INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF DÍAZ PEÑA *v.* VENEZUELA

JUDGMENT OF JUNE 26, 2012
(Preliminary objection, merits, reparations and costs)

In the case of *Díaz Peña*,

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), composed of the following Judges:

Diego García-Sayán, President
Manuel E. Ventura Robles, Vice President
Leonardo A. Franco, Judge
Margarette May Macaulay, Judge
Rhadys Abreu Blondet, Judge
Alberto Pérez Pérez, Judge, and
Eduardo Vio Grossi, Judge;

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

in accordance with Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter also "the American Convention" or "the Convention") and with Articles 31, 32, 65 and 67 of the Rules of Procedure of the Court* (hereinafter also "the Rules of Procedure"), delivers this Judgment, structured as follows:

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* The Court's Rules of Procedure approved by the Court during its eighty-fifth regular session held from November 16 to 28, 2009.

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I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. On November 12, 2010, pursuant to the provisions of Articles 51 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Court case 12,703 against the Bolivarian Republic of Venezuela (hereinafter also "the State," "the Venezuelan State" or "Venezuela").

2. The proceedings before the Commission were conducted as follows:

a) On October 12, 2005, Patricia Andrade of the Venezuela Awareness Foundation lodged the initial petition before the Inter-American Commission (No. 1133-05) in which she also requested precautionary measures in favor of Mr. Díaz Peña, who at that time was subject to preventive detention in the Pre-Trial Detention Center of the General Directorate of the Intelligence and Prevention Services, located in El Helicoide in Caracas, Venezuela.[1]

b) On March 20, 2009, the Commission issued admissibility report No. 23/09 (hereinafter "admissibility report"), declaring that petition No. 1133-05 was admissible with regard to the presumed violation of Articles 5, 7, 8 and 25 of the American Convention in relation to Articles 1(1) and 2 of this instrument, and inadmissible with regard to the claims concerning the presumed violation of Articles 4, 11, 15 and 24 of the American Convention.

c) On July 13, 2010, the Commission approved merits report No. 84/10 (hereinafter "merits report"), under Article 50 of the Convention, in which it concluded that the Venezuelan State was responsible for the violation of Articles 5, 7, 8 and 25 of the American Convention, in relation to Articles 1(1) and 2 of this instrument, and made a series of recommendation to the State.

d) On August 12, 2010, the State was notified of the said report and granted two months to provide information on the measures adopted to comply with the Commission's recommendations. In view of the State's failure to present any information, the Commission decided to submit this case to the jurisdiction of the Court. The Commission appointed Paulo Sérgio Pinheiro, Commissioner, and Santiago A. Canton, Executive Secretary, as delegates, and Elizabeth Abi-Mershed, Deputy Executive Secretary, and Silvia Serrano Guzmán, lawyer of the Executive Secretariat, as legal advisers.

3. The Commission submitted to the Inter-American Court all the facts and human rights violations described in its merits report No. 84/10.[2] The facts presented by the Inter-American Commission occurred in the context of the protests which took place in Venezuela, particularly in Plaza Francia in Altamira, Caracas, beginning in October 2002 and continuing into part of 2003, and related to events that occurred on February 25, 2003, when two explosive devices were detonated in the Consulate General of the Republic of Colombia and in the Office for International Trade of the Kingdom of Spain in Caracas and, specifically, to the detention of Raúl José Díaz Peña for his alleged responsibility in them. It is alleged that his detention was illegal and arbitrary and

[1] Mr. Díaz Peña was sentenced and convicted to nine years and four months' imprisonment by a judgment of April 29, 2008, and when the time he had spent in preventive detention was subtracted four years and eleven months remained to be served (*infra* para. 89). On May 13, 2010, he was granted the alternative measure of serving his sentence in an open regime, and on September 5, 2010, he did not return to the Community Treatment Center as he should have done under the said regime. Currently, he is living in the United States of America where he has requested asylum (*infra* para. 90).

[2] According to Article 35(3) of the Rules of Procedure of the Court, "[t]he Commission shall indicate which facts contained in the report to which Article 50 of the Convention refers it is submitting to the consideration of the Court."

that he was subjected to a preventive detention regime that exceeded the duration established by criminal law, based on a presumption of risk of flight.[3] During the time he remained in preventive detention at the headquarters of the former Directorate General of Intelligence and Prevention Services (hereinafter "DISIP"),[4] the situation of the presumed victim was not subject to judicial review. In addition, Raúl José Díaz Peña was subject to a trial with a series of irregularities that, it is alleged, resulted in the criminal proceedings lasting approximately five years and two months from the time of his arrest until he was sentenced and convicted. While he was in the State's custody, he was allegedly subjected to detention conditions that had serious effects on his health, without receiving the medical care that he supposedly required in a timely manner. Furthermore, the Commission considered that the Court should specifically take into consideration the more general problem of the alleged lack of independence and impartiality of some judicial authorities and of the Public Prosecution Service in Venezuela, in order to analyze the way in which these problems were reflected in the instant case.

4. Based on the foregoing, the Commission asked the Court to conclude and declare that the State was responsible for violating the following articles of the American Convention on Human Rights to the detriment of Raúl José Díaz Peña:

- Article 7(1), 7(2) and 7(4) (rights not to be deprived of liberty illegally and to know the reasons for the detention) in relation to Article 1(1);
- Article 7(1) and 7(3) (right not to be deprived of liberty arbitrarily) in relation to Articles 1(1) and 2;
- Articles 7(1), 7(5) and 8(2) (right to be tried within a reasonable time or to be released, and presumption of innocence) in relation to Article 1(1);
- Articles 7(1), 7(6) and 25(1) (rights to recourse to a competent judge or court to decide on the lawfulness of the arrest, and to judicial protection) in relation to Article 1(1);
- Article 8(1) (right to be judged within a reasonable time by an independent and impartial judge or court) in relation to Article 1(1), and
- Article 5(1) and 5(2) (right to humane treatment) in relation to Article 1(1).

Consequently, the Commission asked that the State be ordered to adopt specific measures of reparation.

II
PROCEEDINGS BEFORE THE COURT

5. The Commission's submission of the case was notified to the representative and to the State on December 22 and 23, 2010, respectively.

6. On February 21, 2011, Patricia Andrade of the Venezuela Awareness Foundation, representative of the presumed victim (hereinafter "the representative"), forwarded her brief with pleadings, motions and evidence (hereinafter "pleadings and motions brief"), in accordance with Articles 25 and 40 of the Rules of Procedure. In general, the representative agreed with the violations alleged by the Inter-American Commission, and asked that the Court order the State to adopt different measures of reparation and pay the procedural expenses and costs.

[3] The first paragraph of article 251 of the Code of Criminal Procedure indicates that "[r]isk of flight shall be presumed in cases of unlawful acts, punished by imprisonment for a maximum of ten years or more."

[4] At the end of 2009, this became the Bolivarian National Intelligence System (SEBIN).

7. On May 24, 2011, the State presented its brief filing preliminary objections[5] and answering the briefs submitting the case and with pleadings and motions (hereinafter "answering brief"). In this brief, Venezuela denied its international responsibility for violating the rights alleged by the Commission and by the representative and asked that the Court: (a) "declare report No. 84/10 of July 13, [2010, …] irreceivable, as well as the requests for reparations and costs"; (b) "dismiss and reject the pleading, motions and evidence submitted […] by Raúl José Díaz Peña, […] and, consequently, not sentence the Venezuelan State to make the reparations and pay the costs contained in the said brief," and (c) "urge the Commission to annul the arguments, conclusions and recommendations contained in report No. 84/10, […] because they do not represent the objective reality of the facts, they violate the sovereignty of the Venezuelan State, and they harm its domestic legal system. Lastly, the State appointed Germán Saltrón Negretti and Manuel García Andueza, as agent and deputy agent, respectively.

8. On August 12, 2011, the representative and the Commission forwarded their respective written arguments on the preliminary objection of failure to exhaust domestic remedies, in accordance with Article 42(4) of the Rules of Procedure.[6]

9. Following the submission of the principal briefs (*supra* paras. 1, 6 and 7), in an Order of November 2, 2011, the President required that affidavits be received from five witnesses, one proposed by the representative and four by the State, as well as the expert opinions of two expert witnesses, one proposed by the representative and the other required, *ex officio,* by the President of the Court. The President also asked the State to submit various documents as helpful evidence. In addition, the President convened the parties and the Commission to a public hearing to receive the statement of the presumed victim proposed by the representative by video conference and, directly, the testimony of a witness and the opinion of an expert witness both proposed by the State, as well as the final oral arguments of the representative and of the State and the final oral observations of the Commission on the preliminary objection and eventual merits, reparations and costs.

10. The public hearing was held on December 1, 2011, during the Court's ninety-third regular session.[7]

11. On January 23 and 24, 2012 the State, the representative, and the Inter-American Commission submitted their respective final written arguments and observations. The State submitted, *inter alia*, documents requested by the Judges of the Court during the public hearing, which were forwarded to the other parties to that they could make any observations they deemed pertinent.

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[5] One of the two preliminary objections filed by the State was an allegation of "lack of impartiality" of some of the Judges and the Secretary of the Court. In this regard, the acting President of the Inter-American Court, Judge Alberto Pérez Pérez, issued the Order of June 24, 2011, in which he decided, *inter alia,* that the argument of lack of impartiality in the functions performed by some of the Judges who are members of the Court, submitted by the State of Venezuela as a preliminary objection, was not a preliminary objection. In addition, he declared that this allegation of lack of impartiality was unfounded and considered that it corresponded to the Court, in plenary, to continue hearing this case fully, until its conclusion. *Cf. Case of Díaz Peña v. Venezuela*. Order of the acting President of the Inter-American Court of Human Rights of June 24, 2011.

[6] In a note of the Secretariat of August 19, 2011, it was observed that, in the said brief, the representative had presented pleadings additional to the arguments on the preliminary objection that were requested; consequently, on the instructions of the President of the Court, the representative was informed that they were inadmissible. Nevertheless, the representative could present the arguments that she deemed pertinent at the appropriate procedural moments established in the Rules of Procedure, such as during the public hearing and in the final written arguments.

[7] At this hearing, there appeared: (a) for the Inter-American Commission: Elizabeth Abi-Mershed, Deputy Executive Secretary, and Silvia Serrano Guzmán, Adviser; (b) for the representative: Patricia Andrade of Venezuela Awareness Foundation, and Verioska Velasco, journalist, and (c) for the State: Germán Saltrón Negretti, Agent, and Norevy Cortez, Lawyer of the State Human Rights Agency before the Inter-American and International Systems.

III
JURISDICTION

12. The Inter-American Court is competent to hear this case pursuant to Article 62(3) of the Convention, because Venezuela has been a State Party to the American Convention since August 9, 1977, and accepted the compulsory jurisdiction of the Court on June 24, 1981.

IV
EVIDENCE

13. Based on the provisions of Articles 46, 47, 48, 50, 57 and 58 of the Rules of Procedure, together with the Court's case law concerning evidence and its assessment,[8] the Court will examine the probative documentary evidence forwarded by the parties at the corresponding procedural opportunities, and also the statement of the presumed victim, the testimony, and the expert opinion provided by affidavit, by audiovisual means, and during the public hearing before the Court, and the helpful evidence requested by the Court and its President (*supra* paras. 9 and 11). When examining and assessing the evidence, the Court will abide by the rules of sound judicial discretion within the corresponding legal framework.[9]

A) Documentary, testimonial and expert evidence

14. The Court received different documents presented as evidence by the Inter-American Commission, the representative and the State attached to their main briefs. The Court also received the affidavits provided by the witnesses Eligio Cedeño, Didier Alirio Rojas Rodríguez, Jimai Montiel Calles and Enrique Alberto Arrieta Pérez. Regarding the evidence rendered during the public hearing, the Court received the testimony provided by electronic audiovisual means by the presumed victim Raúl José Díaz Peña, as well as the testimony of witness Elvis Ramírez and expert witness Espartaco José Martínez Barrios.[10]

15. Furthermore, in a brief of November 18, 2011, the Inter-American Commission advised the Court that "owing to his health," expert witness Alberto Arteaga Sánchez was "unable to provide the expert opinion" required, *ex officio*, by the President of the Court. For its part, the State failed to forward the affidavit made by witness Ricardo Hecker Puterman within the corresponding time frame, without any justification. Likewise, the representative did not forward the opinion provided by affidavit by expert witness James Jean within the respective time frame, but rather submitted a document entitled "expert opinion on the psychological reports prepared by the Florida Center for Survivors of Torture," by Gisell Estrella Viña and Maribel Del Río-Roberts (*infra* para. 21).

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[8] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits.* Judgment of March 8, 1998. Series C No. 37, paras. 69 to 76, and *Case of Fornerón and daughter v. Argentina. Merits, Reparations and costs.* Judgment of April 27, 2012. Series C No. 242, para. 10.

[9] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits*, para. 76, and *Case of Fornerón and daughter v. Argentina*, para. 10.

[10] The purpose of all these statements was established in the Order of the President of the Court of November 2, 2011, which can be consulted on the Court's web page at: http://www.corteidh.or.cr/docs/asuntos/diaz_2_11_11.pdf (last consulted on June 26, 2012).

B) Admission of the evidence

B.1) Admission of the documentary evidence

16. In this case, as in others, the Court admits those documents submitted opportunely by the parties that were not contested or challenged and the authenticity of which was not disputed.[11] The documents requested as helpful evidence by the Order of the President of the Court of November 2, 2011,[12] and by the Court during the public hearing, are incorporated into the body of evidence in application of the provisions of Article 58(b) of the Rules of Procedure.

17. With regard to newspaper articles, the Court has considered that they can be assessed when they refer to well-known public facts or declarations made by State officials or when they corroborate aspects related to the case.[13] The Court decides to admit those documents that are complete or that, at least, allow their source and date of publication to be verified, and will assess them taking into account the body of evidence, the observations of the parties, and the rules of sound judicial discretion.

18. Also, regarding some documents indicated by the Commission by means of electronic links, the Court has established that if a party provides, at least, the direct electronic link to the document it cites as evidence and the document can be accessed neither legal certainty nor procedural balance are impaired because it can be located immediately by the Court and by the other parties.[14] In this case, the parties did not oppose or make observations on the content and authenticity of such documents.

19. Some types of evidence proposed or requested pose specific problems that the Court will analyze in the following paragraphs in order to make an explicit ruling in this regard.

Request to transfer expert opinions provided in other cases against Venezuela

20. The Commission asked the Court to transfer the expert opinions provided in other cases against Venezuela by Antonio Canova González and Román Duque Corredor. The former had referred, *inter alia*, to the situation of the Venezuelan Judiciary, its disciplinary regime, and the constitutional and legal powers of the administrative-law judges to order the integral restitution of legal situations that had been violated under Venezuela's domestic law; and the latter, *inter alia*, to Venezuela's domestic law concerning the functioning of the Judiciary, to error in law as a cause for disciplinary sanction, to the alleged lack of guarantees to ensure the independence of the Judiciary and the separation of powers, to the relationship of this to the existence of provisional judges, and to the norms for the appointment and removal of judges in Venezuela.[15] Neither the State nor the representative presented observations on this request. However, the Court considers that it is not

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[11] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of Fornerón and daughter v. Argentina*, para. 12.

[12] The Constitution, the Penal Code, the Code of Criminal Procedure, and the Law for the Protection of Constitutional Rights and Guarantees of Venezuela, in force and applicable at the time of the facts of this case. *Cf.* Order of the President of the Court of November 2, 2011, fifth operative paragraph.

[13] *Cf. Case of Velásquez Rodríguez v. Honduras, supra* note 11, para. 146, and *Case of López Mendoza v. Venezuela. Merits, reparations and costs*. Judgment of September 1, 2011. Series C No. 233, para. 19.

[14] *Cf. Case of Escué Zapata v. Colombia. Merits, reparations and costs.* Judgment of July 4, 2007. Series C No. 165, para. 26, and *Case of Chitay Nech et al. v. Guatemala, supra* note 52, para. 54.

[15] Expert witness Antonio Canova González, lawyer specialized in administrative and constitutional law, proposed by the representative, testified in the case of *Reverón Trujillo v. Venezuela,* and expert witness Román Duque Corredor, former justice of the Political and Administrative Chamber of the Supreme Court of Justice, proposed by the Commission, in the case of *Apitz Barbera et al. ("First Court of Administrative Law") v. Venezuela*.

pertinent to transfer the said expert opinions, because their purpose is outside the factual framework of the instant case (*infra* para. 55).

Psychological reports prepared by the Florida Center for Survivors of Torture

21. On November 18, 2011, the representative forwarded the above-mentioned "expert opinion on the psychological reports prepared by the Florida Center for Survivors of Torture" and attached the *curricula vitae* of "the psychologists who prepared the said opinion" without providing any explanation in this regard (*supra* para. 15). On November 28, 2011, the representative was reminded that the persons who prepared the opinion "were not the person proposed at the appropriate occasion and required by the President in the first operative paragraph of his Order of November 2, 2011," because "[t]his expert opinion should have been prepared by James Jean." The representative and the State presented observations on this opinion in briefs of November 30 and December 1, 2011, respectively, even though such observations had not been requested by either the President or the Court; however, they did not make any other reference in this regard subsequently. The representative asked the Court to accept the psychological opinion prepared by the Florida Center for Survivors of Torture because, when offering it, she had indicated that it would be issued by this entity, but had not specified or given the name of the person who would issue the psychological reports because, given the way the Center operates, "the psychological report […] must be prepared by psychologists who are specialists in torture, [and] James Jean merely supervises and decides when Raúl Díaz has completed each stage of the program […]." For its part, the State indicated that it "reject[ed] and contest[ed] the [said] expert opinion […] because the conditions agreed and approved in the Order […] were not met […]."

22. The Court has verified that, in the Order of November 2, 2011, the President of the Court established that the expert witness proposed by the representative "James Jean, Specialist of the Florida Center for Survivors of Torture assigned to the case of Raúl José Díaz Peña," would provide an "expert opinion on the psychological, mental and personal effects and the effects on his health that the conditions endured during his imprisonment had had on Raúl José Díaz Peña." This opinion was to be provided by affidavit and sent to the Court by November 18, 2011.[16] The representative did not contest this decision or communicate with the Court. On the said date, the representative forwarded a psychological assessment prepared on March 25, 2011, by the psychologists Gisell Estrella Viña, Psy.D. and Maribel Del Río-Roberts, Psy.D., of the Center for Assessment and Intervention, Department of Applied Interdisciplinary Studies, Nova Southeastern University, which had been requested by Raúl Díaz "to determine his current level of general functioning, to assist in the process of requesting political asylum, and to explore the socio-emotional difficulties that he [was] experiencing"; the said assessment was notarized on the day it was prepared. Evidently, the persons who prepared the psychological assessment submitted to the Court are not the person who was proposed by the representative at the appropriate opportunity and required by the President of the Court. In addition, the assessment was prepared prior to the President's Order of November 2, 2011. Consequently, the Court finds that the said assessment does not correspond to the expert evidence required by the President in his Order and that, in the way in which it was provided, it is not appropriate to admit it. Consequently, the Court will not take it into consideration in its decision.

Time-barred evidence presented by the State

23. The Court notes that evidence provided outside the appropriate procedural occasions is not admissible, unless it complies with the exceptions established in Article 57(2) of the Rules of Procedure, namely, *force majeure*, grave impediment or if it relates to a fact that occurred after the said procedural occasions. In the instant case, together with its final written arguments, the

[16] *Cf.* Order of the President of the Court of November 2, 2011, first and second operative paragraphs.

State forwarded evidence that neither the Court nor its President had requested, without justifying the submission of this evidence, consisting of, *inter alia*, 74 compact discs with audiovisual recordings "of all the hearings held during the trial of Raúl Díaz Peña," after the answering brief. Regarding the compact discs, the representative argued that their presentation had been irregular because they constituted time-barred evidence and "[a]lthough it was true that the State possessed these recordings when it answered the application and did not include them at that time, it is also true that they contained elements that have been extensively discussed." In view of the fact that they are time-barred and that none of the grounds for exceptions are met, the Court finds that it is not appropriate to admit the said compact discs presented by the State outside the appropriate occasion; consequently the Court will not consider them in its decision.

Other documents provided by the State with its final written arguments

24. The Court admits, *ex officio*, pursuant to Article 58(b) of the Rules of Procedure, the documents provided by the State with its final written arguments that had been requested by the Court. Accordingly, it incorporates them and they will be assessed as pertinent, taking into account the body of evidence, the observations of the parties, and the rules of sound judicial discretion. Similarly, the Court admits, *ex officio*, in keeping with Article 58(a) of the Rules of Procedure, those documents forwarded by the State with its final written arguments that were not contested or challenged, and the authenticity of which was not disputed, exclusively to the extent that they are pertinent and useful for the determination of the facts and the eventual legal consequences of those facts.

Helpful evidence requested by the Court during the hearing

25. Regarding the helpful evidence requested by the Court during the public hearing held in this case (*supra* para. 11), the State failed to submit the decision ordering the removal of Judge Prado. Since the disciplinary case file forwarded by the State as an attachment to its final arguments shows that this is decision No. 2005-0238 issued by the Judicial Commission of the Supreme Court of Justice on November 1, 2005, and that the text of this decision appears on the web page of the Supreme Court of Justice of the Bolivarian Republic of Venezuela, as advised in a note of the Secretariat of May 7, 2012, and based on Article 58(a) of the Court's Rules of Procedure, the said decision is incorporated into the body of evidence of the instant case, *ex officio*. The parties were given the opportunity to present their observations in this regard.

B.2) Admission of the statement of the presumed victim and of the testimonial and expert evidence

26. With regard to the statement of the presumed victim, the testimony of the witnesses, and the expert opinion provided during the public hearing and by affidavit presented at the appropriate opportunity, the Court finds them pertinent only to the extent that they are in keeping with the purpose defined by the President of the Court in the Order requiring them (*supra* para. 9). They will be assessed in the corresponding chapter together with the other elements of the body of evidence and taking into account the observations made by the parties.[17]

27. Regarding the statement of the presumed victim, the State made observations on some of Raúl José Díaz Peña's answers during his appearance before the Court, and alleged that the content of some of them was untrue. The Court notes that the State's observations attempt to discredit the probative value of Mr. Díaz Peña's statement, but do not contest the admissibility of this evidence. According to the Court's case law, the statements made by the presumed victims

[17] *Cf. Case of Loayza Tamayo v. Peru. Merits.* Judgment of September 17, 1997. Series C No. 33, para. 43, and *Case of Fornerón and daughter v. Argentina*, para. 13.

cannot be assessed alone, but must be evaluated in the context of all the evidence in the proceedings,[18] because they are useful to the extent that they can provide further information on the alleged violations and their consequences.[19] Based on the foregoing, the Court admits the said statement, although its probative value will be considered taking into account the above-mentioned criteria and the rules of sound judicial discretion.

28. Regarding the expert opinion provided by Espartaco Martínez during the public hearing, the representative requested that the expert witness "be rejected as an expert […] because he was an [alleged] biased witness of the State who [had] tried to manipulate the opinion of the Judges with his statement." In this regard, she noted that Mr. Martínez "emphasized that he had no knowledge of the case, [and that] he only wished to give opinions on "dogma", but [he had been] specific in giving an opinion that concurred with the State's position." In addition, she indicated that Mr. Martínez had referred to issues about which "he [had] not [been] called on to declare as an expert witness, but were situations that were being examined in the case." She also indicated that, "as noted during the hearing, Prosecutor Martínez should have facilitated 'his notes' on which his expert opinion was based; however, […] they were never [received]."

29. The Court considers that, apart from these general assertions, the representative has not presented grounds for the alleged bias that would indicate the existence of one of the causes for impediment established in Article 48(1) of the Rules of Procedure. As regards the alleged concurrence of the expert's opinion with the position of the State, the Court has already established that even when the statements of the expert witnesses contain elements that support the arguments of one of the parties, this does not *per se* disqualify the expert.[20] Lastly, regarding the conclusions of the expert that are alleged to have exceeded the purpose of his testimony, the Court reiterates that it only admits those statements that are in keeping with the purpose that was defined opportunely (*supra* para. 26). Based on the above, the Court admits this expert opinion to the extent that it is in keeping with the purpose required and will assess it together with the body of evidence, taking into account the observations of the representative and the rules of sound judicial discretion.

30. The representative also made observations on the testimony given during the public hearing by Elvis Ramírez, arguing that this person did "not have the medical, psychiatric or psychological qualifications to given an opinion on the subject [on which he was called to testify]," because, during the hearing, he had confirmed that he "became aware of the place of detention of the [presumed] victim […], when he was appointed […] head of the Pre-Trial Detention Center in August 2009" and, since Raúl Díaz was released in May 2010, Mr. Ramírez had only known the SEBIN Pre-Trial Detention Center during the last 10 months of the presumed victim's detention. She also referred to supposed contradictions in this testimony, questioned the truth of certain answers given by Mr. Ramírez, and stated that "[i]n 2004, police Captain Elvis Ramírez [had been] Head of the Rapid Response Unit of the former DISIP, now SEBIN," and that this unit had been composed of "commandos [who] ha[d] been the subject of serious reservations owing to [the alleged] violation of human rights."

31. In this regard, the Court recalls that witnesses are governed by the obligation established in Article 51(3) of the Rules of Procedure "to speak the truth, the whole truth, and nothing but the truth" with regard to the facts and circumstances of which they are aware concerning the purpose

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[18] *Cf. Case of Loayza Tamayo v. Peru*. *Merits*, para. 43, and *Case of Fornerón and daughter v. Argentina*, para. 13.

[19] Cf. Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs. Judgment of November 23, 2009. Series C No. 209, para. 93, and Case of Fornerón and daughter v. Argentina, para. 13.

[20] Cf.. Case of Radilla Pacheco v. Mexico, para. 97.

of their testimony and must avoid giving personal opinions.[21] Moreover, the Court considers that the representative's observations on this testimony refer to aspects of its content that do not contest its admissibility, but relate to matters of probative value.[22] Consequently, the Court admits this testimony and will assess it when examining the merits of the matter, together with the remainder of the body of evidence. Thus, the pertinent parts of the representative's observations will be considered when analyzing the merits of the dispute, provided they refer to the facts alleged in this case, in keeping with its factual basis and the purpose of the litigation.

32. Regarding the list of questions presented by the representative to the witnesses Didier Alirio Rojas Rodríguez, Jimai Montiel Calles and Enrique Alberto Arrieta Pérez, which were admitted by the President of the Court and forwarded to the parties, expressly requesting the State to coordinate and take the necessary steps to ensure that the witnesses included the respective answers in their affidavits, as established in the Order of the President of November 2, 2011 (*supra* para. 9), the Court has verified that, following an extension of the time frame that was granted at the request of the State, "in order to forward an addendum [to] the testimonial reports [sent] with the answer to the questions admitted by the Court […], taking into consideration the time required for the domestic and notarial procedures," Venezuela failed to submit the said addendum within the time granted to this end, and failed to present any explanation in this regard.

33. Regarding the statements forwarded by the State, the Court notes that they do not contain the answers to the questions submitted by the representative and opportunely admitted by the President. The fact that the Rules of Procedure establish the possibility of the parties formulating written questions for the deponents offered by the other party and, as appropriate, by the Commission, imposes the corresponding obligation of the party that offered the testimony to coordinate and take the necessary steps to forward the questions to the deponents, and that the respective answers are provided. In the Court's opinion, the State's conduct is incompatible with the obligation of procedural cooperation and with the principle of good faith that govern the international proceedings.[23]

V
THE FACTS OF THE CASE

A) Preliminary considerations

34. In accordance with Article 35(1) of the Court's Rules of Procedure, this case was submitted to the Court by the presentation of the report referred to in Article 50 of the Convention (namely, "the merits report"). According to Article 35(3) of the Rules of Procedure, the Commission "shall indicate which facts contained in [this report] it is submitting to the consideration of the Court." The facts in the merits report submitted to the Court's consideration constitute the factual framework of the proceedings before the Court. In the Court's opinion, when reference is made to the facts contained in the merits report, the said regulatory provision refers to the factual determinations made by the Inter-American Commission, and not to a simple reference to the arguments of the parties. In addition, it is not admissible that the presumed victims or their

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[21] Cf. Case of González et al. ("Cotton field") v. Mexico. Preliminary objection, merits, reparations and costs. Judgment of November 16, 2009. Series C No. 205, para. 105.

[22] *Cf. Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197, para. 43, and *Case of Abrill Alosilla et al. v. Peru. Merits, reparations and costs.* Judgment of March 4, 2011. Series C No. 223, para. 47.

[23] *Cf. Case of Cantoral Benavides v. Peru. Preliminary objections.* Judgment of September 3, 1998. Series C No. 40, para. 30, and *Case of Maritza Urrutia v. Guatemala. Merits, reparations and costs*. Judgment of November 27, 2003. Series C No. 103, para. 42.

representatives allege facts that differ from those described in the said report, even though they may state those facts that explain, provide details of, clarify or reject the facts mentioned in the report[24] and that have been submitted to the Court's consideration.

35. In its brief submitting the case, the Commission indicated that it "submit[ted] to the jurisdiction of the Court all the facts […] described in merits report 84/10." The Court has verified that the Commission included the following three sections in the factual determinations made in the Merits Report: "1. Context"; "2. The criminal proceedings undertaken against Raúl José Díaz Peña," and "3. Detention conditions and Raúl José Díaz Peña's health situation."

36. In particular, with regard to the second section on the criminal proceedings, the Commission included specific references to facts that had taken place from September 9, 2003, to May 17, 2010. They included: (a) the investigation and arrest of Raúl José Díaz Peña; (b) the preliminary hearing and other judicial proceedings; (c) the public oral proceedings; (d) the execution of judgment, and (e) the remedy of constitutional *amparo*.

Allegations of irregularities in the preparatory phase of the proceedings and in the proceedings themselves

37. For her part, during the proceedings before the Court, the representative presented factual and legal arguments concerning alleged irregularities during the preparatory phase of the trial. Specifically, she argued the existence of coerced and false statements, the seizure and transfer of evidence without complying with the minimum legal requirements, and the submission of expert evidence that was vitiated and subject to annulment. In addition, she stated that Mr. Díaz Peña was sentenced for crimes whose definition by the Public Prosecution Service was changed and, owing to the absence of due process, "the judgment resulted from an unjust trial."

38. In response, the State indicated that, after charges had been pressed and during the investigation phase, Mr. Díaz Peña's defense counsel could have requested that procedures were conducted to prove his innocence before the examining judge, a right that she did not exercise. In addition, it maintained that "there were no irregularities during the trial." These arguments of the representative and the State were also presented during the proceedings on admissibility and merits before the Commission.[25]

39. The file of this case reveals, as the Commission indicated in the proceedings before the Court, that in admissibility report No. 23/09 of March 20, 2009, relating to the petition presented on October 12, 2005, the Commission observed that the case referred to alleged violations of the American Convention as a result of: (i) "the presumed prolonged preventive detention to which Raúl José Díaz Peña was subjected"; (ii) "the alleged irregularities in the criminal proceedings against him"; (iii) "the deterioration in his health, presumably because of the detention conditions and the presumed negligence in the provision of adequate and prompt medical care" and, based on this determination, it analyzed the exhaustion of the domestic remedies.

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[24] Cf. Case of the Barrios Family v. Venezuela. Merits, reparations and costs. Judgment of November 24, 2011. Series C No. 237, para. 33.

[25] *Cf.* Initial petition of October 12, 2005 (evidence file, tome V, folios 3138 to 3152); Admissibility Report No. 23/09, Petition 1133-05 Raúl José Díaz Peña - Venezuela, issued by the Inter-American Commission on March 20, 2009, paras. 9, 12, 22, 24 and 27 (file of the proceedings before the Inter-American Commission, folios 430 to 438); Merits Report No. 84/10, Case 12,703, Raúl José Díaz Peña – Venezuela issued by the Inter-American Commission on July 13, 2010, paras. 37 and 43 (merits file, tome I, folios 79 and 80); Note AGEV/000600 of May 3, 2007, addressed to the Executive Secretary of the Inter-American Commission on Human Rights by the Agent of the State of Venezuela (evidence file, tome XXV, folios 17191 to 17209), and Note AGEV/000863 of August 5, 2007, addressed to the Executive Secretary of the Inter-American Commission on Human Rights by the Agent of the State of Venezuela (evidence file, tome XXV, folios 17210 to 17218).

40. In the said report, the Commission considered that the domestic remedies had been exhausted "as regards the petitioners' allegations concerning the presumed illegal deprivation of liberty and the prolonged preventive detention of Mr. Díaz Peña and the presumed violation of his right to the presumption of innocence," because various remedies had been filed over the period from March 24, 2006, to May 11, 2007; "at least seven requests to review the precautionary measure of preventive detention" and "annulment based on non-compliance with the methods and conditions established by law, as well as the nullity of the expert opinion offered by the Public Prosecution Office."[26] Moreover, with regard to the detention conditions, the Commission observed that Mr. Díaz Peña's defense counsel "ha[d] taken different steps before the prison authorities and the judges who were hearing the case to request medical care [for him and] his transfer to another prison based on the state of his health."[27] Hence, the Commission considered that the requirements of Article 46(1)(a) of the Convention had been met, "in relation to the arguments relating to the preventive detention and the detention conditions, with regard to the presumed violation of Articles 5, 7, 8 and 25"; accordingly, it concluded that the said claims were admissible in relation to the above-mentioned allegations.[28]

41. Conversely, the Commission stated that "[r]egarding the presumed irregularities in the criminal proceedings against the presumed victim, the case file reveal[ed] that Raúl José Díaz Peña had waived the right to appeal the judgment against him, which was published officially on June 17, 2008."[29] On this basis, it observed that, "regarding the claim of violations of due process in keeping with the right to judicial protection, the presumed victim could have appealed the judgment convicting him, and he waived this remedy of his own volition." Consequently, it concluded that, "based on these facts, the domestic remedies ha[d] not been exhausted and that, owing to non-compliance with this requirement, the exceptions established in Article 46(2) of the American Convention were not met."[30]

42. In this regard, the Court has noted that, during the proceedings before this Court, the Commission indicated that, since "the domestic remedies had not been exhausted, […] the analysis of merits did not incorporate the arguments on the irregularities in the criminal proceedings; for example, on the matter of the illegality of the way in which evidence was obtained," and "that, in fact, the arguments on the irregularities in the criminal proceedings that could have been remedied by appealing the conviction, were inadmissible."

43. When deciding on the admissibility of the said arguments of the representative (*supra* para. 37), the Court "must maintain a reasonable balance between the protection of human rights, the ultimate purpose of the system, and the legal certainty and procedural equilibrium that ensure the stability and reliability of the international protection [because, if it did not,] this would result in the

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[26] *Cf.* Admissibility Report No. 23/09, Petition 1133-05 Raúl José Díaz Peña - Venezuela, issued by the Inter-American Commission on March 20, 2009, paras. 45 to 48 (file of the proceedings before the Inter-American Commission, tome I, folios 442 and 443).

[27] The Commission referred to requests made on November 15, 2006, and June 8, 2007. *Cf.* Admissibility Report No. 23/09, Petition 1133-05 Raúl José Díaz Peña - Venezuela, issued by the Inter-American Commission on March 20, 2009, footnote 62 (file of the proceedings before the Inter-American Commission, tome I, folio 443).

[28] *Cf.* Admissibility Report No. 23/09, Petition 1133-05 Raúl José Díaz Peña - Venezuela, issued by the Inter-American Commission on March 20, 2009, paras. 43 and 50 (file of the proceedings before the Inter-American Commission, tome I, folios 442 to 444).

[29] Admissibility Report No. 23/09, Petition 1133-05 Raúl José Díaz Peña - Venezuela, issued by the Inter-American Commission on March 20, 2009, para. 51 (file of the proceedings before the Inter-American Commission, tome I, folios 443 to 445).

[30] Admissibility Report No. 23/09, Petition 1133-05 Raúl José Díaz Peña - Venezuela, issued by the Inter-American Commission on March 20, 2009, para. 51 (file of the proceedings before the Inter-American Commission, tome I, folios 443 to 445).

loss of the authority and credibility that are essential for the organs responsible for administering the system for the protection of human rights."[31]

44. The foregoing leads naturally to the conclusion that it is not possible to suppose that allegations of a violation of rights that have been declared inadmissible by the Commission in its admissibility report have been submitted to the consideration of the Court. The provisions of the Court's Rules of Procedure must always be interpreted in accordance with of the Convention. In this specific case, Article 35 of these Rules of Procedure must be interpreted in relation to Articles 46 and 47 of the Convention, so that the "facts that allegedly give rise to a violation" (Article 35(1)) and the "facts contained in the report" on merits (Article 35(3)) cannot include allegations that have been considered inadmissible by the Commission and, in particular, facts regarding which domestic remedies have not been exhausted, unless the requirement of prior exhaustion of such remedies is not applicable.

45. Consequently, although the Commission stated that it had submitted to the Court all the facts described in merits report No. 84/10 of July 13, 2010, including those that refer to factual aspects relating to supposed irregularities in the criminal proceedings,[32] regarding which the Commission itself concluded that domestic remedies had not been exhausted in its report of March 20, 2009, those aspects have not been submitted to the Court validly. This conclusion is corroborated taking into account that the Commission did not include the arguments concerning those factual aspects in the legal analysis of its merits report (*supra* para. 42).

46. Therefore, it is not incumbent on the Court to rule on the following legal arguments presented by the representative, which are based on factual aspects that, at the time of the admissibility stage, were excluded from the merits proceedings: (a) the alleged existence of coerced or false statements; (b) the alleged seizure and transfer of evidence which did not comply with the applicable legal provisions; (c) the alleged presentation of expert evidence that was vitiated and subject to annulment, and (d) the alleged change in the legal definition of the facts at the time of the judgment convicting Mr. Díaz Peña.

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[31] *Case of Cayara v. Peru. Preliminary objections.* Judgment of February 3, 1993. Series C No. 14, para. 63, and *Case of Baena Ricardo et al. v. Panama. Preliminary objections.* Judgment of November 18, 1999. Series C No. 61, para. 42. See also, *Case of González Medina and family v. Dominican Republic*. *Preliminary objections, merits, reparations and costs*. Judgment of February 27, 2012. Series C No. 240, para. 28.

[32] For example, in paragraphs 54, 55, 62 and 71 of this report on the factual determinations, the Commission indicated the following:

> a) "On September 12, 2003, Raúl José Díaz Peña appeared before the CICPC to be interviewed during which he indicated that, on September 10, 2003, 'between 10 a.m. and 11 a.m.' a DISIP team came to his house with a warrant from the Prosecutor to seize his yellow Toyota Samuray pickup truck in order to perform forensic testing on it. The DISIP agents who seized it told him that expert tests would be carried out on the pickup truck that same day and that he could come to this agency at 2 p.m. When Raúl José Díaz Peña arrived at the DISIP headquarters at 2 p.m., the expert testing had already begun, therefore they complained to the Sixty-second Prosecutor, who continued with the procedure."
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> b) "As recorded in the expert report of November 5, 2003, the designated expert concluded that "the whitish waxy substance present in the sweeps examined and indicated, respectively, as No. 1 (cargo space) and No. 2 (rear floor - left side) corresponds to the powerful explosive known as C4 or HARRISITE";
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> c) "On June 15, 2004, the 11th First Instance Examining Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area […] declared, *inter alia,* that the objections and requests for annulment proposed by Raúl José Díaz Peña's legal counsel were inadmissible. On July 6, 2004, the Sixty-second Auxiliary Prosecutor of the Caracas Metropolitan Area, Sol Leylimar Domínguez Alvarenga, ruled with regard to the request for annulment made by Raúl José Díaz Peña's defense counsel and requested that the decision issued by the 11th First Instance Examining Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area be confirmed," and
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> d) "On December 2, 2005, a proceeding was held to conduct the hearing of the oral public trial against Raúl José Díaz Peña and [one other person] before the 22nd First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area […]. During this proceeding [the other person prosecuted] declared that […] he was obliged to make a video accusing some individuals, including Raúl Díaz."

47. Despite this, the Court may refer to those aspects as background information to place the facts that are the subject of the merits of the case in context, even though it cannot infer any specific legal consequences from them.[33]

Allegations of a violation of the right to be tried within a reasonable time

48. In its merits report, the Commission determined and argued before the Court the violation of the right to be tried within a reasonable time, established in Article 8(1) of the Convention, and affirmed that "the evidence in the case file reveals that the delay of more than four years in processing the criminal proceedings was due to the conduct of the judicial authorities." The representative argued that "[t]he delay incurred, which meant that this trial was only commenced [on September 17, 2007], was exclusively due to the Public Prosecution Service and the judges, who [had] continually used delaying tactics to keep Raúl Díaz imprisoned illegally, and prolonged his detention for four years and two months." The State contested these arguments indicating that, the trial and conviction of Raúl José Díaz Peña were strictly in keeping with Venezuelan law and with absolute respect for his human rights; at all times the corresponding procedural time frames were strictly observed, as well as the right to petition and to obtain a prompt and effective request, and it should not be interpreted that, for a remedy to be considered effective, the accused must necessarily obtain a positive response to his requests.

49. With regard to the arguments presented by the Commission and the parties, the Court considers that, in order to analyze a possible violation of the right to be tried within a reasonable time, it is necessary to assess four elements, as it has established in its case law: (a) the complexity of the matter; (b) the procedural activity of the interested party; (c) the conduct of the judicial authorities,[34] and (d) the effects on the legal situation of the person involved in the proceedings.[35] Evidently, in order to analyze these components in this case, it is necessary to refer to the entire criminal proceedings and, eventually, to possible actions taken by the courts and the parties involved, some of which were excluded by the Commission in its report on admissibility. Consequently, it is not incumbent on the Court to rule on the alleged violations of the right to be tried within a reasonable time.

Detention conditions and Mr. Díaz Peña's health situation

50. In relation to the section concerning the detention conditions and Raúl José Díaz Peña's health, the Commission indicated that the petitioner had alleged that "on June 24, 2004, Raúl José Díaz Peña was placed for 24 hours in a punishment cell measuring 2.5 meters by 3 meters, with no light, windows or sanitary installations, known in the DISIP as '*el tigrito*' [the little tiger], and that "the reason for this solitary confinement was that he had sent a letter to a radio station which was read out by a journalist."[36]

51. The representative explained that "[w]hile he was imprisoned, Raúl Díaz was treated respectfully; nevertheless, there were some exceptions of officials who threatened and humiliated him and exerted constant psychological pressure on the political prisoners who were detained

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[33] *Cf., mutatis mutandi, Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs.* Judgment of September 26, 2006. Series C No. 154, para. 82, *and Case of Manuel Cepeda Vargas v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of May 26, 2010. Series C No. 213, para. 46.

[34] *Cf. Case of Genie Lacayo v. Nicaragua. Merits, reparations and costs.* Judgment of January 29, 1997. Series C No. 30, para. 77, and *Case of Fornerón and daughter v. Argentina*, para. 66.

[35] *Cf. Case of Valle Jaramillo et al. v. Colombia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C No. 192, para. 155, and *Case of Fornerón and daughter v. Argentina*, para. 66.

[36] Merits Report, No. 84/10, Case of 12,703, Raúl José Díaz Peña - Venezuela, issued by the Inter-American Commission on July 13, 2010, para. 95 (merits file, tome I, folio 98).

there, such as Raúl Díaz in this case. If officials became aware of complaints about the detention conditions they took reprisals that could be physical or psychological, although […] only some officials behaved like that; most of them rejected [that type of] practice."

52. When testifying during the public hearing, Mr. Díaz Peña stated that "the treatment of the DISIP officials was fairly harsh; it was rough, humiliating; they insulted you for your political opinions [with] constant threats, [such as:] we're going to send you to prison so that they kill you; we won't allow your family to see you; we're going to eliminate visiting rights; we're going to eliminate benefits – benefits that we did not have."[37] In this regard, during the public hearing and in her final written arguments, the representative argued that the alleged torture by mechanical suffocation (asphyxia), the alleged collective punishment, the punishment cells known as "*tigritos*," and the physical ill-treatment to which Mr. Díaz Peña had been subjected, caused him emotional harm and she therefore alleged the violation of Article 5(2) of the American Convention. Moreover, she indicated that the victim did not recall having received visits from the Ombudsman's Office, even though, in view of the alleged torture and violations, his family had resorted to this Office, "however, since this was a political case, it [had] refused to accept the complaints." For its part, the Commission did not submit any arguments in this regard.

53. The State questioned the absence of a complaint concerning the alleged torture before either the court hearing the case during the criminal proceedings, the prosecution, the Ombudsman's Office or the Red Cross, all of which had allegedly visited the presumed victim on several occasions. Regarding the supposed complaint filed before the Ombudsman's Office, it noted that "there is no file and no documentation concerning the case." Consequently, it indicated that "they never went to the Ombudsman's Office [and] never filed a complaint before a court."

54. The Commission dedicated paragraphs 195 to 214 of its merits report to this issue and, based on the facts and probative elements mentioned therein, it determined "that, despite the seriousness of his health condition, Raúl José Díaz Peña did not receive treatment or adequate and timely medical care at the detention center with negative consequences for his actual health" and concluded "that the deficient medical care received by the alleged victim violates[d] Article 5 of the American Convention." In addition, it concluded that "the State [had] violated Article 5(1) and 5(2) of the Convention in relation to Article 1(1) of this instrument, to the detriment of Raúl José Díaz Peña." Furthermore, with regard to the facts described by Mr. Díaz Peña, as well as the arguments submitted by the representative regarding acts that would constitute torture, the Commission merely reproduced in paragraph 95 of its merits report the allegations of the then petitioner without making a factual determination in this regard (*supra* para. 34). Consequently, the facts related to the alleged torture by mechanical asphyxia, the alleged collective punishment, the punishment cells known as "*tigritos*," and the physical ill-treatment to which it is alleged Mr. Díaz

[37] Specifically, Mr. Díaz Peña stated the following: "In mid-2004 during the said appeal, I issued a press release; owing to this they placed me in a punishment cell for 48 hours where I had no access to water, no access to a toilet, I slept on the floor [and] did not have the right to wash myself. But the worst treatment by the officials was in mid-2005 during the escape [of a detainee]. At that time, I was tortured by DISIP officials and I was not the only one; around 3 or 4 more detainees were tortured so that we would say who had let [the said individual] out of his cell; even though we told these officials that we had no information about it, they continued. This torture included putting adhesive tape around our wrists before handcuffing us, so that the handcuffs would not leave marks; nevertheless, […] this did leave a mark on me and this is a deformation in the bone of my left hand […]. After they handcuff someone, they lift his arms, they cover you with a type of mattress and begin to hit you, with a stick such as a bat; they do this so that there are no external scars on your body; however, the external scars remain; fortunately, none of my ribs were broken, nothing like this, but I ached because of the beating. After this, since I continued to say nothing to them, because I knew nothing, they placed a plastic bag over my head after spraying the inside of the bag with insecticide, and closed it to asphyxiate me; they repeated this procedure 3 or 4 time until they were convinced that evidently I did not know who had helped [the said individual] escape from his cell." Testimony given by Raúl José Díaz Peña by electronic audiovisual means before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011.

Peña was subjected is not part of the factual framework and, therefore, will not be analyzed in Chapter VII on the merits.

Conclusions regarding the delimitation of the factual framework of this case

55. Based on the above, the factual framework of the instant case submitted to the consideration of the Court is circumscribed to the facts related to the arrest and pre-trial detention of Mr. Díaz Peña; the alleged lack of independence and impartiality of a judge who took decisions in this regard, and the alleged deterioration in Mr. Díaz Peña's health, presumably because of the detention conditions and the alleged lack of adequate and timely medical care and treatment. The factual framework of this case, consequently, does not include a significant number of supposed facts, assessments of facts and contextual references that the parties presented and argued as part of it, and the Court will not rule specifically in regard to these alleged facts, even though it can take them into account, as pertinent, as arguments of the parties and as background information to the disputed facts.

B) Background information

56. There is no dispute between the parties that, in the early morning hours of February 25, 2003, explosive devices were detonated in front of the Consulate General of the Republic of Colombia located in the municipality of Cacao, Miranda state, and in the Office for International Trade of the Kingdom of Spain located in La Castellan, Caracas, Capital District, Venezuela. The explosions injured about three people and caused material damage to the said premises, adjacent buildings, and vehicles in the area.[38]

57. Owing to these two incidents, investigations were opened and it was indicated publicly that the authors were possibly members of the National Armed Forces, because, starting in October 2002, some retired soldiers were holding protest meetings in the Plaza Francia in Altamira, in the municipality of Cacao, in the eastern part of Caracas.[39]

58. Raúl José Díaz Peña was a 29-year-old civil engineering student[40] at the time of the facts;[41] he often attended the events in Plaza Francia in Altamira, where he received the nickname "Felix," as a collaborator for security matters.[42]

59. As of September 10, 2003, Raúl José Díaz Peña was implicated in the said investigation owing to the seizure of a yellow Toyota Samurai pickup truck, license plate ATJ-706, owned by his

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[38] See also news item on BBC World on February 25, 2003, entitled "*Venezuela: condenan atentados*", available at: http://news.bbc.co.uk/hi/spanish/latin_america/newsid_2797000/2797977.stm last visited June 26, 2012).

[39] Request for a judicial measure of deprivation of liberty by the Fourth Prosecutor of the Public Prosecution Service with competence for national environmental defense against officials of the National Armed Forces filed on January 29, 2004 (evidence file, tome XII, folios 6674 to 6686); Preliminary hearing against Felipe Orlando Rodríguez Ramírez held on February 6, 2005 (evidence file, tome XIII, folios 7896 to 7901), and news item broadcast on Venezuelan *Radio Nacional* on November 27, 2003, entitled "*DISIP and CICPC prueban que militares de Altamira están detrás de atentados terroristas",* available at http://www.rnv.gov.ve/noticias/?act=ST&f=2&t=1780 (last visited June 26, 2012).

[40] *Cf.* Testimony given by Raúl José Díaz Peña by electronic audiovisual means before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011, and summary of Raúl José Díaz Peña's curriculum (file of the proceedings before the Inter-American Commission, tome II, folios 1191 to 1192).

[41] *Cf.* Passport of Raúl José Díaz Peña (merits file, tome II, folio 907).

[42] *Cf.* Interview with Raúl José Díaz Peña by the Homicide Investigation Division on September 12, 2003 (evidence file, tome X, folios 5458 to 5463), and Record of the hearing for the presentation of the accused held before the Eleventh Examining Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on February 26, 2004 (evidence file, tome V, folios 2755 to 2768). See also: Testimony given by Raúl José Díaz Peña by electronic audiovisual means before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011.

father, in order to carry out "the forensic tests" required.[43] He was also summoned to testify before the Scientific, Criminal and Forensic Investigations Unit (hereinafter "CICPC")[44] and before the former DISIP[45] on September 11, 2003, before the CICPC on September 12, 2003,[46] and before the Directorate for Counter-terrorism Investigations on December 4, 2003.[47] In addition, it is recorded that he appeared before the CICPC on September 12, 2003, to testify about the incidents under investigation.[48]

C) Arrest, judicial preventive detention, and criminal proceedings

60. Based on the statements taken during the said investigation and the results of the appraisal carried out on the pickup truck,[49] on October 6, 2003, the CICPC called upon the prosecutors in charge of the investigations to process an arrest warrant and search order against Mr. Díaz Peña before the corresponding Examining Court.[50]

61. Consequently, on January 19, 2004, the then Sixty-second Prosecutor of the Public Prosecution Service of the Caracas Metropolitan Area asked the Eleventh Examining Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area to issue an arrest warrant against Raúl José Díaz Peña, because "[d]uring the investigations it ha[d] been determined that RAUL JOSE DIAZ PEÑA [had been] aware of the planning of the terrorist attacks on the said diplomatic premises."[51]

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[43] Authorization to seize the yellow Toyota truck, model Samuray, license plate ATJ-706 issued by the Twenty-second First Instance Examining Judge of September 9, 2003 (file of proceedings before the Inter-American Commission, tome II, folio 1023); Record of interview with Raúl José Díaz Peña by the Homicide Investigation Division on September 12, 2003 (evidence file, tome X, folios 5458 to 5463) and Testimony given by Raúl José Díaz Peña by electronic audiovisual means before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011.

[44] *Cf.* CICPC summons of September 10, 2003, to appear on September 11, 2003 (evidence file, tome V, folio 2719).

[45] *Cf.* Summons of September 10, 2003 (evidence file, tome V, folio 2721).

[46] *Cf.* DISIP summons of September 10, 2003, to appear on September 11, 2003 (evidence file, tome V, folio 2721).

[47] *Cf.* CICPC summons of September 11, 2003, to appear on September 12, 2003 (evidence file, tome V, folio 2722).

[48] *Cf.* Record of interview with Raúl José Díaz Peña by the Homicide Investigation Division on September 12, 2003 (evidence file, tome X, folios 5458 to 5463).

[49] The representative questioned the appraisal performed on the pickup truck, insisting on the "irregularities in the procedures of seizure, inspection and appraisal conducted on the yellow Toyota, Samuray, license plate ATJ-706, which "produced" results that implicated Raúl Díaz." The Court will not rule on this issue because it does not form part of the facts that are the purpose of the dispute in the instant case (*supra* para. 46), although the Court takes note that the results of this appraisal, among other elements, are the basis for committing Mr. Díaz Peña to trial, and that Mr. Díaz Peña's defense counsel requested its annulment (*infra* para 73).

[50] *Cf.* Police record of October 6, 2003 (evidence file, tome X, folios 5455 to 5457).

[51] The Prosecutor indicated that the grounds for the request were:

"On the basis of the provisions of articles 250, 251 and 252 of the Code of Criminal Procedure, this requests meets the requirements for admissibility of the measure requested, which are listed below:

1. Punishable acts, Against Persons, Against the Preservation of Public and Private Interests, and Against Public Order are liable to the punishment of deprivation of liberty, and the action has evidently not prescribed.

2. The evidence from which it is inferred that the accused was an accomplice in the punishable act is provided in chapter III of this brief.

3. Certainty, beyond a reasonable doubt, that the accused may escape owing to the punishment liable to be imposed.

All these concurring elements uphold the admissibility of this application, and are the reason why it is requested that a JUDICIAL ARREST WARRANT be issued against citizen: RAUL JOSE DIAZ PEÑA, identified above, because the requirements established in the norm to prove that the said citizen was truly an accomplice in the offenses of CONSPIRACY, established and penalized in article 287, PUBLIC INTIMIDATION, established and penalized in article 297 and AGAINST THE PRESERVATION OF PUBLIC AND PRIVATE INTERESTS established and penalized in articles 344, 347 and 355, DAMAGE TO

Judicial preventive detention

62. On January 22, 2004, the Eleventh First Instance Examining Court of the Judicial Circuit of the Caracas Metropolitan Area ordered the judicial measure of preventive detention, based on the provisions of articles 250[52], 251[53] and 252[54] of the Procedural Code, together with article 44(1) of the Constitution of the Bolivarian Republic of Venezuela,[55] against Raúl José Díaz Peña;[56] accordingly, it issued arrest warrant No. 002-04,[57] to be sent for execution under note No. 103-04 to the Head of the CICPC Arrests Division.[58] The grounds for this were that "the legal requirements of articles 250, 251 and 252 of the Code of Criminal Procedure had been met to presume that RAUL JOSE DIAZ PEÑA was implicated in the offenses of PUBLIC INTIMIDATION, defined and sanctioned in article 297 and AGAINST PUBLIC AND PRIVATE INTERESTS, defined and sanctioned in articles 344, 347 and 355; DAMAGE TO PUBLIC PROPERTY, defined and sanctioned in articles 475 and 476, MINOR INJURIES, defined and sanctioned in article 418, in relation to article 84(1),

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PUBLIC PROPERTY established and penalized in articles 475 and 476, and MINOR INJURIES established and penalized en article 418, in relation to article 84(1), all of the Venezuelan Penal Code in force. When your court has issued the warrant, he will be brought before it."

Note FMP-62-0038-04 of the Sixty-second Prosecutor of the Caracas Metropolitan Area addressed to the Eleventh Examining Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area dated January 15, 2004, received on January 19, 2004 (evidence file, tome X, folios 5535 to 5539).

[52] Article 250 of the Code of Criminal Procedure establishes the following requirements for the admissibility of a measure of preventive detention: "[t]he examining judge, at the request of the Public Prosecution Service, may order the preventive detention of the accused provided that the existence of the following has been proved:

1. A punishable act liable to the punishment of deprivation of liberty and the action has not prescribed.

2. Evidence to find that the accused has been the author or an accomplice in the perpetration of a punishable act;

3. A reasonable presumption, owing to the assessment of the circumstances of the specific case, of danger of flight or obstruction of the search for the truth with regard to a specific investigation."

Code of Criminal Procedure (evidence file, tome XXVI, folio 17561).

[53] Article 251 of the Code of Criminal Procedure establishes that "[i]n order to determine the danger of flight, the following circumstances, in particular, shall be taken into account: (1) connections to the country, determined by domicile, usual place of residence, domicile of family, business or employment, and possibilities of leaving the country definitively or remaining hidden; (2) the punishment that could be imposed in the case; (3) the extent of the harm caused; (4) the conduct of the accused during the proceedings, or in a previous proceeding, insofar as it indicates willingness to submit to criminal prosecution; (5) the conduct of the accused prior to the offense.

Code of Criminal Procedure (evidence file, tome XXVI, folio 17561).

[54] Article 252 of the Code of Criminal Procedure establishes that "[i]n order to determine the risk of obstruction to discovering the truth, in particular, the genuine suspicion that the accused: (i) will destroy, modify, hide or falsify evidence; (2) exert influence so that co-accused, witnesses, victims or expert witnesses will provide false testimony or behave in a reticent or disloyal manner, or will induce others to act in this way, jeopardizing the investigation, the truth of the facts, and that justice is done."

Code of Criminal Procedure (evidence file, tome XXVI, folio 17561).

[55] Article 44 of the Constitution establishes the following: "[p]ersonal liberty is inviolable, consequently:

1. No one may be arrested or detained without a judicial arrest warrant, unless they are discovered *in flagrante delicto*. In that case, they shall be brought before a judicial authority in no more than forty-eight hours from the moment of detention. They shall be tried in liberty, except for the reasons determined by law, assessed by the judge in each case.

The establishment of bail required by law to grant liberty to the person detained shall not result in any tax."

Constitution of the Bolivarian Republic of Venezuela (evidence file, tome XXVI, folio 17432

[56] *Cf.* Decision ordering judicial preventive detention issued by the Eleventh First Instance Examining Court of the Judicial District of the Caracas Metropolitan Area on January 22, 2004 (evidence file, tome X, folios 5540 to 5545).

[57] *Cf.* Arrest warrant No. 002-04 of January 22, 2004 (evidence file, tome X, folio 5548).

[58] *Cf. Note* No. 103-04 of January 22, 2004 (evidence file, tome X, folio 5547).

and ACCOMPLICE IN CONSPIRACY, defined and sanctioned in article 287, all of the Penal Code," all of which meant that it was necessary "TO APPROVE AN ARREST WARRANT against RAUL JOSE DIAZ PEÑA, in accordance with the provisions of Chapter III, of section VIII, tome 1, of the Code of Criminal Procedure."[59]

63. Although, according to the judicial case file provided by the State, the said Note No. 103-04 was addressed to the Head of the CICPC Arrests Division,[60] on February 10, 2004, the Sixty-second Prosecutor of the Public Prosecution Service of the Caracas Metropolitan Area contacted an agent of the National Investigations Directorate of the then DISIP, and instructed him to withdraw the said note and arrest warrant,[61] which the latter proceeded to do.

64. Furthermore, the evidence provided by the Commission, which the State has not disputed, reveals that, on February 18, 2004, the above-mentioned prosecutor sent a summons to Raúl José Díaz Peña ordering him "to appear, OBLIGATORILY," before the said prosecutor on Wednesday, February 25, 2004, "with his lawyer, so that his statement could be taken pursuant to the provisions of article 130 of the Code of Criminal Procedure";[62] in other words, in order to take a statement from the accused.[63] This summons does not appear in the judicial case file forwarded by the State.

65. On February 25, 2004, Raúl José Díaz Peña presented himself before the Sixty-second Prosecutor of the Public Prosecution Service.[64] However, the judicial case file contains no record of this appearance, but rather a police record prepared by the DISIP officials who arrested him "near the Prosecution's offices."[65]

66. In the section on facts of its merits report No. 84/10, the Commission notes that there are two versions of the way in which the said arrest was carried out, namely:

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[59] Decision ordering the judicial measure of preventive detention issued by the Eleventh First Instance Examining Court of the Judicial District of the Caracas Metropolitan Area on January 22, 2004 (evidence file, tome X, folios 5544 to 5545).

[60] *Cf.* Note No. 103-04 of January 22, 2004 (evidence file, tome X, folio 5547).

[61] *Cf.* Police record of February 10, 2004 (evidence file, tome X, folios 5657 to 5657-A).

[62] Summons of February 18, 2004 (evidence file, tome V, folio 2744).

[63] Article 130 of the Code of Criminal Procedure establishes with regard to the testimony of the accused that:

"The accused shall make a statement during the investigation before the official of the Public Prosecutor's Office in charge of the investigation, when he appears spontaneously and requests this, or when he is summoned by the Public Prosecutor's Office.

If the accused has been arrested, the examining judge shall be notified immediately so that the accused can make a statement before him, within twelve hours at the latest from the time of his arrest; this time limit shall be extended by a similar period, when the accused so requests in order to appoint a defense counsel.

During the intermediate stage, the accused shall make a statement, if this is requested, and the statement shall be received in the preliminary hearing by the judge.

During the oral trial, he shall testify when and as established by this Code.

The accused shall have the right to abstain from testifying and also to testify as often as he wishes, provided that his testimony is pertinent and does not appear to be merely a means of delaying the proceedings.

In any case, the testimony of the accused shall be null if it is not given in the presence of his defense counsel.

Code of Criminal Procedure (evidence file, tome XXVI, folio 17521).

[64] *Cf.* Testimony given by Raúl José Díaz Peña by electronic audiovisual means before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011.

[65] Police record of February 25, 2004 (evidence file, tome X, folios 5659 to 5660).

a) According to the petitioner, an application for *amparo* filed on August 14, 2006, by Mr. Díaz Peña's defense counsel indicated that, when the latter left the Prosecutor's offices with his father in order to take the metro, they were intercepted by DISIP agents who "without showing them the arrest warrant" proceeded to detain him, and some of his belongings were handed over to his father. However, in the arrest report, these agents stated that they were passing by the Prosecution Service's building and observed that there was an individual acting suspiciously; they asked him for his identification document and when they requested a background check on (Raúl Díaz Peña), he appeared with an arrest warrant against him, so they arrested him and took him to the DISIP.[66]

b) According to the Police Record of February 25, 2004, the Deputy Police Chief, attached to the DISIP, placed on record that he was on his way to the Sixty-second Prosecutor's office in the company of two Chief Inspectors and two Inspectors, in order to interview the prosecutor. Regarding the arrest, the record states textually "[…]outside the said Prosecutor's office we saw an individual […] who, upon becoming aware of our presence, began to behave in a nervous and suspicious manner so that, immediately, we began to comply with the usual legal procedures. We identified ourselves as police officers attached to this office, and told him the reason for our action when ordering him to freeze; then, under article 205 of the Code of Criminal Procedure, we proceeded to conduct a body search; he was immediately asked for his national identity document, which was investigated by radio by the duty officer with the Information and Documentation Division of our Service; the duty officer advised that the said individual was required under arrest warrant No. 002-04 of January 22, 2004, issued by the Eleventh First Instance Examining Court of the Criminal Judicial District of the Caracas Metropolitan Area, headed by Judge Denair Nieves Bastia's, for the offenses of public intimidation, against public and private interests, damage to public property, and minor injuries; consequently, we proceeded to arrest him, under article 117 of the rules for police action, not without first reading him his rights as an accused as established in article 125 of the Code of Criminal Procedure."[67]

67. The representative maintained that the police record dated February 25, 2004, is "plagued with lies, it has been altered, and does not indicate the real place or where the [presumed] victim was arrested, and this was supported with impunity by both the Public Prosecution Service, represented by Prosecutor Landaeta, and by the Eleventh Examining Judge, today Justice of the Criminal Chamber of the Supreme Court of Justice, Deyanira Nieves."

68. In the account he gave to the Court, Mr. Díaz Peña stated: "that day, I was going to the headquarters of the Public Prosecution Service with my lawyer and my father. When we arrived, we were interviewed by the prosecutor Gilberto Landaeta and, at that moment, the only thing he did was tell me: 'look, I have asked for an arrest warrant against you signed by the court; I recommend that you present yourself to the courts.' When I asked the reason, he told me: "well, for the same reasons that your pickup truck was seized.' And I said: 'ok, that's all right, I'll go straight to the court to present myself.' He said, wait here a moment, he withdrew and went to make a telephone call to the DISIP offices so that at the headquarters of the Prosecution Service, they would not allow me to present myself before the court."[68]

69. On February 26, 2004, the "hearing to present the accused" was held. During this hearing the Eleventh Court "ordered the judicial measure of preventive detention, under article 250,

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[66] *Cf.* Application for amparo filed before the Constitutional Chamber of the Supreme Court of Justice on August 14, 2006 (evidence file, tome XXIV, folio 16499).

[67] Police record of February 25, 2004 (evidence file, tome X, folios 5659 to 5660).

[68] Testimony given by Raúl José Díaz Peña by electronic audiovisual means before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011.

paragraphs 1, 2 and 3 of the Code of Criminal Procedure."[69] It founded its decision as follows: "several unlawful acts exist that merit deprivation of liberty and proceedings on them have not prescribed"; moreover, "there are well-founded indications to consider that the accused was an author or participant in the perpetration of previously defined unlawful acts."[70] In short, it affirmed that "a summary of the elements yielded by the investigation […] indicates that he knew about the facts before and after they occurred and since there is a reasonable presumption of risk of flight or of obstruction of the search for the truth concerning a specific act under investigation based on an assessment of the circumstances of the specific case, under the heading of article 251 of the Code of Criminal Procedure (that is, owing to the risk of flight, because it is presumed that the accused may evade the charges pressed by the Public Prosecution Service), and under its paragraphs 2 and 3 (that is owing to the punishment that could be imposed based on the concurring offenses and the extent of the damage caused, because damage was caused to property and persons), and article 252 with regard to the risk of obstruction (because the accused may himself, or through the other co-accused, destroy, modify or alter the evidence), the court rejects the defense counsel's request that one of the precautionary measures established in article 256 of the Code of Criminal Procedure be imposed on the accused."[71]

70. In addition, the Eleventh Court decided that Mr. Díaz Peña should be detained at the DISIP headquarters in El Helicoide, Caracas.[72] On February 26, 2004, the same court issued an order of imprisonment against Raúl José Díaz Peña.[73]

71. Lastly, in a decision of February 27, 2004, the Eleventh Court proceeded to provide the grounds for the ruling made in the "hearing for the presentation of the accused,"[74] stating that, "having made the corresponding review of the procedural records in this file," it found that there [were] sufficient indications to prove the perpetration of the offenses" that Mr. Díaz Peña was charged with, and for which a punishment was established of "up to six years' imprisonment; criminal proceedings had not prescribed because the acts were committed very recently that merit[ed] the punishment of deprivation of liberty," and that "there were well-founded indications to consider that RAUL JOSE DIAZ PEÑA [was] presumably an author and participant in the perpetration of the acts of which he was accused," as well as "a reasonable presumption […] of risk of flight or of obstruction of the search for the truth, as established in paragraphs 1, 2 and 3 of article 250 of the Code of Criminal Procedure"; also observing that there was "a risk of flight by the said individual owing to the punishment that could be imposed and the extent of the damage caused," and "risk of obstruction because the said individual could influence the co-accused, witnesses or experts to provide false information, or behave in a disloyal or reticent manner jeopardizing the investigation that is underway, the truth about the facts, and that justice is done."[75]

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[69] Record of the hearing for the presentation of the accused held before the Eleventh Examining Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on February 26, 2004 (evidence file, tome V, folio 2757).

[70] Record of the hearing for the presentation of the accused held before the Eleventh Examining Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on February 26, 2004 (evidence file, tome V, folios 2755 to 2768).

[71] Record of the hearing for the presentation of the accused held before the Eleventh Examining Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on February 26, 2004 (evidence file, tome V, folios 2755 to 2768).

[72] *Cf.* Record of the hearing for the presentation of the accused held before the Eleventh Examining Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on February 26, 2004 (evidence file, tome V, folios 2755 to 2768).

[73] *Cf.* Imprisonment order No. 012-04, issued by the Eleventh Examining Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area, on February 26, 2004 (evidence file, tome X, folio 5678).

[74] Ruling of the Eleventh Examining Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on February 27, 2004 (evidence file, tome X, folios 5680 to 5685).

[75] Ruling of the Eleventh Examining Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on February 27, 2004 (evidence file, tome X, folios 5680 to 5685).

72. Based on the provisions of article 250 of the Code of Criminal Procedure,[76] on March 19, 2004, the Sixty-second Prosecutor requested an extension of the time limit for submitting the final record of the said investigation,[77] and the Eleventh Court granted the 15-day extension requested.[78] On April 6, 2004, the prosecution filed formal charges against Mr. Díaz Peña for the offenses of conspiracy, public intimidation, arson in public buildings, damage to private property, and minor injuries established in articles 287, 290, 297 and 344, with the aggravating circumstances defined in articles 347, 355, 475, 476 and 418 of the Penal Code,[79] as an accomplice, as established in article 84(3) of the Code.[80]

73. On April 22, 2004, Mr. Díaz Peña's defense counsel requested the annulment of certain measures based on non-compliance with the methods and conditions established by law; and the annulment of the opinion provided by the Public Prosecution Service's expert because it violated the guarantees of due process. She also filed objections to the charges brought by the prosecution, and requested the review and revocation of the measure of deprivation of liberty imposed on Mr. Díaz Peña.[81]

74. On June 15, 2004, a preliminary hearing against Raúl José Díaz Peña was held before the Eleventh First Instance Examining Court of the Criminal Judicial District of the Caracas Metropolitan Area during which, *inter alia,* it was decided to admit all the charges filed against Raúl José Díaz Peña, to accept the prosecution's legal classification of the facts, and to maintain the measure of deprivation of liberty, because "the reasons for it had not changed, given the gravity of the acts that have caused a commotion in the country" and "because several unlawful acts have been committed that merit the punishment of deprivation of liberty, that have not prescribed and that, in this court's opinion, give rise to a presumption of risk of flight and obstruction of the proceedings

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[76] The relevant part of article 250 of the Code of Criminal Procedure establishes:

If the judge decides to maintain the measure of judicial preventive detention during the preparatory phase, the prosecutor must file the accusation, or request a dismissal or the closure of the proceedings, within the 30 days following the judicial decision.

This period may be extended for 15 additional days at the most, only if the prosecutor requests this at least five days before the initial period expires. In this case, the prosecutor must provide grounds for his request and the judge shall decide its admissibility after hearing the accused.

Once this period and its extension have expired without the prosecutor having filed the accusation, if applicable, the detainee shall be released by a decision of the examining judge who may impose an alternative precautionary measure.

Code of Criminal Procedure (evidence file, tome XXVI, folio 17527).

[77] *Cf.* Request of the Sixty-second Prosecutor of the Public Prosecution Service of the Judicial District of the Caracas Metropolitan Area dated March 18, 2004, presented the following day (evidence file, tome X, folio 5732).

[78] *Cf.* Hearing to request an extension held before the Eleventh Examining Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on March 24, 2004 (evidence file, tome X, folios 5741 to 5742).

[79] *Cf.* Accusation brief filed by the Sixty-second Prosecutor of the Public Prosecution Service of the Judicial District of the Caracas Metropolitan Area on April 6, 2004 (evidence file, tome X, folios 5776 to 5795).

[80] According to the Prosecutor, "the accused in this case consented to his vehicle being used to keep the explosives that would then be place in the Embassy of Spain and the Consulate of Colombia, gave his assistance to the acts carried out, participating as an accomplice in the offenses of which he is accused." Accusation brief filed by the Sixty-second Prosecutor of the Public Prosecution Service of the Judicial District of the Caracas Metropolitan Area of April 6, 2004 (evidence file, tome X, folio 5786).

[81] *Cf.* Brief filed before the Eleventh Examining Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on April 22, 2004 (evidence file, tome X, folios 5815 to 5835).

in view of the gravity of the acts of which he is accused."[82] In addition, it was decided to retain the DISIP as the place of detention.[83]

First five applications for review of the measure of judicial preventive detention

75. Following the preliminary hearing (*supra* para. 74), on six occasions Mr. Díaz Peña's defense counsel, invoking article 264 of the Code of Criminal Procedure,[84] applied for a review of the measure of deprivation of liberty that had been imposed. The first five requests were filed during the first two years of preventive detention: on September 7[85] and December 16, 2004,[86] and February 21,[87] June 9[88] and September 19, 2005.[89] These requests were denied by decisions of September 15, 2004,[90] December 20, 2004,[91] February 24, 2005,[92] July 8, 2005[93] and October 11, 2005.[94] The said applications were denied on the same grounds relating to the gravity of the offenses and the extent of the damage caused.

Request for a release or the application of a less restrictive measure

76. Furthermore, on March 24, 2006, two years and one month after he had been placed in preventive detention, Raúl José Díaz Peña requested his release or, in any case, that "a less

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82 Record of the preliminary hearing held against Raúl José Díaz Peña before the Eleventh Court of Caracas (evidence file, tome XI, folios 5887 to 5904).

83 *Cf.* Record of the preliminary hearing held against Raúl José Díaz Peña before the Eleventh First Instance Examining Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area of June 15, 2004 (evidence file, tome XI, folios 5887 to 5904).

84 This norm, included in Chapter V: Examination and review of precautionary measures, establishes:

"Examination and review. The accused may request the annulment or substitution of the judicial measure of preventive detention as many times as he deems pertinent. In any case, the judge must examine the need to maintain precautionary measures every three months, and when he considers it prudent substitute them for other less restrictive measures. The refusal of the Court to rescind or substitute the measure is not subject to appeal."

Code of Criminal Procedure (evidence file, tome XXVI, folio 17528).

85 *Cf.* Request for review of the judicial measure of preventive detention, presented by Raúl José Díaz Peña's defense counsel, on September 7, 2004 (evidence file, tome XI, folios 5992 to 5998).

86 *Cf.* Request for review of the judicial measure of preventive detention, presented by Raúl José Díaz Peña's defense counsel, on December 16, 2004 (evidence file, tome XI, folios 6068 to 6072).

87 *Cf.* Request for review of the judicial measure of preventive detention, presented by Raúl José Díaz Peña's defense counsel, on February 21, 2005 (evidence file, tome XI, folios 6104 to 6109).

88 *Cf.* Request for review of the judicial measure of preventive detention, presented by Raúl José Díaz Peña's defense counsel, on June 9, 2005 (evidence file, tome XI, folios 6283 to 6287).

89 *Cf.* Request for review of the judicial measure of preventive detention, presented by Raúl José Díaz Peña's defense counsel, on September 19, 2005 (evidence file, tome XI, folios 6361 to 6364).

90 In this case, in order to maintain that the offenses charged entailed punishments of more than 10 years, the Court even cited article 460 of the Penal Code, which was not included in the accusation admitted at the preliminary hearing or in the opening of the trial (*supra* para. 72). *Cf.* Ruling of the Twenty-eighth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area of September 15, 2004 (evidence file, tome XI, folios 5999 to 6006).

91 *Cf.* Ruling of the Twenty-eighth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on December 20, 2004 (evidence file, tome XI, folios 6073 to 6078).

92 *Cf.* Ruling of the Twenty-eighth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on February 24, 2005 (evidence file, tome XI, folios 6110 to 6115).

93 *Cf.* Ruling of the Twenty-eighth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on July 8, 2005 (evidence file, tome XI, folios 6297 to 6300).

94 *Cf.* Ruling of the Twenty-eighth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on October 11, 2005 (evidence file, tome XI, folios 6378 to 6381).

restrictive measure" than preventive detention be applied until the oral proceedings were held. To this end, he cited article 244 of the Code of Criminal Procedure,[95] and stated that "the maximum duration of preventive detention" had been exceeded," and that "it could never last more than two years," unless an extension had been granted, and that this had not even been requested by the Public Prosecution Service. He added that the purpose of the norm was "to ensure that the State [was] diligent in the prosecution of offenses and not to keep individuals in prison without trial," and that the delays in the case could not be attributed to him."[96]

77. On March 29, 2006, the Twenty-third First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area declared the review of the measure of deprivation of liberty irreceivable.[97] To this end, it stated, in particular, that "the procedural delay c[ould] not be attributed to [the said] court; that "the two years required in order to grant a less severe measure ha[d] not been completed," and that, pursuant to judgment 3421 of the Constitutional Chamber of the Supreme Court of Justice of November 9, 2005, "crimes against humanity, illegal human rights violations, and war crimes were excluded from benefiting, as were alternative precautionary measures if the judge considered that the deprivation of liberty of the accused was in order."[98] It did not explain the grounds of which it classified the offenses with which Mr. Díaz Peña was charged in this way, or why it affirmed that the two years of preventive detention had not elapsed. In addition, the said court indicated that the case law of the Constitutional Chamber "did not denature the presumption of innocence, but rather the accused in this case must prove this during the oral and public debate."[99]

78. On April 17, 2006, Mr. Díaz Peña's defense counsel appealed the decision of March 29, 2006, before the Court of Appeal of the Caracas Metropolitan Area, reiterating and expanding the justification for the original request and, in particular, questioning the classification of the crimes with which he was charged as crimes against humanity, human rights violations, or war crimes, and indicating that the application filed was not to request the review of the measure, as the decision appealed had stated, but "for a ruling to be made regarding the fact that, when it has been verified that the duration of the detention indicated in article 244(2) of the Code of Criminal Procedure has been fulfilled without the State having concluded the proceedings in which he is

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95 The said norm establishes:

Article 244. Proportionality. A measure of personal coercion may not be ordered when this may appear disproportionate in relation to the gravity of the offense, the circumstances in which it was committed, and the probable punishment.

In no case may it be more than the minimum punishment established for each offense, or exceed two years.

Exceptionally, the Public Prosecutor's Office or the complainant may request the examining judge to order an extension which may not exceed the minimum punishment established for the offense, in order to maintain the measures of personal coercion that are about to expire, when there are serious reasons for this, which must be duly founded by the prosecutor or the complainant. In this case, the examining judge must summon the accused and the parties to an oral hearing in order to make a ruling, taking into account the principle of proportionality in order to establish the length of the extension.

Code of Criminal Procedure (evidence file, tome XXVI, folio 17526).

96 *Cf.* Request for the substitution of the judicial measure of preventive detention presented by Raúl José Díaz Peña, on March 24, 2006 (evidence file, tome XV, folios 9211 to 9215).

97 *Cf.* Ruling of the Twenty-third First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on March 29, 2006 (evidence file, tome XV, folios 9231 to 9240).

98 Ruling of the Twenty-third First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on March 29, 2006 (evidence file, tome XV, folios 9231 to 9240).

99 Ruling of the Twenty-third First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on March 29, 2006 (evidence file, tome XV, folios 9231 to 9240).

accused, it should grant him an alternative precautionary measures to deprivation of liberty, whatever the gravity of the crime."[100]

79. On May 12, 2006, the office of the Eighth Prosecutor with Full National Jurisdiction of the Public Prosecution Service presented its answer to the appeal that had been filed requesting that it be declared inadmissible.[101] To this end, it stated, *inter alia,* that "this is the first time in the country's history that a terrorist act of this magnitude has been perpetrated; in this case with international transcendence, because it was perpetrated against public government institutions of other nations" and that "during the investigations, it had been determined" that Mr. Díaz Peña "participated in the planning of the said attack, and the trial was the appropriate occasion for the defense to disprove the elements that the Public Prosecution Service [had presented] in the indictment."[102]

80. The Special First Incidental Chamber of the Court of Appeal of the Criminal Judicial Circuit of the Caracas Metropolitan Area, which heard cases on crimes related to terrorism, declared the appeal admissible,[103] but when deciding on the merits on June 19, 2006, it declared it irreceivable, "in correct compliance with the binding case law of the Constitutional Chamber of the Supreme Court of Justice" and, consequently, confirmed the contested decision.[104] To this end, it founded its decision, *inter alia*, on the fact that the procedural delay could "not be attributed to the First Instance Court, but to the accused's defense counsel"; that the principle of proportionality established in article 244 of the Code of Criminal Procedure implied that the judicial preventive detention of an individual should be applied "only or specifically in the case of those offenses that represent harm with social relevance; in other words, this provision requires that the illegal act investigated should produce real harm of criminal relevance," and that "although it is true that more than two years has elapsed in this case, it is also true that" it was necessary to abide by the binding case law of the Constitutional Chamber of the Supreme Court of Justice.[105] It added that the case involved charges of crimes that were greatly in excess of the provisions of the first paragraph of article 251 of the Code of Criminal Procedure,[106] so that "the procedural presumption of FLIGHT RISK by the accused" was applicable, because "one of the circumstances or presumptions that determine flight risk" is "the punishment that could possibly be imposed on the

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[100] Appeal filed by Mr. Díaz Peña's defense counsel before the Court of Appeal of the Caracas Metropolitan Area on April 17, 2006 (evidence file, tome XV, folios 9275 to 9282).

[101] *Cf.* Response to the appeal of the Eighth Prosecutor of the Public Prosecutor's Office with national jurisdiction dated May 12, 2006 (evidence file, tome XV, folios 9360 to 9365).

[102] Response to the appeal of the Eighth Prosecutor of the Public Prosecutor's Office with national jurisdiction dated May 12, 2006 (evidence file, tome XV, folios 9360 to 9365).

[103] *Cf.* Ruling of the Special First Incidental Chamber of the Court of Appeal of the Criminal Judicial Circuit of the Caracas Metropolitan Area for hearing cases on crimes related to terrorism of June 12, 2006 (evidence file, tome XXIII, folios 15626 to 15628).

[104] *Cf.* Ruling of the Special First Incidental Chamber of the Court of Appeal of the Criminal Judicial Circuit of the Caracas Metropolitan Area for hearing cases on crimes related to terrorism on June 19, 2006 (evidence file, tome XXIII, folios 15629 to 15643).

[105] *Cf.* Ruling of the Special First Incidental Chamber of the Court of Appeal of the Criminal Judicial Circuit of the Caracas Metropolitan Area for hearing cases on crimes related to terrorism on June 19, 2006 (evidence file, tome XXIII, folios 15629 to 15643).

[106] The first paragraph of this norm states that "[r]isk of flight shall be presumed in case of acts punishable with imprisonment with a maximum length of ten years or more. In this case, and provided that the circumstances of article 250 concur, the prosecutor of the Public Prosecution Service must request the measure of judicial deprivation of liberty. In any case, the judge may, based on the circumstances, which he must reason, reject the prosecutor's request and impose on the accused an alternative precautionary measure. The ruling may be appealed by the prosecutor or the victim, whether or not the latter has filed a complaint, within the five days following its publication."

Code of Criminal Procedure (evidence file, tome XXVI, folio 17561).

accused and the magnitude of the harm caused by the unlawful act that is being investigated." Lastly, it related the acts charged to acts of a terrorist nature and punishable violations of human rights."[107]

81. On June 22, 2006, the defense counsel filed an application for annulment[108] against the decision denying the appeal,[109] which was declared inadmissible on June 28, 2006, because it was not "the appropriate means of indicating discrepancy with the decision issued."[110]

Application for amparo

82. On August 14, 2006, Mr. Díaz Peña's lawyer filed an "application for *amparo*" before the Constitutional Chamber of the Supreme Court of Justice, on the basis of articles 1 and 4 of the Organic Law for the Protection of Constitutional Guarantees and Rights, "so that the superior court would re-establish immediately the legal situation that had been breached and violated by the decision of the Twenty-third Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area, of March 29, 2006, rejecting the substitution of the measure of deprivation of liberty requested by this representative, pursuant to the provisions of article 244 of the Code of Criminal Procedure, thus violating constitutional principles and guarantees such as: the right to personal liberty, to due process, to presumption of innocence, and to re-establishment of the legal situation that was harmed by error of law, contained in articles 44, and paragraphs 1, 2, 3, 4 and 8 of article 49 in relation to article 257 of the Constitution violated by the said decision."[111] The application for *amparo* alleged, among other matters, the existence of a procedural delay that could not be attributed to Mr. Díaz Peña, the conditions in which the deprivation of liberty was executed, the absence of sufficient evidence against him, his permanence in pre-trial detention for longer than established by law, and the constant violation of his right to the presumption of innocence.[112]

83. On December 19, 2006, the Constitutional Chamber of the Supreme Court of Justice declared itself incompetent to hear the application for the protection of constitutional protection and forwarded the case file to the Court of Appeal of the Criminal Judicial Circuit of the Caracas Metropolitan Area.[113] In addition, "the Chamber urge[d] that, if the plaintiff's affirmation was true that the above-mentioned court had unduly delayed holding the oral public hearing, the court put

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[107] *Cf.* Ruling of the Special First Incidental Chamber of the Court of Appeal of the Criminal Judicial Circuit of the Caracas Metropolitan Area for hearing cases concerning crimes related to terrorism on June 19, 2006 (evidence file, tome XXIII, folios 15629 to 15643).

[108] The regulation concerning the appeal for annulment in the Code of Criminal Procedure is as follows:

Article 444. Admissibility. The appeal for annulment shall be admissible only against decisions that merely relate to substantiation, so that the court that issued them may re-examine the matter and deliver the appropriate decision.

Code of Criminal Procedure (evidence file, tome XXVI, folio 17537).

[109] *Cf.* Appeal for annulment filed on June 22, 2006 (evidence file, tome XXIII, folios 15654 to 15657).

[110] Ruling of the Special First Incidental Chamber of the Court of Appeal of the Criminal Judicial Circuit of the Caracas Metropolitan Area for hearing cases on crimes related to terrorism on June 28, 2006 (evidence file, tome XXIII, folios 15662 to 15664).

[111] *Cf.* Application for *amparo* filed before the Constitutional Chamber of the Supreme Court of Justice on August 14, 2006 (evidence file, tome XXIV, folios 16496 to 16504).

[112] *Cf.* Application for *amparo* filed before the Constitutional Chamber of the Supreme Court of Justice on August 14, 2006 (evidence file, tome XXIV, folios 16496 to 16504).

[113] *Cf.* Ruling of the Constitutional Chamber of the Supreme Court of Justice of December 19, 2006 (evidence file, tome XXIV, folios 16551 to 16565).

in charge of the case should conduct this hearing in accordance with the legal provisions and time frame."[114]

84. On February 26, 2007, the Special First Incidental Chamber of the Court of Appeal of the Criminal Judicial Circuit of the Caracas Metropolitan Area declared itself competent to hear the application for *amparo*, but held that it was inadmissible under the provisions of article 6(5) of the Organic Law for the Protection of Constitutional Guarantees and Rights; in other words, because the plaintiff had chosen to exercise the ordinary means of contestation established by law, but had not complied precisely with the legal criteria to ensure that the application for *amparo* would be successful,[115] since Mr. Díaz Peña's defense counsel had chosen to file an appeal against the decision rejecting the review of the preventive measure. In addition, the Chamber indicated that, according to article 264 of the Code of Criminal Procedure, the review of the measure of deprivation of liberty can be requested as often as necessary and its refusal did not constitute a violation of a constitutional right or guarantee.[116]

85. On March 2, 2007, Mr. Díaz Peña's defense counsel appealed the declaration of inadmissibility.[117] On May 11, 2007, the Constitutional Chamber of the Supreme Court of Justice rejected the appeal and confirmed the decision of the Special First Incidental Chamber of the Court of Appeal. In this regard, it considered that, "in accordance with the case law [of the said Chamber,] the plaintiff could file the appeal, as he did, against the decision that is the subject of the application for *amparo* that refused to revise a measure of deprivation of liberty because more than two years had passed and he had not been tried, and for this reason it is inadmissible pursuant to the provisions of article 6(5) of the Organic Law for the Protection of Constitutional Guarantees and Rights."[118]

Sixth request for review of the measure of judicial preventive detention

86. The sixth request for review of the measure of deprivation of liberty was presented on April 17, 2007,[119] and refused on April 23, 2007,[120] on similar grounds to the five previous refusals (*supra*, para. 75).

D) Sentence and conviction, and waiver of the right of appeal

87. Finally, Mr. Díaz Peña was sentenced and convicted to nine years and four months' imprisonment by a judgment handed down on April 29, 2008, by the Fourth First Instance Trial

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114 Ruling of the Constitutional Chamber of the Supreme Court of Justice of December 19, 2006 (evidence file, tome XXIV, folio 16563).

115 In particular, the decision stated that since "the complainants have not exhausted the ordinary means stipulated by criminal procedural law, and have not complied faithfully with the legal requirements for the application for *amparo* to be successful." Ruling of the Special First Incidental Chamber of the Court of Appeal of the Criminal Judicial Circuit of the Caracas Metropolitan Area with full competence to hear cases for crimes concerning terrorism at the constitutional level of February 26, 2007 (evidence file, tome XXIV, folios 16597 to 16607).

116 *Cf.* Ruling of the Special First Incidental Chamber of the Court of Appeal of the Criminal Judicial Circuit of the Caracas Metropolitan Area with full competence to hear cases for crimes related to terrorism at the constitutional level of February 26, 2007 (evidence file, tome XXIV, folios 16597 to 16607).

117 *Cf.* Appeal filed on March 2, 2007 (evidence file, tome XXIV, folios 16636 to 16647).

118 Ruling of the Constitutional Chamber of the Supreme Court of Justice of May 11, 2007 (evidence file, tome XXIV, folios 16660 to 16682).

119 *Cf.* Request for review of the judicial measure of preventive detention, filed by Raúl José Díaz Peña's defense counsel, on April 17, 2007 (evidence file, tome XVI, folios 9972 to 9975 and 10028).

120 *Cf.* Ruling of the Fourth First Instance Trial Court of the Criminal Judicial District of the Caracas Metropolitan Area on April 23, 2007 (evidence file, tome XVI, folios 10040 to 10050).

Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area (published on June 17 that year).[121] Consequently, Mr. Díaz Peña had remained in preventive detention for four years and five months,[122] which meant that he had been deprived of liberty during the entire criminal proceedings against him.

88. On July 2, 2008, one of the individuals convicted together with Mr. Díaz Peña filed an appeal against the judgment[123] and, eventually, on January 20, 2009, obtained the annulment of the judgment and an order that a new trial should be held.[124] Mr. Díaz Peña's defense counsel adopted an entirely different attitude: on July 9, 2008, Raúl José Díaz Peña's lawyer submitted a brief in which he stated that his client had asked him to waive the remedy of appeal, because he considered that "these proceedings related to a political rather than a legal case," and requested clarification of the operative part of the judgment owing to a change in the classification of the form of participation,[125] all of which was declared inadmissible on July 11, 2008, by the Fourth First Instance Criminal Trial Court of the Criminal Judicial Circuit of the Judicial District of the Caracas Metropolitan Area.[126] On July 17, 2008, Mr. Díaz Peña indicated to this court his express waiver of the remedy of appeal that he was entitled to file,[127] so that the judgment convicting him became final.

89. On July 25, 2008, the Eighth Caracas Court for Execution of Judgment made the final calculation of the sentence, and four years and eleven months remained to be served.[128]

E) Alternative measure of serving the sentence under an open regime, and subsequent flight

90. On May 13, 2010, the Seventh First Instance Court for Execution of Judgments of the Criminal Judicial Circuit of the Caracas Metropolitan Area granted Mr. Díaz Peña the alternative measure of serving his sentence under an open regime, based on articles 500 of the Venezuelan Code of Criminal Procedure and 65 of the Prison Reform Law.[129] This decision was appealed on May

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[121] On April 29, 2008, the judgment was delivered, and on June 17, 2008, the Fourth First Instance Court of Caracas published the judgment sentencing Raúl José Díaz Peña to nine years and four months' imprisonment, finding him author of the crimes of conspiracy, aggravated arson of a building as a facilitator, and concealment of explosive substances. However, he was acquitted of the crime of illegal possession of a firearm. The dismissal of the accusation of the crime of minor personal injuries was decreed in favor of Raúl José Díaz Peña as well as the dismissal for the alleged perpetration of the offense of damage to property owing to the judicial prescription of the criminal action. *Cf.* Judgment delivered by the Fourth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on June 17, 2008 (evidence file, tome VII, folios 3339 to 3961, tome VIII, folios 3962 to 4621, and tome IX folios 4622 to 4709).

[122] *Cf.* Judgment delivered by the Fourth Court of Caracas on June 17, 2008, in case 45/397/2006 (evidence file, tome XIX, folios 12464 to 13066) and Decision concerning the execution of judgment issued by the Eighth Execution of Judgment Court on July 25, 2008 (evidence file, tome XXII, folios 13960 to 13974).

[123] *Cf.* Appeal filed by the lawyers of Felipe Orlando Rodríguez Ramírez on July 2, 2008 (evidence file, tome IX, folios 4730 to 4788).

[124] *Cf.* Ruling of the First Chamber of the Court of Appeal of the Criminal Judicial Circuit of the Judicial District of the Caracas Metropolitan Area on January 20, 2009 (evidence file, tome IX, folios 4974 to 5049).

[125] *Cf.* Waiver of appeal, filed by Raúl José Díaz Peña's lawyer on July 9, 2008 (evidence file, tome IX, folio 4795).

[126] *Cf.* Ruling of the Fourth First Instance Criminal Trial Court of the Criminal Judicial Circuit of the Judicial District of the Caracas Metropolitan Area (evidence file, tome IX, folios 4796 to 4802).

[127] *Cf.* Statement made by Raúl José Díaz Peña before the Fourth First Instance Trial Court of the Caracas Metropolitan Area on July 17, 2008 (evidence file, tome IX, folio 4818).

[128] *Cf.* Order to execute the judgment issued by the Eighth Execution of Judgment Court on July 25, 2008 (evidence file, tome XXI, folios 13960 to 13974).

[129] *Cf.* Order to grant the alternative measure of serving the sentence under an open regime in favor of Mr. Díaz Peña, issued by the Seven First Instance Court for Execution of Judgment of the Criminal Judicial Circuit of the Caracas Metropolitan Area on May 13, 2010 (evidence file, tome XXI, folios 14456 to 14460).

20, 2010, by the Thirteenth Prosecutor of the Public Prosecution Service.[130] On September 7, 2010, the Director of the Community Treatment Center informed the Court for Execution of Judgments that Mr. Díaz Peña had been absent from this center since September 5, 2010, the date of which he should have returned to the facility after his weekend leave.[131] On September 8, 2010, the Seventh First Instance Court for Execution of Judgment of the Criminal Judicial Circuit of the Caracas Metropolitan Area decided to revoke the alternative measure of serving the sentence under an open regime granted to Mr. Díaz Peña,[132] and contacted INTERPOL to request a national and international red alert notice against Raúl José Díaz Peña as a wanted individual.[133] According to the representative, Mr. Díaz Peña is currently in the United States of America requesting asylum.

F) Detention conditions and deterioration in Mr. Díaz Peña's health

91. Raúl José Díaz Peña remained imprisoned from February 25, 2004 (*supra* paras. 65 and 70), until May 13, 2010,[134] in the Pre-Trial Detention Center in El Helicoide, Caracas, headquarters of the former DISIP.

Detention conditions in the Pre-Trial Detention Center

92. The Pre-Trial Detention Center consists of a structure with two corridors known as "A" and "B,"[135] each approximately 30 meters long by one meter to one and a half meters wide.[136] Each corridor has 10 individual cells and there are communal sanitary installations at the end of the corridor.[137] Generally, only one individual is kept in each cell.[138] The testimony of Elvis Ramírez also

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130 *Cf.* Appeal filed by the Thirteenth Prosecutor of the Public Prosecution Service with national jurisdiction in matters relating to execution of judgment (evidence file, tome XXI, folios 14485 and 14491).

131 *Cf.* Note No. 1693-10 of September 7, 2010 (evidence file, tome XXII, folio 14934).

132 *Cf.* Order revoking the alternative measure of serving the sentence under an open regime issued by the Seventh First Instance Court for Execution of Judgment of the Criminal Judicial Circuit of the Caracas Metropolitan Area of September 8, 2010 (evidence file, tome XXII, folios 14935 to 14937).

133 *Cf.* Order to issue a National and International Request and Red Alert against Mr. Díaz Peña, issued by the Seventh First Instance Court for Execution of Judgment of the Criminal Judicial Circuit of the Caracas Metropolitan Area on September 16, 2010 (evidence file, tome XXII, folio 14966).

134 *Cf.* Decision of May 13, 2010, of the Seventh First Instance Court for Execution of Judgment of the Criminal Judicial Circuit of the Caracas Metropolitan Area; Appearance of Raúl José Díaz Peña of May 14, 2010, before the Seventh First Instance Court for Execution of Judgment of the Criminal Judicial Circuit of the Caracas Metropolitan Area; Note No. 0812-10 of the Seventh First Instance Court for Execution of Judgment of the Criminal Judicial Circuit of the Caracas Metropolitan Area of May 19, 2010, and Release Order No. 018-10 of May 13, 2010, issued by the Seventh First Instance Court for Execution of Judgment of the Criminal Judicial Circuit of the Caracas Metropolitan Area in favor of Raúl José Díaz Peña (evidence file, tome XXI, folios 14460, 14476, 14498 and 14523).

135 *Cf.* Testimony given by Elvis Ramírez before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011; Report of the Head of the Integral Custody Process of the General Directorate of Intelligence and Prevention Services of April 20, 2007 (evidence file, tome XXV, folios 17167 and 17186), and Report issued by the Director General of the General Directorate of Intelligence and Prevention Services on October 2, 2009 (evidence file, tome XXV, folios 17401 to 17409).

136 *Cf.* Testimony given by Eligio Cedeño by affidavit on November 18, 2011 (evidence file, tome XXVII, affidavits, folio 17598).

137 *Cf.* Testimony given by Elvis Ramírez before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011; Report of the Head of the Integral Custody Process of the General Directorate of Intelligence and Prevention Services of April 20, 2007 (evidence file, tome XXV, folios 17167 to 17186), and Report issued by the Director General of the General Directorate of Intelligence and Prevention Services on October 2, 2009 (evidence file, tome XXV, folios 17401 to 17409).

138 Nevertheless, in March 2008, there were 24 people deprived of liberty in that place. *Cf.* Brief sent by the Director General of the General Directorate of Intelligence and Prevention Services to the Fourth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area of March 19, 2008 (evidence file, tome XVIII, folio 12212). Also, the testimony given by Elvis Ramírez reveals that, during the period after August 2009, two brothers who were detained

reveals that thee Pre-Trial Detention Center has a cell known as the "preventive" cell, which has its own sanitary installations and never holds more than six detainees.[139] Mr. Díaz Peña was assigned the cell identified as No. 6 in corridor "B", which measured 2.65 meters by 2.36 meters, and was 2.87 meters high; the security system consisted of a black metal screen with a padlock.[140]

93. With regard to the detention conditions when he arrived at the Pre-Trial Detention Center, during the public hearing, Mr. Díaz Peña stated that "they were fairly deplorable," because the place was "totally closed in, without any type of ventilation or natural light; dark, because even the cells had no light; […] it did not have access to any area for carrying out any activity or for reading a book or to do something; […] it was very hot […]." He also stated that, "for the first year and a half, I did not have access to sunlight, the only chance I had to see the sun was during the transfers to the courts which was every three or four months," and that "there was no window; there were some windows, but they were completely sealed with cement blocks and there was no access to natural light or fresh air."[141] In view of the fact that the State did not clearly and expressly contest the detention conditions of Mr. Díaz Peña from February 25, 2004, to October 12, 2005, described by the Commission and the representative, and since the Court has no evidence that disproves the details of Mr. Díaz Peña's statement, the Court finds that the facts described by Mr. Díaz Peña in his statement are proved.

94. In addition, acceding to the request made when lodging the initial petition, the Inter-American Commission granted precautionary measures to protect Mr. Díaz Peña's life and health on October 31, 2005, and these were maintained while he remained detained.[142] Furthermore, it is a proven fact that, following the adoption of the precautionary measures, his physical detention conditions gradually improved.[143]

95. In summary, the evidence available in the body of evidence of the instant case reveals that, by April 2007, the Pre-Trial Detention Center had the following areas and services: (a) a gymnasium was fitted out and those deprived of liberty had access to it;[144] (b) an area was fitted

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shared one of the cells. *Cf.* Testimony given by Elvis Ramírez before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011.

139 *Cf.* Testimony given by Elvis Ramírez before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011.

140 *Cf.* Report of the Head of the Integral Custody Process of the General Directorate of Intelligence and Prevention Services of April 20, 2007 (evidence file, tome XXV, folios 17160 and 17161), and Report issued by the Director General of the General Directorate of Intelligence and Prevention Services on October 2, 2009 (evidence file, tome XXV, folio 17403). See also, Statement made by Raúl José Díaz Peña before the Inter-American Court at the public hearing held on December 1, 2011.

141 Testimony given by Raúl José Díaz Peña by electronic audiovisual means the Inter-American Court at the public hearing held on December 1, 2011.

142 *Cf.* Admissibility Report No. 23/09, Petition 1133-05 Raúl José Díaz Peña - Venezuela, issued by the Inter-American Commission on March 20, 2009, para. 4 (file of the proceedings before the Inter-American Commission, tome I, folio 428), and Merits Report No. 84/10 issued by the Inter-American Commission on Human Rights el July 13, 2010, paras. 6 to 19 (merits file, tome I, folios 73 to 75).

143 In this regard, it is clear that, as of 2007, significant improvements were made to the Pre-Trial Detention Center, because the inmates organized different detention spaces with materials they themselves provided in areas previously authorized by the DISIP authorities. *Cf.* Testimony given by Eligio Cedeño by affidavit on November 18, 2011 (evidence file, tome XXVII, affidavits, folios 17598 to 17601), and Testimony given by Raúl José Díaz Peña by electronic audiovisual means before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011.

144 *Cf.* Report of the Head of the Integral Custody Process of the General Directorate of Intelligence and Prevention Services of April 20, 2007 (evidence file, tome XXV, folios 17160 and 17161); Report issued by the Director General of the General Directorate of Intelligence and Prevention Services on October 2, 2009 (evidence file, tome XXV, folios 17403 to 17409). See also Testimony given by Elvis Ramírez before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011, and Testimony given by Raúl José Díaz Peña by electronic audiovisual means before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011.

out for receiving visits measuring 9 meters by 6 meters, for a total of 54 square meters, with male and female sanitary installations,[145] and also an area for receiving educational instructions, and another for receiving conjugal visits;[146] (c) a telephone with a specific timetable for using it;[147] (d) items such as documents, photographs, a television, a stereo system, clothes, and implements for their personal hygiene were authorized in the individual cells,[148] and (e) a kitchen had been installed in one of the individual cells in corridor "A" which all the detainees could use,[149] so that, although the Pre-Trial Detention Center provided a meal service with breakfast, lunch and supper,[150] those deprived of liberty could also eat meals provided by their families, or could prepare their own food.[151]

96. In addition, it is a proven fact that, in the Pre-Trial Detention Center, Mr. Díaz Peña received visits from the members of his family and his lawyers.[152] Also, the International Red Cross, the Fundamental Rights Agents, and the Ombudsman's Office also made visits to the Pre-Trial Detention Center, during which they interviewed the individuals detained there.[153]

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145 *Cf.* Report of the Head of the Integral Custody Process of the General Directorate of Intelligence and Prevention Services of April 20, 2007 (evidence file, tome XXV, folios 17161 and 17162). See also Testimony given by Elvis Ramírez before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011, and Testimony given by Raúl José Díaz Peña by electronic audiovisual means before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011.

146 *Cf.* Report of the Head of the Integral Custody Process of the General Directorate of Intelligence and Prevention Services of April 20, 2007 (evidence file, tome XXV, folios 17160 and 17161). See also Testimony given by Elvis Ramírez before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011.

147 *Cf.* Report of the Head of the Integral Custody Process of the General Directorate of Intelligence and Prevention Services of April 20, 2007 (evidence file, tome XXV, folio 17162).

148 *Cf.* Testimony given by Elvis Ramírez before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011; Report of the Head of the Integral Custody Process of the General Directorate of Intelligence and Prevention Services of April 20, 2007 (evidence file, tome XXV, folios 17167 to 17186), and Report issued by the Director General of the General Directorate of Intelligence and Prevention Services on October 2, 2009 (evidence file, tome XXV, folios 17403 to 17409).

149 *Cf.* Testimony given by Elvis Ramírez before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011; Report of the Head of the Integral Custody Process of the General Directorate of Intelligence and Prevention Services of April 20, 2007 (evidence file, tome XXV, folios 17160 and 17161), and Report issued by the Director General of the General Directorate of Intelligence and Prevention Services on October 2, 2009 (evidence file, tome XXV, folios 17403 to 17409).

150 *Cf.* Testimony given by Elvis Ramírez before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011; Report of the Head of the Integral Custody Process of the General Directorate of Intelligence and Prevention Services of April 20, 2007 (evidence file, tome XXV, folio 17161), and decision of November 21, 2005, of the Vice Minister for Legal Security of the General Directorate for Human Rights of the Bolivarian Republic of Venezuela (evidence file, tome XXV, folios 17148 and 17149).

151 *Cf.* Testimony given by Elvis Ramírez before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011. See also Testimony given by Raúl José Díaz Peña by electronic audiovisual means before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011.

152 *Cf.* Testimony given by Raúl José Díaz Peña by electronic audiovisual means before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011; Testimony given by Elvis Ramírez before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011; Decision of November 21, 2005, of the Vice Minister for Legal Security of the General Directorate for Human Rights of the Bolivarian Republic of Venezuela (evidence file, tome XXV, folios 17148 and 17149); Report of the Head of the Integral Custody Process of the General Directorate of Intelligence and Prevention Services of April 20, 2007 (evidence file, tome XXV, folio 17161), and Report issued by the Director General of the General Directorate of Intelligence and Prevention Services on October 2, 2009 (evidence file, tome XXV, folio 17405).

153 *Cf.*, among others, Testimony given by Elvis Ramírez before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011, and Report of the Head of the Integral Custody Process of the General Directorate of Intelligence and Prevention Services of April 20, 2007 (evidence file, tome XXV, folios 17163 and 17164).

97. It is also an undisputed fact that, as of October 2005, the Venezuelan authorities gradually began to permit access to fresh air, and the use of ventilators, among other elements. In addition, the evidence reveals that, around two years after the entry of Mr. Díaz Peña, a barred window of approximately 0.60 by 0.30 meters was opened in the corridor of the general entrance to the Pre-Trial Detention Center; this was a common space for all the entries into the detention corridors and it gave on to one of the access roads to the former DISIP Investigation Division.[154] By April 2007, the Pre-Trial Detention Center had a system of artificial lighting and ventilation provided by standing fans and internal air extractors which communicated with the outside[155] and, by September 2009, the said corridor "B" had a 24,000 Btu air conditioning system.[156] Subsequently, several small windows were opened up in the gymnasium to provide light and air.[157] Nevertheless, this measure appears to have been concluded after the time spent by Mr. Díaz Peña in the Pre-Trial Detention Center.

98. Regarding time outdoors, the State only provided three records of the time spent in the open air by Mr. Díaz Peña on August 5, 2006, and August 29 and September 13, 2009,[158] so that it is not possible to establish with certainty the frequency with which Mr. Díaz Peña was allowed to go outdoors, and for how long, during the time he remained in the State's custody in the then DISIP Pre-Trial Detention Center. Despite this, it can be inferred from the evidence that, during the first year and a half of Mr. Díaz Peña's imprisonment, he was not allowed out into the open air in the sunlight and that, subsequently, the possibility of going out into the fresh air and taking the sun was restricted at times to one hour on the weekend, at other times to two hours on weekends, and at still other times, to only two hours every two weeks.[159]

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154 *Cf.* Testimony given by Eligio Cedeño by affidavit on November 18, 2011 (evidence file, tome XXVII, affidavits, folios 17598 and 17599).

155 *Cf.* Testimony given by Elvis Ramírez before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011, and Report of the Head of the Integral Custody Process of the General Directorate of Intelligence and Prevention Services of April 20, 2007 (evidence file, tome XXV, folios 17160 and 17161).

156 *Cf.* Report issued by the Director General of the General Directorate of Intelligence and Prevention Services on October 2, 2009 (evidence file, tome XXV, folio 17403).

157 *Cf.* Testimony given by Elvis Ramírez before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011.

158 The schedule for time outdoors for August 5, 2006, records that Mr. Díaz Peña was allowed out from 9.40 a.m. to 10:40 a.m. *Cf.* Schedules for time allowed outdoors of the individuals detained in the DISIP Investigation Coordination Unit for August 5, 2006 (evidence file, tome XXV, folio 17152). In addition, the schedule for time outdoors of those detained for August 29 and September 13, 2009, shows that Mr. Díaz Peña was allowed out from 8 a.m. to 10 a.m. *Cf.* Schedules for time outdoors of the individuals detained in the DISIP Investigation Unit of August 29 and September 13, 2009 (evidence file, tome XXV, folios 17412 and 17413).

159 The case file shows that, in a brief of August 25, 2006, the State advised the Inter-American Commission that it had set up a system to allow those interned in the DISIP who so wished to go outdoors for one hour at a time during the week and at weekends. *Cf.* Communication addressed to the Inter-American Commission by the State Agent for Human Rights before the Inter-American and International Systems of the Bolivarian Republic of Venezuela dated August 25, 2006 (evidence file, tome XXV, folio 17146). Conversely, reports provided by DISIP officials dated April 20, 2007, March 19, 2008, and October 2, 2009, reveal that Mr. Díaz Peña went outside to get some sun for two hours at weekends in a selected area, and in keeping with a pre-established timetable. *Cf.* Report of the Head of the Integral Custody Process of the General Directorate of Intelligence and Prevention Services of April 20, 2007 (evidence file, tome XXV, folio 17161); Brief sent by the Director General of the General Directorate of Intelligence and Prevention Services to the Fourth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area of March 19, 2008 (evidence file, tome XVIII, folios 12211 and 12212), and Report issued by the Director General of the Directorate of Intelligence and Prevention Services on October 2, 2009 (evidence file, tome XXV, folios 17403 to 17409). During the public hearing Elvis Ramírez explained that the detainees were allowed to go out into the sunshine under "a roster" divided into three groups. The groups rotated the outings each week, so that "if [a group] is allowed out on Saturday this week, next week it will be allowed out on Sunday, the following week it will not go out, and the third week it will again be allowed out on Saturday"; these outings are from 8 a.m. to 10 a.m. In addition, he indicated that this situation "has been gradually improved based on recommendations of the International Red Cross and the opinions of some of the detainees." Testimony given by Elvis Ramírez before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011. Conversely, during the public

99. Furthermore, the case file records that the security system in the area of the Pre-Trial Detention Center consists of doors made of metal railings with their respective padlocks. From the main entrance of the area to the cell of the different inmates there are six doors with metal railings.[160] It is an uncontested fact that, in mid-2006, the Director of Investigations, in charge of the area of the Pre-Trial Detention Center, ordered that "the cells should remain locked with padlocks from 10 p.m. to 7 a.m." In this regard, Raúl Díaz Peña and Eligio Cedeño testified that the cells of those deprived of liberty remained locked from around 10 p.m. until 6 a.m. the next day.[161] In this regard, the witness proposed by the State, Elvis Ramírez, Captain General, Investigations Coordinator as of August 2009 of the then DISIP, explained that there is a system with a bell that any detainee who has an emergency during the night can activate and, immediately, the officials on duty who are there 24 hours a day will go and attend the emergency.[162] Nevertheless, Mr. Díaz Peña indicated that the said bell was put in place five years after he entered the Center.[163] All in all, even though the Court does not have clear elements that would allow it to conclude when the bell was placed in corridor "B" of the Pre-Trial Detention Center, it is a proven fact that, at night and for more than three years, those deprived of liberty in the Pre-Trial Detention Center were subjected to long periods locked in their cells and that, since they had no sanitary installations in the cells, they had to call the officials who were guarding them in order to have access to the sanitary installations in each corridor.[164] However, if they received no response to their calls, they had to use bags or waste paper baskets that each of them had in their cell and could only throw out the fecal matter the next day.[165]

Mr. Díaz Peña's health situation and the medical treatment he received

100. With regard to the medical care and attention that Mr. Díaz Peña received while he was in the custody of the Venezuelan State, the evidence reveals that, on his entry into the Pre-Trial Detention Center on February 25, 2004, he underwent a physical examination and it was recorded that he was "generally in good condition."[166]

101. Subsequently, in a brief presented on November 1, 2004, Mr. Díaz Peña's defense counsel informed the judge of the case that, for more than three months, his client had been suffering from problems in his ears and that, approximately four years earlier, he had undergone surgery on his right ear,[167] and his left ear had been drained. In addition, it was explained that the DISIP Medical

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hearing, Mr. Díaz Peña stated that "we had access to sunlight […] one hour every 15 days." *Cf.* Testimony given by Raúl José Díaz Peña by electronic audiovisual means before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011.

160 *Cf.* Report issued by the Director General of the General Directorate of Intelligence and Prevention Services on October 2, 2009 (evidence file, tome XXV, folio 17408).

161 *Cf.* Testimony given by Raúl José Díaz Peña by electronic audiovisual means before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011, and Testimony given by Eligio Cedeño by affidavit on November 18, 2011 (evidence file, tome XXVII, affidavits, folio 17600).

162 *Cf.* Testimony given by Elvis Ramírez before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011.

163 *Cf.* Testimony given by Raúl José Díaz Peña by electronic audiovisual means before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011.

164 Testimony given by Elvis Ramírez before the Inter-American Court during the public hearing held on December 1, 2012, and Testimony given by José Díaz Peña before the Inter-American Court during the public hearing held on December 1, 2012.

165 Testimony of Eligio Cedeño given by affidavit on November 18, 2011 (evidence file, tome XXVII, affidavits, folios 17599 and 17600).

166 *Cf.* Medical report signed by Dr. Pedro Francis N. of February 25, 2004 (evidence file, tome X, folio 5662).

167 It is a proven fact that, on July 7, 1999, Raúl José Díaz Peña had a transmeatal tympanoplasty in the right ear because he had tympanic atelectasis and seromucous otitis, with a satisfactory evolution and recovery of hearing in the said

Service had been treating the problem in his left ear; this Service provide medical services to the Center's officials and their families and were also responsible for providing general medical care to those detained in the Pre-Trial Detention Center in case of a health problem or emergency, in addition to providing them with regular general medicine services.[168] Despite following the treatment indicated by the ear, nose and throat specialist, the problem and the consequent pain and secretion had persisted. Consequently, the said specialist had indicated that an examination and assessment was required by an external center specialized in this type of ear problem that had the appropriate instruments to treat it.[169] In this regard, Mr. Díaz Peña explained during the public hearing that "regarding my health problems, they were problems that gradually increased; they began with simple allergies owing to the conditions of the place – the dust gave me allergies; these allergies worsened, they turned into colds, the colds got worse because they did not receive adequate treatment, and these colds began to cause me hearing and respiratory problems; hence towards the end of 2004, I told the DISIP officials that I had a problem with my ear."[170]

102. The case file also contains a medical report dated April 20, 2007, prepared by surgeons attached to the DISIP Medical Service, which records that, during the medical examination carried out that same day, Mr. Díaz Peña had a perianal abscess, for which there was no treatment, apart from an operation; he was therefore awaiting the approval of the court that was hearing the case in order to undergo surgery.[171] In this regard, Mr. Díaz Peña stated during the public hearing that "the food was terrible; it caused me stomach problems so that I suffered from hemorrhoids and then the perianal abscess."[172]

103. The evidence reveals that, on repeated occasions, Mr. Díaz Peña, his representative, Alberto Esteban Díaz Arvelo, Mr. Díaz Peña's father, the prosecutor assigned to the case, and the State Human Rights Agent before the International and Inter-American Systems asked the judge of the case that medical examinations and assessments be carried out on Mr. Díaz Peña, and these were eventually ordered. The evidence shows that on June 7,[173] June 27[174] and August 8, 2006,[175] and

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ear. *Cf.* Medical report signed by Dr. José Ramón Gutiérrez Longobardi dated February 25, 2011 (evidence file, tome VI, folio 3302).

168 *Cf.* Testimony given by Elvis Ramírez before the Inter-American Court of Human Rights during the public hearing held on December 1, 2012, and Report of the Head of the Integral Custody Process of the General Directorate of Intelligence and Prevention Services of April 20, 2007 (evidence file, tome XXV, folio 17162).

169 Brief filed on November 1, 2004, before the Twenty-eighth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area (evidence file, tome XI, folios 6029 to 6030).

170 Testimony given by Raúl José Díaz Peña by electronic audiovisual means before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011.

171 *Cf.* Report of the Head of the Pre-Trial Detention Process of the General Directorate of Intelligence and Prevention Services of August 2, 2007, and Medical report signed by Dr. Elisaul Morales on April 20, 2007 (evidence file, tome XXV, folios 17220 to 17224).

172 Testimony given by Raúl José Díaz Peña by electronic audiovisual means before the Inter-American Court of Human Rights during the public hearing held on December 1, 2011.

173 *Cf.* Ruling of the Fourth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on June 7, 2006 (evidence file, tome XV, folio 9448), and Note No. 0449-06 of the Fourth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area of June 7, 2006 (evidence file, tome XV, folio 9449).

174 *Cf.* Note 0510-06 of the Fourth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area of June 27, 2006 (evidence file, tome XV, folio 9471). Before the judge of the case ordered this transfer, on June 20 2006, the prosecutor assigned to the case, sent a note to the Director of the Dr. Carlos Arvelo Military Hospital asking for information in order to verify whether this health care center had the appropriate equipment for performing a CAT scan on Raúl Díaz Peña. *Cf.* Note No DFGR-VFGR-DGAP-DPDF-16-PRO-421-7030-06 from the Office of the Prosecutor General of the Republic of August 15, 2006 (evidence file, tome XXV, folio 17143). Subsequently, on June 25, 2006, Mr. Díaz Peña asked the judge in charge of the case to ratify the request for a transfer, because the requested transfer had not been carried out. *Cf.* Appearance of June 26, 2006 (evidence file, tome XV, folio 9470); Brief sent by the Director General of the General Directorate of Intelligence and Prevention Services to the Fourth First Instance Trial Court of the Criminal Judicial Circuit of

on November 6, 2007,[176] the Judge of the case ordered that Mr. Díaz Peña be transferred to Hospital Vargas, the Dr. Carlos Arvelo Military Hospital, the Ear, Nose and Throat Institute, and the Clinic of the National Guard, respectively, to undergo specialized tests, which it was not possible to perform. Furthermore, during the time that Mr. Díaz Peña was detained in the Pre-Trial Detention Center, he received: (a) six medical evaluations by a private family doctor on September 26, 2005,[177] March 7[178] and November 27, 2006,[179] May 30[180] and February 22, 2007,[181] and March 12, 2010;[182] (b) three medical appointments with the Chuao Otorhinolaryngology Medical Group "*Instituto Otohospital*" on September 14[183] and November 28, 2006,[184] and August 24, 2007,[185] in which the doctor who attended him was the same one who had treated him since 1992 for repeated otitis, and who also cleaned his left ear and prescribed anti-allergic and anti-inflammatory medication and antibiotics;[186] (c) various doctor's appointments in the DISIP Medical Service, where Mr. Díaz Peña had access to an ear, nose and throat specialist. However, this service did not have the necessary equipment to perform the specialized examinations that Mr. Díaz Peña required

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the Caracas Metropolitan Area (evidence file, tome XV, folio 9512), and Police record of July 6, 2006 (evidence file, tome XV, folio 9513).

175 *Cf.* Note No. 644-06 of the Fourth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area of August 8, 2006 (evidence file, tome XV, folio 9528), and Police record of August 22, 2006 (evidence file, tome XV, folio 9566).

176 *Cf.* Ruling of the Fourth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on November 6, 2007 (evidence file, tome XVII, folio 11135); Note No. 760-07 of the Fourth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area of November 6, 2007 (evidence file, tome XVII, folio 1136); Police record of November 14, 2007 (evidence file, tome XVII, folios 11254 to 11255), and Note No. 009-08 of the Fourth First Instance Trial Court of the Judicial Circuit of the Caracas Metropolitan Area of January 9, 2008 (evidence file, tome XXV, folios 17284 to 17285).

177 *Cf.* Medical report of September 26, 2005, signed by Dr. Carmen Peña (evidence file, tome XI, folios 6498 to 6500).

178 *Cf.* Medical report of March 7, 2006, signed by Dr. Carmen Peña (evidence file, tome XV, folio 9438).

179 *Cf.* Medical report of November 27, 2006, signed by Dr. Carmen Peña (evidence file, tome V, folios 3240 to 3243).

180 *Cf.* Medical report of May 30, 2007, signed by Dr. Carmen Peña (file of proceedings before the Inter-American Commission, tome II, folios 945 to 948).

181 *Cf.* Medical report of February 22, 2007, signed by Dr. Carmen Peña (evidence file, tome V, folio 3245).

182 *Cf.* Medical report of March 12, 2010, signed by Dr. Carmen Peña (evidence file, tome V, folio 3278).

183 *Cf.* Brief sent by the Director General of the General Directorate of Intelligence and Prevention Services to the Fourth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area dated September 26, 2006 (evidence file, tome XV, folio 9567); Certification of consultation signed by Dr. José Ramón Gutiérrez Longobardi dated September 14, 2006 (evidence file, tome XV, folios 9568); Medical report of September 15, 2006, signed by Dr. José Ramón Gutiérrez Longobardi (evidence file, tome XV, Judicial case file No. 7E-1592-09 attached to the answer, folio 9569); Police record of September 14, 2006 (evidence file, tome XV, folios 9570), and Report of the Head of the Integral Custody Process of the General Directorate of Intelligence and Prevention Services of April 20, 2007 (evidence file, tome XXV, folios 17162 to 17163).

184 *Cf.* Note No. 100-900-400-440-441 No. 000037 of the Director General of the General Directorate of Intelligence and Prevention Services of January 8, 2007 (evidence file, tome XXV, folio 17154); Note No. 100-900-400-440 No. 1125 of the Captain General of the General Directorate of Intelligence and Prevention Services of December 12, 2006 (evidence file, tome XXV, folio 17156), and Medical report of November 28, 2006, signed by Dr. José Ramón Gutiérrez Longobardi (evidence file, tome XXV, folio 17157).

185 *Cf.* Medical report of August 24, 2007, signed by Dr. José Ramón Gutiérrez Longobardi (evidence file, tome XVI, folio 10367), and Note No. 100-400-440-441 No. 001729 of the Director General of the General Directorate of Intelligence and Prevention Services of the Ministry of People's Power for Internal Relations and Justice of the Bolivarian Republic of Venezuela of August 29, 2007 (evidence file, tome XXV, folio 17251).

186 *Cf.* Medical report of February 25, 2011, signed by Dr. José Ramón Gutiérrez Longobardi (evidence file, tome VI, folio 3302).

while he was detained.[187] In this regard, the evidence reveals that four medical checkups were performed by the ear, nose and throat specialist of the DISIP Medical Service, which were recorded in the medical reports of November 15, 2004,[188] November 8, 2007,[189] and March 5[190] and 24, 2008,[191] as well as two medical checkups carried out by doctors attached to the DISIP Medical Service, as recorded in the medical reports of April 20, 2007,[192] and September 9, 2009;[193] (d) six forensic examinations were performed on Mr. Díaz Peña by forensic doctors attached to the CICPC National Forensic Science Coordination Unit with their respective expert opinions of April 20, 2005,[194] June 29, 2006,[195] July 16[196] and October 31, 2007,[197] November 28, 2008,[198] and April 2, 2009,[199] and (e) two specialized examinations were made on January 28[200] and March 18, 2008.[201]

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187 *Cf.* Brief filed by the State Agent for Human Rights before the Inter-American and the International Systems before the Twenty-second First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area (evidence file, tome XV, folio 9433).

188 *Cf.* Note No. Inst. 0212-05 of the National Director of Investigations of the DISIP dated February 18, 2005 (evidence file, tome XI, folio 6133); Order of March 11, 2005, of the Twenty-eighth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area (evidence file, tome XI, folio 6136), and Medical report of November 15, 2004, signed by Dr. Lily Viseras Gutiérrez (evidence file, tome XI, folio 6134).

189 *Cf.* Medical report of November 8, 2007, signed by Dr. Efraín González Prato (evidence file, tome XVII, folios 11185 to 11192).

190 *Cf.* Medical report of March 5, 2008, signed by Dr. Efraín González Prato (evidence file, tome XVIII, folios 12135 to 12136), and Brief sent by the Director General of the General Directorate of Intelligence and Prevention Services to the Fourth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area dated March 5, 2008 (evidence file, tome XVIII, folio 12134).

191 *Cf.* Medical report of March 24, 2008, signed by Dr. Efraín González Prato (evidence file, tome XVIII, folios 12239 to 12240).

192 *Cf.* Medical report of April 20, 2007, signed by Dr. Elisaul Morales (evidence file, tome XXV, folios 17222 to 17224).

193 *Cf.* Medical report of September 9, 2009, signed by Dr. Leidy Briceño (evidence file, tome XXV, folio 17410), and Ruling of the Pre-Trial Detention Center of the DISIP Investigations Coordination Unit (evidence file, tome XXV, folio 17411).

194 *Cf.* Expert report of the Forensic Physician (Professional II) Anunziata Dambrosio of April 20, 2005 (evidence file, tome XI, folio 6231), and Note No. 162-05 of the Twenty-eighth Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area of May 13, 2005 (evidence file, tome XI, folio 6230).

195 *Cf.* Expert report of the Forensic Physician (Professional II) Alberto López of June 29, 2006 (evidence file, tome XV, folios 9506 to 9507), and Note FMP-82-1181-2006 of the Eighty-second Prosecutor of the Public Prosecution Service of the Judicial District of the Caracas Metropolitan Area (evidence file, tome XV, folios 9504 to 9505).

196 *Cf.* Note FMP-82-AMC-1417-2007 signed by the Eighty-second Prosecutor of the Public Prosecution Service of the Judicial District of the Caracas Metropolitan Area addressed to the Prosecutor General of the Republic, Directorate for the Protection of Fundamental Rights, dated July 16, 2007 (evidence file, tome XXVIII, folios 17761 to 17763), and Expert report of the Forensic Physician (Professional III) Mary Olga Farías dated July 16, 2007 (evidence file, tome XXVIII, folio 17764).

197 *Cf.* Medical report of October 31, 2007, signed by Dr. Joel Vallenilla (evidence file, tome XXV, folio 17244), and Medical Opinion forwarded by the Forensic Physician Joel Vallenilla to the Fourth First Instance Trial Court of the Judicial Circuit of the Caracas Metropolitan Area, of November 5, 2007 (evidence file, tome XXV, folios 17256 to 17257).

198 *Cf.* Note No. 129 14795-08 of Dr. Luis Martínez Ascanio, Forensic Physician of the National Coordination of Forensic Science of Caracas, of November 28, 2008 (evidence file, tome IX, folio 4969), and Note FMP-82-AMC-850-2008 of the Eighty-second Prosecutor of the Public Prosecution Service of the Judicial District of the Caracas Metropolitan Area addressed to the Eighth First Instance Criminal Judge for Execution of Judgment of the Judicial District of the Caracas Metropolitan Area (evidence file, tome IX, folio 4968).

199 *Cf.* Medical report of April 2, 2009, signed by Dr. Minerva Barrios, Forensic Physician of the National Directorate of Forensic Science of Caracas (evidence file, tome XXI, folio 14111).

200 *Cf.* Medical report of March 5, 2008, signed by Dr. Efraín González Prato (evidence file, tome XVIII, folios 12135 to 12136), and Note sent by the Director General of the of the General Directorate of Intelligence and Prevention Services to the Fourth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area of March 5, 2008 (evidence file, tome XVIII, folios 12134).

104. Finally, following his release from the DISIP Pre-Trial Detention Center, medical examinations were conducted on Mr. Díaz Peña on July 19, 2010, and on February 25, 2011. The former verified that there was evidence of the abscess in the rectal region in 2005 and 2007 that had not been operated on and that had drained spontaneously, resulting in the presence of a rectal fistula, diagnosed as "Anal-rectal fistula, third-degree hemorrhoids."[202] While the latter confirmed that Mr. Díaz Peña had a problem in his left ear similar to the one he had had previously in his right ear for which he had undergone surgery on July 7, 1999; thus, his left ear had been treated with medication, but "it has not been operated on to date."[203]

105. Regarding the constant problems that Mr. Díaz Peña had in his left ear while he was in the DISIP Pre-Trial Detention Center, it has been proved that, on November 15, 2004, the ear, nose and throat specialist of the DISIP Medical Service had suggested carrying out a computerized axial tomography (CAT scan) of the middle ear and mastoids, and pure tone audiometry,[204] but these test were not carried out until January 28[205] and March 18, 2008[206] (that is, more than three years later). Although it is true that Mr. Díaz Peña received medical treatment during that period and his condition improved transitorily, it is also true that his symptoms returned constantly.

106. It has also been proved that, in his diagnosis of March 24, 2008, the ear, nose and throat specialist of the DISIP Medical Service concluded that Mr. Díaz Peña "ha[d] no clinical or para-clinical criteria (CAT scan of the middle ear and mastoids, vocal and tonal audiometric tests and impedance measurement) that would reveal surgical pathology in area of the ear."[207] In this regard, the Court notes that the ear, nose and throat specialist of DISIP Medical Service had twice insisted not only on tonal audiometric testing and the CAT scan of the middle ear and mastoids, but also on a tomography of para-nasal sinuses (coronal and axial cross sections), in order to determine whether Mr. Díaz Peña required an operation in the area of otorhinolaryngology.[208] However, when making his diagnosis on March 24, 2008, he did not request that the latter test be

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201 *Cf.* Criminal Investigations Unit decision of March 18, 2008 (evidence file, tome XVIII, folio 12232); Note sent by the Director General of the General Directorate of Intelligence and Prevention Services to the Fourth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area dated March 26, 2008 (evidence file, tome XVIII, folio 12231), and X-ray diagnosis by Dr. Félix Salas Barraez dated March 18, 2008 (evidence file, tome XVIII, folios 12234 to 12238).

202 *Cf.* Medical report of July 19, 2010, signed by the Surgeon General, Dr. Francisco Manzanilla (evidence file, tome VI, folio 3300).

203 Medical report of February 25, 2011, signed by Dr. José Ramón Gutiérrez Longobardi (evidence file, tome VI, folio 3302).

204 *Cf.* Note No. Inst. 0212-05 of the DISIP National Director of Investigations of February 18, 2005 (evidence file, tome XI, folio 6133); Ruling of the Twenty-eighth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on March 11, 2005 (evidence file, tome XI, folio 6136), and Medical report of November 15, 2004, signed by Dr. Lily Viseras Gutiérrez (evidence file, tome XI, folio 6134).

205 *Cf.* Medical report of March 5, 2008, signed by Dr. Efraín González Prato (evidence file, tome XVIII, folios 12135 to 12136), and Note sent by the Director General of the General Directorate of Intelligence and Prevention Services to the Fourth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area of March 5, 2008 (evidence file, tome XVIII, folio 12134).

206 *Cf.* Criminal Investigations Unit decision of March 18, 2008 (evidence file, tome XVIII, folios 12232 to 12233); Note sent by the Director General of the General Directorate of Intelligence and Prevention Services to the Fourth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area of March 26, 2008 (evidence file, tome XVIII, folio 12231), and X-ray diagnosis by Dr. Félix Salas Barraez of March 18, 2008 (evidence file, tome XVIII, folios 12234 to 12238).

207 Medical report of March 24, 2008, signed by Dr. Efraín González Prato (evidence file, tome XVIII, folios 12239 to 12240).

208 *Cf.* Medical report of November 8, 2007, signed by Dr. Efraín González Prato (evidence file, tome XVII, folios 11185 to 11192), and Medical report of March 5, 2008, signed by Dr. Efraín González Prato (evidence file, tome XVIII, folios 12135 to 12136).

performed, and settled for just the results obtained from the first two that were carried out. Nevertheless, on March 3[209] and April 21, 2010,[210] the defense counsel and Mr. Díaz Peña's father, respectively, requested his transfer to the Chuao Otorhinolaryngology Medical Group so that his ear, nose and throat specialist could make an assessment of his hearing, since his hearing problems had again worsened. In other words, following the March 24, 2008, diagnosis, Mr. Díaz Peña's symptoms reappeared, and there is no record in the body of evidence in this case that he had been transferred as requested.

107. In short, the Court has verified that, during the time Mr. Díaz Peña remained detained in the Pre-Trial Detention Center, his medical reports revealed a progressive deterioration in his health. In this regard, on November 15, 2004, more than eight months after Mr. Díaz Peña had entered the Pre-Trial Detention Center, the ear, nose and throat specialist of the DISIP Medical Service recorded that Mr. Díaz Peña, with a history of a myringoplasty in the right ear in 1999, had otalgia and hypoacusis in the left ear with an evolution of nine months.[211] In this regard, the reports of the private family doctor who evaluated Mr. Díaz Peña on several occasions refer to hypoacusis, chronic otitis media in the right ear and suppurating otitis in the left ear.[212] Meanwhile, various medical reports prepared on Mr. Díaz Peña were also consistent in indicating decrease in hearing and nasal allergies, nasal obstruction syndrome owing to allergic rhinitis, meningitis, sinusitis, gingivitis, and gingivorragia.[213] Similarly, a medical report dated November 27, 2006, recorded that, early in November 2006, Mr. Díaz Peña had abdominal colic, flatulence and recurring diarrhea.[214] Subsequently, starting in 2007, the medical reports were consistent in indicating the presence of recurrent perianal abscesses, and an expert opinion of November 28, 2008, indicated that Mr. Díaz Peña had a perianal fistula that had evolved over two years,[215] while the medical report of March 12, 2010, recorded that Mr. Díaz Peña had suffered from a perianal abscess on four occasions, with an anal fissure as a result of the last episode that had been drained and treated by the patient himself, hence the recurrence.[216]

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209 *Cf.* Appearance of Mr. Díaz Peña's defense counsel of March 3, 2010 (evidence file, tome XXI, folio 14406).

210 *Cf.* Brief submitted by Alberto Esteban Díaz Arvelo to the Seventh First Instance Court for Execution of Judgment of the Criminal Judicial Circuit of the Caracas Metropolitan Area dated April 21, 2010 (evidence file, tome XXI, folio 14437).

211 *Cf.* Note No. Inst. 0212-05 of the DISIP National Director of Investigations of February 18, 2005 (evidence file, tome XI, folio 6133); Ruling of March 11, 2005, of the Twenty-eighth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area (evidence file, tome XI, folio 6136), and Medical report of November 15, 2004, signed by Dr. Lily Viseras Gutiérrez (evidence file, tome XI, folio 6134).

212 *Cf.* Medical report of September 26, 2005, signed by Dr. Carmen Peña (evidence file, tome XI, folios 6498 to 6500); Medical report of May 30, 2007, signed by Dr. Carmen Peña (file of proceedings before the Inter-American Commission, tome II, folios 945 to 948); Medical report of November 27, 2006, signed by Dr. Carmen Peña (evidence file, tome V, folios 3240 to 3243), and Medical report of March 12, 2010, signed by Dr. Carmen Peña (evidence file, tome V, folio 3278).

213 *Cf.* Expert report of the Forensic Physician (Professional II) Anunziata Dambrosio of April 20, 2005 (evidence file, tome XI, folio 6231); Medical report of September 15, 2006, signed by Dr. José Ramón Gutiérrez Longobardi (evidence file, tome XV, folio 9569); Expert report of the Forensic Physician (Professional III) Mary Olga Farías of July 16, 2007 (evidence file, tome XXVIII, folio 17764); Medical report of August 24, 2007, signed by Dr. José Ramón Gutiérrez Longobardi (evidence file, tome XVI, folio 10367); Medical report of November 8, 2007, signed by Dr. Efraín González Prato (evidence file, tome XVII, folios 11185 to 11192), and Medical report of March 12, 2010, signed by Dr. Carmen Peña (evidence file, tome V, folio 3278).

214 *Cf.* Medical report of November 27, 2006, signed by Dr. Carmen Peña (evidence file, tome V, folios 3240 to 3243).

215 *Cf.* Note No. 129 14795-08 of Dr. Luis Martínez Ascanio, Forensic Physician of the National Coordination of Forensic Science of Caracas, dated November 28, 2008 (evidence file, tome IX, folio 4969), and Note FMP-82-AMC-850-2008 of the Eight-second Prosecutor of the Public Prosecution Service of the Judicial District of the Caracas Metropolitan Area addressed to the Eighth First Instance Criminal Judge for Execution of Judgment of the Judicial District of the Caracas Metropolitan Area (evidence file, tome IX, folio 4968).

216 *Cf.* Medical report of March 12, 2010, signed by Dr. Carmen Peña (evidence file, tome V, folio 3278).

108. In this regard, even though during an interview conducted with Mr. Díaz Peña by several State officials on November 21, 2005, he stated that in that place he was "safe and therefore it was preferable that he remained detained [t]here,"[217] in briefs of April 5 and 15, and June 30, 2005, March 14, July 11 and August 7, 10 and 14, 2006, and January 29, 2010, Mr. Díaz Peña and his defense counsel asked the judge of the case, the prosecutor assigned to the case, and officials from the State Agency for Human Rights before the International and Inter-American Systems, to transfer him to a detention center other than the DISIP.[218] Regarding these requests, the case file only includes answers dated July 13, 2005,[219] and February 17, 2010,[220] in which the judge of the case rejected them.

VI
PRELIMINARY OBJECTION OF FAILURE TO EXHAUST DOMESTIC REMEDIES

A) Arguments of the parties and of the Inter-American Commission

Arguments of the State

109. The State filed the preliminary objection of failure to exhaust domestic remedies. In particular, it argued that Raúl José Diaz Peña "failed to file, exercise and, above all, exhaust the domestic remedies" established by law and the Constitution in the Venezuelan domestic legal system and that, if he had filed them opportunely and not waived them, this would have allowed him to rectify the presumed irregularities in the criminal proceedings instituted against him and denounced before the Court. In this regard, the State referred to the existence of the following remedies: (i) the ordinary remedy of appeal; (ii) the appeal for review, and (iii) the constitutional review. It also indicated that the Venezuelan system of criminal procedure included a stage known as "Execution of judgment," and that article 478 of the Code of Criminal Procedure showed clearly that any person who was convicted had a series of rights and possibilities related to the execution

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[217] Decision of November 21, 2005, of the Vice Minister of Legal Security of the General Directorate for Human Rights of the Bolivarian Republic of Venezuela (evidence file, tome XXV, folios 17148 and 17149).

[218] *Cf.* Brief filed on April 5, 2005, before the Twenty-eighth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area (evidence file, tome XI, folios 6170 and 6171); Appearance of Mr. Díaz Peña before the Twenty-eighth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on April 15, 2005 (evidence file, tome XI, folio 6186); Brief filed on June 30, 2005, before the Twenty-second First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area (evidence file, tome XI, folios 6295 to 6296); Communication addressed by the State Agent for Human Rights before the Inter-American and the International Systems of the Bolivarian Republic of Venezuela to the Inter-American Commission dated August 25, 2006 (evidence file, tome XXV, folio 17145); Hearing of Raúl José Díaz Peña before the Eight-second Prosecutor of the Public Prosecution Service of the Judicial District of the Caracas Metropolitan Area on July 11, 2006 (evidence file, tome XV, folios 9508 to 9509); Hearing on August 7, 2006, before the Fourth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area (evidence file, tome XV, folio 9527); Note No. 644-06 of the Fourth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area of August 8, 2006 (evidence file, tome XV, folio 9528); Hearing on August 10, 2006, before the Fourth First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area (evidence file, tome XV, folio 9530); Record of August 14, 2006 of the State Agency for Human Rights before the Inter-American and the International Systems of the Ministry of Foreign Affairs of the Bolivarian Republic of Venezuela (evidence file, tome XXV, folios 17150 to 17151); Brief filed on January 29, 2010, before the Seventh First Instance Court for Execution of Judgment of the Criminal Judicial Circuit of the Caracas Metropolitan Area (evidence file, tome XXI, folios 14392 to 14393), and Ruling of the Seventh First Instance Court for Execution of Judgment of the Criminal Judicial Circuit of the Caracas Metropolitan Area of February 17, 2010 (evidence file, tome XXI, folio 14394).

[219] *Cf.* Ruling of the Twenty-second First Instance Trial Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area on July 13, 2005 (evidence file, tome XI, folio 6310).

[220] *Cf.* Brief filed on January 29, 2010, before the Seventh First Instance Court for Execution of Judgment of the Criminal Judicial Circuit of the Caracas Metropolitan Area (evidence file, tome XXI, folios 14392 to 14393), and Ruling of the Seventh First Instance Court for Execution of Judgment of the Criminal Judicial Circuit of the Caracas Metropolitan Area on February 17, 2010 (evidence file, tome XXI, folio 14394).

of the punishment; moreover, he was not prevented from exercising other actions or remedies designed to safeguard his rights that had presumably been violated. In this regard, the State indicated that "the petitioner or his representatives should have indicated expressly before the Commission which of the situations established in Article 46[(2)(b)] of the American Convention […] provided the grounds for the failure to exhaust the domestic remedies," because they had the legal obligation to indicate why the petitioner did not have access to these remedies or whether he had been prevented from exhausting them. In addition, the State indicated that the petition filed before the Commission stated expressly that "to date the family and his defense counsel have decided not to file any remedy in order to expedite the benefits that he may receive […] and, thus, he may be granted parole so that he is able to accede to the doctors required for his operation and prompt recovery." According to the State, the Commission should have analyzed this statement, because the grounds for not filing the remedy were based on subjective situations of the petitioner and not on interference or obstruction by the State.

110. The State also referred to the subsidiary or complementary nature of the inter-American protection system and indicated that, in briefs of August 25, 2006, and January 9, May 3 and August 5 and 8, 2007, it had submitted arguments to the Commission affirming that the latter's opinion – according to which the prior exhaustion of domestic remedies was one of the State's means of defense that could be waived, even tacitly – "could not be justified, because no State can tacitly waive its rights," and "contradicts the spirit, purpose and reason of the [American] Convention." The State indicated that, according to Articles 27 and 28 of its Rules of Procedure, "the Commission has the obligation and the responsibility to verify compliance with all the procedural requirements, […] before processing or considering a petition. With regard to the time frame for the presentation of petitions established in Article 46(1)(b), the State maintained that "the Commission must require petitioners to satisfy the prior exhaustion of domestic remedies in order to […] comply strictly with the peremptory time frame established in Article 32(1) of [its] Rules of Procedure," because the infringement of this article would violate flagrantly the intention of the States when acceding to the American Convention. The State observed that the petition before the Commission was submitted on October 12, 2005, and "that, at that date, the Venezuelan courts were still hearing the proceedings against [Raúl José Díaz Peña], which proves the failure to exhaust domestic remedies and, consequently, the inadmissibility of the said petition." On this basis, the State asked the Court to declare its disapproval of the Commission's conduct, "insofar as it should not admit any case where it is evident that the petitioner has not exhausted the domestic remedies."

Arguments of the Commission

111. In response, the Commission argued that the filing of this objection was time-barred and asked the Court to declare it inadmissible because the arguments on which it was founded had not been submitted opportunely. The Commission maintained that, even though it is true that, at the admissibility stage before the Commission, the State had argued that the criminal proceedings were underway and that the domestic remedies had not been exhausted, this argument had been generic, without indicating any of the remedies proposed. Consequently, it corresponded to the Court to declare the preliminary objection irreceivable owing to its lack of precision at the appropriate procedural moment. In addition, the Commission noted that the arguments made by the State in its answering brief before the Court of May 24, 2011, "[had been] included in almost identical terms" in a brief submitted to the Commission on November 12, 2009, after the admissibility stage. Notwithstanding the foregoing, the Commission also argued the substantial inadmissibility of the arguments submitted by the State on the preliminary objection and indicated that it was not consistent with the purpose of the case delimited by the Commission in the admissibility report, because this preliminary objection referred to the exhaustion of domestic remedies "in relation to allegations that had not been admitted by the Commission and that were not ruled on at the merits stage," so that "its inadmissibility was evident."

112. In this regard, the Commission indicated that, on receiving the initial petition, it had identified three groups of facts: (a) those related to the preventive detention of Mr. Díaz Peña and the duration of the proceedings; (b) those related to a series of irregularities in the criminal proceedings, and (c) those related to the detention conditions and the lack of medical attention. According to the Commission, these facts differed in nature and, owing to their continuing nature, it had analyzed the requirement of exhaustion of domestic remedies separately; consequently, it had declared the first and third groups of facts admissible – namely, the preventive detention, the duration of the proceedings, and the issues of personal integrity – because it considered that Mr. Díaz Peña had exhausted numerous domestic remedies, which it referred to in detail, as well as taking different steps before the domestic authorities. Regarding the facts relating to irregularities concerning due process, the Commission had declared the petition inadmissible precisely because Raúl José Díaz Peña "waived the right to file an appeal against his conviction." Hence, "since it would have been possible to rectify some of the supposed violations of due process by using this remedy, the Commission considered that the requirement of exhaustion of domestic remedies had not been met at that time" and, consequently, "the analysis of the merits did not include the arguments on the irregularities in the criminal proceedings; for example, the aspect relating to the illegality of the way evidence was obtained."

Arguments of the representative

113. For her part, the representative endorsed the arguments presented by the Commission and asked that the Court declare the State's arguments on the preliminary objection inadmissible and continue hearing the case in its entirety. Specifically, the representative stated that, when the petition was lodged before the Commission, the judgment convicting Raúl Díaz Peña had not been delivered and, at that time, it was a question of protecting his rights to presumption of innocence, not to be deprived of liberty unlawfully, to be tried while at liberty, and to due process, especially regarding compliance with a reasonable time, regarding which she argued that the violations "had already been committed and were substantiated as the facts evolved during the proceedings." The representative stated that Mr. Díaz Peña had exhausted the remedies provided under Venezuelan law for the jurisdictional review of preventive detention, exercising an application for constitutional *amparo* as a last remedy.[221] Regarding the appeal for review established in article 470 of the Code of Criminal Procedure, the representative indicated that it was only admissible against final judgments, which did not apply to the presumed victim. In addition, she indicated that the reasons why Raúl Díaz Peña did not exercise the domestic legal remedies when he was sentenced and convicted "related to the constant and systematic failure of the Venezuelan Judiciary to comply with the time frames established in the Code of Criminal Procedure for his trial and for deciding the procedural incidents."

B) Considerations of the Court

114. First, the Court notes that the State, in its arguments, seeks to require the Court to modify its consistent case law which affirms that if the objection of failure to exhaust domestic remedies is not filed at the appropriate moment, the possibility of filing this objection is relinquished. In this regard, the Court reiterates, as it has in the cases of *Reverón Trujillo, Usón Ramírez* and *Chocrón*

[221] On this point, she indicated that Raúl José Díaz Peña technical defense counsel contested the decision that confirmed the judicial measure of preventive detention by filing the appeal for review established in article 264 of the Code of Criminal Procedure, arguing, basically, the expiry of the time limit for preventive detention under the provisions of article 244 of the said Code. To counter the negative decision, an application for constitutional *amparo* was filed, which was declared inadmissible, and an appeal was filed against this declaration of inadmissibility, which was declared irreceivable by the Constitutional Chamber of the Supreme Court of Justice.

Chocrón,[222] that although the supervision of the Inter-American Court is of a subsidiary, supplementary and complementary nature,[223] Article 46(1)(a) of the Convention stipulates that the rule of the exhaustion of domestic remedies must be interpreted in accordance with generally recognized principles of international law, which include the principle establishing that the use of this rule is a defense available to the State and, therefore, must be verified at the procedural moment in which the objection has been filed. If it is not filed while the admissibility is being processed before the Commission, the State has relinquished the possibility of using this measure of defense before the Court. This has been recognized not only by this Court,[224] but also by the European Court of Human Rights.[225] Consequently, the Court reiterates that the interpretation that it has given to Article 46(1)(a) of the Convention for more than 20 years is in conformity with international law.

115. Furthermore, it is pertinent to recall that, when the Commission's conduct in relation to the proceedings followed before it is questioned as a preliminary objection, the Court has maintained that the Inter-American Commission has autonomy and independence in the exercise of its mandate as established in the American Convention and, in particular, in the exercise of its functions in relation to the processing of individual petitions established by Articles 44 to 51 of the Convention.[226] However, in matters it is considering, the Court has the authority to monitor the legality of the Commission's conduct,[227] which does not necessarily mean reviewing the proceedings conducted before the latter,[228] unless there has been a grave error that violates the right to defense of the parties.[229] Lastly, the party who affirms that the conduct of the Commission during the proceedings before it has been irregular and impaired the right to defense must prove

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[222] *Cf. Case of Reverón Trujillo v. Venezuela, para. 20; Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of November 20, 2009. Series C No. 207, para. 22, and *Case of Chocrón Chocrón v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2011. Series C No. 227, para. 21.

[223] *Cf.* Preamble and Article 46 of the American Convention on Human Rights. See also: *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Arts. 74 and 75). Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 31, and *Case of Chocrón Chocrón v. Venezuela*, para. 21.

[224] *Cf. Case of Velásquez Rodríguez v. Honduras*. *Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, para. 88, citing the *Matter of Viviana Gallardo et al.*, Decision of November 13, 1981, No. G 101/81. Series A, para. 26, and *Case of Mejía Idrovo v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of July 5, 2011 Series C No. 228, paras. 27 and 29.

[225] *Cf.* ECHR, *Case of De Wilde, Ooms and Versyp ("Vagrancy" Cases) v. Belgium (Merits)*, Judgment of 18 June 1971, Series A no. 12, paras. 54 and 55; ECHR, *Case of Foti et al. v. Italy,* Judgment of 10 December 1982, Series A no. 56, para. 46, and ECHR, *Case of Bitiyeva and X v. Russia*, Judgment of 21 June 2007, paras. 90 and 91.

[226] *Cf. Control of Due Process in the Exercise of the Powers of the Inter-American Commission on Human Rights* (Arts. 41 and 44 of the American Convention on Human Rights). Advisory Opinion OC-19/05 of November 28, 2005. Series A No. 19, first operative paragraph, and *Case of Grande v. Argentina. Preliminary objections and merits*. Judgment of August 31, 2011 Series C No. 231, para. 45.

[227] *Cf. Control of Due Process in the Exercise of the Powers of the Inter-American Commission on Human Rights (Arts. 41 and 44 of the American Convention on Human Rights).* Advisory Opinion OC-19/05, *supra* note 8, third operative paragraph, and *Case of Grande v. Argentina. Preliminary objections and merits*. Judgment of August 31, 2011 Series C No. 231, para. 45.

[228] *Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 24, 2006. Series C No. 158, para. 66, and *Case of González Medina and family v. Dominican Republic*, para. 28.

[229] Cf. *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, para. 66, and *Case of González Medina and family v. Dominican Republic*, para. 28.

this harm.[230] In this regard, a complaint or difference of opinion with regard to the conduct of the Inter-American Commission is not sufficient.[231]

116. The Court will now assess whether, in this case, the formal and material presumptions exist to admit a preliminary objection of failure to exhaust domestic remedies.[232] To this end, it will begin by presenting a chronological summary of the pertinent facts.

117. First, the Court notes that, the initial petition of October 12, 2005,[233] did not allege that domestic remedies had been exhausted, but rather the petition merely transcribed Article 46 of the American Convention and made the two following statements, one of them before the transcription of the said article and the other after:

> "Owing to the legal situation of the citizen Raúl Díaz Peña in Venezuela in the instant case, the exception to the exhaustion of domestic remedies established in Article 46 has been complied with," [and]
>
> […]
>
> "The citizen Díaz Peña is defenseless before the Venezuelan courts owing to the influence of some members of the Legislature and the Executive. Because of this defenselessness, he has been obliged to seek the protection of the […] Commission."

118. After a copy of the original petition had been forwarded to it, the State, in a brief of May 3, 2007, presented its observations on the petition in which it referred to the criminal proceedings instituted against Mr. Díaz Peña, rejected everything set out in the petition, and affirmed that "this case d[id] not meet the requirements to be admitted by the Commission, because proceedings were underway before the competent organs of the State, in which, at all times, the human rights of [Mr.] Díaz had been guaranteed and, in addition, the existing domestic remedies had not been exhausted."[234] Venezuela repeated these assertions in briefs of August 5 and 8, 2007.[235] In the second brief, presented in the context of the precautionary measures adopted by the Commission, the State made specific reference to Article 46(1)(a) of the American Convention.

119. In its admissibility report of March 20, 2009,[236] the Commission:

a) Did not rule on the petitioner's argument that the exceptions to the requirement of exhaustion of domestic remedies were applicable.

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230 *Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.)*, *supra* note 14, para. 66, and *Case of Vélez Loor v. Panama. Preliminary objections, Merits, Reparations and Costas*. Judgment of November 23, 2010 Series C No. 218, para. 22.

231 *Cf. Case of Castañeda Gutman v. United Mexican States. Preliminary objections, merits, reparations and costs.* Judgment of August 6, 2008. Series C No. 184, para. 42, and *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*. Preliminary objections, merits, reparations and costs. Judgment of November 24, 2010. Series C No. 219, para. 27.

232 *Cf. Case of Perozo et al. v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of January 28, 2009. Series C No. 195, para. 42, and *Case of Vera Vera et al. v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of May 19, 2011. Series C No. 224, para. 13.

233 *Cf.* Initial petition of October 12, 2005 (evidence file, tome V, folios 3138 to 3152).

234 Note AGEV/000600 of May 3, 2007, addressed to the Executive Secretary of the Inter-American Commission on Human Rights by the Agent of the State of Venezuela (evidence file, tome XXV, folios 17191 to 17209).

235 *Cf.* Note AGEV/000863 of August 5, 2007, addressed to the Executive Secretary of the Inter-American Commission on Human Rights by the Agent of the State of Venezuela (evidence file, tome XXV, folios 17210 to 17218), and Note AGEV/000940 of August 8, 2007, addressed to the Executive Secretary of the Inter-American Commission on Human Rights by the Agent of the State of Venezuela (evidence file, tome XXV, folios 17225 to 17235).

236 *Cf.* Admissibility Report No. 23/09, Petition 1133-05 Raúl José Díaz Peña - Venezuela, issued by the Inter-American Commission on March 20, 2009 (file of proceedings before the Inter-American Commission, tome I, folios 441 to 445).

b) Did not indicate that the State's argument was time-barred or lacked the required specificity as regards indicating the existing remedies, but rather analyzed the arguments on which it was founded.

c) Regarding the exhaustion of domestic remedies, it understood that they had been duly exhausted on May 11, 2007, when the Constitutional Chamber of the Supreme Court of Justice confirmed the inadmissibility of the application for constitutional *amparo* filed on August 14, 2006, against the rejection of the appeal for review of the measure of detention filed on March 24, 2006 (*supra* paras. 82 to 85).

d) Regarding the time frame, concluded that, since "the application for *amparo* that exhausted the domestic remedies [had been] declared inadmissible in second instance on May 11, 2007," the petition [had been] submitted opportunely on October 12, 2005.

e) Consequently, the Commission considered that the requirements of Article 46(1)(a) of the American Convention had been met in relation to the arguments concerning the preventive detention and the detention conditions, in relation to the presumed violation of Articles 5, 7, 8 and 25 of the Convention

f) To the contrary, regarding the presumed irregularities of the criminal proceedings, based on the waiver of the right to appeal the adverse judgment (*supra* para. 88) the Commission found that, for these facts, the domestic remedies had not been exhausted and that, given the failure to comply with this requirement, the exceptions established in Article 46(2) of the American Convention had not been met.

120. On November 12, 2009, in the brief with observations submitted in the proceedings on the merits of the case before the Commission and after admissibility report No. 23/09 of March 20, 2009, the State referred to the existence of the ordinary remedy of appeal, the appeal for review, and the constitutional review, as well as the possibilities of protecting Mr. Díaz Peña's rights at the eventual stage of execution of judgment established in the Venezuelan system of criminal procedure.[237]

121. The above reveals that the objection does not include the facts relating to "a group of irregularities in the criminal proceedings," regarding which the petition was declared inadmissible and which, therefore, do not form part of the factual framework of the instant case (*supra* paras. 41 and 46). Consequently, this Court's analysis will be limited to the "groups of facts" regarding which the Commission declared the petition admissible: those relating to "the preventive detention of Mr. Díaz Peña and the duration of the proceedings," and those relating to "the detention conditions and the lack of medical care." Before this, the Court will examine a formal objection filed by the Commission.

Presumed lack of specificity

122. The Commission has affirmed before this Court that the State's argument of failure to exhaust domestic remedies lacked specificity at the appropriate procedural moment, because it had been of a general nature and had not included a precise indication of the existing remedies. The Court considers that the Commission's argument cannot be admitted in general, because when the State argued the failure to exhaust the domestic remedies, the Commission had not yet divided up the purpose of the petition into three different elements. As already indicated (*supra* para. 39), that division was made by the Commission, at least implicitly, in admissibility report No. 23/09 of

[237] *Cf.* Note AGEV/000537 of November 12, 2009, addressed to the Inter-American Commission on Human Rights by the Agent of the State of Venezuela (evidence file, tome V, folios 3157 to 3176).

March 20, 2009. Up until that time, it could have been considered that the matter related to a complaint of violation of due process in the context of a criminal trial that was underway and the duration of which had not exceeded a reasonable time. Hence, the State cannot be blamed for the fact that, when presenting its observations on the petition, it made no specific reference to the available remedies, with the important exception that will be mentioned when analyzing the aspect regarding the detention conditions and the deterioration in Mr. Díaz Peña's health (*infra* paras. 126 and 127).

Arguments relating to the preventive detention and the duration of the proceedings

123. The Commission considered that domestic remedies had been exhausted bearing in mind that different appeals had been filed over the period from March 24, 2006, to May 11, 2007 (*supra* para. 119(c)). Thus, it referred to appeals filed over a period that began more than five months after the initial petition was lodged before the Commission and culminated one year and seven months after this. The Court finds that, in these circumstances, it cannot be understood that the requirement of prior exhaustion of domestic remedies established in Article 46(1)(a) of the American Convention has been satisfied. Furthermore, the Court observes that, when the initial petition was forwarded to the State on February 23, 2007, the decision of May 11, 2007, that supposedly exhausted domestic remedies had not yet been issued.

124. Moreover, it cannot be considered that domestic remedies had been exhausted by the requests filed by Mr. Díaz Peña's defense counsel in the context of the criminal proceedings that were underway at the time (nullity based on failure to comply with the legal methods and conditions, nullity of an expert opinion offered by the Public Prosecution Service; requests for review of the preventive detention). In fact, the appropriate remedy in this regard, was to appeal the judgment delivered at the end of the proceedings (without prejudice to the possibility of contesting it owing to the excessive duration of the proceedings or of the preventive detention). As already indicated (*supra* para. 88), Mr. Díaz Peña expressly waived the right to file this appeal, and the Inter-American Commission declared that "the arguments concerning the irregularities in the criminal proceedings that could have been rectified by contesting the adverse judgment were inadmissible" (*supra* para. 42).

125. Based on the above, *the preliminary objection of failure to exhaust domestic remedies filed by the State is admitted as regard the facts relating to the preventive detention of Mr. Díaz Peña and the duration of the proceedings.*

Arguments relating to the detention conditions and the deterioration in Mr. Díaz Peña's health

126. The situation is different as regards the detention conditions and the deterioration in Mr. Díaz Peña's health (which the Commission alluded to as "the detention conditions and absence of medical attention") (*supra* para. 112). The corresponding arguments were submitted in the initial petition and, although the Commission had not yet explained the division of the different aspects of the case into three parts, the State could not ignore that, in that regard, it should have referred to precise and opportune remedies. Despite this, the State did not indicate specifically – either then or later – the remedies that could have been filed to obtain an improvement in the poor detention conditions that were alleged and to prevent the consequent deterioration in Mr. Díaz Peña's health that was alleged. That omission leads to the conclusions that, in this respect, there were no remedies to be exhausted. Consequently, the exception to the requirement of prior exhaustion of domestic remedies established in Article 46)(2)(a) of the American Convention is applicable.

127. Therefore, *the Court rejects the objection of failure to exhaust domestic remedies filed by the State as regards the detention conditions and the deterioration in Mr. Díaz Peña's health.*

VII
MERITS

RIGHT TO PERSONAL INTEGRITY IN RELATION TO THE OBLIGATIONS TO RESPECT AND GUARANTEE THE RIGHTS

128. In this chapter, the Court will examine the arguments on violation of the right to personal integrity in relation to the obligations to respect and guarantee the rights.

A) Arguments of the Commission and of the parties

129. The arguments of the Commission under Article 5(1) and 5(2) of the American Convention refer to the alleged progressive deterioration in the health of Raúl José Díaz Peña as a result of the alleged detention conditions to which he had been subjected, added to the alleged lack of adequate and opportune medical care for "the loss of hearing in one ear and recurring perianal abscesses." Hence, when establishing the State's international responsibility, it considered the existence of the following detention conditions of Raúl José Díaz Peña in the DISIP: (a) the lack of natural light and ventilation; (b) the fact of being locked up at night from 10 p.m. to 7 a.m., without access to the sanitary installations, and (c) time in the open air being limited to two hours once every 15 days.

130. In addition, the Commission argued that "the State was not diligent in permitting a rigorous and opportune diagnosis of the health situation of the [presumed] victim by continuous access to medical specialists and the performance of the specialized tests that he required." In addition, according to the Commission, "once it was aware of the importance of an operation and of the limited prospect of recovery under the detention conditions in which [Mr. Díaz Peña] was kept, the State [had] failed to adopt any measure to permit the operation to be carried out immediately and to facilitate conditions for his rehabilitation."

131. The representative agreed with the arguments of the Commission and indicated that when Mr. Díaz Peña entered the DISIP cells, the detention conditions were inhuman and deplorable, for the following reasons: the cell had no illumination and any light it received came from the corridor; he slept on a mattress on the floor; it was strictly forbidden to have electric appliances; there was no kind of air from outside; it was very hot and humid; it was very dusty; he was not allowed to go out into the sunlight; there was no place to do exercises; there was a single bathroom for 10 cells; visiting rights were twice a week for one hour, and the DISIP provided the food, which was very greasy. Subsequently, after October 2005, the Venezuelan authorities gradually allowed the use of ventilators and access to sunlight one hour each week. Nevertheless, in mid-2006, the Director of Investigations, responsible for the area of the Pre-Trial Detention Center, where Raúl Díaz was imprisoned, had ordered that "the cells remain locked with padlocks from 10 p.m. to 7 a.m.," which made it impossible for the prisoners to go to the sanitary installations during these hours, obliging them "to attend to their necessities in plastic bags, newspapers or bottles, without being able to wash their hands, and having to keep their feces and urine in that small cell throughout the night," a situation that would continue until the date on which Mr. Díaz Peña left the DISIP. In addition, she argued that the detention conditions to which Mr. Díaz Peña was subjected from February 25, 2004, to October 12, 2005, had resulted in "changes in his biological clock," and that the food received from the DISIP had wreaked havoc with his health, causing him "continuous diarrhea, with the loss of 12 kilos in six months."

132. The representative indicated that, in 2005, Raúl Díaz had been diagnosed with a perianal abscess that required appropriate treatment, which he had not received. In addition, since the cells were locked for the night at 10 p.m., "having to attend to his necessities in a bag, without being able to wash" had exacerbated the infection and he had developed a fistula that would only be cured by an operation, "so that, at this time, he had a cyst that required surgery." In addition, she

argued that Mr. Díaz Peña had serious health problems in his ears, especially his left ear, "which had been treated belatedly" and which were the "result of colds that never ended owing to his allergy to dust, and having to breath impure air because the air did not circulate owing to the absence of windows." In this regard, she referred to supposed contradictions between the medical reports prepared by independent doctors and those prepared by the DISIP medical staff, and indicated that "the State only provided reports by general practitioners that had been prepared following examinations without the necessary medical equipment used by the specialists, and this is why they concluded that Díaz Peña was a healthy adult," while the reports that indicated "the risks of encephalitis, meningitis or another serious illnesses that would place Díaz Peña's life at risk," as well as the need for an operation, were simply ignored by the State,[238] and this had led to a health problem from which the presumed victim still suffered. Lastly, she argued that a change in the place of detention had been requested and all the necessary steps had been taken, but this had not happened "owing to the State's lack of interest; hence, the detention conditions required to ensure that the harm to [the presumed victim's] integrity was alleviated, had not materialized."

133. In response, the State indicated that it had guaranteed the fundamental rights of those held for trial or sentenced and convicted who were in the place formerly known as the DISIP – now the General Directorate of the Bolivarian National Intelligence System (SEBIN) – and complied absolutely with the necessary conditions of health and hygiene. In addition, it argued that Mr. Díaz Peña had been provided with the pertinent medical treatment. Specifically, it indicated that the DISIP facilities had areas for physical activities, a place for visits by family and friends, an electric stove, electrical appliances, refrigerators to keep food cool, and area for conjugal visits with its respective bathroom, and acceptable conditions of hygiene, as well as cells provided with several fire extinguishers distributed in the different corridors. In addition, it referred to the existence of a log entry of November 21, 2005, recording the physical conditions and the guarantees of the human rights of Mr. Díaz Peña.

134. The State indicated that Mr. Díaz Peña was always provided with the pertinent medical care and that the judge of the case had allowed him to go to the *Instituto Médico Otorrinolaringológico*, on Santa Cruz Street, Chuao, Miranda state, which was "one of the best medical centers in Caracas," where he had been by a specialist on June 14, September 14 and November 28, 2006. Furthermore, on January 8, 2007, the DISIP Director General had informed the State's Agent at the time of Mr. Díaz Peña's transfer to the said medical center for a medical evaluation and cleaning of his ear. The State argued that doctors at the Military Hospital had also been able "to examine the problem with his left ear." Similarly, the State referred to the records, visits, and examinations of Mr. Díaz Peña of November 21, 2005, June 16, July 28 and October 19, 2006, April 25 and August 6, 2007, September 9 and October 2, 2009.

B) Considerations of the Court

135. This Court has indicated that, according to Article 5(1) and 5(2) of the Convention,[239] any person deprived of liberty has the right to live in detention conditions compatible with his personal dignity. As the entity responsible for places of detention, the State plays a special role as guarantor

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[238] The representative affirmed that Mr. Díaz Peña had been treated seven time, "only not by a specialist," and although it was true that the alleged victim had been treated in the Chuao Ear, Nose and Throat Clinic twice, on September 14, 2006 and on November 28, 2007, during the second visit, "an urgent operation to save the diseased ear" had been recommended," and therefore "the visits to the [said] Center [had] ceased." Lastly, she mentioned that "[t]wo examinations [by] forensic physicians [had confirmed] the need for specialized medical equipment."

[239] The pertinent part of Article 5 of the American Convention stipulates that:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

of the rights of all those who are in its custody.[240] This entails the State's obligation to safeguard the health and welfare of prisoners, providing them, among other elements, with the required medical assistance, and ensuring that the manner and method of deprivation of liberty do not exceed the inevitable level of suffering inherent in detention.[241] In this regard, the Court has considered that bad physical and hygienic conditions in places of detention,[242] such as the lack of adequate light and ventilation,[243] can, in themselves, violate Article 5 of the American Convention, depending on their intensity, duration and the personal characteristics of those that endure them, because they can cause suffering of an intensity that exceeds the inevitable level of suffering resulting from the detention, and because they result in feelings of humiliation and inferiority.[244] Thus, the State cannot invoke financial difficulties to justify detention conditions that do not comply with the minimum international standards in this area and that fail to respect the dignity of the human being.[245]

136. Although it has been confirmed in this case that, approximately one year and eight months after Mr. Díaz Peña entered the Pre-Trial Detention Center a window was opened in a specific area of it, the use of standing ventilators was gradually allowed, a system of artificial lights, air extractors and air conditioning were progressively installed, and, in a limited manner, access to the open air (*supra* para. 97), the precautionary measures adopted were insufficient to comply with the State's obligation to carry out a complete overhaul of the facilities in order to ensure access to natural light and fresh air, as well as regular and constant time out in the open air, as part of the inherent conditions of detention.

137. In addition, the Court has indicated that the general obligations to respect and guarantee the rights established in Article 1(1) of the American Convention gives rise to special obligations that are determined on the basis of the particular needs for protection of the subject of law, owing either to his personal situation or to the specific situation in which he finds himself.[246] Thus, the State has the obligation to provide detainees with regular medical checkups and attention and adequate treatment when this is required.[247] Principle 24 of the Body of Principles for the Protection

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240 *Cf. Case of Neira Alegría et al. v. Peru*. *Merits*. Judgment of January 19, 1995. Series C No. 20, para. 60, and *Case of Vélez Loor v. Panama*, para. 198.

241 *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay. Preliminary objections, merits, reparations and costs.* Judgment of September 2, 2004. Series C No. 112, para. 159, and *Case of Vélez Loor v. Panama*, para. 198.

242 In this regard, Rule 10 of the United Nations Standard Minimum Rules for the Treatment of Prisoners establishes that: "[a]ll accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation." While Rule 12 stipulates that "[t]he sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner."

243 Regarding access to natural light and fresh air, Rule 11 of the United Nations Standard Minimum Rules for the Treatment of Prisoners establishes that " In all places where prisoners are required to live or work: (a) The windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation; (b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight. With regard to access to fresh air and to physical and recreational training, Rule 21 of the United Nations Standard Minimum Rules for the Treatment of Prisoners stipulates that "(1) Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits. (2) Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end space, installations and equipment should be provided."

244 *Cf. Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela. Merits, reparations and costs.* Judgment of July 5, 2006. Series C No. 150, para. 97.

245 *Cf. Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela*, para. 85, and *Case of Vélez Loor v. Panama*, para. 198.

246 *Cf. Case of the Pueblo Bello Massacre v. Colombia. Merits, reparations and costs.* Judgment of January 31, 2006. Series C No. 140, para. 111, and *Case of Vera Vera et al. v. Ecuador*, para. 42.

247 *Cf. Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114, para. 156, and *Case of Vélez Loor v. Panama*, para. 220.

of All Persons under Any Form of Detention or Prison stipulates that "[a] proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge."[248] Care by a doctor who does not have links to the prison or detention authorities is an important safeguard against the torture or physical or mental ill-treatment of the persons deprived of liberty.[249] In this regard, the lack of adequate medical treatment for a persons who is deprived of liberty and in the State's custody may be considered a violation of Article 5(1) and 5(2) of the Convention depending on the particular circumstances of the specific person, such as their health or the type of ailments they suffer from, the time that has passed without attention, the accumulative physical and mental effects,[250] and in some cases the sex and age of the person.[251]

138. In order to rule on the alleged violations of Article 5(1) and 5(2) of the American Convention, the Court must now refer only to the conditions regarding which the Commission made factual determination in the merits report (*supra* para. 34).

139. The pertinent facts were described *in extenso* in section F) of Chapter V, entitled "Detention conditions and deterioration of Mr. Díaz Peña's health" (*supra,* paras. 91 to 108). In brief, the Court has verified that during the time Mr. Díaz Peña remained detained in the Pre-Trial Detention Center, the medical reports that were prepared showed a progressive deterioration in his health. On November 15, 2004, more than eight months after Mr. Díaz Peña entered the Pre-Trial Detention Center, it was recorded that Mr. Díaz Peña, with a history of a myringoplasty in the right ear in 1999, had otalgia and hypoacusis in the left ear with an evolution of nine months. Various medical reports indicated a decrease in his hearing and nasal allergies, a syndrome of nasal obstruction due to allergic rhinitis, meningitis, sinusitis, gingivitis, and gingivorragia; in November 2006, it was recorded that Mr. Díaz Peña had abdominal colic, flatulence and recurrent diarrhea; in 2007, the presence of recurrent perianal abscesses was recorded; an expert appraisal of November 28, 2008, indicated that Mr. Díaz Peña had a perianal fistula with an evolution of two years, and the medical report of March 12, 2010, recorded that he had suffered from a perianal abscess on four occasions, which had resulted in an anal fissure, all of which had been drained and treated by the patient himself, which explained their recurrent nature (*supra,* para. 107).

140. In summary, it must be considered proved that the detention conditions were extremely deficient, in particular the lack of access to light and natural ventilation, and the restricting time in the open air for more than six years, as well as being locked up at night and thus the restrictions in access to the only sanitary installations available for 10 individual cells for more than three years. In addition, it has been proved that Mr. Díaz Peña suffered a serious progressive deterioration in his health and that the medical assistance services were not provided opportunely, adequately and completely for the problems that Mr. Díaz Peña had in his left ear; in particular as regards the indication of the ear, nose and throat specialist that he required an examination and evaluation in an external center specialized in this type of ear problem that had adequate instruments to treat it, and the delay of several months in performing the computerized axial tomography (CAT scan) of the middle ear and mastoids, as well as the tonal audiometry.

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[248] United Nations, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Adopted by the General Assembly in Resolution 43/173, 9 December 1988, Principle 24. See also, Rule 24 of the United Nations Standard Minimum Rules for the *Treatment* of Prisoners.

[249] *Cf. Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela*, para. 102, and *Case of Vélez Loor v. Panama*, para. 220.

[250] Cf. Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela, para. 103, and Case of Vélez Loor v. Panama, para. 220.

[251] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, para. 74, and *Case of Vera Vera et al. v. Ecuador*, para. 44.

141. Based on these facts, *the Court finds that Mr. Díaz Peña's detention conditions did not comply with the minimum material requirements of decent treatment and, consequently, taken as a whole, constituted inhuman and degrading treatment that violated the provisions of Article 5(1) and 5(2) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Díaz Peña.*

VIII
REPARATIONS
(Application of Article 63(1) of the American Convention)

142. Based on the provisions of Article 63(1) of the American Convention,[252] the Court has indicated that any violation of an international obligation that has produced harm entails the obligation to make adequate reparation,[253] and that this article reflects a customary norm that constitutes one of the basic principles of contemporary international law on State responsibility.[254]

143. The reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in the re-establishment of the previous situation. When this is not feasible, as on numerous occasion, the Court will determine measures to guarantee the rights that have been violated and repair the consequences produced by the violations.[255] Consequently, the Court has found the need to grant different measures of reparation in order to redress the harm integrally; thus, in addition to pecuniary compensation, measures of restitution and satisfaction and guarantees of non-repetition have special relevance for the harm caused.[256]

144. This Court has established that "the reparations must have a causal connection with the facts of the case, the violations declared, the damage proved, and the measures requested in order to repair the respective damage. Therefore, the Court must observe this concurrence in order to rule appropriately and in keeping with the law."[257]

145. Based on the violations of the American Convention declared in the preceding chapter, the Court will proceed to examine the claims presented by the Commission and the representative, as well as the State's arguments, in light of the criteria established in the Court's case law regarding the nature and scope of the obligation to make reparation,[258] so as to order measures to make reparation for the damage caused to the victim. The claims relating to the aspects of the case

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[252] Article 63(1) of the Convention establishes that "[i]f 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."

[253] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Fornerón and daughter v. Argentina*, para. 145.

[254] *Cf. Case of Aloeboetoe et al. v. Suriname. Reparations and costs.* Judgment of September 10, 1993. Series C No. 15, para. 43, and *Case of Fornerón and daughter v. Argentina*, para. 145..

[255] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, para. 26, and *Case of Fornerón and daughter v. Argentina*, para. 157.

[256] *Cf. Case of* the *Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of November 24, 2009. Series C No. 211, para. 226, and *Case of Pacheco Teruel et al. v. Honduras*, para. 91..

[257] *Case of Ticona Estrada v. Bolivia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C No. 191.para. 110, and *Case of Fornerón and daughter v. Argentina*, para. 146.

[258] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs,* paras. 25 to 27, and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 240.

regarding which it has been determined that the requirement of prior exhaustion of domestic remedies had not been complied with will not be taken into account.

146. Before determining the measures of reparation, the Court notes that, in its answering brief, the State, in general, asked the Court not to admit the reparations and costs requested by the representative and by the Commission; thus, it did not refer to the requests for reparation specifically.

A) Injured party

147. The Commission considered that Raúl José Díaz Peña was a beneficiary. In addition, it informed the Court that, in a communication of September 12, 2010, following merits report No. 84/10, the petitioner, in addition to indicating the victim's interest in presenting the case to the Inter-American Court, mentioned the following family members of Raúl José Díaz Peña: Alberto Esteban Díaz Arvelo (father), Algi Josefina Peña de Díaz (mother) and Claudia Elena Díaz Peña (sister), including a reference to their "physical changes" and changes in "lifestyle" as a result of the human rights violations to the detriment of Raúl José Díaz Peña.

148. The representative referred to the suffering experienced by the Díaz Peña family, who, according to the representative, will "suffer from persecution, harassment [and] anguish for the rest of their lives." In this regard, she indicated that the State should make reparation to Raúl Díaz, his father, his mother and his sister for the extensive damage caused owing the severe anguish they suffered.

149. In this case, the Court reiterates that, according to Article 63(1) of the Convention, the injured party is considered to be those declared victims of the violation of any right recognized therein. Consequently, the Court considers Raúl José Díaz Peña to be an "injured party," and, as the victim of the violations declared in paragraphs 135 to 141 of Chapter VII, he will be considered a beneficiary of the reparations ordered by the Court.

150. Regarding Mr. Díaz Peña's parents and sister, who the representative requested should be compensated, the Court observes that the Commission did not declare them as victims of any violation of the Convention in its merits report, and merely identified Mr. Díaz Peña as the sole beneficiary of the reparations. Consequently, in the instant case and in accordance with its case law,[259] the Court will not consider the victim's family to be an injured party, and will not rule on the requests made by the representative in their favor.

B) Measures of integral reparation: satisfaction and guarantees of non-repetition

151. The Commission asked that the Court order the Venezuelan State to take the following measures of reparation: (a) make a public acknowledgement of international responsibility; (b) publish the judgment that the Court eventually delivers: (c) order the administrative, disciplinary or other measures with regard to the conduct of State officials that contributed to the violations found in merits report No. 84/10, including the lack of adequate and timely medical care, as well as the delays at different stages of the proceedings; (d) implement measures to rectify the detention conditions at the former DISIP – actual Bolivarian Intelligence Service (SEBIN); (e) adopt effective measures to ensure that those deprived of liberty at the former DISIP – actually Bolivarian Intelligence Service (SEBIN) – have access to opportune and appropriate medical care, and (e)

[259] *Cf. Case of the Ituango Massacres v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2006. Series C No. 148, para. 98, and *Case of Tiu Tojín v. Guatemala. Merits, reparations and costs.* Judgment of November 26, 2008. Series C No. 190, para. 58.

adapt the first paragraph of article 251 of the Code of Criminal Procedure to Venezuela's international obligations in the area of preventive detention.

152. The representative, for her part, requested "acknowledgment of the innocence of Raúl Díaz, which should be published in four important national newspapers and that this acknowledgement take up a whole page in the main section," and that "the Agent for the Venezuelan State, Germán Saltrón, make a public statement to all the media, retracting the attacks on the dignity of Raúl Díaz and indicating his innocence," because this agent of the State had made "statements subjecting Raúl Díaz to public opprobrium calling him a 'participant in a coup, a criminal and a terrorist.'"

B.1) Satisfaction: publication and dissemination of the Judgment

153. The Court decides, as it has in other case,[260] that the State must publish, within six months of notification of this Judgment: (a) the official summary of this Judgment prepared by the Court, once, in the Official Gazette; (b) the official summary of this Judgment prepared by the Court, once, in a national newspaper with widespread circulation, and (c) this Judgment, in its entirety, available for one year, on an official website.

B.2) Guarantees of non-repetition

154. The Court need only rule on the requests for reparation related to the facts concerning which it has declared violations. In that regard, the Court establishes that the State must adopt, within a reasonable time, the necessary measures to ensure that the detention conditions in the Pre-Trial Detention Center of the former General Directorate of Intelligence and Prevention Services (DISIP) – now, Bolivarian Intelligence Service (SEBIN) – located in El Helicoide, in Caracas, Venezuela, are in accordance with the relevant international standards. In this regard, it should be recalled that these standards are even stricter in the case of persons deprived of liberty who have not been convicted, because the way they are treated must accord with the presumption of innocence. In particular, the State must ensure that any person deprived of liberty lives in conditions that are compatible with his human dignity, which include, *inter alia*: (a) well-ventilated cells with access to natural light; (b) access to clean showers and sanitary installations with sufficient privacy; (c) food of good quality, with sufficient nutritional value to maintain the health and strength of the person deprived of liberty, and (d) the necessary, adequate, decent and timely health care.

B.3) Other measures requested

155. Regarding the other measures requested, the Court finds that the harm to Mr. Díaz Peña will be sufficiently repaired with the delivery of this judgment, its publication (*supra* para. 153), and the compensation established in paragraphs 161 and 167 *infra*.

156. Furthermore, regarding the other measures of reparation requested by the Commission (*supra* para. 151), the Court considers that the delivery of this Judgment and the reparations ordered in this chapter are sufficient and appropriate to remedy the violations suffered by the victim and does not find it necessary to order the said measures.[261]

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[260] *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs*. Judgment of December 3, 2001. Series C No. 88, para. 79*, and Case of González Medina and family v. Dominican Republic*, para. 295.

[261] *Cf. Case of Radilla Pacheco v. Mexico*, para. 359, and *Case of Pacheco Teruel et al. v. Honduras*, para. 123.

C) Compensation

C.1) Pecuniary damage

157. The Court has developed the concept of damage in its case law and the situations in which it should be compensated. This Court has established that pecuniary damage entails "the loss of or harm to the income of the victims, the expenses incurred owing to the facts, and the consequences of a pecuniary nature that have a causal connection to the facts of the case."[262]

158. The Commission asked the Court to establish, based on the equity principle, the amount of the reparation corresponding to the pecuniary damage.

159. In relation to "compensation and costs" for Mr. Díaz Peña, the representative took into account the operations (surgery on the middle ear and perianal abscess), post-operation and rehabilitation expenses, medicines, and the convalescence time of Raúl Díaz. Hence, she requested US$28,000.00 for expenses relating to the middle ear surgery, and US$35,000.00 for expenses relating to the operation on the hemorrhoids and perianal abscess.

160. The Court observes that Mr. Díaz Peña received private medical care as a result of the ailments he suffered while he was in the State's custody (*supra* para. 103). Nevertheless, with the evidence in the case file, the Court is unable to quantify precisely the amount that Mr. Díaz Peña or his next of kin paid out. Likewise, although the medical attestations provided indicate that Mr. Díaz Peña has not yet been operated on for his health problems,[263] no evidence was submitted to authenticate the estimated costs of the said operations presented by the representative. Therefore, the Court is unable to quantify the amount that the victim would require if he had to undergo the said operations.

161. Consequently, in this case the Court considers it necessary to order reparation for pecuniary damage that includes a component for rehabilitation adapted to the physical ailments suffered by the victim. Therefore, it establishes, in equity, the sum of US$5,000.00 (five thousand United States dollars), which must be paid to Mr. Díaz Peña by the State as reimbursement for expenses incurred for medical care,[264] and also to cover future expenses for specialized medical treatment and other related costs, in the place where he resides.[265]

C.2) Non-pecuniary damage

162. The Court has developed the concept of non-pecuniary damage and has established that this "may include both the suffering and anguish caused to the direct victim and his family, the harm to values of great significance to the individual, as well as the changes of a non-pecuniary nature in the living conditions of the victim or his family."[266]

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[262] *Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Fornerón and daughter v. Argentina*, para. 187.

[263] *Cf.* Medical report of July 19, 2010, signed by the Surgeon General, Dr. Francisco Manzanilla (evidence file, tome VI, folio 3300), and Medical report of February 25, 2011, signed by Dr. José Ramón Gutiérrez Longobardi (evidence file, tome VI, folio 3302)

[264] *Cf. Case of Bueno Alves v. Argentina. Merits, reparations and costs.* Judgment of May 11, 2007. Series C No. 164, para. 185, and *Case of the Barrios Family v. Venezuela*, para. 366.

[265] *Cf. Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, para. 269.

[266] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs.* Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Pacheco Teruel et al. v. Honduras*, para. 134.

163. The Commission asked the Court to establish, in equity, the amount of the reparation corresponding to non-pecuniary damage.

164. The representative requested one million United States dollars for Mr. Díaz Peña for emotional damage, an amount that includes "the pain suffered by Raúl Díaz, owing to six years of political imprisonment in the DISIP cells, which cannot be calculated in money; pain that affects his future life and requires therapies and a lifestyle that can help him overcome the trauma suffered, which is severe," as well as "the changes in lifestyle (work, physical, emotional, moral and, again, the time away from his immediate family by being obliged to go into exile owing to the harassment that the Venezuelan State has initiated against Raúl Díaz; harassment that continues to this day with continuous statements that try to implicate him in acts of terrorism in Venezuela; constant attacks where he is exposed to public disrepute as a terrorist by President Hugo Chávez, his cabinet and followers, as well as continuous attacks in programs of the Venezuelan State television channel)." Bearing in mind "the circumstance that the recent harassment obliged Raúl Díaz to leave Venezuela and that he is living in [the United States of America]," she asked that the payment be made in the United States of America.

165. In this case it has been proved that Mr. Díaz Peña was subjected to preventive detention in deficient conditions and, consequently, suffered a progressive deterioration of his health because adequate and specialized medical assistance was not provided (*supra* para. 140). Based on the violations it has declared in this Judgment, the Court considers that it can be presumed that the violations produced non-pecuniary damage, because it is inherent in human nature that any person who suffers a violation of his human rights experiences suffering.[267]

166. International jurisprudence has established repeatedly that the Judgment may constitute *per se* a form of reparation.[268] However, considering the circumstances of the case *sub judice*, the Court finds it pertinent to establish an amount, in equity, as compensation for non-pecuniary damage.[269]

167. Consequently, the Court finds it pertinent to establish, in equity, the sum of US$10,000.00 (ten thousand United States dollars) in favor of Raúl José Díaz Peña, as compensation for non-pecuniary damage.

D) Costs and expenses

168. The representative asked that the Venezuelan State be condemned to pay the costs and expenses of these proceedings, without establishing a specific amount for her organization or submitting vouchers for expenditures.

169. The Court reiterates that, under its case law,[270] costs and expenses are part of the concept of reparation, because the activity deployed by the victims in order to obtain justice at both the national and the international level entails expenses that must be compensated when the State's international responsibility is declared in a judgment.

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267 *Cf. Case of Reverón Trujillo v. Venezuela,* para. 176, and *Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs*. Judgment of October 13, 2011. Series C No. 234, para. 259.

268 *Cf. Case of El Amparo v. Venezuela. Reparations and costs*. Judgment of September 14, 1996. Series C No. 28, para. 35, and *Case of Fornerón and daughter v. Argentina*, para. 149.

269 *Cf. Case of Neira Alegría et al. v. Peru. Reparations and costs.* Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of González Medina and family v. Dominican Republic*, para. 319.

270 *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs.* Judgment of August 27, 1998. Series C No. 39, para. 79, and *Case of Fontevecchia and D'Amico v. Argentina. Merits, reparations and costs*. Judgment of November 29, 2011. Series C No. 238, para. 124.

170. Regarding their reimbursement, the Court must assess prudently their scope, which includes the expenses arising before the authorities of the domestic jurisdiction, as well as those incurred during the proceedings before the Court, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be made based on the principles of equity and taking into account the expenses indicated by the parties, provided their *quantum* is reasonable.

171. The Court has indicated that "the claims of the victims or their representatives with regard to costs and expenses, and the evidence to support them, must be submitted to the Court at the first procedural moment granted to them; that is, with the brief with pleadings, motions and evidence, without prejudice to these claims being updated subsequently, in keeping with the new costs and expenses they have incurred owing to the proceedings before this Court."[271] In addition, the Court reiterates that it is not sufficient to merely forward probative documents; rather, the parties must submit arguments that relate the evidence to the fact to which it is supposed to relate and, in the case of alleged financial disbursements, the items and their justification must be clearly established.[272]

172. In the instant case, the representative did not provide any evidence to authenticate the disbursement of the alleged expenditure. However, the Court also notes that the representative incurred expenses to attend the public hearing of the case at the seat of the Court, as well as expenses arising from forwarding her briefs, among other matters, during the proceedings before the Court. In addition, it is reasonable to suppose that, during the five years the matter was processed before the Commission, the victim or his next of kin had financial expenses. Taking this into account and owing to the lack of vouchers, the Court establishes, in equity, the sum of US$3,000.00 (three thousand United States dollars) in favor of the Venezuela Awareness Foundation. At the stage of monitoring compliance with this Judgment, the Court may order the State to reimburse the victim or his representatives any reasonable and duly authenticated expenses.

E) Means of complying with the payments ordered

173. The State must make the payment of the compensation for pecuniary and non-pecuniary damage and the reimbursement of costs and expenses established in this Judgment directly to the persons and organizations indicated herein, within one year of notification of this Judgment, in accordance with the following paragraphs.

174. If the beneficiary is deceased or dies before he receives the respective compensation, this shall be made directly to his heirs, in accordance with the applicable domestic law.

175. The State must comply with its monetary obligation by payment in United States dollars or the equivalent in Venezuelan currency, using the exchange rate in force in the Central Bank of the Bolivarian Republic of Venezuela, the day before the payment to make the respective calculation.

176. If, for causes that can be attributed to the beneficiary of the compensation and his heirs, it is not possible to pay the amounts established within the time frame indicated, the State must deposit the said amounts in his favor in an account or a certificate of deposit in a solvent Venezuelan financial institution, in United States dollars, and in the most favorable financial conditions allowed

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[271] *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of November 21, 2007. Series C No. 170, para. 275, and *Case of Fornerón and daughter v. Argentina, para. 202.*

[272] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador,* para. 277, and *Case of Contreras et al. v. El Salvador. Merits, reparations and costs.* Judgment of August 31, 2011. Series C No. 232, para. 233.

by law and banking practice. If the corresponding compensation is not claimed for 10 years, the amounts shall be returned to the State with the interest accrued.

177. The amounts established in this Judgment as compensation and as reimbursement of costs and expenses must be delivered to the persons and organizations indicated integrally, as established in this Judgment, without any reductions due to possible taxes or charges.

178. If the State should fall in arrears it must pay interest on the amount owed corresponding to bank interest on arrears in the Bolivarian Republic of Venezuela.

IX
OPERATIVE PARAGRAPHS

179. Therefore,

THE COURT

DECIDES,

By six votes to one,

1. To admit the preliminary objection of failure to exhaust domestic remedies filed by the State as regards the facts relating to the preventive detention of Raúl José Díaz Peña and the duration of the proceedings, in keeping with paragraphs 114 to 125 of this Judgment.

2. To reject the preliminary objection of failure to exhaust domestic remedies filed by the State as regards the detention conditions and the deterioration in the health of Raúl José Díaz Peña, in keeping with paragraphs 126 to 127 of this Judgment.

DECLARES,

by six votes to one, that

3. The State is responsible for the violation of the right to personal integrity recognized in Article 5(1) and for the inhuman and degrading treatment contrary to Article 5(2) in relation to Article 1(1) of the American Convention on Human Rights to the detriment of Raúl José Díaz Peña, in keeping with paragraphs 135 to 141 of this Judgment.

AND ORDERS,

by six votes to one, that,

4. This Judgment constitutes *per se* a form of reparation.

5. The State must make the publications ordered, as established in paragraph 153 of this Judgment.

6. The State must adopt, within a reasonable time, the necessary measures to ensure that the detention conditions in the Pre-Trial Detention Center of the former General Directorate of

Intelligence and Prevention Services, now the Bolivarian Intelligence Service, located in El Helicoide are in accordance with the relevant international standards, as established in paragraph 154 of this Judgment.

7. The State must pay the amounts established in paragraphs 161, 167 and 172 of this Judgment, as compensation for pecuniary and non-pecuniary damage and for reimbursement of costs and expenses, as applicable, within one year of notification of this Judgment, as established in paragraphs 173 to 178 hereof.

8. The State must, within one year of notification of this Judgment, provide the Court with a report on the measures adopted to comply with it.

9. The Court will monitor full compliance with this Judgment, in exercise of its powers and in compliance with its obligations under the American Convention on Human Rights, and will close this case when the State has complied fully within its provisions.

Judge Eduardo Vio Grossi informed the Court of his Dissenting Opinion which accompanies this Judgment.

Done, at San José, Costa Rica, on June 26, 2012, in the Spanish and the English languages, the Spanish version being authentic.

Diego García-Sayán
President

Manuel E. Ventura Robles

Leonardo A. Franco

Margarette May Macaulay

Rhadys Abreu Blondet

Alberto Pérez Pérez

Eduardo Vio Grossi

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

SEPARATE OPINION OF JUDGE EDUARDO VIO GROSSI,
CASE OF DÍAZ PEÑA *v.* VENEZUELA
JUDGMENT OF JUNE 26, 2012
(*Preliminary objection, merits, reparations and costs*)

Introduction

The dissenting opinion with regard to the judgment in reference (hereinafter "the Judgment") is presented, because the undersigned considers that the preliminary objection filed by the Bolivarian Republic of Venezuela (hereinafter "the State") concerning the prior exhaustion of domestic remedies was admissible as regards the whole of the instant case and not only part of it, as indicated in this judgment, because, since this requirement had not been complied with opportunely, the Inter-American Commission on Human Rights (hereinafter "the Commission") should have declared the petition lodged before, which originated the case, inadmissible. Consequently, the Commission should have abstained from processing the petition and, subsequently, submitting it to the Inter-American Court of Human Rights (hereinafter "the Court"). Hence, it was not incumbent on the Court to rule on its merits. The foregoing for the following reasons.

1. Decision on the admissibility of the petition

Based on the provisions of Articles 44,[1] 45(1) and (2),[2] 46)(1)(a)[3] and (2),[4] 47[5] and 48[6] of the American Convention on Human Rights (hereinafter "the Convention"), it is evident that the decision on admissibility or

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[1] "Any person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."

[2] *"1. Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.*

2. Communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the aforementioned competence of the Commission. The Commission shall not admit any communication against a State Party that has not made such a declaration.

[3] *"Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: (a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law."*

[4] *"2. The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:*
(a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
(b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
(c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

[5] *"The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if:*
(a) any of the requirements indicated in Article 46 has not been met;
(b) the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention;
(c) the statements of the petitioner or of the state indicate that the petition or communication is manifestly groundless or obviously out of order; or
(d) the petition or communication is substantially the same as one previously studied by the Commission or by another international organization.

[6] *"1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows:*
(a) If it considers the petition or communication admissible, it shall request information from the government of the state indicated as being responsible for the alleged violations and shall furnish that government a transcript of the pertinent portions of the petition or communication. This information

inadmissibility that the Commission must issue under the provisions of these articles must be with regard to the specific "*petition or communication lodged*" which contains the pertinent denunciation or complaint against a State Party to the Convention, owing to violation of this instrument, and not with regard to other and different subsequent requests, presentations, documents, measures or decisions.

Similarly, on the same basis, it is beyond question that the said decision must, on the one hand, refer to the facts that the said petition refers to and, on the other, abide by its specific terms and, especially, what is requested or set forth in it.

The articles of the Convention cited above, which are those that the Court must apply and interpret,[7] leave no margin of doubt in this regard, because they refer clearly, precisely, expressly, repeatedly, and only to the "*petition or communication lodged.*" In this regard, they contain a peremptory mandate and, consequently, do not concede any margin for an interpretation other than the one set forth that differs from that which the States Parties to the Convention really agreed to in this regard, and as they stated in these articles.

However, as can be observed in the Judgment, this is not what happened in the instant case.

It is a fact of the case that, as it states, the request that originated the case was lodged on October 12, 2005, and, in its own words, is a "*petition and complaint against the State of Venezuela for the violation of human rights and due process of the victim Raúl José Díaz Peña, illegally detained … ,"* for whom are requested "*measures in favor of the victim, who has health problems that must be treated as soon as possible and, once this has been decided, that* [the Commission*] continue on to decide the merits of the petition."*

The note accompanying the petition, of the same date, reiterates that *"the following petition and complaint against the State of Venezuela* [is lodged] *for the violation of human rights and due process of the victim Raúl José Díaz Peña,"* and then indicates the "*human rights violated*" in the context of the criminal proceedings that were underway against the victim at the time concerned, successively, the "*prison conditions*," the "*illegal detention*" the "*accusation against Raúl Díaz Peña,*" the *"irregularities in the proceedings,"* the *"violations of due process,"* and the *"procedural delay*," all of which occurred prior to the submission of the said petition.

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shall be submitted within a reasonable period to be determined by the Commission in accordance with the circumstances of each case.

(b) After the information has been received, or after the period established has elapsed and the information has not been received, the Commission shall ascertain whether the grounds for the petition or communication still exist. If they do not, the Commission shall order the record to be closed.

(c) The Commission may also declare the petition or communication inadmissible or out of order on the basis of information or evidence subsequently received.

(d) If the record has not been closed, the Commission shall, with the knowledge of the parties, examine the matter set forth in the petition or *communication in order to verify the facts. If necessary and advisable, the Commission shall carry out an investigation, for the effective conduct of which it shall request, and the states concerned shall furnish to it, all necessary facilities.*

(e) The Commission may request the states concerned to furnish any pertinent information and, if so requested, shall hear oral statements or receive written statements from the parties concerned.

(f) The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.

2. However, in serious and urgent cases, only the presentation of a petition or communication that fulfills all the formal requirements of admissibility shall be necessary in order for the Commission to conduct an investigation with the prior consent of the state in whose territory a violation has allegedly been committed."

[7] Art. 62(3) of the Convention: "The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

It is worth adding that the said request was only added to or complemented, without altering it, by notes from the petitioner dated June 14, and July 10 and 18, 2006, in response to a request of the Commission dated April 21, 2006, with information on judicial measures and decisions after the date of the petition and relating to the application for *amparo* [protection of constitutional rights] filed, to the evolution of the criminal proceedings, and to the requests concerning the detention conditions.

Thus, the foregoing reveals that the petition was founded on what had happened and was happening in the criminal proceedings and that, conversely, the precautionary measures that the Commission was asked to adopt, to be decided previously, as in fact was decided,[8] *concerned facts that were taking place during these proceedings, which, according to the petition, were that Mr. Díaz Peña had "health problems."*

This is corroborated by the Judgment itself, which states that, in the initial petition, the petitioner "*also, requested precautionary measures in favor of Mr. Díaz Peña,*" which "*were maintained while his detention lasted";*[9] in other words, in addition to what was requested with regard to what could be called the merits, it requested the said measures.[10] This is also supported by the subsequent observations of the petitioner that "*when lodging the petition before the Commission, no judgment convicting Raúl Díaz Peña existed and that, at that time, it was a question of protecting the rights to presumption of innocence and not to suffer unlawful deprivation of liberty, to be tried in liberty, and to due process, especially as regards compliance with a reasonable time, regarding which it alleged that the violations 'had already been committed and were gradually substantiated as the proceedings evolved.'*"[11]

In other words, the petition related basically and exclusively to what had happened up until October 12, 2005, in the criminal proceedings filed against Mr. Díaz Peña, considered as a unit or an indissoluble whole. This is also revealed in the circumstances that all the petitions made concerning the deprivation of liberty or preventive detention were filed before the judge before whom the said proceedings were being processed or in relation to him.[12]

Additionally, the Judgment itself recognizes that the petition referred fundamentally to the criminal proceedings in question, when it states that, up until the Admissibility Report of March 20, 2009, *"…it could have been considered that the matter related to a complaint of violation of due process … ."*[13]

Nevertheless, the Commission attributed another understanding or scope to the said petition, distinguishing three types of facts in it; some relating to the preventive detention and the length of the proceedings, others to irregularities in the criminal proceedings, and the third, to the detention conditions and the absence of medical attention. Based on this, it declared that the petition was inadmissible with regard to the second group of facts, and admissible in relation to the first and third group of facts.[14]

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8 Para. 94 of the Judgment. All references to paragraphs below will refer to the paragraphs of the Judgment.

9 Paras. 2(a) and 94.

10 Paras. 2(a) and 94.

11 Para. 113.

12 The fact that the precautionary measures ordered by the Commission are thus, according to Article 25(1) of its Rules of Procedure in force at the time,, "[*i*]*n serious and urgent cases,"* so that the "*State concerned"* adopts them *"to prevent irreparable harm to persons"* and, in accordance with Article 25(4) of these Rules of Procedure, the granting and adoption of them "*shall not constitute a prejudgment on the merits of a case"* is consistent with this observation.

13 Para. 122.

14 Para. 121.

It was this distinction, therefore, that allowed the Commission to proceed as it did; namely ruling not on the admissibility of the petition as it was lodged by the petitioner and in his terms, but according to the Commission's understanding of the petition, and that allowed it, therefore, to declare it inadmissible as regards one aspect, and admissible as regards the other two, as if the latter were not an indivisible part of the former.

For its part, although the Judgment notes that the Commission "*submitted to the Court all the facts described in merits report No. 84/10*,"[15] and despite recognizing that, at least up until the Admissibility Report, the complaint related to the criminal proceedings,[16] it follows the division made by the Commission as if this was a factual aspect of the case and not a methodological option, hence theoretical and questionable. By proceeding in this way, the Judgment did not rule on all the facts that had been submitted, but exclusively on the pertinent ones that had allowed the Commission to substantiate the partial admissibility of the petition.[17]

In other words, taking this approach, the Judgment validated the contradiction in which the Commission had incurred when submitting to the Court all the facts of the case and, at the same time, asking it to rule exclusively on some of them. Thus, considering that it was only competent to rule on the latter, the Court also considered those facts, not as they had been submitted in the petition, but as elements that had taken place outside the criminal proceedings taken as a whole.

2. Rule of the prior exhaustion of domestic remedies

From the articles of the Convention mentioned previously it can also undoubtedly be inferred that, for a petition to be admitted by the Commission, the requirement consisting in the prior filing and exhaustion of domestic remedies must have been met at the date of its presentation before the Commission, and not subsequently.

This is because the corresponding provisions of the Convention establish, peremptorily, on the one hand that "[*a]dmission by the Commission of a petition or communication […] shall be subject to the following requirements: […] that the remedies under domestic law have been pursued and exhausted*,"[18] and, on the other hand, that "[*t]he Commission shall consider inadmissible any petition […] if: […] any of the requirements indicated in Article 46 has not been met*,"[19] which include the said requirement of prior exhaustion of domestic remedies.

However, another fact of the instant case is that, at the date the petitioner lodged the petition before the Commission, that is October 12, 2005, the domestic remedies had not been exhausted.

In fact, bearing in mind that it corresponds to the petitioner to request that his petition be exempted from the obligation of having previously exhausted the domestic remedies in order to be admitted, it must be understood that the said remedies were not exhausted when the pertinent petition was lodged.

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15 Para. 45.

16 Para. 122.

17 Paras. 55 and 121.

18 Art. 46(1)(a) of the Convention.

19 Art. 47 of the Convention.

This is what occurred in the instant case. And this is expressly recognized in the petition itself, when it states that "*[o]wing to the legal situation of the citizen Raúl Díaz Peña in Venezuela in this case, the exception to the exhaustion of domestic remedies under Article 46 is complied with.*" In other words, what it asks is that, for the petition to be admitted, the need to previously exhaust the domestic remedies should not be required, which logically leads to the conclusions that, in point of fact, it is accepting that the remedies were not exhausted when it was submitted because, if they had been, there would have been no need to invoke the exception established in the said provision.

The above is supported by the circumstance that the petition did not indicate which of the causes established in the pertinent norm[20] is invoked as grounds for applying the requested exception because, if it had done so, as established in the corresponding provision of the Convention, it would have had to indicate either the inexistence of due process, or the remedies to which access had been denied or which the petitioner had been prevented from exhausting or in which there had been a delay in the respective decision. If access had been denied to the pertinent remedies or if the petitioner had been prevented from exhausting them, or if there had been a delay in the respective decision, this should have been specified. But this did not happen; presumably because they were not filed or no attempt was made to do so.

To the above, must be added that the petition itself indicates "*Remedies filed*," namely: *"September 7, 2004: Petition for review of the judicial measure of preventive detention," "December 16, 2004, Request for a precautionary measure of liberty, for under 10 years in accordance with articles invoked by the prosecution," "March 1, 2005: request for a precautionary measure of liberty for, under 10 years in accordance with articles invoked by the prosecution," "April 14, 2005: Request for transfer to another detention center," "June 6, 2005, a precautionary measure again filed,"* and *"June 10, 2005, request for a transfer to another detention center for humanitarian reasons, based on the deterioration in the physical and emotional health of Raúl Díaz.*"[21]

However, the said procedural actions are not really "remedies,"[22] because they do not allege the illegality or the arbitrary nature of a judicial decision; they were not requested to annul, to declare illegal or to invalidate; rather their purpose was to request the lifting of the measure of deprivation of liberty, the transfer of the person detained to another center or the realization of medical examinations and treatment and, all this, based on reasons other than the reasons for a remedy or an appeal. Perhaps, it is for these reasons that the petition did not refer to the said remedy and to the said measures in relation to compliance with the requirement of prior exhaustion of domestic remedies and that, on the other hand, it asked to be exempt from the latter.

Likewise, it must be said that it would be inadmissible to deduce from the mere fact of the presentation of successive requests, which strictly speaking do not contest a decision, in other words, that do not constitute real domestic "remedies," that the latter have been exhausted, because this could lead to the absurdity that it would be sufficient to present similar petitions several times in order to comply with the requirement of prior exhaustion of domestic remedies.

3. <u>The objection argued by the State</u>

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20 Art. 46(2) of the Convention.

21 The Judgment alludes to three other requests; namely, dated February 21, June 9, and September 19, 2005 (para. 75).

22 *Diccionario Jurídico Universitario*, Editorial Heliasta, Buenos Aires, 2000, and *Diccionario de la Lengua Española*, Real Academia Española, Twenty-second edition..

Meanwhile it is also a fact of the case that the State, after receiving a copy of the "initial" or "original petition" in order to formulate its observations – that is during the admissibility proceeding and before the issue of the Admissibility Report of March 20, 2009 – mentioned the objection concerning prior exhaustion of domestic remedies in its briefs with observations on the petition of May 3 and August 5, 2007, indicating that the case was being heard in a criminal proceeding before a competent national court and *"the existing domestic remedies ha[d] not been exhausted."*[23]

Hence, the State's observations could only refer to the facts set out in the petition and not to those that occurred subsequently; and although "*the Commission indicated that after it received the initial petition it had identified*"[24] the three groups of facts mentioned above, it has been verified in this case that the distinction was made on March 20, 2009; namely, when the Commission ruled on the admissibility of the said petition,[25] which occurred three years and five months after it had been presented and that, in addition, was its first decision on the petition, since it had not issued any other that were not merely formalities, made, in any case, by its Secretariat.[26]

Hence, when formulating its observations and indicating that all the domestic remedies had not been exhausted in relation to the petition, the State could not have known about the division of the petition that the Commission made subsequently. The observation of the State, which the Commission considered to be a "*generic*" argument[27] was, consequently, consistent with what really happened, because the remedies against the ruling that ended the criminal proceedings could not have been determined or specified or, especially, filed at that point.

In this regard, it is also necessary to bear in mind that the objection of failure to comply with the prior exhaustion of domestic remedies is related, not to the State's obligation to provide theoretical or hypothetical information on the national or domestic law in force concerning remedies that could be filed against a decision, but rather to demonstrating the real and effective possibility of appealing, at the appropriate time, a specific existing decision. In other words, whether, at that time and in those circumstances, the remedies against the said decision are truly available and are adequate, appropriate, and effective; and, to this end, it is evidently essential to know the exact terms of the decision, which can only occur once it has been issued. Consequently, the State could not be required to refer to the specific remedies that could be filed before the said decision had been issued, nor could it be presumed, in the event that it makes a general and, therefore, theoretical reference to them, that they do not exist.

It is therefore evident that, since at the date of the petition (October 12, 2005), and at the date of the State's observation on this (in 2007), no judgment had been delivered in the criminal proceedings, it was impossible, in this case, to require the State to comply with the jurisprudential requirements of indicating precisely or in detail, the remedies that could be filed against a ruling that was only delivered, convicting the victim, on April 29, 2008.[28]

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[23] Para. 118, and also in the brief of August 8, 2007, presented in relation to the precautionary measures ordered.

[24] Para. 112.

[25] Paras. 39 and 122.

[26] Art. 29(1) of the Commission's Rules of Procedure: "*Initial Processing: The Commission, acting initially through the Executive Secretariat, shall receive and carry out the initial processing of the petitions presented, …*".

[27] Para. 111. Nevertheless, it did not proceed in the same way with regard to the petitioner's request that Article 46(2) of the Convention be applied to the petition, because it did not rule in this regard (para. 119(a)).

[28] Para. 87.

And this is why, also, that the Judgment records that *"[o]n November 12, 2009, in the brief with observations submitted in the proceedings on the merits of the case before the Commission and after admissibility report No. 23/09 of March 20, 2009, the State referred to the existence of the ordinary remedy of appeal, the appeal for review, and the constitutional review, as well as the possibilities of protecting Mr. Díaz Peña's rights at the eventual stage of execution of judgment established in the Venezuelan system of criminal procedure."*[29]

The Commission's action has had another consequence that exceeds the provisions of international law, which is that the determination on admissibility was issued, not on the basis of the last decision of the State which, on October 12, 2005, had given rise to its international responsibility under international law, but principally on its decisions after that date.

4. Inadmissibility of the petition with regard to facts relating to irregularities in the criminal proceedings

Now, based on the above distinction that it made with regard to the petition, the Commission declared it inadmissible regarding "*the presumed irregularities of the criminal proceedings,"* because, owing to "*the waiver of the right to appeal the adverse judgment […] the Commission found that, for these facts, the domestic remedies had not been exhausted and that, given the failure to comply with this requirement, the exceptions established in Article 46(2) of the American Convention had not been met.*"[30]

By doing this, the Commission not only considered events that had occurred after October 12, 2005; namely the adverse judgment of April 29, 2008, and even the convicted man's waiver to appeal the judgment on July 17, 2008,[31] but failed to deduce the corresponding logical conclusions from them. In other words, if it had considered the petition as a whole, as the petitioner requested, the way it proceeded would not have been possible. This is because the inadmissibility decided exclusively with regard to the irregularities in the criminal proceedings underway against Mr. Díaz Peña that, as mentioned, should have been established because at the time of the petition, the domestic remedies had not been previously exhausted, logically should also have resulted in inadmissibility with regard to the preventive detention and the duration of the proceedings, and to the detention conditions and to the lack of medical attention, because these circumstances occurred in the context of the said proceedings and not separate from them or with no close connection to them.

As already indicated, the Judgment validated the procedure followed by the Commission when it indicated, regarding "*the facts related to 'a group of irregularities in the criminal proceedings,' […] the petition was declared inadmissible and, therefore, they do not form part of the factual framework of the instant case.*"[32]

Based on this statement in the Judgment, the Court appears to renounce the exercise of its "*authority […], in matters it is considering, […] to monitor the legality of the Commission's conduct, which does not necessarily mean reviewing the proceedings conducted before the latter, unless there has been a grave error that violates the right to defense of the parties.*"[33] This is because the said authority must be exercised if the

29 Para. 120.

30 Para. 119(f).

31 Para. 88.

32 Para. 121.

33 Para. 115.

State, despite having asserted the objection of failure to previously exhaust domestic remedies before the Commission, asserts this before the Court also; provided this is based on the "*rule … [that this] is a defense available to the State";*[34] hence, not only and exclusively with regard to whether or not domestic remedies existed at the time of the petition, but basically regarding the decision which, on that occasion, the Commission adopted. Thus, it is specifically with regard to the decision taken by the Commission on the matter that the Court has competence to rule and, unfortunately, this did not happen in the instant case, even though the State filed the corresponding objection.

5. Inadmissibility of the petition with regard to the facts relating to the pre-trial detention and the duration of the proceedings

The same can be said as regards the admissibility of the petition in relation to the facts corresponding to the preventive detention and the duration of the proceedings. This was established because the Commission found that this referred to a situation that was distinct and separate from the criminal proceedings. As mentioned above, this does not correspond to the content of the petition and, thus, it was not in order to separate it from the whole and establish partial admissibility on this basis.

But also and in addition, as indicated in relation to the whole petition, the said admissibility was established based on the fact *"that different appeals had been filed over the period from March 24, 2006, to May 11, 2007,"*[35] in other words, based on domestic procedural actions that took place months and years after the petition had been lodged, so that, obviously, they could not be included or invoked as its grounds.

This is precisely why the Judgment states that "*in these circumstances, it cannot be understood that the requirement of prior exhaustion of domestic remedies established in Article 46(1)(a) of the American Convention has been satisfied,"* and that "*furthermore […] when the initial petition was forwarded to the State on February 23, 2007, the decision of May 11, 2007, that supposedly exhausted domestic remedies had not yet been issued*."[36] Consequently, it declared admitted "*the preliminary objection of failure to exhaust domestic remedies filed by the State is admitted as regards the facts relating to the preventive detention of Mr. Díaz Peña and the duration of the proceedings."*[37]

Furthermore, what is surprising is that the Judgment founded this statement also on the fact that "*[m]oreover, it cannot be considered that domestic remedies had been exhausted by the requests filed by Mr. Díaz Peña's defense counsel in the context of the criminal proceedings that were underway at the time,"* because *"the appropriate remedy in this regard, was to appeal the judgment delivered at the end of the proceedings,"* which *"Mr. Díaz Peña expressly waived the right to file,"* and on the fact that the Commission had declared that *"the arguments concerning the irregularities in the criminal proceedings that could have been rectified by contesting the adverse judgment were inadmissible*."[38]

In other words, this affirmation appears to recognize that the petition is dealt with considering the said three aspects merely because the Commission divided it up in this way and not because, in fact, these are three different matters. Moreover, the wording in the Judgment would appear to insinuate that, if the Commission had not considered the

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34 Para. 114.

35 Para. 123.

36 Para. 123.

37 Para. 125.

38 Para. 124.

petition in this way, the decision on the admissibility of the petition would have referred only to the criminal proceedings, which would include, consequently, the facts relating to the preventive detention and the duration of the proceedings.

6. Admissibility of the petition with regard to the detention conditions and the lack of medical attention

Regarding the assertion in the Judgment, of the admissibility of the petition as regards the detention conditions and the deterioration in health or, as the Commission refers to them, the detention conditions and the lack of medical attention,[39] it can also be maintained that, as the Judgment itself infers,[40] all the facts gathered under this heading occurred in the context of the criminal proceedings, as is revealed by the circumstance that the requests concerning these aspects made by the detainee or his representatives were sent to the judge who was hearing the case.[41] It can also be stated that these requests, as in the case of the others, were mere administrative measures and not real remedies. These reasons would have been sufficient to declare admissible the objection filed by the State regarding non-compliance with the requirement of prior exhaustion of domestic remedies and inadmissible, consequently, the petition also as regards the detention conditions and the deterioration in health.

But, to this should be added, with all the more reason, that the facts of the case are that several of the said requests were admitted, that "*it is a proven fact that, following the adoption of the precautionary measures, his physical detention conditions gradually improved*"[42] and that, consequently, the detainee received medical attention.[43]

Therefore, the assertion made in the Judgment that, although "*the State cannot be blamed for the fact that, when presenting its observations on the petition, it made no specific reference to the available remedies*," an "*important exception*" existed in this regard "*that will be mentioned when analyzing the aspect regarding the detention conditions and the deterioration in Mr. Díaz Peña's health*."[44] And, this is difficult to understand because, when referring to this aspect the Judgment merely indicates that *"[t]he situation is different as regards the detention conditions and the deterioration in Mr. Díaz Peña's health*" and that, *"[c]onsequently, the exception to the requirement of prior exhaustion of domestic remedies established in Article 46)(2)(a) of the American Convention is applicable*," so that, without further explanation, it ends by rejecting "*the objection of failure to exhaust domestic remedies filed by the State as regards the detention conditions and the deterioration in Mr. Díaz Peña's health."*[45]

The Judgment does not support this. It does not indicate why that "*situation*" was "*different*" or why, even though "*the Commission had not yet explained the division of the different aspects of the case into three parts, the State could not ignore that, in this regard, it should have referred to precise and opportune remedies."* Nor does it throw any light on the reason why it reproaches the State for not having indicated "*the remedies that could have been filed to obtain an improvement in the poor detention conditions that were alleged and to prevent the consequent deterioration in Mr. Díaz Peña's health that was alleged."* And what is even more striking is that it concludes

39 Para. 126.

40 Paras. 91 to 108.

41 Para. 103.

42 Para. 94.

43 Paras. 100 to 107.

44 Para. 122.

45 Paras. 126 and 127.

presuming, without providing any explanation either, that "there were no remedies to be exhausted."[46]

Since the statement made in the Judgment is contradictory and, all things considered, does not provide the arguments that would justify it, it is not comprehensible, and sows doubt as regards why the Court did not apply to this aspect of the petition at least the same consideration as it provided to the others

Conclusion

Finally, in this case, the said admissibility report and the Judgment that partially validates it affect the principles of subsidiarity and complementarity that imbue the inter-American system of human rights with the legal certainty and security with which its treaty-based provisions must be applied and interpreted, as well as the procedural balance and equality that should reign in the processing of "*petitions or communications lodged*" before the Commission and submitted to the Court and, therefore, placed and left the State in a situation of defenselessness.

Evidently, this opinion is issued, as in the case of other issued by the undersigned,[47] taking into consideration one of the specific imperatives faced by a tribunal such as the Court, which is that it must act with full awareness that, as an autonomous and independent entity, there is no higher authority controlling it, which means that, in honor of the high function assigned to it, it must strictly respect the limits of this function, and remain and evolve within the sphere appropriate to a jurisdictional entity. Undoubtedly, acting in this way is the best contribution the Court can make to enhancing the inter-American institutional framework for human rights, a requirement *sine qua non* for the safeguard of these rights.

This opinion is issued from this perspective, bearing in mind that the Court is called on to interpret and apply the Convention, mindful that changing or amending it is the competence of its States Parties,[48] so that, in the performance of its function, the Court must seek justice, not in abstract, but under the said Convention and not outside the Convention or in contradiction to it, or trying, directly or indirectly, to amend it.

It is based on the above that the Court's observations should be understood concerning "*the tolerance of 'evident violations of the procedural rules established in the Convention, would entail the loss of the essential authority and credibility of the organs responsible for administering the system of human rights protection,*"[49] and this is precisely why it was necessary, in this case, to admit totally the objection of lack of prior exhaustion of domestic remedies submitted by the State.

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46 Para. 125.

47 Complaint submitted to the Court on August 17, 2011, and Dissenting Opinion, Judgment on merits, reparations and costs, Case of Barbani Duarte *et al. v.* Uruguay, of October 13, 2011.

48 Art. 76 of the Convention: *" 1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General.*

2. Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification.

49 Para. 43.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary