleged inexistence of an unwarranted delay in the investigations and proceedings opened in the domestic jurisdiction relate to issues concerning the merits of the case, because they contest the arguments regarding the presumed violation of Articles 8 and 25 of the American Convention. Moreover, the Court finds that it has no cause to re-examine the Inter-American Commission's reasoning when it decided on the admissibility of this case"[46] *(underlining added).*

62. Although the rule of the failure to exhaust domestic remedies is in the interests of the State, it also represents a right of the individuals that simple and prompt remedies exist that *protect their fundamental rights*, as established in Article 25 of the American Convention, to ensure that these remedies are truly effective to remedy violations in the domestic sphere and to avoid the involvement of the organs of the inter-American system.[47]

63. In this regard, it should be recalled, as established by the Inter-American Court, that the State "is the main guarantor of the human rights of the individual, so that if an act occurs that violates these rights, it is the State itself that has the duty to resolve the matter at the domestic level […], before having to respond before international organs, such as the inter-American system, and this stems from the subsidiary nature of the international proceedings in relation to the national systems of human rights guarantees."[48] These ideas have also recently become case law under the concept that all the authorities and organs of a State Party to the Convention have the obligation to exercise "control of conformity with the Convention."[49]

64. In sum, if the precedent that is being created by what in the Judgment is called the "early stage" of the proceedings is taken literally, it could have a negative effect on the inter-American system for the protection of human rights, because, in many matters being processed before the Commission, or even in cases before the Court, this would mean admitting the preliminary objection of failure to exhaust domestic remedies, without examining the merits of the case; and this is contrary to the direction in which the Inter-American Court's case law has been evolving since its first cases, to the detriment of the right of access to justice.

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[44] *Case of Salvador Chiriboga v. Ecuador. Preliminary objection and merits*. Judgment of May 6, 2008. Series C No. 179, Para. 45.

[45] *Case of Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of August 12, 2008. Series C No. 186

[46] *Cf. Case of the Serrano Cruz Sisters v. El Salvador. Preliminary objections.* Judgment of November 23, 2004. Series C No. 118, para. 141, and *Case of Salvador Chiriboga v. Ecuador. Preliminary objection and merits.* Judgment of 6 May 6, 2008. Series C No. 179, para. 44.

[47] Similarly, see the concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot to the judgment of the Inter-American Court in the *Case of Liakat Ali Alibux v. Suriname*, of January 14, 2014, especially paras. 24 to 26, and with regard to the dimensions of Article 25 of the Pact of San José, paras. 30 to 125 of that opinion.

[48] *Case of Acevedo Jaramillo et al. v. Peru. Interpretation of the judgment on preliminary objections, merits, reparations and costs.* Judgment of November 24, 2006. Series C No. 157, para. 66.

[49] *Case of the Santo Domingo Massacre v. Colombia***.** *Preliminary objections, merits and reparations*. Judgment of November 30, 2012. Series C No. 259, para. 142.

2.2 Exceptions to the rule of prior exhaustion of domestic remedies

65. We will now analyze each of the exceptions established in the rule of prior exhaustion of domestic remedies established in Article 46(2) of the American Convention on Human Rights.

2.2.a The domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated (Art. 46(2)(a) of the American Convention)

66. As previously indicated, the representatives argued that a structural problem exists which affects the independence and impartiality of the judiciary and is summarized by the subjection of the Judicial Branch to the interests of the Executive Branch.

67. Meanwhile, the Inter-American Commission has insisted that "the problem described in this case is structural in nature and responds to a *de facto* situation of the judiciary that goes far beyond the abstract regulation of criminal proceedings."

68. However, in the Judgment, it has been considered that the direct application of the exception contained in Article 46(2)(a) of the American Convention cannot be derived from an alleged structural context of the provisional nature of the judiciary, because this would mean that, based on an argument of a general nature regarding the lack of independence or impartiality of the judiciary, it would not be necessary to comply with the requirement of prior exhaustion of domestic remedies.

69. First, it is important to indicate that, in the chapter on the "Determination of pertinent facts," the Judgment totally omits the issue of the provisional status of prosecutors and judges in Venezuela, even though this is a key element and one that has been especially debated by the parties; moreover, there is abundant material in the case file on specific facts relating to this issue.[50] Second, there can be no doubt that this problem of the provisional status of judges and prosecutors in that country – which the Court has already examined in the cases of *Apitz Barbera et al.*,[51] *Reverón Trujillo*[52] and *Chocrón Chocrón*[53] against Venezuela – is closely related to the issue of the judicial remedies in the domestic jurisdiction. The Court has even determined a series of proven facts in these cases in relation to the main aspects of the judicial restructuring process in Venezuela. Thus, it would have been appropriate for the Court to combine the examination of the preliminary objection of failure to exhaust domestic remedies with an analysis of the arguments on merits in this case, as it has on other occasions.

70. Regarding this situation, and specifically in relation to Venezuela, the Inter-American

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[50] In the three previous cases in the Court's history where it did not examine the merits of the case (see *supra* footnote 1 of this opinion), there is no description or specific determination of the facts. Curiously, this is the first case in which, admitting the preliminary objection, a heading is included in the Judgment entitled "Determination of the pertinent facts to decide the preliminary objection on the failure to exhaust domestic remedies," entirely omitting the facts relating to the situation of the provisional status of prosecutors and judges.

[51] *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*. *Preliminary objection, merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182.

[52] *Case of Reverón Trujillo v. Venezuela*. *Preliminary objection, merits, reparations and costs*. Judgment of June 30, 2009. Series C No. 197.

[53] *Case of Chocrón Chocrón v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2011. Series C No. 227.

Commission has already ruled noting that, in "the lists of appointments and transfers made by the Judicial Commission of the Supreme Court of Justice during 2012, all the judges correspond to temporary (most of them), interim and provisional postings." In addition, with regard to the provisional nature of prosecutors in Venezuela, the Commission observed that, in October 2008, the Prosecutor General acknowledged that:

> Prosecutors whose appointments are provisional are at a disadvantage; their provisional status exposes them to the influence of pressure groups, which could undermine the constitutionality and legality of the justice system. Provisional status in the exercise of public office is contrary to Article 146 of the Constitution of the Bolivarian Republic of Venezuela, which provides that positions in government are career service posts and are won by public competition."[54]

71. In its report on the case of *Allan R. Brewer Carías (Venezuela)*[55] in the context of its system of petitions and cases, the Commission ruled on the impact that changes in agents of justice may have on a criminal investigation, owing to their provisional status. Thus, the Inter-American Commission has indicated that numerous assignments of different provisional prosecutors to the same case have negative effects on the advance of the investigations, if the importance, for example, of the ongoing gathering and evaluation of the body of evidence is taken into account. The Commission has considered that a situation such as the one indicated may have negative consequences on the rights of the victims in the context of criminal proceedings related to human rights violations.

72. When assessing the situation of the provisional nature of judges in Venezuela, in the case of *Reverón Trujillo,*[56] the Court indicated that, at the time of the events of that case (from 2002 to 2004), "approximately 80% of the country's judges were provisional." In addition, "[i]n 2005 and 2006, a program was implemented under which those provisional judges appointed on a discretionary basis were able to achieve tenure. The number of provisional judges had been reduced to approximately 44% by the end of 2008."[57] In August 2013, according to a witness presented by the State, the situation of the Judiciary was as follows: 1095 provisional judges, 50 special substitute judges, 183 temporary judges, 657 tenured judges, and 12 vacant posts for judge."[58] In 2013, only 33% of judges were permanent and 67% were appointed or removed by the Judicial Commission, because they did not enjoy tenure.[59]

73. Furthermore, in relation to the provisional nature of the prosecutors attached to the Public Prosecution Service, up until 2005, 307 provisional, interim and substitute

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[54] IACHR. *Guarantees for the Independence of justice operators. Towards strengthening access to justice and the rule of law in the Americas.* OEA/Ser.L/5/II. Doc. 44. December 5, 2013.

[55] IACHR. *Merits Report No. 171/11 Case 12,724 Allan R. Brewer Carías (Venezuela),* November 3, 2011, para. 130. See also, IACHR. Report *Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. Doc. 54, December 30, 2009, para. 229.

[56] *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197.

[57] *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197, Para. 106.

[58] Testimonial statement of Luis Fernando Damiani Bustillos, witness for the State. In 2013, according to a publication on the TSJ website, more than 71 provisional judges, 408 temporary judges and 356 interim judges were appointed in the country's different judicial circumscriptions. See also the expert opinion of Antonio Canova González of August 29, 2013.

[59] Testimony of Octavio José Sisco Ricciardi during the public hearing held in this case. See also, annexes 24 and 25 to the State's answering brief which refer to a total of 1,949 judges, 34% of whom have tenure, and 65% do not.

prosecutors had been appointed; hence approximately 90% of the prosecutors did not have tenure, had no stability in their post, and could be freely appointed and removed by the Prosecutor General.[60] In 2008, "638 prosecutors were appointed without a public competition being held and without being given regular status, consequently making them freely appointed and removable."[61] In 2011, 230 prosecutors were freely selected and appointed in decisions that "were not reasoned."[62] In 2011 and 2013, actions were taken as regards public competitions based on merits and qualifications to become a career prosecutor, which included the appointment *of the first four non-provisional prosecutors.*[63] One of the State's witnesses indicated that, during 2011-2012, 88 students had graduated from the training program for career prosecutors, and it was expected that 102 more would graduate in 2012-2013.[64]

74. For its part, the Commission observed that the authorities who have adopted decisions that could be interpreted as favorable to the accused have been removed from the Judicial Commission. In addition, this lack of stability has had a significant impact on both the judges and the prosecutors who have been associated with this case, because all the Public Prosecution Service officials and judicial authorities who have been involved in its have been provisional appointees. The Commission emphasized that the risks associated with the provisional nature of appointments have been revealed in at least two situations, namely: (i) "after a Chamber declared the nullity of the prohibition to leave the country, considering that it had not been justified, two of its members were removed from their posts," and "(ii) the supervisory judge who had asked the prosecutor for the case file and who, in view of the prosecutor's refusal, had formally notified his superior, was removed from his position by the Judicial Commission without any disciplinary proceedings or reason of any kind." According to the Commission, this had sent a message that "had effectively dissuaded any objective and independent action on the part of the judicial authorities without tenure who would continue to hear the proceedings."

75. The above considerations show clearly that the examination of the dispute presented in relation to the exhaustion of domestic remedies, specifically with regard to the exception contained in Article 46(2)(a), is closely connected to the problem of the provisional nature of judges and prosecutors in Venezuela, and this is undoubtedly related to Article 8(1) of the American Convention — the right to a competent, independent and impartial judge or court – taking into account that the arguments are credible and, if proved, could constitute violations of the Pact of San José. Hence, we consider that the examination of this issue cannot be separated from the analysis of the merits of the case and, therefore, the Inter-American Court should have analyzed the preliminary objection presented by the State together with the arguments on merits submitted by the parties to the case, as it has in the past, in keeping with its consistent case law on this matter.

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60 IACHR, Annual Report 2005, OEA/Ser.L/V/II.124 Doc. 7, February 27, 2006, para. 294.

61 IACHR. Report. Democracy and Human Rights in Venezuela, OEA/Ser.L/V/II. Doc. 54, December 30, 2009, para. 264.

62 *Cf.* IACHR, Annual Report 2011, OEA/Ser.L/V/II, Doc. 5 corr. 1, March 7, 2011, para. 459.

63 Newsletter of the National School for Prosecutors of the Public Prosecution Service, "*Desde la Escuela Nacional de Fiscales*", Year 1, Number 2, January – April 15, 2012; Newsletter of the National School for Prosecutors of the Public Prosecution Service, "*Desde la Escuela Nacional de Fiscales*", Year 2, Number 5, January – April 15, 2013; Newsletter of the National School for Prosecutors of the Public Prosecution Service, "*Desde la Escuela Nacional de Fiscales*", Year 2, Number 6, April 15 – June 2013. See also, testimony of the State's witness Santa Palella Stracuzzi.

64 Testimony of the State's witness Santa Palella Stracuzzi.

2.2.b The party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them (Art. 46(2)(b) of the American Convention)

76. In this regard, in the Judgment it has been considered that the procedural stage – namely, "the early stage" – at which this case is currently prevents reaching a *prima facie* conclusion with regard to the impact of the provisional status of the judiciary on the guarantee of judicial independence in order to establish the admissibility of an exception to the exhaustion of domestic remedies based on Article 46(2)(b) of the Convention. The majority opinion supports this consideration by the fact that not even a first instance decision exists based on which it would be possible to assess the real impact that the provisional status of the judges has had on the proceedings.

77. Meanwhile, the representatives have argued that, "by arbitrarily and illegally conditioning the processing of the request for annulment to the appearance of the presumed victim, based on a court order contrary to the Convention, Mr. Brewer Carías was prevented from having access to the domestic remedies, to which was added "a well-founded fear" that the exercise of the remedies would subject him to an increase in the persecution against him. In addition, they have indicated "that the supervisory judges who ruled in favor of the defense, or who sought to rectify violations of due process allegedly committed during the investigative stage were replaced."

78. The Commission also observed, in response to the allegations of the petitioners, that the State had not indicated the appropriate remedies to question the appointment or removal of judges. It indicated that the remedies usually available to the defense, such as recusal, are not appropriate to challenge the provisional status of judges assigned to the proceedings or their removal owing to their actions. The Commission found that the removal of several provisional judges in this case, following the adoption of decisions regarding the presumed victim's situation, may have affected his access to domestic remedies and, therefore, this aspect of the claim should be exempt from the requirement being analyzed.

79. We have already referred to the contextual issue of the provisional status of judges in Venezuela (see *supra* paras. 66 to 74 of this opinion); however, it should be pointed out that although the majority opinion considers that, based on the procedural stage that the domestic proceedings are at, it is not possible to measure the impact that this has had on the proceedings, the case file contains elements that could, if they were evaluated when examining the merits, lead us to a different conclusion.

80. First, the Inter-American Court could have examined whether the impact of the provisional status of prosecutors and judges in a specific case represents, in itself, a violation of the right to an independent and impartial judge or court, established in Article 8(1) of the American Convention, from the perspective of the accused. In this specific case, it is noted that the provisional status of the judges and prosecutors who have been involved in the criminal proceedings against Mr. Brewer Carías has, indeed, had an impact. As the Judgment itself mentions, "at least four provisional prosecutors investigated the facts related to the events of April 11, 12 and 13, 2002, including those concerning the drafting of the "Carmona Decree." Initially, provisional prosecutor José Benigno Rojas was in charge of the investigation; he was then substituted by provisional prosecutor Danilo Anderson and, on August 28, 2002, the investigation was taken over by Luisa Ortega Díaz as substitute for the Sixth Prosecutor of the Public Prosecution Service at the National Level."[65] In 2007, Ms. Ortega Díaz became Prosecutor General, but, since the previous year (2006)

[65] Para. 46 of the Judgment.

Prosecutor 122 of the Public Prosecution Service of the Metropolitan Area of Caracas, María Alejandra Pérez, had been mandated "to act together with or separately from the Sixth Prosecutor."[66]

81. It should also be noted that the supervisory judges were either provisional or temporary. In fact, initially Twenty-fifth Temporary Judge Josefina Gómez Sosa had intervened in relation to the events of April 11, 12 and 13, 2002. On February 3, 2005, this judge was replaced by Judge Manuel Bognanno.[67] On June 29, 2005, the appointment of Twenty-fifth Judge Manuel Bognanno was annulled,[68] and he was replaced by Judge José Alonso Dugarte Ramos in the First Instance Court of the Criminal Judicial Circuit of the Metropolitan Area of Caracas.[69] In 2006, María Lourdes Fragachan took over as supervisory judge[70] and, subsequently, Judges José Alonso Dugarte Ramos[71] and Máximo Guevara Rizquez intervened.[72]

82. Several of the judges have been removed from their functions owing to decisions they issued during the criminal proceedings in this case. For example, two appeals judges were suspended from their posts without pay by decision No 2005-0015, of February 3, 2005.[73] This decision states the following:

> "Having seen the public uproar resulting from the non-unanimous decision of the 10th Chamber of the Court of Appeal of the Criminal Judicial Circuit of the Metropolitan Area of Caracas revoking the preventive measure of prohibition to leave the country, which the Twenty-fifth Supervisory Court of the same Criminal Judicial Circuit had issued against the persons accused by the Public Prosecution Service of the offense of civil rebellion, this Judicial Commission observes that the said Chamber founded its decision on the failure to motivate the decision appealed, and instead of returning the case file to the original court for the error to be corrected, which was inexcusable, it admitted it as a reason to annul the said preventive measure."

83. In the said decision No 2005-0015, the Judicial Commission decided to suspend Judge Josefina Gómez Sosa from her functions without pay and to appoint the lawyer Manuel Bognanno to replace her.[74] Subsequently, temporary judge Manuel Bognanno was removed from his post[75] after denouncing to the Superior Prosecutor the irregularity

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66 Note of Prosecutor 122 of the Public Prosecution Service of the Metropolitan Area of Caracas (file of annexes to the answering brief, folio 16970).

67 Decision No. 2005-0015 of the Supreme Court of Justice de Caracas, of February 3, 2005 (file of annexes to the motions and argument brief, tome VI, folio 7098).

68 Decision of the Supreme Court of Justice of June 29, 2005 (file of annexes to the motions and argument brief, tome VI, folio 7105). This decision indicated: "the appointment of the following professionals is annulled […]: […] the lawyer Manuel Antonio Bognanno […], temporary judge of the First Instance Court of the criminal judicial circuit […], owing to observations made before this court."

69 Table of appointments and replacements of judges and prosecutors of the Venezuelan Judiciary (file of annexes to the merits report, tome III, folio 1142).

70 Record of the Twenty-fifth Court of June 20, 2006 (file of annexes to the answering brief, folio 17435).

71 Record of the Twenty-fifth Court of July 27, 2006 (file of annexes to the answering brief, folio 17580).

72 Record of the Twenty-fifth Court of September 27, 2006 (file of annexes to the answering brief, folio 17774).

73 Decision that appears in the case file on folio 7097.

74 First operative paragraphs of the Resolution of the Judicial Commission of February 3, 2005 (folio 7097 of the file).

75 Resolution 2005-1045 of the Judicial Commission of June 29, 2005 (which appears on folio 7105 of the file), annuls the appointment of Judge Manuel Antonio Bognanno Palmares.

committed by the Sixth Provisional Prosecutor by not forwarding the requested case file,[76] and he was substituted – a few days after this dispute – by provisional judge José Alonso Dugarte Ramos.[77] In the Judgment, it is considered that, since the said dispute between the judge and the prosecutor is related to a request by the defense counsel of another of the accused,[78] it is not possible to establish a direct causal link between the decision to annul the appointment of Judge Bognanno[79] and the effects on the presumed victim; an argument that we do not share, because the majority opinion disregards the fact that this is *the same judge who is hearing the same criminal proceedings* in which Mr. Brewer Carías is one of the accused and one of the central arguments of the representatives of the presumed victim is, precisely, the impact of the provisional status of judges and prosecutors who may be freely removed.

84. This "impact of provisional and temporary prosecutors and judges," as well as the effects that this had on the proceedings against Mr. Brewer Carías, is closely related to the presumed violation of Article 8(2)(c) of the American Convention — the right to an adequate defense – because, as the case file shows, during the indictment stage of the proceedings, the Sixth Provisional Prosecutor did not permit Mr. Brewer Carías to be provided with photocopies of the proceedings,[80] which means that that the accused had to go in person on several occasions, over the course of nine months, to copy by hand the proceedings, the photocopies of which he was systematically denied.[81] In addition, the same Provisional Prosecutor refused to give the accused full access to the case file; in particular as regards the examination and transcription of the videos that were cited as evidence against Mr. Brewer Carías.[82]

85. In this regard, the Inter-American Court's case law is relevant as regards the right to adequate time and means for the preparation of the defense established in Article 8(2)(c) of the American Convention, which implies the obligation of the State to allow the accused access to the case file against him.[83] In this regard, the Court has determined that domestic law must organize the respective proceedings in accordance with the Pact of San José.[84] Furthermore, the Inter-American Court has stipulated that the State's obligation to adapt

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[76] Regarding the dispute between the Twenty-fifth First Instance Supervisory Judge of the Criminal Judicial Circuit of the Metropolitan Area of Caracas, Judge Manuel Bognanno, and the Provisional Sixth Prosecutor, see para. 58 of the resolution.

[77] *Cf.* Table of appointments made by the Executive Directorate of the Judiciary dated June 29, 2005 (file of annexes to the merits report, tome III, folio 1142).

[78] *Cf.* para. 56 of the Judgment.

[79] *Cf.* para. 110 of the Judgment.

[80] During the public hearing, reference was made to a circular that prohibited making photocopies. The file contains the circular issued by the office of the Prosecutor General on July 10, 2001, which ordered "desist[ing] from issuing simple or certified copies of the investigation records, which should not be understood as a restriction of the right of the accused, the defense counsel, and other persons who have been authorized to intervene in the proceedings to examine the records that are part of the investigation" (tome VII, folio 3152 of the file).

[81] As established by the State itself, Mr. Brewer Carías signed "seventeen records registering access to and review of the case file" (tome I, folio 731 of the file).

[82] Decision of the prosecutor of April 21, 2005 (file of annex 1 to the answering brief, exhibit 9, folio 1236).

[83] *Case of Palamara Iribarne v. Chile*. *Merits, reparations and costs.* Judgment of November 22, 2005. Series C No 135, para. 170.

[84] *Cf. Case of Valle Jaramillo et al. v. Colombia*. *Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 192, para. 233; *Case of Case of Heliodoro Portugal v. Panama*. *Preliminary objections, merits, reparations and costs*. Judgment of August 12, 2008. Series C No. 186, para. 247; *Case of Kawas Fernández v. Honduras*. *Merits, reparations and costs*. Judgment of April 3, 2009 Series C No. 196, para. 188, and *Case of Radilla Pacheco v. Mexico*. *Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2009. Series C No. 209, para. 247

domestic law to the provisions of the Convention includes the text of the Constitution and all legal provisions of a secondary or regulatory character, in order to ensure the effective practical application of the standards for the protection of human rights.[85]

86. The Inter-American Court has also found that access to the case file is a requirement *sine qua non* of the victim's procedural intervention in the proceedings in which he is a complainant or an intervenor, according to domestic law. Although the Court has considered it admissible that, in certain cases, the measures taken during the preliminary investigation in criminal proceedings may be kept confidential[86] in order to ensure the effectiveness of the administration of justice, this confidentiality may never be invoked to prevent the victim from accessing the case file in a criminal trial. The State's authority to avoid the dissemination of the contents of the proceedings, if appropriate, must be guaranteed by the adoption of the necessary measures that are compatible with the exercise of the victims' procedural rights.

87. Even though Mr. Brewer and his representatives were given access to the case file, the defense was not allowed to obtain photocopies. In the *Case of Radilla Pacheco v. Mexico*, the Inter-American Court considered that "the refusal to issue copies of the investigation case file to the victims constitute[d] a disproportionate burden against them, incompatible with their right to participate in the preliminary inquiry" and that "States must have mechanisms that are less harmful to the right of access to justice to protect the dissemination of the content of investigations that are underway and the integrity of the case files."[87]

88. In addition, the above-mentioned series of provisional prosecutors and judges and its possible effect on the specific case is also related to the presumed violation of Article 8(2)(f) of the American Convention, owing to the impossibility of presenting pre-trial evidence with regard to Pedro Carmona Estanga and to be present during the examination of Patricia Polea. Indeed, this provision of the Convention establishes that one of the basic guarantees of any person accused of an offense consists in "the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may t*hrow light on the facts*."[88] Thus, this right, as a basic guarantee, is protected during the different stages of the criminal proceedings.[89]

89. On this point, it is necessary to distinguish two specific issues in this case. In the first place, the one relating to the pre-trial evidence consisting in the testimony Pedro Carmona Estanga, evidence that was not accepted by the prosecutor based on the argument that he was one of the co-accused in the criminal proceedings, although this would plainly have been essential in order to throw light on the facts. Mr. Brewer's representatives affirm that the decision not to admit this pre-trial evidence was "arbitrary

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[85] *Cf. Case of Zambrano Vélez et al. v. Ecuador. Monitoring compliance with judgment.* Order of the Inter-American Court of Human Rights of September 21, 2009, forty-ninth considering paragraph, and *Case of Radilla Pacheco v. Mexico.* Preliminary objections, merits, reparations and costs. Judgment of November 23, 2009. Series C No. 209, para. 247.

[86] *Cf. Case of Barreto Leiva v. Venezuela. Merits, reparations and costs.* Judgment of November 17, 2009. Series C No. 206, paras. 54 and 55.

[87] *Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2009. Series C No. 209, para. 256.

[88] Similarly, *Case of Ricardo Canese v. Paraguay*. *Merits, reparations and costs.* Judgment of August 31, 2004. Series C No. 111, para. 164.

[89] Case of *Mohamed v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 23, 2012. Series C No. 255, para. 91.

because, under Venezuelan law, the condition of being one of the accused does not constitute a legal impediment to testifying."[90]

90. Second, the representatives argued that they "were unable to be present during the testimony of any of the witnesses, and could only cross-examine a few of them"; in particular, they argued that they were unable to be present during the examination of Patricia Polea, and the prosecutor had refused this verbally on the day the interview was held.[91] On this point, the case law established in the case of *Barreto Leyva* is relevant in the sense that, of necessity, it must be possible to exercise the right of defense as soon as a person is implicated as a possible author of, or participant in, a wrongful act and this right only ceases when the proceedings – including, if appropriate, the stage of execution of judgment – have concluded. To maintain the contrary, would entail making the guarantees under the Convention that protect the right to defend oneself dependent on the proceedings being at a specific stage, leaving open the possibility that, prior to this, the rights of the person under investigation could be impaired by actions of the authorities that he is unaware of or which he cannot control or oppose effectively, which is evidently contrary to the American Convention. Preventing a persons from exercising his right of defense as of the start of the investigation against him, and if the authorities order or execute actions that entail an impairment of his rights, signifies empowering the investigative authority of the State to the detriment of fundamental rights of the person investigated. The right of defense obliges the State to treat the individual, at all times, as a true subject of the proceedings, in the broadest sense of this concept, and not simply as an object of them.[92]

91. From all the preceding considerations, we again reach the conclusion that the Inter-American Court should have delayed the examination of the preliminary objection of failure to exhaust domestic remedies, until the examination of the merits of the case, because the dispute evidently encompasses aspects of both admissibility and merits in relation to the judicial guarantees established in Article 8 of the American Convention, specifically with regard to the right to an independent and impartial judge or court (Art. 8(1) ACHR), the right to an adequate defense (Art. 8(2)(c) ACHR) and the right to cross-examine witnesses and to obtain the appearance of persons who may throw light on the facts (8(2)(f) ACHR). And the contrived argument of the "early stage" of the proceedings — that appears in the Judgment – should not have been used to avoid examining the merits of the case.

2.2.c There has been unwarranted delay in rendering a final judgment under the aforementioned remedies (Art. 46(2)(c) of the American Convention)

92. In order to determine the admissibility of this exception to the exhaustion of domestic remedies, the Judgment analyzed the dispute between the parties concerning: (i) the time frame and the procedural stage established in domestic law for deciding requests for annulment, and (ii) the need for the presence of the accused at the preliminary hearing and the reasons why the hearing was delayed.

93. Our dissenting position stems, precisely from the reasoning that disputes such as: whether or not the request for annulment could be decided without Mr. Brewer's presence

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[90] Folio 161 (tome I) of the merits file.

[91] This refusal was based on article 306 of the Organic Code of Criminal Procedure which stipulated that: "*The Public Prosecution Service may allow the accused, the victims or their representatives to be present during the measures taken [in the preliminary stage], when their presence would be useful to clarify the facts and would not prejudice the success of the investigation or prevent prompt and regular proceedings.*"

[92] *Case of Case of Barreto Leiva v. Venezuela. Merits, reparations and costs*. Judgment of November 17, 2009. Series C No. 206, para. 30.

as part of the preliminary hearing or independently of this; whether this request should be decided within the three-day time frame or, to the contrary, during the preliminary hearing, and whether the State's failure to rule on the request constitutes an unwarranted delay in the criminal proceedings, *are directly related to the merits of the case*, because both parties have submitted arguments on reasonable time, judicial guarantees, and judicial protection that are closely related to this determination. Consequently, only by examining the merits would it have been possible to determine whether the said unwarranted delay really existed, and whether the rights under the American Convention were violated

2.2.c.a) The time frame and the procedural stage established by domestic law for deciding the requests for annulment

94. The Judgment noted that there are "two interpretations of the procedural stage at which the requests for annulment that were filed should be decided."[93] Nevertheless, despite the complexity of the arguments of both parties about the procedural stage at which the decision should be taken, the Judgment subsequently decides a polemic aspect, among other arguments, by indicating that a 523-page request could not be decided in three days, as if the length of the request determines the procedural stage at which it must be decided.

95. In its analysis of this point, the majority opinion completely disregarded the first request for annulment of October 4, 2005, filed during the preliminary investigation stage, a request that was not even processed. Furthermore, it did not consider that the second request for annulment of November 8, 2005, was clearly divided into matters related, on the one hand, to the absolute nullity of the measures taken in the investigation conducted by the Public Prosecution Service and, on the other, the nullity of the decision concluding the indictment stage against Allan R. Brewer Carías.

96. Indeed, as the case file indicates,[94] the November 8, 2005, request for a declaration of nullity clearly includes the heading "II. REQUEST FOR ANNULMENT OF ALL THE PROCEEDINGS OWING TO THE SYSTEMATIC AND MASSIVE VIOLATION OF THE CONSTITUTIONAL AND LEGAL GUARANTEES OF ALLAN R. BREWER CARÍAS," and this, in turn, is divided into six parts: (1) nullity owing to the refusal of defense measures: (a) refusal of testimony, and (b) denial of access to videos, and to their transcription; (2) nullity owing to the violation of the right to defense and the principle of the presumption of innocence by inverting the burden of proof and using hearsay testimony; (3) nullity owing to the violation of the right of defense and the adversarial principle related to mediatized practice of investigation procedures; (4) nullity owing to absence of a prompt decision (relating to the first request for annulment of October 4, 2005); (5) nullity based on the violation of the guarantee of an ordinary judge, and (6) observations and arguments common to the preceding requests for annulment.

97. In this regard, we consider that the distinction made in the second request for annulment of November 8, 2005, between the nullity of proceedings in the investigation stage and the nullity of the decision concluding the stage of the indictment of Allan R. Brewer Carías is clear. Indeed, on the one hand, the nullity of all the measures taken owing to violations of fundamental rights during the investigation could be decided *before the preliminary hearing* (some of the arguments even refer to the failure to process the first request for annulment of October 4, which should have been decided during the preliminary investigation stage); to the contrary, the nullity of the indictment could be decided at any

[93] Para. 130 of the Judgment.

[94] Folios 14696 to 14787 of the file of annexes to the answering brief, which correspond to pages 21 to 111 of the brief requesting annulment of November 8, 2005.

time, either before bringing the case to trial or after the preliminary hearing, as established in the case law of the Constitutional Chamber of the Supreme Court. The request for annulment of November 8 contains arguments on both nullities of proceedings based on the violation of fundamental rights, during the investigation stage and also in the decision concluding the indictment stage. It can be clearly seen in this request that the annulment of the measures taken in the investigation stage is being argued (heading II of the request, see *supra* para. 96 of this opinion), while, starting under heading III (entitled "SUBMISSION OF OBJECTIONS" refers to the nullity of the indictment (not of the investigation during the preliminary investigation stage) that "preferably" – which does not mean necessarily – should be decided after the preliminary hearing. Indeed, as recorded in the Judgment,[95] in a judgment of February 14, 2002, the Constitutional Chamber of the Supreme Court had indicated, *inter alia*:

> If a request for annulment is filed, the supervisory judge – based on the urgency in view of the type of violation, and given the silence of the law – **may, before ordering that the case go to trial, and at any time before that act, rule on it,** even though **it is preferable** that this is done during the preliminary hearing.[…] *(bold added).*

98. As can be observed, the case law regarding the moment at which the request for the annulment of proceedings can be decided is not conclusive. The first request for annulment of October 4 should have been processed and decided during the investigation stage, in which it was alleged, essentially, that the right to the presumption of innocence had been violated owing to the implications of the book published by the Prosecutor General; the second request for annulment of November 8 – which, also, was not even processed – could be decided before or after the preliminary hearing, taking into account the clear division made in the request with regard to the nullity of the proceedings at the investigation stage, and with regard to the nullity of the decision concluding the indictment stage. The majority opinion admits the position of the State; in other words, the more restrictive interpretation of the right of access to justice of the presumed victim, which is evidently prohibited by Article 29 of the American Convention and runs counter to the *pro homine* principle. It is precisely the proven complexity of the dispute between the parties with regard to the requests for annulment and the fact that the principle purpose of the case focuses on the presumed violations of different *judicial guarantees (due process) and judicial protection*, that required the Inter-American Court to examine the merits of the case and to analyze the preliminary objection of failure to exhaust domestic remedies in light of the arguments of the parties on the merits of the case.

99. The preceding considerations reveal, with all the more reason, why the examination of the dispute submitted with regard to the exhaustion of domestic remedies, cannot be separated from the analysis of the merits of the case – as the Inter-American Court has found in many cases according to its consistent case law in this regard – because the request for annulment in question, the procedural stage at which it should have been decided, as well as its reasonable time, are intrinsically related to the presumed violation of the rights to judicial guarantees and judicial protection referred to in Articles 8 and 25 of the American Convention.

100. In this situation, the Court has affirmed previously that preliminary objections are acts that seek to prevent the analysis of the merits of the disputed matter by objecting to

[95] Para. 124 of the Judgment.

the admissibility of a case or of the person, matter, time or place, *provided that these objections are of a preliminary nature*.[96]

101. Since the matter of the admissibility of deciding the request for annulment in the absence of Mr. Brewer Carías cannot be examined without previously analyzing the merits of the case, it cannot be analyzed in the context of this preliminary objection.[97] Thus, the Inter-American Court should have rejected the preliminary objection of failure to exhaust domestic remedies filed by the State and, consequently, proceeded to analyze the merits of this case.

2.2.c.b) The need for the presence of the accused at the preliminary hearing and the reasons why the hearing was postponed

102. On this issue, in the Judgment, it has been considered that the absence of Mr. Brewer Carías "has meant that it has not been possible to hold the preliminary hearing against him, so that it can be affirmed that the delay in deciding the requests for annulment could be attributed to his decision not to submit to the proceedings, and has an impact on the analysis of the unwarranted delay or reasonable time."[98]

103. The majority opinion based its reasoning on an interpretation of Article 7(5) of the American Convention. In this regard, the Judgment indicates that the presence of the accused is an essential requirement for the normal and legal implementation of the proceedings and that Article 7(5) of the Convention establishes that "release may be subject to guarantees to assure his appearance for trial," so that States are authorized to establish domestic laws to ensure the appearance of the accused.

104. We also dissent from the majority opinion in this respect, because the determination of whether the proceedings against Mr. Brewer complied with the requirements of Article 7(5) of the American Convention is undoubtedly a matter relating to the merits. In any case, as revealed by the case file, it should be considered that Mr. Brewer Carías had been summoned for the preliminary hearing on several occasions; however, on none of these occasions was the postponement of the hearing due to the presumed victim's absence, but rather to other reasons.[99] In this regard, the representatives have argued throughout the

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[96] *Cf. Case of Las Palmeras v. Colombia. Preliminary objections.* Judgment of February 4, 2000. Series C No. 67, para. 34; *Case of Vélez Restrepo and family v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of September 3, 2012. Series C No. 248, para. 30; Case of *Artavia Murillo et al. (In vitro fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2012. Series C No. 257, para. 40, and Case of *Mohamed v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 23, 2012. Series C No. 255, para. 23.

[97] *Cf. Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of August 6, 2008. Series C No. 184, para. 39, and *Case of Vélez Restrepo and family v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of September 3, 2012. Series C No. 248, para. 30.

[98] Para. 143 of the Judgment.

[99] In para. 138 of the Judgment, it is affirmed that, on three occasions, the postponement or delay of the preliminary hearing was "directly related to the actions of Mr. Brewer or his defense counsel." This is not entirely exact, because on the first occasion (November 17, 2005), the postponement was due to the fact that the Twenty-fifth Judge recused himself, so that, evidently, exercising a right cannot be used against the currently presumed victim as claimed in the Judgment; on the second occasion, the hearing was not held, among other reasons, because "the Twenty-fifth Judge was on leave and the Twenty-fourth Supervisory Judge headed the court" and, on the third occasion, it can be seen that, in fact, it was presumed that Mr. Brewer Carías would not appear because he was not in the country (para. 139 of the Judgment), although this did not necessarily mean that he would not appear. Following the issue of the arrest warrant against Mr. Brewer Carías, the hearing was again postponed on thirteen occasions and, "only once was Mr. Brewer mentioned explicitly; specifically, on October 25, 2007, the hearing was postponed, because the court was awaiting 'the appeal filed by the legal representative of [Mr. Brewer Carías] against the note that had been sent to INTERPOL" (para. 142 of the Judgment). As can be appreciated,

proceedings that the State has not "presented […] any evidence of even one case in which the preliminary hearing was postponed because of the failure to appear of Mr. Brewer Carías."

105. Added to this, in the judicial ruling of the Twenty-fifth Court of July 20, 2007, responding to the request presented by one of the other accused in the proceedings, who was also waiting for the preliminary hearing to be held, that Mr. Brewer be separated from the case, in view of "the impossibility of holding this hearing since he was abroad," the supervisory judge founded his decision on:

> "In the case in question, the preliminary hearing has not been postponed owing to the failure to appear of [Mr.] Brewer Carías; to the contrary, the different delays that are noted in the records of this case file have been due to the numerous requests filed by the different defense counsel of those accused.[100]

106. According to the evidence in the case file, the failure to appear of Mr. Brewer Carías occurred *after the indictment had been filed against him*, at which time the defense counsel of Mr. Brewer Carías informed the Twenty-fifth Judge that Mr. Brewer would not return to the country because he considered that: (i) the actions of the Public Prosecution Service in this case had clearly constituted official political persecution against him"; (ii) "the Prosecutor General himself […] ha[d] directly violated his guarantee of the presumption of innocence, by publicly condemning him in advance of a trial, with the publication of the book '*Abril comienza en octubre*'"; (iii) "in response to the opportune appeal filed before the court, he ha[d] only obtained negative responses [and] these negative and frequently delayed responses from the jurisdictional organ ha[d], in turn, constituted new violations of his constitutional guarantees"; (iv) "his right to obtain the dismissal of the case in the intermediate state of the proceedings had been curtailed"; (v) all of this represented the denial of accessible, impartial, appropriate, transparent, autonomous, independent, responsible, equitable and expedite justice," and (vi) "the indictment was, in itself, already a sentence, designed to punish his political and ideological criticism of the project intended to subjugate Venezuela."

107. The above-mentioned considerations, especially with regard to the publication of a book by the Prosecutor General entitled "*Abril comienza en octubre*" in which reference is made to certain statements by someone according to which Mr. Brewer was the author of the "Carmona Decree," and in which it is stated that Mr. Brewer Carías had supposedly been present at a meeting where this decree was drawn up, are directly related to the right to judicial guarantees and, in particular, to the right to the presumption of innocence.

108. In this regard, the Court's recent case law in the case of *J v. Peru* should be recalled,[101] where it established plainly that:

> 233. The Inter-American Court has indicated that, in the sphere of criminal justice, the principle of the presumption of innocence constitutes a cornerstone of the judicial

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there is no way to conclude that the postponements of the preliminary hearing can be attributed directly and exclusively to the absence of the currently presumed victim, as the majority opinion tries to demonstrate.

[100] Ruling of the Twenty-fifth Court of the Judicial Circuit of the Metropolitan Area of Caracas of July 20, 2007, on the brief filed by the defense counsel of José Gregorio Vásquez (file of annexes to the motions and arguments brief, tome v, folios 6832 to 6838).

[101] *Case of J. v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of November 27, 2013. Series C No. 275.

> guarantees.[102] The presumption of innocence means that the accused does not have to prove that he has not committed the offense attributed to him, because the *onus probandi* corresponds to the accuser,[103] and any doubt must be used to benefit the accused. Thus, the irrefutable proof of guilt constitutes an essential requirement for imposing criminal punishment; hence, the burden of proof lies with the accuser and not with the accused.[104] In addition, **the principle of the presumption of innocence signifies that the judges must not open the proceedings with a preconceived idea that the accused has committed the offense of which he is accused**[105] *(bold added).*

109. In this regard, the Inter-American Court, following the criteria of the European Court has stressed that the presumption of innocence may be violated not only by the judges or courts in charge of the proceedings, but also by other public authorities,[106] and therefore State authorities must choose their words carefully when making declarations on criminal proceedings before a person or persons have been tried and convicted of the respective offense.[107] Even though, during the criminal proceedings, accusations of guilt by officials such as prosecutors and attorneys do not constitute a violation of the presumption of innocence, the declarations of these officials to the press, without reservations or explanations, infringe the presumption of innocence, because they encourage the pubic to believe in the person's guilt and prejudge the assessment of the facts by a competent judicial authority.[108] The Court has agreed with this opinion and has noted that State authorities must choose their words carefully when making statements about a criminal trial.[109]

110. The Court has reiterated in its case law that State authorities must take into account that public officials occupy a position of guarantor of the fundamental human rights and, therefore, their declarations cannot ignore such rights.[110] This obligation of special care is

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[102] *Cf. Case of Suárez Rosero v. Ecuador. Merits.* Judgment of November 12, 1997. Series C No. 35, para. 77, and *Case of López Mendoza v. Venezuela. Merits, reparations and costs.* Judgment of September 1, 2001. Series C No. 233, para. 128.

[103] *Cf. Case of Ricardo Canese v. Paraguay. Merits, reparations and costs.* Judgment of August 31, 2004. Series C No. 111, para. 154, and *Case of López Mendoza v. Venezuela. Merits, reparations and costs.* Judgment of September 1, 2011. Series C No. 233, para. 128

[104] The Human Rights Committee of the International Covenant on Civil and Political Rights has ruled similarly. Human Rights Committee. General Comment No. 32. Right to equality before courts and tribunals and to a fair trial (HRI/GEN/1/Rev.9 (vol. I)), para. 30.

[105] *Cf. Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 26, 2010. Series C No. 220, para. 184, and *Case of López Mendoza v. Venezuela. Merits, reparations and costs.* Judgment of September 1, 2011. Series C No. 233, para. 128.

[106] Thus, the European Court of Human Rights has considered that declarations made by the Ministry of the Interior and senior police authorities, by the Speaker of Parliament, the Prosecutor General, or other prosecution authorities in charge of the investigation, and even by a well-known retired General, who was also a candidate to a governorship but who was not a public official at the time of his declarations, gave rise to violations of the presumption of innocence in each case. *Cf. Allenet de Ribemont v. France*, 10 February 1995, Series A no. 308; *Butkevičus v. Lithuania*, no. 48297/99, § 49, ECHR 2002-II (extracts); *Daktaras v. Lithuania,* no. 42095/98, § 42, ECHR 2000-X; *Fatullayev v. Azerbaijan*, no. 40984/07, § 160 and 161, 22 April 2010; *Khuzhin and Others v. Russia,* no. 13470/02, § 95, 23 October 2008, and *Kuzmin v. Russia*, no. 58939/00, § 59 a 69, 18 March 2010.

[107] *Cf. Daktaras v. Lithuania,* no. 42095/98, § 41, ECHR 2000-X; *Butkevičus v. Lithuania*, no. 48297/99, § 49, ECHR 2002-II (extracts); *Ismoilov et al. v. Russia*, no. 2947/06, §166, 24 April 2008; *Böhmer v. Germany*, no. 37568/97, §56, 3 October 2002, and *Khuzhin and Others v. Russia,* no. 13470/02, § 94, 23 October 2008.

[108] ECHR, *Allenet de Ribemont v. France*, 10 February 1995, § 41, Series A no. 308. Similarly, *Ismoilov and Others v. Russia*, no. 2947/06, § 161, 24 April 2008.

[109] *Case of J. v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of November 27, 2013. Series C No. 275, para. 244.

[110] *Cf. Case of Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 131; *Case of Ríos et al. v. Venezuela*. *Preliminary objections, merits, reparations and costs*. Judgment of January 28, 2009. Series C No. 194, para. 139; *Case of Perozo et al. v. Venezuela*. *Preliminary objections, merits, reparations and costs*. Judgment

particularly necessary in situations of increased social conflict, alterations of public order, and social or political polarization, precisely due to the series of risks that these may signify for certain persons or groups at a specific time.[111] The presumption of innocence does not prevent the authorities from keeping society duly informed about criminal investigations, but requires that, when they do so, they should observe the discretion and circumspection necessary to guarantee the presumption of innocence of those possibly involved.[112]

111. In this case, the fact that the Prosecutor General's book entitled "*Abril comienza en octubre*," was published in September 2005 could have led people to presume that Mr. Brewer Carías was guilty of drafting the so-called "Carmona Decree," because the formal indictment against the currently presumed victim by the respective prosecutor was issued less than a month later, in October that year, a matter to which an objection was raised in the first request for annulment of October 4, 2005, during the preliminary investigation stage.

112. It should not be forgotten, as revealed by the case file, that, on August 28, 2002, the Prosecutor General appointed directly, as a "special substitute," the very prosecutor who, in October 2005, had drawn up the formal charges against Mr. Brewer Carías.[113] The possible violation of the right to the presumption of innocence is particularly evident in a system where prosecutors are appointed provisionally, and under which free appointment and removal exists. Thus, in this case is was essential to analyze this structural situation, since the provisional nature of the appointments could have had a negative impact on the autonomy of the prosecutors and on the corresponding criminal proceedings, which, we consider, could not be ignored by the inter-American judges.

113. It is also relevant to mention that this allegation with regard to the drafting of the "Carmona Decree" made by the Prosecutor General in his book published in September 2005 – added to the fact that it was made by an important State official – may have contributed to substantiate the guilt of the presumed victim. Consequently, in keeping with the previously mentioned case law of the Inter-American Court, prosecutors, and especially prosecutors general, must abstain from writing, even in a book, about cases that are being heard by other prosecutors, considering that this obligation of circumspection is increased in

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of January 28, 2009. Series C No. 195, para. 151, and *Case of J v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of November 27, 2013. Series C No. 262, para. 247.

111 *Cf. Case of Ríos et al. v. Venezuela*. *Preliminary objections, merits, reparations and costs*. Judgment of January 28, 2009. Series C No. 194, para.139, and *Case of Perozo et al. v. Venezuela*. *Preliminary objections, merits, reparations and costs*. Judgment of January 28, 2009. Series C No. 195, para. 151.

112 In this regard, the European Court of Human Rights has indicated that: "The freedom of expression, guaranteed by Article 10 of the Convention, includes the freedom to receive and impart information. Article 6 § 2 cannot therefore prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected." ECHR, *Allenet de Ribemont v. France*, 10 February 1995, § 38, Series A no. 308. See also, *Case of J. v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of November 27, 2013. Series C No. 275, para. 247.

113 The respective appointment appears on folio 979 of the main case file, which states: "BOLIVARIAN REPUBLIC OF VENEZUELA. PUBLIC PROSECUTION SERVICE. Office of the Prosecutor General. Caracas, August 28, 2002. Years 192 and 143. DECISION No. 539: JULIÁN ISAÍAS RODRÍGUEZ DÍAZ, Prosecutor General, pursuant to the provisions of article 1 and 49 of the Organic Law of the Public Prosecution Service, and since the measures taken by the First and Second Substitutes of the Sixth Prosecutor of the Public Prosecution Service with full competence at the national level to locate and serve notice of summons have been unsuccessful, and thus the respective list of substitutes has been exhausted, I appoint as SPECIAL SUBSTITUTE the lawyer LUISA ORTEGA DÍAZ, bearer of identify card No. 4,555,631, who has been employed as Special Substitute of the Seventh Prosecutor of the Public Prosecution Service of the Judicial Circumscription of the Metropolitan Area of Caracas, to take charge of the said Office, which is currently vacant, as of 01-09-2002 and until new instructions from this Office. Register, notify and publish. JULIÁN ISAÍAS RODRÍGUEZ DÍAZ. Prosecutor General."

situations of great social conflict, alterations of public order, and social and political polarization, such as the situation on April 11, 12 and 13, 2002.

114. Furthermore, we consider that the Judgment makes a restrictive interpretation of Article 7(5) of the American Convention, contrary to Article 29 of this instrument, by indicating that the presumed victim is a fugitive from justice, when this is not so. The case file reveals that the first time Mr. Brewer Carías was summoned by the prosecutor of the Public Prosecution Service who opened the investigation proceeding for the events of April 2002 he came forward to testify on June 3 that year.[114] Moreover, the case file contains numerous records that the currently presumed victim was defending himself constantly, even going personally to copy the case file by hand for nearly nine months when he was formally indicted in 2005.[115]

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[114] Testimony of Mr. Brewer Carías of June 3, 2002, before the Sixth Prosecutor, in the file of annexes to the answering brief, exhibit 2, folios 8986 to 8998.

[115] See testimony provided during the public hearing in this case by León Henrique Cottin, Venezuelan defense counsel of Mr. Brewer Carías in the domestic criminal proceedings, as well as the following records that appear in the copy of the judicial proceedings forwarded to the Court: Record of review of case file No. C43 of January 27, 2005 (file of annexes to the answering brief, annex 1, exhibit 7, folio 11164); record of review of case file No. C43 of January 28, 2005 (file of annexes to the answering brief, annex 1, exhibit 7, folio 11168); record of review of case file No. C43 of January 31, 2005 (file of annexes to the answering brief, annex 1, exhibit 7, folio 11182); record of review of case file No. C43 of February 1, 2005 (file of annexes to the answering brief, annex 1, exhibit 7, folio 11196); record of review of case file No. C43 of February 3, 2005 (file of annexes to the answering brief, annex 1, exhibit 7, folio 11214); record of review of case file No. C43 of February 9, 2005 (file of annexes to the answering brief, annex 1, exhibit 7, folio 11268); record of review of case file No. C43 of February 11, 2005 (file of annexes to the answering brief, annex 1, exhibit 7, folio 11273); record of review of case file No. C43 of February 15, 2005 (file of annexes to the answering brief, annex 1, exhibit 7, folio 11321); record of review of case file No. C43 of February 16, 2005 (file of annexes to the answering brief, annex 1, exhibit 7, folio 11337); record of review of case file No. C43 of February 18, 2005 (file of annexes to the answering brief, annex 1, exhibit 7, folio 11383); record of review of case file No. C43 of February 18, 2005 (file of annexes to the answering brief, annex 1, exhibit 7, folio 11386); record of review of case file No. C43 of February 21, 2005 (file of annexes to the answering brief, annex 1, exhibit 7, folio 11398); record of review of case file No. C43 of February 22, 2005 (file of annexes to the answering brief, annex 1, exhibit 7, folio 11399); record of review of case file No. C43 of February 22, 2005 (file of annexes to the answering brief, annex 1, exhibit 8, folio 11412); record of review of case file No. C43 of February 24, 2005 (file of annexes to the answering brief, annex 1, exhibit 8, folio 11505); record of review of case file No. C43 of February 25, 2005 (file of annexes to the answering brief, annex 1, exhibit 8, folio 11508); record of review of case file No. C43 of February 28, 2005 (file of annexes to the answering brief, annex 1, exhibit 8, folio 11546); record of review of case file No. C43 of March 1, 2005 (file of annexes to the answering brief, annex 1, exhibit 8, folio 11572); record of review of case file No. C43 of March 2, 2005 (file of annexes to the answering brief, annex 1, exhibit 8, folio 11579); record of review of case file No. C43 of March 3, 2005 (file of annexes to the answering brief, annex 1, exhibit 8, folio 11601); record of review of case file No. C43 of March 4, 2005 (file of annexes to the answering brief, annex 1, exhibit 8, folio 11619); record of review of case file No. C43 of March 7, 2005 (file of annexes to the answering brief, annex 1, exhibit 8, folio 11641); record of review of case file No. C43 of March 10, 2005 (file of annexes to the answering brief, annex 1, exhibit 8, folio 11740); record of review of case file No. C43 of March 15, 2005 (file of annexes to the answering brief, annex 1, exhibit 8, folio 11792 and 11793); record of review of case file No. C43 of March 15, 2005 (file of annexes to the answering brief, annex 1, exhibit 8, folio 11784); record of review of case file No. C43 of March 16, 2005 (file of annexes to the answering brief, annex 1, exhibit 8, folio 11836); record of review of case file No. C43 of March 19, 2005 (file of annexes to the answering brief, annex 1, exhibit 9, folio 11950); record of review of case file No. C43 of March 21, 2005 (file of annexes to the answering brief, annex 1, exhibit 9, folio 11970); record of review of case file No. C43 of March 22, 2005 (file of annexes to the answering brief, annex 1, exhibit 9, folio 11972 and 11973); record of review of case file No. C43 o March 28, 2005 (file of annexes to the answering brief, annex 1, exhibit 9, folio 12004 and 12005); record of review of case file No. C43 of March 31, 2005 (file of annexes to the answering brief, annex 1, exhibit 9, folio 12081); record of review of case file No. C43 of April 7, 2005 (file of annexes to the answering brief, annex 1, exhibit 9, folios 12162 and 12163); record of review of case file No. C43 of April 8, 2005 (file of annexes to the answering brief, annex 1, exhibit 9, folio 12165); record of review of case file No. C43 of April 12, 2005 (file of annexes to the answering brief, annex 1, exhibit 9, folio 12191); record of review of case file No. C43 of April 18, 2005 (file of annexes to the answering brief, annex 1, exhibit 9, folio 12310); record of review of case file No. C43 o April 25, 2005 (file of annexes to the answering brief, annex 1, exhibit 9, folio 12354); record of review of case file No. C43 of April 26, 2005 (file of annexes to the answering brief, annex 1, exhibit 9, folio 12355); Record of review of case file No. C43 of May 2, 2005 (file of annexes to the answering brief, annex 1, exhibit 10, folio 12401); record of review of case file No. C43 of May 10, 2005 (file of annexes to the answering brief, annex 1,

115. The fact that Mr. Brewer Carías left the country in September 2005 (freely, because no arrest warrant had been issued against him), and at the same time as the publication of the Prosecutor General's book, does not mean that he was a fugitive from justice. As previously mentioned (see *supra* para. 106 of this opinion), the defense counsel of Mr. Brewer Carías informed the judge that Mr. Brewer would not return to the country owing to a series of procedural violations that he had indicated were "clearly official political persecution against him." Hence, according to the representatives there was a "well-founded fear" that the exercise of the remedies would increase the persecution to which he had been subjected. In addition, they indicated "that he remains abroad as an exile in order to safeguard his freedom and his physical and moral integrity."[116] Accordingly, in this case the reasons why the presumed victim is not coming forward should be analyzed in light of the arguments submitted on merits, because if they are justified, it would be contrary to the American Convention to oblige a person to attend his trial deprived of liberty, when violations of the rights to *the presumption of innocence, to be tried by an independent and impartial judge or court, to due process, and to judicial guarantees* established in Articles 8 and 25 of the American Convention haves been proved; rights expressly cited as violated in the case of the currently presumed victim, and not analyzed in the case.

116. The interpretation made of Article 7(5) of the American Convention in the Judgment departs from the provisions of Article 29 of the Pact of San José, which establishes that no provision of the Convention may be interpreted as permitting any State Party to *suppress or limit the enjoyment or exercise of the rights and freedoms recognized in this Convention*. The majority opinion does not analyze Article 7(5) of the Convention in light of Article 29 of this instrument but, to the contrary, decides to make a restrictive interpretation that limits this article, disregarding the *pro homine* status that should be given to this interpretation, according to the said article 29 of the Convention and the Court's consistent case law, in the understanding that, the right to personal liberty is involved. Claiming that Mr. Brewer Carías should return to his country and lose his liberty and, in these conditions, defend himself personally in a trial, constitutes an incongruent and restrictive argument with regard to the right of access to justice, because, the aspects relating to merits invoked by the presumed victim involving diverse violations of Articles 8 and 25 of the American Convention were not analyzed in this case, and they inherently condition the interpretive scope of Article 7(5) of the Pact of San José regarding the right to personal liberty.[117]

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exhibit 10, folio 12609); record of review of case file No. C43 of June 1, 2005 (file of annexes to the answering brief, annex 1, exhibit 11, folio 12887); record of review of case file No. C43 of June 7, 2005 (file of annexes to the answering brief, annex 1, exhibit 11, folio 12928); record of review of case file No. C43 of June 9, 2005 (file of annexes to the answering brief, annex 1, exhibit 11, folio 12954); record of review of case file No. C43 of June 15, 2005 (file of annexes to the answering brief, annex 1, exhibit 11, folio 12970); record of review of case file No. C43 of June 29, 2005 (file of annexes to the answering brief, annex 1, exhibit 11, folio 12992); record of review of case file No. C43 of July 4, 2005 (file of annexes to the answering brief, annex 1, exhibit 11, folio 13014); record of review of case file No. C43 of July 4, 2005 (file of annexes to the answering brief, annex 1, exhibit 13, folio 13052); record of review of case file No. C43 of July 11, 2005 (file of annexes to the answering brief, annex 1, exhibit 13, folio 13095); record of review of case file No. C43 of September 22, 2005 (file of annexes to the answering brief, annex 1, exhibit 13, folio 13980); record of review of case file No. C43 of September 27, 2005 (file of annexes to the answering brief, annex 1, exhibit 13, folio 13997); record of review of case file No. C43 of September 28, 2005 (file of annexes to the answering brief, annex 1, exhibit 13, folio 14008); record of review of case file No. C43 of September 30, 2005 (file of annexes to the answering brief, annex 1, exhibit 13, folio 14022); record of review of case file No. C43 of October 7, 2005 (file of annexes to the answering brief, annex 1, exhibit 13, folio 14100), among others.

[116] Brief with final arguments and observations of the representatives of Mr. Brewer Carías, para. 133.

[117] It should not be ignored, as revealed by the case file, that the defense counsel of Mr. Brewer Carías expressly asked that Mr. Brewer be guaranteed the right to be tried a free man, a request of October 26, 2005, that was not even processed. *Cf.* Appeal of the defense counsel before the Twenty-fifth Supervisory Judge received on October 28, 2005 (file of annexes to the merits report, tome IV, folios 1636 to 1700).

117. Once again, the issue of presumed violations of Articles 8(1) (right to an independent and impartial judge or court, 8(2) (basic rights of a person accused of a criminal offense, which are, *inter alia* the presumption of innocence, an adequate defense, and to present and to examine witnesses), 25 (Right to Judicial Protection), as well as the restrictive interpretation itself of Article 7(5) of the American Convention made by the majority opinion in this case, leads us to assert categorically that the Inter-American Court should have examined the dispute regarding the need for the accused's presence at the preliminary hearing and the reasons why the hearing was postponed, in light of the considerations on merits relating to these articles, in order to have a broader context for its examination of this and other disputes in the case.

118. In sum, we, the undersigned, dissent from the majority opinion because we consider that the three exceptions established in Article 46(2) of the American Convention can be determined, because the case involves questions of substance, especially those relating to supposed violations of the rights to an independent and impartial judge and court (Art. 8(1) ACHR), to due process (Art. 8(2) ACHR), and to judicial protection (Art. 25 ACHR). By accepting the preliminary objection of failure to exhaust domestic remedies, Mr. Brewer is being condemned to face a trial in which it is possible that violations of the American Convention have been committed.

119. Consequently, the Inter-American Court should have rejected the preliminary objection of failure to exhaust domestic remedies and should have proceeded to decide the merits of the case, pursuant to the consistent case law in this matter established by the Court itself. The use of the contrived theory of the "early stage" of the proceedings as one of the central arguments in the Judgment in order not to proceed to analyze the presumed violations of the human rights protected by the Pact of San José, represents a clear step backwards in the Court's consistent case law, which may establish the precedent that negative consequences are being created for the presumed victims in the exercise of the right of access to justice, a fundamental right of extreme importance for the inter-American system as a whole, because it constitutes a guarantee for the other rights of the American Convention and jeopardizes the practical effects (*effet util*) of this instrument.

3. Defense of the rule of law and the exercise of the legal profession

120. As noted throughout this opinion, we consider that the Court should have proceeded to examine the merits of the case, because the matters of admissibility and of merits were closely related. They include the effect of the provisional status of prosecutors and judges and its specific impact on criminal proceedings; the analysis of the presumption of innocence, an adequate defense and, in general, aspects related to Articles 8 and 25 of the American Convention.

121. Moreover, we consider that the analysis of the merits was essential, also, in order to examine the fact that an internationally renowned jurist, such as Allan Brewer Carías, has been criminally indicted for responding to a request for his professional advice. The facts reveal that the accused, Mr. Brewer Carías, merely availed himself of his right to exercise the legal profession.

122. Already, on a previous occasion, the Inter-American Court analyzed a criminal conviction based on a person's exercise of his profession. Thus, in the case of *De la Cruz Flores v. Peru,*[118] the victim had received a criminal sentence for treating members of

[118] *Cf. Case of De la Cruz Flores v. Peru. Merits, reparations and costs.* Judgment of November 18, 2004.

Sendero Luminoso (Shining Path) in his capacity as a doctor, which, according to the Court, "is not only an essentially legitimate service, but also one that a doctor is obliged to provide."[119]

123. The foregoing is supplemented by the considerations of the Court when issuing *Advisory Opinion OC-5/85 on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism.*[120] In this opinion, the Inter-American Court stated that a journalist who was not a member of a journalists' association could not be criminally sanctioned owing to the interrelationship between the right to freedom of expression and the exercise of journalism. In other words, the journalist who was not a member of a journalists' association was making legitimate use of this right; thus the Court declared that the Costa Rican law that decreed criminal sanctions for exercising the profession of journalism without being a member of the said association was incompatible with the American Convention.

124. In the case of *Brewer Carías v. Venezuela* also, we are faced with the fact that it is sought to criminalize an action inherent in the exercise of the legal profession, which, by its very nature, is lawful. Even though different professions are involved, the Court's criterion of protecting the exercise of a profession should prevail; and, in the case of Mr. Brewer, this means the exercise of the legal profession and defense of the rule of law. The failure to analyze the merits of the case of the criminal prosecution of Mr. Brewer Carías restricted what should be the main task of an international human rights court: the defense of the human being in the face of the high-handedness of the State.

125. An international court of human rights must, above all else, defend the rule of law – and in this specific case, also the exercise of the legal profession – which is intrinsic to a democratic regime, the values that inspire the inter-American system as a whole and, particularly, the principles that govern the Inter-American Democratic Charter.

Manuel E. Ventura Robles
Judge

Eduardo Ferrer Mac-Gregor Poisot
Judge

Pablo Saavedra Alessandri
Secretary

Series C No. 115.

[119] *Case of De la Cruz Flores v. Peru. Merits, reparations and costs.* Judgment of November 18, 2004. Series C No. 115, para. 102.

[120] *Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights).* Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5.