

Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 97/09; Petition 84-07
Session: Hundred Thirty-Fifth Regular Session (3 – 8 August 2009)
Title/Style of Cause: Allan R. Brewer Carías v. Venezuela
Doc. Type: Decision
Decided by: Second Vice President: Felipe Gonzalez;
Commissioners: Sir Clare K. Roberts, Florentin Melendez, Paolo G. Carozza.
In accordance with the provisions of Article 17(2)(a) of the Rules of Procedure of the Commission, Commissioner Luz Patricia Mejia Guerrero, a Venezuelan national, did not take part in the debate or in the decision of the present case. Likewise, Commissioner Victor Abramovich recused himself from the debate and the decision in this case in accordance with the provisions of Article 17(2)(b) of the Rules of Procedure of the Commission.
Dated: 8 August 2009
Citation: Brewer Carías v. Venezuela, Petition 84-07, Inter-Am. C.H.R., Report No. 97/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009)
Represented by: APPLICANTS: Pedro Nikken, Helio Bicudo, Claudio Grossman, Juan Mendez, Douglas Cassel, and Hector Faundez
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I. SUMMARY

1. On January 24, 2007, the Inter-American Commission on Human Rights (hereinafter “the Commission”) received a petition submitted by Pedro Nikken, Hélio Bicudo, Claudio Grossman, Juan Méndez, Douglas Cassel, and Héctor Faúndez (hereinafter “the petitioners”) alleging that the courts of the Bolivarian Republic of Venezuela (hereinafter “the State”) are responsible for the political persecution of constitutional law expert Allan R. Brewer Carías in the context of a judicial proceeding against him for the crime of conspiracy to violently change the Constitution in the context of the events of April 11 to 13, 2002.

2. The petitioners alleged that the State is responsible for violating the rights to personal security, judicial guarantees, honor and dignity, freedom of expression, movement and residence, equal protection, and judicial protection, provided for at Articles 7, 8, 11, 13, 22, 24, and 25 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”), as well as breaching its duty to respect the rights enshrined in the Convention and to adopt provisions of domestic law in keeping with Articles 1(1) and 2 of the Convention. They also alleged that their claim is admissible by application of the exceptions to the rule of prior exhaustion of domestic remedies provided for at Article 46(2) of the American Convention. The State, for its part, alleged that Allan Brewer Carías is subjected to a criminal proceeding with all the guarantees of due process, that he is absent from the country and, therefore, the proceedings

could not move forward, and that the petition is inadmissible because the domestic remedies had not been exhausted.

3. After examining the allegations received, and pursuant to the requirements set forth at Articles 46 and 47 of the American Convention, the Commission decided to declare the claim admissible with respect to the alleged violation of Articles 2, 8, 13 and 25 of the American Convention, in connection with its article 1(1). In addition, it declared the claim inadmissible with respect to the alleged violation of Articles 7, 11, 22, and 24 of the American Convention and decided to give notice of the report to the parties and order its publication in its Annual Report to the General Assembly.

II. PROCESSING BEFORE THE COMMISSION

4. The petition was recorded under number P 87/07. After the preliminary analysis of the claims, on October 24, 2007, additional information was requested from the petitioners on the judicial remedies pursued and the procedural effects of the physical absence of the accused in Venezuela, among other issues. On November 19, 2007, the petitioners requested an extension, which was granted on November 27, 2007. By communication of December 27, 2007, the petitioners filed their response. By communications of February 25 and April 30, 2008, the petitioners submitted additional information.

5. Once the preliminary review of the petition was completed, the Commission decided to process it, and on June 17, 2008, a copy of the pertinent parts was sent to the State, which was given two months to submit observations in keeping with Article 30(2) of the Rules of Procedure. The period expired without the State submitting its observations.

6. On January 14, 2009, the petitioners asked the Commission to continue processing the case. On February 4, 2009, the Commission reiterated its request for observations to the State; it did not receive any response. On February 6, 2009, the petitioners filed a communication by which they questioned the reiteration of the request for observations from the State. On August 31, 2009, after the deadline originally set by the Commission had passed, the State submitted its response to the petition.

III. THE PARTIES' POSITIONS

A. The petitioners' position

1. Context

7. The petitioners allege that from December 2001 to April 2002 there was an intense social mobilization of protest against several policies of the Government of President Hugo Chávez Frías. They indicate that on April 11, 2002, the commanders of the Armed Forces stated their repudiation of the authority of the President of the Republic, and the next day General Lucas Rincón informed the population that "the President of the Republic was asked to resign from his position, which he accepted." [FN2]

[FN2] Albor Rodríguez (ed.), *Verdades, mentiras y Videos*. Lo más relevante de las interpelaciones en la Asamblea Nacional sobre los sucesos de abril, Libros El Nacional, Caracas (2002), pages 13 and 14, cited in original petition received January 24, 2007, page 9.

8. The petitioners allege that in the early morning hours of April 12, 2002, Pedro Carmona Estanga, one of the leaders of the civic protests, communicated with jurist Allan Brewer Carías[FN3] and sent a vehicle to pick him up at his residence. They indicate that Brewer Carías was taken to “Fort Tiuna,” headquarters of the Ministry of Defense and of the General Command of the Army. They indicate that he was received there by two lawyers[FN4] who showed him a draft decree, later known as the “Carmona Decree,” which ordered the dissolution of the constituted authorities and the establishment of a “government of democratic transition.”

[FN3] The petitioners note that Allan Brewer Carías is a jurist with well-known experience and expertise in constitutional law, the defense of democracy, the rule of law, and human rights who had voiced strong criticisms of a series of decisions adopted by Executive decrees in Venezuela. Original petition received January 24, 2007, paras. 13-20.

[FN4] In his statement to the Public Ministry, Allan Brewer Carías said: “They took me to a small cubicle where Mr. Carmona was; I greeted him and he asked me to analyze a document they had given him when he arrived there, to which end he put me in touch with two young lawyers by the names of Daniel Romero and José Gregorio Vásquez, who were the ones who showed me the document...” Cited in the formal indictment of Allan Brewer Carías of January 27, 2005, Annex 5 to the original petition received January 24, 2007.

9. They allege that at approximately noon Allan Brewer Carías went to the Miraflores Palace to personally tell Carmona Estanga that he rejected the document as it strayed from the Constitution and was in violation of the Inter-American Democratic Charter. They indicate that he finally had to do so by telephone. That same day Mr. Pedro Carmona Estanga announced the dissolution of the constituted authorities and the establishment of a “government of democratic transition,” among other measures. They indicate that the announcement of a “coup against the Constitution” provoked reactions that led to the reinstatement of Hugo Chávez as President of the Republic on April 13, 2002.

10. They note that afterwards the media speculated[FN5] as to the presence of Allan Brewer Carías during the early morning hours of April 12, 2002 at “Fort Tiuna” and identified him as the intellectual author or actual drafter of the so-called “Carmona Decree.”[FN6] They indicate that such speculation was publicly refuted by Allan Brewer Carías.[FN7]

[FN5] Edgar López, *Carta Interamericana Democrática fundamenta Gobierno de Transición*. In: *El Nacional*, April 13, 2002; Laura Weffer Cifuentes, *Cómo se fraguó la renuncia de Hugo Chávez*. In: *El Nacional*, April 13, 2002; Mariela León, *Primer Presidente Empresario*. In: *El Universal*, April 13, 2002; Patricia Poleo, *Factores de Poder*. In: *El Nuevo País*, April 16 and 17,

2002; Ricardo Peña, *Círculo íntimo*. In: *El Reporte*, April 18, 2002; Patricia Poleo, *Factores de poder*. In: *El Nuevo País*, April 25, 2002; Francisco Olivares, interview with Daniel Romero, *Los militares manejaron todas las decisiones políticas*. In: *El Universal*, April 26, 2002; Milagros Socorro, *Al país se le tendió una trampa*. In: *El Nacional*, April 27, 2002; Francisco Olivares, *Historia del segundo decreto*. In: *El Universal*, April 28, 2002; Nitu Pérez Osuna, *El video de Chávez retenido*. In: *El Mundo*, May 3, 2002; Television programs of Rafael Poleo and Patricia Poleo, *Dominio Público* (Venevisión), April 12, 2002; César Miguel Rondón interview with Teodoro Petkoff on *30 Minutos* (Televén), May 12, 2002; Domingo Blanco interview with Patricia Poleo on *Primera Página* (Globovisión), April 15, 2002; César Miguel Rondón interview with Patricia Poleo on *30 Minutos* (Televén), April 16, 2002; Luisiana Ríos and Carlos Omobono interview Patricia Poleo on *La Entrevista* (RCTV), April 16, 2002; Carlos Fernández interviews Tarek William Saab on *Triángulo* (Televén), May 10, 2002; Program *Voces de un país* of Luis García Figueroa (Globovisión), May 28, 2002. Formal indictment of Allan Brewer Carías of January 27, 2005. Annex 5 to the original petition received January 24, 2007.

[FN6] “At the headquarters of the Army Command, zone reserved for the Chairman of the Joint Chiefs of Staff, Pedro Carmona had been installed in a cubicle.... In the cubicle across from him was Allan Brewer Carías, drafting by hand what would become the Constitutive Act of the Transition Government.... Brewer Carías replied: ‘The resignation doesn’t matter. Lucas is about to announce it on television and that will be more than sufficient....’” Article from the daily newspaper *El Nuevo País*, April 16, 2002, by Patricia Poleo. *Factores de poder*, cited in the formal indictment of Allan Brewer Carías, January 27, 2005, Annex 5 to the original petition received January 24, 2007.

[FN7] The petitioners cited the following press reports: Allan Brewer Carías responde a las acusaciones: *No redacté el decreto de Carmona Estanga*, article by Ana Damelis Guzmán, *El Globo*, Caracas, April 17, 2002, p. 4. *El abogado desmiente haber redactado acta constitutiva de gobierno transitorio*; *Brewer Carías se desmarca de Pedro Carmona Estanga*, article by Feliz González Roa Notitarde, Valencia, April 17, 2002 p.13. *Brewer Carías: no sé quién redactó el decreto Carmona*, article by Jaime Granda, *El Nuevo País*, April 17, 2002, p. 2. Allan R. Brewer Carías *En mi propia defensa. Respuesta preparada con la asistencia de mis defensores Rafael Odremán y León Henrique Cottib contra la infundada acusación fiscal por el supuesto delito de conspiración*, Editorial Jurídica Venezolana, Caracas, 2006, p. 192, among others. Original petition received January 24, 2007, pp. 10 and 11.

11. They indicate that the National Assembly designated a “Special Parliamentary Commission to investigate the events of April 2002.” In its August 2002 report this Special Commission urged that part of the government designated the Poder Ciudadano to investigate and determine the responsibilities of citizens “...who, without being vested with public functions, acted in an active and coordinated fashion in the conspiracy and coup d’etat.” The list of citizens to be investigated includes Allan Brewer Carías “as his participation in the planning and execution of the coup d’etat has been shown....”

2. Facts related to the judicial proceeding

12. The petitioners allege that from 2002 to 2005 at least four provisional prosecutors investigated the facts around the drafting of the “Carmona Decree,” among other facts related to

the events of April 11 to 13, 2002. They note that initially the investigation was entrusted to provisional prosecutor José Benigno Rojas, who did not file charges. They indicate that he was replaced by provisional prosecutor Danilo Anderson, who did not file charges either, and who was murdered in November 2004.[FN8] Subsequently, Luisa Ortega Díaz, Sixth Provisional Prosecutor of the Public Ministry at the National Level with Full Jurisdiction (hereinafter also “Sixth Prosecutor”)[FN9], took over the investigation and filed a number of charges. They allege that since then, the pattern of conduct, of both the Public Ministry and the provisional judges who have seen the case, has been to attach value to those aspects of the evidence that may contribute to convicting Allan Brewer Carías and discard those aspects that show his innocence.

[FN8] See IACHR Press Release 24/04 at <http://www.cidh.oas.org/Comunicados/English/2004/24.04.htm>.

[FN9] Original petition received January 24, 2007, para. 54. They allege that this prosecutor, and 10 other prosecutors, were all assigned trials on political dissidents. At present, Luisa Ortega Díaz is said to be the Attorney General of the Republic. Petitioners’ brief received January 3, 2008, p. 21.

13. The petitioners allege that during the investigative stage, the defense counsel for Allan Brewer Carías were unable to obtain a copy of any of the items in the record; rather, they were only allowed to transcribe, by hand, the various documents in the record. They allege, therefore, that they were deprived of a reasonable time and conditions for his defense.[FN10] They argue that during the review of the record, Allan Brewer Carías found that the texts transcribed in the formal indictment (acta de imputación fiscal) did not match the contents of the videos that he considered to be evidence.[FN11] In view of the foregoing, the provisional prosecutor was asked to make a specialized technical transcription of the content of all the videos with interviews by journalists used as evidentiary elements in the indictment. The request was denied on April 21, 2004, on the basis that “it would contribute nothing to the investigation.”

[FN10] The petitioners indicate that at present the trial is before the 25th Court of Control, before which the defense does have access to the record. Nonetheless, they consider that the lack of access in the investigative phase was an irreparable encumbrance. Petitioners’ brief received January 3, 2008, pp. 11 and 12.

[FN11] Brief of Brewer Carías’s defense of May 4, 2005, directed to the Twenty-Fifth Judge of Control, which indicates that after having seen the videos and press articles in the record of the case, they were able to establish the untruthfulness or falsity of the texts, given that in certain parts of the videos used for the indictment what one sees doesn’t correspond to what one hears in the video used, and at the same time to request once again all of the videos contained in the record of the case. Annex 43 to the original petition, received January 24, 2007, para. 118.

14. They also allege that on April 21, 2004, the Sixth Prosecutor rejected the testimony of Nelson Mezerhane, Nelson Socorro, Yajaira Andueza, Guaicaipuro Lameda, and Leopoldo

Baptista, offered by the defense, based on them being referential witnesses whose statements lacked probative value in light of the law in force.[FN12]

[FN12] “Of the innumerable items of evidence requested by the defense counsel, almost all have been agreed to, as a result of which it is also false that the petition to produce evidence was ignored, i.e. the statements by NELSON MEZERHANE, NELSON SOCORRO, YAHAIRA ANDUEZA Y LEOPOLDO BAPTISTA, that they seek to have the Public Ministry interview them, so that it may take cognizance of what attorney ALLAN BREWER CARIAS told them, as if the party making the request had not already so informed the representative for the prosecution, and seeking to introduce evidence from referential witnesses that had legal value under the Code of Criminal Procedure (Código de Enjuiciamiento Criminal), accordingly in the view of the Public Ministry the testimony was not and is not necessary for clarifying the facts, and they were informed in writing within the legal time for doing so.” Decision of the Sixth Prosecutor at National Level with Full Jurisdiction of April 21, 2004, in which the request filed by the representatives of Brewer Carias to have Messrs. Nelson Socorro and Leopoldo Baptista subpoenaed to testify that Mr. Allan Brewer Carías’s activities in the days prior to April 10, 2002, were not part of the facts alleged and therefore unnecessary. In a decision of April 21, 2004, issued by that Prosecutor, the Public Ministry decided and ordered that an official note be included in the record requested by the representatives of Allan Brewer Carías on considering that not including said document could constitute a violation of the accused’s right to due process. Original petition received January 24, 2007, paras. 90 and 95-100.

15. They indicate that on January 27, 2005, the Sixth Provisional Prosecutor filed the indictment against Allan Brewer Carías for the offense of conspiracy to change the Constitution violently by drafting the Carmona Decree.[FN13] They allege that this was based on the allegation by acting Army Colonel Ángel Bellorín, who indicated that “it is a notorious fact repeated and known to all through various means of communication that the authors of that decree are citizens Allan Brewer Carías, ..., known ... as experts on constitutional matters....”[FN14]

[FN13] Venezuelan Criminal Code, Article 144: “The following shall be punished by imprisonment of 12 to 24 years: ... 2. Those who, without the purpose of changing the republican political form that the Nation has given itself, conspire or rise up to violently change the National Constitution.”

[FN14] Complaint filed by Ángel Bellorín on May 22, 2002, Annex 6 to the original petition received January 24, 2007.

16. They indicate that the proceeding in which the case against Allan Brewer Carías is included was initially assigned to Josefina Gómez Sosa, Temporary Twenty-Fifth Judge of Control. At the request of the Sixth Prosecutor, the Twenty-Fifth Judge of Control decreed the order prohibiting Allan Brewer Carías from leaving the country. That order was appealed to the Tenth Chamber of the Court of Appeals. On January 31, 2005, the Chamber of Appeals issued

the revocation of the order prohibiting his exit from the country. On February 3, 2005, the Judicial Commission of the Supreme Court of Justice suspended the judges of the Court of Appeals who voted for the nullity of the decision appealed, as well as Temporary Judge Josefina Gómez Sosa, for not having stated sufficient grounds for the order prohibiting exit from the country. Judge Gómez Sosa was replaced by Judge of Control Manuel Bognanno, also temporary. They allege that he was suspended from his position on June 29, 2005, after notifying the Superior Prosecutor, June 27, 2005, of alleged irregularities in the investigation conducted by the Sixth Prosecutor.

17. On May 4, 2005, the defense asked the Twenty-Fifth Judge of Control to show all the videos, admit the testimony offered, and allow access to the copies of the record. In response the judge ordered the Sixth Prosecutor to allow the defense “total access to the record and the videos that are kept in relation to the case...”[FN15]. Nonetheless, he decided that it was not up to him to rule on the relevance of the testimony offered by the defense. On May 16, 2005, the defense appealed to the Court of Appeals the decision of the Twenty-Fifth Judge of control not to rule on the relevance of the testimony offered.

[FN15] Twenty-Fifth Judge of Control, official note 25C-482-05, decision of May 11, 2005. Annex 44 to the original petition received January 24, 2007.

18. They also indicate that the defense also introduced Allan Brewer Carías’s immigration record into the evidence to show that during the weeks prior to April 12, 2002, he was outside the country, and therefore he couldn’t have conspired to violently change the Constitution. They indicate that on May 9, 2005, the Sixth Provisional Prosecutor rejected the evidence, considering it unnecessary.[FN16]

[FN16] Decision of May 9, 2005, in which it was considered that in the request the defense did not indicate what it was seeking to prove, which facts in the indictment they were going to refute with its filing of new evidence, and as it was considered that the request was not in line with what is established in Article 198 of the Organic Code of Criminal Procedure, which states that: “... a means of evidence, to be admitted, should refer directly or indirectly to the object of the investigation and be useful for discovering the truth.” Annex 35 to the original petition received January 24, 2007, para. 101.

19. On May 30, 2005, the Office of the Sixth Prosecutor sought a declaration of nullity of the decision by the Twenty-Fifth Judge of Control, on the grounds that no notice had been given of the brief filed by the defense, accordingly it had not had an opportunity to defend itself.[FN17] On July 6, 2005, the Court of Appeals found null and void the decision by the Twenty-Fifth Judge of Control not to rule on the relevance of the testimony offered and ordered that another judge of control rule on the defense’s brief. On August 10, 2005, the defense filed a brief with the Twenty-Fifth Judge of Control insisting on admission of the testimony offered and on compliance with the decision of the Court of Appeals.

[FN17] The Prosecutor indicates that from the date of Allan Brewer Carías's indictment, January 27, 2005, up until May 9, 2005, "have reviewed all the exhibits during 47 working days, of 67 that have elapsed. A certificate of review has been prepared of each and every one of the times that they have requested and reviewed the record and it has been set forth in this brief to show the falsity of the accusations made by attorney ALLAN BREWER CARIAS and his defense counsel." Request for nullity by the Provisional Prosecutor of June 30, 2005, Annex 12 to the original petition received on January 24, 2007.

20. On September 30, 2005, the defense submitted a brief for anticipated production of evidence in the form of a statement by Pedro Carmona Estanga before the Twenty-Fifth Judge of Control. On October 20, 2005, the request was declared unfounded[FN18] based on Pedro Carmona Estanga also being indicted in the case, so his statement would have not probative value. They indicate that they once again filed the statement by Pedro Carmona; that it was rejected by the same judge, that they filed a motion of recusal against him for having issued an opinion once again on the same issue; and that the motion for recusal was rejected based on the judge not having issued a pronouncement on the guilt or innocence of Allan Brewer Carías. They note that finally they submitted the statement by Pedro Carmona in writing and they allege that he has been "ignored" by the judge. In addition, they argue that a paragraph was quoted from the book by Pedro Carmona Estanga[FN19] in the accusation against Allan Brewer Carías without taking into account another paragraph of the same book in which Pedro Carmona notes that he had never attributed the authorship of the decree in question to him.[FN20]

[FN18] Decision of the Twenty-Fifth Judge of Control of October 20, 2005. Annex 30 to the original petition received January 24, 2007.

[FN19] "Numerous opinions were received. Civilian and military jurists were heard, among them Messrs. Allan Brewer-Carías, Carlos Ayala Corao, ... and numerous political actors, but it cannot be said that their opinions were fully set forth or that its drafting can be attributed to them." Pedro Carmona. Testimonio ante la historia, Caracas 2004, p. 95, Annex 3 to the original petition received January 24, 2007, para. 103.

[FN20] "... I never attributed to Mr. Brewer-Carías the authorship of the Decree, for it would be irresponsible.... I even respect the differences that Mr. Brewer expressed in relation to the path chosen and what he said in the record in his interview with the Office of the Attorney General of the Republic, even though I take issue with some of his interpretations." See Pedro Carmona. Testimonio ante la historia, Caracas 2004, p. 108, Annex 3 to the original petition received January 24, 2007, para. 105.

21. They note that by discretionary and arbitrary decision of the Sixth Provisional Prosecutor, the defense of Allan Brewer Carías was not allowed to be present in the examination of the witnesses called to testify before her. They indicate that in some cases the prosecutor admitted questions in writing, but it was not possible to present them in the case of supervening witnesses who came forward in the course of the investigation and who gave statements in secret. They

specifically note that on October 5, 2005, testimony was taken from General Lucas Rincón, with the defense having been convened or notified.

22. They allege that the testimony offered by journalist and politician Jorge Olavarría in support of Allan Brewer Carías's innocence[FN21] was not taken into account and that to the contrary it was considered as part of the basis for the indictment.[FN22]

[FN21] "I come before you to give testimony under oath that I have knowledge of the injurious falsehood that he attributes to Mr. Allan Randolph Brewer Carías, of having been the author of the act of constitution of the so-called 'Transition and National Unity Government installed.... I have personal knowledge that Mr. Brewer did not draft that document. I consider it my duty to so testify." Annex 35 to the original petition received January 24, 2007, para. 107.

[FN22] "... After six o'clock in the evening of Wednesday, April 10, attorneys Daniel Romero and José Gregorio Vásquez, who I did not know, came to my office. Mr. Romero read what he said was the draft documents for the installation of a transition government. I made some historical observances and Mr. Brewer called his attention to the Inter-American Democratic Charter; it was clear to both of us that the attorneys were ignorant of these matters, because of which we didn't accord it much importance. When Mr. Brewer and I were leaving we were noting the superficiality and banality of the document." Annex 36 to the original petition received January 24, 2007, para. 108.

23. On October 21, 2005, the Sixth Prosecutor formalized the indictment against Allan Brewer Carías and the proceeding went on to an intermediate stage. That decision was appealed by the defense before the Court of Appeals on October 28, 2005.[FN23] The appeal was denied on December 1, 2005.

[FN23] Appeal by the defense of the decision of the Twenty-Fifth Judge of Control of October 20, 2005. Annex 47 to the original petition received January 24, 2007.

24. On November 8, 2005, the defense filed a motion for nullity of the entire proceeding based on violations of judicial guarantees.[FN24] They indicate that this request has yet to be ruled on, and that the proceeding is still in an intermediate phase.

[FN24] Answer by the defense to the arraignment (la acusación) of Allan Brewer Carías of November 8, 2006. Annex 2 to the original petition received January 24, 2007.

25. The petitioners indicate that Brewer Carías participated with his presence at proceedings until September 28, 2005, when he left Venezuela. They note that on October 26, 2005, the defense of Allan Brewer Carías asked the Provisional Judge of Control to guarantee his right to be tried in liberty[FN25] and to make an anticipated declaration that depriving him of liberty

during the trial would be out of order, considering that he is not dangerous, is a working man and active in the academy, with residence and roots in Venezuela. They indicate that the provisional judge never ruled on this request.

[FN25] They note that Article 44(1) of the Constitution of Venezuela establishes that every person “shall be tried in liberty,” that Article 102 of the Organic Code of Criminal Procedure (COPP) establishes that: “one shall avoid, especially, requesting preventive deprivation of liberty of the accused when it is not absolutely necessary to ensure the purposes of the proceedings” and that its Article 125(12) establishes that it is a right of the accused “not to be judged in absentia, except as provided in the Constitution of the Republic.” The petitioners indicate that “the possibility of trial in absentia in the case of crimes against public property was eliminated from the Constitution of the Bolivarian Republic of Venezuela in 1999 and therefore the phrase ‘except as provided in the Constitution of the Republic’ is no longer relevant.” Original petition received January 24, 2007, para. 131; and p. 3 of the petitioners’ brief received January 3, 2008.

26. Subsequently, on May 10, 2006, the defense informed the Provisional Judge of Control that Allan Brewer Carías had accepted an appointment as adjunct professor at the Columbia University School of Law in the United States, and they asked that the proceeding continue. They indicate that even though it was known that he was outside the country, on June 2, 2006, the Sixth Provisional Prosecutor asked the Judge to issue an arrest order for Allan Brewer Carías based on danger of flight. In response, on June 15, 2006, the Provisional Judge of Control ordered a measure for his confinement[FN26], which has not been executed given that to date Allan Brewer Carías remains abroad.

[FN26] Decision of the Provisional Judge of Control of June 15, 2006, ordering the preventive detention of Allan Brewer Carías. Annex 52 to the original petition received January 24, 2007.

27. The petitioners indicate that on July 12, 2006, the Sixth Prosecutor sent a request for cooperation to INTERPOL to search for and locate Allan Brewer Carías, with a view to his preventive detention and possible extradition. In addition, on July 11, 2006, the Ambassador of Venezuela in the Dominican Republic directed a communication to INTERPOL, requesting the arrest of Allan Brewer Carías, as he had been extended an invitation to give a lecture in that country. In addition, the diplomat had denounced him to the media in the Dominican Republic as a “conspirator”. They indicate that in response to those requirements, INTERPOL requested information from the courts on the nature of the crime of which Brewer Carías had been accused being that of a common crime. They indicate that by clarification of September 17, 2007, the Court of First Instance Sitting as Court of Control of the Judicial Circuit of the Metropolitan Area of Caracas answered that Allan Brewer Carías was said to be the intellectual author of a frustrated attack on the President of the Republic, and that accordingly it was shown that what the indictment described it was not in the nature of a political crime. They indicate that the defense appealed and asked that said clarification be annulled, but that the appeal was dismissed on October 29, 2007.

28. In addition, they note that when an invitation was sent to Allan Brewer Carías to give a lecture at the Inter-American Institute of Human Rights (IIDH), the Ambassador of Venezuela in Costa Rica sent a letter to the president of the IIDH referring to Allan Brewer Carías as someone who “as is known, participated as material and intellectual author and provided direction to ensure correctness in the drafting of the decree by which the constituted branches of government were abolished in the Bolivarian Republic of Venezuela” and that for this reason “he fled the country.” They indicate that in addition arrest orders were requested of INTERPOL in connection with the two invitations sent to Allan Brewer Carías to give lectures in Peru and Spain, and that he decided not to attend, based on security considerations.

29. On January 11, 2008, the representatives of Allan Brewer Carías filed a motion for dismissal before the Twenty-Fifth Judge of Control based on Decree 5790, with Rank, Value, and Force of Special Law on Amnesty, issued on December 31, 2007, by President Hugo Chávez. That provision, directed to “all those persons who, in confrontation with the established general order, and who as of this date are in their right and have been subjected to criminal proceedings, who have been tried and convicted,” includes, among the conduct subject to amnesty, “the drafting of the Decree of the de facto government of April (12,) 2002.”[FN27] The request was denied on January 25, 2008, based on Allan Brewer Carías not having entered an appearance in the proceeding. The petitioners allege that the denial was groundless, in violation of the right to effective judicial protection and equal protection. They indicate that the decision was appealed to the Fifth Chamber of the Court of Appeals of the Criminal Circuit of the Metropolitan Area of Caracas and denied on April 3, 2008.

[FN27] Gaceta Oficial No. 5.870 Extra of December 31, 2007. Art. 1.A. Petitioners’ brief received February 25, 2008, para. 2.

3. Arguments on the violation of the American Convention

30. The petitioners allege that the State is responsible for violating the rights established in Articles 8(1), 8(2), 11, 13, 22, 24, 25, 1(1), and 2 of the American Convention, to the detriment of Allan Brewer Carías.

31. Based on the right to be heard by a competent, independent, and impartial judge or court, established at Article 8(1) of the American Convention, the petitioners argue that the prosecutors and judges who acted in the indictment and arraignment of Brewer Carías are provisional officials, and that they have been replaced whenever their decisions were not “to the liking of the persecutors.” They argue that the provisional nature of judges and prosecutors violates the guarantee of independence and impartiality set forth at Article 8 of the American Convention insofar as they do not enjoy stability in their position, and can be freely removed or suspended.

32. With respect to the right of all persons accused of a crime to be presumed innocent so long as their guilt has not been legally established, set forth at Article 8(2) of the American Convention, the petitioners allege that a proceeding was begun against Allan Brewer Carías

based on a “notorious communicational fact” (“hecho notorio comunicacional”), even though he refuted the information that appeared in the press. The petitioners allege that in the case-law of the Constitutional Chamber of the Supreme Court of Justice of Venezuela, a “notorious communicational fact” is only present when there is news disseminated by the media that has not been refuted or contradicted. They also argue that the office of the prosecutor shifted the burden of proof by requiring the defense to disprove the accusation it leveled against Allan Brewer Carías.

33. In addition, they allege that the requests for arrest warrants sent to INTERPOL are manifestly inadequate and abusive given that the crime of which Allan Brewer Carías is charged is a typical pure political crime, and Article 3 of the INTERPOL Constitution prohibits it from engaging in “any intervention or activities of a political, military, religious or racial character.” They consider that the determination by the domestic courts that the conduct imputed to Brewer Carías constitutes a common crime is “... an arbitrary maneuver that changes the legal characterization of the crime imputed, constitutes violations of due process, and may entail ill-fated consequences for his liberty, security, and honor.” They argue that such arrest warrants violate the principle of the presumption of innocence.

34. In addition, they argue that entities such as the National Assembly, the Supreme Court of Justice, the Office of the Attorney General of the Republic, as well as members of the diplomatic corps made public statements on the scope of the conduct of which Brewer Carías is accused and his alleged guilt.

35. As for the National Assembly, they allege that in the report of the “Special Parliamentary Commission to investigate the events of April 2002” it has been shown that Allan Brewer Carías participated in conduct from which he was afforded no opportunity to defend himself. They also allege that said report violates the principle of legality. They indicate that 40% of the members of the Assembly voted against the report on the grounds that “it invents a new category of sanction ... to try to establish moral or ethical liabilities in respect of citizens who hold no position as a public servant.”[FN28]

[FN28] They indicate that the legislators considered that the investigation of these citizens violates the principle of legality on seeking to establish political liabilities and sanction them without them being public employees “... (in flagrant contradiction with other political responsibilities that it does establish for other citizens who don’t hold any public office either). But in this case one fabricates a non-existent sanction ... which constitutes a violation of the constitutional rights of the accused and in open violation as well of the general principle of law according to which *nulla crimen sine lege*.” Original petition received January 24, 2007, para. 76.

36. In the case of the Supreme Court of Justice, they allege that it had anticipated an opinion on indicating in writing that “in numerous witness testimony that is publicly known, Mr. Allan Brewer-Carías is indicated as one of the authors of the decree in question, and of these there is one that stands out, which is the narration of the events by none other than Pedro Carmona

Estanga in his book ‘Mi testimonio ante la Historia.’”[FN29] They allege that the Attorney General of the Republic also gave an anticipated opinion on Allan Brewer Carías’ guilt in his book “Abril Comienza en Octubre,”[FN30] in which he assumes as true certain assertions made in the media that were under investigation by his office, and which were never ratified with testimony or corroborated. They indicate that Allan Brewer Carías took the matter up with the Attorney General of the Republic in a missive sent on the eve of his departure from Venezuela.[FN31] Finally, the members of the diplomatic corps publicly referred to Allan Brewer Carías as a “conspirator” and “author of the April 12 Decree,” conduct imputed to him without evidence or any judicial finding of guilt.

[FN29] Letters of December 13, 2005 and January 31, 2006 from the Supreme Court of Justice to the Inter-American Institute of Human Rights and to the Ibero-American Institute of Procedural Law (Instituto Iberoamericano de Derecho Procesal). Original petition received January 24, 2007, para. 78.

[FN30] Isaías Rodríguez, “Abril comienza en octubre,” Caracas, September 2005, Annex 21 to the original petition received January 24, 2007, para. 80.

[FN31] Letter from Allan Brewer Carías, in: Allan Brewer Carías, *En mi propia defensa*, Editorial Jurídica Venezolana, Caracas, 2006, Annex 2 to the original petition received January 24, 2007, para. 80.

37. With respect to the right of the accused to have adequate time and means for the preparation of his defense, established at Article 8(2)(c) of the American Convention, the petitioners allege that during the investigative stage Allan Brewer Carías’s defense counsel were unable to obtain a copy of any part of the record, rather, they were only allowed to transcribe manually the various documents in the record, causing the defense irreparable harm.

38. With respect to the right of the defense to question the witnesses and to call witnesses or expert witnesses to cast light on the facts, established in Article 8(2)(f) of the American Convention, the petitioners allege that Allan Brewer Carías’s defense was not allowed to be present during the testimony of the witnesses called to testify by the Sixth Prosecutor. They indicate that in some cases the Prosecutor admitted questions in writing, but that it was not possible to submit them in the case of supervening witnesses who came forward in the course of the investigation and gave their testimony in secret. They note specifically that on October 5, 2005, testimony was taken from General Lucas Rincón, without the defense having been given called or given notice. In addition, they argue that the ten journalists who disseminated the “notorious communicational events” that were the basis for the indictment were not called to ratify their assertions. They note that on being called by the defense of Allan Brewer Carías, they said that they had not been witnesses to the facts, thus the petitioners consider inadmissible the referential evidence that was the basis for indicting Allan Brewer Carías.

39. As for the appearance of the witnesses offered by the defense, they allege that on April 21, 2004, the Sixth Prosecutor rejected the testimony of Nelson Mezerhane, Nelson Socorro, Yajaira Andueza, Guaicaipuro Lameda, and Leopoldo Baptista on the grounds that they were referential witnesses whose testimony lacked any evidentiary value under the rules in place. In

addition, they allege that they were denied the anticipated filing of the statement by Pedro Carmona Estanga, and that as it had been submitted in writing, it had likely been “ignored.”

40. With respect to the rights to personal security and movement and residence, established at Articles 7 and 22 of the American Convention, the petitioners allege that the arrest warrant for Allan Brewer Carías implies that he can no longer return to his country without subjecting himself to preventive detention in violation of his right to the presumption of innocence. In addition, they suggest that the absence of a decision on the request for an anticipated declaration of the unlawfulness of the deprivation of liberty during the trial, filed by Allan Brewer Carías, made it necessary for him to take measures to ensure his own personal liberty and security, and leave the country. They allege that even though Allan Brewer Carías has not been detained, he is subject to international persecution and harassment that limits his freedom of movement, and that keeps him from returning to his country without running the risk of being detained so as to face a criminal proceeding in which he does not enjoy the proper guarantees. They allege that because of this harassment, he has been compelled to miss 17 important academic events to which he was invited.[FN32]

[FN32] List of events, Annex 59 to the petitioners’ brief received January 3, 2008, p. 20.

41. They consider that in cases of political persecution, international law comes to the aid of one who seeks to protect himself or herself from the state in question. They indicate that this is the ultimate foundation of asylum and refuge as legal institutions. They allege that one who is persecuted has a right not to be returned to his persecutors, to the point that international law imposes on a state that denies refuge or asylum a legal duty not to return the victim to the jurisdiction of the state that is persecuting him, by means of the rule known as non-refoulement.

42. As regards the right to honor and dignity established in Article 11 of the American Convention, the petitioners allege that the declarations of government representatives with respect to criminal acts not judicially proven affect the honor of Allan Brewer Carías and threaten the principle of independence of the judiciary. They consider that in the instant case the systematic accusations of “golpista” (“coup-monger” or “coup leader”) leveled at Allan Brewer Carías and attributing to him the authorship of the decree in question harmed his reputation and prestige as a constitutional law expert and university professor. In this respect, they allege that the pronouncements of State organs such as the National Assembly, the Supreme Court of Justice, the Attorney General of the Republic, and the embassies of Venezuela in the Dominican Republic and Costa Rica are violations of the right to honor and dignity of Allan Brewer Carías and show that the investigation as a whole violates Article 11 of the American Convention.[FN33]

[FN33] The petitioners cite IACHR. Gallardo Rodríguez, Case 11,430 OAS/Ser.L/V/II.95 Doc. 7 rev., para. 76. Original petition received January 24, 2007, paras. 135 and 136.

43. With respect to the right to freedom of expression established in Article 13 of the American Convention, the petitioners allege that because of Allan Brewer Carías's open dissidence with the policies of the government, some journalists presumed that he was associated with the establishment of the so-called "transition government." They allege that the government and its institutions have used the mere presence of Allan Brewer Carías at "Fort Tiuna" on the eve of the issuance of the Carmona Decree as a pretext for hushing the voice of an important opposition figure, accusing him of having been involved in the coup. In this sense, they consider that the criminal proceeding against Allan Brewer Carías constitutes a violation of his right to freedom of expression, established in Article 13 of the American Convention.

44. With respect to the right to equal protection the law established at Article 24 of the American Convention, the petitioners allege that in the proceeding on the conspiracy to violently change the Constitution only civilians, and not members of the military, have been indicated, even though it was the top-level military commanders who were said to have requested the resignation of the Head of State. They indicate that the members of the armed forces initially indicated by the Public Ministry benefited from the constitutional privilege of preliminary proceeding (antejuicio) for the Supreme Court to determine whether there are merits for initiating the trial.[FN34] In that case the Supreme Court considered that there was no basis for going forward with a trial based on the consideration that the events of April 2002 did not constitute a coup d'état but rather a "power vacuum." They indicate that subsequently that decision was declared null by the constitutional Chamber but that even when some members of the military were called forth to face indictment, they have not appeared.[FN35] The petitioners allege that the State is responsible for the act of discrimination, in violation of Article 24 of the American Convention, in relation to Article 1(1).

[FN34] They indicate that the right to a preliminary proceeding (derecho de antejuicio) is established in Article 266 of the Constitution of Venezuela. Original petition received January 24, 2007, para. 148.

[FN35] They indicate that the General in Chief of the Army, Lucas Rincón Gutiérrez, who announced in April 2002 that the military high command had sought the resignation of the President of the Republic, has not been subjected to any investigation. Original petition received January 24, 2007, para. 149.

45. With respect to the right to judicial protection established at Article 25 of the American Convention, the petitioners allege that in Venezuela there is no effective judicial remedy for the protection of the rights of Allan Brewer Carías. In this respect, they indicate that Allan Brewer Carías repeatedly turned to the Provisional Judge of Control and to the Court of Appeals in order to have his rights re-established in the course of the proceeding. They allege that in response the courts held that they did not have legal powers to protect his rights, that his pleadings were inopportune[FN36] or that they could not interfere with the autonomy of the Office of the Attorney General in the conduct of the investigation.[FN37]

[FN36] Decision of the Court of Control of May 11, 2005. Annex 44 to the original petition received January 24, 2007, para. 125.

[FN37] Original petition received January 24, 2007, para. 124.

46. Finally, the petitioners allege that the State breached its duty to adopt the measures necessary, legislative or otherwise, to uphold the rights protected in the Convention, in violation of Articles 2 and 1(1). They indicate that the national legislation is not adequate in relation to the appointment and permanence in their posts of judges and prosecutors, to uphold the rights of Allan Brewer Carías and of all Venezuelans to be heard by an independent and impartial court.

4. Arguments on the admissibility of the claim

47. The petitioners argue that the remedies available in the domestic jurisdiction are illusory in view of the general conditions of the country and the circumstances of this case. They consider that the Judiciary lacks independence and impartiality and that in general there is a situation of denial of justice.[FN38] They argue that the Commission has already established, in other cases, that the victim does not have domestic remedies in a situation of “dysfunctional judiciary unable to resolve his situation,” which occurs, among others situations, when its corruption or lack of independence is established.[FN39] The petitioners also cite considerations of the IACHR regarding the impact of the permanence of a high percentage of provisional judges on the independence of the Judiciary in Venezuela.[FN40] They also question the election of the magistrates of the Supreme Court of Justice after the adoption of the Constitution: the reform of the Organic Law of that Court, which provided for election, by the National Assembly, of 12 new justices by simple majority[FN41]; and the removal or “retirement” of the justices who did not follow the government line.[FN42] As long as the Supreme Court has the function of appointing and removing lower judges, the petitioners consider that this situation affects the autonomy of the Judiciary.

[FN38] The petitioners cite I/A Court H.R. Judicial Guarantees in States of Emergency. OC 9-87, October 6, 1987. Series C. No. 9, para. 24 and Case of Bámaca González (sic). Judgment of November 25, 2000. Series C. No. 70, para. 191. Original petition received January 24, 2007, para. 157.

[FN39] The petitioners cite Report 5/94 (Elvis Lovato Rivera) Annual Report of the IACHR, 1993, consideration No.5, paras. f and h, pp. 187 ff.

[FN40] The petitioners cite the Report on the Situation of Human Rights in Venezuela adopted December 29, 2003, page 3.

[FN41] The petitioners note that the IACHR established in its Report on the Situation of Human Rights in Venezuela of 2003 that this law “does not take into consideration the concerns expressed by the IACHR in its report in terms of the possible threats to the independence of the Judicial branch.” Original petition received January 24, 2007, para. 38. They also indicate that several constitutional challenges have been brought against that law, including the one presented by the deans of the country’s most prestigious law schools, which, after three years, was still awaiting a decision. Original petition received January 24, 2007, para. 40.

[FN42] The petitioners indicate that on the eve of the appointment of the justices, the then-Chairman of the Parliamentary Commission entrusted with choosing the candidates for a place on the Supreme Court said the following to the press: "while us members of the legislature have the power over this choice, the President of the Republic was consulted and his opinion was taken into account.... Let's be clear, we are not going to score own-goals. The list included people from the opposition who meet all the requirements. The opposition could have used them to reach an agreement in the last two sessions but they refused. So we're not going to do it for them. The group nominated does not include anyone who is going to act against us, so even if it's in a 10-hour session, we'll approve it. Original petition received January 24, 2007, para. 39.

48. They consider that the instant case fits within the framework of a state policy in which Allan Brewer Carías not only has been condemned beforehand, but is also impeded from using the remedies normally available for his defense within the criminal proceeding, which are arbitrarily not recognized by the Public Ministry and the judicial system. The petitioners argue that having recourse to those remedies becomes a meaningless formality and that the exceptions to Article 46(2) fully apply in this situation and exempt them from the requirement of exhausting domestic remedies, which in practice cannot attain their aim.[FN43]

[FN43] The petitioners cite I/A Court H.R., Case of Velásquez Rodríguez. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 64. Original petition received January 24, 2007, para. 153.

49. They further allege that the proceeding has been at a standstill since the issuance of the arrest warrant for Allan Brewer Carías in June 2006, and that therefore the preliminary hearing has not been held, which constitutes an unwarranted delay in the proceeding, and a violation of the right to trial in liberty and without delay. They also allege unwarranted delay in resolving the motion of nullity filed November 8, 2005. They indicate that said request has not yet been resolved, and that the proceeding is in an intermediate phase.

50. With respect to the procedural effects of the lack of physical presence of Allan Brewer Carías in the unfolding of the proceeding, they consider that these only reach procedural acts that cannot go forward without his presence, such as the preliminary hearing and the oral and public trial. They indicate that this does not stand in the way of other judicial proceedings that do not imply that he is being tried in his absence, such as the motion for nullity filed on November 8, 2005. They argue that the prohibition of a trial in absentia constitutes a procedural guarantee that should always be understood so as to favor the accused or defendant, and never against him. They indicate that it is not a punishable act under the Venezuelan Criminal Code.[FN44] The petitioners allege that staying outside the country is a reasonable act so as to impede the aggravation of the human rights violations already suffered, and the threats of their repetition.

[FN44] The petitioners indicate that according to Article 259 of the Venezuelan Criminal Code, not even flight of a defendant from the establishment where he or she is detained is punishable, unless it involves violence. Petitioners' brief received January 3, 2008, p. 34.

51. Accordingly, they allege that the exceptions to the exhaustion of domestic remedies provided for in the three subsections of Article 46(2) of the American Convention apply.

B. The State's position

1. Context

52. The State cites the resolutions adopted by the Permanent Council and by the General Assembly of the Organization of American States which define the events that took place between April 12 and April 13, 2002, as a "grave disruption of the constitutional order" of Venezuela. The State points out that the assumption of power by Pedro Carmona during that time cannot be justified by an alleged "power vacuum" since the Venezuelan Constitution establishes that the Executive Vice President of the Republic is the official stand-in for the President of the Republic in the various hypotheses regarding permanent or temporary absence from office contemplated in Articles 233 and 234 of this instrument. The State further contends that even if the Constitution did not establish the line of succession to assume the powers of office when the president is absent, it would be up to the Constitutional Chamber of the Supreme Court of Justice to determine the proper procedure to be followed.

53. The State emphasizes that the Constitution does not allow for the "illegal assumption of the office" nor does it establish that a Decree of Transition can become a mechanism to repeal the Constitution or to fill the void created by the absence of the President of the Republic.[FN45] The State points out that the decree adopted within the context of the events of April 12th and 13th, 2002, intended to empower the President of the de facto Junta to reorganize the "Powers of the State" without establishing any limits to the nature of its powers, their scope or their duration.

[FN45] The State indicates that Constitutional Article 233 considers the President of the Republic to be permanently unavailable by reason of any of the following: death; resignation; removal from office by decision of the Supreme Tribunal of Justice; permanent physical or mental disability certified by a medical board designated by the Supreme Tribunal of Justice and with the approval of the National Assembly; abandonment of his position, duly declared by the National Assembly; and recall by popular vote. Article 234 establishes that temporary unavailability shall be replaced by the Executive Vice-President for a period of up to ninety days, which may be extended by resolution of the National Assembly for an additional ninety days. If the unavailability continues, the National Assembly shall have the power to decide whether the unavailability to serve should be considered permanent. Submission from the Ministry of Popular Power for Foreign Affairs AEGV/000394 on August 25, 2009, page 12.

54. The State points out that the petition makes clear that Allan Brewer Carías knew of the existence and content of the decree in question and that he went to the Miraflores Palace to give Pedro Carmona his opinion. The State rejects the petitioners' allegation that Allan Brewer Carías disagreed with the content of the decree which would have been unconstitutional even if its content had been different. Therefore, the State questions the notion that if Allan Brewer Carías' opinion had been heard and considered, the decree would have been moderately unconstitutional rather than manifestly unconstitutional.

55. The State contends that even though he knew the content of the decree, Allan Brewer Carías did not repudiate its adoption as any defender of the Constitution and of democracy should have done. The State points out that Article 333 of the Constitution establishes that in the event that the instrument is repealed by an act of force or by any means other than those provided for in the same Constitution, it is the duty of every person with or without vested official authority to help return it into actual effect. The State also alleges that although Allan Brewer Carías considers himself "a dissident of authoritarian policies," he did not denounce the establishment of a de facto government that concentrated all power in the hands of one person, that changed the name of the Republic and that dissolved all constituted authorities.

56. The State contends that those who guided the coup d'état used the Inter-American Democratic Charter as the basis and grounds to promote an unconstitutional and anti-democratic decree.[FN46] It points out that the Inter-American Charter establishes principles and mechanisms aimed at protecting the democratic institutions of the States, not at rendering their Constitutions powerless. The State further contends that the constitutional law expert Allan Brewer Carías did not denounce this abuse of the provisions of the Inter-American Charter either.

[FN46] The State indicates that Article 3 of the Inter-American Charter establishes that: "Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government." The State argues that the Inter-American Democratic Charter recalled that the OAS Charter, which ordered the IACHR to be established, recognized that representative democracy is indispensable for the stability, peace and development of the region and that one of the OAS's proposals is to promote and consolidate representative democracy. In this respect, the Chiefs of State and Government of the Americas, gathered at the Third Summit of the Americas, which took place from April 20 to 22, 2001, established that any unconstitutional alteration or interruption to the democratic order of a State in the Hemisphere constitutes an insurmountable obstacle to the participation of that State's government. Submission from the Ministry of Popular Power for Foreign Affairs AEGV/000394 on August 25, 2009, pages 14 and 15.

57. The State argues that the hypothesis that Brewer Carías was prosecuted in order to scare him because of his long trajectory as a defender of democracy and of human rights and for his

political dissidence (see supra III A) is false. It contends that there are no grounds or proof to support the allegation and that political dissidence does not constitute an excuse to commit the crime of conspiring to violently change the Constitution.

58. In the opinion of the Venezuelan State if the IACHR declares this petition admissible, it will again validate the coup d'état of April 11, 2002, and will ignore the resolutions adopted by the General Assembly of the OAS and by its Permanent Council.[FN47]

[FN47] The State claims that the IACHR admitted there was a coup d'état, and unduly recognized the perpetrators of the acts committed on April 11 and 12, when it sent a letter "de factum" to the Minister of Foreign Relations, which requested information on the events, as if legitimacy could exist within the concept of usurpation. The State claims that it became extremely concerned that the IACHR has not processed a precautionary measure requested for the Constitutional President of Venezuela, Hugo Rafael Chávez Frías, but that instead has requested certain information from the usurpers admitting their legitimate character as leaders. The State claims that, on this date, Allan Brewer Carías and the IACHR admitted there had been a coup d'état "recognizing its leaders and disregarding the legitimacy of the President Chávez government," the attributes of the OAS Charter, Inter-American Democratic Charter, and even the IACHR. Submission from the Ministry of Popular Power for Foreign Affairs AEGV/000394 on August 25, 2009, page 15.

2. Allegations regarding how the judicial proceedings were carried out

59. The State points out that the process to indict Allan Brewer Carías was set in motion on April 12, 2002, by the Office of the Public Prosecutor with Nationwide Jurisdiction on Matters of Corruption and with Special Jurisdiction over Banks, Insurance and Capital Markets, in order to determine the degree of responsibility of the persons involved in the events that took place in April 2002 and whose records were later forwarded to the Office of the Sixth Prosecutor.

60. The State points out that on January 27, 2005, the Sixth Prosecutor filed charges against Allan Brewer Carías, for his "alleged participation in drafting the Constitutive Act of the Government of Democratic Transition and National Unity containing the Constitutive Decree of a Government of Democratic Transition and National Unity [...] on April 12, 2002, at the Miraflores Palace, after a group of civilians and officers of the National Armed Forces, ignoring the constitutional and legitimately constituted government, outside the law and the Constitution of the Bolivarian Republic of Venezuela, proceeded to form a de facto government; their conduct falling within the scope of the alleged crime of CONSPIRING TO VIOLENTLY CHANGE THE CONSTITUTION, a punishable offense under the provisions of Article 144 (2) [currently Article 143(2)] of the Penal Code." [FN48]

[FN48] The State cites Article 144: "The following persons will be punished with prison for twelve to twenty four years: Those who, without the object of changing the republican political form given to the nation, conspire or rise up to violently change the National Constitution."

Submission from the Ministry of Popular Power for Foreign Affairs AEGV/000394 on August 25, 2009, page 22.

61. The State alleges that the arraignment proceeding was carried out in accordance with all the principles and guarantees of due process established in the Constitution of the Bolivarian Republic of Venezuela, as well as in the rules of criminal procedure and in the international agreements and treaties the Republic is a party to. The State points out that during the proceedings Allan Brewer Carías was duly counseled by his chosen attorneys, León Enrique Cottin Núñez and Pedro Nikken Bellshawog. Furthermore, the State points out, during those proceedings the Sixth Prosecutor asked the accused: "[...] if he understood the reasons why he was being charged, if he had any questions about what was said during the proceedings [...]" and that the accused didn't say anything. The State also points out that the accused was asked if he wished to make any statements to which he responded that he did not. The State also points out that the indictment was signed by defense attorneys Pedro Nikken and León Cottin and by Allan Brewer Carías.

62. The State contends that the attorneys for Allan Brewer Carías fully exercised their right to a defense and that they requested the prosecutors to conduct further investigations in order to shed more light on the facts. It argues that, in response, the Public Ministry carried out those actions that met the requirements of relevance and need.

63. The State points out that during the investigation phase, the defense filed appeals to all the judicial rulings issued and that those appeals were dismissed by the various chambers of the Courts of Appeal that heard them.

64. The State indicates that on October 21, 2005, Allan Brewer Carías was indicted by the Twenty-fifth Court of Control on charges of Conspiring to Violently Change the Constitution.

65. The State points out that on May 10, 2006, the Twenty-fifth Court of Control received written communication from the defense in which Allan Brewer Carías stated his intention to leave the country based on the false assumption that his constitutional rights and guarantees to a defense had been violated and on the fact that "[...] the distinguished University of Columbia had offered him the opportunity to fulfill an old professional aspiration, to become a member of their faculty, and that he had decided to wait until the circumstances were more conducive to ensuring an impartial trial with respect for his guarantees [...]"[FN49]

[FN49] Submission from the Ministry of Popular Power for Foreign Affairs AEGV/000394 August 25, 2009, page 24.

66. As a result, the State points out, on June 2, 2006, the Public Ministry requested that the Twenty-fifth Court of Control issue an order of judicial preventive detention against Allan Randolph Brewer Carías, even though the charging documents included a request for such an order. The State argues that his refusal to submit to criminal prosecution is not only an attempt

against the investigation carried out by the Public Ministry but also against the entire system of justice.

67. The State argues that, consequently, on June 15, 2006, the Twenty-fifth Court of Control issued the order of judicial preventive detention No. 010-06 against the accused, based on the fact that all the requirements for the issuance of the order had been met as established under the provisions of Article 250 and in accordance with Article 251 first paragraph, subsections 1, 2, 3 and 4 of the COPP.[FN50] The State points out that the arrest warrant was forwarded to the Director of the Scientific, Criminal and Criminological Investigations Corps as well as to the Director of INTERPOL.

[FN50] The State cites Article 250 of the Organic Code of Criminal Procedure (COPP): “Origin. The oversight judge, at the request of the Public Ministry, may order the pre-trial detention of the accused, provided that the existence is attested of: 1. A punishable act that deserves a deprivation of liberty and whose criminal actions have not evidently been prescribed; 2. Due cause to presume that the accused has committed or participated in the commission of an offense; 3. Reasonable cause, based on an appraisal of the circumstances in each case, to assume the risk of flight or obstruction in the search for the truth with respect to a specific investigation. (Underlining by the State). Within the twenty-four hours following the prosecutor’s request, the oversight judge will make a decision with respect to the request made. Should it be deemed that the requirements set forth in this article are met and that pre-trial detention is, therefore, applicable, an arrest warrant shall be issued for the accused person against whom the measure has been requested. Within forty-eight hours following his detention, the accused will be brought before the judge, who, in the presence of the parties and the victims, if there are any, will decide whether to maintain the imposed measure or substitute it for one less severe. If the judge agrees to maintain the pre-trial detention measure during the preliminary phase, the prosecutor should present the charges, request the stay of the proceedings or, in such a case, close the proceedings, within thirty days following the judicial decision. This lapse of time may be extended up to a maximum of an additional two weeks, provided that the prosecutor requests so at least five days before the extension expires. In this case, the prosecutor should advance his request and the judge will decide what is appropriate after listening to the accused. After this period of time and its extension, if so be the case, without the prosecutor having filed the charges, the detained person will be released by decision of the oversight judge, who may impose another precautionary measure. In any case, the trial judge, at the request of the Public Ministry, shall order the pre-trial detention of the accused when it is justifiably presumed that this person will not comply with the decisions in the case, in accordance with the procedures established in this article. In exceptional cases of extreme need and urgency, and provided the existence of the suppositions set forth in this article, the oversight judge, at the request of the Public Ministry, shall authorize the suitable detention of the accused. This authorization should be ratified by a decision within twelve hours of the detention, otherwise the procedures will follow that are set forth in this article.” “Article 251. Risk of Flight. In making a determination as to the risk of flight, particular consideration shall be given to the following circumstances: 1. Roots in the country, determined by domicile, habitual residence, family home, business or work activities, and facilities for permanent departure from the country or remaining in hiding; (Underlined by the State). 2. The possible penalty in the case; 3. The extent of the harm caused; 4. The behavior

of the accused during the proceeding or in other previous proceedings, to the extent that it indicates his willingness to submit to criminal prosecution; (Our underlining). 5. The behavior prior to the commission of the offense. First Paragraph: A risk of flight is presumed to exist in cases involving offenses punishable with a term of imprisonment of 10 years or more. (...)"

68. With regard to the petitioners' allegation of the violation of the principle of presumption of innocence, considering that it was the defense's responsibility to discredit the charges filed by the Office of the Prosecutor (see supra III A), the State argues that, taken together, Article 125.5[FN51] and Articles 131[FN52] and 305[FN53] of the COPP, outline an active and proactive role for the defense within the investigation in order to guarantee due process of law, and that it can request that other actions or investigations be pursued in order to discredit the charges filed as long as they meet the relevance, need and usefulness requirements, and as long as they are directly related to the investigation and help to shed more light on the facts.

[FN51] The State refers to Article 125 of the COPP. Rights. "The accused shall have the following rights: 1. To be specifically and clearly informed of the charged acts; 2. To communicate with family members, lawyer of choice, or association of legal assistance, to inform of his detention; 3. Be assisted, since the initial stages of the investigation, by a lawyer chosen by the accused or his family members and, otherwise, by a court-appointed attorney; 4. Be assisted, free of charge, by a translator or interpreter if the accused does not understand or speak the Spanish language; 5. Request the Public Ministry carry out investigation procedures to disprove the charges made; (emphasis by the State); 6. Appear directly before the Judge in order to make a statement; 7. Request that the investigation be activated and have access to its content, except in cases which have been declared reserved in certain parts and only for the time that this statement continues; 8. Request the pre-trial detention be declared improper in advance; 9. Be subjected to the constitutional precept that exempts one from making statements and, even in the case of consenting to make a statement, not making it under oath; 10. Not be subjected to torture or other cruel, inhumane or degrading treatment to personal dignity; 11. Not be subjected to techniques or methods that alter free will, even with consent; 12. Not be tried in absentia, except as set forth in the Constitution of the Bolivarian Republic of Venezuela." Submission from the Ministry of Popular Power for Foreign Affairs AEGV/000394 on August 25, 2009, pages 30 and 31.

[FN52] The State refers to Article 131 of the COPP. Preliminary warning. "Before the statement begins, the accused will be subjected to the constitutional precept that exempts him from declaring on his own behalf and, even in the case of consenting to making a statement, not doing so under oath. He shall also be told in detail of the act which has been attributed to him, with all of the circumstances of time, place and mode of commission, including those that are of importance for the judgment, the applicable legal provisions, and the information that the investigation bears against him. He will also be instructed that the statement is a means for his defense and, therefore, that he has the right to explain everything which may serve to disprove the suspicions against him and to request proceedings be carried out as considered necessary." (Emphasis by the State). Submission from the Ministry of Popular Power for Foreign Affairs AEGV/000394 del August 25, 2009, pages 31 and 32.

[FN53] The State refers to Article 305 of the COPP. Proposition of proceedings. “The accused, the persons who have intervened in the case, and their representatives, may request that the prosecutor undertake proceedings to clarify the acts. The Public Ministry shall initiate these proceedings, if considered pertinent and useful, making record of its opinion to the contrary as subsequently corresponds.” Submission from the Ministry of Popular Power for Foreign Affairs AEGV/000394 on August 25, 2009, page 32.

69. In response to the petitioners’ allegation regarding the lack of access to “alleged evidence against the accused, and to witnesses and other evidence he has brought forth”[FN54], (see supra III A), the State contends that, in the preparatory and in the intermediate phase, the petitioners confuse basic concepts that are necessary in order to understand the process and to make claims of that nature, such as the investigations, elements of conviction, types of evidence and actual evidence; and that they don’t even know at which stage of the Venezuelan system of criminal procedure should those be used.

[FN54] The State cites paragraph 5 of the petition presented to the Commission on January 24, 2007.

70. With regard to the allegation made by the petitioners that they had been denied the right to a timely and effective defense (see supra III A), the State argues that the petitioners do not provide any evidence for the allegation and that they pretend the Commission to simply take their word that they have not had access to the case file, and, therefore, to a timely and effective defense. The State rejects those arguments and alleges that it has 17 case records signed by legal counsel for Mr. Allan Brewer Carías during the proceedings at the Public Ministry, where he acknowledged with his signature that he reviewed each and all parts of the case file without making any observations. Likewise, the State points out that the petitioners reviewed the videos and other annexes connected to the charges filed, as the request forms to review case files indicate. In light of this, the State argues that it seems strange and false for the petitioners to claim that they did not have access to the case file or to what they mistakenly refer to as “the evidence” during the investigation phase. The State also points out that during the investigation phase and since the date of the indictment, Allan Brewer Carías and his legal counsel have repeatedly appeared at the Office of the Sixth Prosecutor in order to “familiarize themselves with the contents of the case brought against the accused.”

71. With regard to the petitioners’ allegation that “in general...the right of the defense to question witnesses present in court was violated [...]” (see supra III A), the State argues that the petitioners confuse “evidence introduced in court during the trial stage with the “elements of conviction” presented in the Office of the Prosecutor during the investigation phase. In that regard, the State contends that the questioning of witnesses conducted by the Office of the Prosecutor is not the equivalent of testimony given in court during the trial stage in accordance with the provisions of Articles 355[FN55] and 356[FN56] of the COPP. Once the identity of a person called to testify by the Office of the Prosecutor is known, the defense may request that the Public Ministry ask the witness certain questions, providing it demonstrates the relevance, need,

usefulness and connection to the investigation.[FN57] The State points out that in Brewer Carías' case, the defense did not request the Public Ministry to do so. The defense must show the relevance, need, usefulness and connection to the investigation of the persons it suggests the Office of the Prosecutor should interview during the investigation phase, and it may request that certain questions be asked as long as they meet the same requirements persons being interviewed. The State contends that the attorneys for Brewer Carías did not meet this requirement. It points out that during interviews at the Office of the Prosecutor, the defense may actively participate in that investigation (which is not a proceeding to enter evidence for trial) which will be reflected in the record of the interview. The State also points out that if testimony or evidence from the investigative proceeding is admitted by the Court of Control and it then progresses on to the Trial Court, it is at that point that the defense may question and cross-examine witnesses and can control the process of witness examination. The State points out that the present case has not reached the trial phase and, therefore, the defense will have the opportunity to examine and cross-examine witnesses whose testimony has been admitted by the Court of Control in the intermediate phase. Thus, the State comes to the conclusion that the petitioners confuse[FN58] the investigation phase, the intermediate phase, and the trial phase in Venezuelan Criminal Procedure.

[FN55] The State cites Article 355 of the COPP. Witnesses. "Next, the presiding judge shall proceed to summon the witnesses, one by one: first, those who offered themselves to the Public Ministry; next, those proposed by the complainant; and, lastly, those for the accused. The presiding judge may alter this order when it is not considered convenient to furthering the clarification of the acts. Before making a statement, witnesses may not communicate amongst themselves or with other persons or see, hear or be informed of what is occurring in the proceedings. Afterwards, the presiding judge shall decide if the proceedings continue in the pre-trial chamber or if they are withdrawn. Nonetheless, the non-compliance of the lack of communication will not impede the witness's statement, but the tribunal shall appreciate this circumstance when it evaluates the evidence." Submission from the Ministry of Popular Power for Foreign Affairs AEGV/000394 on August 25, 2009, page 35.

[FN56] The State cites Article 356 of the COPP. Examination. "After taking oath and asking the expert or witness to identify themselves and state the general circumstances to appreciate their report or statement, the presiding judge will allow the person to address what he knows about the proposed event as an object of evidence. After the account has been given, the judge will allow direct examination. The person who proposed the examination will begin; then the other parties will continue in the order the presiding judge considers convenient. The defense should be the last to examine. Later, the tribunal may question the expert or the witness. The presiding judge will moderate the examination and will prevent the deponent from answering leading, catch or impertinent questions. The judge will also attempt to ensure the examination takes place without undue pressure and without offending the dignity of the persons. The parties may request that the presiding judges' decisions be repealed when they limit the examination or they may object to questions posed. The experts and witnesses will express the reasons behind their information and the origin of their knowledge." Submission from the Ministry of Popular Power for Foreign Affairs AEGV/000394 on August 25, 2009, page 35.

[FN57] The State cites Article 305, 125 numeral 5 and 131 of the COPP. Submission from the Ministry of Popular Power for Foreign Affairs AEGV/000394 on August 25, 2009, page 38.

[FN58] The State indicates that said confusion is also reflected in the citation of the petitioners in Report No. 85/99 of Case No. 11.258 (Figueredo Planchart), which specifically refers to the acts undertaken before a tribunal and not during the investigation.

72. The State alleges that Allan Brewer Carías faced the criminal proceedings against him, in liberty, without an arrest warrant issued in his name, until July 14, 2006. In that sense, the State refutes the petitioners' allegation contending that: "[...] the State tries to deny Dr. Brewer Carías his physical freedom, denies his right to stand trial in liberty and restricts his freedom of movement by issuing an order for his preventive detention which is not supported by any immediate need and which does not meet minimum national and international legal standards to justify such an exceptional measure." The State emphasizes that from April 12, 2002, until he left the country on June 2, 2006, Allan Brewer Carías had enjoyed absolute liberty and contends that it was Allan Brewer Carías who provoked the activation of the legal and constitutional mechanisms on which the order of preventive detention was based.

73. With regard to the petitioners' allegation that international law was violated, (see supra III A) the State argues that international human rights law is supplementary and ancillary and that it does not substitute the State's own actions. The State contends that the petitioners have the obligation to (i) identify the domestic law violated, in this case the COPP and/or the Constitution; (ii) to explain the violation of the domestic law based on its own case file, the jurisprudence and interpretation in the domestic legal system, and without this entailing a presentation of arguments on the merits of the case; and, last, (iii) to translate the domestic law violated into the corresponding international law.

74. Lastly, the State points out that the by being in contempt of court Allan Brewer Carías missed the opportunity to be included under the provisions of the Decree with Rank, Value and Force of Special Law of Amnesty issued on December 31, 2007, by President Hugo Chavez Frías, in exercise of his constitutional powers. The State points out that the decree applied to all persons who:

[...] are at odds with the established order, are within the law and have submitted to criminal proceedings for the following crimes:

- A) Drafting the decree of the de facto government of April 12, 2002.
- B) Signing the decree of the de facto government of April 12, 2002
- C) The violent take-over of the state government of the State of Mérida on April 12, 2002
- D) The illegal deprivation of liberty of citizen Ramón Rodríguez Chacín, Minister of the Interior and Justice, on April 12, 2002
- E) Instigating to Commit a Crime and Military Disobedience until December 2, 2007 [...].

75. Therefore, the State requests that the Commission declare the petition inadmissible.

3. Allegations regarding the admissibility of the petition

76. The State argues that the petitioners' claim violates the principle that the Inter-American Human Rights System supplements domestic legislation when they allege a political persecution that doesn't exist. The State points out that the Commission has maintained that the purpose of the admissibility stage is not to verify if an accused person is guilty or innocent, but to confirm whether the domestic remedies have been exhausted or not. Therefore, the State argues that the petitioners should not allege defenses that should be taken up in Venezuelan Courts and that have nothing to do with the competence of the IACHR to examine the case. The State alleges that arguments regarding the individuals responsible for drafting the decree in question, such as the claim that Allan Brewer Carías was "not even remotely responsible for drafting the decree of April 12th", or the allegation regarding the "baseless indictment of Dr. Brewer Carias, by written communication dated January 27, 2005 [...]", assume that the Commission will determine whether the indictment is groundless or not when this falls within the jurisdiction of the Venezuelan courts. The State argues that the arguments of fact and of law presented by the petitioners must be resolved by the courts of the Bolivarian Republic of Venezuela and that, to that end, Allan Brewer Carías must come into compliance with the Venezuelan courts.

77. The State contends that the petitioners have not exhausted the domestic remedies in light that the criminal proceeding against Allan Brewer Carías is in the intermediate stage due to the fact that he fled the country and that in Venezuela trial in absentia does not exist. As a result, the State argues, the proceedings have not reached the trial stage; the oral and public hearing has not been held; the admission of evidence has not begun; and no lower court judgment has been issued that would allow the filing of an appeal of the proceedings, of an appeal of final judgment, of annulment, of cassation, of criminal review, of amparo; and, finally, a constitutional review by the Constitutional Chamber of the Republic of Venezuela.

78. In the opinion of the State, the petitioners' argument that just because some of the domestic remedies proved unsuccessful all domestic remedies must be considered exhausted is inadmissible. The State contends that the petitioners argue for the admissibility of the petition and then claim the exception to the requirement of exhaustion of domestic remedies when the latter is the consequence of the former. Specifically, the State considers that the petitioners present the facts relating to the criminal proceedings against Allan Brewer Carias falsely and with malice in order that "there be a declaration [...] that the exemption to the requirement of exhaustion of domestic remedies applies because they are ineffective and for the lack of access to justice, for the absence of due process of law and for unwarranted delay, all of this within the framework of a pattern of use of criminal law against those who present themselves as distinguished personalities in the legal world and in the state of law" (see supra III A).

79. Based on the foregoing, the State requests that the Commission declare the petition inadmissible.

IV. ANALISIS

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

80. The petitioners are authorized by Article 44 of the Convention to file complaints on behalf of the alleged victims. For its part, the Venezuelan State ratified the American Convention on August 9, 1977; accordingly, the Commission is competent *ratione personae* to examine the petition. The Commission is also competent *ratione temporis* insofar as the American Convention was already in force for the State on the date the facts alleged in the petition are said to have occurred.

81. The Commission is competent *ratione loci*, as the violations alleged are said to have taken place within the territory of a state party to that the Convention. Finally, the Commission is competent *ratione materiae*, because the petition alleges violations of human rights protected by the American Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies

82. Article 46(1)(a) of the American Convention requires the prior exhaustion of domestic remedies in the domestic jurisdiction in keeping with generally recognized principles of international law as a requirement for the admission of claims regarding alleged violations of the American Convention. Article 46(2) of the Convention provides that the requirement of prior exhaustion of domestic remedies does not apply when:

- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

83. In accordance with the burden of proof applicable to this matter, a State that alleges non-exhaustion of domestic remedies must point out the domestic remedies to be exhausted and provide proof of their effectiveness.[FN59]

[FN59] IACHR Rules of Procedure, Article 31.3. See IACHR, Report No. 32/05, petition 642/03, Admissibility, Luis Rolando Cuscul Pivaral, et al, affected by HIV/AIDS, Guatemala, March 7, 2005, paras. 33-35; IA-Court, Case of the Mayagna (Sumo) Awas Tingni Community. Preliminary Objections, para. 53; Case Durand and Ugarte. Preliminary Objections. Judgment of May 28, 1999. Series C No. 50, para. 33; and Case Cantoral Benavides. Preliminary Objections. Judgment of September 3, 1998. Series C No. 40, para. 31.

84. In the matter under consideration, the State alleges that the criminal proceeding against Allan Brewer Carías is in the intermediate stage due to the fact that Allan Brewer Carías fled the country and that in Venezuela there is no trial in absentia. The State further explains that because of that situation, the proceeding has not reached the trial stage, the oral and public hearing has

not taken place, the admission of evidence has not begun, there has been no lower court judgment issued that would allow for the filing of an appeal to the proceedings, an appeal to final judgment, an appeal for annulment, for cassation, a criminal review, an amparo petition, and finally, a constitutional review by the Constitutional Chamber of the Republic of Venezuela.

85. For their part, the petitioners allege that their claim is admissible by application of the three exceptions to the prior exhaustion requirement cited above. First, they allege that the process has been at a standstill since the issuance of the arrest warrant for Allan Brewer Carías in June 2006, and that no preliminary hearing has been held, which constitutes unwarranted delay. They also allege unwarranted delay in resolving the motion for nullity filed on November 8, 2005. Second, they allege that the present case fits within the framework of a State policy in which Allan Brewer Carías not only has been condemned beforehand, but by which he is also impeded from using the remedies normally available for his defense within the criminal procedure, which have been arbitrarily not recognized by the Public Ministry and by the judicial system. Finally, they allege that the remedies available in the domestic jurisdiction are illusory considering that the Judiciary lacks independence and impartiality, and that in general there is a situation of denial of justice.

86. As regards the application of the exception to the prior exhaustion requirement provided for at Article 46(2)(c) of the Convention for the alleged unwarranted delay in the proceeding, the Commission notes that, as the information submitted by the parts indicates, the investigation of the events of April 12, 2002, began in August 2002, when the Special Commission issued its report and urged the Citizens Power to investigate them. The indictment of Allan Brewer Carías was handed down on January 27, 2005, and that he participated in the process, physically present, until September 28, 2005, when he travelled abroad, where he remains till the day of approval of this report. The accusation against Allan Brewer Carías was formalized on October 21, 2005, the date on which the process went to the intermediate stage, and on June 15, 2006, an arrest warrant was issued for him, which it has not been possible to enforce given his stay abroad.

87. In this respect, the Commission observes that while the motion for nullity filed on November 8, 2005, could have been resolved without the presence of Allan Brewer Carías, the physical absence of the accused in fact impeded the holding of the preliminary hearing and other procedural acts related to his trial, as a result, the Commission does not have elements to attribute to the State an unwarranted delay in the decision regarding the criminal proceedings as a whole. The Commission notes, however, that the lack of resolution of the appeal for annulment is an indication of delay attributable to the State with regard to the resolution of the claims concerning due process which were included in the same appeal.

88. As for the application of the exception to the requirement of prior exhaustion of domestic remedies provided for at Article 46(2)(b) of the Convention, the petitioners allege that Allan Brewer Carías has been impeded from using the remedies that should be available to the defense in a criminal proceeding, which were arbitrarily unrecognized by the Public Ministry and by the judicial system. The petitioners allege that Allan Brewer Carías has not been allowed to have access to domestic remedies considering that there has apparently been a violation of the principle of presumption of innocence in his case in light of statements by members of the

Judiciary on the alleged guilt of the accused; that the provisional status of prosecutors and judges involved in the case may have affected their independence and impartiality. In addition, they refer to the impairment of due process guarantees related to the exercise of the defense at trial, such as the right to interrogate and offer witnesses as well as to have access to the file in conditions that make it possible to duly prepare the defense of the accused. They argue that these alleged violations of access to judicial remedies with due guarantees were questioned before the courts by means of the motion for nullity filed on November 8, 2005, which has not been resolved.

89. The Commission notes that the claims mentioned in the preceding paragraph were filed in domestic court together with the appeal for annulment and, consequently, must be analyzed in that context and the analysis *supra* in accordance with Article 46(2)(c). As it has been already pointed out with regard to that appeal, there has been a delay in issuing a decision, and the Commission considers that the lapse of more than three years in the resolution of this appeal is a factor that falls within the framework of the exception to exhaustion of domestic remedies due to an unwarranted delay.

90. The petitioners consider that in cases of political persecution, international law is on the side of one who seeks protection from the State in question. It indicates that this is the ultimate basis of asylum and refuge as legal institutions, and they cite the principle of non-refoulement. The Commission understands, however, that Allan Brewer Carías is not abroad with refugee status. The Commission considers that an eventual analysis of the allegations of political persecution or of the factors that would have affected his right to due process should be done during the stage on the merits.

91. As for the petitioner's argument regarding the illusory nature of domestic remedies due to the lack of independence and impartiality of the Judiciary, the petitioners base their argument on the election of the Supreme Court of Justice not having been done in keeping with the Constitution; that the reform of the Organic Law of the Supreme Court of Justice of 2002 established the election of judges by simple majority, and that those justices who do not follow the government line have been removed or "retired." The State considers that the petitioners' argument that because some of the remedies they resorted to proved unsuccessful all domestic remedies must be considered exhausted is inadmissible, and rejects the characterization of the alleged facts presented by the petitioners with regard to the independence of the Judiciary.

92. While the IACHR has stated on several occasions its concern over factors that may affect the impartiality and independence of some public servants working in the Public Ministry and the Judiciary in Venezuela, the nature of a contentious procedure requires that the petitioners present concrete arguments on the impact on the judicial process related to the claim.[FN60] Generic mentions of the context are not sufficient per se to justify the invocation of that objection.

[FN60] IACHR, Report No. 96/06 Admissibility (Capote, Trujillo et al.), Venezuela, para. 69.

93. As indicated supra the State it is not within the purview of the IACHR to make a determination of guilt or innocence regarding an accused person in a criminal proceeding. But, it is the responsibility of the Commission to analyze if the guarantees of due process which are protected by the Convention have been violated and –in terms of determining the admissibility of the petition—whether domestic remedies have been exhausted or if the exception to the requirement should apply in light of the characteristics of the claim. In the present case, the petitioners allege that factors such as the provisional nature of the judges and prosecutors involved in the case, has made them subject to removal without proceeding, a situation that affects the guarantees of impartiality and independence.

94. Specifically, the petitioners allege that by request of the Sixth Prosecutor, the Twenty-fifth Court of Control issued the order barring Allan Brewer Carías from leaving the country. That order was appealed to the Tenth Chamber of the Court of Appeals. On January 31, 2005, the Chamber of Appeals revoked the order barring Brewer Carías from leaving the country. On February 3, 2005, the Judicial Commission of the Supreme Court of Justice suspended the judges of the Court of Appeals who voted for the nullity of the decision appealed, as well as Temporary Judge Josefina Gómez Sosa, for not having stated sufficient grounds to support the order prohibiting exit from the country. Judge Gómez Sosa was replaced by Judge of Control Manuel Bognanno, also temporary. The petitioners allege that Judge Bognanno was suspended from office on June 29, 2005, after notifying the Superior Prosecutor on June 27, 2005, of alleged irregularities in the investigation conducted by the Sixth Prosecutor.[FN61] In other words, the petitioners allege that the judges of control of guarantees who ruled in favor of the defense or sought to rectify violations of due process allegedly committed during the investigation phase were replaced.

[FN61] In the session on June 29, 2005, the Judicial Commission designated José Alonso Dugarte Ramos as the Provisional Judge in replacement of Manuel Antonio Bognanno Palmares in the Trial Court of the Criminal Judicial Circuit – Caracas Metropolitan Area. On June 27, 2005, the suspended provisional judge wrote to the Public Ministry's Superior Prosecutor of the Caracas Metropolitan Area informing him of the alleged obstruction by the Sixth National Prosecutor's Office, under the responsibility of Dr. Luisa Ortega Díaz who handles the case against Mr. Carmona Estanga, et al. Dr. Ortega Díaz had not informed the Tribunal on the time set by the Public Ministry to present –six months since the identification of those accused– its concluding act. She had also requested that the Ministry “take on an objective attitude, leading to collaborating and not obstructing the actions of the competent body.” Additionally, on May 11, 2005, this same suspended judge instructed the Sixth Prosecutor's Office of the Public Ministry to provide access to the totality of the evidence existing in the file and the videos showing the relationship with the case in which Allan Brewer Carías is accused. Annex to the original petition received on January 24, 2007, para.56.

95. The Commission observes that, in response to the allegations made by the petitioners, the State has not indicated the most effective remedies to question the assignment or removal of judges. In fact, it should be pointed out that the remedies usually available to the defense, such as recusal, are not suitable to question the provisional appointments of judges assigned to the

proceeding or their removal because of their performance. The Commission finds that the removal of several provisional judges in the present case, after rendering decisions regarding the situation of the alleged victim, may have affected his access to domestic remedies and, therefore, this aspect of the claim should be exempt from the requirement being analyzed.

96. Therefore, considering its analysis of the arguments and information presented by the parties, the Commission concludes that the claims regarding the alleged violations of Articles 1.1, 2, 8 and 25 must be exempt from exhausting domestic remedies before resorting to the inter-American system for protection in accordance with the provisions of Article 46(2)(b) and (c) of the American Convention. The allegations presented by the petitioners with regard to Articles 7, 11, 13, 22 and 24 are closely linked to the claims presented regarding Articles 8 and 25, and will be analyzed more specifically in section 4 *infra*.

97. The Commission reiterates that the claim of the exceptions to the requirement of exhaustion of domestic remedies established in Article 46(2) of the Convention is closely linked to the determination of possible violations of certain rights enshrined in the Convention, such as the guarantee of access to justice. Nonetheless, Article 46(2) of the American Convention, by its nature and object, is a norm with autonomous content, *vis à vis* the substantive norms of the Convention. Therefore, the determination of whether the exceptions to the rule of exhaustion of domestic remedies apply in the case in question must be made prior to and separate from the analysis on the merits of the case, since they must meet a different standard of measure than the one used to determine the violation of Articles 8 and 25 of the Convention. It should be pointed out that the causes and effects that have prevented the exhaustion of domestic remedies in the present case will be analyzed, where relevant, in the report adopted by the Commission on the merits of the controversy in order to confirm whether they actually constitute violations of the American Convention.

2. Date of submission of the petition

98. The American Convention establishes that for a petition to be admissible by the Commission, it must be submitted within six months from the date on which the allegedly injured person has been given notice of the final decision. In the claim under analysis, the IACHR has established that the exception to the prior exhaustion requirement provided for at Article 46(2)(b) of the American Convention applies. In this respect, Article 32 of the Commission's Rules of Procedure establishes that in those cases in which the exceptions to the exhaustion of domestic remedies apply, the petition must be submitted within a time the Commission considers reasonable. To that end, the Commission must consider the date on which the alleged violations of rights are said to have taken place, and the circumstances of each case.

99. In the instant case, the petition was received on January 24, 2007, and the facts that led to the claim began in 2002, and their effects continue to the present day. Therefore, in view of the context and the characteristics of the instant case, the Commission considers that the petition was submitted within a reasonable time and that the admissibility requirement of timeliness of submission has been met.

3. Duplication of procedures and international *res judicata*

100. It does not appear from the record that the subject matter of the petition is pending before another international proceeding for settlement, nor does it reproduce a petition that has already been examined by this or another international organization. Therefore, the requirements established at Articles 46(1)(c) and 47(d) of the Convention have been met.

4. Characterization of the facts alleged

101. In view of the elements of fact and law described and the nature of the matter before it, the IACHR considers that the petitioners' allegations on the judicial proceeding brought against Allan Brewer Carías could tend to establish possible violations of the rights to judicial guarantees and judicial protection protected at Articles 2, 8, 13, and 25 of the American Convention in relation to the general obligations established at Article 1(1) of the same instrument. And as the claim is not manifestly groundless or obviously out of order, the Commission considers that the requirements established at Articles 47(b) and (c) of the American Convention have been satisfied.

102. With regard to the alleged violation of the right established in Article 13 of the American Convention, the petitioners claim that the political persecution Allan Brewer Carías would be subjected to would affect his right to freedom of expression, thus, the Commission considers that this aspect of the petition should be examined in the analysis on the merits stage.

103. With regard to the alleged violation of the right to honor and dignity established in Article 11 of the Convention, the Commission finds that this claim is subsumed in the claim regarding the alleged violation of Article 8(2) of the American Convention, and, therefore, it is considered inadmissible.

104. With regard to the claims of the alleged violation of the right to personal security, the right to freedom of movement and residence, and the right to equal protection established in Articles 7, 22 and 24, the Commission notes that the petitioners have claimed that the alleged violation of these rights derived from the manner in which the judicial proceeding against Allan Brewer Carías was conducted, but they have not submitted sufficient elements to show that the alleged facts could constitute a violation of the same. Therefore, those allegations are considered inadmissible.

V. CONCLUSIONS

105. Based on the foregoing considerations of fact and law, and without prejudging on the merits, the Inter-American Commission concludes that the instant case meets the admissibility requirements set forth at Articles 46 and 47 of the American Convention, with regard to the allegations relating to Articles 1, 2, 8, 13 and 25, and that the allegations with regard to Articles 7, 11, 22 and 24 are inadmissible. Accordingly,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To find the petition under study admissible, in relation to Articles 2, 8, 13, and 25 of the American Convention, in relation to Article 1(1) of the same instrument.
2. To find the petition under study inadmissible in relation to Articles 7, 11, 22, and 24.
3. To notify the State and the petitioner of this decision.
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 General Assembly of the OAS.

Approved by the Inter-American Commission on Human Rights in Buenos Aires, Argentina, on the 8th day of the month of September, 2009. (Signed): Luz Patricia Mejía Guerrero, President; Felipe González, Second Vice-President, Sir Clare K. Roberts, Florentín Meléndez, and Paolo G. Carozza, members of the Commission.