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 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

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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.

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 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

[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.

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]

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

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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.

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

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 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

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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.

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 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

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

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.

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 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

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[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.

[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.

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 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.

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

[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.

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 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,

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

[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.

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 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

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30 Paras. 88 and 96 of the Judgment.

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.

"[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 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]

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[34] Para. 17 of the Judgment.

[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.

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 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

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[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.

[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.

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 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

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[43] Para. 101 of the Judgment.

[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.

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.

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

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[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.

[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*

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 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

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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.

[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

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 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,

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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.

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.

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.

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) 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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65 Para. 46 of the Judgment.

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 domestic law to the provisions of the Convention includes the text of the Constitution and all legal provisions of a secondary or regulatory

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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

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

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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.

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

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 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.

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[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.

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 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"

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.

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 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]

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95 Para. 124 of the Judgment.

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.*

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 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

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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, 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.

> 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 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).*

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[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.

[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.

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 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

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[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; *Butkeviđus 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; *Butkeviđus 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 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.

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 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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[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."

[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

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

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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, 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.

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]

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

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[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).

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 *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.

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

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