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File Number(s):	Report No. 23/09; Petition 1133-05
Session:	Hundred Thirty-Fourth Regular Session (16 – 27 March 2009)
Title/Style of Cause:	Raul Jose Diaz Pena v. Venezuela
Doc. Type:	Decision
Decided by:	First Vice President: Victor Abramovich; Second Vice President: Felipe Gonzalez; Commissioners: Sir Clare K. Roberts, Paulo Sergio Pinheiro, Florentin Melendez, Paolo G. Carozza. In keeping with Article 17(2) of the Commission's Rules of Procedure, Commissioner Luz Patricia Mejia, of Venezuelan nationality, did not participate in the deliberations or decision in the instant case.
Dated:	20 March 2009
Citation:	Diaz Pena v. Venezuela, Petition 1133-05, Inter-Am. C.H.R., Report No. 23/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009)
Represented by:	APPLICANT: Patricia Andrade
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I. SUMMARY

1. On October 12, 2005, the Inter-American Commission on Human Rights (hereinafter "the Commission") received a petition submitted by Patricia Andrade of the organization Venezuela Awareness Foundation (hereinafter "the petitioner") alleging the responsibility of agents of the Bolivarian Republic of Venezuela (hereinafter "the State," "the Venezuelan State," or "Venezuela") for the alleged illegal detention of Raúl José Díaz Peña (hereinafter "the alleged victim") on February 25, 2005, the irregularities in the criminal proceeding against him, and his conditions of detention at the Directorate of Intelligence and Prevention Services (DISIP: Dirección de los Servicios de Inteligencia y Prevención) at El Helicoide, Caracas.

2. The petitioner argues that the State is responsible for violating the right to humane treatment, to a fair trial, and the right to privacy, provided for at Articles 5, 8, and 11 of the American Convention on Human Rights (hereinafter also "the American Convention" or "the Convention"). During the processing of the petition, violations were also alleged of the right to life, the right to personal liberty, the right of assembly, the right to equal protection, and the right to judicial protection, provided for at Articles 4, 7, 15, 24, and 25 of the American Convention in relation to the obligation to ensure the rights, established at Article 1(1) of the Convention.[FN2]

[FN2] Briefs from the petitioner received at the IACtHR on June 29, 2007, and October 2, 2008.

3. After examining the parties' positions and in compliance with the requirements set forth at Articles 46 and 47 of the American Convention, the Commission decided to declare the case admissible for purposes of examining the alleged violation of Articles 5, 7, 8, 25, in connection with the obligations established at Article 1(1) and, in application of the principle of *iura novit curia*, in connection with the obligations established at Article 2 of the American Convention. The Commission decided to declare the petition inadmissible with respect to the alleged violations of Articles 4, 11, 15, and 24 of the American Convention. It also decided to give notice of the report to the parties, and to order its publication.

II. PROCESSING BEFORE THE COMMISSION

4. On October 12, 2005, the Commission received the initial petition, which was registered under number P1133-05. Along with the initial petition, the petitioner filed a request for precautionary measures on behalf of the alleged victim, which was granted by the Commission on October 31, 2005.[FN3] The precautionary measures are in force as of the date of adoption of this report.

[FN3] IACtHR, Annual Report 2005, Chapter III, Precautionary measures granted or extended by the IACtHR in 2005. "On October 31, 2005, the Commission granted precautionary measures in favor of Raúl Jose Díaz Peña. The information available indicates that Mr. Díaz has been detained at the Investigations Division of the Intelligence and Prevention Services Directorate (DISIP), El Helicóptero facility, in Caracas, since February 25, 2004, in cells that lack natural ventilation and have no sources of air or daylight. Given the situation of the beneficiary, the IACtHR asked the Venezuelan State to instruct the competent authorities to carry out medical examinations in order to assess the beneficiary's health and provide him with the specialized treatment he requires, to transfer him to a preventive detention center where he is guaranteed access to decent living conditions, natural light, fresh air, and exercise, and, until he is effectively transferred from the DISIP to a preventive custody facility, to ensure him the guarantees necessary to preserve his physical, mental, and moral integrity. The Commission also asked the State to guarantee that Mr. Díaz would not face reprisals in connection with his proceedings before the inter-American human rights system."

5. With respect to the processing of the petition, on April 24, 2005, the Commission requested the additional information on the judicial remedies pursued in the domestic jurisdiction in relation to his case. On June 14, July 10, and July 18, 2006, the Commission received communications from the petitioner by which she submitted additional information. On August 8, 2006, the Commission forwarded a copy of the pertinent parts of the petition and the briefs containing additional information to the State, which was given two months to submit observations, in keeping with Article 30(2) of the Rules of Procedure.

6. On August 28 and November 22, 2006, the Commission received briefs containing additional information from the petitioner, which were forwarded to the State for its observations. On January 11, 2007, the Commission received a brief from the State by which it

requested that a copy of the initial petition be sent to it again[FN4]; it was resent on February 23, 2007. On March 28, 2007, a brief of additional information was received from the petitioner, which was passed on to the State for its observations.

[FN4] Note AGEV/000037 from the Ministry of People's Power for Foreign Relations of the Bolivarian Republic of Venezuela, January 9, 2007.

7. On May 4, 2007, the State's brief of observations was received[FN5]; it was transmitted to the petitioner on May 29, 2007, for her observations. On May 7 and 16, 2007, the Commission received briefs with additional information from the petitioner, which were transmitted for the State. On June 29, 2007, the Commission received the petitioner's observations, which were transmitted to the State for its observations. On May 21, 2008, the Commission asked the petitioner for up-to-date information on the situation of the alleged victim, which was sent in on June 4, 2008, and forwarded to the State for its observations. On October 2 and 20, 2008, the Commission received additional information from the petitioner, which was transmitted to the State for its observations. On December 3, 2008, the Commission received additional information from the petitioner, which was transmitted to the State for its observations.

[FN5] Note AGEV/000600 from the Ministry of People's Power for Foreign Relations of the Bolivarian Republic of Venezuela, May 3, 2007.

III. THE PARTIES' POSITIONS

A. The petitioner's position

8. By way of background, the petitioner notes that as of October 22, 2002, Raúl José Díaz Peña, like many other Venezuelans, went to witness the demonstrations which at that time were taking place at the Plaza Francia in the Altamira section of Caracas.[FN6] On February 25, 2003, at the same time as the attacks were perpetrated, using explosives, against the Consulate General of the Republic of Colombia and the International Trade Office (Oficina de Comercio Internacional) of the Kingdom of Spain[FN7], Raúl José Díaz Peña was at Plaza Altamira. The petitioner argues that due to the attacks the Public Ministry began to make accusations against and persecute those persons who frequented the Plaza Altamira. She argues that several of the persons detained due to these events were subjected to torture by state agents to secure forced confessions.[FN8]

[FN6] The petitioner notes that as of October 2002 and for several months, a group of soldiers, who said they were observing Article 350 of the Constitution of the Bolivarian Republic of Venezuela, gathered at the Plaza de Altamira in Caracas. Brief from the petitioner received at the IACHR on October 2, 2008.

[FN7] On February 25, 2003, two explosive artifacts exploded near the diplomatic offices of Spain and Colombia. According to press reports, pamphlets were found in the area of the attacks from the Frente Bolivariano de Liberación with slogans supporting the government of President Hugo Chávez. Press information available at: http://news.bbc.co.uk/hi/spanish/latin_america/newsid_2797000/2797977.stm. In addition, information from Radio Nacional de Venezuela indicates that the then-deputy director of the Criminal Investigations Corps (Cuerpo de Investigaciones Penales y Criminalísticas) stated that “the attacks with two powerful bombs against the diplomatic offices of Colombia and Spain (which left four persons with moderate injuries and considerable material damage) were carried out ... by terrorists and all our investigations are so oriented.” Press information available at: <http://www.rnv.gov.ve/noticias/index.php?act=ST&f=2&t=2484>.

[FN8] The petitioner notes the witness statements by Silvio Mérida Ortiz before the 22nd Court of First Instance (for Trial) of the Judicial Circuit for the Metropolitan Area of Caracas, Case 347- 05, December 2, 2004. Attached to the brief from the petitioner of June 13, 2006, and Pedro Antonio Sifontes “... Yes I knew Mr. Raúl Díaz, he is a person who was with me at the Plaza, a civilian helping out with security at the plaza, and we dealt with one another directly, I can tell you about the bombs, yes we heard them, yes we learned but I was forced to make statements about things I never knew about ... in one of those statements I said that Mr. Luis Chacin who is in the case of us the soldiers, he carried explosives in a bag and put them in Raúl Díaz’s pick-up, but I never saw those explosives” Fourth Court of First Instance (for Trial) of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, Case No. 4J-397-2006, Reasoning of the Judgment, April 28 and 29, 2008. Attached to the petitioner’s brief received at the IACRH October 2, 2008.

9. The petitioner argues that on September 9, 2003, the 22nd Court of First Instance (for Review) of the Criminal Judicial Circuit for the Metropolitan Area of Caracas authorized the DISIP to seize Raúl José Díaz Peña’s vehicle to take the evidence necessary for clarifying the facts that are investigated “related to detonating explosive artifacts at the offices of the diplomatic representations of the Republics of Colombia and Spain.”[FN9] She alleges that the pick-up truck was seized and taken to the DISIP, and that an expert examination was begun without the presence of Mr. Díaz Peña, who arrived at the time it had been scheduled and not accompanied by an attorney. It is alleged that Mr. Díaz Peña signed a document that indicated that he had been a witness to the expert examination without any of the officials present explaining to him that it had begun before he arrived. The petitioner alleges that in performing the expert examination, the chain of custody was violated, and that the security, presentation, and integrity of the evidence were not assured. She indicated that the results of the expert examination determined that traces of a highly explosive substance were found in the vehicle[FN10] and that on October 6, 2003, an officer of the Homicide Investigations Division of the Criminal Justice Corps (CICPC) noted, in a police report, that the seized vehicle, property of Raúl José Díaz Peña[FN11], transported the explosives used in the attacks of February 25, 2003.

[FN9] The petitioner cites the 22nd Court of First Instance (for Review) of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, September 9, 2003. Attached to the original petition received at the IACHR October 12, 2005.

[FN10] The petitioner cites expert report No. 9700-035-5583 of the Department of Microanalysis of the Criminal Investigations Corps (Cuerpo de Investigaciones Penales y Criminalísticas, CICPC), November 5, 2003. "The waxy and whitish substance present in the samples studied and labeled, respectively, No. 1 (Freight Area) and No. 2 (Back floor – left side) correspond to a high explosive known as C4 or HARRISITIE." Attached to the original petition received at the IACHR on October 12, 2005.

[FN11] The petitioner cites the Police Report of the Homicide Investigations Division of the CICPC, October 6, 2003: "Chacín Sanguines Luis Gregorio, presently accused as one of the direct participants in placing the explosive devices at the diplomatic headquarters ... kept the package containing the C-4 material (high explosive) ... in a pick-up truck ... owned by a citizen who assiduously attends the Plaza Francia de Altamira whose nickname is 'FENIX' [and identified by the police agents as Raúl José Díaz Peña]." Attached to the original petition received at the IACHR on October 12, 2005.

10. The petitioner indicates that Raúl José Díaz Peña was summonsed on numerous occasions to declare about the attacks of February 25, 2003, and that he appeared each time.[FN12] She notes that on January 15, 2004, the Office of the 62nd Prosecutor for the Metropolitan Area of Caracas sought an arrest warrant for Mr. Díaz Peña for allegedly committing the crimes of conspiracy (agavillamiento), public intimidation against the conservation of public and private interests, damage to public property, and moderate lesions.[FN13] She alleges that on January 22, 2004, the Eleventh Court of First Instance (for Review) of the Judicial District for the Metropolitan Area of Caracas ordered that Mr. Díaz Peña be detained.[FN14]

[FN12] The petitioner notes that Raúl José Díaz Peña was summonsed on September 11, 2003, to DISIP headquarters; on September 12, 2003, to CICPC headquarters; on September 15, 2003, to CICPC headquarters; and on December 4, 2003, to the Directorate for Investigations into Terrorism (Dirección de Investigaciones contra el Terrorismo). Original petition received at the IACHR on October 12, 2005.

[FN13] The petitioner cites Official Note FMP-62-0038-04 of the Office of the 62nd Prosecutor for the Metropolitan Area of Caracas, January 15, 2004. Attached to the original petition received at the IACHR on October 12, 2005.

[FN14] The petitioner cites the 11th Court of First Instance (for Review) of the Judicial District for the Metropolitan Area of Caracas, January 22, 2004. Attached to the original petition received at the IACHR October 12, 2005.

11. As for the alleged illegal detention of Raúl José Díaz Peña, the petitioner notes that the Office of the 62nd Prosecutor sent a summons to Mr. Díaz Peña for him to come forward with his attorney to declare on February 25, 2004. She alleges that on February 25, 2004, the alleged victim appeared at the Office of the Prosecutor and at that moment the prosecutor notified him of the charges and the arrest warrant for him, and proceeded to detain him and take him to the DISIP jail at El Helicoide.[FN15] She alleges that contrary to the provisions of Article 117 of the Organic Code of Criminal Procedure (COPP), Mr. Díaz Peña was not read his rights nor shown

the warrant for his arrest.[FN16] The petitioner notes that on February 26, 2004, a hearing for presentation of the detainee was held at the Eleventh Court of Control[FN17] and that on February 27, 2004, the same court ordered the preventive judicial deprivation of liberty of Mr. Díaz Peña based on the existence of sufficient elements for showing the commission, in the degree of complicity, of the crimes for which he was arrested.[FN18]

[FN15] In the amparo action filed August 14, 2006, Raúl José Díaz Peña's defense noted: "... once my client accompanied by his father left the Office of the Prosecutor to take the metro, they were intercepted by the officers [of the DISIP], who, without showing him the arrest warrant, proceeded to detain my client, and some of his belongings were given to his father; nonetheless, in the act of arrest these officers note for the record that they went by the building housing the Office of the Prosecutor and perceived that there was a subject with a suspicious attitude who they asked to show his identification, and when checked on the radio this individual (Raúl Díaz Peña) appears as wanted, and he was detained and taken to the DISIP." Attached to the petitioner's brief received at the IACtHR on August 28, 2006.

[FN16] The petitioner cites Article 117 of the Organic Code of Criminal Procedure, Gaceta Oficial No. 5,558 of November 14, 2001: "Rules for police action. The investigative authorities of the police should detain the accused in the cases that this Code orders, with the following principles for action...6th. Inform the detainee of his or her rights; 7th. Communicate to the relatives or other persons related to the accused the establishment where he or she is detained; 8th. Set the place, day, and time of the detention in an inalterable document."

[FN17] The petitioner cites the Order of Hearing for Presentation of the Accused. Case No. CO-11-2565-03, 11th Court of First Instance (for Review) of the Judicial District for the Metropolitan Area of Caracas, February 26, 2004. Attached to the original petition received at the IACtHR October 12, 2005.

[FN18] The petitioner makes reference to the crimes of conspiracy (agavillamiento), public intimidation, crimes against the conservation of public and private interests, damage to public property, and moderate lesions (Article 287 in relation to Articles 84(1), 297, 344, 347, 355 475, 476, and 418 of the Criminal Code of the Bolivarian Republic of Venezuela). She also cites the Judicial Order Preventive Deprivation of Liberty, Case No. CO-11-2565-03, 11th Court of First Instance (for Review) of the Judicial District for the Metropolitan Area of Caracas, February 27, 2004. Attached to the original petition received at the IACtHR October 12, 2005.

12. The petitioner alleges that on April 6, 2004, the representative of the Public Ministry lodged an accusation against the alleged victim, and that on April 22, 2004, Raúl José Díaz Peña's defense filed a motion for nullity due to failure to abide by the forms and conditions established in the law and also asked that the expert examination offered by the Public Ministry be annulled and requested that the detention be revoked.[FN19] She alleges that in June 2004 a constitutional amparo action was filed before the Eleventh Court, which was rejected by the judge in charge. The petitioner argues that on June 15, 2004, the preliminary hearing was held in which the Eleventh Court admitted in full the accusation brought against Mr. Díaz Peña, embraced the legal characterization of the facts offered by the Office of the Prosecutor, determined that an oral and public trial should begin, and considered it proper to keep the order of deprivation of liberty in place.[FN20]

[FN19] The petitioner cites the brief submitted to the 11th Court of First Instance (for Review) of the Judicial Circuit for the Metropolitan Area of Caracas, April 22, 2004. Attached to the original petition received at the IACRH October 12, 2005.

[FN20] The petitioner cites the Record of Preliminary Hearing, 11th Court of First Instance (for Review) of the Judicial Circuit for the Metropolitan Area of Caracas, June 15, 2004, Accused: Raúl José Díaz Peña and Silvio Daniel Mérida Ortiz. Attached to the original petition received at the IACRH October 12, 2005.

13. As for the prolonged preventive detention of Raúl José Díaz Peña, the petitioner notes that on September 7, 2004, it was asked that the measure of preventive detention be reviewed[FN21]; the negative response was handed down on September 15, 2004, by the 28th Court considering the existence of well-founded indicia of the participation of the alleged victim in the attacks and the presumption of flight provided for in Article 251 of the COPP[FN22] since, if the accused were proven guilty, the sentence to be imposed could exceed 10 years.[FN23] She alleged that throughout the proceeding numerous motions for review and for replacement of the detention measure have been filed which have been denied based on the presumption of flight.[FN24]

[FN21] The petitioner makes reference to Article 264 of the Organic Code of Criminal Procedure, Gaceta Oficial No. 5,558 of November 14, 2001: “Examination and review. The accused may request reconsideration or replacement of the judicial measure of preventive deprivation of liberty as many times as he or she sees fit. In any event the Judge must examine the need to maintain the precautionary measures every three months, and when he or she deems it appropriate he or she shall replace them by other that are less cumbersome. The refusal of the court to reconsider or replace the measure shall not be subject to appeal.”

[FN22] The petitioner makes reference to Article 251 of the Organic Code of Criminal Procedure, Gaceta Oficial No. 5,558 of November 14, 2001: “... First Paragraph: Danger of flight is presumed in cases involving acts punishable by deprivation of liberty of at least 10 years. In such a situation, the prosecutor of the Public Ministry, so long as the circumstances in Article 250 are met, shall request the Measure of Preventive Judicial Deprivation of Liberty. In any case, the judge may, depending on the circumstances, of which he or she shall give a reasoned explanation, reject the prosecutor’s petition, and impose on the accused a replacement precautionary measure. The decision handed down may be appealed by the prosecutor or the victim, whether or not the victim has filed a complaint, within five days of its publication.”

[FN23] The petitioner cites the 28th Court of First Instance (for Review) of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, resolution of September 20, 2004. Attached to the original petition received at the IACRH October 12, 2005.

[FN24] The petitioner cites the 28th Court of First Instance (for Review) of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, resolution of December 20, 2004. 22nd Court of First Instance of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, resolution of July 8, 2005. Attached to the original petition received at the IACRH October 12, 2005. She also cites the Fourth Court of First Instance for Criminal Matters (for Review) of the Criminal

Judicial Circuit for the Metropolitan Area of Caracas, resolution of April 23, 2007. Attached to the petitioner's brief received at the Commission on May 7, 2007.

14. The petitioner alleges that on March 24, 2006, as two years had elapsed from the time the alleged victim was detained, a motion for review of the measure of detention was filed, pursuant to Article 244 of the COPP[FN25], and that on March 29, 2006, the 23rd Court denied the review of the detention measure.[FN26] She noted that a motion of appeal of that decision was filed, which was rejected on June 19, 2006, by the First Specialized Subsidiary Chamber of the Court of Appeals, and, in its place, the decision of the 23rd Judge was affirmed.[FN27] She notes that among the bases for the rejection, the judge reported that "while it is true that more than two years have elapsed ... the Constitutional Chamber of the Supreme Court of Justice handed down a decision ... which reliably establishes that all those crimes against humanity, punishable violations of human rights, and war crimes are excluded from benefits such as substitute precautionary measures, in the event that the judge considers that there is a foundation for the deprivation of liberty of the accused." [FN28] She also alleges that the judge, in applying the presumption of flight in Article 251 of the COPP, indicated that "... the Public Ministry, based on its investigations, was able to verify that citizen Raúl José Díaz Peña participated in planning the [attack against the Consulate of Colombia and the Embassy of Spain]", which constitutes an act of terrorism.[FN29] The petitioner alleges that the reasoning used by the judge violates the principle of the presumption of innocence. She also notes that a motion for reconsideration was filed against that decision, and denied on June 30, 2006.

[FN25] The petitioner makes reference to Article 244 of the Organic Code of Criminal Procedure, Gaceta Oficial No. 5,558 of November 14, 2001: "Proportionality. No personal measure of coercion may be ordered when it is disproportionate in relation to the seriousness of the crime, the circumstances in which it was committed, and the likely sanction. In no case may the minimum penalty provided for each crime be exceeded, nor may it be greater than two years. On an exceptional basis, the Public Ministry or complainant may ask the judge overseeing the matter on review for an extension, which may not exceed the minimum penalty provided for the crime...."

[FN26] The petitioner cites the 23rd Court of First Instance (on Review) of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, Pronouncement on the Motion to Review the Replacement Precautionary Measure, March 29, 2006, which determined that "it is apparent that the procedural delay is not imputable to this court and it is also apparent that the two-year period, for granting a less cumbersome measure, has not elapsed." Attached to the petitioner's brief of June 13, 2006.

[FN27] The petitioner cites the First Specialized Subsidiary Chamber of the Court of Appeals of the Criminal Judicial Circuit for the Metropolitan Area of Caracas for hearing Cases of Terrorism-related Crimes, Judge writing for the Court Maikel José Moreno, Resolution of Motion of Appeal, June 19, 2006. Attached to the petitioner's brief of June 13, 2006. The petitioner submitted press information that notes the existence of complaints for corruption against Judge Maikel Moreno and his alleged ties to the so-called "Gang of Dwarfs" ("Banda Los Enanos"). Attached to the petitioner's brief of June 13, 2006.

[FN28] The petitioner cites the First Specialized Subsidiary Chamber of the Court of Appeals of the Criminal Judicial Circuit for the Metropolitan Area of Caracas to hear Cases of Terrorism-related Crimes, writing for the Court Judge Maikel José Moreno, Resolution of Motion of Appeal, June 19, 2006. Attached to the petitioner's brief of June 13, 2006.

[FN29] The petitioner cites the First Specialized Subsidiary Chamber of the Court of Appeals of the Criminal Judicial Circuit for the Metropolitan Area of Caracas to hear Cases of Terrorism-related Crimes writing for the Court Judge Maikel José Moreno, Resolution of Motion of Appeal. June 19, 2006. Attached to the petitioner's brief of June 13, 2006.

15. The petitioner argues that on August 14, 2006, a constitutional amparo action was filed on the grounds that the determination that the appeal of the refusal to review the order to deprive Raúl José Díaz Peña of liberty was inadmissible, handed down by the 23rd Court of First Instance on March 29, 2006, violates the rights to personal liberty, due process, presumption of innocence, and re-establishment of the legal situation harmed by judicial error provided for by the Constitution of the Bolivarian Republic of Venezuela.[FN30] She notes that the amparo action alleged, among other grounds, the existence of a procedural delay not attributable to Mr. Díaz Peña, the conditions in which his deprivation of liberty was carried out, the lack of sufficient evidence against him, his remaining in preventive detention for a period longer than that established by law, and the constant violation of his right to the presumption of innocence.[FN31]

[FN30] Articles 44, 49(1), (2), (3), (4), and (8), and 257.

[FN31] The petitioner notes that the amparo action was filed before the Supreme Court of Justice and that on December 19, 2006, the Constitutional Chamber of the Supreme Court of Justice declared that it lacked jurisdiction to hear the constitutional amparo action, and it referred the matter to the corresponding Courts of Appeals. It notes that on February 8, 2007, two members of the Special Chamber of the Court of Appeals of the Criminal Judicial District for the Metropolitan Area of Caracas recused themselves, which is why a Subsidiary Chamber was constituted. Constitutional Chamber of the Supreme Court of Justice, writing for the Court Judge Marcos Túlio Dugarte Padrón, Case No. 06-1245, December 19, 2006. Attached to petitioner's brief of January 23, 2007.

16. The petitioner argues that on February 26, 2007, the First Specialized Subsidiary Chamber of the Court of Appeals of the Criminal Judicial Circuit for the Metropolitan Area of Caracas declared itself to have jurisdiction to hear the amparo action and declared it inadmissible based on Article 6(5) of the Organic Law of Amparo over Constitutional Rights and Guarantees, that is, since the moving party opted to exercise the regular means of challenge enshrined in the legal order, without fully meeting the legal conditions for the amparo action to prevail[FN32] since Mr. Díaz Peña's defense opted to file a motion to appeal the decision that denied any review of the preventive measure. Moreover, she noted that according to Article 264 of the COPP, the review of the measure ordering deprivation of liberty can be requested as many times as necessary and its refusal does not constitute a violation of a constitutional right or guarantee.[FN33]

[FN32] The petitioner cites the First Specialized Subsidiary Chamber of the Court of Appeals of the Criminal Judicial Circuit for the Metropolitan Area of Caracas with Jurisdiction to Hear Terrorism-related Cases, in Constitutional Jurisdiction, Case No. S7-3119-07, February 26, 2007. Petitioner's brief received at the IACtHR March 28, 2007.

[FN33] The petitioner cites the First Specialized Subsidiary Chamber of the Court of Appeals of the Criminal Judicial Circuit for the Metropolitan Area of Caracas with Jurisdiction to Hear Terrorism-related Cases, Case No. S7-3119-07, February 26, 2007. Petitioner's brief received at the IACtHR March 28, 2007.

17. The petitioner notes that the declaration of inadmissibility was appealed on March 2, 2007[FN34], and that on May 11, 2007, the Constitutional Chamber of the Supreme Court of Justice rejected the appeal and affirmed the decision of the First Specialized Subsidiary Chamber of the Court of Appeals.[FN35] She alleges that with this decision all domestic remedies available to secure the liberty of Mr. Díaz Peña pursuant to Article 244 of the COPP were exhausted. She notes that in tandem, on April 17, 2007, more than three years after the detention of Raúl José Díaz Peña, the Fourth Court of First Instance was asked once again to review the deprivation of liberty, and that motion was rejected on April 23, 2007, considering that the circumstances due to which the measure was initially decreed have not changed, and that the circumstances for presuming danger of flight are still present, since the sentence that could be imposed on Mr. Díaz Peña is “considerable.”[FN36]

[FN34] The petitioner makes reference to the appeal brief directed to the Judges of the Constitutional Chamber of the Supreme Court of Justice, March 2, 2007. Attached to the petitioner's brief of May 7, 2007.

[FN35] The petitioner cites the Constitutional Chamber of the Supreme Court of Justice, writing for the Court Judge Arcadio Delgado Rosales, Case No. 07-0376, May 11, 2007, which indicated, among the grounds of inadmissibility, that “the injured person has opted to take recourse to the regular courts or made use of pre-existing judicial means [and] that the moving party pursued the regular remedies provided for in the law against the deprivation of liberty for more than two years without having been tried.” Attached to the petitioner's brief received at the IACtHR May 16, 2007.

[FN36] The petitioner cites the Fourth Court of First Instance for Criminal Matters (for Trial) of the Criminal Judicial Circuit of the Judicial District for the Metropolitan Area of Caracas, April 23, 2007. Attached to the petitioner's brief of May 7, 2007.

18. By virtue of the foregoing, the petitioner alleges that the State is responsible for violating the right to personal liberty protected at Article 7 of the American Convention insofar as at the time of his arrest Mr. Díaz Peña was not shown the arrest warrant nor was he informed of his rights, as per Article 117 of the COPP. She alleges that the detention was with the words “I'm sorry but you have to come with me” and that afterwards the officer who detained him wrote false information in the document with respect to the moment and place of detention. She further

alleges that the trial of Raúl José Díaz Peña began more than three years after his arrest, and his conviction was handed down more than four years later, in violation of Article 244 of the COPP, which establishes a limit of two years for the precautionary deprivation of liberty. The petitioner notes that all the remedies pursued on behalf of Raúl José Díaz Peña, such as the review of the deprivation of liberty, the replacement of the deprivation of liberty, the motion to annul, and the amparo action, have been dismissed by the authorities.

19. She further alleges that the label of “terrorist” that the State has used to refer to Mr. Díaz Peña has denigrated his good name in the eyes of public opinion, which the petitioner considers to violate the right to humane treatment protected at Article 5 of the American Convention.[FN37] She also notes that the alleged victim’s exposure to public mockery, calling him “golpista, fascista y terrorista” (coup-monger, fascist, and terrorist) and the fact that these events are part of the new textbooks of the Venezuelan educational system, constitute a violation of his right to privacy, set forth at Article 11 of the American Convention.[FN38]

[FN37] The petitioner also argues that as of the date of the facts, there was no law in force in the country defining terrorist acts.

[FN38] The petitioner makes reference, among others, to the book Venemérides, which describes the events related to the “terrorist attacks recently perpetrated at the diplomatic legations of Colombia and Spain.” Original petition received at the IACRH October 12, 2005.

20. As for the delay in the criminal procedure, the petitioner alleges that it has been put off on numerous occasions by the recusal, rotation, or removal of the judges in charge. She notes that the trial should have begun 90 days after the hearing of July 15, 2004, yet due to the failure to appoint the lay judges[FN39] the defense counsel requested a one-person trial, and the case was assigned to the 28th Court of First Instance. The petitioner notes that this situation was repeated on several occasions and in different courts.[FN40] The petitioner argues that afterwards the judge in charge at the 28th Court disqualified herself from hearing the matter since it had come before her at the 11th Court.[FN41]

[FN39] The petitioner notes that in November 2004 the last notice was made for appointing lay judges. Original petition received at the IACRH October 12, 2005.

[FN40] The petitioner also notes that some of the courts that heard the case designated and vetted the lay judges, and trial dates were set, yet subsequently the judges recused themselves, which made it necessary to repeat the procedure.

[FN41] The petitioner notes that the judges’ recusal was formally approved on May 16, 2005.

21. The petitioner notes that the case was assigned to the 22nd Trial Court. On November 3, 2005, the Judicial Commission of the Supreme Court of Justice removed the judge in charge of the proceeding, which, according to the petitioner, evidences the political nature of the case against the alleged victim. She argues that on November 2, 2005, the Oral and Public Trial was to be held, but that it wasn’t due to the unjustified failure to appear (for the fourth consecutive

time) of the representative of the Office of the Prosecutor. She alleges that also on November 2, 2005, the judge proceeded to prepare two resolutions, one calling on the Public Ministry to take disciplinary measures against the prosecutor in charge of the case[FN42] since the procedural delay caused by his failure to appear violated due process, and the other indicating that on November 7, 2005, Silvio Mérida Ortiz, tried along with Raúl Díaz Peña, completed two years in detention without judgment, which would require her to decree a less cumbersome precautionary measure than deprivation of liberty, according to Article 244 of the COPP.[FN43]

[FN42] The petitioner notes that the prosecutor in charge of the case was Gilberto Alfredo Landaeta Gordon, who was previously the 62nd Prosecutor for the Metropolitan Area of Caracas, and subsequently Eighth Prosecutor of the Public Ministry at the National Level with full jurisdiction.

[FN43] The petitioner makes reference to the press conference of Judge María Mercedes Prado on November 7, 2005, in which the removed judge noted that her questioning of the activity of the prosecutor in charge of the case provoked the swift intervention of the Office of the Inspector of Courts and of the Judicial Commission of the Supreme Court of Justice, and her subsequent removal. Video attached to the petitioner's brief of June 13, 2006. The petitioner also notes that the case of Judge María Mercedes Prado was noted in Chapter IV of the IACHR's 2005 Annual Report as one of the examples of the lack of guarantees vis-à-vis the removals, which are said to be reprisals for handing down decisions contrary to the Executive branch. IACHR. Annual Report 2005, Chapter IV: Venezuela, paras. 295 and 297, available at http://www.cidh.oas.org/annualrep/2005sp/cap.4d.htm#_ftnref26.

22. The petitioner alleges that after the removal, another judge from the same 22nd Trial Court took cognizance of the case. She alleges that on December 2, 2005, Silvio Mérida Ortiz declared that he was tortured for seven days and forced to testify against Raúl José Díaz Peña, who he said he had only seen in Plaza Altamira.[FN44] She also alleges that on three occasions, December 5, 2005, January 30, 2006, and March 3, 2006, the judge in charge sought to recuse herself and asked that she be taken off the case.[FN45] The petitioner notes that on March 7, 2006, the case was assigned to the 13th Court of First Instance (for Trial), whose judge proceeded to recuse herself on March 14, 2006. She argues that the case was assigned to the 23rd Court of First Instance (for Trial) and that the defense of General Felipe Rodríguez asked that the proceeding be joined; that motion was granted.

[FN44] The petitioner cites the 22nd Court of First Instance (for Trial) of the Judicial Circuit of the Metropolitan Area of Caracas, Case 347- 05, December 2, 2004. "I was forced to make a video inculpating persons, among them Raúl Díaz, who I know and I only saw him at Plaza Altamira ... yes, I was subjected to much torture." Attached to the petitioner's brief of June 13, 2006.

[FN45] The petitioner cites the 22nd Court of First Instance (for Trial) of the Judicial Circuit for the Metropolitan Area of Caracas, Act of recusal, December 5, 2005. Attached to petitioner's brief of June 13, 2006.

23. The petitioner notes that the defense of General Felipe Rodríguez sought the recusal of the judge of the 23rd Court, which was granted, and the case was assigned to the Fourth Court of First Instance (for Trial). She argues that on October 18, 2006, the Fourth Judge of First Instance (for Trial) sought to recuse herself from the case[FN46] as a result of which it was assigned to the 29th Court. Nonetheless, the Court of Appeals declared that the recusal was unfounded[FN47] and the case went back to the Fourth Court. Accordingly, the petitioner argues that dilatory practices have permeated the whole procedure.

[FN46] The petitioner cites the Fourth Court of First Instance (for Trial) of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, Act of recusal, October 18, 2006. Attached to the petitioner's brief received at the IACtHR November 22, 2006.

[FN47] The petitioner cites the Court of Appeals of the Criminal Judicial Circuit of the Judicial District for the Metropolitan Area of Caracas, Case No. 2146-2006 (CI) S-6, October 20, 2006. Attached to petitioner's brief received at the IACtHR November 22, 2006.

24. She alleges that on September 18, 2007, the Fourth Court of First Instance (for Trial) of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, constituted as a one-person court, began the oral phase of the trial. She alleges that on February 29, 2008, in the context of the trial, Silvio Mérida Ortiz gave testimony before the Fourth Court and stated that he had been the victim of torture and pressures by officers from the Office of the Prosecutor to get him to incriminate Raúl José Díaz Peña.[FN48] She notes that period of final conclusions was on April 28, 2008, and the verdict was read on April 29, 2008, and was formally published on June 17, 2008. She indicates that Raúl José Díaz Peña was convicted and sentenced to nine years and four months imprisonment, as he was found to be the perpetrator responsible for committing the crimes of conspiracy (agavillamiento), aggravated arson as facilitator, and concealment of explosive substances.[FN49] The petitioner alleges that the judge made a change in legal characterization at the moment of handing down the verdict, without giving notice to the accused, impeding him from preparing his defense as per Article 350 of the COPP. She argues that on July 23, 2008, the Eighth Court (for Enforcement) received the verdict from the Fourth Court, and proceeded to definitively compute the sentence on July 25, 2008.[FN50] She notes that the judge determined that the alleged victim could accede to the benefits established in the law to serve the sentence. She notes that the judge determined that the alleged victim could gain access to the benefits established in the law to enforce the sentence[FN51] but established as a requirement that the alleged victim be taken to a prison establishment. The petitioner considers that this condition is improper, since from the outset Raúl José Díaz Peña was held at the DISIP and should be able to accede to the benefits from that establishment.

[FN48] The petitioner cites the Fourth Court of First Instance (for Trial) of the Criminal Judicial Circuit for the Metropolitan Area of de Caracas, Act of Oral and Public Trial, Case No. 4J-397-06, Statement of the accused Silvio Mérida Ortiz. Attached to the petitioner's brief received at the IACtHR October 2, 2008. “[Danilo Anderson] threatened me ... and afterwards came Dr. Landaeta and he also threatened me not only with me but with my children, for me to make a

statement, change my version, and in fact they called by house by phone and threatened that if I didn't change the version they were going to kill my children ... they made strong threats against me, I had to yield, they made calls to my house threatening my children, they spent one year in hiding, I didn't see them for a year, and things happened in this way, I had to revoke my attorneys due to pressures ... I completely, roundly retract what I said, because I was subject to mistreatment and torture totally to intimidate and to inculpate persons who I didn't even know, others I did, and I am not aware of those persons having done anything...." "(1) Mérida when did you meet Félix. A: Known as such, at the Plaza Altamira, in other words I would see him at the Plaza Altamira once I arrived, I think I saw him in December, because of course I don't recall when he arrived, I always saw him, but not like any contact, I met him at the DISIP, and that his name was Raúl Díaz"

[FN49] The petitioner cites the Fourth Court of First Instance (for Trial) of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, Act of Oral and Public Trial, Case No. 4J-397-06, April 28 and 29, 2008. Attached to the petitioner's brief received at the IACRH October 2, 2008.

[FN50] The petitioner indicates that the Eighth Court noted, with respect to Raúl José Díaz Peña that "in consideration of the sentenced imposed on him (9 years and 4 months in prison) and the time of his preventive detention (4 years and 5 months), it is noted expressly that what remains of his sentence, after time served, is four (4) years and eleven (11) months, which will have been served on June 25, 2013." Court of First Instance of the Criminal Judicial Circuit of the Judicial District for the Metropolitan Area of Caracas, Eight Court (for Enforcement), Case No. 8-E-1755-08, July 25, 2008. Attached to the petitioner's brief received at the IACRH October 2, 2008.

[FN51] The petitioner notes that the judge determined that at the moment of calculating, he could request the benefits of working outside the prison and assignment to an open establishment established at Articles 65 and 66 of the Law on the Prison Regime, Gaceta Oficial No. 36,975 of June 19, 2000.

25. The petitioner argues that the alleged victim waived the right to appeal his conviction. She argues that the resolution of the appeal could have taken another one to two years, since a large percentage of the judges heard the matter at trial, and thus would recuse themselves from hearing the appeal or would be challenged. She argues that bringing or not bringing an appeal would not change Mr. Díaz Peña's status as a political prisoner, and that in any event his situation could worsen. She argues that as more than four years have elapsed since Mr. Díaz Peña's arrest, he would rather accede to any benefit or alternative measure to serve the sentence and not pursue a remedy which by all indications would be illusory.[FN52]

[FN52] Petitioner's brief received at the IACRH June 4, 2008.

26. The petitioner notes that the enforcement of the conviction has been held up by the motion for appeal filed by Felipe Rodríguez, since the Eighth Court (Enforcement) referred the entirety of the record to the Court of Appeals. She alleges that Raúl José Díaz Peña appeared with his defense counsel before Chamber One of the Court of Appeals and asked that a certified copy of the record be forwarded to the Eighth Court, so that it might proceed to enforce it, which

was found improper on October 21, 2008, as the judgment is not final, since an appeal had been filed.[FN53] The petitioner argues that while the judgment is not firm with respect to Felipe Rodríguez, it is with respect to Raúl José Díaz Peña, since he has waived any appeal.

[FN53] The petitioner cites the First Chamber of the Court of Appeals of the Criminal Judicial Circuit for the Caracas Area, Resolution of October 21, 2008. Attached to the petitioner's brief received at the IACtHR December 3, 2008.

27. Therefore, the petitioner argues that the State is responsible for violating the rights to a fair trial and judicial protection enshrined at Articles 8 and 25 of the American Convention insofar as the testimony of the persons who incriminated the alleged victim was obtained under torture; and insofar as the prosecutors and judges in charge of the process took several measures that entailed delay, casting doubt on their impartiality. The petitioner argues that the case was before at least 50 judges in four years, since they were removed or recused themselves from hearing the case because of its political connotations. In addition, the petitioner alleges that the State is responsible for violating the right to assembly, protected at Article 15 of the American Convention, to the detriment of Raúl José Díaz Peña, since his merely being present at Plaza Altamira and sympathizing with the dissident activists was criminalized as conspiracy (agavillamiento) for there is no evidence that the alleged victim had gone to Plaza Altamira to assemble for illegal purposes. She also argues that the State is responsible for violating the right to equal protection, protected at Article 24 of the American Convention insofar as the investigation into and trial of Raúl José Díaz Peña included numerous irregularities and procedural flaws.

28. The petitioner also alleged that the State is responsible for the detention of Mr. Díaz Peña at the DISIP in El Helicoide in inhumane conditions. She notes that his cell has no natural ventilation or inlets for air, the lighting is with artificial white light, the place is quite hot and humid, as a result of which fans are kept on 24 hours a day. She alleges that Mr. Díaz Peña is not allowed to go outside at all, or to receive any natural light, and that in the wake of his detention he has begun to experience health problems such as loss of weight, loss of pigmentation, pains in his bones, respiratory infections, continuous colds, acute meningitis, continuous hemorrhoids, anal fissures, and grave middle ear infection, which has caused him to lose almost all of his hearing in the left ear. He indicated that these health problems have been verified by the forensic physician of the DISIP, who ordered medication and an in-depth study at a health center that has adequate medical equipment. The petitioner also argues that on June 24, 2004, Raúl José Díaz Peña was confined for 24 hours in a punishment cell two-and-a-half meters by three meters, without light, windows, or bathroom, called the "little tiger" ("el tigrito") at the DISIP.[FN54]

[FN54] The petitioner alleges that the motive for the confinement was having sent a letter to a radio station, which was read live by a journalist.

29. The petitioner argues that while there has been an improvement in the conditions of detention of Raúl José Díaz Peña, since the Commission decreed precautionary measures on his behalf, his health has continued to deteriorate. He argues that in addition to the medical problems that have been reported from the outset of the detention, the alleged victim is in need of surgery to extract a perianal abscess that causes him pain, fever, constipation, and rectal bleeding, and for which he requires hospitalization and post-operative recovery period in salubrious conditions. She further notes that the alleged victim has lost his hearing, and that the specialist told him that until he undergoes surgery he will not have access to the therapy he needs to improve his condition.

30. Accordingly, the petitioner argues that the State is responsible for the violation of the right to life protected at Article 4 of the American Convention by reason of the grave health situation of the alleged victim and the State's negligence in failing to provide adequate medical services, posing a risk to the life of Raúl José Díaz Peña. In addition, the petitioner argues that the State is responsible for violating the right to humane treatment protected at Article 5 of the American Convention to the detriment of Raúl José Díaz Peña based on the conditions of his detention at the DISIP and the health problems that he has suffered as a result. The petitioner argues that his health is deteriorating and that the State has ignored the precautionary measures issued by the Commission and the repeated requests for a transfer so as to perform the medical check-ups and surgery that he needs.

31. In summary, the petitioner argues that the State is responsible for the violation of the rights to life and humane treatment, personal liberty, fair trial, privacy, the right of assembly, the right to equal protection, and the right to judicial protection protected at Articles 4, 5, 7, 8, 11, 15, 24, and 25 of the American Convention in relation to the duty to ensure the rights, provided for at Article 1(1) of the Convention, to the detriment of Raúl José Díaz Peña.

32. With respect to the State's allegation regarding the failure to exhaust domestic remedies (see infra B), the petitioner indicates that the conviction was handed down on April 29, 2008, and Raúl José Díaz Peña expressly waived the appeal, as he considered it an illusory remedy, wanted to be able to quickly accede to the benefits of serving the sentence, which in practice has not occurred. In addition, she alleges that as the alleged victim has been detained for more than two years, an application was filed to review the deprivation of liberty, in keeping with Article 244 of the COPP, which was denied. She argues that this decision was appealed, yet the appeal was found inadmissible, in response to which a motion for reconsideration was filed, which was also denied. She notes that an amparo action was brought in response to those decisions, which was declared inadmissible in the first instance, and subsequently on appeal on May 11, 2007. She adds that the resolution of May 11, 2007, which declared the amparo inadmissible on appeal, exhausted domestic remedies.

B. The State's position

33. In response to the petitioner's claim, the State alleged, with respect to the conditions of detention, that Raúl José Díaz Peña is being held at the Coordination Unit for Investigations in the Sub-Process for Control of Apprehended Persons (Coordinación de Investigaciones en el Sub-Proceso de Control de Aprehendido), cell No. 6, corridor B. It alleges that the cell in which

he is held is 2.65 meters long, 2.36 meters wide, and 2.87 meters high, with good light and a bathroom at the end of the hallway. It adds that the cells have a ventilation system through stand-up fans and air extractors in the hallways. It noted that in terms of recreation, there is an area set aside as a gym with exercise machines that can be used during free time from 8 a.m. until 9 p.m.

34. The State notes that the DISIP allows daily activities in the open air, and that Mr. Díaz Peña goes out for sun once a week, according to the stipulated schedule. It indicated that the DISIP has a permanent area for verbal communication and another area for carrying out educational activities in which English and grammar classes are given by prisoners who have a "high degree of personal level" ("alto grado de nivel personal"). It also noted that the DISIP has a general dining room in which three meals are served, breakfast, lunch, and dinner.[FN55] It further states that the prisoners have available to them some electrical appliances that they use to attend to their daily needs.[FN56] As for the regime of visits, the State indicated that there are pre-established days for them, these being Thursday from 11 a.m. to 2 p.m. and Sunday from 11 a.m. to 5 p.m., and that they take place in an area set aside and organized for that purpose.

[FN55] The State notes that the meals given to the inmates are the same served to the staff of the DISIP every day. Note AGEV/000600 of the Ministry of People's Power for Foreign Relations of the Bolivarian Republic of Venezuela, May 3, 2007.

[FN56] The State indicates that, among other things, freezers, microwave ovens, toasters, and electric ranges are available. Note AGEV/000600 from the Ministry of People's Power for Foreign Relations of the Bolivarian Republic of Venezuela, May 3, 2007.

35. As for the alleged victim's health situation, the State argued that on June 16, 2006, the Public Ministry commissioned the Office of the 82nd Prosecutor to go to the DISIP, together with the physician assigned to the Forensic Medicine Service (Servicio de Medicatura Forense) of the CICPC in order to perform a forensic medical examination, which was done. It also alleges that the place where he is held was inspected, a record of which was set forth in the document prepared to that end. The State indicated that the DISIP has a Health Coordination Unit, which offers general medical care 24 hours a day in the event of any health incident or emergency that any inmate may suffer. It noted that on August 16, 2006, the alleged victim was taken, after a hearing before the Fourth Court of First Instance for Trial of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, to the otorhinolaryngology medical group, where he was treated by a specialist physician, who cleaned out his left ear as it was stuffed. It also alleged that at a consultation on September 15, 2006, the specialist cleaned his right ear and indicated that a retraction was found that causes infections.

36. The State indicated that on November 28, 2006, Mr. Díaz Peña was taken once again to the otorhinolaryngology medical group for a medical evaluation and cleaning of the left ear. It alleges that on February 14, 2007, the Office of the 82nd Prosecutor forwarded an official note to the chief of forensic medicine of the CICPC, asking that a new medical forensic examination be performed and that, as a result, on March 30, 2007, Raúl José Díaz Peña was evaluated by two physicians and an otorhinolaryngology team, as he had problems in the ear, and it was noted that Mr. Díaz Peña is undergoing treatment for hemorrhoids and is in good health. It notes that at that

moment a commission from the Public Ministry performed an inspection of the alleged victim's cell and that no change was reported.[FN57] Finally, it alleged that on April 20, 2007, the alleged victim was evaluated by another physician, assigned to the Health Coordination unit of the DISIP, whose report concluded that he is in good health.

[FN57] The State notes that throughout 2006 several visits were made by non-governmental organizations to the DISIP, for example the International Committee of the Red Cross (June 20 and 21, 2006), Archbishop of Caracas (September 11, 2006), and the Programa Venezolano de Educación-Acción en Derechos Humanos (PROVEA). Note AGEV/000600 from the Ministry of People's Power for Foreign Relations of the Bolivarian Republic of Venezuela, May 3, 2007.

37. The State argues that at all times it has taken the actions necessary to protect and guarantee the human rights of Raúl José Díaz Peña and that it has carried out all the actions to implement the precautionary measures issued by the Commission in 2005. It notes that to determine whether there has been unwarranted delay, one must consider the conduct of the parties, and that in this case the process has been carried out in keeping with the regular procedure. In its brief the State recounts the procedural actions and notes that as the delay is not attributable to the State, procedural delay cannot be argued.[FN58]

[FN58] The State notes that the state authorities are aware that they must carry out the procedural acts with the greatest possible celerity in order to give effect to the Constitution and statute law.

38. As for the petitioner's allegations regarding the alleged illegal detention of Mr. Díaz Peña, the State indicates that on January 19, 2004, the Public Ministry requested an arrest warrant from the 11th Court of First Instance (for Review) of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, which was issued by that court, and by virtue of which the arrest was carried out. It therefore argues that Mr. Díaz Peña was lawfully detained.

39. The State indicates that it rejects all that is set forth in the petition submitted to the Commission, that the instant case does not meet the admissibility requirements, since the proceeding against Mr. Díaz Peña is before the competent entities, and that in the course of the proceeding his human rights have been guaranteed at all times. Finally, it argues that the petitioner has not exhausted domestic remedies in keeping with Article 31 of the Commission's Rules of Procedure, and that therefore the claim of the alleged violation of the American Convention is inadmissible.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence

1. Competence of the Commission *ratione personae*, *ratione loci*, *ratione temporis*, and *ratione materiae*

40. The petitioners are authorized by Article 44 of the Convention to submit complaints on behalf of the alleged victims. The Venezuelan State ratified the American Convention on August 9, 1977. Accordingly, the Commission is competent ratione personae to examine the petition. In addition, the Commission is competent ratione temporis insofar as the American Convention was already in force for the State as of the date on which the facts alleged in the petition are said to have occurred.

41. The Commission is competent ratione loci insofar as the violations alleged are said to have occurred in the territory of a state party to that treaty. Finally, the Commission is competent ratione materiae, because the petition alleged violations of human rights protected by the American Convention.

B. Admissibility Requirements

1. Exhaustion of domestic remedies

42. Article 46(1)(a) of the American Convention requires the prior exhaustion of domestic remedies, in keeping with generally recognized principles of international law, as a requirement for admitting claims alleging violations of the rights protected. The purpose of this requirement is to enable the national authorities to take cognizance of the alleged violation of a right protected and, if appropriate, to resolve it before it is heard by an international body.

43. The Commission observes that this case refers to alleged violations of the American Convention as a result of the alleged prolonged preventive detention to which Raúl José Díaz Peña was subjected, the alleged irregularities in the criminal proceeding against him, as well as the deterioration of his health, allegedly because of the conditions of detention and negligence in the supply of adequate and timely medical care.

44. The State alleges failure to exhaust domestic remedies. Specifically, the State indicated that the petition refers to a proceeding pending before the competent entities, in the context of which existing remedies have not been pursued.

45. The Commission has stated earlier that to comply with the prior exhaustion requirement, petitioners have to exhaust suitable remedies, i.e. remedies that are available and effective for remedying the situation alleged. In the instant case, as regards the petitioner's allegations regarding the unlawful deprivation of liberty and prolonged preventive detention of Mr. Díaz Peña and the alleged violation of his right to the presumption of innocence, it appears from the record that on March 24, 2006, two years after the alleged victim's detention, a motion for review of the detention measure was filed as per Article 244 of the COPP, and that on March 29, 2006, the 23rd Court denied the review of the deprivation of liberty. Subsequently, a motion appealing that decision was filed, which was found inadmissible on June 19, 2006, by the First Specialized Subsidiary Chamber of the Court of Appeals, and, instead, the decision of the 23rd Judge was affirmed.[FN59] The judge found the remedy inadmissible, among other grounds, applying the presumption of flight provided for in Article 251 of the COPP.[FN60] It appears from the record that a motion for reconsideration was brought against that decision, which was denied on June 30, 2006.

[FN59] The petitioner cites the First Specialized Subsidiary Chamber of the Court of Appeals of the Criminal Judicial Circuit for the Metropolitan Area of Caracas to hear Cases of Terrorism-related Crimes, writing for the Court Judge Maikel José Moreno, Resolution of the Motion of Appeal, June 19, 2006. Attached to the petitioner's brief of June 13, 2006.

[FN60] The petitioner cites the First Specialized Subsidiary Chamber of the Court of Appeals of the Criminal Judicial Circuit for the Metropolitan Area of Caracas to hear Cases of Terrorism-related Crimes, writing for the Court Judge Maikel José Moreno, Resolution of Motion of Appeal, June 19, 2006. Attached to the petitioner's brief of June 13, 2006.

46. It appears from the record that on August 14, 2006, a constitutional amparo motion was brought before the Supreme Court of Justice on the grounds that the rejection of the motion to modify the deprivation of liberty of Raúl José Díaz Peña by the 23rd Court of First Instance, on March 29, 2006, was in violation of several constitutional provisions. It was argued that the deprivation of liberty was implemented illegally; that the basis of the declaration of inadmissibility violated the presumption of innocence in respect of Mr. Díaz Peña by expressly characterizing him as responsible for committing the attacks of February 25, 2003[FN61]; the procedural delays have not been imputable to Mr. Díaz Peña, as these were due to the recusals, rotations, and removal of judges; and that the prosecutors and judges in charge of the criminal proceeding and of the requests for review and substitution of the measure ordering deprivation of liberty were neither independent nor impartial.

[FN61] The finding of inadmissibility states in part: "... the Public Ministry, according to its investigations, was able to verify that citizen Raúl José Díaz Peña participated in the planning of the [attack against the Consulate of Colombia and the Embassy of Spain]," which constitutes an act of terrorism. First Specialized Subsidiary Chamber of the Court of Appeals of the Criminal Judicial Circuit for the Metropolitan Area of Caracas to hear cases of Terrorism-related Crimes, writing for the Court Judge Maikel José Moreno, Resolution of Motion to) Appeal, June 19, 2006. Attached to the petitioner's brief of June 13, 2006.

47. The amparo action was found inadmissible on February 26, 2007, by the First Specialized Subsidiary Chamber of the Court of Appeals of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, and its inadmissibility was affirmed in an appeal of May 11, 2007, by the Constitutional Chamber of the Supreme Court of Justice, which based its decision on the possibility of the defense of Mr. Díaz Peña being able to file, as in effect it did, a motion of appeal against the refusal to review the deprivation of liberty, thus on having opted to bring regular challenges provided for in the legal order, the amparo is inadmissible. From the record it appears that the decision in the amparo case, in the first instance and on appeal, failed to refer to the arguments in Mr. Díaz Peña's defense regarding the illegal deprivation of liberty, the illegality of the evidence collected, or and the existence of procedural delay not imputable to Mr. Díaz Peña.

48. As appears from the record, Raúl José Díaz Peña's defense filed at least seven motions for review of the preventive detention measure, as per Article 264 of the COPP, all of which were rejected. In addition, on April 22, 2004, Raúl José Díaz Peña's defense filed a motion for nullity, among others, for failure to comply with the forms and conditions established in the law, and to nullify the expert report offered by the Public Ministry, which was denied.

49. With respect to the conditions of detention, the Commission observes that from the record it appears that the defense of Mr. Díaz Peña has taken several initiatives before the prison authorities and before the judges with jurisdiction, to request medical care for the alleged victim and to seek his transfer to another prison, considering the health[FN62] of Raúl José Díaz Peña.

[FN62] The motions filed November 15, 2006, and June 8, 2007, are in the record.

50. The Commission considers, therefore, that the requirements of Article 46(1)(a) of the American Convention have been satisfied as regards the preventive detention and the conditions of detention with respect to the alleged violation of Articles 5, 7, 8, and 25.

51. As for the alleged irregularities of the criminal proceeding that was held against the alleged victim, it appears from the record that Raúl José Díaz Peña waived his right to appeal the conviction, formally published on June 17, 2008, as he considers that such an appeal would be illusory, and so as to not cause further delay in the criminal proceeding, and so as to thereby be able to opt for one of the benefits of serving the sentence. In that sense, the Commission observes that as regards the claim for violations of due process, in keeping with the right to judicial protection, the alleged victim was able to appeal the conviction, a remedy he decided to waive of his own will. Accordingly, the Commission considers that for these facts domestic remedies have not been exhausted, and that given the failure to meet the requirement, the exceptions provided for in Article 46(2) of the American Convention would not apply.

52. Article 46(1)(a), given its nature and purpose, is a provision whose content is autonomous vis-à-vis the substantive provisions of the Convention. Therefore, the determination on exhaustion of the domestic remedies applicable to the case in question should be made prior to and separate from the analysis of the merits, since it depends on a different standard of appreciation from that used to determine the possible violation of Article 8 of the American Convention. It should be noted that the causes and effects of the exhaustion of judicial remedies to which reference has been made will be analyzed in the report the Commission adopts on the merits, in order to determine whether there have been violations of the American Convention.

2. Time for submitting the petition

53. Article 46(1)(b) of the Convention establishes that for the petition to be declared admissible, it must have been submitted within six months of the date on which the interested person was notified of the final decision that exhausted domestic remedies. This rule does not apply when the Commission finds that one of the exceptions to the prior exhaustion requirement provided for in Article 46(2) of the Convention applies. In those cases, the Commission must

determine whether the petition was submitted in a reasonable time, as required by Article 32 of its Rules of Procedure.

54. When submitting the petition, the petitioner asked the Commission to apply the exceptions to the prior exhaustion requirement provided for at Article 46(2) of the Convention, considering the “legal situation of the alleged victim.” During the processing of the petition, the defense of Mr. Díaz Peña pursued several remedies including the amparo (see *supra* IV.B.1 Exhaustion of domestic remedies). Thus, in consideration of what is established in the previous section (see *supra* IV.B.1 Exhaustion of domestic remedies) the decision of the amparo remedy that exhausted domestic remedies was declared inadmissible on appeal on May 11, 2007, and considering that the petition was filed on October 12, 2005, the Commission considers that the petition was filed in timely fashion.

3. Duplication of procedure and international res judicata

55. It does not appear from the record that the subject matter of the petition is pending any other international procedure for settlement, or that it reproduces a petition already examined by this or any other international body. Therefore, the requirements established at Articles 46(1)(c) and 47(d) of the Convention are satisfied.

4. Characterization of the alleged facts

56. In view of the elements of fact and law raised by the parties, and the nature of the matter put before it, the IACtHR considers that the petitioner’s allegations concerning preventive detention and the alleged victim’s conditions of detention could constitute possible violations of the rights to humane treatment, personal liberty, fair trial, and judicial protection provided for at Articles 5, 7, 8, and 25 of the American Convention in relation to the general obligations established in Article 1(1) of the same treaty.

57. In addition, given the factual elements of this petition, and in application of the principle of *iura novit curia*, the Commission should establish the possible responsibility of the State for the alleged violation of its duty to adopt provisions of domestic law, established at Article 2 of the American Convention, in connection with the right to the presumption of innocence established at Article 8(2) of the American Convention. This is insofar as the decisions that denied the review of the deprivation of liberty, provided for at Article 264 of the COPP, were based on the presumption of flight established in Article 251 of the COPP, which holds that one presumes danger of flight “in cases punishable by prison sentences whose maximum term is at least 10 years.” In view of the foregoing, the Commission finds that in the instant case the petitioner’s allegations with regard to the presumption of flight could characterize a violation of the duty established in Article 2 in connection with Article 8(2) of the American Convention.

58. With respect to the arguments on the alleged violation of the rights to life, assembly, privacy, and equal protection, protected at Articles 4, 11, 15, and 24 of the American Convention, the petitioner’s arguments have not been duly substantiated in the petition, thus those claims cannot be found admissible.

V. CONCLUSIONS

59. The Commission concludes that it is competent to examine the claims presented by the petitioner regarding the alleged violation of Articles 5, 7, 8, and 25, in conjunction with Articles 1(1) and 2 of the American Convention, and that they are admissible as per the requirements established at Articles 46 and 47 of the American Convention.

60. Based on the foregoing arguments of fact and law, and without this constituting any preliminary judgment on the merits,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the petition under study admissible in relation to Articles 5, 7, 8, and 25 of the American Convention, in conjunction with Articles 1(1) and 2 of the same instrument.
2. To declare the petition inadmissible in relation to the arguments concerning the alleged violations of Articles 4, 11, 15, and 24 of the Convention.
3. To give notice of this decision to the Venezuelan State and the petitioner.
4. To begin to examine the case on the merits.
5. To publish this decision and include it in the Annual Report to be submitted to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on March 20, 2009. (Signed): Víctor E. Abramovich, First Vice-president; Felipe González, Second Vice-president; Sir Clare K. Roberts, Paulo Sérgio Pinheiro, Florentín Meléndez, and Paolo G. Carozza, members of the Commission.