

**REPORT No. 171/11<sup>1</sup>**  
**CASE 12.724**  
**MERITS**  
**ALLAN R. BREWER CARÍAS**  
**VENEZUELA**  
**November 3, 2011**

**I. SUMMARY**

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

2. On September 8, 2009, the Commission found the petition admissible with respect to the alleged violation of rights protected in Articles 2, 8, 13, and 25 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") taken in conjunction with the obligations set forth in Article 1(1) thereof.

3. In the merits stage, the petitioners argued that the State was responsible for violation of Articles 2, 8, 13, and 25 of the Convention in conjunction with the obligations contained in Article 1(1) thereof, to the detriment of Allan R. Brewer Carías. The State, for its part, held that it is not responsible for the violations alleged, given that Allan Brewer Carías is a fugitive and, therefore, the criminal proceeding in which he would be able to invoke domestic remedies in defense of his rights cannot continue.

4. Having examined the arguments as to fact and law submitted by the parties, the Commission concludes that the State is responsible for violation of Articles 8 and 25 of the American Convention taken in conjunction with the obligations contained in Articles 1(1) and 2 thereof, to the detriment of Allan R. Brewer Carías, and that it is not responsible for violation of Article 13 of that instrument.

**II. PROCESSING BY THE COMMISSION AFTER ADMISSIBILITY REPORT No. 97/09**

5. Having completed the admissibility proceeding on petition 84/07, the Commission adopted Report 97/09, which declared the petition admissible.<sup>2</sup> The IACHR then assigned the petition case number 12.724, in accordance with Article 37(2) of its Rules of Procedure. Both parties were notified of Report 97/09 in a communication dated September 25, 2009. At the same time, the Commission requested the petitioners to present their submissions on the merits of the matter within the two-month deadline provided in Article 38(1) of its Rules of Procedure then in force, and offered its good offices for a possible friendly settlement.

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<sup>1</sup> Pursuant to Article 17(2) of the Rules of Procedure of the IACHR, Commissioner Luz Patricia Mejía Guerrero, a Venezuelan national, did not participate in the discussion or decision in the present case.

<sup>2</sup> IACHR, Report No.97/09, Petition 84-07, Admissibility, Allan R. Brewer Carías, Venezuela, September 8, 2009.

6. On October 23, 2009, the petitioners indicated their willingness to accept the Commission's offer with respect to a friendly settlement procedure in a written communication that was forwarded on October 28, 2009, to the State, which was given one month to comment. On November 17 and 30, 2009, the State and the petitioners, respectively, presented their arguments on merits. The State made no comment about a friendly settlement procedure. On December 8, 2009, the petitioners' brief was transmitted to the State, which was requested to present its comments within two months. The State submitted additional comments on February 17, 2010. The State's briefs dated November 17, 2009 and February 17, 2010, were relayed to the petitioners on February 19, 2010, for comment. On February 19, 2010, the IACHR also transmitted to the State for comment a brief presented by the petitioners on February 18, 2010.

7. The petitioners submitted additional observations on April 8, 2010, which were conveyed to the State for its attention on April 9, 2010. On May 5, 2011, the petitioners submitted additional information which was relayed to the State for its attention on May 10, 2011.

### **III. POSITIONS OF THE PARTIES ON MERITS**

#### **A. The petitioners' position**

##### **1. Context**

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

9. The petitioners allege that in the early hours of April 12, 2002, Pedro Carmona Estanga, one of the leaders of the civic protests, communicated with jurist Allan Brewer Carías and sent a vehicle to collect him at his residence.<sup>3</sup> They indicate that Brewer Carías was taken to "Fort Tiuna," headquarters of the Ministry of Defense and of the General Command of the Army. They indicate that he was met there by two lawyers who showed him a draft decree, later known as the "Carmona Decree," which ordered the dissolution of the constituted authorities and the establishment of a "government of democratic transition.

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

11. They note that afterwards the media speculated as to the presence of Allan Brewer Carías during the early hours of April 12, 2002 at "Fort Tiuna" and identified him as the intellectual

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<sup>3</sup> The petitioners note that Allan Brewer Carías is a jurist with well-known experience and expertise in constitutional law, the defense of democracy, the rule of law, and human rights who had voiced strong criticisms of a series of decisions adopted by Executive decrees in Venezuela.

author or actual drafter of the so-called "Carmona Decree." They indicate that such speculation was publicly refuted by Allan Brewer Carías.<sup>4</sup>

12. They say that the National Assembly appointed a "Special Parliamentary Commission to investigate the events of April 2002." In its August 2002 report this Special Commission is said to have urged that part of the government designated the *Poder Ciudadano* to investigate and determine the responsibilities of citizens "who, without being vested with public functions, acted in an active and coordinated fashion in the conspiracy and coup d'état." The list of citizens to be investigated apparently included Allan Brewer Carías "as his participation in the planning and execution of the coup d'état has been shown."

## 2. Facts related to the judicial proceeding

13. The petitioners allege that from 2002 to 2005 at least four provisional prosecutors investigated the facts around the drafting of the "Carmona Decree," among other facts related to the events of April 11 to 13, 2002. They note that initially the investigation was entrusted to provisional prosecutor José Benigno Rojas, who did not file charges. They indicate that he was replaced by provisional prosecutor Danilo Anderson, who did not file charges either, and who was murdered in November 2004. Subsequently, Luisa Ortega Díaz, Sixth Provisional Prosecutor of the Public Ministry at the National Level with Full Jurisdiction (hereinafter also "Sixth Provisional Prosecutor"),<sup>5</sup> took over the investigation and filed a number of charges<sup>6</sup>. They allege that since then, the pattern of conduct, of both the Public Ministry and the provisional judges who have had cognizance of the case, has been to attach value to those aspects of the evidence that may contribute to convicting Allan Brewer Carías and discard those aspects that show his innocence.

14. The petitioners allege that during the investigative stage, the defense counsels for Allan Brewer Carías were unable to obtain a copy of the record; rather, they were only allowed to transcribe, by hand, the various documents in the record. They allege, therefore, that they were deprived of a reasonable time and conditions for his defense.<sup>7</sup> They argue that during the review of the record, Allan Brewer Carías found that the texts transcribed in the formal indictment did not match the contents of the videos considered to be evidence. In view of the foregoing, the provisional prosecutor was asked to make a specialized technical transcription of the content of all the videos with interviews by journalists used as evidentiary elements in the indictment. The request was denied on April 21, 2004, on the basis that "it would contribute nothing to the investigation."

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

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<sup>4</sup> The petitioners say that he did so in the following press reports: Allan Brewer Carías responde a las acusaciones: *No redacté el decreto de Carmona Estanga*, article by Ana Damelis Guzmán, *El Globo*, Caracas, April 17/4/02, p. 4. *El abogado desmiente haber redactado acta constitutiva de gobierno transitorio; Brewer Carías se desmarca de Pedro Carmona Estanga*, article by Feliz González Roa Notitarde, Valencia, April 17/4/02, p.13. *Brewer Carías: no sé quién redactó el decreto Carmona*, article by Jaime Granda, *El Nuevo País*, April 17/04/02, p. 2. Allan R. Brewer Carías, *En mi propia defensa. Respuesta preparada con la asistencia de mis defensores Rafael Odremán y León Henríque Cottib contra la infundada acusación fiscal por el supuesto delito de conspiración*, Editorial Jurídica Venezolana, Caracas, 2006, p. 192, among others.

<sup>5</sup> They allege that this prosecutor and 10 other prosecutors were assigned all the trials of political dissidents. At present, Luisa Ortega Díaz is said to be the Attorney General of the Republic.

<sup>6</sup> They allege that this prosecutor was later replaced by Prosecutor María Alejandra Pérez.

<sup>7</sup> The petitioners say that, at present, the trial is before the 25th Court of Control, before which the defense does have access to the record. Nonetheless, they consider that the lack of access in the investigative phase was an irreparable encumbrance.

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

16. They indicate that on January 27, 2005, the Sixth Provisional Prosecutor filed the indictment against Allan Brewer Carías for the offense of conspiracy to change the Constitution violently by drafting the Carmona Decree. They argue that this was based on the allegation of active Army Colonel Ángel Bellorín, who indicated that it was a well-known fact widely reported by the media that Allan Brewer Carías, a well-known expert on constitutional matters, was one of the authors of that decree.

17. They indicate that the proceeding in which the case against Allan Brewer Carías is included was initially assigned to Josefina Gómez Sosa, Temporary Twenty-Fifth Judge of Control (hereinafter also "Temporary Twenty-Fifth Judge"). At the request of the Sixth Provisional Prosecutor, the Temporary Twenty-Fifth Judge issued the order prohibiting several citizens under investigation for their suspected involvement in the events from leaving the country. That order was appealed to the Tenth Chamber of the Court of Appeals. On January 31, 2005, the Chamber of Appeals revoked that order. On February 3, 2005, the Judicial Commission of the Supreme Court of Justice suspended the judges of the Court of Appeals who voted for the nullity of the decision appealed, as well as Temporary Judge Josefina Gómez Sosa, for not having stated sufficient grounds to support the order prohibiting exit from the country. Judge Gómez Sosa was replaced by Judge of Control Manuel Bognanno, also temporary. They allege that he was suspended from his position on June 29, 2005, after notifying the Superior Prosecutor, June 27, 2005, of alleged irregularities in the investigation conducted by the Sixth Provisional Prosecutor.

18. The petitioners say that on May 4, 2005, the defense asked the Temporary Twenty-Fifth Judge to show all the videos, admit the testimony offered, and allow access to the copies of the record. In response the judge ordered the Sixth Provisional Prosecutor to allow the defense full access to the record and any videos that might be germane to the case. Nonetheless, he decided that it was not up to him to rule on the relevance of the testimony offered by the defense. On May 16, 2005, the defense appealed to the Court of Appeals the decision of the Temporary Twenty-Fifth Judge not to rule on the relevance of the testimony offered.

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

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

21. They add that on September 30, 2005, the defense submitted a brief for anticipated production of evidence in the form of a statement by Pedro Carmona Estanga before the Temporary Twenty-Fifth Judge. On October 20, 2005, the request was declared unfounded on the grounds that Pedro Carmona Estanga was also being indicted in the case, so his statement would have not probative value. They indicate: that they once again filed the statement by Pedro Carmona; that it was rejected by the same judge, that they filed a motion of recusal against him for having issued an

opinion once again on the same issue; and that the motion for recusal was rejected based on the judge not having issued a pronouncement on the guilt or innocence of Allan Brewer Carías. They note that finally they submitted the statement by Pedro Carmona in writing and they allege that he has been “ignored” by the judge. In addition, they argue that a paragraph was quoted from the book by Pedro Carmona Estanga in the accusation against Allan Brewer Carías without taking into account another paragraph of the same book in which Pedro Carmona notes that he had never attributed the authorship of the decree in question to him.

22. They note that by discretionary and arbitrary decision of the Sixth Provisional Prosecutor, the defense of Allan Brewer Carías was not allowed to be present in the examination of the witnesses called to testify before her. They indicate that in some cases the prosecutor admitted questions in writing, but it was not possible to present them in the case of supervening witnesses who came forward in the course of the investigation and who gave statements in secret. They note specifically that on October 5, 2005, testimony was taken from General Lucas Rincón, without the defense having been given called or given notice.

23. They argue that the testimony offered by journalist and politician Jorge Olavarría in support of Allan Brewer Carías’s innocence was not taken into account and that, on the contrary, it was considered as part of the basis for the indictment. They hold that on October 21, 2005, the Sixth Provisional Prosecutor formalized the indictment against Allan Brewer Carías and the proceeding went on to an intermediate stage. That decision was appealed by the defense before the Court of Appeals on October 28, 2005. The appeal was denied on December 1, 2005. They add that on November 8, 2005, the defense filed a motion for nullity of the entire proceeding based on violations of judicial guarantees, that this motion has yet to be ruled on, and that the proceeding is in an intermediate phase.

24. The petitioners indicate that Brewer Carías participated in person at proceedings until September 28, 2005, when he left Venezuela. They note that on October 26, 2005, the defense of Allan Brewer Carías asked the Temporary Twenty-Fifth Judge to guarantee his right to be tried at liberty and issue an advance declaration that depriving him of liberty during trial would be out of order,<sup>8</sup> since he is not dangerous, is professionally and academically active, and has his residence and roots in Venezuela. They indicate that the judge never ruled on this motion.

25. They hold that, on May 10, 2006, the defense informed the Temporary Twenty-Fifth Judge that Allan Brewer Carías had accepted an appointment as adjunct professor at the Columbia University School of Law in the United States, and they asked that the proceeding continue. They indicate that even though it was known that he was outside the country, on June 2, 2006, the Sixth Provisional Prosecutor asked the Judge to issue an arrest order for Allan Brewer Carías as he posed a flight risk. In response, on June 15, 2006, the Provisional Judge of Control ordered that he be taken into custody. However, that order has not been executed because, to date, Allan Brewer Carías remains abroad.

26. The petitioners indicate that on July 12, 2006, the Sixth Provisional Prosecutor sent a request for cooperation to INTERPOL to search for and locate Allan Brewer Carías, with a view to his preventive detention and possible extradition. In addition, on July 11, 2006, Venezuelan

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<sup>8</sup> They note that Article 44(1) of the Constitution of Venezuela establishes that every person “shall be tried at liberty,” that Article 102 of the Organic Code of Criminal Procedure (COPP) establishes that: “one shall avoid, especially, requesting preventive deprivation of liberty of the accused when it is not absolutely necessary to ensure the purposes of the proceedings” and that its Article 125(12) establishes that it is a right of the accused “not to be judged in absentia, except as provided in the Constitution of the Republic.” The petitioners say that “the possibility of trial in absentia in the case of crimes against public property was eliminated from the Constitution of the Bolivarian Republic of Venezuela in 1999, and therefore the phrase ‘except as provided in the Constitution of the Republic’ is no longer relevant.”

Ambassador to the Dominican Republic sent a communication to INTERPOL, requesting the arrest of Allan Brewer Carías, as he had been extended an invitation to give a lecture in that country. In addition, the diplomat had denounced him to the media in the Dominican Republic as a “conspirator”. They say that in response, INTERPOL requested information from the courts on the nature of the offense that had led Brewer Carías to be charged with a common crime. They indicate that in a clarification dated September 17, 2007, the Court of First Instance Sitting as Court of Control of the Judicial Circuit of the Metropolitan Area of Caracas answered that Allan Brewer Carías was the intellectual author of a failed attack on the President of the Republic, which, therefore, ruled out any possibility that the charges be considered as corresponding to a political crime. They indicate that the defense appealed and asked that said clarification be annulled; however, the appeal was dismissed on October 29, 2007.

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

28. On January 11, 2008, the representatives of Allan Brewer Carías filed a motion for dismissal before the Twenty-Fifth Judge of Control under Decree 5790, with Rank, Value, and Force of a Special Amnesty Law, issued on December 31, 2007, by President Hugo Chávez. That provision, which covers “all those persons in conflict with the law, who as of this date have surrendered themselves to the authorities, have submitted to criminal proceedings, and have been tried and convicted,” includes, among the conduct eligible for amnesty, “the drafting of the decree of the de facto government of April (12), 2002.” The request was denied on January 25, 2008, on the grounds that Allan Brewer Carías had not appeared in the proceeding. The petitioners note that the decision was appealed to the Fifth Chamber of the Court of Appeals of the Criminal Circuit of the Metropolitan Area of Caracas and denied on April 3, 2008.

### **3. Submissions on violation of the American Convention**

29. The petitioners claim that the State is responsible for violation of the rights set forth in Articles 8(1), 8(2), 13, 25, 1(1), and 2 of the American Convention, to the detriment of Allan Brewer Carías.

30. As regards the right to a hearing by a competent, independent, and impartial tribunal recognized at Article 8(1) of the American Convention, the petitioners argue that the prosecutors and judges who acted in the charges and indictment brought against Brewer Carías are provisional officials, and that they have been replaced whenever their decisions were not “to the liking of the persecutors.” They hold that the provisional nature of judges and prosecutors violates the guarantee of independence and impartiality set forth at Article 8 of the American Convention insofar as they do not enjoy tenure in their position and can be freely removed or suspended.

31. They claim that the Venezuelan judicial system is fettered by a relationship of chronic dependence as a result of the endemic problem of the provisional status of judges and prosecutors. In this regard, they provide a detailed analysis of the provisional status of judges in Venezuela since August 1999, when the reorganization of the judiciary began, initially under the supervision of the Judicial Emergency Commission and later, another judicial reorganization commission. At present the process is being implemented by the Office of the Executive Director of

the Magistrature. They argue that the main effects of this indefinite process of “perpetual reorganization” is the provisionality of judicial appointments, the abandonment of competitive selection as outlined in the Constitution, and a complete lack of tenure for judges who are ultimately subject to free appointment and removal by the Commission of the day. They say that a similar situation exists for prosecutors.

32. As regards the way in which this alleged situation of lack of tenure and independence among judges and prosecutors has affected the judicial proceeding against Allan Brewer Carías, they hold that this process of reorganization with free appointment and removal of judges and prosecutors was in place before the criminal proceeding against Allan Brewer Carías was instituted and that it continues at present. Furthermore, two lower court judges and two members of the Court of Appeals were dismissed in connection with, or immediately after having adopted, decisions that could be considered favorable to Allan Brewer Carías. They allege that the decisions ordering those dismissals were discretionary, without due process for those concerned and without disclosure, at least in the case of Judge Bognanno, of the formal grounds that might have justified their termination. They argue that the lack of tenure, coupled with the openly political bias with which the Sixth Provisional Prosecutor has acted throughout have been factors that have resulted in patent procedural violations and left Allan Brewer Carías defenseless. They also say that this situation has an “exemplary effect” given the contrast between the punishment of provisional judges who have ruled in favor of the accused in this case, and the reward for the political loyalty shown by the Sixth Provisional Prosecutor, who, not long after filing multiple indictments in criminal proceedings with political implications, was promoted to Director General of Prosecutions of the Public Ministry and currently holds the position of Attorney General.

33. With respect to the right of all persons accused of a criminal offense to be presumed innocent so long as their guilt has not been proven according to law, as recognized in Article 8(2) of the American Convention, the petitioners argue that a proceeding was begun against Allan Brewer Carías based on a “well-known fact widely reported by the media,” even though he refuted the information that appeared in the press. The petitioners argue that according to the case-law of the Constitutional Chamber of the Supreme Court of Justice of Venezuela, a “well-known fact widely reported by the media” only occurs when there is news disseminated by the media that has not been refuted. They also argue that the office of the prosecutor shifted the burden of proof by requiring the defense to disprove the accusation that it leveled at Allan Brewer Carías.<sup>9</sup>

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

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<sup>9</sup> In this regard, the petitioners note that the Sixth Provisional Prosecutor plainly showed that, to her mind, it was up to the accused to disprove the charges, since she said -in the trial of another person indicted in the same proceedings- before the Twentieth Court of Control that “in the opinion of the Public Ministry the accusation made against [...] meets the legal requirements, and therefore, in any event it is up to his defense to prove otherwise. Why is it assumed that he did not conspire? The reasons why he accompanied citizen Allana [sic] Brewer Carías on the day of the events? What objections or opposition did he offer to the drafting of the decree? The lack of response and evidence to disprove the justified suspicions of the Public Ministry regarding his participation in the drafting of the decree are the reasons why it is considered unnecessary to elaborate on the indictment, since, in the opinion of the Public Ministry, they have not shown that he was not involved [...]”. The petitioners cite the brief of the Provisional Prosecutor of the Sixth Court of Control, dated June 3, 2005. Annex 18 to the original petition received January 24, 2007.

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

36. As for the National Assembly, they contend that in the report of the "Special Parliamentary Commission to investigate the events of April 2002" it has been shown that Allan Brewer Carías participated in conduct from which he was afforded no opportunity to defend himself. In the case of the Supreme Court of Justice, they allege that the court made a prejudgment by indicating in writing that "the publicly known testimony of numerous witnesses identifies Allan Brewer-Carías as one of the authors of the decree in question." They allege that the Attorney General of the Republic also prejudged Allan Brewer Carías' guilt in his book "*Abril Comienza en Octubre*," in which he assumes as true certain assertions made in the media that were under investigation by his office, and which were never ratified with testimony or corroborated. Finally, they say that members of the diplomatic corps publicly referred to Allan Brewer Carías as a "conspirator" and "author of the April 12 Decree," which conduct imputed to him without evidence or any judicial finding of guilt.

37. With respect to the right of the accused to have adequate time and means for the preparation of his defense, as established at Article 8(2)(c) of the American Convention, the petitioners allege that during the investigative stage Allan Brewer Carías's defense counsel were unable to obtain a copy of any part of the record; rather, they were only allowed, personally, to transcribe manually the various documents in the record, which ran to thousands of pages in 27 sections. They say that this refusal to issue copies was an obstruction of the right to defense, without any reasonable grounds, and deprived Allan Brewer Carías and his attorneys of a reasonable time and conditions for his defense. They argue that the right to be afforded the necessary facilities to mount a defense is a fundamental element of due process, which was denied to Allan Brewer Carías.

38. With respect to the right of the defense to examine witnesses and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts, as established in Article 8(2)(f) of the American Convention, the petitioners allege that Allan Brewer Carías's defense was not allowed to be present during the examination of the witnesses called to testify by the Sixth Provisional Prosecutor. In this regard, they hold that the defense was arbitrarily refused requests to produce proof or evidence to protect the rights of Allan Brewer Carías. They indicate that in some cases the Prosecutor admitted questions in writing, but that it was not possible to submit them in the case of supervening witnesses who came forward in the course of the investigation and "gave their testimony in secret." They note specifically that on October 5, 2005, testimony was taken from General Lucas Rincón, without the defense having been given called or given notice. In addition, they argue that the ten journalists who divulged the "well-known facts reported by the media" that were the basis for the indictment were not called to ratify their assertions. They note that on being called by the defense of Allan Brewer Carías, they said that they had not been witnesses to the facts, thus the petitioners consider inadmissible the referential evidence that was the basis for indicting Allan Brewer Carías.

39. As for the appearance of the witnesses offered by the defense, they allege that on April 21, 2004, the Sixth Provisional Prosecutor rejected the testimony of Nelson Mezerhane, Nelson Socorro, Yajaira Andueza, Guaicaipuro Lameda, and Leopoldo Baptista on the grounds that they were referential witnesses whose testimony lacked any evidentiary value under the rules in force. In addition, they allege that they were denied the anticipated filing of the statement by Pedro Carmona Estanga, and that as it had been submitted in writing, it had likely been "ignored."

40. With respect to the argument of the State regarding submission of evidence and the appropriate time for contesting in the trial stage evidence collected in the investigation, the petitioners claim that the State denied the accused judicial guarantees provided in Article 8 of the American Convention during the investigation stage, which explains and proves that Allan Brewer Carías “has been a victim of a massive violation of the right to a normal proceeding.” They say that perhaps “for the State the whimsical belief of a prosecutor suffices to blithely make accusations with no evidence other than the dictates of his fancy and without allowing the person concerned to control or contest the evidence on which they claim to base their belief.”

41. They argue that there is nothing in the Organic Code of Criminal Procedure (hereinafter “COPP” for the Spanish) to prevent the accused from upholding all their fair trial guarantees. They held that Article 125 of the COPP sets out the rights of the accused, which include to request the Public Ministry to carry out investigation procedures to disprove the charges made and to request that pre-trial detention be declared improper in advance, as was requested on October 26, 2005, and on which the judge of control did not make a decision. They argue that the accused has the right that the investigation conclude exculpating him, through a final decision that proposes the dismissal of this case (COPP, Arts. 315-320), and even if the final decision is to indict, the accused has the right in a preliminary hearing before a judge of control to have his case dismissed. They hold that the fair trial guarantees recognized in Article 8 of the American Convention apply at every stage of all proceedings.<sup>10</sup>

42. Furthermore, in the indictment, the prosecutor used a series of videos as supposed evidence against Allan Brewer Carías, which, in the prosecutor's opinion, contained statements by journalists and interviewees that incriminated him. They say that Allan Brewer Carías asked to be shown the videos concerned on several occasions, but he was only shown the contents of some of them. On different dates thereafter, Allan Brewer Carías's defense counsel asked to be shown the contents of those videos and received diverse negative replies, variously citing as reasons that the tapes had allegedly not been found all, that because of the large number of accused in the investigation it was difficult to find a suitable time, or that the office was busy with other matters at the time. Next, a procedure was requested that consisted of ordering technicians to prepare transcripts of all the videos in the record that contained interviews with journalists and were intended to be considered as supposed elements of proof for the indictment; however, this procedure was denied in a decision dated April 21, 2005.

43. The petitioners say that after the Special Amnesty Law was adopted, the Allan Brewer Carías's prosecution should have ceased given that the amnesty decree suppressed the offense. In addition, they argue that the refusal of the motion to dismiss under Decree 5790, with Rank, Value, and Force of a Special Amnesty Law was unfounded, which violated Articles 8 and 1 of the American Convention, and in itself contains a discriminatory principle insofar as it restricted its application to those who had surrendered themselves to the authorities and submitted to criminal proceedings, and was applied to persons in the same circumstances as Allan Brewer Carías; that is, whose arrest and pre-trial detention had been ordered in connection with acts relating to the coup d'état in 2002.

44. With respect to the right to freedom of expression established in Article 13 of the American Convention, the petitioners allege that because of Allan Brewer Carías's open dissidence with the policies of the government, some journalists presumed that he was associated with the establishment of the so-called “transition government.” They allege that the government and its institutions have used the mere presence of Allan Brewer Carías at “Fort Tiuna” on the eve of the

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<sup>10</sup> In support of their arguments they cite I/A Court H.R. *Case of Claude-Reyes et al v. Chile*. Judgment of September 19, 2006. Series C No. 151, par. 116.

issuance of the Carmona Decree as a pretext for hushing the voice of an important opposition figure, accusing him of having been involved in the coup. In this sense, they consider that the criminal proceeding against Allan Brewer Carías constitutes a violation of his right to freedom of expression, established in Article 13 of the American Convention.

45. With respect to the right to judicial protection established at Article 25 of the American Convention, the petitioners allege that in Venezuela there is no effective judicial remedy for the protection of the rights of Allan Brewer Carías. In this respect, they indicate that Allan Brewer Carías repeatedly turned to the Provisional Judge of Control and to the Court of Appeals in order to have his rights restored in the course of the proceeding. They allege that, in response, the courts held that they did not have legal powers to protect his rights, that his motions were time-barred or that they could not interfere with the autonomy of the prosecutor's office in the conduct of the investigation.

46. In that connection, they say that Allan Brewer Carías and his attorneys presented themselves repeatedly at the office of the Sixth Provisional Prosecutor during the investigation phase. They say that Allan Brewer Carías went to that office almost daily for nine months, even if it was simply to make a manuscript copy of the proceedings, a copy of which was systematically denied to him. However, they argue that those appearances proved futile since the provisional prosecutor did nothing to rectify the irregularities that arose in the preparation of the case file and arbitrarily rejected the requests of the defense and the evidence that was offered to her.

47. Furthermore, they claim that in the instant case the way in which the State acted also clearly demonstrates the absence of an effective judicial remedy to protect Allan Brewer Carías from violations of his human rights, particularly when faced with a judicial system and a public ministry utterly devoid of independence.

48. They indicate that Allan Brewer Carías repeatedly turned to the provisional judge of control and the Court of Appeals to seek the restoration of his rights. Provisional Judge of Control Bognanno decided that he lacked legal authority for that purpose and that he could not interfere, since the provisional prosecutor enjoys "autonomy" in the conduct of the investigation. The petitioners argue that in light of the foregoing, the only judicial recourse available against the violation of the right to a fair trial guaranteed by the Constitution and the Convention was and is the vacation of the thus flawed judicial proceedings on grounds of unconstitutionality, in accordance with Article 191 of the Organic Code of Criminal Procedure:

Article 191. Vacation. All proceedings having to do with the intervention, presence, and representation of the accused shall be vacated in those cases and forms recognized in this Code, or when they entail a failure to observe or a violation of fundamental rights and guarantees envisaged in this Code, the Constitution, laws, and international treaties, conventions, or agreements signed by the Republic.

49. Thus, they note that the answer and objection to the indictment of November 8, 2005, requested the judge to vacate the proceedings on account of the above violations, and concluded with the following motion:

In light of the foregoing, we respectfully move for the vacation of all the proceedings in this case, owing to the systematic and massive violation of Dr. Allan Brewer Carías's constitutional rights and guarantees, as has been reflected throughout this chapter, and that the record be ordered returned to the Office of the Superior Prosecutor of the Metropolitan Area of Caracas so that it might appoint an impartial prosecutor to open such investigations as it considers necessary, observing the constitutional guarantees of those investigated.

50. They hold that the COPP does not explicitly provide a time limit for adopting a decision on a motion to vacate based on "violation of fundamental rights and guarantees," as was demanded by Allan Brewer Carías's defense. Therefore, such a motion should be processed in accordance with the general provision contained in Article 177 of the COPP, for written proceedings in which no other deadline has been set:

Article 177. Time limits for decisions. The judge shall adopt decisions on purely procedural matters forthwith. All orders and final judgments that follow oral proceedings shall be issued immediately the hearing concludes. In written proceedings decisions shall be adopted within three days afterward.

51. Under this general and supplementary rule, a decision on the motion to vacate should have been issued within three days after November 8, 2005; however, it would appear that has not yet occurred. In other words, there has been an unwarranted delay of more than four years in the decision on the motion to vacate, which, according to the petitioners constitutes a violation of Article 25 of the Convention.

52. They consider that in cases of political persecution, international law comes to the aid of one who seeks to protect himself or herself from the state in question. They indicate that this is the cornerstone of asylum and refuge as legal institutions, but that it is also a humanitarian institution that is broader in scope. They argue that someone who is persecuted has a right not to be returned to his persecutors, to the point that international law imposes on a state that denies refuge or asylum a legal duty not to return the victim to the jurisdiction of the state that is persecuting them, by means of the rule known as *non-refoulement*.

53. Furthermore, the petitioners argue that the State breached its duty to adopt the measures necessary, legislative or otherwise, to uphold the rights protected in the Convention, in violation of Articles 2 and 1(1) thereof. They indicate that the national legislation is not adequate in relation to the appointment and permanence in their posts of judges and prosecutors, to uphold the rights of Allan Brewer Carías and of all Venezuelans to be heard by an independent and impartial tribunal. Furthermore, they argue that Article 2 of the American Convention requires states parties to regulate criminal proceedings in such a way as to ensure that judicial guarantees are observed throughout the proceedings, including the investigation stage, which entails adopting all the measures necessary to ensure that the provisions of the Convention are effectively fulfilled.

## **B. The State's position**

### **1. Context**

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

55. The State emphasizes that the Constitution does not allow for the "illegal assumption of the office" nor does it establish that a Decree of Transition can become a mechanism

to repeal the Constitution or to fill the void created by the absence of the President of the Republic. The State points out that the decree adopted within the context of the events of April 12 and 13, 2002, intended to empower the President of the de facto Junta to reorganize the "Powers of the State" without establishing any limits to the nature of its powers, their scope or their duration.

56. The State points out that the petition makes clear that Allan Brewer Carías knew of the existence and content of the decree in question and that he went to the Miraflores Palace to give Pedro Carmona his opinion. The State rejects the petitioners' claim that Allan Brewer Carías disagreed with the content of the decree.

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

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

## **2. Submissions related to the judicial proceeding**

59. In its submissions on merits the State requests the Commission to dismiss as spurious and unfounded the arguments of the petitioners in relation to Articles 2, 8, 13, and 25 of the American Convention, taken in conjunction with Article 1(1) thereof, and wishes to "state expressly for the record the bad faith and temerity of the action intended by the representatives of the supposed victim against the Venezuelan state."

60. The State provides a detailed account of all the remedies, rights, and obligations of the petitioners for upholding their rights, including the presentation of new evidence, examination of witnesses and experts, proceedings for better evaluation of claims, publicity, settlement, continuity, oral proceedings, to testify as often as they consider appropriate, or not to testify. The State notes that the accused can deny, contradict, and argue matters of fact and law; submit answers and rejoinders; recuse, and confer at all times with his attorney, without any of the foregoing entailing a suspension of the hearing; in other words, he may avail himself of any rights and guarantees that might serve to accomplish the aims of the defense.

61. The State cites Article 327 of the COPP of 2005, which does not set out obligations with respect to the absence of the accused from the preliminary hearing and cites the COPP of 2009,<sup>11</sup> which provides that if the preliminary hearing is postponed more than twice due to the failure of the accused to appear, the proceeding must continue for the other accused and the judge shall hold the hearing with those who are in attendance and separate from the case those who have

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<sup>11</sup> The State cites the COPP of September 4, 2009. Brief of the Ministry of Foreign Affairs, AGEV/000530, November 17, 2009.

not appeared. If the hearing is not held within the prescribed time, the parties may invoke such disciplinary actions as may be appropriate against the person responsible for the failure of the hearing to be held.

62. The State also cites Article 328 of the COPP of 2005 and 2009, which provides the accused with the possibility of invoking a series of procedural acts, such as filing objections, motions for revocation of precautionary measures, and motions to suspend, among others. In this regard, the State considers that the petitioners still have a number of remedies pending which, if used, would give rise to actions that they could invoke to uphold their rights.

63. The State argues that in spite of all the remedies at their disposal, the petitioners seek to violate the complementary nature of the inter-American human rights system with an argument concerning the exceptions to the rule of exhaustion of domestic remedies. It says that it "does not understand if this is due to abject ignorance or bad faith taken to the extreme."

**a. Contentions regarding the request for the annulment of the proceedings**

64. The State claims that it is absurd and malicious of the petitioners "to tell the Commission that the request for the annulment of the entire investigation and the proceedings can be resolved without the presence of the accused, when those requests were made in a document responding to the accusation and are the logical consequence of the arguments of the defense 'to reject all parts of the proceedings, as regards the considerations of both fact and law.'" It holds that if the defense is responding to the accusation, then that is because it is exercising its powers and authority set out in Article 328 of the COPP<sup>12</sup> and it would fall to the judge, in the presence of all the parties, including the accused, to resolve the requests made by each,<sup>13</sup> as provided for in Article 330 of the COPP.<sup>14</sup> It maintains that the request for annulment is contained in the response to the accusation and is not, as the petitioners claim, an autonomous request that can be resolved in the absence of the accused, in that it does not address incidental matters that affect rights but is instead a request that bears on the merits and essence of the preliminary hearing itself<sup>15</sup> and, as such, must be resolved in the presence of the parties in order to avoid abridging their rights.

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<sup>12</sup> The State cites the COPP, published in the Official Gazette of the Republic of Venezuela, special edition No. 5.930, September 4, 2009. Submission from the Ministry of Popular Power for Foreign Affairs No. AGEV/000530 of November 17, 2009.

<sup>13</sup> To support its arguments, the State cites: Constitutional Chamber of the Supreme Court of Justice, Case No. 09-0173, decision of October 19, 2009: "[...] that the threat or violation of constitutional rights alleged by the plaintiff is not actionable by the Fourth Control Judge, in that 'said judge may only rule on the accused's request at the preliminary hearing [...] the ruling sought by the plaintiff for the annulment of the prosecutor's indictment may only be given at the preliminary hearing, which has not taken place due to the defendant's failure to appear' [...] Regarding the failure to rule on requests for '...joinders, annulments, and amended pleadings...', in this Chamber's opinion such requests should be resolved at the preliminary hearing, as stipulated in Article 330 of the Organic Code of Criminal Procedure; for that reason, the purported threat to or violation of constitutional rights alleged by the plaintiff is not actionable by the Fourth Control Court [...], in that said court may only rule on the accused's request at the preliminary hearing [...]." (State's emphasis). Submission from the Ministry of Popular Power for Foreign Affairs No. AGEV/000530 of November 17, 2009, pp. 44 and 45.

<sup>14</sup> The State cites the COPP, published in the Official Gazette of the Republic of Venezuela, special edition No. 5.930, September 4, 2009. Submission from the Ministry of Popular Power for Foreign Affairs No. AGEV/000530 of November 17, 2009.

<sup>15</sup> To support its arguments, the State cites: Constitutional Chamber of the Supreme Court of Justice, No. 01-2304, decision of November 16, 2001: "Note that calling a preliminary hearing does not presuppose the existence of a violation of the plaintiff's right of personal security and right of defense, since it is at the preliminary hearing that the control judge determines the procedural viability of the prosecutor's indictment, upon which the existence or otherwise of the oral proceedings will depend. In other words, the preliminary hearing determines the object of the trial – through an examination of the materials offered by the prosecution service – and whether the involvement of the defendant in the facts with which he is charged is 'probable'; thus, the holding of such a hearing in no way harmed the defendant in the main proceedings

Continued...

65. The State maintains that the Commission is in error in equating the reply to the Public Prosecution Service's accusations and petitions to an improperly termed remedy for annulment – a term that does not exist since these are correctly spoken of as forms of challenges and nullifications as established in Articles 190 *et seq.* of the COPP, which represent the ways in which the petitioners can file disputes but which must be resolved at the preliminary hearing in the presence of the parties. It states that if the Commission speaks of a remedy for annulment, it is easy, albeit incorrect, to separate the preliminary hearing from the inaccurately termed remedy and then argue, and maintain, the exception to the exhaustion of domestic remedies rule. It maintains that the petitioners have not filed a remedy for annulment but rather a reply to the prosecution service's accusation, which contains various requests that cannot be resolved in the absence of the accused. Consequently, the paralysis in the proceedings is not due to an unwarranted delay on the part of the State, but rather because of the defendant's failure to appear.

66. The State maintains that both the prosecutor's requests in the accusation and those of the defense in its reply remain unresolved not because it seeks to violate the rights of the accused or to delay the proceedings, but because for as long as the accused is absent from the criminal trial and a fugitive from Venezuelan justice, no examination or decision can be made regarding requests made by the parties if they are not all present; moreover, there is also the fact that the requests touch on and have a determining role in deciding the merits of the case.

**b. Contentions regarding the right to an effective remedy and to due process**

67. The State claims that the right to judicial protection does not mean that an individual must obtain decisions that are in line with his interests; on the contrary, it means that the individual enjoys the possibility of access to the justice system to defend his contentions and to secure, in an efficient way, a response from State that is grounded on law.

68. Venezuela holds that the charges against Allan Brewer Carías were made in accordance with the principles and procedural guarantees established in both the Constitution and the associated criminal law and in the treaties, conventions, and international agreements that the State has signed. It maintains that at the indictment, on January 27, 2005, Allan Brewer Carías was duly assisted by lawyers of his choosing, León Enrique Cottin Núñez and Pedro Nikken Bellshawog. It reports that on that occasion, the Sixth Provisional Prosecutor asked the accused: "[...] if he understood the reasons charges were being brought, whether he had any questions about the matter [...]" and that the accused made no response. In addition, he was asked whether he wished to give a statement, to which the accused replied that he did not. It indicates that the deed of indictment was signed by his defense team and that later; Allan Brewer Carías left the prosecutor's office in full enjoyment of his freedom, because the proceedings against him were being pursued without an order for him to be held in custody.

69. It holds that Allan Brewer Carías's legal representatives fully exercised his right of defense and that they requested that formalities be pursued in order to cast light on the facts. It maintains that in response, the Public Ministry carried out those actions that met the requirements of relevance and necessity.

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...continuation

[...]” Submission from the Ministry of Popular Power for Foreign Affairs No. AGEV/000530 of November 17, 2009, pp. 43 and 44.

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

71. The State notes that after Allan Brewer Carías was formally accused of the crime of conspiring to violently change the Constitution on October 21, 2005, he informed the judge, in writing, on May 10, 2006, of his plans to leave the country, falsely assuming that his rights and constitutional guarantees of defense were being violated and because “[...] the distinguished University of Columbia has offered him the opportunity to fulfill an old professional aspiration, to become a member of their faculty, and that he has decided to wait until the circumstances were more conducive to ensuring an impartial trial with respect for his guarantees [...].”

72. It reports that as a result, on June 2, 2006, the Public Ministry requested that the Twenty-fifth Temporary Judge issue a judicial preventive detention order against Allan Randolph Brewer Carías, even though the charging documents included a request for such an order. Venezuela maintains that his refusal to submit to criminal prosecution is not only an affront against the investigation carried out by the Public Ministry but also against the entire justice system.

73. For that reason, the State claims, on June 15, 2006, the Twenty-fifth Temporary Judge ordered the custody of the accused, given the presence of all the admissibility requirements set forth in Article 250 of the COPP, in accordance with Nos. 1, 2, 3, and 4 of the first paragraph of Article 251 thereof.

74. In response to the petitioners’ contention that presumption of innocence was violated in that it fell to the defense to counter the charges made by the prosecution service (see *supra* III A), the State points out that Article 125.5 of the COPP,<sup>16</sup> read in conjunction with Articles 131 and 305, outlines an active and pro-active role for the defense within the investigation in order to guarantee due process of law, and that it can request that other actions or investigations be pursued in order to discredit the charges filed as long as they meet the relevance, need, and usefulness requirements, and as long as they are directly related to the investigation and help shed more light on the facts.

75. In response to the petitioners’ allegation regarding the lack of access to “alleged evidence against the accused, and to witnesses and other evidence he has brought forth”<sup>17</sup> (see *supra* III A), the State contends that, in the preparatory and intermediate phases, the petitioners confuse basic concepts that are necessary in order to understand the process and to make claims of that nature, such as the investigations, elements of conviction, elements of proof and actual

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<sup>16</sup> The State refers to Article 125 of the COPP. “Rights: The accused shall have the following rights: 1. To be specifically and clearly informed of the charged acts; 2. To communicate with family members, lawyer of choice, or association of legal assistance, to report his detention; 3. Be assisted, from the initial stages of the investigation, by a lawyer chosen by the accused or his family members and, otherwise, by a court-appointed attorney; 4. Be assisted, free of charge, by a translator or interpreter if the accused does not understand or speak the Spanish language; 5. Request the Public Ministry carry out investigation procedures to disprove the charges made; (State’s emphasis); 6. Appear directly before the Judge in order to make a statement; 7. Request that the investigation be activated and have access to its content, except in cases which have been declared reserved in certain parts and only for the time that this statement continues; 8. Request the pre-trial detention be declared improper in advance; 9. Be subjected to the constitutional precept that exempts one from making statements and, even in the case of consenting to make a statement, not making it under oath; 10. Not be subjected to torture or other cruel, inhumane or degrading treatment to personal dignity; 11. Not be subjected to techniques or methods that alter free will, even with consent; 12. Not be tried *in absentia*, except as set forth in the Constitution of the Bolivarian Republic of Venezuela.” Submission from the Ministry of Popular Power for Foreign Affairs No. AGEV/000394 of August 25, 2009, pp. 30 and 31.

<sup>17</sup> The State cites paragraph 5 of the petition lodged with the Commission on January 24, 2007.

evidence; and that they do not even know at which stage of the Venezuelan system of criminal procedure those should be used.

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

77. With regard to the petitioners' allegation that "in general... the right of the defense to question witnesses present in court was violated [...]" (see *supra* III A), the State argues that the petitioners confuse "evidence" introduced in court during the trial stage with the "elements of conviction" presented in the office of the prosecutor during the investigation phase. In that regard, the State contends that the questioning of witnesses conducted by the prosecutor is not the equivalent of testimony given in court during the trial stage, in accordance with the provisions of Articles 355 and 356 of the COPP. Once the identity of a person called to testify by the prosecutor's office is known, the defense may request that the Public Ministry ask the witness certain questions, providing it demonstrates the relevance, need, usefulness, and connection thereof to the investigation.<sup>18</sup> Venezuela points out that in Brewer Carías's case, the defense did not ask the Public Ministry to do so. The defense must show the relevance, need, usefulness, and connection to the investigation of the persons it suggests the prosecutor should interview during the investigation phase, and it may request that certain questions be asked as long as they meet the same requirements. The State contends that Brewer Carías's attorneys did not meet this requirement. It points out that during interviews at the prosecutor's office, the defense may actively participate in that investigation (which is not a proceeding to enter evidence for trial) and that will be reflected in the record of the interview. The State also points out that if the results of such investigations are admitted by the Court of Control and then progress on to the Trial Court, it is at that point that the defense may question and cross-examine witnesses and can control the process of witness examination. Venezuela stresses that the present case has not reached the trial phase and, therefore, the defense will have the opportunity to examine and cross-examine witnesses whose testimony has been admitted by the Court of Control in the intermediate phase. Thus, the State comes to the conclusion that the petitioners are confusing<sup>19</sup> the investigation phase, the intermediate phase, and the trial phase as provided for in Venezuelan Criminal Procedure.

78. The State contends that Allan Brewer Carías faced the criminal proceedings against him, in liberty, without an arrest warrant issued in his name, until July 14, 2006. The State

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<sup>18</sup> The State cites Articles 305, 125.5, and 131 of the COPP. Submission from the Ministry of Popular Power for Foreign Affairs No. AGEV/000394 of August 25, 2009, p. 38.

<sup>19</sup> The State indicates that said confusion is also reflected in the petitioners' citation of Report No. 85/99 of Case No. 11.258 (Figueredo Planchart), which specifically refers to the acts undertaken before a tribunal and not during the investigation.

therefore refutes the petitioners' contention that "[...] the State tries to deny Dr. Brewer Carías his physical freedom, denies his right to stand trial in liberty, and restricts his freedom of movement by issuing an order for his preventive detention which is not supported by any immediate need and which does not meet minimum national and international legal standards to justify such an exceptional measure." The State emphasizes that from April 12, 2002, until he left the country on June 2, 2006, Allan Brewer Carías enjoyed absolute liberty, and it contends that it was Allan Brewer Carías who provoked the activation of the legal and constitutional mechanisms on which the order of preventive detention was based.

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

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

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

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

81. Regarding the possible restriction of Allan Brewer Carías's access to the remedies offered by domestic jurisdiction by the temporary status, independence, and impartiality of the judges, the State maintains that, as the Inter-American Court has established, it must be shown that in the specific case, the courts' decisions were subordinated to matters relating to the temporary status, independence, and impartiality of the judges.<sup>20</sup>

82. The State claims that Allan Brewer Carías, currently a fugitive from justice, and his defense team decided, in a most irresponsible way and based on their opinions and an offer of work from a foreign university, to absent themselves from the criminal trial on the grounds of an alleged lack of trust that, to date, they have not been able to substantiate; furthermore, because they have not obtained positive answers, they seek to break the most basic rules of procedure, in order to avoid not the trial but the preliminary hearing. Finally, it maintains that the credibility of international human rights protection agencies bears a close relation to the observance of the principles of objectivity, impartiality, good faith, and non selectivity.

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<sup>20</sup> To support its arguments, the State cites: I/A Court H. R., *Case of Ríos et al. v. Venezuela*, Judgment of January 28, 2009, Series C No. 194, and *Case of Perozo et al. v. Venezuela*, Judgment of January 28, 2009, Series C No. 195. Submission from the Ministry of Popular Power for Foreign Affairs No. AGEV/000530 of November 17, 2009, p. 59.

### **3. Contentions regarding the right of freedom of expression**

83. Regarding the analysis of the alleged violation of the right of freedom of expression at the merits stage, the State maintains that this situation is “one of the most veiled forms of violating the State’s right of defense when groundless claims with no evidence whatsoever are considered, in an attempt to introduce them ‘later’ at the merits stage.” On this point, the State contends that “the petitioners have not presented sufficient evidence to show that the alleged facts could tend to establish a violation.” The State “cannot accept the Commission’s admitting a claim [...] when the possibility of the alleged violation has not even been shown [...] but merely insinuated through entirely subjective appreciations.”<sup>21</sup>

84. It maintains that it cannot be accused of wanting to silence Allan Brewer Carías’s voice when, even following his indictment, he has made use of his right of free expression and “has continued to refer to Venezuelan State and even his own case in the terms he sees fit.”<sup>22</sup> Venezuela submits that Allan Brewer Carías’s books have been subject to no restrictions, bans, or censorship. It holds that the violation of Allan Brewer Carías’s right of freedom of expression is nonexistent.

## **IV. ANALYSIS OF THE MERITS**

### **A. Findings of fact**

#### **1. Background**

85. Between December 2001 and April 2002, there was a mobilization within society to protest against various government policies.<sup>23</sup> On April 11, 2002, the commanders of the Armed Forces stated their repudiation of the authority of the President of the Republic, and the next day General Lucas Rincón informed the population that “the President of the Republic was asked to resign from his position, which he accepted.”<sup>24</sup>

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<sup>21</sup> Submission from the Ministry of Popular Power for Foreign Affairs No. AGEV/000530 of November 17, 2009, p. 49.

<sup>22</sup> To support its arguments, the State cites: “La demolición del Estado de derecho y la destrucción de la democracia en Venezuela,” Conference given at the office of the Attorney General of the State of Rio de Janeiro, August 26, 2009; The Citizen’s Access to Constitutional Jurisdiction: Special reference to the Venezuelan system of Judicial Review, Round-table conference of the International Association of Constitutional Law, IACL, on “Challenges to the consolidation of the Rules of Law of Democracy in Latin America. Compared experiences.” Porto de Galinhas, State of Pernambuco, Brazil, August 24, 2009; “El Juez Constitucional al servicio del autoritarismo y la ilegítima mutación de la Constitución: el caso de la Sala Constitucional del Tribunal Supremo de Justicia de Venezuela (1999-2009).” Notes for seminar address by Prof. Eduardo García de Enterría, Law School of the Complutense University of Madrid, April 1, 2009; Reforma Constitucional, Asamblea Constituyente y Control Judicial Contencioso Administrativo: el caso de Honduras (2009) y el precedente venezolano (1999), New York, July 2009; “Historia. Los sucesos de abril de 2002 y las consecuencias de la renuncia del Presidente Hugo Chávez Frías a la Presidencia de la República,” April 2009; El Juez Constitucional vs. La alternabilidad republicana, 2009. Notes on the judgment of the Constitutional Chamber, of February 3, 2009, upholding the constitutionality of the 2008-2009 constitutional amendment process to amend the principle of alternance in government by allowing continuous and indefinite reelection to elected office, to be submitted to referendum on February 15, 2009; “En mi propia defensa,” Ed. Jurídica Venezolana, 2006, and “Mi testimonio ante la Historia.” Submission from the Ministry of Popular Power for Foreign Affairs No. AGEV/000530 of November 17, 2009, pp. 49 and 50.

<sup>23</sup> “The political climate in Venezuela has shown a marked tendency to radicalization, which became accentuated in the early months of 2002 and culminated in a breakdown of the constitutional order on April 11, with its subsequent restoration on April 14 of that year.” IACHR, Report on the Situation of Human Rights in Venezuela, 2003, OEA/Ser.L/V/II.118 doc. 4 rev. 1, October 24, 2003, Executive Summary, para. 4. During the serious events of April 11, 2002, the Commission condemned the coup d’état carried out against the constitutional order.

<sup>24</sup> Albor Rodríguez (ed), *Verdades, mentiras y Videos. Lo más relevante de las interpellaciones en la Asamblea Nacional sobre los sucesos de abril*, Libros El Nacional, Caracas (2002), pp. 13 and 14, cited in: original petition received on January 24, 2007, p. 9.

86. In the early morning hours of April 12, 2002, Pedro Carmona Estanga, one of the leaders of the civic protests, communicated with jurist Allan Brewer Carías<sup>25</sup> and sent a vehicle to pick him up at his residence. Brewer Carías claims he was taken to Fort Tiuna, the headquarters of the Ministry of Defense and of the General Command of the Army, and that:

They took me to a small cubicle where Dr. Carmona was; I greeted him and he asked me to analyze a document they had given him when he arrived there, to which end he put me in touch with two young lawyers by the names of Daniel Romero and José Gregorio Vásquez, who were the ones who showed me the document [...].<sup>26</sup>

87. That document, later known as the “Carmona Decree,” ordered the dissolution of the established authorities and the establishment of a “government of democratic transition.”<sup>27</sup>

88. At around midday, Allan Brewer Carías went to Miraflores Palace. That same day Mr. Pedro Carmona Estanga announced the dissolution of the constituted authorities and the establishment of a “government of democratic transition,” among other measures. Hugo Chávez was reinstated as President of the Republic on April 13, 2002.<sup>28</sup>

89. The resolutions adopted by the Permanent Council and General Assembly of the Organization of American States defined the events of April 12 and 13, 2002, as a “abrupt interruption of the democratic and constitutional order” in Venezuela.<sup>29</sup>

90. Later, the media<sup>30</sup> broadcast stories about the presence of Allan Brewer Carías at Tiuna Fort in the early-morning hours of April 12, 2002, connecting him with the drafting of what became known as the Carmona Decree. For example, the media reported that:

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<sup>25</sup> Allan Brewer Carías is a specialist in constitutional law, who expressed severe criticisms of a series of decisions adopted by decree by the executive branch in Venezuela. He has been a senator and cabinet minister, and was a member of the National Constituent Assembly in 1999. Original petition received on January 24, 2007, paras. 13 to 20.

<sup>26</sup> **Annex 1.** Statement of Allan Brewer Carías to the prosecution service. Cited in the formal indictment of Allan Brewer Carías, January 27, 2005; Annex 5 to the original petition received on January 24, 2007.

<sup>27</sup> **Annex 2.** The Decree is contained in the formal indictment of Allan Brewer Carías, January 27, 2005; Annex 5 to the original petition received on January 24, 2007.

<sup>28</sup> “The Commission issued a press release to this effect on April 13, 2002, in which it expressed, *inter alia*, its strong condemnation of the acts of violence and its regret that the most senior authorities were removed from public office, and cautioned that these acts represented a breach of constitutional order.” IACHR, Report on the Situation of Human Rights in Venezuela, 2003, OEA/Ser.L/V/II.118 doc. 4 rev. 1, October 24, 2003, para. 7.

<sup>29</sup> **Annex 3.** OAS, Resolution of the Permanent Council, The Current Situation in Venezuela, OEA/Ser.G, CP/doc. 3616/02, May 28, 2002. See: CP/Res. 811 (1315/02). IACHR, Report on the Situation of Human Rights in Venezuela, 2003, OEA/Ser.L/V/II.118 doc. 4 rev. 1, October 24, 2003, para. 534.

<sup>30</sup> **Annex 4.** Edgar López, *Carta Interamericana Democrática fundamenta Gobierno de Transición*. In: *El Nacional*, April 13, 2002; Laura Weffer Cifuentes, *Cómo se fraguó la renuncia de Hugo Chávez*. In: *El Nacional*, April 13, 2002; Mariela León, *Primer Presidente Empresario*. In: *El Universal*, April 13, 2002; Patricia Poleo, *Factores de poder*. In: *El Nuevo País*, April 16 and 17, 2002; Ricardo Peña, *Círculo íntimo*. In: *El Reporte*, April 18, 2002; Patricia Poleo, *Factores de poder*. In: *El Nuevo País*, April 25, 2002; Francisco Olivares, interviewing Daniel Romero, *Los militares manejaron todas las decisiones políticas*. In: *El Universal*, April 26, 2002; Milagros Socorro, *Al país se le tendió una trampa*. In: *El Nacional*, April 27, 2002; Francisco Olivares, *Historia del segundo decreto*. In: *El Universal*, April 28, 2002; Nitu Pérez Osuna, *El video de Chávez retenido*. In: *El Mundo*, May 3, 2002; Television programs of Rafael Poleo and Patricia Poleo, *Dominio Público* (Venevisión), April 12, 2002; César Miguel Rondón, interviewing Teodoro Petkoff, on *30 Minutos* (Televisión), May 12, 2002; Domingo Blanco, interviewing Patricia Poleo, on *Primera Página* (Globovisión), April 15, 2002; César Miguel Rondón, interviewing Patricia Poleo, on *30 Minutos* (Televisión), April 16, 2002; Luisiana Ríos and Carlos Omobono, interviewing Patricia Poleo, on *La Entrevista* (RCTV), April 16, 2002; Carlos Fernández, interviewing Tarek William Saab, on *Triángulo* (Televisión), May 10, 2002; *Voces de un país* program, with Luis García Figueroa (Globovisión), May 28, 2002. Formal indictment of Allan Brewer Carías of January 27, 2005. Annex 5 to the original petition received on January 24, 2007.

At the headquarters of the Army Command, in the zone reserved for the Chairman of the Joint Chiefs of Staff, Pedro Carmona had been installed in a cubicle.... In the cubicle across from him was Allan Brewer Carías, drafting by hand what would become the Constitutive Act of the Transition Government.... Brewer Carías replied: 'The resignation doesn't matter. Lucas is about to announce it on television and that will be more than enough....'<sup>31</sup>

91. In numerous press conferences, Allan Brewer Carías denied what he called speculations.<sup>32</sup> On April 13, 2002, the alleged victim gave an interview in which, with reference to the "government of democratic transition," he said:

[...] that the constitutive document of the transition government is based on the Inter-American Democratic Charter, which Venezuela signed on September 11, 2001... And so is the new government's legal reference point the Inter-American Democratic Charter, and not the National Constitution of 1999, drafted by the Constitutional Assembly and validated in a national referendum? Not exactly. What this was was the exercise of the civic right of resistance or civil disobedience, which is guaranteed and provided for in Article 350 of the National Constitution. The people of Venezuela, through their representatives, repudiated a regime, authorities, legislation that went against democratic principles and values and that violated constitutional rights and guarantees. Undeniably, there was a civil rebellion, followed by the resignation of the President of the Republic, as was announced by the military command. The constitutional vacuum had to be filled by the representatives of different sectors of society, on the basis, I insist, of Article 340 of the Constitution. How can you speak of abiding by the rule of law if the governing council agreed to dissolve the legitimately established powers? The dissolution of the legitimately established powers is a manifestation of that right of civil disobedience.<sup>33</sup>

92. The National Assembly appointed a "Special Parliamentary Commission to investigate the events of April 2002." In its July 2002 report, this Special Commission urged the Citizen's Branch of Government to investigate and determine the responsibilities of citizens "who, without being vested with public functions, acted in an active and coordinated fashion in the conspiracy and coup d'état."<sup>34</sup> The list of citizens to be investigated included Allan Brewer Carías "as his participation in the planning and execution of the coup d'état has been shown."<sup>35</sup>

## 2. Established facts regarding the judicial proceedings

93. Proceedings to indict Allan Brewer Carías were set in motion on April 12, 2002, by the Office of the Public Prosecutor with Nationwide Jurisdiction on Matters of Corruption and with

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<sup>31</sup> **Annex 5.** Article in the daily *El Nuevo País*, April 16, 2002, by Patricia Poleo, *Factores de poder*. Cited in the formal indictment of Allan Brewer Carías, January 27, 2005; Annex 5 to the original petition received on January 24, 2007.

<sup>32</sup> **Annex 6.** *Allan Brewer Carías responde a las acusaciones: No redacté el decreto de Carmona Estanga*, story by Ana Damelis Guzmán, *El Globo*, Caracas, April 17, 2002, p. 4. *El abogado desmiente haber redactado acta constitutiva de gobierno transitorio; Brewer Carías se desmarca de Pedro Carmona Estanga*, story by Feliz González Roa Notitarde, Valencia, April 17, 2002, p. 13. *Brewer Carías: no sé quién redactó el decreto Carmona*, story by Jaime Granda, *El Nuevo País*, April 17, 2002, p. 2. Allan R. Brewer Carías *En mi propia defensa. Respuesta preparada con la asistencia de mis defensores Rafael Odremán y León Henríquez Cottib contra la infundada acusación fiscal por el supuesto delito de conspiración*, Editorial Jurídica Venezolana, Caracas, 2006, p. 192 *et al.* See stories in Annex 2 to the original petition received on January 24, 2007.

<sup>33</sup> **Annex 7.** Article published in the daily *El Nacional*, April 13, 2002, by Edgar López, *Carta Interamericana Democrática fundamenta gobierno de transición*. Cited in the formal indictment of Allan Brewer Carías, January 27, 2005; Annex 5 to the original petition received on January 24, 2007.

<sup>34</sup> **Annex 8.** Report of the Special Parliamentary Commission to investigate the events of April 2002. Annex 20 to the original petition received on January 24, 2007.

<sup>35</sup> Report of the Special Parliamentary Commission to investigate the events of April 2002. Annex 20 to the original petition received on January 24, 2007.

Special Jurisdiction over Banks, Insurance and Capital Markets, in order to determine the degree of responsibility of the persons involved in the events of April 2002. On May 22, 2002, serving Army Colonel Ángel Bellowín filed a complaint stating that “it is a publicly accepted fact reported by the media that the authors of that decree are the citizens ALLAN BREWER CARÍAS, [and three others], known [...] as experts on constitutional matters [...] as indicated by the newspaper articles referred to below [...].”<sup>36</sup>

94. From 2002 to 2005, at least four provisional prosecutors investigated the facts surrounding the drafting of the “Carmona Decree”, along with other facts related to the events of April 11 to 13, 2002. Initially, the investigation was assigned to Provisional Prosecutor José Benigno Rojas. On July 9, 2002, the witness Jorge Olavarría presented that prosecutor with a statement of testimony indicating that Brewer Carías had not written the Carmona Decree.<sup>37</sup> José Benigno Rojas was replaced by Provisional Prosecutor Danilo Anderson.<sup>38</sup> Later, on August 28, 2002, the office of the Sixth Provisional Prosecutor took over the investigation.<sup>39</sup>

95. On January 27, 2005, the Sixth Provisional Prosecutor filed an indictment against Allan Brewer Carías for his supposed:

“participation in the drafting and production of the Deed Establishing the Government of Democratic Transition and National Unity, which contains a [Democratic and National Unity] (sic), read out by the citizen DANIEL ROMERO on April 12, 2002, within the premises of Miraflores Palace, after a group of individuals, civilians, and officers of the National Armed Forces, repudiating the constitutionally and legitimately established government, in breach of the Constitution of the Bolivarian Republic of Venezuela and its laws, proceeded to constitute a *de facto* government.”<sup>40</sup>

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<sup>36</sup> **Annex 9.** Complaint lodged by Ángel Bellowín on May 22, 2002. Annex 6 to the original petition received on January 24, 2007.

<sup>37</sup> **Annex 10.** Submission of Jorge Olavarría. Annex 36 to the original petition received on January 24, 2007.

<sup>38</sup> “02. SIGNATORIES OF THE DECREE OF PEDRO CARMONA ESTANGA

Implicated: Approximately 400 people

Prosecutors: 6th National, Luisa Ortega Díaz

• State: Between October 18 and November 10, 2004, the Fourth Prosecutor with Full Jurisdiction, Danilo Anderson, charged the following citizens with the alleged commission of the crime of civil rebellion [...].

• Later, in December 2004, the investigation was assigned to the Sixth National Prosecutor, Luisa Ortega Díaz, following Anderson’s death.

• Thus, since January of this year, the following citizens have been indicted [...], Allan Brewer Carías, [...]” Public Ministry. Overview of investigations of the events of April 2002, April 8, 2005. In: <http://www.uru.org/11A/balancefiscalainvestigaciones11a.pdf>.

<sup>39</sup> **Annex 11.** Resolution No. 539 of the Attorney General of the Republic appointing Luisa Ortega Díaz as Special Alternate of the Sixth Prosecution Office of the Public Ministry at the national level, with full jurisdiction, August 28, 2002. Annex 8 to the original petition received on January 24, 2007. See. *Ultimas Noticias: Solicitan Sobreseer a firmantes y militares*, January 9, 2008. “Caracas. National Prosecutor Sixth, María Alejandra Pérez, requested the closing of proceedings for those investigated for the signature of the *de facto* government’s decree of Pedro Carmona Estanga of April 12, 2002, by which the Constitution was withdrawn [...]”.En: <http://venezuelareal.zoomblog.com/archivo/2008/01/09/solicitan-sobreseer-a-firmantes-y-mili.html>

<sup>40</sup> **Annex 1.** Formal Indictment. Annex 5 to the original petition received on January 24, 2007.

96. Such actions are identified in the Venezuelan Criminal Code, in order to guarantee the upholding of the Constitution, as the crime of conspiring to violently change the Constitution, provided for and punishable under Article 144.2 of the Criminal Code.<sup>41</sup>

97. On May 4, 2005, the defense lodged a brief stating that an interview used as evidence in bringing criminal charges was not in line with reality.<sup>42</sup> It thus noted that the program *30 Minutos* had interviewed Teodoro Petkoff, who stated that:

We are facing a sui generis coup d'état; Pedro Carmona has full powers to appoint mayors and governors; he took oath before himself; he dismissed the justices of the Supreme Court of Justice, the People's Defender, the Comptroller... he has dictatorial powers. We are facing a *de facto* government, because it does not meet democratic paradigms. Brewer must explain that decree to the OAS.<sup>43</sup>

98. The defense states that this is a falsehood of which Teodoro Petkoff himself was aware and who, in response to a question from the prosecution, said:

SEVEN: Please explain why you said in the interview that Brewer had to explain that decree to the OAS. REPLY: I did not say that Brewer had to explain the decree to the OAS; what I said was, after hearing the program again, 'I don't know how we are going to explain this situation to the OAS.' I was obviously referring to the coup d'état and not to Brewer. EIGHT: Do you know who produced the decree ...? REPLY: No. I wasn't there.<sup>44</sup>

99. In the aforesaid filing, the provisional prosecutor was asked to make a specialized technical transcription of the content of all the videos with interviews by journalists used as evidentiary elements in the indictment. That request was denied on April 21, 2005.<sup>45</sup>

100. On March 31, 2005, the defense requested that Nelson Socorro and Leopoldo Baptista be summoned to give statements, for them to report on Allan Brewer Carías's activities in the days leading up to April 10, 2002. That request was denied on April 21, 2005, by the Sixth Provisional Prosecutor, who ruled that Allan Brewer Carías's activities prior to April 10, 2002, were not a part of the indictment and were therefore not necessary.<sup>46</sup>

101. The proceedings that included the case against Allan Brewer Carías were initially assigned to the Twenty-fifth Temporary Judge, Josefina Gómez Sosa. At the request of the Sixth

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<sup>41</sup> Criminal Code of Venezuela, Article 144: "The following shall be punished by imprisonment of 12 to 24 years. Those who, without the purpose of changing the republican political form that the Nation has given itself, conspire or rise up to violently change the National Constitution." (Current Article 143.2). **Annex 13.** Submission from the Ministry of Popular Power for Foreign Affairs No. AGEV/000394 of August 25, 2009, pp. 22 and 24. **Annex 1.** Formal Indictment. Annex 5 to the original petition received on January 24, 2007.

<sup>42</sup> **Annex 14.** Brief of Brewer Carías's defense of May 4, 2005, directed to the Twenty-fifth Control Judge, which indicates that after having seen the videos and press articles in the record of the case, they were able to establish the untruthfulness or falsity of the texts, given that in certain parts of the videos used for the indictment what one sees doesn't correspond to what one hears in the video used, and at the same time to request once again access to all of the videos contained in the record of the case. Annex 43 to the original petition received on January 24, 2007, para 118.

<sup>43</sup> **Annex 14.** Defense brief, presented on May 4, 2005. Annex 43 to the original petition received on January 24, 2007.

<sup>44</sup> **Annex 14.** Defense brief, presented on May 4, 2005. Annex 43 to the original petition received on January 24, 2007.

<sup>45</sup> **Annex 15.** Prosecutor's response of April 21, 2005. Annex 42 to the original petition received on January 24, 2007.

<sup>46</sup> **Annex 16.** Decision of the Sixth Temporary National Full-jurisdiction Prosecutor of April 21, 2005. Annex 34 to the original petition received on January 24, 2007.

Provisional Prosecutor, on December 17, 2004, the Twenty-fifth Temporary Judge issued an order preventing 27 persons charged in connection with the events of April 2002 from leaving the country.<sup>47</sup> An appeal against that order was lodged with the Tenth Chamber of the Court of Appeal. On January 31, 2005, the Appeals Chamber overturned the ban on leaving the country. On February 3, 2005, the Judicial Commission of the Supreme Court of Justice suspended those Court of Appeal judges who had voted to annul the decision against which the appeal was brought; it also suspended Temporary Judge Josefina Gómez Sosa, for failing to give adequate grounds in the order prohibiting them from leaving the country.<sup>48</sup> Judge Gómez Sosa was replaced by Judge Manuel Bognanno.<sup>49</sup>

102. On May 4, 2005, the defense asked the Twenty-fifth Temporary Judge to exhibit all the videos, to admit the testimony offered, and to give them access to copies of the case file.<sup>50</sup> The defense submitted Allan Brewer Carías's immigration record, to show that during the weeks prior to April 12, 2002, he was out of the country. On May 9, 2005, the Sixth Provisional Prosecutor rejected the evidence on the grounds that it was unnecessary.<sup>51</sup>

103. On May 11, 2005, the Twenty-fifth Temporary Judge, Manuel Bognanno, ordered the Sixth Provisional Prosecutor to allow the defense "full access to the case file and videos held in

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<sup>47</sup> The Admissibility Report N°97/09 wrongly indicated that the ban on leaving the country included Allan Brewer Carías. In the merits procedural stage it was determined that this ban was not issued against Allan Brewer Carías but against other inditees investigated for their alleged participation in those facts. "The Judicial Commission of the Supreme Court of Justice [...] suspended, indefinitely and without pay, the judges of the Tenth Chamber of Court of Appeal who, on the 1st of this month, overturned the ban on leaving the country imposed on 27 persons accused of civil rebellion for allegedly endorsing the decree whereby Pedro Carmona Estanga replaced President Hugo Chávez on April 12, 2002.

[...] The affected judges are Pedro Troconis Da Silva and Herten Vilela Sibada, who found that the ban on leaving the country ordered [...] by the 25th Control Judge, Josefina Gómez Sosa, was not sufficiently grounded. [...] Because it found that Judge Gómez Sosa committed an inexcusable error, the Judicial Commission also resolved to suspend her indefinitely and without pay.

On this point, the ruling states: "Often, ungrounded rulings are issued with the deliberate purpose of having them overturned on appeal; it is truly inexplicable for first instance judge to have adopted such a decision without giving reasons, when that is an elementary obligation of all judges."

The Judicial Commission insisted that the Tenth Chamber of the Court of Appeal, "instead of noting the crass error and ordering its rectification by returning the proceedings for that purpose, took advantage of the error and aggravated it, issuing the decision that is now causing uproar in the country."

The request for a ban on leaving the country was imposed on December 17 by the Sixth Provisional Prosecutor of the Public Ministry, Luisa Ortega, and it was upheld during the night of that same day by Judge Gómez Sosa.

The defendants were: Heidi Engelberth, María Corina Machado, José Rodríguez Iturbe, Julio Brazón, Leopoldo López Gil, Felipe Brillembourg, César Carballo, José Curiel, Rocío Guijarro, Sergio Omar Calderón, Raúl De Armas, Guacaipuro Lameda, León Arismendi, Godofredo Marín, Douglas León Natera, Rafael Huizi Clavier, Vilma Petrush, Enrique Yéspica, Jaime Manzo, Federico Carmona, Ignacio Salvatierra, Alberto Quirós Corradi, Corina Parisca de Machado, Juan Pablo Borregales, Alejandro Peña Esclusa, Elías Bittar, and Alvis Muñoz." *El Nacional*, February 4, 2005, A/2. "Suspendidos Jueces que favorecieron a imputados por Decreto de Carmona." See also: Resolution of the Supreme Court of Justice of November 15, 2009, in the appeal filed by Judge Josefina Gómez Sosa.

<sup>48</sup> **Annex 17.** Dismissal Resolution. See: [http://www.tsj.gov.ve/informacion/resoluciones/cj/resolucionCJ\\_08.htm](http://www.tsj.gov.ve/informacion/resoluciones/cj/resolucionCJ_08.htm).

<sup>49</sup> **Annex 17.** Dismissal Resolution, in which the new judge is appointed. See: [http://www.tsj.gov.ve/informacion/resoluciones/cj/resolucionCJ\\_08.htm](http://www.tsj.gov.ve/informacion/resoluciones/cj/resolucionCJ_08.htm).

<sup>50</sup> **Annex 18.** See: Decision of the Sixth Temporary Prosecutor of May 9, 2005. Annex 35 to the original petition received on January 24, 2007.

<sup>51</sup> **Annex 18.** Decision of May 9, 2005, in which it was considered that in the request the defense did not indicate what it was seeking to prove, which facts in the indictment they were going to refute with its filing of new evidence, and as it was considered that the request was not in line with what is established in Article 198 of the Organic Code of Criminal Procedure, which states that: "... a means of evidence, to be admitted, should refer directly or indirectly to the object of the investigation and be useful for discovering the truth." Annex 35 to the original petition received on January 24, 2007.

connection with the proceedings...” and ruled that it was not for him to rule on the relevance of the testimony offered.<sup>52</sup> On May 16, 2005, the defense filed an appeal against that decision with the Court of Appeals.<sup>53</sup> In turn, on May 30, 2005, the Sixth Provisional Prosecutor asked the Twenty-fifth Temporary Judge<sup>54</sup> and the Ninth Chamber of the Court of Appeal<sup>55</sup> to annul the decision granting full access to the case file, on the grounds that she had not been notified of the filing presented by the defense and, consequently, she had been unable to offer a defense against it. On that point, the prosecutor stated that from the date of Allan Brewer Carías’s indictment on January 27, 2005, up to May 9, 2005, the accused’s representatives:

have reviewed all the evidence, over 47 working days from a total of 67 calendar days. On each and every occasion when they requested and reviewed the case file, a deed of review was prepared, which I enclose herewith to demonstrate the falsehood of the claims made by the attorney ALLAN BREWER CARIAS and his defense team.<sup>56</sup>

104. The prosecutor requested absolute annulment on the grounds that they were referential witnesses whose statements lacked value as evidence under current legal provisions and, further, she stated that:

Of the numerous pieces of evidence requested by the defense, they have almost all been agreed on; it is therefore also false that the request for the discharging of evidence was ignored with respect to the statements of NELSON MEZERHANE, NELSON SOCORRO, YAHAIRA ANDUEZA, and LEOPOLDO BAPTISTA, whom they wish the Public Ministry to interview in order to learn what the attorney ALLAN BREWER CARIAS said to them, as if the applicant had not already informed the prosecution and were seeking the inclusion of referential witnesses that were valid under the Code of Criminal Prosecution, on account of which, in the view of the Public Ministry, that testimony was not and is not necessary to cast light on the facts, and they were informed of that, in writing, at the appropriate juncture.<sup>57</sup>

105. On June 10, 2005, Judge Bognanno asked the Sixth Provisional Prosecutor to refer the case file to him, to which she replied, on June 27, 2005, “please indicate to this prosecution office the provision on which that request is based and which requires the Public Ministry to report on and hand over documents in its possession.”<sup>58</sup> That same day, the judge wrote to the Public Ministry’s Senior Prosecutor for the Caracas Metropolitan Area to inform him of alleged obstruction by the Sixth Provisional Prosecutor in the proceedings against Mr. Carmona Estanga *et al.*, by failing to inform the court of the deadline set by the Public Ministry for presenting its conclusions, after six months had passed since the defendants were identified, and asking the prosecution service to “assume an objective attitude, aimed at cooperating with and not hindering the actions of the

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<sup>52</sup> **Annex 19.** Twenty-fifth Control Judge, deed 25C-482-05, decision of May 11, 2005. Annex 44 to the original petition received on January 24, 2007.

<sup>53</sup> **Annex 20.** See: Decision of the Ninth Chamber of the Court of Appeal, July 6, 2005. Annex 45 to the original petition received on January 24, 2007.

<sup>54</sup> **Annex 21.** Request for annulment by the Provisional Prosecutor, June 30, 2005. Annex 12 to the original petition received on January 24, 2007.

<sup>55</sup> **Annex 22.** Request for annulment by the Provisional Prosecutor, June 30, 2005. Annex 19 to the original petition received on January 24, 2007.

<sup>56</sup> **Annex 21 y 22.** Requests for annulment by the Provisional Prosecutor, June 30, 2005, Annexes 12 and 19 to the original petition received on January 24, 2007.

<sup>57</sup> **Annex 21.** Prosecutor’s request for annulment of the order for the issuing of copies of the proceedings of June 30, 2005, from the Sixth Temporary Prosecutor to the Temporary Control Judge. Annex 12 to the original petition received on January 24, 2007.

<sup>58</sup> **Annex 23.** Document from the Sixth Temporary Prosecutor to the Twenty-fifth Control Judge, June 27, 2005. Annex 13 to the original petition received on January 24, 2007.

court.”<sup>59</sup> Manuel Bognanno was suspended from his position on June 29, 2005, and José Alonso Dugarte Ramos was appointed Temporary Judge to replace Manuel Antonio Bognanno at the First-instance Court of the Criminal Judicial Circuit of the Caracas Metropolitan Area.<sup>60</sup>

106. On July 6, 2005, the Court of Appeal overturned the decision of the Twenty-fifth Temporary Judge and ordered another control judge to rule on the defense brief.<sup>61</sup> On August 10, 2005, the defense filed a brief with the Twenty-fifth Temporary Judge insisting on the admission of the testimony offered and on compliance with the Court of Appeal’s ruling.<sup>62</sup>

107. On September 28, 2005, Allan Brewer Carías left Venezuela.<sup>63</sup> That same day, the defense asked that Lucas Rincón be summoned to give testimony with a list of questions.<sup>64</sup> On September 30, 2005, the defense submitted a brief for anticipated production of evidence in the form of a statement by Pedro Carmona Estanga before the Twenty-fifth Judge.<sup>65</sup> On October 5, 2005, Lucas Rincón was interviewed by the prosecution service in connection with the questions put forward by the defense.<sup>66</sup> On October 18, 2005, the defense filed a new request for a statement to be taken from Pedro Carmona Estanga.<sup>67</sup> On October 20, 2005, that request was ruled inadmissible<sup>68</sup> on the grounds that Pedro Carmona Estanga was also being indicted in the case, so his statement would have not probative value. The Twenty-fifth Temporary Judge was challenged by the defense for having issued an opinion once again on the same issue.

108. On October 21, 2005, the Sixth Provisional Prosecutor formalized the indictment against Allan Brewer Carías, the preventive custody of the accused was requested, and the proceeding went on to the intermediate stage.<sup>69</sup>

109. On October 26, 2005, Allan Brewer Carías’s defense team asked the Twenty-fifth Temporary Judge to guarantee his right to be tried in liberty and to issue an advance ruling on the inadmissibility of his arrest during the trial, considering that he was not dangerous, was a working man and active in academic circles, with residence and roots in the country.<sup>70</sup> The judge does not appear to have ruled on that filing.

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<sup>59</sup> **Annex 24.** Document No. 632-05 of June 27, 2005. Annex 14 to the original petition received on January 24, 2007.

<sup>60</sup> **Annex 25.** See: [http://www.tsj.gov.ve/designaciones/designacion.asp?fecha\\_id=320](http://www.tsj.gov.ve/designaciones/designacion.asp?fecha_id=320).

<sup>61</sup> **Annex 26.** Decision of the Ninth Chamber of the Court of Appeal, July 6, 2005. Annex 45 to the original petition received on January 24, 2007.

<sup>62</sup> **Annex 27.** Brief presented by the defense to the Twenty-fifth Control Judge on August 10, 2005. Annex 46 to the original petition received on January 24, 2007.

<sup>63</sup> Petitioners’ submission of November 30, 2009, p. 94.

<sup>64</sup> **Annex 28.** Annex 27 to the original petition received on January 24, 2007.

<sup>65</sup> **Annex 29.** Annex 29 to the original petition received on January 24, 2007.

<sup>66</sup> **Annex 30.** Annex 28 to the original petition received on January 24, 2007.

<sup>67</sup> **Annex 31.** Defense request for anticipated production of evidence, October 18, 2005. Annex 32 to the original petition received on January 24, 2007.

<sup>68</sup> **Annex 32.** Decision of the Twenty-fifth Control Judge, October 20, 2005. Annex 30 to the original petition received on January 24, 2007.

<sup>69</sup> **Annex 33.** Formal indictment. Annex 48 to the original petition received on January 24, 2007. In that indictment, the prosecutor also brought charges against Cecilia Sosa Gómez and José Gregorio Vásquez López.

<sup>70</sup> **Annex 34.** Defense appeal against the prosecutor’s request to the Twenty-fifth Control Judge, received on October 26, 2005. Annex 49 to the original petition received on January 24, 2007.

110. The defense filed an appeal against the indictment on October 28, 2005.<sup>71</sup> On November 8, 2005, in its reply to Allan Brewer Carías's indictment, the defense requested the annulment of the entire proceedings on account of violations of the right to a fair trial.<sup>72</sup>

111. On December 13, 2005, and January 31, 2006, several justices of the Supreme Court sent a letter to the Inter-American Institute of Human Rights and the Ibero-American Institute of Constitutional Procedural Law stating that:

in numerous witness testimonies that are publicly known, Mr. Allan Brewer-Carías is indicated as one of the authors of the decree in question [...]. Of course, this matter must be addressed by the natural judge here in Venezuela with all guarantees [...]. We are sure that Dr. Brewer-Carías will present himself to clear up his legal situation with responsibility.<sup>73</sup>

112. The recusal of the Twenty-fifth Temporary Judge was denied on January 30, 2006, on the grounds that the judge had not issued a ruling on the guilt or innocence of Allan Brewer Carías.<sup>74</sup>

113. On May 10, 2006, the defense informed the Twenty-fifth Temporary Judge that Allan Brewer Carías had accepted an appointment as adjunct professor at the Columbia University School of Law in the United States, and they requested that the proceedings continue.<sup>75</sup> That filing states that:

[...] the distinguished University of Columbia has offered [Brewer Carías] the opportunity to fulfill an old professional aspiration ... and that he has decided to wait until the circumstances were more conducive to ensuring an impartial trial with respect for his guarantees ... in order for the appropriate decision to be adopted and for the proceedings to continue, all with the aim of causing no delays or harm to the other defendants in the case at hand.<sup>76</sup>

114. On June 2, 2006, the Sixth Provisional Prosecutor asked the judge to order the preventive custody of Allan Brewer Carías on account of the flight risk he posed.<sup>77</sup> On June 6, 2006, the Sixth Provisional Prosecutor submitted Francisco Usón's statement to the press.<sup>78</sup> On June 15, 2006, the Twenty-fifth Temporary Judge issued preventive custody order No. 010-06 against the defendant.<sup>79</sup> The arrest warrant was forwarded to the Director of the Scientific, Criminal, and Criminological Investigations Corps as well as to the Director of INTERPOL.<sup>80</sup> It has not been enforced because, to date, Allan Brewer Carías remains abroad.

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<sup>71</sup> Defense appeal against the formal indictment before the Twenty-fifth Control Judge, received on October 28, 2005. Annex 47 to the original petition received on January 24, 2007.

<sup>72</sup> **Annex 35.** Reply of the defense to the indictment of Allan Brewer Carías of November 8, 2006. Annex 2 to the original petition received on January 24, 2007.

<sup>73</sup> **Annex 36.** Annexes 15 and 16 to the original petition received on January 24, 2007.

<sup>74</sup> **Annex 37.** Annex 33 to the original petition received on January 24, 2007.

<sup>75</sup> **Annex 38.** Defense brief of May 10, 2006. Annex 50 to the original petition received on January 24, 2007.

<sup>76</sup> Defense brief of May 10, 2006. Annex 50 to the original petition received on January 24, 2007.

<sup>77</sup> **Annex 39.** Annex 51 to the original petition received on January 24, 2007.

<sup>78</sup> **Annex 40.** Annex 38 to the original petition received on January 24, 2007. In the request, the prosecutor enclosed a copy of *Ultimas Noticias* of June 6, 2006, p. 30. Interview of General Usón: "I saw Allan Brewer hard at work in one of the cubicles of the Army General Staff. Minutes later, in my presence, he told a person who was with me: '...this decree will take us back to the Constitution of 1961.'" Annex 38 to the original petition received on January 24, 2007.

<sup>79</sup> **Annex 41.** Decision of the Temporary Control Judge of June 15, 2006, ordering the preventive custody of Allan Brewer Carías. Annex 52 to the original petition received on January 24, 2007.

<sup>80</sup> **Annex 42.** Annex 23 to the original petition received on January 24, 2007.

115. On February 22, 2007, the defense team of José Gregorio Vásquez, who was accused in conjunction with Allan Brewer Carías, asked the Twenty-fifth Temporary Judge, in light of the fact that the order for Allan Brewer Carías's custody could not be enforced because he was abroad, to separate that case from the criminal trial in order for the preliminary hearing to be held. On July 20, 2007, the judge decided not to separate the proceedings on the grounds that the court would rule at the preliminary hearing.<sup>81</sup> In that decision, the court ruled:

[...] in the case at hand, the holding of the preliminary hearing has not been delayed due to the failure of citizen ALLAN R. BREWER CARÍAS to appear; on the contrary, the various deferrals recorded in this case file have been due to the numerous filings lodged by the defendants' defense teams. They have not been due to the contemptuous absence of the named defendant; on the contrary, they have been caused by the numerous defense requests for deferrals.<sup>82</sup>

116. On July 11, 2006, the Venezuelan Ambassador in the Dominican Republic communicated with INTERPOL to request the arrest of Allan Brewer Carías, as he had been extended an invitation to give a lecture in that country.<sup>83</sup> On July 12, 2006, the Sixth Provisional Prosecutor sent INTERPOL a request for cooperation in searching for and locating Allan Brewer Carías, with a view to placing him in preventive custody and subsequent extradition.<sup>84</sup> They say that in response, INTERPOL requested information from the courts on the nature of the offense that had led Brewer Carías to be charged with a common crime.<sup>85</sup> On June 1, 2007, the Commission for the Control of INTERPOL's Files concluded that the nature of the action against Allan Brewer Carías was predominantly political and, consequently, it recommended that the INTERPOL General Secretariat delete Allan Brewer Carías's record.<sup>86</sup> By means of a clarification note of September 17, 2007, the Court of First Instance Sitting as Court of Control of the Caracas Metropolitan Area Judicial Circuit answered that Allan Brewer Carías was suspected of being the intellectual author of a frustrated attack on the President of the Republic, and that accordingly the indictment was not for a political crime.<sup>87</sup> The defense appealed and requested the annulment of the note of clarification. That appeal was denied on October 29, 2007.<sup>88</sup>

117. According to what has been published, Luisa Ortega Díaz, the Attorney General of the Republic and former Sixth Temporary Prosecutor, speaking of the investigation of Allan Brewer Carías, told the press: "When I led that investigation, after his indictment attorney BC was summoned to the preliminary hearing, and through his lawyers he sent a communication stating that he did not believe in Venezuelan justice; that Venezuelan justice offered the citizens, including

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<sup>81</sup> **Annex 43.** Decision of the Twenty-fifth Court of July 20, 2007. Annex 55 to the petitioners' submission received on January 3, 2008.

<sup>82</sup> **Annex 44.** Decision of the Twenty-fifth Court of July 20, 2007. Annex 55 to the petitioners' submission received on January 3, 2008.

<sup>83</sup> **Annex 45.** Annex 23 to the original petition received on January 24, 2007.

<sup>84</sup> **Annex 46.** See: Response from the Twenty-fifth Court to INTERPOL. Annex 57 to the petitioners' submission received on January 3, 2008.

<sup>85</sup> **Annex 47.** Communication from INTERPOL of July 27, 2007. Annex 56 to the petitioners' submission received on January 3, 2008.

<sup>86</sup> **Annex 48.** Letter from INTERPOL of August 1, 2007. Annex to the petitioners' submission of February 18, 2010.

<sup>87</sup> **Annex 46.** Response from the Twenty-fifth Court to INTERPOL. Annex 57 to the petitioners' submission received on January 3, 2008.

<sup>88</sup> **Annex 49.** Appeal by the defense. Annex 58 to the petitioners' submission received on January 3, 2008.

himself, no guarantees; and that for that reason he had chosen to leave the country and would not return until there was a change of government.”<sup>89</sup>

118. On January 11, 2008, Allan Brewer Carías’s attorneys presented the Twenty-fifth Temporary Judge with a request for dismissal,<sup>90</sup> based on the Decree with Rank, Value and Force of Special Law of Amnesty, No. 5790, enacted on December 31, 2007, by President Hugo Chávez. That legislation, directed to “all those persons who, in confrontation with the established general order, and who as of this date are in their right and have been subjected to criminal proceedings, who have been tried and convicted,” includes, among the actions subject to amnesty, “the drafting of the Decree of the *de facto* government of April (12,) 2002.”<sup>91</sup> The request was denied on January 25, 2008, based on Allan Brewer Carías not having entered an appearance in the proceedings. The defense filed an appeal against that denial,<sup>92</sup> which was similarly turned down on April 3, 2008.<sup>93</sup> The proceedings are at the preliminary phase before the 25th Control Court, before which, as of January 2008, the defense did have access to the case files. On November 23, 2009, after having been told informally that the case file was not physically at the offices of the Twenty-fifth Temporary Judge, the defense inquired as to its location in order to request certified copies.<sup>94</sup>

## **B. Findings of law**

### **1. Right to a fair trial and judicial protection (Articles 8(1) and 25 of the American Convention, in conjunction with Article 1(1) thereof)**

119. Article 8(1) of the American Convention provides that:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

120. Article 25 of the Convention, in turn, reads:

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

2. The States Parties undertake:

(a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;

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<sup>89</sup> **Annex 50.** *El País*, interview of Luisa Ortega Díaz, January 8, 2008. Annex 71 to the petitioners’ submission received on November 30, 2009.

<sup>90</sup> **Annex 51.** Request for dismissal. Annex 74 to the petitioners’ submission received on November 30, 2009.

<sup>91</sup> **Annex 52.** Official Gazette, special edition No. 5.870, December 31, 2007. Art. 1.A. Annex 70 to the petitioners’ submission received on November 30, 2009.

<sup>92</sup> **Annex 53.** Appeal filing of February 7, 2008. Annex 75 to the petitioners’ submission received on November 30, 2009.

<sup>93</sup> **Annex 54.** See: Defense brief. Annex 76 to the petitioners’ submission received on November 30, 2009.

<sup>94</sup> **Annex 54.** Defense brief. Annex 76 to the petitioners’ submission received on November 30, 2009.

(b) to develop the possibilities of judicial remedy; and,

(c) to ensure that the competent authorities shall enforce such remedies when granted.

121. Article 1(1) of the American Convention provides that:

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

122. Article 2 of the American Convention provides that:

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

**a. Right to an impartial and independent judge**

123. First of all, the Commission will analyze the claims alleging a lack of independence and impartiality on the part of the prosecutors and judges responsible for the investigation and prosecution of Allan Brewer Carías. It will also examine the claims alleging that domestic law is inadequate, because of circumstances surrounding the appointment and tenure of judges and prosecutors, for upholding Allan Brewer Carías's right to be heard by an independent and impartial tribunal.

124. It should first be noted that judicial independence is an essential guarantee if judicial systems are to discharge their duties adequately in a democratic society. The legitimacy of judges' decisions and, consequently, the legitimacy of the judiciary depend on that guarantee. Accordingly, the Commission recalls the importance of the State's duty of ensuring and promoting the independence and impartiality of its judicial system.<sup>95</sup> In addition, the Inter-American Court has said that "one of the principal purposes of the separation of public powers is to guarantee the independence of judges" and, to that end, different political systems have devised strict procedures, for both appointments and removals;<sup>96</sup> the Court has also stated that "the principle of judicial independence constitutes one of the basic pillars of the guarantees of the due process, reason for which it shall be respected in all areas of the proceeding and before all the procedural instances in which decisions are made with regard to the person's rights. The Court has considered that the principle of judicial independence results necessary for the protection of fundamental rights, reason for which its scope shall be guaranteed even in special situations, such as the state of emergency."<sup>97</sup>

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<sup>95</sup> See: I/A Court H. R., *Case of Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, Series C No. 197, para. 67. See: IACHR, Report 48/00, Case 11.166, Merits, Walter Humberto Vásquez Bejarano, Peru, April 13, 2000, para. 44.

<sup>96</sup> See: *Case of the Constitutional Court v. Peru*, Merits, Reparations, and Costs, Judgment of January 31, 2001, Series C No. 71, para. 73; and *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of August 5, 2008, Series C No. 182, para. 55.

<sup>97</sup> I/A Court H. R., *Case of Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, Series C No. 197, para. 68. See: *Habeas Corpus in Emergency Situations* (Arts. 27.2, 25.1, and 7.6 of the American Convention on Human Rights), Advisory Opinion OC-8/87, January 30, 1987, Series A No. 8, para. 30; and *Judicial Guarantees in States of Emergency* (Arts. 27.2, 25, and 8 of the American Convention on Human Rights), Series A No. 9, January 30, 1987, para. 20.

125. In the case at hand, the Commission has established that between 2002 and 2005, at least four provisional prosecutors investigated the facts surrounding the drafting of the “Carmona Decree,” along with other facts related to the events of April 11 to 13, 2002. In addition, it has established that on January 27, 2005, the Sixth Provisional Prosecutor filed charges against Allan Brewer Carías and that both the investigation and the criminal proceedings were conducted, at the preliminary stage, by temporary judges.

126. As for the context, the Commission has established that the judges who made up the Tenth Chamber of the Court of Appeal – and who, on January 31, 2005, voted to annul the order preventing 27 of the people accused in connection with the enactment of the Carmona Decree from leaving the country – were suspended from duty on February 3, 2005, by the Judicial Commission of the Supreme Court of Justice. That same Commission also suspended Temporary Judge Josefina Gómez Sosa for having failed to give adequate grounds for that same ban.

127. The Commission has also established that Control Judge Manuel Bognanno, who replaced Judge Gómez Sosa, was likewise suspended from duty on June 29, 2005, after writing, on June 27, 2005, to the senior prosecutor of the Caracas Metropolitan Area prosecution service to inform him of “alleged obstruction” on the part of the Sixth Provisional Prosecutor in the criminal proceedings against Allan Brewer Carías, by failing to inform the Court of the deadline set by the Public Ministry for presentation of the conclusions, and to ask the Public Ministry to “assume an objective attitude, aimed at cooperating with and not hindering the actions of the court.”

128. In its 2003 Report on Venezuela, the Commission determined that provisional judges were those did not enjoy security of tenure in their positions and could be freely removed or suspended, which could imply a conditioning of their actions, in that they might not feel legally protected from undue interference or pressure from other parts of judiciary or from external sources.<sup>98</sup> The Commission stated that having a high percentage of provisional judges had a serious detrimental impact on citizens’ right to the adequate administration of justice and on the judges’ right to stability in their positions as a guarantee of judicial independence and autonomy.<sup>99</sup>

129. In December 1999, following the adoption of the new Constitution, the National Constitutional Assembly decreed the “Transitional Government Regime.”<sup>100</sup> The IACHR noted with concern that this regime went beyond the limits of normal, appropriate nonpermanence and included guidelines of a legislative nature that went further than a transitional regime.<sup>101</sup> Doubts were cast on the actions of the Judicial Emergency Commission and, later, of the Commission for the Restructuring and Functioning of the Judicial System regarding whether the guarantees of due process had been upheld in the appointment and removal of judges. In its report, the IACHR noted that on occasions, provisional judges had been appointed without meeting the requirements set for

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<sup>98</sup> IACHR, *Report on the Situation of Human Rights in Venezuela*, 2003, OEA/Ser.L/V/II.118 doc. 4 rev. 1, October 24, 2003, para. 159.

<sup>99</sup> IACHR, *Report on the Situation of Human Rights in Venezuela*, 2003, OEA/Ser.L/V/II.118 doc. 4 rev. 1, October 24, 2003, para. 160. Information submitted to the Commission in 2003 indicated that more than 80% of Venezuelan judges were “provisional.” This situation was also noted with concern by the Human Rights Committee of the International Covenant on Civil and Political Rights. IACHR, *Report on the Situation of Human Rights in Venezuela*, 2003, OEA/Ser.L/V/II.118 doc. 4 rev. 1, October 24, 2003, para. 163.

<sup>100</sup> IACHR, *Report on the Situation of Human Rights in Venezuela*, 2003, OEA/Ser.L/V/II.118 doc. 4 rev. 1, October 24, 2003, para. 166.

<sup>101</sup> IACHR, *Report on the Situation of Human Rights in Venezuela*, 2003, OEA/Ser.L/V/II.118 doc. 4 rev. 1, October 24, 2003, para. 166.

those positions<sup>102</sup> and that their appointments had been made without carrying out the competitive processes provided for in Article 255 of the Venezuelan Constitution.<sup>103</sup>

130. In its 2006 Report on Venezuela, in Chapter IV of its 2006 Annual Report, and in its 2009 report *Democracy and Human Rights in Venezuela*, the IACHR noted its concern about the situation of prosecutors in Venezuela, recalling that in addition to the possible undermining of their independence and impartiality that could arise from the constant removals and new appointments, the provisional status and resultant lack of tenure of the civil servants responsible for initiating and pursuing criminal investigations could also necessarily lead to difficulties in identifying, pursuing, and concluding specific lines of investigation as well as in meeting the procedural deadlines set for investigations. It stated that changes in investigating prosecutors have a negative impact on the pursuit of the corresponding investigations, bearing in mind, for instance, the importance of the collection and ongoing assessment of evidence. It said that this situation could therefore have negative repercussions on the rights of victims in criminal proceedings involving human rights violations.<sup>104</sup>

131. Regarding the temporary status of judges, the Inter-American Court has in turn stated that the tenure of judges in their positions is an essential element in judicial independence.<sup>105</sup> Likewise, in its report *Democracy and Human Rights in Venezuela*, the Commission said that the nonremoval of judges and prosecutors from their positions is indispensable to guarantee their independence from political changes or alternating governments.<sup>106</sup>

132. On this point, the United Nations Basic Principles on the Independence of the Judiciary stipulate that “the term of office of judges [...] shall be adequately secured by law” (Principle 11) and that “judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists” (Principle 12).<sup>107</sup>

133. In its 2009 report *Democracy and Human Rights in Venezuela*, the Commission underscored the fact that having provisional judges instead of regular ones means they can be easily removed when they adopt decisions that might affect government interests, which compromises the independence of the Venezuelan judicial branch.<sup>108</sup> Similarly, a 2000 ruling by the Political-Administrative Chamber of the Supreme Court of Justice of Venezuela, later repeated by that same chamber and reaffirmed by the Constitutional Chamber, maintained that:

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<sup>102</sup> IACHR, *Report on the Situation of Human Rights in Venezuela*, 2003, OEA/Ser.L/V/II.118 doc. 4 rev. 1, October 24, 2003, para. 168.

<sup>103</sup> IACHR, *Report on the Situation of Human Rights in Venezuela*, 2003, OEA/Ser.L/V/II.118 doc. 4 rev. 1, October 24, 2003, para. 169.

<sup>104</sup> IACHR, *Report on Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. doc. 54, December 30, 2009, para. 229.

<sup>105</sup> I/A Court H. R., *Case of the Constitutional Court v. Peru*, Judgment of January 31, 2001, Series C No. 71, para. 75; *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*, Judgment of August 5, 2008, Series C No. 182, para. 138.

<sup>106</sup> IACHR, *Report on Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. doc. 54, December 30, 2009, para. 229.

<sup>107</sup> United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan, August 26 to September 6, 1985, and confirmed by the General Assembly in resolutions 40/32 of November 29, 1985, and 40/146 of December 13, 1985. See: I/A Court H. R., *Case of the Constitutional Court v. Peru*, Judgment of January 31, 2001, Series C No. 71, para. 71.

<sup>108</sup> IACHR, *Report on Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. doc. 54, December 30, 2009, para. 253.

Those holding a position for which they did not compete do not enjoy the right [of judicial stability] and, consequently, may be removed from the position in question under the same conditions in which they were appointed – in other words, without the competent administration being obliged to justify such dismissal on the provisions of the disciplinary regime, which is applicable, again, only to career judges, those who hold their posts by reason of a public competitive process.<sup>109</sup>

134. Although the Commission understands that, in exceptional circumstances, it may on occasions be necessary to appoint judges on a temporary basis, not only must such judicial officials be selected by means of an appropriate procedure, they must also enjoy a certain guarantee of tenure in their positions.<sup>110</sup> In turn, the Inter-American Court has ruled that “the guarantee of tenure translates, as regards provisional judges, into the requirement that they be afforded all the inherent benefits of permanence until adoption of the resolution bringing a legal end to their time of service.”<sup>111</sup>

135. In its rulings the Inter-American Court has noted that Venezuela’s temporary judges perform exactly the same duties as regular judges: they administer justice.<sup>112</sup> Consequently, it has stated that people facing prosecution have the right, under both the Venezuelan Constitution and the American Convention, to have their cases resolved by judges who are and appear to be independent. Consequently, it said that the State must afford both regular and temporary judges the guarantees that arise from the principle of judicial independence.<sup>113</sup> The Court has also ruled that the tenure of provisional judges is closely linked to the guarantee against external pressures, because if provisional judges are not ensured that they will remain in their positions for a specific period of time, they are vulnerable to pressure from different sectors, mainly from those who have the power to decide on dismissals or promotions within the judiciary.<sup>114</sup>

136. The Court has also said that:

[...] States are bound to ensure that provisional judges be independent and therefore must grant them some sort of stability and permanence in office, for to be provisional is not equivalent to being discretionally removable from office. [...] Along the same lines, the Court considers that the fact that appointments are provisional should not modify in any manner the safeguards instituted to guarantee the good performance of the judges and to ultimately benefit the parties to a case. Also, such provisional appointments must not extend indefinitely in time, and must be subject to a condition subsequent, such as a predetermined deadline or the holding and completion of a public competitive selection process based on ability and qualifications, or of a public competitive examination, whereby a permanent replacement for the provisional judge is appointed. Provisional appointments must be an exceptional situation,

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<sup>109</sup> Supreme Court of Justice of Venezuela, Political and Administrative Chamber, Judgment No. 02221 of November 28, 2000; and Supreme Court of Justice of Venezuela, Political and Administrative Chamber, Judgment No. 1798 of October 19, 2004. Constitutional Chamber of the Supreme Court of Justice, Judgments Nos. 1413, 5111, and 5116, in: IACHR, *Report on Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. doc. 54, December 30, 2009, para. 225.

<sup>110</sup> See: IACHR, Report No. 30/97, Case 10.087, Merits, Gustavo Carranza, Argentina, September 30, 1997, para. 41.

<sup>111</sup> I/A Court H. R., *Case of Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, Series C No. 197, para. 117.

<sup>112</sup> I/A Court H. R., *Case of Chocrón Chocrón v. Venezuela*, Judgment of July 1, 2011, Series C No. 227, para. 103. See: I/A Court H. R., *Case of Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, Series C No. 197, para. 114.

<sup>113</sup> I/A Court H. R., *Case of Chocrón Chocrón v. Venezuela*, Judgment of July 1, 2011, Series C No. 227, para. 103. See: I/A Court H. R., *Case of Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, Series C No. 197, para. 114.

<sup>114</sup> I/A Court H. R., *Case of Chocrón Chocrón v. Venezuela*, Judgment of July 1, 2011, Series C No. 227, para. 106. See: I/A Court H. R., *Case of Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, Series C No. 197, para. 117.

rather than the rule. Thus, when provisional judges act for a long time, or the fact is that most judges are provisional, material hindrances to the independence of the judiciary are generated. Such vulnerable situation of the Judiciary is compounded if no removal from office procedures respectful of the international duties of the States are in place either.<sup>115</sup>

137. The IACHR has already stated in its report *Democracy and Human Rights in Venezuela* that the problem of temporary status “also affects prosecutors in Venezuela, in that all the prosecutors of the Attorney General’s Office are freely appointed and removable”<sup>116</sup>. In 2008, alone 638 prosecutors were appointed without a public competition being held and without their being given regular status, consequently making them freely appointed and removable<sup>117</sup>.

138. In its report the IACHR has already expressed its concern about the situation of Venezuela’s prosecutors, recalling that in addition to the possible undermining of their independence and impartiality that could arise from the constant removals and new appointments, the provisional status and resultant lack of tenure of the civil servants responsible for initiating and pursuing criminal investigations could also necessarily lead to difficulties in identifying, pursuing, and concluding specific lines of investigation as well as in meeting the procedural deadlines set for the investigation phase. Changes in investigating prosecutors have a negative impact on the pursuit of the corresponding investigations in terms of, for instance, the collection and ongoing assessment of evidence. This situation could therefore have negative repercussions on the rights of victims in criminal proceedings involving human rights violations<sup>118</sup>.

139. The IACHR stressed that during the inaugural ceremony of the National Prosecutors’ School on October 6, 2008, the Attorney General of the Republic, Luisa Ortega Díaz, acknowledged that

Prosecutors whose appointments are provisional are at a disadvantage; their provisional status exposes them to the influence of pressure groups, which would undermine the constitutionality and legality of the justice system. Provisional status in the exercise of public office is contrary to Article 146 of the Constitution of the Bolivarian Republic of Venezuela, which provides that positions in government are career service posts and are won by public competition<sup>119</sup>.

140. The IACHR has already expressed its concern regarding the failure to award regular status in appointments of prosecutors and it reiterates the importance of the correct implementation of the prosecutorial career in light of the fundamental role that the Attorney General’s Office plays in conducting criminal investigations. The Commission also reiterates the importance of prosecutors enjoying the stability necessary to guarantee their independence, impartiality, and suitability, and to ensure the effectiveness of investigations conducted to eliminate impunity, particularly in cases of

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<sup>115</sup> I/A Court H. R., *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”)*, Judgment of August 5, 2008, Series C No. 182, para. 43.

<sup>116</sup> IACHR, *Report on Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. doc. 54, December 30, 2009, para. 264.

<sup>117</sup> IACHR, *Report on Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. doc. 54, December 30, 2009, para. 264.

<sup>118</sup> IACHR, *Annual Report 2006*. Chapter IV: Human Rights Developments in the Region. Venezuela, para. 167 and *Report on Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. doc. 54, December 30, 2009, para. 265.

<sup>119</sup> Report by the *Television Foundation of the National Assembly. Inaugurada Escuela Nacional de Fiscales (National Prosecutors’ School Inaugurated)*. Article dated October 6, 2008. Available in Spanish at: <http://www.antv.gob.ve/m8/noticiam8.asp?id=14946>. IACHR, *Report on Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. doc. 54, December 30, 2009, para. 266.

human rights violations<sup>120</sup>. In that regard, the Commission considers of the utmost importance that prosecutors could perform their duty without political interference.

141. In sum, the Commission maintains that the State's duty of ensuring compliance with the guarantee of reinforced stability with respect to judges and prosecutors is independent of whether those officials' appointments are temporary or permanent, since the purpose of that stability is to protect the function of the judiciary itself and, through that, to protect human rights as a whole.

142. With reference to the guarantee of judicial independence and in connection with Article 2 of the American Convention, the Inter-American Court has said that the State's general duty to adapt its domestic law to the stipulations of the Convention in order to guarantee the rights enshrined in it, established in Article 2, includes the enactment of regulations and the development of practices that seek to achieve an effective observation of the rights and liberties enshrined therein, as well as the adoption of measures to suppress regulations and practices of any nature that imply a violation to the guarantees established in the Convention.<sup>121</sup>

143. The jurisprudence established by the Inter-American and European Courts, in accordance with the United Nations Basic Principles on the Independence of the Judiciary, indicate the following guarantees of judicial independence: an adequate appointment process, nonremoval from their positions, and freedom from external pressure.<sup>122</sup>

144. The Inter-American Court has already ruled on the judicial restructuring process in Venezuela and the regulations governing the provisional status of judges in the following terms:

[...] from August 1999 and up to the present, provisional judges do not have stability in their position, they are appointed discretionally and may be removed without being subject to any previously established proceeding. Likewise, at the time of the facts of the present case, the percentage of provisional judges in the country reached approximately 80%. In the years 2005 and 2006 a program through which the same provisional judges who were appointed discretionally achieved a titular position was carried out. The number of provisional judges was decreased to approximately 44% at the end of the year 2008.<sup>123</sup>

145. The Commission notes that this is still the situation as of the date of this report. The Inter-American Court has also said that the State has the duty to guarantee an appearance of independence of the judiciary that inspires legitimacy and enough confidence not only to parties at trial, but to all citizens in a democratic society.<sup>124</sup>

146. In the present case, three temporary judges during the preliminary stage were in charge of the criminal procedure against Brewer Carías. This situation itself, constitutes, an affectation to judicial guarantees in this particular case. The Commission also notes that on May 11, 2005 Temporary Judge Twenty-fifth Manuel Bognanno ordered the Sixth Provisional Prosecutor to allow full access to the case-files to the defense. On May 30, 2005 Sixth Provisional Prosecutor

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<sup>120</sup> IACHR. *Access to Justice and Social Inclusion: The Road toward Strengthening Democracy in Bolivia*. June 28, 2007, para. 96 and IACHR, *Report on Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. doc. 54, December 30, 2009, para. 267.

<sup>121</sup> I/A Court H. R., *Case of Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, Series C No. 197, para. 60.

<sup>122</sup> I/A Court H. R., *Case of Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, Series C No. 197, para. 70.

<sup>123</sup> I/A Court H. R., *Case of Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, Series C No. 197, para. 106.

<sup>124</sup> I/A Court H. R., *Case of Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009, Series C No. 197, para. 67.

requested the declaration of annulment to that decision. On June 5, Judge Bognanno requested Sixth Provisional Prosecutor the case-file, and on June 27 2005 she required and indication of the norm that imposes to the Public Ministry the obligation to send the case-files before it. On June 27, 2005 the Judge informed Public Ministry's Senior Prosecutor about possible "obstructive actions" by the Provisional Prosecutor Sixth in the case and requested the Public Ministry to "take an objective attitude, oriented to collaborate and not to hinder the actions of the jurisdictional organ". Manuel Bognanno was suspended from his position on June 29, 2005 and a new Temporary Judge was designated to take the procedure.

147. In sum, judge Bognanno was dismissed and replaced two days after issuing a complaint for the lack of compliance of his order in the defendant's favor for him to be given access to the entire case file. In light of the above analysis, the Commission believes that in the case at hand, the regulations and praxis governing the appointment, removal, and provisional status of judges in Venezuela affected Allan Brewer Carías's right to an independent judge.

148. Based on the preceding considerations, the Commission concludes that the fact that the prosecution of Allan Brewer Carías was conducted by temporary prosecutors and judges meant, as has been shown, that the guarantees of independence and impartiality were lacking. Consequently, the State failed to ensure the means necessary to provide justice in the investigation and criminal prosecution of Allan Brewer Carías, as required by Articles 8(1) and 25 of the American Convention, in connection with Articles 1(1) and 2 thereof.

**b. Adequate means for preparing a defense**

149. Secondly, the Commission will analyze the claims alleging the purported inability to secure photocopies of the case files during the investigation, and alleging that the defense team was only allowed to transcribe by hand the different documents in the case file, thus denying them the timely and effective possibility of offering a defense. The State, in contrast, claims that it has 17 deeds signed by Allan Brewer Carías's legal representative during the proceedings before the Public Prosecution Service, indicating that he reviewed the case file but made no comments thereon. In light of this, the State argues that it seems strange and false for the petitioners to claim that they did not have access to the case file or to what they mistakenly refer to as "the evidence" during the investigation phase.

150. The Commission has established that on May 4, 2005, the defense asked the Twenty-fifth Temporary Judge to exhibit all the videos, to admit the testimony offered, and to give access to copies of the case file. On May 11, 2005, the Twenty-fifth Temporary Judge, Manuel Bognanno, ordered the Sixth Provisional Prosecutor to allow the defense "full access to the case file and videos held in connection with the proceedings." In turn, on May 30, 2005, the Sixth Provisional Prosecutor asked the Twenty-fifth Temporary Judge and the Ninth Chamber of the Court of Appeal to annul that decision, arguing that from the date of Allan Brewer Carías's indictment up to May 9, 2005, the accused's representatives were able to review all items in the case file. However, the defense had not been given the copies they requested.

151. On June 10, 2005, Judge Bognanno asked the Sixth Provisional Prosecutor to refer the case file to him, to which she replied asking him to indicate the provision on which that request was based and which required the Public Ministry to report on and hand over the documents that it holds. The judge wrote to the Senior Prosecutor of the Public Ministry to inform him of alleged obstruction by the Sixth Provisional Prosecutor and asking the prosecution service to assume an "objective attitude." Manuel Bognanno was suspended from duty on June 29, 2005. On July 6, 2005, the Court of Appeal overturned the ruling of the Twenty-fifth Temporary Judge and ordered another control judge to rule on the defense brief. During the intermediate stage of the proceedings, the defense has had access to the copies of the case file.

152. In connection with requests for copies of investigation case files from the Public Ministry, the case law of the Criminal Cassation Chamber of the Supreme Court of Justice has ruled that:

[...] with respect to the alleged violation of the rights of equality, due process, and defense, based on the Public Ministry's presumed failure to respond to their requests for certified copies of the case documents, it must be noted that Article 304 of the current applicable Code expressly provides that all undertakings of the investigation shall be kept from third parties but that documents may be examined by the accused and his defense team and by the victim and his attorneys with special powers, regardless of whether or not he is a party in the action. [...]

Moreover, Article 97 of the Organic Law of the Public Ministry states that the court may agree on the copying, exhibition, or inspection of a given document, file, book, or record in the archive, and such an order shall be implemented unless the Attorney General of the Republic determines said document, file, book, or record to be of a reserved or confidential nature.

This is in line with the power awarded to the Public Ministry, under Article 285 of the Constitution and Articles 108 and 280 of the Organic Code of Criminal Procedure, to investigate (with the applicable formalities) the occurrence of punishable acts and to order, at the investigation stage, the confidentiality of the procedural record, as explained by Article 304 thereof, which would be the sole obstacle to the securing of copies of the case file.<sup>125</sup>

153. In the case at hand, the Commission notes that the Sixth Provisional Prosecutor did not order the confidentiality of the procedural record as "the sole obstacle to the securing of copies of the case file." Neither did the prosecutor abide by the court's order to afford access to the case file, arguing that the defense had reportedly been able to examine it.

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<sup>125</sup> Supreme Court of Justice, Criminal Cassation Chamber, Judgment No. 298/2009, case file 2009-105, June 18, 2009. In: <http://www.tsj.gov.ve/decisiones/scp/junio/298-18609-2009-a09-105.html>. See also: "Thus, within this constitutional framework and to ensure effective judicial protection, Article 49 of the Constitution enshrines the right of defense, which must be present in all judicial and administrative proceedings conducted by agencies of the State in their relations with the public, and which must be inviolable at all stages of investigations and trials, in order to ensure all persons prior knowledge of the charges for which they are being investigated and of the evidence against them, to afford them adequate time to prepare the means with which to defend themselves, and, primordially, the right to appeal an adverse judgment to secure its review by a higher body; and all of this is of greater importance in criminal proceedings, where the punitive power of the State is evident.

Consequently, the rights of defense and of due process were established by the framers of the Constitution as a guarantee to protect the human rights of the accused which, during a criminal trial, implies, as a *sine qua non* for its exercise, access by the accused to the proceedings conducted during the investigation phase, to enable him to prepare his claims and develop an adequate defense [...].

Thus, Article 97 of the Organic Law of the Public Ministry provides:

'(...) The court may agree on the copying, exhibition, or inspection of a given document, file, book, or record in the archive, and such an order shall be implemented, unless the Attorney General of the Republic determines said document, file, book, or record to be of reserved or confidential nature.'

Consequently, since the Public Ministry did not place a reservation on the documents comprising investigation No. 24F40NN-0034-05 and in accordance with the aforesaid Article 97, this Chamber shares the opinion of the Second Chamber of the Court of Appeal of the Zulia State Criminal Judicial Circuit, which ruled groundless the amparo relief brought, finding that the actions of the Tenth First-instance Court of that criminal judicial circuit, serving as a control court, were in accordance with the law and the scope of its jurisdiction, as provided for in Article 4 of the Organic Law of Amparo for Constitutional Rights and Guarantees, in finding that, pursuant to the right of defense, to due process, to effective judicial protection, and to the obtaining of a timely response, the defendant is entitled to secure simple copies of the investigation documents to prepare his defense, provided that the Public Ministry has not ordered total or partial reservations placed on the proceedings." Supreme Court of Justice, Criminal Cassation Chamber, Judgment No. 298/2009. case file No. 06-0760, July 26, 2006. In: <http://www.tsj.gov.ve/decisiones/scon/Julio/1427-260706-06-0760.htm>.

154. Accordingly, the Commission finds that during the criminal investigation of Allan Brewer Carías by the Public Ministry, there was a violation of the judicial guarantee enshrined in Article 8(2)(c) of the American Convention through the absence of “[...] the adequate means for the preparation of his defense.”

**c. Right to judicial protection (reasonable delay)**

155. The Commission will now analyze the claims relating to the delay in responding to the filing for annulment. The Commission has established that on November 8, 2005, the defense team lodged a request for the annulment of the entire proceedings on account of violations of the right to a fair trial. That filing for annulment was made in the response to the indictment. The petitioners claim that, to date, that annulment application has not been resolved and, consequently, the proceedings remain at the intermediate stage. In response, the State maintains that the filing for annulment has to be resolved at the preliminary hearing, which has not taken place because of the absence of the defendant.

156. On this point, Article 191 of the COPP provides that:

Absolute annulment shall apply in cases involving the intervention, assistance, and representation of the accused, in the circumstances and manner established by this Code, or in cases involving breaches or violations of the fundamental rights and guarantees provided in this Code, the Constitution of the Republic, laws, and treaties, conventions, or international agreements signed by the Republic.<sup>126</sup>

157. The Supreme Court of Justice has reiterated in its jurisprudence about the juncture at which filings for annulment are to be resolved, that:

[...] in criminal proceedings, the control judge will uphold procedural guarantees during the preparatory and intermediate stages, but the Organic Code of Criminal Procedure does not indicate a juncture in the proceedings for filing and resolving breaches of those guarantees, including violations of the Constitution; for criminal proceedings there is no provision similar to Article 10 of the Code of Civil Procedure, nor any referral to that code by the Organic Code of Criminal Procedure.

[...] In the opinion of this Chamber, it depends on the stage in the proceedings at which it is made: if during the intermediate stage, the judge may resolve it either before the preliminary hearing or as the result of that hearing, depending on the constitutional violation that is alleged, since there are some constitutional breaches that lack the urgency of others, in that they do not irreparably and immediately violate the legal situation of one of the parties.

Article 328 of the Organic Code of Criminal Procedure does not include requests for annulment among the proceedings that the parties may pursue at the intermediate stage, but the Chamber holds it to be possible as a derivative of the right of defense. If such a request for annulment is made, the control judge – according to the urgency indicated by the degree of the violation and given the silence of the law – may resolve it prior to opening the case for trial and at any time prior to such opening; however, it is preferable for it to be done at the preliminary hearing, giving priority to deciding on the points referred to in Article 330 of the Organic Code of Criminal Procedure, in order to allow the parties the right of rebuttal, which is a principle that governs criminal proceedings (Article 18 of the Organic Code of Criminal Procedure).

However, when the annulment overlaps with the object of preliminary objections, it must be resolved at the same juncture as those preliminary objections: in other words, at the

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<sup>126</sup> COPP of December 4, 2009.

preliminary hearing, which additionally guarantees the right of defense of all the parties in the proceedings and abides by the principle of rebuttal.<sup>127</sup>

158. In 2001 the Tribunal already observed that:

The calling for the preliminary hearing does not suppose the existence of a violation of the right to personal security and to the defense of the plaintiff, because it is in the preliminary hearing when the control judge determines the procedural possibility of the accusation of the prosecutor, on which depends the existence or not of the oral judgment. Meaning that, during the preliminary hearing -through the examination of the proof presented by the Public Ministry-the object of the judgment is determined, and also it is determined if the participation of the indictee in the facts investigated is 'possible'; therefore the celebration of that hearing did not cause any damage to the indictee in the principal cause [...]<sup>128</sup>.

159. In addition, in its general case law, the Supreme Court has ruled that:

[...] the ruling sought by the plaintiff for the annulment of the prosecutor's accusation may only be given at the preliminary hearing, which has not taken place due to the defendant's failure to appear [...]. Regarding the failure to rule on requests for '...joinders, annulments, and amended pleadings...', in this Chamber's opinion such requests should be resolved at the preliminary hearing, as stipulated in Article 330 of the Organic Code of Criminal Procedure; for that reason, the purported threat to or violation of constitutional rights alleged by the plaintiff is not actionable by the Fourth Control Court [...], in that said court may only rule on the accused's request at the preliminary hearing [...].<sup>129</sup>

160. Accordingly, the Commission notes that the annulment filing should be resolved at the preliminary hearing, which did not take place due to the defendant's failure to appear. Even when Article 327 of the 2005 COPP did not explicitly require the presence of the defendant at the preliminary hearing, jurisprudence had required it. The 2009 amendments to the COPP, on its part, takes this jurisprudence and state that if the preliminary hearing has been postponed on more than two occasions due to the failure to appear of a defendant, the proceedings are to continue with respect to the other defendants and the judge is to conduct the hearing with those who did appear, separating from the case those who did not.

161. In consideration whereof, and given the fact that the reforms to the COPP entered into force in 2009 for all procedures that were on course<sup>130</sup>, the Commission believes that the presence of the accused is required at the preliminary hearing, in order for that formality to be held and for the judge, on that occasion, to resolve the request for annulment lodged by the defendant's defense team. Consequently, the Commission finds that there was no violation of Article 25(1) of the American Convention, in conjunction with Article 1(1) thereof, with respect to Allan Brewer Carías.

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<sup>127</sup> Constitutional Chamber of the Supreme Court of Justice, case file No. 07-0827, decision of July 20, 2007.

<sup>128</sup> Constitutional Chamber of the Supreme Court of Justice, No. 01-2304, decision of November 16, 2001: Submission from the Ministry of Popular Power for Foreign Affairs No. AGEV/000530 of November 17, 2009, pp. 43 and 44.

<sup>129</sup> Constitutional Chamber of the Supreme Court of Justice, case file No. 09-0173, decision of October 19, 2009. See also Decision of the Accidental Chamber of the Court of Appeal of the Criminal Judicial Circuit of the State of Sucre, October 19, 2008.

<sup>130</sup> First Final Provision of the Partial Reform Law to the Criminal Procedural Organic Code, Official Gazette N°. 5.930, September 4, 2009 "[t]his code will apply since its entry into force, even for those procedures that are in course and for the facts to be sanctioned that were committed before that, when they are more favorable to the indictee or accused."

**2. Right of free expression (Article 13 of the American Convention, in conjunction with Article 1.1 thereof)**

162. The American Convention guarantees all persons the right to freedom of thought and expression. Article 13 of that instrument provides as follows: "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing ... or through any other medium of one's choice."

163. In accordance with the right enshrined in Article 13 of the American Convention, the expression of thoughts and ideas and their dissemination are indivisible, and restricting the possibilities for their dissemination imposes a constraint on the right of free expression. That right is essential for the development and strengthening of democracy and for full enjoyment of human rights. Full recognition of freedom of expression offers a fundamental guarantee for ensuring the rule of law and democratic institutions.

164. In the case at hand, no elements of fact or law have been submitted to indicate or to allow it to be reasonably concluded that the investigation and criminal trial of Allan Brewer Carías sought to silence his right of expression. Consequently, the Commission finds that it has been unable to establish the alleged violation of Allan Brewer Carías's right to freedom of thought and expression.

165. Finally, with regard to the alleged violation of the principle of non-refoulement and the alleged violation of the principle of presumption of innocence, the Commission finds that no elements requiring a merits analysis were presented.

**V. CONCLUSIONS**

166. In light of the foregoing analysis, the Venezuelan State is responsible for violating the rights set out in Articles 8 and 25 of the American Convention, in conjunction with Articles 1(1) and 2 thereof, with respect to Allan R. Brewer Carías. In addition, the Commission concludes that the Venezuelan State is not responsible for violating the right enshrined in Article 13 of the American Convention.

**VI. RECOMMENDATIONS**

167. Based on the foregoing considerations of fact and law,

**THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS:**

1. That the State adopt measures to ensure the independence of the judiciary, with reforms to strengthen the procedures whereby judges and prosecutors are appointed and removed, to affirm their tenure in those positions, and to eliminate the temporary status of the vast majority of judges and prosecutors, in order to uphold the rights to judicial protection and to a fair trial established in the American Convention.

2. Should the criminal proceedings against Allan Brewer Carías continue, that the State establish the conditions necessary to ensure that the trial is conducted in accordance with the guarantees and standards enshrined in Articles 8 and 25 of the American Convention.

3. That the State make appropriate reparations for the human rights violations established in this report, in both their material and moral dimensions.

Done and signed in the city of Washington, D.C., on the 3rd day of November 2011. (Signed):  
Dinah Shelton, President; José de Jesús Orozco Henríquez, First Vice-President; Rodrigo Escobar Gil,  
Second Vice-President; Paulo Sérgio Pinheiro, Felipe González, and María Silvia Guillén, Commissioners.