DISSENTING OPINION OF THE JUDGE *AD HOC* EINER ELIAS BIEL MORALES IN THE CASE OF REVERÓN TRUJILLO *V.* VENEZUELA

1. In the judgment issued in the present case, the Inter-American Court of Human Rights (hereinafter "the Court" or "the Tribunal") dismissed the preliminary objection filed by the State regarding lack of exhaustion of domestic remedies. I differ from the majority's decision and, therefore, with due respect for the opinion of my colleagues, I allow myself to present the legal reasons for my dissent. This difference with the majority prevents me from backing the Judgment in its totality. However, I point out that, in the event that the jurisdiction of the Tribunal to hear and issue a decision on the merits of the case is accepted, in general terms, I accept the arguments offered upon deciding the merits of the matter, taking into account that the Inter-American Court upon issuing its decision offers justice to that stated by the victim.

The preliminary objection of non-exhaustion of domestic remedies

2. The Preamble of the American Convention states that: "the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states" (highlight is not from the original). From the aforementioned it can be clearly concluded that the protection offered by the Inter-American System is exclusively complementary to the domestic systems and in no way is it substitutive or the main system. In this sense, it is important to point out that under the terms of the Convention the States Parties undertake to "respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms."[1] Therefore, the responsibility and obligation to comply with the duties contracted through the Convention falls upon national authorities, which reaffirms the Court's essentially supplementary nature. This means that only in those cases in which a State has been allowed to repair by itself a violation according to the Convention, and it has not done so, may the Inter-American System have jurisdiction to hear those violations.

3. This undeniable supplementary nature of the Inter-American System is materialized mainly in the requirement to exhaust domestic remedies. Specifically, from the start of its duties the Inter-American Court has established that: "[t]he rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international proceeding. This is particularly true in the international jurisdiction of human rights, because the latter "reinforces or complements" the domestic jurisdiction (American Convention, Preamble)."[2]

4. Additionally, this nature has been acknowledged not only by the Inter-American System but by other regional systems as well, for example the European

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[1] Article 1(1) of the American Convention on Human Rights.

[2] I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*. *Merits.* Judgment of July 29, 1988. Series C No. 4, para. 61; I/A Court H.R., *Case of Godínez Cruz v. Honduras*. *Merits.* Judgment of January 20, 1989, Series C No. 5, para. 64, and I/A Court H.R., *Case of Fairén Garbi and Solís Corrales v. Honduras*. *Merits.* Judgment of March 15, 1989. Series C No. 6, para. 85.

Human Rights Protection System. In this regard, the European Human Rights Court has expressed that the protection established in the European Human Rights Convention is subsidiary to the national protection system.[3] The European Convention allows each State Party, first, the task of guaranteeing the rights and freedoms enshrined. The institution created by it, makes its own contribution to that task, but is involved only through adversarial proceedings and when all domestic remedies have been exhausted (Art. 26)"[4]. From the aforementioned, it can be concluded that the European Court acknowledges in a clear and precise manner the importance of offering the State the possibility to repair the violations of human rights through the exhaustion of all its domestic remedies, intimately relating this with the objective itself of the international systems, namely offering protection to those rights when the States have not done so.

5. Anyway, I start my opinion with these reflections, both well known and accepted, regarding the complementary nature of the Court, because it is precisely this principle what motivates me to conclude that the preliminary objection filed by the State of Venezuela should have been accepted in the present case.

6. The State of Venezuela filed a preliminary objection, stating that Mrs. Reverón Trujillo "did not file the Appeal for Revision before the Constitutional Chamber of the Supreme Court of Justice." However, the majority has decided that, since "the […] preliminary objection was not filed in a timely manner […] the State [missed] its chance to use this means of defense before this Tribunal." (paras. 20 and 21 of the Judgment) This implies that no progress is made on the revision regarding the effectiveness of the remedy to confront the problems that would derive from the decision adopted by the Political-Administrative Chamber. In this regard, it is important to point out that in the case file there are copies of several judgments of the Constitutional Chamber of the Supreme Court of Justice in which the latter accepted the appeal for revision, as evidence of the possibility to turn to this remedy and obtain favorable results.

7. The present decision is respectful of the reiterated jurisprudence of the Court, which has established, first of all, that the objection of lack of exhaustion of domestic remedies is a rule in which the possibility to invoke it can be waived expressly or tacitly by the State that has the right to do so and, second, that the way to waive this right corresponding to the State is by not filing the objection in a "timely" manner.[5]

8. However, I disagree with this jurisprudence of the Court and, therefore, with the decision made in the present case. First of all, as previously stated, the subsidiary nature of the Court is one of the grounds for its jurisdiction. The exhaustion of domestic remedies is established in the American Convention as a requirement of admissibility, reason for which it is not clear why the Inter-American Court has turned it into a "means of defense" for the State, which the latter can

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[3] ECHR, *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, Judgment of 23 July 1968, para. 10; ECHR, *Case of Aksoy v. Turkey*, Judgment of 18 December 1996, para. 51, and ECHR, *Case of Sisojeva and others v. Latvia*, Judgement of 15 January 2007.

[4] ECHR, *Handyside v. United Kingdom*. Judgment (Merits) of 7 December 1976, para. 48.

[5] *Cfr. Case of Velásquez Rodríguez v. Honduras. Preliminary Objections.* Judgmentof June 26, 1987. Series C No. 1, para. 88.

waive. It is understood that it is the State's duty to indicate if there are domestic remedies to be exhausted, but this does not mean that if it did not do so at a specific moment, the Court or the Commission can abstain from examining the admissibility requirements.

9. Second, the rule invoked has been created by the jurisprudence of the Court and it is not enshrined in the American Convention or in any other treaty that is binding for the States. In this sense, as made clear in a recent dissenting opinion,[6] "if the objective was to create a preclusive opportunity for the arguing of this objection, it should have been established explicitly in the text of the American Convention." Likewise, it is not enough to file against the States the rules adopted by the Commission and Court in their Rules of Procedure, since the latter do not constitute treaties to which the States have consented.

10. The aforementioned responds to general principles of legal certainty. In effect, the States have had to face the application of a standard that seems to contradict what has been established in the convention. The jurisprudential rule does not seem to have been created based on the principle of consent of the States Parties to the Convention, which may generate difficulties for a consensus regarding the legitimacy of the decisions adopted by the Tribunal in what corresponds specifically to this preliminary objection. Rules that the States were not aware of upon ratifying the corresponding treaty are being applied to them.

11. In fact, the jurisprudence of the Court in this matter seems to have developed, on occasions, criteria not necessarily compatible among each other or even modified in different ways, as occurs since the case *of Perozo et al. v. Venezuela,* when instead of referring to the tacit waiver it indicates that the State did not file the preliminary objection in a timely manner. This standard weakens even more the requirements of legal certainty regarding the procedural behavior States must follow in the litigation before the Court, since the change or variation made in the Judgment regarding the tacit waiver, which is now substituted with "loss of the possibility", in my opinion is not a manner of mere semantics, but a variation that would generate much more confusion, since it seems to be associated to the idea of preclusion, which is not enshrined in the Convention either.

12. Likewise, it is important to point out the frequency or recurrence with which these matters are presented by the States before the Court, which –regardless of the Commission's opinion and the Court's jurisprudence of more than 20 years- is a sign of the importance of solving this matter in a definitive matter accepting the possibility of debating the preliminary objections of this nature before the Tribunal.

13. Finally, I consider that the fact that the Court is the only jurisdictional body of the Inter-American System implies that it must maintain complete jurisdiction to revise and decide matters of admissibility. As has been established by the Tribunal's jurisprudence, the latter "does not act, with regard to the Commission in a procedure of revision, appeal, or similar. Its full jurisdiction to consider and review *in toto* the previous actions and decision of the Commission, results from its nature of single

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[6] Dissenting opinions issued by the judge *ad hoc* Pier Paolo Pasceri Scaramuzza with regard to two judgments of the Inter-American Court: I/A Court H.R. *Case of Ríos et al. v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of January 28, 2009. Series C No. 194 and I/A Court H.R. *Case of Perozo et al. v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of January 28, 2009. Series C No. 195.

jurisdictional body in this matter. In this sense, while ensuring a more complete judicial protection of the human rights acknowledged by the Convention, the State Parties that have accepted the jurisdiction of the Court are guaranteed the strict respect of its regulations."[7] In that same line, it has been established that "if the Commission decided the matter of admissibility, it should be analyzed again before this Court given the jurisdictional nature of this body in contrast to the first. This form of action is in perfect tune with the Court's power of full jurisdiction regarding the decisions made by the Commission."[8] I share this opinion and point out that just as this Tribunal has the jurisdiction necessary to decide if there has been a violation of human rights, it also has jurisdiction to decide procedural matters stated as grounds for its possibility to hear the case.[9] Therefore, there is no reason for the Tribunal not to revise the procedural rules imposed by the Commission regarding an alleged "timely" moment to present the preliminary objections.

14. Based on the aforementioned, the Court should have analyzed the effectiveness of the appeal for revision indicated by the State, in order to conclude if in effect the domestic remedies were or not exhausted in the terms of the Convention. Despite the fact that I agree with the reasons that serve as grounds for the decisions on merits adopted by the majority, I consider it necessary and convenient to assume that the requirement of lack of exhaustion of domestic remedies cannot be a defense the State may waive tacitly, since it constitutes a rule on which the subsidiary principle of the Inter-American System is based.

Thus, I present the reasons for my dissenting opinion in the present case. Date ut-supra

Einer Elías Biel Morales
Judge *ad hoc*

Pablo Saavedra Alessandri
Secretary

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7 I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras. Preliminary Objections.* Judgment of June 26, 1987. Series C No. 1, para. 29.

8 Dissenting opinion of judge *ad hoc* Pier Paolo Pasceri, supra note 6.

9 I/A Court H.R., *Case of 19 Tradesmen v. Colombia. Preliminary Objection.* Judgment of June 12, 2002. Series C No. 93 para. 27; I/A Court of H.R., *Case of Constantine et al. v. Trinidad and Tobago. Preliminary Objections.* Judgment of September 1, 2001. Series C No. 82, para. 71.