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Institution: Inter-American Court of Human Rights
Title/Style of Cause: Oscar Enrique Barreto Leiva v. Venezuela
Doc. Type: Judgement (Merits, Reparations and Costs)
Decided by: President in exercise: Diego Garcia Sayan;
Judges: Sergio Garcia Ramirez; Manuel E. Ventura Robles; Margarete May Macaulay; Rhadys Abreu-Blondet

Due to reasons of force majeure, the President of the Court, Judge Cecilia Medina Quiroga, and Judge Leonardo A. Franco, did not participate in the deliberation and delivery of this Judgment. The Vice-President of the Court, Judge Diego Garcia-Sayan, assumed the Presidency, according to Article 5(1) of the Rules of Procedure of the Tribunal.

Dated: 17 November 2009
Citation: Barreto Leiva v. Venezuela, Judgement (IACtHR, 17 Nov. 2009)
Represented by: APPLICANT: Carlos Armando Figueredo Planchard

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In the case of Barreto Leiva,

The Inter-American Court of Human Rights (hereinafter, the “Inter-American Court”, the “Court” or the “Tribunal”), pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter, the “Convention” or the “American Convention”) and Articles 29, 31, 37(6), 56 and 58 of the Court’s Rules of Procedure [FN2] (hereinafter, the “Rules of Procedure”) delivers this Judgment.

[FN2] Approved by the Court during its XLIX Period of Ordinary Sessions, held from November 16 to 25, 2001 and partially amended by the Court during its LXXXII Period of Ordinary Sessions, held from January 19 to 31, 2009.

I. INTRODUCTION OF THE CASE AND PURPOSE OF THE APPLICATION

1. On October 31, 2008 the Inter-American Commission on Human Rights (hereinafter, the “Commission” or the “Inter-American Commission”) filed, pursuant to Articles 51 and 61 of the Convention, an application against the Bolivarian Republic of Venezuela (hereinafter, the “State” or “Venezuela”) originating in the instant case. The initial application was filed with the Commission on August 9, 1996. On July 17, 2008, the Commission approved the Report on Admissibility and Merits N° 31/08, by means of which it concluded that the case was admissible and made certain recommendations for the State. This report was notified to the State on July 31,

2008. Considering that the Commission had not received any response from the State with regard to the measures adopted to implement the recommendations, it decided to submit the instant case to the Court's jurisdiction. The Commission appointed Commissioner Paulo Sergio Pinheiro, and Executive Secretary Santiago A. Canton as delegates and Deputy Executive Secretary Elizabeth Abi-Mershed, and attorneys Juan Pablo Albán Alencastro, Verónica Gómez, Débora Benchoam and Silvia Serrano, specialists of the Executive Secretariat, as legal advisers.

2. The application relates to the criminal proceeding by which Mr. Oscar Enrique Barreto Leiva (hereinafter, "Mr. Barreto Leiva" or the "alleged victim") was sentenced to one year and two months imprisonment for crimes against public property as a result of his actions while serving as a Director General in 1989, of the Department of Administration and Services of the Ministry of the Secretariat of the Presidency of the Republic. According to the Commission, during the processing of a criminal proceeding before the Supreme Court of Justice against the then President of the Republic, a senator and a representative, Mr. Barreto was summoned to testify as witness and later on, an arrest warrant was issued against him. The Commission argued that in said proceeding, the alleged victim was not notified of the charges against him due to the secrecy of the investigation phase. Furthermore, the Commission alleged that the secrecy of the investigation phase implied that Mr. Barreto Leiva was not able to be assisted by a counsel of his choice during that phase, to examine and cross-examine witnesses, to have access to the evidence being gathered, present evidence in his defense and counteract the evidence against him. Moreover, according to the Commission, the fact that the Supreme Court of Justice tried, in sole instance, the case of the alleged victim would constitute a violation of his right to be tried by a competent tribunal, given the fact that his position did not merit a special criminal privilege, as well as a violation of his right to appeal an adverse judgment. Finally, the Commission deemed that Mr. Barreto Leivo was subjected to preventive detention based exclusively on indications of criminal responsibility, with no possibility of bail, which lasted longer than the final sentence imposed.

3. The Commission requested the Court to declare that the State is responsible for the violation of the rights enshrined in Articles 7(1), 7(3) and 7(5) (Right to Personal Liberty), 8(1), 8(2)(b), 8(2)(c), 8(2)(d), 8(2)(f) and 8(2)(h) (Right to a Fair Trial) and 25(1) (Right to Judicial Protection) of the American Convention, in relation to the obligations established in Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) therein, to the detriment of the alleged victim. Moreover, the Commission requested the Court to order certain measures of reparations.

4. On January 1, 2009 Mr. Carlos Armando Figueredo Planchard, the representative of the alleged victim (hereinafter, the "representative") filed the brief containing pleadings, motions and evidence (hereinafter, "brief of pleadings and motions"), by which he arrived at the same conclusions that the Inter-American Commission.

5. On March 14, 2009, the State submitted a brief containing the response to the application and observations to the brief of pleadings and motions (hereinafter, "response to the application"). The State alleged that Mr. Barreto Leiva was tried by the Supreme Court "pursuant to the principle of connection based on ancillary jurisdiction of the former President of the Republic, but this does not mean that the State violated the due process of law and the right to be

tried by a competent court, [...] apart from the fact that since it is the maximum judicial instance, he was provided with more procedural guarantees". The State appointed Mr. Germán Saltrón Negretti as Agent and Mr. Larry Devoe Márquez as Deputy Agent. Afterwards, on April 29, 2009 the State appointed Mr. Gonzalo González Vizcaya as Deputy Agent.

II. PROCEEDING BEFORE THE COURT

6. The application was notified to the representative and to the State on November 17 and 18, 2008, respectively. During the proceeding before this Tribunal, apart from the filing of the main briefs forwarded by the parties (*supra* para. 1, 4 and 5), the President of the Court (hereinafter, the "President") issued an Order [FN3] requesting the forwarding of three testimonies rendered by affidavit, timely offered by the representatives. Furthermore, the President convened the parties to a public hearing in order to listen to the statements of the alleged victim, the witnesses and expert witnesses proposed, as applicable, by the Commission, the State and the representative, as well as the final arguments on the merits and the possible reparations and costs. Finally, the President ordered the parties to present the respective briefs containing the final arguments no later than August 6, 2009.

[FN3] Cf. Case of Barreto Leiva V. Venezuela. Order of the President of the Court of May 21, 2009.

7. The public hearing was held on July 2, 2009 during the LXXXIII Period of Ordinary Sessions of the Court, at the seat of the Court in the city of San José, Costa Rica. [FN4]

[FN4] To this hearing, there appeared: a) on behalf of the Inter-American Commission: Delegate Paulo Sergio Pinheiro and Adviser Juan Pablo Albán Alencastro; b) on behalf of the alleged victim: Representative Carlos Armando Figueredo Planchard, and adviser Carlos Rafael Pérez, and c) on behalf of the State: Agent Germán Saltrón Negretti, and Deputy Agent Gonzalo González Vizcaya.

8. On July 1, 2009 the Tribunal received an *Amicus curiae* brief from Círculo Bolivariano Yamileth López [Yamileth López Bolivarian Circle]. [FN5] Said brief referred, *inter alia*, to the implementation of the adversarial system in Venezuela.

[FN5] Said brief was filed by María del Milagro Solís Aguilar, Oscar Barrantes Rodríguez, Hans Barboza Rojas, Edgar Rodríguez Sancho, Rodrigo Quirós Castro and Lisandro Cordón Vega.

9. On July 31, 2009, the representative filed the brief containing the final arguments. The briefs of the State and of the Commission were received on August 6, 2009. The State forwarded additional documentary evidence.

10. On August 28, 2009 the representative filed an objection to the documentary evidence forwarded by the State together with the final arguments, considering that it was "time-barred". The Commission made no observations.

11. On September 22, 2009 the President requested the representative to forward, as evidence to facilitate adjudication of the case, a non-certified copy of the decision dated May 18, 2004 by means of which the Supreme Court of Justice ordered the judicial detention of Mr. Barreto Leiva. The representative forwarded said evidence five days after the date established to such end, on October 7, 2009. On October 21, 2009, the Commission noted that said evidence allowed to confirm one of the violations alleged by it. The State presented no observations.

III. COMPETENCE

12. The Inter-American Court has jurisdiction over this case in accordance with Article 62(3) of the American Convention, given the fact that Venezuela has been a State Party to the American Convention since August 9, 1977 and has accepted the binding jurisdiction of the Tribunal on June 24, 1981.

IV. EVIDENCE

13. Based on the provisions of Articles 44 and 45 of the Rules of Procedure, as well as on the Court's case law regarding the evidence and assessment thereof [FN6], the Court shall now examine and assess the documentary evidence forwarded by the parties at the different procedural stages, as well as the affidavits rendered during the public hearing. In doing so, the Tribunal will assess them on the basis of sound judgment, within the applicable legal framework. [FN7]

[FN6] Cf. Case of the "White Van" (Paniagua Morales et al.) V. Guatemala. Reparations and Costs. Judgment of May 25, 2001. Series C No. 76, para. 50; Case of Perozo et al. V. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195, para. 91; and Case of Kawas Fernández V. Honduras. Merits, Reparations and Costs. Judgment of April 3, 2009; Series C No. 196, para. 36.

[FN7] Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala, Merits. Judgment of March 8, 1998. Series C, Nº 37, para. 76; and Case of Perozo et al. V. Venezuela, supra note 6, para. 112, and Case of Kawas Fernández V. Honduras, supra note 6, para. 36.

1. Testimonial Evidence and Expert Reports

14. The Court received the affidavits rendered by the following witnesses proposed by the representative: [FN8]

a) Luis Enrique Farías Mata, who rendered a statement about "his dissenting opinion at the trial against Mr. Barreto Leiva";

- b) Beatriz Di Totto, who declared about the “[alleged] violation of the due process of law in the proceeding conducted against Mr. Barreto Leiva and the [alleged] pressures from the Executive on the Supreme Court of Justice in the same case[; and] about the [alleged] violation of the right to defense of Mr. Barreto Leiva on the part of the Comptroller General of the Republic of Venezuela”; and
- c) Alberto Arteaga Sánchez, who rendered a statement about “the [alleged] violations of the due process of law in the proceeding conducted against Mr. Barreto Leiva and the [alleged] pressure exerted by the Executive on the Supreme Court of Justice in the same case”.

[FN8] On June 6, 2009 the representative informed that "due to reasons of force majeure", Mr. Alberto Arteaga Sánchez, called upon by the President to render a statement at the public hearing, was unable to assist the hearing; therefore the representative requested the Court to allow such witness to render an affidavit. On June 8, 2009 the President granted the request, On June 26, 2009 the representative informed the Tribunal of its decision to dismiss the affidavit of Alfredo Ducharne.

15. Moreover, as to the evidence produced at the public hearing, the Court listened to the declarations rendered by the following people: [FN9]

- a) Oscar Barreto Leiva, alleged victim proposed by the Commission. He declared about the “criminal proceeding conducted against him; the [alleged] obstacles he had to face in order to search justice in his case and the consequences in his personal, family and professional life of the [alleged] human rights violations committed”;
- b) Jesús Ramón Quintero, tenured professor of the Criminal Procedural Law Chair at Universidad Central de Venezuela and Universidad Católica Andrés Bello; expert witness proposed by the Commission. He rendered a statement about the “criminal legislation of the protection of public and constitutional property applicable to the time in which the criminal proceeding of this case was conducted; and the reforms introduced in such fields after the delivery of the condemnatory judgment against the [alleged] victim”; and
- c) Gilberto Venere Vásquez, attorney and PhD in Public Law, expert witness proposed by the State. He rendered a statement about “the reforms carried out to the Criminal Code and the Basic Code of Criminal Procedure, to adapt them to the rules of the American Convention on Human Rights and about the transition from the inquisitorial to the adversarial system”.

[FN9] During the public hearing, the State declared that it desisted from the taking the testimony of Mr. José Vicente Rangel.

2. Evidence Assessment

16. In the case at hand, as in many other cases, [FN10] the Tribunal admits the evidentiary value of such documents timely forwarded by the parties in that have not been disputed nor challenged, or its authenticity questioned. As to the documentary evidence forwarded by the

State together with its final arguments (supra para. 9), the Tribunal takes note of the observations made by the representative (supra para. 10) in relation to the fact that such evidence is time-barred. However, considering that such evidence consist of the court files of the case produced at the domestic level, the Tribunal decides to accept such evidence, in accordance with Article 47(1) of its Rules of Procedure, for it is pertinent and necessary to determine the facts of the instant case.

[FN10] Cf. Case of Velásquez Rodriguez V. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4, para. 140; and Case of Perozo et al. V. Venezuela, supra note 5, para. 94, and Case of Kawas Fernández V. Honduras, supra note 5, para. 39.

17. As to the evidence to facilitate adjudication of the case, which was untimely forwarded by the representative (supra para. 11) the Tribunal decides to accept it for it is useful for the instant case and was not challenged by the State.

18. As to the testimonies and expert opinions offered by the witnesses and expert witnesses at the public hearing and by means of affidavits, the Court deems they are relevant to the extent they relate to the purpose defined by the President of the Tribunal in the Order requiring them (supra para. 6).

19. As to the statement of Mr. Barreto Leiva, the Tribunal shall analyze his testimony taking into account that since the alleged victim has a direct interest in the case, his statement cannot be assessed alone. [FN11]

[FN11] Cf. Case of Loayza Tamayo V. Perú. Merits. Judgment of September 17, 1997. Series C. Nº 33, para. 43; Case of Valle Jaramillo et al. V. Colombia. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 192, para. 54 and Case of Tristán Donoso V. Panamá. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193, para. 24.

V. ARTICLES 8 (RIGHT TO A FAIR TRIAL) [FN12] AND 25 (RIGHT TO JUDICIAL PROTECTION) [FN13] IN RELATION TO ARTICLES 1(1) (OBLIGATION TO RESPECT RIGHTS) [FN14] AND 2 (DOMESTIC LEGAL EFFECTS) [FN15] OF THE AMERICAN CONVENTION

[FN12] Article 8 of the Convention, in its relevant part, provides that:

1. Every person has the right to a hearing [...] by a competent, independent and impartial tribunal [...].
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[...]

- b) prior notification in detail to the accused of the charges against him;
- c) adequate time and means for the preparation of his defense;
- d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
- [...]
- f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
- [...], and
- h) the right to appeal the judgment to a higher court.

[...]

[FN13] Article 25(1) of the Convention establishes that:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

[FN14] Article 1(1) of the Convention establishes that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

[FN15] Article 2 of the Convention establishes that:

[W]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

1. Background

20. At the time of the facts, Mr. Barreto Leiva was the Director General of the Department of Administration and Services, Ministry of the Secretary of the Presidency of the Republic. [FN16]

[FN16] Cf. judgment delivered by the Supreme Court of Justice on May 30, 1996 in case file N° 0588 (record of appendices to the application, Volumes I and II, appendix 14, pages 310 to 1175); statement of Mr. Barreto Leiva rendered before the Superior Court for Safeguarding Public Assets on February 10, 1993 (record of appendices to the application, volume I, appendix 3, page 240) and statement of Mr. Barreto Leiva rendered at the public hearing held before the Inter-American Court on July 2, 2009.

21. On February 22, 1989, at the meeting with the Council of Ministers, the then President of the Republic, Mr. Carlos Andrés Pérez Rodríguez, approved a budgetary adjustment of Bs. 250.000.000,00 (two hundred fifty million bolivares) and attributed it to the Ministry of Foreign

Affairs. Large amounts from said adjustment were used to buy United States dollars and were partially invested in a Venezuelan police commission for the Republic of Nicaragua in order to provide security and protection services to the then President of that country, Mrs. Violeta Barrios de Chamorro and several of her ministers, as well as to train the security personnel appointed by said authorities. [FN17]

[FN17] Judgment delivered by the Supreme Court of Justice on May 30, 1996, supra note 16.

22. The Supreme Court of Justice (hereinafter, the “SCJ”) considered that these facts constituted aggravated generic misappropriation of public funds and sentenced those considered responsible for said illegal acts to serve different prison terms. The SCJ sentenced the alleged victim to a year and two months imprisonment and other accessory penalties [FN18] after having found him liable as an accomplice to the crime of aggravated generic misappropriation. [FN19]

[FN18] Said accessory penalties included: being barred from political activity for the duration of the sentence, payment of trial costs, being barred from holding public office for a period equal to the sentence to commence after the sentence had been completed, and the payment of restitution, reparation or compensation for damages caused to public property (Cf. judgment delivered by the Supreme Court of Justice of May 30, 1996, supra note 15, page1075).

[FN19] Judgment delivered by the Supreme Court of Justice on May 30, 1996, supra note 16, pages 1074 and 1075.

23. The Inter-American Commission as well as the representative of Mr. Barreto Leiva alleged that the criminal proceeding leading to his conviction disregarded many of the judicial guarantees provided in the Convention, namely: prior notification in detail of the charged filed (Article 8(2)(b); adequate time and means for the preparation of his defense (Article 8(2)(c); the right to defend himself or to be assisted by legal counsel of his own choice (8(2)(d); the right to examine witnesses present in the trial and to obtain the appearance, as witnesses, of experts or of other persons who may shed light on the facts (8(2)(f), right to be tried by a competent court (8(1)) and the right to appeal a judgment against him (8(2)(h).

24. The Court shall now proceed to analyze, in that order, the alleged violations of the Convention, but it considers relevant to repeat, as in previous cases, [FN20] that it does not have competence to establish the criminal liability of the individuals. That is why in the instant case, the Court shall not decide on the guilt or innocence of Mr. Barreto Leiva or of any of the people who were tried with him, since this is a matter of the Venezuelan criminal jurisdiction.

[FN20] Cf. Case of Velásquez Rodríguez V. Honduras. supra note 10, para. 134; Case of Suárez Rosero V. Ecuador. Merits, Judgment of November 12, 1997, Series N°. 35, para. 37, Case of

Lori Berenson Mejía V. Perú. Merits, Reparations and Costs. Judgment of November 25, 2004. Series C N° 119, para. 92.

25. Furthermore, the Court considers appropriate to, first, refer to the State's argument according to which "during the proceeding conducted before the [SCJ], none of the defendants and later on, convicted people alleged [any] violation of the Rule of Law". In this regard, the Tribunal considers that this type of arguments should have been previously put forward, at the appropriate procedural time of the processing of admissibility before the Inter-American Commission [FN21] and after, if applicable, as a preliminary objection before the Court. In view of the fact that this is not what happened, the Tribunal dismisses these allegations.

[FN21] Cf. Case of Velásquez Rodríguez V. Honduras. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 88; Case of Bayarri V. Argentina. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 30, 2008. Series C N° 187, para. 16; Case of Reverón Trujillo V. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, para. 21.

2. Prior notification in detail to the accused of the charges against him (Article 8(2)(b)

26. The Commission indicated that Mr. Barreto Leiva testified three times during the investigation phase and before an arrest warrant was issued in his name and two of the corresponding summons did not specify the status under which the Mr. Barreto Leiva was required to appear. It mentioned that "by testifying, the victim was already charged in the proceedings and therefore, he was entitled to the right to receive prior and detailed notification of the charges against him". The representative agreed with the Commission.

27. The State asserted that "before the arrest warrant, Mr. Barreto Leiva was summoned to testify as witness about the investigation and later on, when his participation was verified as a result of the inquiries, he was once again summoned as suspect, according to the formalities prescribed by the Code of Criminal Procedure". The State explained that at that time "he [...] could not be notified of charges that still did not exist against him".

28. To comply with Article 8(2)(b) of the Convention, the State must notify the accused not only of the charges against him, that is, the crimes or offenses he is charged with, but also of the reasons for them, and the evidence for such charges and the legal definition of the facts. The defendant has the right to know, through a clear, detailed and precise description, all the information of the facts in order to fully exercise his right to defense and prove to the judge his version of the facts. The Court has considered that timely compliance with Article 8(2)(b) is essential for the effective exercise of the right to defense. [FN22]

[FN22] Cf. Case of López Álvarez V. Honduras. Merits, Reparations and Costs. Judgment of February 1, 2006. Series C No. 141, para. 149; Case of Palamara Iribarne v. Chile. Merits,

Reparations and Costs. Judgment of November 22, 2005. Series C N° 135, para. 225; and Case of Acosta Calderón V. Ecuador. Merits, Reparations and Costs. Judgment of June 24, 2005. Series C No. 129, para. 118 and Case of Tibi V. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004. Series C No. 114, para. 187.

29. Now then, the right to defense must be necessarily exercised as from the moment a person is accused of being the perpetrator or participant of an illegal act and ends when the jurisdiction thereby ceases, [FN23] including, where applicable, the enforcement phase. The opposite would imply to subordinate the conventional guarantees that protect the right to defense, including Article 8(2)(b), to that the person under investigation finds, at certain procedural allowing the possibility that, previously, part of his rights be violated by acts of the authority that he disregards or which he cannot control or effectively object to, which is evidently contrary to the Convention. In fact, to prevent a person from exercising his right to defense from the moment the investigation begins and the authority in charge orders or executes actions entailing an infringement of rights is to magnify the investigative powers of the State to the detriment of the fundamental rights of the person under investigation. The right to defense binds the State to treat the person, at all times, as a true party to the proceeding, in the broadest sense of this concept and not simply as an object thereof.

[FN23] Cf. mutatis mutandis Case of Suárez Rosero V. Ecuador, supra note 20, para. 71; Case of Bayarri V. Argentina, supra note 20, para. 105; and Case of Heliodoro Portugal V. Panamá. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 186, para. 148.

30. Based on the foregoing, Article 8(2).b) of the Convention applies even before the “charges”, in a strict sense, are filed. For this right to fully operate and satisfy its inherent aims, it is necessary for said notification to take place before the accused renders his first statement [FN24] before any public authority.

[FN24] Cf. Case of Tibi V. Ecuador, supra note 22, para. 187; Case of Palamara Iribarne V. Chile, supra note 22, para. 225, and Case of Acosta Calderón V. Ecuador, supra note 22, para. 118.

31. Clearly, the content of the notice shall vary according to the progress of the investigation, reaching the highest point, established in paragraph 27 supra, with the formal and definitive filing of the charges. Before that and as a minimum requirement, the person under investigation must learn about, in as much detail as possible, the charges against him.

32. In the instant case, the issue at stake is the capacity of Mr. Barreto Leiva by the time he rendered the three statements before the judicial authorities before being subjected to pre-trial detention. The Commission and the representative asserted that he was the person being

investigated, while the State indicated that he was a witness. However, the assertions of the State would seem to be limited to when Mr. Barreto Leiva rendered a statement before the Congress of the Republic, since it expressly accepts that the alleged victim was a "defendant" before the Court for Safeguarding Public Assets (hereinafter, the "CSPA"). [FN25]

[FN25] The State's brief containing final arguments literally indicates: "The rights of Mr. Barreto Leiva as a witness were fully respected, then as a defendant and later on, as an accused. As a witness, when he declared before the Commission of the Comptroller of the National Congress; as a defendant, when he was summoned to declare before the Superior Court for Safeguarding Public Assets and later on, as an accused when he declared before the Substantiation Court of the Supreme Court of Justice".

33. From the evidence furnished, it spring that on January 26, 1993, Mr. Barreto Leiva rendered a statement before the Permanent Commission of the Comptroller of the Chamber of Deputies of the Congress of the Republic. [FN26] The cross-examination of the deputies aimed at obtaining information on the irregularities in the handling of public funds (supra para. 21). Regarding this statement, the Commission and the representative did not indicate that the alleged victim had appeared in a capacity different from that of witness; therefore, the Court shall not analyze this aspect.

[FN26] Cf. transcription of the statement of Mr. Barreto Leiva rendered before the Permanent Commission of the Comptroller of the Chamber of Deputies of the Congress of the Republic of January 26, 1993 (record of appendices to the final written arguments of the State, appendix 14, pages 5181 to 5234).

34. Afterwards, on February 4, 1993 the CSPA agreed to receive the "informative testimony" of Mr. Barreto Leiva, [FN27] and on that same date, a summons was issued to such effect. [FN28] Said summons did not specify the status under which the alleged victim was required to appear.

[FN27] Cf. court order of the CSPA of February 4, 1993 (record of appendices to the final written arguments of the State, appendix 5, page 4847).

[FN28] Cf. summons issued by the CSPA for Mr. Barreto Leiva on February 4, 1993 (record of appendices to the final written arguments of the State, appendix 5, page 4849).

35. On February 10, 1993, Mr. Barreto Leiva rendered a statement before the CSPA. He testified without being sworn in and after being advised of the constitutional guarantee against providing testimony that may incriminate himself or his relatives. There is no evidence proving that he was informed of the capacity of witness or defendant under which he was supposed to appear [FN29].

[FN29] Cf. statement of Mr. Barreto Leiva before the CSPA of February 10, 1993 (record of appendices to the application, volume I, appendix 5, page 239).

36. According to the domestic legislation, an "informative testimony" or a "preliminary examination statement" is that statement rendered by the person being investigated. Hence, Article 75(d) of the Code of Criminal Procedure in force at the time of the events [FN30] (hereinafter, the "CCP") indicated that : "[i]n the process of gathering evidence, the Judicial Police will carry out the following actions: a)Take informative statements from accused individuals in accordance with the provisions established in Article 193". Moreover, Article 192 provided that: "[i]n the days following the detention of the defendant or summons of the defendant to appear in court, plus time allowed for distance travelled, the Court of Instruction will take their testimony in accordance with the provisions of this Chapter" (emphasis added).

[FN30] Code of Criminal Procedure of Venezuela, Official Gazette N° 748, extraordinary, of February 3, 1962 (record of appendices to the application, volume I, appendix 2, pages 121 to 215).

37. Furthermore, Article 193 of the CCP indicated that:

[...] any time that it is required to hear from the accused in person, the defendant will be informed of the crime about which he is being questioned and he will be read the constitutional provision that guarantees his right to "not be compelled to testify in his case or to incriminate himself, his spouse or his relatives within a fourth degree of consanguinity or second degree of affinity.

38. Taking into account said set of rules, the Court considers reasonable the argument of the Commission according to which if Mr. Barreto Leiva had provided a witness testimony, he would have been sworn in, as the law stipulates, [FN31] and that the fact of having informed him of his right against self-incrimination also proves that he was being investigated in reality. In addition, it is verified that the guarantees provided to Mr. Barreto Leiva are similar to the ones provided to other people who were investigated in the same case – who, later on, were convicted – and very different from the ones provided to those who clearly appeared as witnesses. [FN32]

[FN31] Article 169 of the CCP established that: " [a]fter witnesses are sworn in, they will be asked to provide their full names, age, marital status, address, profession or trade; and they will be examined in accordance with the provisions of chapters I, II and V of this Article" (emphasis added).

[FN32] For example, it spring from the witnesses José Vicente Rodríguez Aznar and Ruth Oesterreicher de Krivoy that they were legally sworn in and that the "personal circumstances as to which all witnesses must be questioned established by the Code of Criminal Procedure" were

applied to them (Cf. statements of José Vicente Rodríguez Aznar and Rught Oesterreicher de Krivoy before the CSFA on March 2 and 3, 1993, respectively, record of appendices to the final written arguments of the State, appendix 4, pages 4365 and 4386). At the same time that Mr. Barreto Leiva, Reinaldo Figueredo Planchard and Carlos Vera were not sworn in and after being advised of the constitutional guarantee against providing testimony that may incriminate them or their relatives, according to Article 193 of the CCP when referring to the “accused person” (Cf. statements of Mr. Carlos Vera and Reinaldo Figueredo Planchard before the CSPA of February 8 and March 4, 1993, respectively, record of appendices to the final written arguments of the State, appendix 4, pages 4015 and 4394 and statement of Mr. Barreto Leiva before the CSPA of February 10, 1993, *supra* note 29)

39. The situation of the alleged victim when rendering the second statement dated October 5, 1993, this time before the Substantiation Court of the SCJ, is different. From the very beginning this Court notified him that he would render a witness testimony, [FN33] sworn him in and asked him to provide his full names, age, marital status, address, profession or trade as provided for by the CCP. [FN34]

[FN33] Cf. summons for Mr. Barreto Leiva issued by the Substantiation Court of the Supreme Court of Justice on September 29, 1993 (records of appendices to the application, Volume I, appendix 7, page 266).

[FN34] Cf. statement of Mr. Barreto Leiva before the Substantiation Court of the Supreme Court of Justice of October 5, 1993 (record of appendices to the final written arguments of the State, appendix 2, page 3544).

40. Finally, the third statement of Mr. Barreto Leiva, rendered, once again, before the Substantiation Court of the SCJ on December 15, 1993, was “informative”, [FN35] he was not sworn in and he was not advised of his right against self-incrimination. [FN36]

[FN35] Cf. summons for Mr. Barreto Leiva issued by the Substantiation Court of the Supreme Court of Justice on December 14, 1993 (records of appendices to the application, Volume I, appendix 8, page 268).

[FN36] Cf. statement of Mr. Barreto Leiva before the Substantiation Court of the Supreme Court of Justice on December 15, 1993 (records of appendices to the application, Volume I, appendix 9, page 270). Even, on this occasion, Mr. Barreto indicated, conscious of his status as person being investigated, “although I personally and morally regret the change to being classified as an accused person”.

41. Based on the foregoing, the Court concludes that in the first statement, Mr. Barreto Leiva was being investigated by the CSPA; in the second statement before the Substantiation Court of the SCJ, he testified as a witness and in the third statement before the same court, his status changed again into person being investigated. Therefore, in accordance with the provisions of

paragraphs 28 to 30 supra, he was entitled, in the first and in the last statement, at least, to the right enshrined in Article 8(2)(b) of the Convention. The Court shall now analyze whether the State complied with this obligation.

42. In that regard, Venezuela asserted that

Prior to the issuance of the arrest warrant against Mr. Barreto Leiva, this is, on May 18, 1994, it was not possible to notify him of the inquiries or charges that may be filed at that time, nor could he have access to the case file, by virtue of the secrecy of the proceedings. It was during the inquiries that Mr. Barreto Leiva was formally joined to the proceedings, and as a result, the arrest warrant was issued against him; from that moment onwards, Mr. Barreto Leiva had full access to the court file and was assisted by legal counsels of his choosing (emphasis added in the text).

43. Furthermore, the State asserted that "the reasons and causes of the controversy were publicly discussed at the National Congress for several months, which is why Mr. Barreto Leiva cannot hold that he did not know of the charges filed against him".

44. It is worth mentioning, as a result, that the State accepts that it did not inform Mr. Barreto Leiva of the facts attributed to him before he appeared before the courts. Therefore, it is appropriate to analyze whether the reasons given by the State are sufficient to justify such omission.

45. It is reasonable that, in certain cases, there is secrecy of the proceedings conducted during the preliminary investigation in a criminal case, in order to guarantee the effectiveness of the administration of justice. It falls upon the State the power to open a court file in the search for truth of the facts, adopting the measures necessary to impede that such work be affected by the elimination or withholding of evidence. However, such power must be reconciled with the right to defense of the person being investigated, which entails, *inter alia*, the possibility to learn about the facts attributed to him.

46. The transition between "person being investigated" and "accused" – and, on occasions, even "convicted" - may occur at any time. It is not possible to wait until the person is formally accused or- as in the instant case- deprived of liberty to provide him with the information that is essential for the timely exercise of the right to defense.

47. The fact that Mr. Barreto Leiva would have learnt, by the media or by his previous statement before the Congress (supra para. 32) about the investigation that was being conducted, does not release the State from complying with the provision of Article 8(2).b of the Convention. The person being investigated, before rendering a statement, has to officially learn about the facts he is charged with, not just infer them from the public information or the questions that are made to him. In this way, his response may be effective and without the margin of error that the guesswork produces; the principle of congruence, according to which there must be correlation between the facts informed to the accused and the indictment and the conviction, is guaranteed; [FN37] and the right to defense is ensured.

[FN37] Cf. Case of Fermín Ramírez V. Guatemala. Merits, Reparations and Costs. Judgment of June 20, 2005. Series C No. 126, para. 67 and 68.

48. Based on the foregoing, the Tribunal concludes that Venezuela violated the right enshrined in Article 8(2)(b) of the American Convention, in relation to Article 1(1) therein, to the detriment of Mr. Barreto Leiva.

3. Granting the accused adequate time and means for the preparation of his defense (Article 8(2)(c))

49. The Commission and the representative asserted that the investigation process was secret and that Mr. Barreto Leiva could not gain knowledge of the records in the case until he was deprived of liberty.

50. The State indicated that the rules applicable to the criminal procedure in force at the time of the events were observed by the SCJ. It further asserted that the requirement of public nature of the proceedings during the investigative phase “obeys to the requirement of certain degree of secrecy to ensure the success of the investigation”, as well as to “avoid the dishonor or prejudice that an accusation may cause on the people”; the “passion and interest of the private individuals, political parties or groups that may interfere or change the course of the investigative proceedings” and the possibility that the person being investigated “with prior notification, be safe from and evade justice”.

51. Article 60 of the Political Constitution in force at the time of the events, provided:

The defendant shall have access to all evidentiary material and to all means of defense provided for by law as soon as the appropriate arrest warrant has been executed.

52. Article 73 of the Code of Criminal Procedure, in its pertinent part, set forth that:

[t]he investigation proceedings, whether initiated by the court itself or at the instance of an interested party, shall remain secret, except for the representative from the Public Ministry, until the investigation is completed. The proceedings will cease to be secret for the accused, for whom an arrest warrant was issued [...].

53. In that regard, the Court refers to the terms stated in the preceding paragraphs (supra para 45 to 46) and further states that though the Court recognizes the existence of the authority, and even the obligation, of the State to guarantee, to the maximum extent possible, the success of the investigations and the imposition of penalties to those who are found to be guilty, the power of the State in this matter is not unlimited. It must conduct its actions “within limits and according to procedures that preserve both public safety and the fundamental rights of the human person.” [FN38]

[FN38] Cf. Case of Bulacio V. Argentina. Judgment of September 18, 2003. Series C No. 100, para. 124; Case of Juan Humberto Sánchez V. Honduras. Judgment of June 7, 2003. Series C N° 99 para. 86.

54. One of the fundamental rights is the right to count on adequate time and means for the preparation of the defense, enshrined in Article 8(2).c) of the Convention, which binds the State to allow the accused having access to the record of the case and to the evidence gathered against him [FN39]. Moreover, in the presence of both parties to an action, the State must guarantee the intervention of the accused in the analysis of the evidence.

[FN39] Cf. Case of Palamara Iribarne V. Chile, supra note 22, para. 170.

55. If the State intends to limit this right, it must respect the principle of nullum crimen nulla poena sine lege praevia, arguing, in a well-founded way, which is the legitimate goal it intends to achieve and proving that the means to be used in order to achieve such goal is adequate, necessary and strictly proportional. Otherwise, the restriction of the right to defense of the individual will be contrary to the Convention.

56. In the instant case, the Court notes that, according to the law (supra paras.50 and 0) the investigative supporting documentation, while the investigation was being conducted, was always secret for the person being investigated who was not under arrest. In other words, the right to defense of the individual under investigation was always subordinated, being the characteristics of the particular case irrelevant for the law – and by authority of law, for the court.

57. Based on the foregoing, the Tribunal concludes that the State violated Article 8(2).c) of the Convention, in conjunction with Article 1(1) therein, to the detriment of Mr. Barreto Leiva. Likewise, considering that this violation was committed as a consequence of the application of Articles 60 of the Constitution and 73 of the CCP in force at the time of the events, the State also failed to comply with Article 2 of the Convention [FN40].

[FN40] The fact that said domestic rule is not longer in force at the date this Judgment is delivered is not an impediment for the Tribunal to declare the violation of Article 2 of the Convention, inasmuch as such rule was applied in due time to the detriment of the victim of the instant case (Cf. Case of La Cantuta V. Perú. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C N° 237, para. 189).

4. right of the accused to be assisted by a counsel of his choosing (Article 8(2)(d))

58. According to the Commission and the representative, Mr. Barreto could not be assisted by defense counsel while providing testimony during the investigation phase.

59. The State pointed out that in all the testimonies rendered by Mr. Barreto Leiva "a representative from the Office of the Public Prosecutor was always present", whose role was "to defend the rights of the individual being investigated and the conduct of the proceeding", which, according to the State, "adversely affects the alleged violation of the right to defense".

60. As can be noticed, the fact that Mr. Barreto Leiva was not advised by a counsel when providing a testimony before the CSPA and the Substantiation Court of the SCJ is not at issue. The issue is whether the presence of the Public Prosecutor's Office during such statements makes up the role of the defense counsel.

61. The charges may be confronted and disproved by the accused by his own acts, including the statement he renders about the facts he is charged with, and by the legal representation exercised by a law professional, who advises the accused on his rights and duties and who also exercises, *inter alia*, a critical control over lawfulness in the production of evidence.

62. If the right to defense arises as of the moment in which an investigation into an individual is ordered (*supra* para. 29), the accused must have access to a legal representation from that moment onwards, especially during the procedure in which his statement is rendered. To prevent the accused from being advised by a counsel means to strictly limit the right to defense, which leads to a procedural unbalance and leaves the individual unprotected before the punishing authority.

63. The right to a legal representation cannot be satisfied by who, at the end, will file charges, that is, the Public Prosecutor's Office. The charges reassert the criminal cause of action; the defense, responds and rejects. It is not reasonable to entrust naturally opposed forces with one person.

64. As a result, Mr. Barreto Leiva was entitled, according to the American Convention, to be assisted by a counsel and not by the Office of the Public Prosecutor when he provided the two informative statements indicated in paragraphs 35 and 40 *supra*. By depriving him of such legal counseling, the State violated Article 8(2)(d) of the Convention, in conjunction with Article 1(1) therein, to his detriment.

5. right to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons (Article 8(2)(f))

65. The Commission and the representatives did not present arguments to sustain the violation of this right. They limited to point out that the violation of such right was the consequence of the secrecy of the investigation process, without referring to witnesses or expert witnesses that the victim could examine or people who were denied to appear.

66. Based on the lack of accuracy in relation to this aspect and considering that the secrecy of the investigation process was analyzed in the above paragraphs, the Tribunal declares that the violation of Article 8(2)(f) of the Convention by the State has not been proven.

6. right to be tried by a competent tribunal (Article 8(1))

67. The Commission indicated that Mr. Barreto Leiva “was involved in a case in which the President of the Republic and Deputies of the Republic were also named as perpetrators of the crime. The connection of cases in the first case was established by law, that is, there was a combined case with a Deputy of the Republic, which implied a trial in the [CSPA]. But, [the Venezuelan legal system] had no provisions applicable in the event that a person not covered by a special privilege was a party in a criminal case against the President of the Republic who, under the provisions of the Constitution and of the Organic Law of the Supreme Court of Justice, should be tried in sole instance by the high court Notwithstanding the absence of laws regulating connection in cases such as this one, the Supreme Court of Justice tried Mr. Barreto Leiva in sole instance, using jurisprudence to apply the aforementioned principle of connection”.

68. Moreover, the State claimed that the SCJ, in accordance with the Venezuelan legislation, determined that there were merits to prosecute former President Carlos Andrés Pérez and former deputies and senators associated with the case and, as a result, “by application of the special jurisdiction contained in the Constitution in force at that time, the proceedings must be combined, including, based on connection, the persons liable for prosecution for these crimes”. Furthermore, the State explained that the special privilege of the President lies in “the need to protect the majesty of the presidential institution and of who has the investiture at the moment the trial begins”.

69. Article 215 of the Constitution, in its relevant part, provided that:

[t]hese are powers of the Supreme Court of Justice:

1. To determine whether or not grounds exist to try the President of the Republic or whomsoever acts in his stead, and, if there are, to continue to hear the case subject to prior authorization by the Senate until a final judgment is rendered.

2. To determine whether or not grounds exist to try members of the Congress, [...] and in the event that grounds do exist, to refer the records to the competent Ordinary Court if it is a common offense, or, if it concerns political offenses, to continue to hear the case until a final judgment is rendered, [...].

70. Article 82 of the Organic Law for Safeguarding of Public Assets provided, where applicable, that:

[t]he Superior Courts for Safeguarding Public Assets based in Caracas and with jurisdiction throughout the country will be the competent courts:

1) To determine whether to proceed to trial, hear cases and issue judgments in the first instance in the trials of Senators and Deputies of the Congress of the Republic [...] for the criminal offenses established in this Law [...].

2) To hear and decide appeals and de facto appeals filed against judgments issued by Courts of First Instance.

[...]

71. Article 89 of the same Law provided that:

[w]hen some of the public servants mentioned in Article 82 appear as perpetrators, accomplices or accessories and, simultaneously, there are civil servants or private individuals who must be prosecuted in Courts of First Instance for offenses established in this law, the Superior Court for Safeguarding Public Assets will be the competent tribunal to hear all those cases. [...]

72. Article 9 of the CCP established, where applicable, that "[t]here will not be separate cases filed for the same crime or offense even if there are several defendants, except for exceptional cases established by special laws". Article 27 of the same body of law established that "[o]nly one of the competent tribunals will hear cases of crimes related to each other". And Article 28 established that:

1. Crimes will be considered related: If committed simultaneously by two or more persons together, if these fall under the jurisdiction of different ordinary courts.
2. Crimes that are committed by two or more persons at different times and places, if the persons acted in concert to commit the crimes.
3. Crimes committed as a means to commit or facilitate the commission of other crimes.
4. Crimes committed in order to avoid prosecution for other crimes.
5. The various crimes a defendant is accused of, if proceedings are instituted for any one of those crimes.

73. On June 8, 1993, the SCJ issued a decision on its competence to hear the instant case in the following terms:

That connection annuls the general principles that establish competence in criminal matters and it could be subjective or relating to the perpetrators of the crime, or objective or relating to punishable acts. In either case, there cannot be separate proceedings; that would undermine the unity of the case and there could be a risk that contradictory judgments would be issued; therefore the proceedings must be combined to avoid that risk. [...] There must then be only one investigation that covers perpetrators and participants since, presumably, all have participated in some way in the commission of the crime and their individual responsibility will be determined during the trial.

The unity of the case does not allow then to initiate two separate proceedings for the same crimes or that indictments, which are essential, be issued by different judges, because it would alter the nature of the penal action and would work against the principles of unity, economy and procedural speed [FN41].

[FN41] Judgment of the SCJ of June 8, 1993 (record of appendices to the application, volume I, appendix 6, pages 251 and 252).

74. This Tribunal deems necessary to draw up some considerations in relation to the privilege, the connection and the competent tribunal which are relevant for the suit at law. The privilege has been established to protect the integrity of the State's role that depends on the people who enjoy such protection and to avoid, in this way, altering the normal conduct of the

public service. It does not constitute a personal right of the public servants. It serves the public interest. On this assumption, the privilege seeks a purpose compatible with the Convention. Moreover, the connection seeks a purpose, conventionally acceptable, by means of which a same court will hear different cases related to each other. Preventing, in this way, contradictory judgments and guaranteeing unity of decisions and procedural economy.

75. Article 8(1) of the Convention enshrines the right to a hearing by “a competent [...] tribunal, previously established by law”, provision that is related to the concept of a competent court, one of the guarantees of the due process of law, which has been even accepted by certain sectors of the doctrine, as a condition of such Article. This implies that people have the right to be tried, in general, by a competent tribunal, in accordance with legally established procedures.

76. The existence and jurisdiction of the competent tribunal derives from the law, which has been defined by the Court as the “general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of the States Parties for that purpose.” [FN42] Consequently, in a Rule of Law, only the Legislative branch is able to regulate, by means of laws, the jurisdiction of the courts.

[FN42] Cf. The Word “Laws” in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86 of May 9, 1986, Series A Nº 6.

77. However, the privilege does not necessarily come into conflict with the right to a competent tribunal, if such privilege is expressly established and defined by the Legislative branch and serves a legitimate purpose, as has been previously indicated. In this way, not only the right in question is respected but also the jurisdiction court turns into the competent tribunal of the individual who enjoys a privilege. If, however, the law does not provide for privileges but the Executive branch or the Judiciary itself establishes such privileges, distracting in this way the individual from the court that the law embodies as its competent tribunal, the right to be tried by a competent court would be violated. Likewise, if the connection is expressly regulated by law, the competent tribunal of an individual shall be the court that is competent to hear cases of connectivity as established by law. If the connection is not regulated by law, it would be a violation to distract the individual from the court originally assigned to hear the case.

78. In the case at hand, Mr. Barreto Leiva did not enjoy any kind of privilege; therefore, in principle, he should be tried by an ordinary criminal court of first instance. The members of the Congress, who were also accused with the victim, should be tried by the CSPA (supra para. 70). Finally, the competent court to try the President of the Republic was the SCJ (supra para. 69). All of these tribunals were established by the Venezuelan law prior to the facts at issue.

79. It falls upon the law to establish the rules for the operation of connectivity, in order to define which court should hear which related cases.

80. There is no special law- just as the Commission claims- establishing that if the President of the Republic is accused, together with an individual who does not enjoy any privilege, of a crime punishable by the Law on Public Assets, the case shall be heard by the President's competent court. Nevertheless, this does not constitute an obstacle to the application of the general principle, contemplated by the Venezuelan legislation, according to which only one of the competent courts will try crimes related to each other, being competent to hear all of them. In this case, this would lead to two possible situations: that the President be tried by a tribunal that is competent to try the individual who does not enjoy any privilege, or vice versa. Logically, the first situation is inadmissible, since it is not in line with the purposes that justify the institution of the privilege. The second situation respects the principle of connection as well as the public interest guaranteed by the judicial privilege. This was the interpretation made by the SCJ in the instant case (*supra* para. 73) and this Court does not find sufficient reasons to depart from the criterion adopted by the highest Venezuelan tribunal.

81. Based on the foregoing, the Court declares that the State did not violate the right to be tried by a competent tribunal, enshrined in Article 8(1) of the Convention.

7. right to appeal a judgment (Article 8(2)(h)

82. The Commission emphasized that, in the instant case, "one of the consequences of vesting the victim with a procedural privilege [...], was that the victim had no legal avenue to appeal the judgment against him, even though the Law for Safeguarding Public Assets, established that he should have been tried in first instance by the Superior Court for Safeguarding Public Assets and, in second instance, by the Supreme Court of Justice". The representative agreed with the Commission.

83. The State indicated that the United Nations Human Rights Committee had pointed out "in case N°64 of 1979 against Colombia" that "for the determination of the right to review by a higher court, it is necessary to take into account the procedure established by the laws and not the right to appeal itself". In a similar sense, the State quoted a decision issued by the "European (sic) Committee on Human Rights" in the case of Duilio Fanalio, in which it concluded that "the case may only be tried in sole instance by the Constitutional Court inasmuch as it involves a procedure related to accusations against ministers".

84. The first matter referred to by the State is the case of Consuelo Salgar de Montejo against Colombia, decided over by the United Nations Human Rights Committee (hereinafter, the "Committee") regarding Article 14(5) of the International Covenant on Civil and Political Rights (hereinafter, the "ICCPR") which is very similar to Article 8(2)(h) of the American Convention [FN43]. In said case, the Committee decided, in a similar sense to the one displayed by Venezuela, the following:

The Committee considers that the expression "according to law", found at párrafo 5 del artículo 14 del Pacto is not intended to leave the very existence of the right of review to the discretion of the States parties, since the rights are those recognized by the Covenant, and not merely those recognized by domestic law. Rather, what is to be determined "according to law" is the modalities by which the review by a higher tribunal is to be carried out. [FN44]

The Committee ruled against the State on the grounds that the State denied Mrs. Consuelo Salgar de Montejo the right to review by a higher tribunal.

[FN43] Article 14(5) of the ICCPR provides that:

Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

[FN44] Cf. Human Rights Committee, Communication N° 64/1979, Consuelo Salgar de Montejo V. Colombia, U.N. Doc. CCPR/C/OP/C at 127 (1985) March 24, 1982; para. 10.4.

85. The other decision referred to by the State (supra para. 83) it is also one issued by the Committee. It is the case of Duillo Fanali against Italy. [FN45] Venezuela accurately mentioned that in this case, the Committee did not rule against Italy for the fact that the petitioner was tried in sole instance together with people who enjoy a special privilege. However, the lack of conviction was due to the fact that the State had made a reservation regarding Article 14(5) of the ICCPR, and not because the Committee had considered that there was no violation. In addition, in other cases, the Committee has pointed out that:

The State party contends that in situations such as the author's, if an individual is tried by the highest ordinary criminal court, the guarantee set out in Article 14, paragraph 5, of the Covenant does not apply; the absence of a right to review by a higher tribunal is offset by the fact of being tried by the highest court, and this situation is common in many States parties to the Covenant. Article 14, paragraph 5, of the Covenant stipulates that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. The Committee points out that "according to law" is not intended to mean that the very existence of a right to review is left to the discretion of the States parties. Although the State party's legislation provides in certain circumstances for the trial of an individual, because of his position, by a higher court than would normally be the case, this circumstance alone cannot impair the defendant's right to review of his conviction and sentence by a court. The Committee accordingly concludes that there has been a violation of Article 14, paragraph 5, of the Covenant with regard to the facts submitted in the communication. [FN46]

[FN45] Cf. Human Rights Committee, Communication N° 75/1980, Duilio Fanali V. Italy U.N. Doc. CCPR/C/OP/2 at 99 (1990) March 31, 1983.

[FN46] Cf. Human Rights Committee, Communication N° 1073/2002, Jesús Terrón c. Spain, U.N.Doc. CCPR/C/82/D/1073/2002 (2004), November 15, 2004, para. 7.4.

86. The only exception to this rule, which the Committee has accepted, was put forward in the following terms:

Where the highest court of a country acts as first and only instance, the absence of any right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the

State party concerned; rather, such a system is incompatible with the Covenant, unless the State party concerned has made a reservation to this effect [FN47] (emphasis added).

[FN47] Cf. Human Rights Committee, General Comment N° 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), para. 47.

87. As a consequence, the international decisions that Venezuela refers to in its defense, are not applicable to the State. In fact, such decisions are adverse to the State.

88. The case-law of this Court has emphasized that the aim of the right to appeal a judgment is to protect the right of defense by creating a remedy to prevent a flawed ruling, containing errors unduly prejudicial to a person's interests, from becoming final. [FN48]

[FN48] Cf. Case of Herrera Ulloa V. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C N°. 107, para. 158.

89. The right to review by a higher court, expressed by means of the complete review of the conviction, ratifies the grounds and provides more credibility to the judicial acts of the State and, at the same time, offers more security and protection to the rights of the accused.

90. While States have a margin of discretion in regulating the exercise of that remedy, they may not establish restrictions or requirements inimical to the very essence of the right to appeal a judgment. [FN49] The State may establish special judicial privileges for the prosecution of high-ranking government authorities and these privileges are compatible, in principle, with the American Convention (supra para. 74). However, even in these situations, the State may allow the accused the possibility of appealing a condemnatory judgment. This would happen, for example, if it were decided that the proceedings at first instance would be conducted by the president or of a courtroom of a superior tribunal and the appeal would be heard by the full tribunal, to the exclusion of those who already issued an opinion on the case.

[FN49] Cf. Case of Herrera Ulloa V. Costa Rica, supra note 48, para. 161.

91. Based on the foregoing, the Tribunal declares that Venezuela violated the right of Mr. Barreto Leiva enshrined in Article 8(2)(h) of the Convention, in conjunction with Article 1(1) and 2 therein, inasmuch as the alleged victim was convicted in a court of sole instance and he did not have the possibility, as a result, of appealing the judgment. It is worth mentioning, moreover, that Mr. Barreto Leiva could have appealed the condemnatory judgment issued by the court that heard his case should the principle of connection, which combined the prosecution of several people in the hands of a same court, had not be applied. In this case, the application of the

principle of connection, which is admissible per se, entailed the inadmissible consequence of depriving the accused of the remedy referred to in Article 8(2)(h) of the Convention.

8. right to be tried by an impartial tribunal

92. The representatives stated that “the impartiality of the tribunal that [...] tried [Mr. Barreto Leiva] was not satisfactory, among other things, due to the pressure exerted by other officials and authorities over the Supreme Court of Justice and the political reasons of the entire procedure”.

93. The State mentioned that “the arguments of the alleged victim in relation to the partiality of the Supreme Court of Justice have no evidentiary basis and only show his disagreement with the condemnatory judgment”.

94. Considering that the violation of the right to be tried by an impartial tribunal was not alleged by the Inter-American Commission, the Court reiterates that the alleged victims and their representatives may invoke the violation of other rights different to those included in the application, so long as they refer to facts already included in the application, which constitutes the factual framework of the proceeding. [FN50]

[FN50] Cf. Case of the “Five Pensioners” V. Perú. Merits, Reparations and Costs. Judgment of February 28, 2003. Series C No. 98, para. 155; Case of Kawas Fernández V. Honduras, supra note 6, para. 127; and Case of Reverón Trujillo V. Bolivia, supra note 21, para. 135.

95. In the case at hand, the arguments of the representatives are based on the following facts described by the Commission in its application:

On January 24, 1996, the television channel Televen broadcast an interview with the then President of the Republic Rafael Caldera, who said: “It would be to defraud the citizens to give Carlos Andrés Pérez a presidential pardon [...] it would be to ignore the judgment rendered by the Supreme Court of Justice which is appropriate [...]”.

Before a judgment was issued, draft documents from the office of the Justice Luis Manuel Palís were published in the mass media. There were also interviews given based on those documents and it was reported that all judges had submitted their observations.

[...]

On June 14, 1996, the newspaper El Nuevo País, transcribed a conversation between then Senator Virgilio Ávila Vivas and former President Carlos Andrés Pérez, which makes reference to a conversation that the senator had with the judge responsible for the definitive decision of the SCJ, with regard to the introduction of possible mitigating circumstances, among other things.

On September 3, 1997, an Article written by Edgar Lopez entitled, “Congress will cite SCJ judges who plan to run for reelection” was published in the political section of the El Nacional newspaper. This Article stated, among other things, that “Senator Arístides Beaujón, chairman of the committee in question, brought to mind that the nine-year-term to which these five judges had been elected elapsed on May 1995. Since then, the renewal of the terms of three-fourths of

the members of the SCJ had been “sufficiently justified,” among other reasons, admitted Beaujón, because it was considered inconvenient to alter the balance of the political forces before the conclusion of the trial of former President Carlos Andrés Pérez in the case of the 250 million Bolivars secret account”.

96. The Commission did not present arguments about the evidence - which consisted, basically, of press releases- that would allow the Tribunal to understand how such facts were considered proven. Also, the Commission did not claim any legal consequence in such regard. In its report on Admissibility and Merits (supra note 1), the Commission stated that "the petitioner did not furnish sufficient evidence nor argue, in detail, the reasons why the independence and impartiality of the [SCJ] would be impaired in the specific case so as to build up truly external pressures capable of producing an effect on the final decision".

97. Before the Court, the representative did not present evidence additional to the evidence duly furnished before the Commission. The representative limited to assert that there existed “pressures” over the SCJ and to mention, in a general way, that the procedure had “political motives”.

98. The Inter-American Court has established that impartiality means that the judge, who intervenes in a particular matter, must come up with the facts of the case without any type of bias, subjectively speaking, and furthermore, offering sufficient guarantees, of an objective nature, that would allow to cast any doubt that the defendant or the community may harbor about impartiality. Personal or subjective impartiality is presumed, unless evidence to the contrary. In its turn, the so-called objective approach test consists in determining whether the judge in question offered sufficient elements of conviction to exclude any legitimate misgivings or well-grounded suspicion of partiality regarding his or her person [FN51].

[FN51] Cf. Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) V. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 56.

99. The representative did not manage to disprove the presumption of subjective impartiality of the court, nor did it offer sufficient elements of conviction that allow questioning its objective impartiality. Consequently, the Tribunal does not find reasons to depart from the decision made by the Commission during the procedure before it and declares that the State did not violate the right to be tried by an impartial tribunal, embodied in Article 8(1) of the Convention.

9. judicial protection (Article 25(1))

100. The Commission stated that “as a result of the extension of the special privilege”, Mr. Barreto Leiva “did not enjoy any judicial protection whatsoever and was left with no defense in a situation that could not be appealed”. In that regard, the Commission requested the Court “to declare that the State violated, to his detriment, the right enshrined in Article 25(1) of the

American Convention". The representative agreed with the Commission and the State did not present any arguments in this respect.

101. Article 25(1) of the Convention establishes, in broad terms, the obligation of every State Party to provide, to all persons subject to its jurisdiction, an effective legal recourse against legal acts that violate the fundamental rights. [FN52]

[FN52] Cf. Case of Reverón Trujillo V. Venezuela, supra note 21, para. 59.

102. In this respect, the Court considers that the facts of this case are limited to the field of application of Article 8(2)(h) of the Convention that, as has been previously mentioned (supra para. 87), embodies a specific type of remedy that must be offered to every person accused of a crime, as a guarantee of his or her right to defense and it deems that it is not provided for in the case of the application of Article 25(1) of said treaty. The defenseless situation of Mr. Barreto Leiva was due to the impossibility of appealing the condemnatory judgment, situation covered by Article 8(2)(h) in question.

103. Therefore, the Court declares that the State did not violate the right embodied in Article 25(1) of the Convention.

10. Specifications related to Article 2 of the Convention

104. As observed in paragraphs 56 and 90 supra, this Court declared the non-compliance with Article 2 of the Convention, considering that the Venezuelan legal system prevented Mr. Barreto Leiva from gaining access to the records of the proceeding before being arrested, in violation of Article 8(2).c) of the Convention, as well as it failed to provide him with a remedy that would allow the accused to appeal the judgment against him, in violation of Article 8(2)(h) of said treaty.

105. Venezuela pointed out that "it adhered to the compliance with domestic laws that, at the time of the events, were considered, in Venezuela and in the rest of Latin America, the criminal due process. The application of the American Convention implied a change in the doctrine which meant for the States Parties to the Convention the adaptation of its laws; however, this entails a progressive process, reason by which the Commission cannot conclude that the application of the extinct [CCP] violated the Convention, inasmuch as this code was in line with the Constitution of the Republic of Venezuela of 1961, in force at the time of the events of the instant case."

106. The Court has stipulated, on several occasions, regarding the general obligation of every State Party to adapt its domestic laws to the provisions of that Convention, that "[u]nder the law of nations, a customary law prescribes that a State that has concluded an international agreement must introduce into its domestic laws whatever changes are needed to ensure execution of the obligations it has undertaken." [FN53] This principle is embodied in Article 2 of the Convention, which establishes the general obligation of every State Party to adapt its domestic legislation to the provisions of the Convention itself, to guarantee the rights enshrined therein, which implies

the need to adopt effective measures within their own domestic laws compatible with its provisions and its effects (*effet utile*). [FN54]

[FN53] Cf. Case of Garrido and Baigorria V. Argentina. Reparations and Costs. Judgment of August 27, 1998. Series C No. 39, para. 68; Case of Zambrano Vélez et al. V. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C Nº. 16, para. 55; and Case of Heliodoro Portugal V. Panamá, *supra* note 23, para. 179.

[FN54] Cf. Case of “The last temptation of Christ” (Olmedo- Bustos et al.) V. Chile. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73, para. 87; Case of Ivcher Bronstein V Peru. Competence. Judgment of September 24, 1999. Series C No. 54, para. 37; and Case of Heliodoro Portugal V. Panamá, *supra* note 23, para. 179.

107. This principle requires the adoption of two types of measure, namely: i) the repeal of laws and practices of any kind that entail a violation of the guarantees established in the Convention, or that disregard the rights recognized therein or impede their exercise, and (ii) the enactment of laws and the development of practices conducive to respect for those guarantees. [FN55]

[FN55] Cf. Case of Almonacid Arellano et al. V. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, para. 118; and Case of Heliodoro Portugal V. Panamá, *supra* note 23, para. 180.

108. It is reasonable to understand that the adjustment of domestic laws to conform to the American Convention under the terms established in the preceding paragraphs may take some time for the State. However, such time must be reasonable. Hence, in the case of Heliodoro Portugal V. Panamá this Court noted that the even though the defendant State assumed in 1996 the obligation to define the offense of forced disappearance in 1996, it did so in 2007. The Inter-American Court deemed that “more than 10 years elapsed [...] this exceeds the reasonable time in which to do so.” [FN56]

[FN56] Cf. Case of Heliodoro Portugal V. Panamá, *supra* note 23, para. 187.

109. Venezuela ratified the American Convention in 1977 and the facts of the instant case occurred in 1993. The State had 16 years to adapt its domestic legislation to conform to the Convention, which the State did not do. Consequently, the Court rejects the argument of the State (*supra* para. 104).

VI. ARTICLE 7 (PERSONAL LIBERTY), [FN57] IN CONJUNCTION WITH ARTICLES 1(1) (OBLIGATION TO RESPECT RIGHTS) AND 2 (DOMESTIC LEGAL EFFECTS) OF THE AMERICAN CONVENTION

[FN57] Article 7 of the Convention, in its relevant part, provides that:

1. Every person has the right to personal liberty and security
 - [...]
 3. No one shall be subject to arbitrary arrest or imprisonment.
 - [...]
 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
-

1. arbitrary arrest (Article 7(3))

110. The Commission indicated that the imposition of preventive detention on Mr. Barreto Leiva was “based exclusively on indications of criminal responsibility [...] with no justification of what objectives the prosecution sought with the imposition of that measure”, all of which amounted to, according to the Commission, a violation of the rights enshrined in Articles 7(1) and 7(3) of the American Convention. The representative agreed with the argument put forward by the Commission and the State did not contest such allegations.

111. The Court has established that, in order to restrict the right to personal liberty using measures such as remand in custody, there must be sufficient evidence to allow reasonable supposition that the person committed to trial has taken part in the criminal offense under investigation. [FN58] Nevertheless, “even in these circumstances, the deprivation of liberty of the accused cannot be based on general preventive or special preventive purposes, which could be attributed to the punishment, but [...] based on a legitimate purpose, which is: to ensure that the accused does not prevent the proceedings from being conducted or elude the system of justice.” [FN59]

[FN58] Cf. Case of Chaparro Álvarez and Lapo Íñiguez. V. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C N° 170, para. 101; and Case of Servellón García et al. V. Honduras. Merits, Reparations and Costs. Judgment of September 21, 2006. Series C No. 152, para. 90.

[FN59] Cf. Case of Chaparro Álvarez and Lapo Íñiguez. V. Ecuador, supra note 58, para. 103; and Case of Servellón García et al. V. Honduras, supra note 58, para. 90, and Case of Acosta Calderón V. Ecuador, supra note 22, para. 111.

112. Article 182 of the CCP in force in Venezuela at the time of the events, established, in its pertinent part, that:

So long as it has been indisputably proven that a crime has been committed that merits corporal punishment and there is no obvious penalty prescribed for such offense, and there are well-

founded indications of an individual's culpability, the Examining Magistrate Court will issue a warrant for the arrest of the accused that will contain the following:

1. Full name of the accused and any other identifying information.
2. A summary of the facts and legal grounds for the arrest warrant and the provisional classification of the crime.

113. On May 18, 1994, based on Article 182 of the CCP mentioned above, the SCJ issued an "arrest warrant" against Mr. Barreto Leiva, "for the crime of complicity to misappropriate public funds". The SCJ pointed out:

Based on circumstantial evidence, it has been established the assistance provided by the citizens [...] and Oscar Barreto Leiva in the illegal transfer of dollars, to which a part of the two hundred and fifty millions bolivares (Bs. 250.000.000, 00) were subjected, as ordered by the Ministry of Foreign Affairs in favor of the Ministry of the Secretary of the Presidency, which was made in two remittances dated March 17, 1989 and March 21, 1989, for five hundred thousand dollars (\$ 500.000, 00) and two million dollars (\$ 2.000.000, 00) respectively (emphasis omitted). [FN60]

[FN60] Court order issued by the SCJ on May 18, 1994 (record on merits, volume III, pages 1423, 1424 and 1428 and 1429).

114. From the reading of the arrest warrant, the Tribunal concludes that the State, through the SCJ, complied with the first aspect necessary to restrict the right to personal liberty by means of the precautionary measure, that is, to point out the sufficient circumstantial evidence that would allow to reasonably assume that the person subjected to the proceeding has participated in the illegal act under investigation. It is now appropriate to verify whether the State complied with the second aspect, this is, to base the precautionary measure on the legitimate purpose of ensuring that the accused shall not impede the conduct of the proceedings or elude justice (supra para. 111).

115. In this respect, the Court notes that the arrest warrant, in none of the 454 pages, mentions the need to order the preventive detention of Mr. Barreto Leiva based on sufficient circumstantial evidence, which would persuade the objective observer that the accused would impede the conduct of the proceedings or elude justice. The foregoing, coupled with the fact that the domestic legislation (supra para. 112) only required "well-founded indications of criminal responsibility", without referring to the legitimate purpose that the precautionary measure must serve, leads the Tribunal to conclude that the preventive detention in the instant case was applied as a rule and not as the exception.

116. Consequently, the Tribunal declares that the State, by failing to give sufficient reasons regarding the achievement of a legitimate purpose in line with the Convention upon the issuance of the arrest warrant against Mr. Barreto Leiva, violated his right not to be subject to arbitrary detention, enshrined in Article 7(3)) of the Convention. Likewise, his right to personal liberty was infringed, as embodied in Article 7(1) of the Convention, in conjunction with Article 1(1) therein, inasmuch as "any violation of subparagraphs 2 to 7 of Article 7 of the Convention

necessarily entails the violation of Article 7(1) thereof, because the failure to respect the guarantees of the person deprived of liberty leads to the lack of protection of that person's right to liberty." [FN61] Finally, the Tribunal declares that the State failed to comply with its obligation embodied in Article 2 of the Convention, insofar as its domestic legislation did not establish sufficient guarantees of the right to personal liberty, since it allowed imprisonment based only on "indications of criminal responsibility", without establishing, also, that it is necessary for the measure to serve a legitimate purpose.

[FN61] Cf. Case of Chaparro Álvarez and Lapo Íñiguez. V. Ecuador, supra note 58, para. 54.

2. Reasonable time under preventive detention (Article 7(5)) and presumption of innocence (Article 8(2))

117. The Commission indicated that the period of time Mr. Barreto Leiva endured under preventive detention was 16 days longer than the final sentence imposed. It asserted that the application of preventive detention ignored the principle of reasonable time and the guarantee of presumption of innocence enshrined in Articles 7(5) and 8(2) of the American Convention, "because that detention became a punitive rather than a precautionary measure". The State did not present arguments contesting such allegations.

118. From the evidence furnished, it spring that Mr. Barreto Leiva was sentenced to one year and two months imprisonment (supra para. 22). However, he was detained for one year, two months and sixteen days. [FN62] Consequently, the preventive detention of the victim was 16 days longer than the final sentence imposed.

[FN62] Judgment of the SCJ of June 13, 1996 (record of appendices to the response to petition, volume I, appendix 15, page 1182).

119. The Tribunal has established that Article 7(5) of the Convention guarantees the right of every person to be tried within a reasonable time or to be released without prejudice to the continuation of the proceedings. This right imposes temporal limits on the duration of pre-trial detention and, consequently, on the State's power to protect the purpose of the proceedings by using this type of precautionary measure. Certainly, it is necessary to make a distinction between this provision regarding the duration of the pre-trial detention as precautionary measure and the provision contained in Article 8(1) that relates to the term for the substantiation of the proceeding. Even when they refer to different issues, both rules have the same purpose: to limit, as much as possible, the abridgement of rights of an individual.

120. When the duration of pre-trial detention exceeds a reasonable time, the State can restrict the liberty of the accused by other measures that are less harmful than deprivation of liberty by imprisonment and that ensure his presence at the trial. This right also imposes the judicial obligation to process criminal proceedings in which the accused is deprived of his liberty with greater diligence and promptness. [FN63]

[FN63] Cf. Case of Bayarri V. Argentina, supra note 21, para. 70.

121. From the principle of presumption of innocence, enshrined in Article 8(2) of the Convention, derives the obligation of the State not to restrict the liberty of a detained person beyond the limits strictly necessary to ensure that he will not impede the efficient development of an investigation and that he will not evade justice. Preventive detention is, therefore, a precautionary rather than a punitive measure. [FN64] It is, also, the most severe measure that may be applied to the person accused of a crime. For which reason, its application must be exceptional. The rule must be the defendant's liberty while a decision is made regarding his criminal responsibility. [FN65]

[FN64] Cf. Case of Suárez Rosero V. Ecuador, supra note 20, para. 77.

[FN65] Cf. Case of López Álvarez V. Honduras, supra note 22, para. 67; Case of Palamara Iribarne V. Chile, supra note 21, para. 196, and Case of Acosta Calderón V. Ecuador, supra note 22, para. 74 and Case of Tibi V. Ecuador, supra note 21, para. 106.

122. The preventive detention is limited by the principle of proportionality, [FN66] by virtue of which a person that is presumed innocent cannot be treated equal to or worse than a convicted person. The State must avoid that the measure of procedural coercion be equal to or more harmful for the defendant than the punishment in case of conviction. This means that it should not be appropriate to authorize the preventive detention in cases where it is not possible to impose a prison term, and that such prison term must cease when the detention period has exceeded a reasonable time. [FN67] The principle of proportionality implies, also, a rational relationship between the precautionary measure and the purpose sought, so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or excessive compared to the advantages obtained from this restriction and the achievement of the purpose sought. [FN68]

[FN66] Cf. Case of the "Juvenile Reeducation Institute" V. Paraguay. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C N°112, para. 228; Case of López Álvarez V. Honduras, supra note 22, para. 67; and Case of Chaparro Álvarez and Lapo Íñiguez. V. Ecuador, supra note 58, para. 93.

[FN67] Cf. Case of Bayarri V. Argentina, supra note 21, para. 74.

[FN68] Cf. Case of Chaparro Álvarez and Lapo Íñiguez. V. Ecuador, supra note 58, para. 93.

123. Based on the foregoing, the Court declares that the State violated Articles 7(5) and 8(2) of the American Convention, insofar as the pre-trial detention of Mr. Barreto Leiva exceeded the temporal, reasonable and proportional limits to which it should have been subjected. All of the above entailed, in addition, the violation of the right to personal liberty, embodied in Article 7(1) of the Convention, in relation to Article 1(1) therein.

VII. REPARATIONS

124. It is a principle of International Law that any violation of an international obligation that has caused damage entails the duty to provide adequate reparation. [FN69] The Court has based its decisions on this particular subject pursuant to the provisions of Article 63(1) of the American Convention. [FN70]

[FN69] See 76; and Case of Perozo et al. V. Venezuela, *supra* note 6, para. 404, and Case of Kawas Fernández V. Honduras, *supra* note 6, para. 156.

[FN70] Article 63(1) of the Convention provides that:

If the Court finds that there has been a violation of a right or freedom protected by [this] Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

125. In accordance with the above considerations on the merits and the violations of the Convention declared to be such in the preceding chapters, as well as in the light of the criteria embodied in the Court's case-law in connection with the nature and scope of the obligation to make reparations, [FN71] the Court will now address the requests for reparations made by the Commission and the representative, as well as the State's observations thereof, in order to adopt the measures required to redress the damage.

[FN71] Cf. Case of Perozo et al. V. Venezuela, *supra* note 6, para. 406, and Case of Kawas Fernández V. Honduras, *supra* note 6, para. 157.

1. Injured Party

126. The Court considers that Mr. Barreto Leiva is the "injured party" in his capacity of victim of the violations which have been proven to be committed to his detriment, as a result of which he is entitled to the reparations as may be set by the Tribunal.

127. In relation to the wife and daughters of Mr. Barreto Leiva, for whom the representative requested compensation, the Court notes that the Commission did not declare them as victims of any violation of the Convention in its Report on Merits and that, in the application, the Commission identified Mr. Barreto Leiva as the only beneficiary of the reparations. Therefore, the Tribunal, according to its case-law, [FN72] shall not consider the victim's next of kin as beneficiaries of reparations.

[FN72] Cf. Case of the Ituango Massacres V. Colombia. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006. Series C 148, para. 98; Case of Bayarri V. Argentina, *supra* note 20, para. 126 and Case of Tiu Tojín V. Guatemala. Merits, Reparations and Costs. Judgment of November 26, 2008. Series C N° 190, para. 58.

2. review of the condemnatory judgment

128. The Tribunal pointed out in the preceding paragraphs that Venezuela violated Article 8(2)(h) of the Convention insofar as it prevented Mr. Barreto Leiva from appealing the condemnatory judgment issued against him. The Commission and the representative did not request any other measure than compensation, tending to repair the violation. However, the Court, considering that the reparation of the damage flowing from a breach of an international obligation calls for, if practicable, full restitution (*restitutio in integrum*), which consists in restoring a previously-existing situation, [FN73] decides to order the State to offer Mr. Barreto Leiva the possibility of appealing the judgment in question.

[FN73] See Case of La Cantuta V. Peru, *supra* note 40, para. 201.

129. The Court is aware that Mr. Barreto Leiva complied with the sentence imposed. Nevertheless, the consequences that followed from a conviction are still present and this Tribunal cannot determine that such consequences are the result of a legitimate or illegitimate conviction. That is a duty of the State (*supra* para. 24) which has not been complied with yet, insofar as the right to appeal the judgment before a higher court is pending.

130. Consequently, if Mr. Barreto Leiva requests so to the State, by means of the Judiciary, he must be granted the right to appeal the decision to fully review the condemnatory judgment. If the court decides that the conviction was according to the Law, such court shall not impose an additional punishment on the victim and it shall reiterate that the victim has already complied with all the convictions imposed in due time (*supra* para. 22). If, however, the court decides that Mr. Barreto Leiva is innocent or that the conviction imposed on him was not according to the Law, the court shall order appropriate measures of reparations for the time that Mr. Barreto Leiva was deprived of liberty and for all the pecuniary and non-pecuniary damage caused to him. This obligation must be complied with within a reasonable time.

131. The Court recalls that the obligation to provide reparations, which is governed in every aspect by international Law, must not be altered or breached by the respondent State on the basis of its domestic law. [FN74]

[FN74] Cf. Case of Goiburú et al. V. Paraguay. Merits, Reparations and Costs. Judgment of September 22, 2006. Series C No. 153, para. 141; Case of Montero Aranguren et al. (Reten de Catia) V. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 5,

2006. Series C N°. 150, para. 117; Case of Ximenes Lopez V. Brazil, Merits, Reparations and Costs. Judgment of July 4, 2006. Series C N°. 149, para. 209.

3. Domestic legal effects

132. The Inter-American Commission requested the Court to order the State the adoption of "the legal, administrative and any other type of measures necessary to avoid the recurrence of similar actions, independent of the legislative modifications already adopted after the violations in this case had taken place". The representative did not request this measure of reparation and the State presented no argument in this respect.

133. The Court notes that the Commission did not identify which are the legislative or any other type of measures it requests. The Tribunal recalls that, pursuant to Article 34(1) of the Rules of Procedure, it is the duty of the Commission to indicate in the application, the requests related to reparations and costs, as well as the legal arguments and the pertinent conclusions. This duty is not fulfilled with general requests with no indication of the facts and supporting evidence on which it will bear, in order to analyze the purpose, reasonability and scope.

134. Without prejudice to the foregoing and considering the violations declared in the instant case, the Tribunal deems appropriate to order the State to adapt, within a reasonable term, its domestic legal system, in order to guarantee the right to review by a higher court, according to Article 8(2)(h) of the Convention, to every person tried for a crime, even to those persons who enjoy a special judicial privilege.

135. As to the domestic rules that hindered the access of the person being investigated to the investigative proceeding and the rules based solely on the existence of "indications of criminal responsibility" to order the arrest, which were declared to be incompatible with Article 2 of the Convention (supra paras. 57 and 116), the Tribunal notes that they have been modified as of the year 1999 and that the Commission, during the entire proceeding before the Court, "positively" valued said modifications. Based on the foregoing, the Court abstains from ordering a measure of reparation in relation to this aspect.

4. Publication of the Judgment

136. The Commission and the representative requested the Tribunal to order the State to publish this judgment. The State present no argument in this respect.

137. As ordered by this Tribunal in other cases, [FN75] the State shall publish, at least once, in the Official Gazette and in another national daily newspaper, paragraphs 20 to 24, 35, 39 to 41, 47, 48, 56, 57, 60, 63, 64, 78, 88 to 91, 115, 116 and 118 to 123 of the present Judgment, without the corresponding footnotes, and the operative paragraphs therein. Said publications shall be made within six months following notice of this Judgment.

[FN75] Cf. Case of La Cantuta V. Peru, *supra* note 40, para. 227; Case of Rios et al. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 194, para. 405; and Case of Perozo et al. V. Venezuela, *supra* note 6, para. 415.

5. public apologies

138. The Commission and the representative requested the Court to order the State to publicly acknowledge its international responsibility for the harm inflicted. The State did not present arguments in this aspect.

139. The Court has ordered, on several occasions, defendant States the organization of acts to confer dignity on the victim or in the victim's memory, when the seriousness of the facts and the violations committed call for it. For example, in the case of Anzualdo Castro V. Perú, a public act of apology was ordered given that the State was found responsible for the forced disappearance of the victim, his stigmatization and the revictimization of his next-of-kin. [FN76] In the case of Heliodoro Portugal V. Panamá, related to the forced disappearance of the victim, the Tribunal considered it was proven that the lack of justice and the concealment of the truth caused the victim's next-of-kin a profound distress, intense psychological suffering, anguish, and uncertainty and so, it ordered a public act for the acknowledgment of the State's international responsibility in order to repair the damage caused and to avoid the repetition of facts similar to those of that case. [FN77] In the case of Kawas Fernández V. Honduras the Court concluded that the manner and circumstances in which the victim was murdered, and failure by Government authorities to investigate that event as well as the inefficacy of the measures adopted to clarify the events and, if applicable, punish those responsible therefor, have affected the moral and psychological health of the victim's relatives, [FN78] which called for, *inter alia*, an act of public apology.

[FN76] Cf. Case of Anzualdo Castro V. Perú. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 22, 2009. Series C No. 202, para. 198 and 200.

[FN77] Cf. Case of Heliodoro Portugal V. Panamá, *supra* note 23, para. 249.

[FN78] Cf. Case of Kawas Fernández V. Honduras, *supra* note 6, para. 183.

140. In other cases, the Court has considered that the judgment constitutes *per se* a form of reparation. For example, in the cases of Fermín Ramírez V. Guatemala, [FN79] Raxcacó Reyes V. Guatemala [FN80] and Case of Boyce et al V. Barbados, [FN81] related to death sentences incompatible with the Convention, where the victims were not executed, the Tribunal did not order the States an act of public apology and even, it did not order the payment of compensation for non-pecuniary damage, given that it considered that the issuance of the judgment was sufficient.

[FN79] Cf. Case of Fermín Ramirez V. Guatemala, *supra* note 37, para. 130.

[FN80] Cf. Case of Raxcacó Reyes V. Guatemala. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 133, para. 131.

[FN81] Cf. Case of Boyce et al. V. Barbados. Preliminary Objection, Merits, Reparations and Costs . Judgment of November 20, 2007. Series C No. 169, para. 126.

141. In the instant case, the Court considers that the violations committed against Mr. Barreto Leiva shall be sufficiently repaired by the issuance of the instant judgment, the publication thereof (supra para. 137) the possibility of appealing the condemnatory judgment (supra para. 130) and the compensatory amount set in paragraph 148 infra.

6. Compensatory amounts and reimbursement of costs and expenses

142. The Commission pointed out that the representative “is in a better position to quantify the claims” of the victim; therefore, the Commission abstained from indicating the items and amounts for which Mr. Barreto Leiva should be compensated. The representative presented the victim's claims, which are analyzed next, together with the State's response.

6.1. Pecuniary and non-pecuniary damage

143. The representative claimed that the victim must be compensated for lost wages as of his arrest. The representative set the amount of US\$ 233.685, 08 (two hundred thirty-three thousand six hundred eighty-five with 08/100 cents dollars of the United States of America).

144. As to the non-pecuniary damage, the representative indicated that during two years, Mr. Barreto Leiva suffered “a systematic and aggressive campaign, verbal insults, slander, lies and strong epithets, most of them degrading, daily transmitted by radio, television and printed media”. It further asserted that his social life was “seriously affected” and that he was forced to send his two minor daughters to study abroad. The amount that, for this item, is requested substantially varies from the brief of pleadings and motions to the brief of final arguments. While in the first brief, the representative requested US\$ 150.000, 00 (a hundred and fifty thousand dollars of the United States of America), in the last brief, it requested US\$ 250.000, 00 (two hundred and fifty thousand dollars of the United States of America). The representative did not explain the reason for such an increase.

145. Finally, the representative indicated that Mr. Barreto Leiva had to incur in medical expenses "in order to receive psychological rehabilitation after having been publicly attacked". The representative asked as compensation for this item the amount of US\$ 5.000, 00 (five thousand dollars of the United States of America). The representative did not furnish any type of supporting evidence for these expenses.

146. The State mentioned, in a general way, that "all the ups and downs that Mr. Oscar Barreto Leiva went through, after being tried by the Venezuelan courts [...] were the result of the mistakes made during the performance of his role as public servant".

147. In the first place, the Tribunal emphasizes that the pecuniary damage as well as the non-pecuniary damage so alleged do not relate to the violations of the American Convention mentioned in this Judgment, but to the conviction of Mr. Barreto Leiva, at the domestic level. As established in paragraph 24 supra, it does not fall upon the Court to analyze the guilt or innocence of Mr. Barreto Leiva and, therefore, to order reparations in this regard; rather, the Court must solely and exclusively analyze the violations of the Convention declared in this judgment. It is for the domestic courts to assess which are the reparations that should be ordered for Mr. Barreto Leiva in case the situation indicated in paragraph 130 supra occurs.

148. Based on the foregoing, the Tribunal abstains from ordering a compensation for the alleged pecuniary and non-pecuniary damage under the terms mentioned by the representative. The Court, however, must acknowledge that the violations declared in this Judgment resulted in a non-pecuniary damage, since it is part of human nature itself that any person who suffers a violation of their human rights experiments suffering. [FN82] Therefore, the Court equitable determines the amount of US\$ 15.000, 00 (fifty thousand dollars of the United States of America) that must be delivered to Mr. Barreto Leiva directly.

[FN82] Cf. Case of Reverón Trujillo V. Venezuela, supra note 21, para. 176.

6.2. Reimbursement of costs and expenses

149. In the brief of pleadings and motions, the representative pointed out that the “cost of the filing of the remedies before the domestic instances, investigation in courts, press and television since the year 1996 to the present, plus the photocopies, preparation of records, communications, opinions and subsequent dissemination, by different means, of said information to the American Commission” amounted to US\$ 5.000, 00 (five thousand dollars of the United States of America). Later on, in the brief of final arguments, for the same items, the representative requested the reimbursement of US\$ 7.000, 00 (seven thousand dollars of the United States of America). The representative did not explain the reason for such increase.

150. Likewise, in the initial brief, the representative indicated that “for three nights of accommodation at a hotel in San José de Costa Rica, [...] plus the meals and travel expenses, the Venezuelan State should reimbursed [Mr. Barreto Leiva] the amount of a thousand and seven hundred dollars of the United States of America (US\$ 1.700, 00)”. In the brief of final arguments, the representative increased such amount, without further explanation, to US\$ 2.500, 00 (two thousand five hundred dollars of the United States of America).

151. The representative requested the reimbursement of US\$ 3.000,00 (three thousand dollars of the United States of America) for airline tickets to attend the hearing held in this case. Finally, it argued that the State should pay, for “professional fee”, the amount of US\$ 30.000, 00 (thirty thousand dollars of the United States of America) to Mr. Carlos Armando Figueredo Planchard and US\$ 10.000, 00 (ten thousand dollars of the United States of America) to Mr. Carlos Rafael Pérez.

152. The Tribunal considers that the claims of the victims or their representatives as to costs and expenses and the supporting evidence must be offered to the Court at the first occasion granted to them, that is, in the brief of requests and motions, without prejudice to the fact that such claim may be later on updated, according to new costs and expenses incurred during the processing of the case before this Court. [FN83] Likewise, the Court has considered that “it is not sufficient to remit probative documents; rather the parties must develop the reasoning that relates the evidence to the fact under consideration, and, in the case of alleged financial disbursements, the items and their justification must be described clearly.” [FN84]

[FN83] Cf. Case of Molina Theissen V. Guatemala. Reparations and Costs. Judgment of July 3, 2004. Series C N°. 108, para. 22; Case of Chaparro Álvarez and Lapo Íñiguez. V. Ecuador, supra note 58, para. 275; and Case of Tristán Donoso V. Panamá, supra note 11, para. 215.

[FN84] Cf. Case of Chaparro Álvarez and Lapo Íñiguez. V. Ecuador, supra note 58, para. 277.

153. In the instant case, the representative did not furnish evidence to justify the disbursement of the alleged expenses. However, the Court also notes that the victim incurred in expenses to attend the public hearing held in the instant case at the seat of the Tribunal, as well as expenses for the remittance of briefs, among other things, during the processing before this Tribunal. Furthermore, it is reasonable to assume that during the 12 years of the processing of the case before the Commission, the victim made economic disbursements. Based on the foregoing and considering the lack of receipts, the Court equitably determines the amount of US\$ 10.000, 00 (ten thousand dollars of the United States of America) in favor of Mr. Barreto Leiva. Said amount includes future expenses that the victim may incur during the procedure of monitoring compliance with this Judgment. Mr. Barreto Leiva shall deliver, in turn, the amount he deems appropriate to the persons who acted as their representatives at the domestic level and in the processing of the case before the Inter-American system.

6.3. Method of Compliance with the Payments Ordered

154. The State shall make the payment of the compensation for non-pecuniary damage directly to the Mr. Barreto Leiva, as well as the reimbursement of costs and expenses, within the term of one year as of the notice of this Judgment.

155. Should Mr. Barreto Leiva die before the pertinent above compensatory amounts are paid thereto, such amounts shall inure to the benefit of their heirs, pursuant to the provisions of the applicable domestic legislation. .

156. The State must discharge its pecuniary obligations by tendering United States dollars or an equivalent amount in the Venezuelan legal currency, at the New York, USA exchange rate between both currencies prevailing on the day prior to the day payment is made.

157. If, due to reasons attributable to the beneficiary of the above compensatory amounts, Mr. Barreto Leiva was not able to collect them within the period set for that purpose, the State shall deposit said amounts in an account held in the beneficiary’s name or draw a certificate of deposit

from a reputable Venezuelan financial institution, in US dollars and under the most favorable financial terms allowed by the legislation in force and the customary banking practice in Venezuela. If after ten years compensation set herein were still unclaimed, said amounts plus accrued interests shall be returned to the State.

158. The amounts allocated in this Judgment as compensation and reimbursement of costs and expenses shall be delivered to Mr. Barreto Leiva in their entirety, and may not be affected, reduced, or conditioned on account of current or future tax purposes.

159. Should the State fall into arrears with its payments, Venezuelan banking default interest rates shall be paid on the amounts due.

VIII. OPERATIVE PARAGRAPHS

160. Therefore:

THE COURT,

DECLARES,

Unanimously that:

1. The State violated the right to prior notification in detail of the charged filed embodied in Article 8(2)(b) of the American Convention, in relation to Article 1(1) therein, to the detriment of Mr. Barreto Leiva, under the terms of paragraphs 28 to 48 of this Judgment.

2. The State violated the right to have adequate time and means for the preparation of his defense, embodied in Article 8(2)(c) of the American Convention, in relation to Articles 1(1) and 2 therein, to the detriment of Mr. Barreto Leiva, under the terms of paragraphs 53 to 57 of this Judgment.

3. The State violated the right to be assisted by legal counsel of his choice, embodied in Article 8(2)(d) of the American Convention, in relation to Article 1(1) therein, to the detriment of Mr. Barreto Leiva, under the terms of paragraphs 60 to 64 of this Judgment.

4. The State did not violate the right to examine witnesses present in trial and to obtain the appearance of witnesses and expert witnesses, enshrined in Article 8(2)(f) of the American Convention, under the terms of paragraphs 65 and 66 of this Judgment.⁵ The State did not violate the right embodied in Article 8(1) of the Convention of being tried by a competent court, based on the reasons mentioned in paragraphs 74 to 81 of this Judgment.

6. The State violated the right to appeal a ruling, embodied in Article 8(2)(h) of the Convention, in conjunction with Articles 1(1) and 2 therein, to the detriment of Mr. Barreto Leiva, under the terms of paragraphs 84 to 91 of this Judgment.

7. The State did not violate the right of Mr. Barreto Leiva of being tried by an impartial court, enshrined in Article 8(1) of the American Convention, based on the reasons mentioned in paragraphs 94 to 99 of this Judgment.

8. The State did not violate the right to judicial guarantees, contemplated in Article 25(1) of the American Convention, based on the reasons mentioned in paragraphs 101 to 103 of this Judgment.

9. The State violated the right to personal liberty and the right not to be subject to arbitrary detention, embodied in Articles 7(1) and 7(3) of the American Convention, in relation to Articles 1(1) and 2 therein, to the detriment of Mr. Barreto Leiva, under the terms of paragraphs 111 to 116 of this Judgment.

10. The State violated the right to personal liberty, the right to trial within a reasonable time and the right to be presumed innocent, embodied in Articles 7(1), 7(5) and 8(2) of the American Convention, in conjunction with Articles 1(1) therein, to the detriment of Mr. Barreto Leiva, under the terms of paragraphs 118 to 123 of this judgment.

AND ORDERS:

Unanimously that:

11. This Judgment is per se a form of reparation.

12. The State, by means of its Judiciary and according to the terms of paragraphs 128 to 131, must grant Mr. Barreto Leiva, if he so wishes, the possibility of appealing the decision and fully reviewing the condemnatory judgment to which this Judgment makes reference (supra para. 22). If the court decides that the conviction was according to the Law, such court shall not impose an additional punishment on the victim and it shall reiterate that the victim has already complied with all the convictions imposed in due time. If, however, the court decides that Mr. Barreto Leiva is innocent or that the conviction imposed on him was not according to the Law, the court shall order appropriate measures of reparations for the time that Mr. Barreto Leiva was deprived of liberty and for all the pecuniary and non-pecuniary damage caused to him. This obligation must be complied with within a reasonable time.

13. The State must, within a reasonable time and according to paragraphs 133 and 134 of this Judgment, adapt its domestic legal system, in order to guarantee the right to review by a higher court, according to Article 8(2)(h) of the Convention, to every person tried for a crime, even to those persons who enjoy a special judicial privilege

14. The State must, within the term of six months as of notice of this Judgment, publish, at least once, in the Official Gazette and in another newspaper of wide national circulation, the chapters indicated in paragraph 137 of this Judgment, without the corresponding footnotes and the operative paragraphs therein.

15. The State must, within the term of one year as of notice of this Judgment, pay the amounts determined in paragraphs 148 and 153 therein, as compensation for non-pecuniary damage and reimbursement of costs and expenses, under the conditions and terms mentioned in paragraphs 154 to 159 of this Judgment.

16. The Court shall monitor full compliance with this Judgment, by virtue of its authority and in compliance with its duties according to the American Convention, and shall consider this case closed once the State has fully complied with what was decided in this Judgment. Within a term of one year as from the date notice the Judgment is served, the State shall submit to the Tribunal a report on the measures adopted in order to comply with the Judgment.

Done in Spanish and English, the Spanish text being authentic, in San José, Costa Rica, on November 17, 2009.

Diego García-Sayán

President in exercise

Sergio García Ramírez
Manuel E. Ventura Robles
Margarette May Macaulay
Rhadys Abreu Blondet

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President in exercise

Pablo Saavedra Alessandri
Secretary