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ORGANIZATION OF AMERICAN STATES

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

APPLICATION TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Oscar Barreto Leiva

Case 11.663

VERSUS THE BOLIVARIAN REPUBLIC OF VENEZUELA

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I. INTRODUCTION

1. The Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission" or the "Commission"), files with the Inter-American Court of Human Rights (hereinafter the "Inter-American Court" or the "Court") the application, case number 11.663, *Oscar Barreto Leiva*, against the Bolivarian Republic of Venezuela (hereinafter the "State" or the "Venezuelan state"), for its responsibility in violating the right to judicial guarantees in the criminal proceeding in which Mr. Oscar Barreto Leiva (hereinafter the "victim") was convicted of crimes against public property as a result of his actions while serving as Director General, Department of Administration and Services of the Ministry of the Secretariat of the Presidency; and, consequently, of further violations of the victim's right to personal liberty and of the right to judicial protection.

2. The Inter-American Commission requests that the Court establish the international responsibility of the Venezuelan state which has failed to comply with its international obligations by violating article 7 (right to personal liberty), article 8 (right to judicial guarantees) and article 25 (right to judicial protection) of the American Convention on Human Rights (hereinafter the "American Convention" or the "Convention"), with regard to the general obligation to respect and guarantee the human rights recognized in article 1.1 of the same instrument and the obligation to adopt domestic legislation established in article 2 of the Convention, in detriment of Oscar Barreto Leiva.

3. This case has been processed in accordance with the provisions of the American Convention and is submitted to the Court in accordance with article 33 of the Court's Rules of Procedure. A copy of report 63/06, prepared in accordance with article 37.3 of the Rules of Procedure of the Inter-American Commission on Human Rights (hereinafter, the "Rules of Procedure of the Commission") and article 50 of the Convention,¹ is attached as an annex.

4. The Commission considers that the filing of this case with the Court is justified due to the need to obtain justice and reparation for the victim. Furthermore, the Commission considers that this case provides an opportunity to develop inter-American jurisprudence with regard to basic judicial guarantees in

¹ IACHR, Report No. 31/08 (admissibility and merits), Case 11.663, *Oscar Barreto Leiva*, Venezuela, July 17, 2008; Appendix 1.

criminal trials, especially, the guarantee to a competent judge and the right to appeal the judgment.

II. PURPOSE

5. The purpose of this application is to respectfully request the Court to find and declare that the Bolivarian Republic of Venezuela violated, to the detriment of Mister Oscar Barreto Leiva, the rights recognized in articles 7.1, 7.3, 7.5, 8.1, 8.2.b, 8.2.c, 8.2.d, 8.2.f, 8.2.h y 25.1 of the American Convention with regard to the general obligations of the state to respect and guarantee human rights and to adopt domestic legislation, established in articles 1.1 and 2 of the same instrument.

6. Consequently, the Inter-American Commission requests that the Court order the State to:

- a) grant the victim appropriate reparation to include full satisfaction for the human rights violations committed to his detriment;
- b) publicly acknowledge international responsibility for the facts in this case;
- c) adopt the necessary legal, administrative and other types of measures to prevent that facts similar to those that form the basis of this complaint are repeated; and
- d) pay the costs and legal expenses incurred in pursuing this case in the Inter-American system.

III. REPRESENTATION

7. Pursuant to articles 22 and 33 of the Rules of Procedure of the Court, the Commission has designated Commissioner Paulo Sergio Pinheiro, and his Executive Secretary, Santiago A. Canton, as the Commission's delegates in this case, Deputy Executive Secretary, Elizabeth Abi-Mershed and attorneys Juan Pablo Alban Alencastro, Veronica Gomez, Debora Benchoam y Silvia Serrano, specialists of the Executive Secretariat of the Commission, have been designated legal counsel.

IV. JURISDICTION OF THE COURT

8. Under the provisions of article 62.3 of the American Convention, the Court is competent to hear any case concerning the interpretation and application of the provisions of the Convention that is submitted to the Court, provided that the States Parties to the case recognize or have recognized the Court's jurisdiction.

9. The Court is competent to hear the case. The Venezuelan state ratified the American Convention on August 9, 1977, and recognized the jurisdiction of the Court on June 24, 1981.

V. PROCESSING BEFORE THE INTER-AMERICAN COMMISSION²

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10. On August 9, 1996, the Commission received the initial petition and on September 16, 1996, the Commission forwarded the relevant sections of the petition to the State requesting that the State provide within a period of 90 days any information it considered pertinent as well as any other considerations in order to determine if all domestic remedies had been exhausted in this case. On the same date, the petitioner was notified of the number assigned to the petition and that the processing of the petition had begun by forwarding the relevant sections to the State. At the same time, the Commission requested the petitioner to provide any additional information that could help verify the facts outlined in the complaint.

11. On February 3, 1997, then Commission received a communication from the State in which it provided information about some of the facts described in the petition, and offered arguments against some of the violations denounced without claiming in its defense that domestic remedies had not been exhausted. On February 11, 1997, the Commission forwarded to the petitioner the relevant sections of the State's communication and requested the petitioner to submit its observations, as well as any new or supplementary information, within a period of 45 days.

12. On March 24, 1997, the Commission received two communications from the petitioner providing annexes to the initial petition as well as observations to the State's communication. The relevant sections of these communications were forwarded to the State on March 26, 1997, requesting that the State submit its reports on the case within a period of 30 days.

~~13. On July 11, 1997, the Commission received a communication from~~
the State and the relevant sections of that communication were forwarded to the petitioner on July 22, 1997, who was granted a period of 30 days to submit his observations. On September 26, 1997, the Commission received a note from the petitioner answering the previous communication from the State. On October 16, 1997, the petitioner's note was forwarded to the State and it was requested that the State submit its report on the case within a period of 30 days.

14. On February 10, 1998, the Commission received written communication from the State responding to the petitioner's previous note. On February 12, 1998, the State's communication was forwarded to the petitioner who was granted a period of 30 days to submit his observations. On March 30, 1998, the State's communication was again forwarded to the petitioner who was granted a new 30-day period to respond.

² The actions mentioned in this section are included in the case file of the processing before the IACHR. Appendix 2.

15. On April 8, 1998, the Commission received a written note from the petitioner in which, in addition to submitting his observations, the petitioner requested a hearing on the case. On June 10, 1998, the Commission forwarded this note to the State, and requested that the State submit its observations within a period of 30 days. On February 19, 1999, the Commission received a communication from the petitioner requesting a decision on the admissibility of the case.

16. On February 23, 1999, the Commission notified the petitioner and the State that it was offering to assist both parties to reach a friendly settlement and requested that the parties respond within a period of 30 days. On March 5, 1999, the Commission received a note from the petitioner indicating that he was not opposed to a friendly settlement. This communication was forwarded to the State on March 8, 1999, and it was requested that the State submit its observations within a period of 30 days.

17. On September 16, 1999, the Commission again notified the State of the offer to reach a friendly settlement and indicated that if no response was received from the State, the case would proceed. On October 6, 1999, the Commission received a communication from the petitioner indicating that, since the State had not responded, he was requesting the Commission to issue its report with regard to the admissibility of the case.

18. On February 17, 2000, the Commission received communication from the petitioner who again requested that the Commission issue its decision on the admissibility of the case. This communication was forwarded to the State on March 13, 2000.

~~19. On July 27, 2000, the Commission sent the State a communication~~ requesting that the State submit whatever information it considered relevant to the case within a period of 30 days.

20. On August 11, 2000, the Commission received communication from the petitioner, again requesting that the Commission issue a decision with regard to the admissibility of the case and also requesting a hearing. On August 14, 2000, the Commission forwarded the petitioner's communication to the State and requested a response from the State within a period of 30 days.

21. On September 13, 2000, the Commission received a communication from the State indicating that it had engaged in some communication with the petitioner with regard to a possible friendly settlement but that the petitioner had stated that, for the time being, it preferred not to discuss the victim's case. On September 26, 2000, the Commission received communication from the petitioner again requesting that the Commission issue its decision on the admissibility of the case.

22. On October 4, 2000, the Commission forwarded to the petitioner the relevant sections of the State's response received on September 13, 2000, and granted the petitioner a period of 45 days to submit his observations.

23. On November 10, 2000, the Commission received a communication from the petitioner indicating that, in the conversations it had held with the State regarding the possibility of reaching a friendly settlement, the State had firmly refused to discuss the subject because the Commission had not issued a decision on the admissibility of the case.

24. On December 5, 2000, the Commission forwarded to the State the petitioner's communication and requested that the State submit its observation within 30 days. The State did not comply with the request.

25. On May 16, 2001, the Commission received communication from the petitioner reiterating his request that the Commission issue its decision on the admissibility of the case. On March 18, 2002, and on August 22, 2002, the Commission received communications from the petitioner requesting the Commission's decision on the admissibility of the case. On January 22, 2004, the Commission received a communication from the petitioner requesting information on the status of his case.

26. On May 12, 2005, the Commission sent communication to the petitioner requesting updated information on the case, specifically with regard to the conditions of incarceration of the victim, within a period of 30 days.

27. On June 23, 2005, the Commission received communication from the petitioner providing additional information on the case. On July 14, 2005, the Commission forwarded the relevant sections of the petitioner's communication of June 23, to the State, granting it a period of 30 days to submit its observations. On August 12, 2005, the State requested the Commission to grant it an extension to submit its observations. A 30-day extension was granted by the Commission beginning on September 1, but the State's observations were not received.

28. On December 4, 2006, the Commission notified both parties that, under the provisions of article 37.3 of the Commission's Rules of Procedure it had decided to postpone issuing a decision on admissibility until it had decided on the merits of the case. In that same communication, the Commission requested that the petitioner submit additional observations on the merits of the case within a period of two months.

29. On January 16, 2007, the petitioner requested a hearing with the Commission to discuss the case. In a communication dated February 21, 2007, the Commission informed the petitioner that, due to the large number of hearings requested, it would not be possible to accommodate his request. The petitioner did not provide additional observations on the merits of the case.

30. On October 19, 2007, the Commission requested that the petitioner provide a copy of the victim's guilty sentence dated May 30, 1996. In a communication date January 24, 2008, the petitioner indicated that it had submitted the sentence together with the petition in 1996.

31. On November 6, 2007, the Commission requested the State to forward a copy of the victim's guilty sentence dated May 30, 1996, and that, in accordance with the Commission's decision to postpone the admissibility phase until the stage on the merits of the case, to submit additional observations on the merits of the case within a period of two months. As of the date of approval of the report on the merits of the case, the Commission had neither received the information it had requested from the State nor the additional observations it had requested from both parties on the merits of the case.

32. Within the framework of the 132nd Regular Session, on July 17, 2008, the Commission approved the Report on Admissibility and Merits 31/08, pursuant to article 37.3 of the Rules of Procedure of the Commission and article 50 of the Convention. In this report, the Commission concluded that:

the petition was admissible and that the Venezuelan state violated, in detriment of the victim; the rights recognized in articles 7.1, 7.3, 7.5, 8.1, 8.2, 8.2 b, 8.2.c, 8.2.d, 8.2.f, 8.2.h and 25.1 of the American Convention with regard to the general obligation to respect and guarantee those rights and to adopt the domestic legal measures established in articles 1.1 and 2 of the same instrument. —

33. In the aforementioned report, the Commission made the following recommendations to the Venezuelan state:

1. To adopt the necessary measures for Oscar Barreto Leiva to receive adequate and timely reparation that would provide full satisfaction for the violation of human rights outlined in this report.
2. To acknowledge publicly its international responsibility for the facts in this case.

34. The report was forwarded to the state on July 31, 2008, with the request that it inform the Commission within a period of two months of the actions taken to implement the recommendations contained in the report, in accordance with the provisions of article 43.2 of the Rules of Procedure of the Commission.

35. At the same time, pursuant to article 43.3 of its Rules of Procedure, the Commission notified the petitioner that the Report on the Merits had been approved and then forwarded to the State, and requested that the petitioner notify the Commission within one month of his position regarding the eventual filing of the case with the Inter-American Court.

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36. On September 5, 2008, the petitioner notified the Commission of the victim's wish that the case be submitted to the Inter-American Court of Human Rights.

37. As of the date this case was submitted to the Court, the Commission had not received any response from the State with regard to what actions had been taken to implement the recommendations contained in report 31/08.

38. On October 29, 2008, taking into consideration the lack of information regarding any substantive progress made in the effective implementation of its recommendations, the Commission, within the framework of the 133rd Session, decided to submit this case to the Inter-American Court.

VI. FACTS

39. At the time that the facts that constitute the basis for the investigation and for the criminal proceeding described in this section of the complaint took place, Mr. Oscar Barreto Leiva was the Director General, Department of Administration and Services, Ministry of the Secretary of the Presidency of the Republic, a fact confirmed by the Venezuelan state during the processing of the case before the Inter-American Commission.³

40. On February 4, 1993, Mister Oscar Barreto Leiva was summoned to appear before the Superior Court for Safeguarding Public Assets to testify in the investigation phase of a summary proceeding initiated by that office, and was warned that if he failed to appear, he would be subject to criminal sanctions established in the Criminal Code⁴.

~~41. On February 10, 1993, Mr. Oscar Barreto Leiva appeared before the Superior Court for Safeguarding Public Assets and testified without being sworn in and after being advised of his constitutional right to refuse giving testimony that may incriminate him, his spouse or relatives within the fourth degree of consanguinity or the second degree of affinity⁵. Some time after Mr. Barreto Leiva began testifying, Prosecutor 70 of the Public Ministry entered the courtroom. Mr. Barreto Leiva continued testifying and later, Prosecutor 118 of the Public Ministry joined the proceedings. The testimony continued and then Prosecutor 63 of the Public Ministry also joined the proceedings.⁶~~

³ Note from the State received on February 10, 1998, case file, processing before the IACHR Appendix 2.

⁴ Summons notice issued by the Superior Court for Safeguarding Public Property, dated February 4, 1993, Annex 4.

⁵ Initial testimony of Mr. Oscar Barreto Leiva before the Superior Court for Safeguarding Public Property, Annex 5.

⁶ Initial testimony of Mr. Oscar Barreto Leiva before the Superior Court for Safeguarding Public Property, Annex 5.

42. On March 11, 1993, the Prosecutor General requested the Supreme Court of Justice (hereinafter SCJ) to grant a preliminary hearing on the merits against then-President of the Republic, Carlos Andres Perez; then-Senator, Alejandro Izaguirre Angeli; and then-Representative, Reinaldo Figueredo Planchart, all for the crimes of embezzlement and misappropriation of public funds⁷.

43. On March 30, 1993, the Superior Court for Safeguarding Public Assets submitted to the SCJ the indictments in the case⁸.

44. On May 20, 1993, the SCJ determined that merits existed to take the aforementioned individuals to trial. On May 21, 1993, the Senate issued the appropriate authorization and on May 26, 1993, the SCJ agreed to proceed with the case against Carlos Andres Perez⁹.

45. On May 27, 1993, the Chamber of Deputies of the National Congress agreed to lift the parliamentary immunity of Reinaldo Figueredo Planchart, and on June 2, 1993, the Senate agreed to lift the parliamentary immunity of Alejandro Izaguirre Angeli¹⁰.

46. On September 29, 1993, Mr. Oscar Barreto Leiva was summoned to appear on October 6, 1993, before the Substantiation Court of the Supreme Court of Justice, in order to provide witness testimony in a summary investigation being conducted by the Court¹¹.

47. On October 5, 1993, Mr. Oscar Barreto Leiva appeared without defense counsel before the Substantiation Court of the Plenary Chamber of the SCJ¹².

~~48. On December 14, 1993, the Substantiation Court of the Plenary Chamber of the SCJ determined that it would be appropriate to summon Mr. Oscar~~

⁷ Judgment issued by the Supreme Court of Justice of Venezuela on May 30, 1996, in the trial of Carlos Andrés Pérez Rodríguez, Alejandro Izaguirre Angeli, Reinaldo Figueredo Planchart, Oscar Enrique Barreto Leiva and Carlos Jesús Vera Aristigueta, folio 3, Annex 14.

⁸ Judgment issued by the Supreme Court of Justice of Venezuela on May 30, 1996, in the trial of Carlos Andrés Pérez Rodríguez, Alejandro Izaguirre Angeli, Reinaldo Figueredo Planchart, Oscar Enrique Barreto Leiva and Carlos Jesús Vera Aristigueta, folio 4, Annex 14.

⁹ Judgment issued by the Supreme Court of Justice of Venezuela on May 30, 1996, in the trial of Carlos Andrés Pérez Rodríguez, Alejandro Izaguirre Angeli, Reinaldo Figueredo Planchart, Oscar Enrique Barreto Leiva and Carlos Jesús Vera Aristigueta, folio 4 y 5, Annex 14.

¹⁰ Judgment issued by the Supreme Court of Justice of Venezuela on May 30, 1996, in the trial of Carlos Andrés Pérez Rodríguez, Alejandro Izaguirre Angeli, Reinaldo Figueredo Planchart, Oscar Enrique Barreto Leiva and Carlos Jesús Vera Aristigueta, folio 5, Annex 14.

¹¹ Summons notice issued by the Substantiation Court of the Supreme Court of Justice, dated September 29, 1993, Annex 7.

¹² Judgment issued by the Supreme Court of Justice of Venezuela on May 30, 1996, in the trial of Carlos Andrés Pérez Rodríguez, Alejandro Izaguirre Angeli, Reinaldo Figueredo Planchart, Oscar Enrique Barreto Leiva and Carlos Jesús Vera Aristigueta, folio 26, Annex 14.

Barreto Leiva, Mr. Carlos Vera Aristigueta and Mr. Tirso Ramos, to provide informative testimony in the proceeding. On that same date, summons for the aforementioned individuals were issued.¹³

49. On December 15, 1993, Mr. Oscar Barreto Leiva appeared without defense counsel before the Substantiation Court of the Plenary Chamber of the SCJ and testified without being sworn in, after being informed of the grounds for his summons and of the legal principle that exempts him from being a witness against himself in accordance with the provisions of article 60 of the constitution in force at the time, and of article 193 of the CEC also in force at the time. Two prosecutors from the Public Ministry especially designated to take part in the proceedings were also present.¹⁴

50. In his testimony, Mr. Oscar Barreto Leiva said: "I am ready to cooperate with this High Court as I did the first time I testified as a witness, and although I personally and morally regret the change to being classified an accused person, I will try to cooperate fully with whatever I am asked so long, of course, as I do not incriminate myself. That's all." In this testimony, Mr. Oscar Barreto Leiva reiterated in full the testimony he had given on October 5, 1993, and he also reiterated the testimony he had given on February 10, 1993, and clarified some aspects of the testimony. In this same testimony, Mr. Oscar Barreto Leiva, pointed out: "I have been my intention all along, and it will remain so, to provide the truth to this high court but, in all honesty, I must express my frustration and pain to be here today testifying as a suspect, even though I come with the same disposition to try to help clarify the truth in a disinterested manner although with more interest when I testify as a suspect."¹⁵

51. On May 18, 1994, arrest warrants were issued for Carlos Andrés Pérez, Alejandro Izaguirre and Reinaldo Figueredo Planchart for the crimes of embezzlement and misappropriation of public funds, as well as for Carlos Jesús Vera Aristigueta and Oscar Barreto Leiva, for the crime of complicity to misappropriate public funds, typified in article 80 of the Organic Law for Safeguarding Public Assets, which prescribed a sentence of 6 months to 3 years in jail for that crime.¹⁶

¹³ Summons issued by the Substantiation Court of the Supreme Court of Justice dated December 14, 1993, Annex 8.

¹⁴ Testimony of Mr. Oscar Barreto Leiva before the Substantiation Court of the Plenary Chamber of the Supreme Court of Justice, Annex 9.

¹⁵ Testimony of Mr. Oscar Barreto Leiva before the Substantiation Court of the Plenary Chamber of the Supreme Court of Justice, Annex 9.

¹⁶ Decision of the Plenary Chamber of the Supreme Court of Justice, dated August 9, 1995, Annex 11.

52. The aforementioned order was enforced on May 25, 1994. At that time, the victim was detained at the "El Junquito" jail, after surrendering to the Judicial Police.¹⁷

53. On June 8, 1994, the SCJ issued a decision on its competence to try Alejandro Izaguirre, Reinaldo Figueredo Planchart and other persons connected to the facts, together with the former President of the Republic, Carlos Andrés Pérez. The SCJ outlined the following considerations:

Competence *ratione personae* is exceptional. Notwithstanding the universal principle adopted by most constitutions that guarantees equality before the law, which is also established by our constitution, there are exceptions and, because of their rank and the nature of their duties, certain individuals enjoy procedural privileges. This competence is determined by the Constitution of the Republic, the Code of Criminal Procedure, and the special laws that specifically regulate it but, as previously stated, its application is restrictive.

The Supreme Court of Justice is competent *ratione personae* to hear criminal offenses committed by the President of the Republic and, with prior authorization of the Senate, will continue to hear the case until a final judgment is issued. On the other hand, with regard to the trial of members of Congress in a court of law and, in the event that it is determined that there are grounds to proceed with a trial and that the appropriate chamber of Congress has lifted parliamentary immunity, the case files will be referred to the Ordinary Court with jurisdiction if it is a misdemeanor, or the Supreme Court of Justice will continue to hear the case if it concerns political crimes. This is established in the last section of article 149 of the Organic Law of the Supreme Court of Justice.

However, the constitutional privilege granted to the President of the Republic under the provisions of article 125, paragraph 1, case of record, that not only the preliminary hearing but also the trial of the President be heard by the Highest Court, tacitly annuls even the principle of appeal, and, in order to be properly exercised, it requires that the general principles that constitute due process be applied, among them, respect for the principle of competence on the basis of connection.

The aforementioned is also recognized by the Organic Law for Safeguarding Public Assets which, although in article 82 establishes that the Superior Courts for Safeguarding Public Assets shall have jurisdiction in the first instance to determine if there are grounds for a trial, to hear the case and to issue decisions in the trials of deputies and senators of the National Congress for crimes established in that law, in article 89 it makes reference to ancillary jurisdiction when establishing that, when some of the public servants mentioned in article 82 are named perpetrators, accomplices or accessories, and, at the same time, civil servants or private individuals who must be tried by Courts of First Instance for violations established in (sic) that law, the Superior Court for Safeguarding Public Assets shall have

¹⁷ Good Conduct Certificate Issued on June 6, 1995, by the Directorate of Prisons, "El Junquito" Detention Center, Annex 10

jurisdiction to hear all those cases. This is also reinforced by article 154 of the Organic Law of the Supreme Court of Justice which refers to the Code of Criminal Procedure in this manner: "Under the provisions of this section, the rules of the Code of Criminal Procedure on this subject shall be applied."

In a criminal trial, competence is a matter of public order and it is so established in the Code of Criminal Procedure. In fact, article 27 of the Code of Criminal Procedure establishes that only one of the competent courts will try crimes related to each other and article 28 defines what should be considered related crimes. That connection annuls the general principles that establish competence in criminal matters and it could be subjective or relating to the perpetrators of the crime, or objective or relating to punishable acts. In either case, there cannot be separate proceedings; that would undermine the unity of the case and there could be a risk that contradictory judgments would be issued; therefore the proceedings must be combined to avoid that risk. Among the cases of connectivity, the law establishes connection by unity of crimes, where several individuals appear responsible for the same punishable offense, either as perpetrators, accomplices or accessories. There must then be only one investigation that covers perpetrators and participants since, presumably, all have participated in some way in the commission of the crime and their individual responsibility will be determined during the trial.

The unity of the case does not allow then to initiate two separate proceedings for the same crimes or that indictments, which are essential, be issued by different judges, because it would alter the nature of the penal action and would work against the principles of unity, economy and procedural speed. Therefore, to the extent possible, the combination of proceedings that have those connections between them must be ensured in order to prevent possible contradictory judgments and even conflicts derived from *res judicata*.

In light of the preceding, it is ordered that the Superior Court for Safeguarding Public Assets be requested to refer all the records in case file No. 92-2713.

Based on the previous arguments and considerations, the Plenary Chamber of the Supreme Court of Justice, administering justice on behalf of the Republic and authorized by law under the provisions of article 215.(1) of the Constitution, and taking into consideration that it concerns a single-court case, also orders that the trial initiated against citizen Carlos Andrés Pérez, President of the Republic, in conjunction with the trials of citizens Alejandro Izaguirre and Reinaldo Figueredo Planchart proceed in this High Court, as well as the trials of persons liable for prosecution for these same crimes until a final judgment is issued.¹⁰

54. The previous decision was not unanimous. Three judges abstained from voting. These are some of the considerations reflected in the vote:

¹⁰ Decision of the Plenary Chamber of the Supreme Court of Justice dated June 8, 1993, Annex 6.

[...] competence in criminal matters is eminently within the realm of public order and cannot be deferred. It is a matter of public order because there are public interests at stake. It cannot be deferred because the parties do not have the power to have a judge who has not been designated by law hear criminal proceedings.

[...] the principle of procedural unity is established in article 9 of the Code of Criminal Procedure, but this is not an absolute principle in the sense that under no circumstances can the unity of a case be divided. The Code itself provides for the exception in this manner: "There shall not be separate cases for one crime or violation even if several individuals are charged with the same offense, except in exceptional cases established by special laws."

[...] in a judgment issued on April 23, 1974, the Political-Administrative Chamber of the Supreme Court of Justice stated: "The regular rules with regard to the competence of courts and criminal procedure do not apply to the public servants described in article 215(1) and (2) of the Constitution, who, because of their rank and the nature (sic) and importance of their responsibilities, enjoy a special privilege. Those public servants are: the President of the Republic or whomsoever acts in his stead, members of Congress or of the Supreme Court itself, Ministers, the Prosecutor General, the Attorney General, the Comptroller General, Governors and the Chiefs of Diplomatic Missions of the Republic. This is an exact list and, therefore, it cannot be expanded freely by ordinary legislators or extended by the courts through extensive or analogous interpretation."

The above transcribed doctrine is really true since the application of ordinary rules with regard to competence, connectivity, ancillary jurisdiction or combination of cases, would inexorably lead to the Plenary Chamber of the Supreme Court of Justice having to hear cases involving common crimes, presumably committed by individuals who do not enjoy the constitutional privilege of having their cases heard by the highest court of the Republic, which would be, obviously, unconstitutional [...].¹⁹

55. On July 13, 1994, the victim, accompanied by legal counsel, testified before the Substantiation Court of the Plenary Chamber of the SCJ.²⁰

56. On August 9, 1995, the Plenary Chamber of the Supreme Court of Justice issued a decision granting a request made by the then detained Barreto Leiva and Carlos Jesús Vera Aristigueta to be released on bail while standing trial. The accused were ordered not to leave the city, not to change address without authorization and not to establish residency in another municipality, state or territory until the proceedings were completed.²¹

¹⁹ Judgment issued by the Plenary Chamber of the Supreme Court of Justice, dated June 8, 1993. Dissenting vote, Annex 6.

²⁰ Sentence handed down by the Supreme Court of Justice of Venezuela on May 30, 1996, in the trial of Carlos Andrés Pérez Rodríguez, Alejandro Izaguirre Angell, Reinaldo Figueredo Planchart, Oscar Enrique Barreto Leiva and Carlos Jesús Vera Aristigueta, folio 38, Annex 14.

²¹ Decision of the Plenary Chamber of the Supreme Court of Justice dated August 9, 1995. Annex 11.

57. The Plenary Chamber of the Supreme Court included the following considerations, in the sense that the release on bail must observe the exact requirements established in the special law that regulates it: "certain crimes, among them, those established in the Organic Law for Safeguarding Public Assets are excluded, but article 22 of the law in question contains an exception, and that exception allows release on bail in those cases where the maximum jail penalty does not exceed two years."²²

58. On October 31, 1995, the Plenary Chamber of the Supreme Court of Justice issued a judgment denying Mr. Oscar Barreto Leiva permission to freely travel to another state.²³

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

60. Before a judgment was issued, draft documents from the office of Judge Luis Manuel Palís were published in the mass media. There were also interviews given based on those documents and it was reported that all judges had submitted their observations.²⁵

61. On May 30, 1996, the Plenary Court of the Supreme Court of Justice issued a guilty verdict against the accused, including Mr. Oscar Barreto Leiva as an accomplice to the crime of Aggravated Generic Misappropriation of Funds which carried a prison sentence of 1 year and 2 months²⁶, in addition to the accessory penalties of being barred from political activity for the duration of the sentence, payment of trial costs, being barred from holding public office for a period equal to the sentence to commence after the sentence had been completed, and the payment of restitution, reparation or compensation for damages caused to public property in the amount determined by expert assessment.²⁷

²² Decision of the Plenary Chamber of the Supreme Court of Justice dated August 9, 1995, Annex 11.

²³ Decision of the Plenary Chamber of the Supreme Court of Justice dated October 31, 1995, Annex 12.

²⁴ Letter from the defense attorneys for former-President Carlos Andrés Pérez addressed to the Supreme Court of Justice dated January 30, 1996, Annex 13.

²⁵ Press article published in the *El Nacional* newspaper on the May 2, 1996 edition, Annex 16.

²⁶ Judgment issued by the Supreme Court of Venezuela on May 30, 1996, in the trial of Carlos Andrés Pérez Rodríguez, Alejandro Izaguirre Angeli, Reinaldo Figueredo Planchart, Oscar Enrique Barreto Leiva and Carlos Jesús Vera Aristigueta, folio 38, Annex 14.

²⁷ Appendix 2 of this application makes it clear that there was no controversy surrounding this fact during the processing of the case before the IACHR. The State made reference to the penalty imposed on Mr. Barreto Leiva in its communication dated February 3, 1997.

62. On June 13, 1996, Mr. Oscar Barreto Leiva was released from jail since had been detained for 1 year, 2 months and 16 days and had, therefore, served out his sentence.²⁸

63. On June 14, 1996, the newspaper *El Nuevo País*, transcribed a conversation between then Senator Virgilio Ávila Vivas and former President Carlos Andrés Pérez, which makes reference to a conversation that the senator had with the judge responsible for the definitive decision of the SCJ, with regard to the introduction of possible mitigating circumstances, among other things.²⁹

64. On September 3, 1997, an article written by Edgar Lopez titled, "Congress will cite SCJ judges who plan to run for reelection" was published in the political section of the *El Nacional* newspaper. This article stated, among other things, that "Senator Arístides Beaujón, chairman of the committee in question, brought to mind that the nine-year-term to which these five judges had been elected elapsed on May 1995. Since then, the renewal of the terms of three-fourths of the members of the SCJ had been "sufficiently justified," among other reasons, admitted Beaujón, because it was considered inconvenient to alter the balance of the political forces before the conclusion of the trial of former President Carlos Andrés Pérez in the case of the 250 million Bolívares secret account"³⁰.

65. It is important to emphasize that during the course of the criminal proceedings against the victim, the Code of Criminal Procedure (hereinafter the CCP) of July 13, 1926, partially amended by legislation dated August 5, 1954; June 26, 1957; January 27, 1962; and December 22, 1995,³¹ and the special criminal proceedings contemplated in the Organic Law for Safeguarding Public Assets of December 23, 1982,³² as well as the Constitution of January 23, 1961,³³ were in force. Various provisions of this group of laws will be analyzed in the legal arguments section of this application.

VII. LEGAL ARGUMENTS

- A. Violation of the right to personal liberty, the right to judicial guarantees and the right to judicial protection, and failure to comply with the obligation to respect and guarantee human rights (articles 7, 8, 25, and 1.1 of the American Convention)

²⁸ Decision of the Supreme Court of Justice dated June 13, 1996, Annex 15.

²⁹ Article published in the *El Nuevo País* newspaper, June 14, 1996 edition, Annex 16.

³⁰ Article published in the *El Nacional* newspaper, September 3, 1997 edition, Annex 16.

³¹ Annex 3.

³² Annex 2.

³³ Annex 1.

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1. Prior notification in detail of the charges against the accused (article 8.2.b of the Convention)

66. Article 8.2.b of the Convention establishes that:

Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[...]

- b. prior notification in detail to the accused of the charges against him.

67. As it was described in the facts section of this application, the victim testified three times during the investigation phase and before an arrest warrant was issued in his name; on February 10, 1993, before the Superior Court for Safeguarding Public Property; and on October 5, 1993 and December 15, 1993, before the Substantiation Court of the SCJ. At least for the testimony on February 10, 1993, and on December 15, 1993, the corresponding summons of February 10, 1993, and of December 14, 1993, did not specify the status under which the victim was required to appear – this last summons only mentioned that he was to provide informative testimony – and throughout the course of these proceedings, he testified without being sworn in and after being advised of the constitutional guarantee against providing testimony that may incriminate him, his spouse or relatives within the fourth degree of consanguinity or second degree of affinity, under the provisions of article 60 of the Constitution and article 193 of the Code of Criminal Procedure. In that regard, it is necessary to take into account the domestic legislation in force at the time the facts transpired.

68. Article 60 of the Constitution established:

1. Personal liberty and security are inviolable, and, consequently: 1. No one shall be incarcerated or detained, unless caught *in fraganti*, without written authorization from the civil servant authorized to order the detention in those cases and having fulfilled the requirements established by law. The investigation cannot be extended beyond the maximum deadline legally stipulated. The defendant shall have access to all evidentiary material and to all means of defense provided for by law as soon as the appropriate arrest warrant has been executed.

[...]

4. No one shall be forced to testify or compelled to provide statements or to admit guilt in a criminal case against him, or to incriminate his spouse or the person with whom he lives in cohabitation, or relatives within the fourth grade of consanguinity or the second degree of affinity.

69. Article 71 of the Code of Criminal Procedure consecrated

[a]n investigation entails the proceedings aimed at investigating and determining the commission of a punishable act, and gathering all the circumstances that may influence how that act is classified; the guilt of the

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presumed perpetrators; and securing the perpetrators and the active and passive objects involved in the commission of the act.

The investigation must be completed within 30 days after the arrest of the defendant. The summonses and proceedings that could not be completed in this term shall be completed during the plenary (full trial).

70. Article 73 of the Code of Criminal Procedure pointed out

[t]he investigation proceedings, whether initiated by the court itself or at the instance of an interested party, shall remain secret, except for the representative from the Public Ministry, until the investigation is completed. The proceedings will cease to be secret for the accused, for whom an arrest warrant was issued, and for the accuser, in cases where the law demands a petition from a party or that the aggrieved party file charges; and from the time that the court executes the arrest warrant to stand trial and that the court issues a decision or confirms the decisions referred to in article 99, in the last paragraph of article 109, and in article 206.

Any accused who has been detained under a warrant, may request through the director of the jail or facility where he is being detained, to be transported to the court to examine his case file, together with an attorney or a person of his confidence.

71. Article 75.(d) of the Code of Criminal Procedure indicated

[I]n the process of gathering evidence, the Judicial Police will carry out the following actions:

- a) Take informative statements from accused individuals in accordance with the provisions established in article 193.

72. Article 169 of the Code of Criminal Procedure established

[a]fter witnesses are sworn in, they will be asked to provide their full names, age, marital status, address, profession or trade; and they will be examined in accordance with the provisions of chapters I, II and V of this article (sic).

Individuals younger than 15 years of age will testify without being sworn in.

73. Article 192 of the Code of Criminal Procedure indicated

[I]n the days following the detention of the defendant or summons of the defendant to appear in court, plus time allowed for distance travelled, the Court of Instruction will take their testimony in accordance with the provisions of this Chapter.

74. Article 193 of the Code of Criminal Procedure indicated

[I]n any of the cases outlined in the preceding article, and any time that it is required to hear from the accused in person, the defendant will be informed

of the crime about which he is being questioned and he will be read the constitutional provision that guarantees his right to "not be compelled to testify in his case or to incriminate himself, his spouse or his relatives within a fourth degree of consanguinity or second degree of affinity."

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75. Based on the analysis of the cited legislation, the Commission considers that, at the time the facts took place: i) the investigation phase was secret except for the Public Ministry; ii) the defendant could have access to the records in the case file and could be advised by defense counsel while testifying during the investigation process but only after a warrant for his arrest had been executed; iii) individuals who provided witness testimony had to be sworn in unless they were under 15 years of age; iv) individuals who testified as accused persons had to be informed of their right against self-incrimination and against incriminating close relatives; and v) "informative testimony" was the testimony provided by the accused during the indictment phase.

76. In the Commission's view, the fact that the summons of December 14, 1993, expressly established that the victim had to appear in order to provide informative testimony; and the fact that in two of the three occasions in which the victim testified prior to the issuance of the arrest warrant he did so without being sworn in and after being informed of his right against self-incrimination; examined in light of the laws that regulated criminal proceedings at the time the facts took place, proves that, by testifying, the victim was already charged in the proceedings and therefore, he was entitled to the right to receive prior and detailed notification of the charges against him.

77. Following this testimony, an arrest warrant for the victim was issued on May 18, 1994. The Commission must emphasize that it was only after the warrant was issued that the victim and his attorneys were able to learn of the charges against the defendant and to have access to the evidence contained in the case file.

78. The Inter-American Court has indicated that the right enshrined in article 8.2.b "orders competent judicial authorities to notify the accused of the charges against him, the reasons for them and for what crimes or violations he is being held responsible."³⁴

79. The Court has also pointed out that in order for this right to fulfill its inherent purpose, notification must take place before the accused testifies for the first time³⁵, and that this guarantee is particularly important when measures that

³⁴ I/A Court H.R., *Case López Álvarez*. Judgment Issued February 1, 2006. Series C No. 141, par. 149; I/A Court H.R., *Case Palamara Iribarne*. Judgment issued November 22, 2005. Series C No. 135, par. 225; I/A Court H.R., *Case Acosta Calderón*. Judgment issued June 24, 2005. Series C No. 129, par. 118; and I/A Court H.R., *Case Tibi*. Judgment issued September 7, 2004. Series C No. 114, par. 187.

³⁵ I/A Court H.R., *Case López Álvarez*. Judgment Issued February 1, 2006. Series C No. 141, par. 149; I/A Court H.R., *Case Palamara Iribarne*. Judgment issued November 22, 2005. Series C No. 135, par. 225; I/A Court H.R., *Case Acosta Calderón*. Judgment issued June 24, 2005. Series C No.

restrict personal liberty are adopted.³⁶ The Court has also emphasized that the defendant's right to a defense is infringed upon if this guarantee is not respected.³⁷

80. The European Court of Human Rights has established that article 6.3 (a) of the European Convention for the Protection of Human Rights and Fundamental Freedoms – the equivalent of article 8.2(b) of the American Convention – recognizes the right of the accused to be notified of the reasons for the charges, meaning, both the crimes upon which the charges are based, as well as the nature of the crimes, that is, the legal classification of such crimes. The Court has also pointed out that the information about the reasons for the charges and their nature must be adequate in order for the accused to prepare his defense.³⁸

81. For its part, the Human Rights Commission pointed out in its General Observation No. 13 that:

The right to be notified of the charges "without delay," requires that the information be provided in the manner described, as soon as a competent authority has drawn up the charges. In the Committee's opinion, this right must be exercised when, in the course of an investigation, a court or an official of the Public Ministry decides to initiate proceedings against a person who either the court or the official suspect has committed a crime or who they publicly describe as such. The specific requirements of paragraph 3(a) can be met by issuing the charges in verbal or written form, as long as the information identifies the law and the alleged facts on which the charges are based.³⁹

82. Based on the preceding, the Commission requests that the Court find that the absence of detailed notification of the crimes Mr. Barreto Leiva was being charged with prior to his testimony of February 10, 1993 and December 15, 1993, due to the secret nature of the investigation phase prior to the issuance of a warrant for his arrest, constituted a violation of the guarantee enshrined in article 8.2(b) of the American Convention with regard to the general obligation established in article 1.1 of the same instrument:

2. Granting the accused adequate time and means for the preparation of his defense (article 8.2(c) of the Convention), the right of the accused

129, par. 118; and I/A Court H.R., *Case Tibi*. Judgment issued September 7, 2004. Series C No. 114, par. 187.

³⁶ I/A Court H.R., *Case López Álvarez*. Judgment issued February 1, 2006. Series C No. 141, par. 149; I/A Court H.R., *Case Palamara Iribarne*. Judgment issued November 22, 2005. Series C No. 135, par. 225; I/A Court H.R., *Case Acosta Calderón*. Judgment issued June 24, 2005. Series C No. 129, par. 118; and I/A Court H.R., *Case Tibi*. Judgment issued September 7, 2004. Series C No. 114, par. 187.

³⁷ I/A Court H.R., *Case Tibi*. Judgment issued September 7, 2004. Series C No. 114, par. 187.

³⁸ ECHR. *Ayçoban and others v. Turkey*. December 22, 2005, par. 21.

³⁹ Human Rights Commission. General Observation No. 13, par. 8.

to defend himself or to be assisted by counsel of his choice (article 8.2(d) of the Convention) and the right to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may shed light on the facts (article 8.2(f) of the Convention)

83. The provisions contained in article 8.2(c),(d) and (f) of the Convention establish that:

Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to the law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[...]

c. providing the accused adequate time and means for the preparation of his defense;

d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

[...]

f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may shed light on the facts.

84. It is alleged in the preceding paragraph, that the victim was not informed of the charges against him, either before or during the times in which he was summoned to testify throughout the investigation phase prior to the issuance of the arrest warrant on May 18, 1994. It has also been explained, that this occurred as a result of the legal provision in force at the time the facts transpired, which established the secrecy of the investigation process. This implied that the accused could not be assisted by defense counsel while providing testimony during the investigation phase, nor could he gain knowledge of the records in the case file unless a warrant for his arrest had been issued. It was also explained that in the proceedings that took place on February 10, 1993, and on December 15, 1993, in which the victim appeared as an accused person, only the trial judge, the victim and the representative of the Public Ministry were present. In accordance with the laws in force at the time, the victim testified without the presence of defense counsel on both occasions.

85. With regard to the evidence obtained throughout the investigation phase, article 245 of the Code of Criminal Procedure in force at the time established:

[t]he evidence gathered during the investigation process will have its full effect during the trial as long as it is not discredited or destroyed in the judicial debate. The interested party may request that the evidence be ratified (restored).

86. In those cases where the investigation process has been secret, the Inter-American Court has found that:

[t]he laws in question [...] are contrary to the right of defense of the accused, since they make it impossible for the accused to have effective access to the case file and to the evidence gathered against him, which prevents him from adequately defending himself, contravening the provisions of article 8.2(c).⁴⁰

87. With regard to the accused not being able to be assisted by defense counsel while testifying throughout the investigation phase of the criminal proceeding, the Court has pointed out

[d]ue to the fact that defense counsel is not allowed to be present while the accused testifies during the investigation phase, and, as it happened in this case, defense counsel had to submit a request to the prosecutor that evidentiary measures be taken without knowing what was contained in the investigation file or what were the charges brought against his client, the right of the accused to be assisted by defense counsel enshrined in article 8.2(d) of the Convention was also violated. Defense counsel was allowed to take part in the proceedings only after the investigation had been concluded and the case had been referred to the plenary court for trial, after which the prosecution ordered that the records be made available to Mr. Palamara Iribarne's attorney in order that he may file a response to the charges against the accused.⁴¹

88. The Court has also emphasized that, in light of the provisions of article 8.2(f), and as a corollary to the right to defense, among the prerogatives that must be granted to persons charged with committing a crime, is to be able to examine witnesses in his favor and witnesses against him under the same conditions.⁴²

89. In a similar sense, the European Court of Human Rights has indicated that, in any proceeding, all the necessary elements must be present "so that the best balance between the parts can be attained for the proper defense of their rights and interests. This implies, among other things, the rule of adversarial procedure."⁴³

⁴⁰ I/A Court H.R., *Case Palamara Iribarne*. Judgment issued November 22, 2005. Series C No. 135, par. 170.

⁴¹ I/A Court H.R., *Case Palamara Iribarne*. Judgment issued November 22, 2005. Series C No. 135, par. 175.

⁴² I/A Court H.R., *Case García Asto and Ramírez Rojas*. Judgment issued on November 25, 2005. Series C No. 137. Par. 152; I/A Court H.R., *Case Lori Berenson Mejía*. Judgment issued November 25, 2004. Series C No. 119, par. 184 and I/A Court H.R., *Case Castillo Petruzzi et al.* Judgment issued May 30, 1999. Series C No. 52, par. 154.

⁴³ ECHR. *Laukkanen and Manninen v. Finland*, N°. 50230/99, § 34, 3 February 2004; *Edwards and Lewis v. the United Kingdom*, nos. 39647/98 and 40461/98, § 52, 22 July 2003; *Öcalan v. Turkey*, no. 46221/99, § 146, 12 March 2003.

90. With regard to the scope of the principle of equality of means in criminal proceedings, the European Court has indicated that it is one of the implications encompassed by the concept of a fair trial, whereby each party must have a reasonable opportunity to present its case under circumstances that do not place it at a disadvantage *vis-a-vis* the opposing party.⁴⁴

91. For its part, the Human Rights Committee established in General Observation No. 13 that:

[sub-paragraph (b), of paragraph 3, establishes that the accused must have adequate time and the appropriate means to prepare his defense and to be able to communicate with defense counsel of his choice. What constitutes "adequate time" depends on the circumstances of each case, but the means must include access to whatever documents and other testimony the accused deems necessary to prepare his defense, as well as being able to hire an attorney and to communicate with him.⁴⁵

[...]

The defendant or his attorney must have the right to operate with diligence and without fear using all available means of defense, and have the right to challenge the proceedings should they consider them to be unfair.⁴⁶

[...]

The defendant shall have the right to examine or have others examine the witnesses for the prosecution and to have witnesses for the defense appear in court and to be examined under the same conditions as the prosecution witnesses. The purpose of this provision is to guarantee the defendant the same legal powers available to the prosecution to subpoena witnesses and to examine and re-examine them.⁴⁷

92. The Commission has previously established that proceedings in which the individual being investigated appears without assistance of counsel, to render testimony in an investigation based on a file he had no access to, with no knowledge of what crimes he is being charged with, do not constitute, in the Commission's opinion, observance of the right to be heard by a competent court, a right enshrined in article 8 of the Convention.⁴⁸ As the IACHR has stated, to hear a person being investigated implies allowing that person to properly defend himself, assisted by legal counsel, with knowledge of all the evidence against him contained in the case file; to hear him is to allow his presence during the questioning of witnesses who may testify against him, allow him to challenge them, to cross-examine them for the purpose of discrediting their incriminating testimony as false

⁴⁴ ECHR, *Öcalan v. Turkey*, 46221/99, 12 March 2003, par. 140.

⁴⁵ Human Rights Committee. General Observation No. 13, par. 9.

⁴⁶ Human Rights Committee. General Observation No. 13, par. 11.

⁴⁷ Human Rights Committee. General Observation No. 13, par. 12.

⁴⁸ IACHR, Report N° 50/00, Case N° 11.298, Reinaldo Figueredo Planchart. Venezuela April 13, 2000, par. 112.

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or contradictory; to hear a defendant is to grant him the opportunity to deny and to detract from the documents sought to be used against him.⁴⁹

93. Based on the preceding, the Commission considers that the fact that the investigation phase prior to the issuance of an arrest warrant was secret, implied not only that Mr. Barreto Leiva had no knowledge of the charges against him in violation of article 8.2(b) of the Convention, but also, and consequently, he could not be assisted by a defense attorney of his choice during this whole phase of the proceedings, including when he testified as an accused person; of examining and cross-examining witnesses, of having access to the evidence being gathered, as well as being able to introduce evidence that could shed light on his version of the facts and counteract the evidence against him. All these elements had the effect of practically eliminating the defendant's right of defense during a crucial stage of the proceedings.

94. This situation cannot be considered corrected by the availability of defense during the trial stage because the right of defense must be guaranteed from the very moment a person is accused of having committed a crime, since the investigation phase could conclude with criminal measures being taken against the accused.

95. The State did not deny during processing before the Commission that the investigation phase had been carried out in secret. On the contrary, the State indicated in general terms that the secret nature of this phase was justified in order to ensure the success of the investigation and to prevent undue interference during the investigative process. In that regard, the Commission would like to point out that the State did not provide specific information about the circumstances or the reasons to justify imposing such restrictions in this particular case, nor did it offer any arguments to support the view that the general practice at the time of the facts did not contradict the principle that during the first proceedings, "the maximum procedural guarantees must be present in order to protect the right of defense."⁵⁰

96. In addition, the Commission considers that, in this case, the violation of the right of defense was aggravated by the fact that: i) by law, the evidence gathered during that phase had full effect during the trial; and ii) the investigative phase could end, as it effectively did, with a measure affecting the personal liberty of the accused.

97. Based on the preceding, the Commission requests that the Court find that the Venezuelan state violated, to the detriment of the victim, the judicial guarantees established in article 8.2(c),(d) and (f), of the American Convention

⁴⁹ IACHR, Report N°50/00, Case N° 11.298, Reinaldo Figueredo Planchart. Venezuela April 13, 2000, par. 112.

⁵⁰ I/A Court H.R., *Case Palamara Iribarne*. Judgment issued November 22, 2005. Series C No. 135, par. 174.

with regard to the general obligation established in article 1.1 of the same instrument.

3. Right to be tried by a competent tribunal (article 8.1 of the Convention), to appeal a judgment against him (article 8.2.h of the Convention) and to judicial protection (article 25.1 of the Convention)

98. Article 8 of the American Convention establishes in relevant parts

1. 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.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[...]

- h. the right to appeal the judgment to a higher court.

99. For its part, article 25 of the Convention establishes in relevant parts

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

100. As it was explained in the facts section, Mr. Barreto Leiva was tried in sole instance by the SCJ based on the principle of "competence based on connection," applied to this case in the judgment rendered by the same court on June 8, 1994.

101. In order to explain how in this case the guarantee to a competent tribunal and, consequently, the right to appeal an adverse judgment were ignored, it is necessary to take into consideration the following domestic legislation in force at the time the facts took place.

102. Article 215 of the Constitution established

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

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

2. To determine whether or not grounds exist to try members of the Congress, or of the Court itself, of Ministers, the Prosecutor General, the Attorney General, or the Comptroller General, Governors, and Chiefs of Diplomatic Missions, and in the event that grounds do exist, to refer the records to the competent Ordinary Court if it is a common offense, or, if it concerns political offenses, to continue to hear the case until a final judgment is rendered, except for the provisions of article 144 with regard to members of Congress.

103. Article 42 of the Organic Law of the Supreme Court of Justice indicated

[I]t is within the jurisdiction of the Court as the highest court of the Republic:
5.- To declare whether or not there are grounds to try the public servants referred to in the first and second clause of article 215 of the Constitution and to hear the respective cases when appropriate (...)

104. Article 81 of the Organic Law for Safeguarding Public Assets consecrated

[t]he special jurisdiction to Safeguard Public Assets is established, to include the Superior Courts for Safeguarding Public Assets and the Criminal Courts of First Instance which shall be the Courts of First Instance in these matters, as soon as it is decided by the Executive Branch.

105. Article 82 of the Organic Law to Safeguard Public Assets established

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

~~1)-To determine whether to proceed to trial, hear cases and issue judgments~~
in first instance in the trials of Senators and Deputies of the Congress of the Republic; Ministers of the Executive Branch; Judges of the Supreme Court of Justice; the Prosecutor General; the Comptroller General of the Republic; the Attorney General of the Republic; members of the Supreme Electoral Council; members of the Judiciary Council; state Governors; Superior Court Judges; Chiefs of Diplomatic Missions of Venezuela in foreign countries; Directors of Ministries and Chairmen and Members of the Board of State Autonomous Institutes and Enterprises for the criminal offenses established in this law, even if the public official committed those crimes while serving in a lower ranking position.

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

First Paragraph

The competence of the Superior Courts for Safeguarding Public Assets to hear the cases described in paragraph 1 of this article, remains in effect even after the public servant has left office as long as the offense with which he is being charged was committed during his term in office.

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Second Paragraph

Judgments of the Superior Courts for Safeguarding Public Assets cannot be appealed to the Supreme Court of Justice.

106. Article 84 of the Organic Law for Safeguarding Public Assets indicated

[C]riminal Courts of First Instance with jurisdiction over matters regarding Safeguarding Public Assets will determine whether to proceed to trial, hear cases and issue judgments in first instance in the trials described in this law, except in those cases established in paragraph 1 of article 82 *ejusdem*.

107. Article 89 of the Organic Law for Safeguarding Public Assets pointed out

[w]hen some of the public servants mentioned in article 82 appear as perpetrators, accomplices or accessories and, simultaneously, there are civil servants or private individuals who must be prosecuted in Courts of First Instance for offenses established in this law, the Superior Court for Safeguarding Public Assets will be the competent tribunal to hear all those cases. If the individuals accused of those same crimes are other than those mentioned in article 82, then the competent court will be the first tribunal that would have heard and ruled on the case.

108. Article 101 of the Organic Law for Safeguarding Public Assets indicated

[f]inal judgments and interlocutory resolutions with the force of final judgments issued by courts competent in matters of Safeguarding Public Assets can be appealed as follows:

1) Appeals to decisions issued in first instance by the Superior Courts for Safeguarding Public Assets can be lodged with the Criminal Cassation Chamber of the Supreme Court of Justice.

2) Appeals to decisions issued by Criminal Courts in the First Instance competent in matters of Safeguarding Public Assets can be lodged with the Superior Courts for Safeguarding Public Assets.

109. Article 9 of the Code of Criminal Procedure established

[t]here will not be separate cases filed for the same crime or offense even if there are several defendants, except for exceptional cases established by special laws. Neither will a defendant face simultaneous trials even if he has committed different crimes or offenses, and, if these fall under different jurisdictions, competence to hear the case will always rest with Ordinary Criminal Courts (...).

110. Article 27 of the Code of Criminal Procedure indicated

[o]nly one of the competent tribunals will hear cases of crimes related to each other.

111. Article 28 of the Code of Criminal Procedure indicated

1° Crimes will be considered related: If committed simultaneously by two or more persons together, if these fall under the jurisdiction of different ordinary courts.

2° Crimes that are committed by two or more persons at different times and places, if the persons acted in concert to commit the crimes.

3° Crimes committed as a means to commit or facilitate the commission of other crimes.

4° Crimes committed in order to avoid prosecution for other crimes.

5° The various crimes a defendant is accused of, if proceedings are instituted for any one of those crimes.

112. A reading of article 215 of the Constitution and article 42 of the Organic Law of the Supreme Court of Justice previously cited, reveals that the position occupied by Mr. Barreto Leiva - Director General, Department of Administration and Services of the Ministry of the Secretariat of the Presidency of the Republic, did not merit special jurisdiction to prosecute criminal offenses.

113. Likewise, articles 81, 82 and 89 of the Law for Safeguarding Public Assets make clear that, since the charge alleged Mr. Barreto Leiva's participation in a crime against public property (generic embezzlement), as a civil servant, Mr. Barreto Leiva should have been tried by: i) the Court for Safeguarding Public Assets if it concerned an individual case; or ii) the Superior Court for Safeguarding Public Assets if there were certain public servants involved in the case such as Deputies of the Republic. In both instances the defendant had the right to appeal an adverse judgment.

114. In this case, Mr. Barreto Leiva was involved in a case in which the President of the Republic and Deputies of the Republic were also named as perpetrators of the crime. As indicated in the preceding paragraph, the connection of cases in the first case was established by law, that is, there was a combined case with a Deputy of the Republic, which implied a trial in the Superior Court for Safeguarding Public Assets. But, neither the Constitution, nor the Law for Safeguarding Public Assets, nor other laws had any provisions applicable in the event that a person not covered by a special privilege was a party in a criminal case against the President of the Republic who, under the provisions of the Constitution and of the Organic Law of the Supreme Court of Justice, should be tried in sole instance by the high court. Notwithstanding the absence of laws regulating connection in cases such as this one, the Supreme Court of Justice tried Mr. Barreto Leiva in sole instance, using jurisprudence to apply the aforementioned principle of connection.

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115. As the Inter-American Court has repeatedly stated, the right to be tried by ordinary courts of justice in legally established proceedings is a basic principle of due process.⁵¹

116. The guarantee of a competent judge implies that the jurisdiction assigned to each judge must have been previously established by domestic legislation and that those jurisdictions are strictly observed.

117. For its part, the European Court, in a case where by judicial decision the special privilege of Ministers of the Republic was extended to the victims even though that connection was not established in any domestic law, concluded that the right to be tried by a court previously established by law had been violated thus:

[t]he Court recalls that in its previously cited decision *Cöeme et autres*, it found that, although article 103 of the Constitution considered the trial of Ministers in Cassation Court an exception, no law contemplated the possibility of extending its jurisdiction (that of the Cassation Court) for related crimes to persons who would have never held the position of Ministers. Articles 226 and 227 of the Code of Criminal Procedure, as well as pronouncements on doctrine and jurisprudence, did not lead, in and of themselves, to the interpretation that connection was "established in the law" in the case under consideration. Based on those conditions, the Court cannot find any elements that would make this complaint different than the one examined on this very point in the *Cöeme et autres* judgment previously cited. The existence of a new legal precedent alone, especially one challenged in the judgment of June 22, 2000, would not lead (the Court) to a different conclusion.

Given the absence of connection established by law, the Court considers that, in this case, the Cassation Court is not a tribunal "established by law", as defined in article 6, to examine the charges against the other five petitioners. Therefore, article 6.1 of the Convention was violated.⁵² (IACHR translation)

⁵¹ I/A Court H.R., *Case Palamara Iribarne*. Judgment issued November 22, 2005. Series C No. 135, par. 125; I/A Court H.R., *Case Lori Berenson Mejía*. Judgment issued November 25, 2004. Series C No. 119, par. 143 and I/A Court H.R., *Case Castillo Petruzzi et al.* Judgment issued May 30, 1999. Series C No. 52, par. 129.

⁵² European Court. *Claes and others v. Belgium*. Paragraphs 41 and 42. Original text in French:

La Cour rappelle que, dans son arrêt *Coëme et autres* précité, elle a considéré que si l'article 103 de la Constitution prévoyait à titre exceptionnel le jugement des ministres par la Cour de cassation, aucune disposition ne prévoyait la possibilité d'étendre la juridiction de celle-ci, pour des faits connexes, à des personnes qui n'ont jamais exercé les fonctions de ministres. Les articles 226 et 227 du code d'instruction criminelle ainsi que les enseignements de la doctrine et de la jurisprudence ne permettaient pas, à eux seuls, de considérer que la connexité était, dans la situation en cause, «prévue par la loi». Dans ces conditions, la Cour ne voit aucun élément de nature à distinguer le présent grief de celui examiné sur ce point dans l'arrêt *Coëme et autres* précité. La seule existence d'un nouveau précédent

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118. Without entering into an analysis of whether special procedural privileges derived from certain investitures are compatible with the American Convention, the Commission notes that what is relevant to this case is the fact that, under the provisions of the legislation in force, Mister Barreto Leiva did not have that investiture and, therefore, he should not have been tried by that court because the principle of connection in this type of case had not been established by law. The Commission requests that the Court find that this situation violated Mister Barreto Leiva's right to be tried by a competent tribunal as provided for in article 8.1 of the American Convention.

119. The Commission must also emphasize that, in this case, one of the consequences of vesting the victim with a procedural privilege he was not entitled to by law, was that the victim had no legal avenue to appeal the judgment against him, even though the Law for Safeguarding Public Assets, which determined which court was competent to hear his case, established that he should have been tried in first instance by the Superior Court for Safeguarding Public Assets and, in second instance, by the Supreme Court of Justice.

120. With regard to the right to appeal an adverse judgment, the Inter-American Court has established that "the right to appeal a judgment is an essential guarantee that must be respected within the framework of due process, in order to allow for an adverse judgment to be reviewed by a different and higher judge or court. The right to appeal a judgment must be guaranteed before the judgment acquires the characteristics of *res judicata*. The intention is to protect the right of defense by granting the possibility to lodge an appeal during the proceedings in order to prevent that a judgment that was issued with biases and errors that will cause undue damage to the interests of a person is allowed to stand."⁵³

121. The Court has also pointed out that although the States have a margin of interpretation to regulate the exercise of that right, they cannot impose restrictions or requirements that infringe on the very essence of the right to appeal a judgment.⁵⁴ In a similar sense, the Human Rights Committee has established the scope of the provisions of the International Covenant on Civil and Political Rights, equivalent to article 8.2(h) of the American Convention, in the following terms:

Jurisprudential, spécifiquement mis en cause dans l'arrêt du 22 juin 2000, ne saurait la faire aboutir à une autre conclusion.

En l'absence de connexité prévue par la loi, la Cour estime que la Cour de cassation n'était pas, dans la présente affaire, un tribunal «établi par la loi» au sens de l'article 6 pour examiner les poursuites contre ces cinq autres requérants. Partant, il y a eu violation de l'article 6 § 1 de la Convention.

⁵³ I/A Court H.R., *Case Herrera Ulloa*. Judgment issued July 2, 2004. Series C No. 107, par. 158.

⁵⁴ I/A Court H.R., *Case Herrera Ulloa*. Judgment issued July 2, 2004. Series C No. 107, par. 161.

Although the forms of appeal may differ according to the domestic legislation of each State party to the Covenant, in accordance with paragraph 5 of article 14, every State has the obligation to re-examine in depth the judgment and the penalty.⁵⁵

122. In cases in which, as a consequence of the application of a special privilege, the victim was prevented from appealing certain decisions throughout the proceedings, the Court concluded

[t]his situation was aggravated by the fact that the Military Code of Justice allows only very few appeals of the decisions issued by the authorities with jurisdiction over military criminal cases which affect fundamental rights of the accused. Therefore, Mister Palamara Iribarne was not able to appeal some of the decisions issued by the authorities with jurisdiction over military criminal cases that affected him, as, for example, the denial to have access to the investigation since that decision could not be appealed.⁵⁶

123. The Commission considers, and specifically requests the Court to find, that the fact that Mister Barreto Leiva was tried by the Supreme Court of Justice, even though that competence had not been established by law; also implied, in his case, the impossibility of appealing the judgment against him, which in addition to violating the guarantee of a trial by a competent tribunal, violated the right enshrined in article 8.2(h) of the American Convention with regard to the obligations established in article 1.1 of the same instrument.

124. Lastly, the Commission considers that this situation implied that, although the ordinary proceedings legally established Mister Barreto Leiva's right to appeal a judgment against him, in practice and as a result of the extension of the special privilege, he did not enjoy any judicial protection whatsoever and was left with no defense in a situation that could not be appealed. In that sense, the Commission requests that the Court find that the State, to his detriment, also violated the right enshrined in article 25.1 of the American Convention with regard to the obligations established in article 1.1 of the same instrument.

4. Right to personal liberty and the presumption of innocence (articles 7.1, 7.3, 7.5 and 8.2 of the Convention)

125. Article 7 of the American Convention establishes in relevant parts

1. Every person has the right to personal liberty and security.
[...]

3. No one shall be subject to arbitrary arrest or imprisonment.
[...]

⁵⁵ Human Rights Commission. Case Reid vs. Jamaica, par. 14-3.

⁵⁶ I/A Court H.R., *Case Palamara Iribarne*. Judgment issued November 22, 2005. Series C No. 135. Par. 186.

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

126. For its part, article 8.2 of the American Convention establishes in relevant parts that

Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law.

127. The evidence submitted with this application indicates that from May 25, 1994, until August 9, 1995, Mister Barreto Leiva was subjected to preventive detention at the "El Junquito" Jail. It has also been established that the grounds for issuing the arrest warrant, in accordance with article 182 of the Code of Criminal Procedure in force at that time, were the existence of "well-founded indications of criminal responsibility" on the part of Mister Barreto Leiva. The sentence that Mister Barreto Leiva finally received was shorter, by 16 days, than the time he spent in jail under preventive detention.

128. The Inter-American Court has indicated that, under the provisions of article 7.1 of the Convention, the protection of liberty safeguards "the physical liberty as well as the personal security of individuals in the context that the absence of guarantees could lead to the subversion of the rule of law and of individuals under detention being deprived of minimum legal protections."⁵⁷

129. With regard to article 7.3 of the Convention, which forbids arbitrary detentions or arrests, the Court has stated that

this is a situation in which no one shall be subject to arrest or detention for reasons that -although within the law- can be considered incompatible with respect for the fundamental rights of the individual for being, among other things, unreasonable, unpredictable or out of proportion.⁵⁸

130. With regard to preventive detention specifically, the Court has indicated that the measure is limited by the principles of legality, presumption of

⁵⁷ I/A Court H.R., *Case García Asto and Ramírez Rojas*. Judgment issued November 25, 2005. Series C No. 137, par. 104; I/A Court H.R., *Case Acosta Calderón*. Judgment issued June 24, 2005. Series C No. 129, par. 56; I/A Court H.R., *Case Tibí*. Judgment issued September 7, 2004. Series C No. 114, par. 97; and I/A Court H.R., *Case of the Gómez Paquiyaur Brothers*. Judgment July 8, 2004. Series C No. 110, par. 82.

⁵⁸ I/A Court H.R., *Case García Asto and Ramírez Rojas*. Judgment issued November 25, 2005. Series C No. 137, par. 105; I/A Court H.R., *Case Acosta Calderón*. Judgment issued June 24, 2005. Series C No. 129, par. 57; I/A Court H.R., *Case Tibí*. Judgment issued September 7, 2004. Series C No. 114, par. 98; and I/A Court H.R., *Case of the Gómez Paquiyaur Brothers*. Judgment issued July 8, 2004. Series C No. 110, par. 83.

innocence, need, and proportionality which are essential in a democratic society.⁵⁹ The Court has also pointed out that preventive detention is the most severe measure that may be imposed on the accused and therefore, it must be imposed as an exception. In the opinion of the Court, the liberty of the accused must be the rule while his criminal responsibility is being proven.⁶⁰

131. The Court has also indicated that the legitimacy of preventive detention is not based solely on the fact that the law allows for it to be imposed in some general hypotheses. The adoption of this precautionary measure requires a judgment of proportionality between the measure, the evidence to support issuing it and the facts being investigated. If there is no proportionality, the measure will be arbitrary.⁶¹

132. The Court has also pointed out that it can be derived from the provisions of article 7.3 of the Convention, that the State has an obligation to not restrict the liberty of the detainee beyond the limit of what is strictly necessary to ensure that the person does not impede the efficient course of the investigations or tries to evade justice.⁶²

133. The Court has emphasized that neither the personal traits of the alleged perpetrator nor the seriousness of the crime with which he is being charged are, in and of themselves, sufficient justification to impose preventive detention which must be considered a precautionary measure not a punitive one.⁶³ According to the Inter-American Court, when a person whose criminal responsibility has not been proven is deprived of liberty for an excessively prolonged period of time and, therefore, disproportionate, the provisions of the Convention are violated. The

⁵⁹ I/A Court H.R., *Case López Álvarez*. Judgment issued February 1, 2006. Series C No. 141, par. 67; I/A Court H.R., *Case García Asta and Ramírez Rojas*. Judgment issued November 25, 2005. Series C No. 137, par. 106; I/A Court H.R., *Case Palamara Iribarne*. Judgment issued November 22, 2005. Series C No. 135, par. 197; and I/A Court H.R., *Case Acosta Calderón*. Judgment issued June 24, 2005. Series C No. 129, par. 74.

⁶⁰ I/A Court H.R., *Case López Álvarez*. Judgment February 1, 2006. Series C No. 141, par. 67.

⁶¹ I/A Court H.R., *Case López Álvarez*. Judgment issued February 1, 2006. Series C No. 141, par. 68.

⁶² I/A Court H.R., *Case López Álvarez*. Judgment issued February 1, 2006. Series C No. 141, par. 69; I/A Court H.R., *Case Palamara Iribarne*. Judgment issued November 22, 2005. Series C No. 135, par. 198; I/A Court H.R., *Case Acosta Calderón*. Judgment issued June 24, 2005. Series C No. 129, par. 111; and I/A Court H.R., *Case Tibi*. Judgment issued September 7, 2004. Series C No. 114, par. 180.

⁶³ I/A Court H.R., *Case López Álvarez*. Judgment issued February 1, 2006. Series C No. 141, par. 69; I/A Court H.R., *Case García Asta and Ramírez Rojas*. Judgment issued November 25, 2005. Series C No. 137, par. 106; I/A Court H.R., *Case Acosta Calderón*. Judgment issued June 24, 2005. Series C No. 129, par. 75; and I/A Court H.R., *Case Tibi*. Judgment issued September 7, 2004. Series C No. 114, par. 180.

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jurisprudence of the Court has established that such a situation is the equivalent of anticipating the sentence.⁶⁴

134. For its part, principle III, paragraph 2, of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas approved by the IACHR establishes that

[...] Preventive deprivation of liberty is a precautionary measure not a punitive one, which shall additionally comply with the principles of legality, the presumption of innocence, need and proportionality, to the extent strictly necessary in a democratic society. It shall only be applied within the strictly necessary limits to ensure that the person will not impede the efficient development of the investigations nor will evade justice, provided that the competent authority examines the facts and demonstrates that the aforesaid requirements have been met in the concrete case.⁶⁵

135. With regard to the relationship between the imposition of preventive detention and the guarantee of presumption of innocence, the Court has reiterated some of the preceding standards and indicated that:

the principle of presumption of innocence constitutes a foundation for judicial guarantees. The obligation of the State to not restrain the detainee's liberty beyond the limits strictly necessary to ensure that he will not impede the efficient development of the investigations and that he will not evade justice derives from that established in article 82.2 of the Convention. In this sense the preventive detention is a cautionary measure not a punitive one. This concept is laid down in multiple instruments of international human rights law. The International Covenant on Civil and Political Rights provides that detention should not be the normal practice with regard to persons who are to stand trial (Article 9.3). It would constitute a violation to the Convention to keep a person whose criminal responsibility has not been established detained for a disproportionate period of time. This would be tantamount to anticipating a sentence, which is at odds with universally recognized general principles of law.⁶⁶

136. The Commission considers that the concept of "a reasonable time" cannot be established in abstract terms because it responds to criteria whose

⁶⁴ I/A Court H.R., *Case López Álvarez*. Judgment issued February 1, 2006. Series C No. 141, par. 69; I/A Court H.R., *Case Acosta Calderón*. Judgment issued June 24, 2005. Series C No. 129, par. 111; I/A Court H.R., *Case Tibi*. Judgment issued September 7, 2004. Series C No. 114, par. 180; and I/A Court H.R., *Case Suárez Rosero*. Judgment issued November 12, 1997. Series C No. 35, par. 77.

⁶⁵ Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Principle III, section 2. Document approved by the Commission at its 131st Regular Meeting, held from March 3 to March 14, 2008.

⁶⁶ I/A Court H.R., *Case Acosta Calderón*. Judgment issued June 24, 2005. Series C No. 129, par. 111; I/A Court H.R., *Case Tibi*. Judgment issued September 7, 2004. Series C No. 114, par. 180; and I/A Court H.R., *Case Suárez Rosero*. Judgment issued November 12, 1997. Series C No. 35, par. 77.

impact must be determined in each case.⁶⁷ Consequently, what domestic laws establish as a "reasonable time" does not guarantee that it is in harmony with the Convention. The particular characteristics of each case will determine when that deadline has been met without prejudice to what is established by law. In cases where individuals are still in preventive detention, the Commission has established guidelines to determine whether a particular period of time is reasonable. What is relevant to this case, however, is that any time that a jail sentence is imposed that it is less than the time a person has spent in preventive detention, that detention must be considered unreasonable.

137. In light of the aforementioned precedents, it is relevant to analyze Mr. Barreto Leiva's preventive detention from two perspectives: i) the grounds for preventive detention based solely on the existence of indications of criminal responsibility; and ii) the period of time Mr. Barreto Leiva spent in preventive detention.

138. With regard to the first perspective, the arrest warrant of May 18, 1994, cited only article 182 of the Code of Criminal Procedure and established the indications of criminal responsibility for persons under preventive detention.

139. Article 182 of the Code of Criminal Procedure then in force, established

So long as it has been indisputably proven that a crime has been committed that merits corporal punishment and there is no obvious penalty prescribed for such offense, and there are well-founded indications of an individual's culpability, the Examining Magistrate Court will issue a warrant for the arrest of the accused that will contain the following:

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

140. Article 103 of the then-in force Organic Law for Safeguarding Public Assets indicated

[d]eprivation of liberty measures contemplated in this law imply mandatory arrest, even those that are merely preventive in nature or the result of conversion. Consequently, any individual tried for offenses established in this law or for related offenses, will not be eligible for pre-trial release, that is, release on bail, established in the Code of Criminal Procedure, nor for the benefits provided for in the Law on Probation and Parole or the benefits contemplated in the Law of the Penitentiary System regarding probation or parole.

⁶⁷ See, *inter alia*, ECHR. Sulajoa v. Estonia, judgment issued February 15, 2005, paragraph 61; ECHR. Klamecki v. Poland (No. 2), judgment issued April 3, 2003, paragraph 118; ECHR. Klyakhin v. Russia, judgment issued November 30, 2004, paragraph 60; ECHR. Stašaitis v. Lithuania, judgment issued March 21, 2002, paragraph 82; ECHR. Jabłoński v. Poland, judgment issued December 21, 2000, paragraph 79.

141. From the reading of these laws and from the actions of the judicial authorities at the time of the facts, it becomes evident that preventive detention was the general rule and not the exception so long as there were well-founded indications of criminal responsibility. Moreover, given the nature of the crime an individual was being charged with, preventive detention was mandatory in all cases with no possibility of released on bail.

142. As established in European jurisprudence on the matter, the existence of indications of criminal responsibility is a condition *sine qua non* for imposing preventive detention.⁶⁸ But, in light of the provisions of the American Convention and of recent Inter-American Court jurisprudence, such indications cannot *per se* imply the presumption that the accused will try to obstruct the proceedings. Specifically, the Court has maintained that, even after verifying the reasonableness of the indications of criminal responsibility, the deprivation of liberty of the accused cannot rest on generic preventive objectives or on specific preventive objectives attributable to the sentence, but only on a legitimate objective, to wit: to ensure that the accused will not impede the course of the proceedings or evade justice.⁶⁹ This implies that the existence of indications of criminal responsibility is a necessary condition but not sufficient to justify issuing an order for preventive detention. The Commission emphasizes that this is the criterion to be met not only to sustain preventive detention over time, but also the first time the decision is made to impose the measure in a case,⁷⁰ otherwise, it would ignore the exceptional nature of the precautionary measure.

143. The Commission considers that, as the jurisprudence of the Court has established, the principle of need that must regulate preventive detention implies that the authority that orders the imposition of the measure must sufficiently prove the reasons why the existence of indications of criminal responsibility has any bearing on the efficient course of the investigations in the case in question.⁷¹ It also implies establishing the reasons why it is appropriate to impose preventive detention rather than a less severe measure.

⁶⁸ See, *inter alia*, ECHR. Sulajoa v. Estonia, judgment issued February 15, 2005, paragraph 62; ECHR. Kiyakhin v. Rusia, judgment issued November 30, 2004, paragraph 61; ECHR. Nikolova v. Bulgaria, judgment issued September 30, 2004, paragraph 61; ECHR. Stašaitis v. Lituania, judgment issued March 21, 2002, paragraph 82; and ECHR. Trzaska v. Polonia, judgment issued July 11, 2000, paragraph 63.

⁶⁹ I/A Court H.R., *Case Chaparro Álvarez and Lapo Íñiguez*. Judgment issued November 21, 2007. Series C No. 170, par. 103.

⁷⁰ In that sense see: I/A Court H.R., *Case Chaparro Álvarez and Lapo Íñiguez*. Judgment issued November 21, 2007. Series C No. 170, par. 105 in which the Inter-American Court establishes that the preventive detention of one of the victims was arbitrary because the judicial decree that ordered the detention did not sufficiently justify the reasons why the liberty of the accused could obstruct the course of the proceedings.

⁷¹ In a similar vein see: I/A Court H.R., *Case Chaparro Álvarez and Lapo Íñiguez*. Judgment issued November 21, 2007. Series C No. 170, par. 105.

144. In that sense, the Commission considers, and requests that the Court find, that the imposition of preventive detention on Mister Barreto Leiva based exclusively on indications of criminal responsibility, with no possibility of bail, with no justification of what objectives the prosecution sought with the imposition of that measure, although legal, was arbitrary and therefore, to his detriment, constituted a violation of the rights enshrined in articles 7.1 and 7.3 of the American Convention with regard to the obligations established in article 1.1 of the same instrument.

145. With regard to the second perspective, that is, the period of time Mister Barreto Leiva spent under preventive detention, the Commission would like to emphasize that the crime with which Mr. Barreto Leiva was charged, was typified in article 60 of the Law for Safeguarding Public Assets. That law established a possible penalty of 6 months to 3 years in jail for that crime. The period of time Mr. Barreto Leiva endured under preventive detention was 16 days longer than the final sentence imposed. Consequently, the Commission requests that the Court find that the imposition of preventive detention in this case ignored the principle of reasonable time and the guarantee of presumption of innocence enshrined in articles 7.5 and 8.2 of the American Convention, with regard to the obligations established in article 1.1 of the same instrument, because that detention became a punitive rather than a precautionary measure.

B. Failure to comply with the obligation to adopt domestic legal remedies (article 2 of the American Convention)

146. Article 2 of the American Convention establishes:

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

147. The Inter-American Court has indicated that in international law, a common law prescribes that a State that is party to an international agreement must make the necessary modifications to its domestic legislation to ensure compliance with the obligations assumed under the agreement. This law is universally recognized and has been classified in jurisprudence as an obvious principle.⁷²

⁷² I/A Court H.R., *Case Zambrano Vélez et al.* Judgment issued July 4, 2004. Series C No. 166, par. 55; I/A Court H.R., *Caso Garrido and Baigorria. Reparations* (art. 63.1 American Convention on Human Rights). Judgment issued August 27, 1998. Series C No. 39, par. 68. Also see I/A Court H.R. *Case La Cantuta*. Judgment issued November 29, 2006. Series C No. 162, par. 170, and I/A Court H.R., *Case Almonacid Arellano et al.* Judgment issued September 26, 2006. Series C No. 154, par. 117.

148. Likewise, the Court has indicated that this principle is included in its article 2 which establishes the general obligation of each State Party to modify its domestic legislation to conform to those provisions in order to guarantee the rights enshrined therein,⁷³ which implies that domestic laws must be effective (the *effet utile* principle)⁷⁴.

149. According to the Court's established precedents, Article 2 of the Convention does not outline which are the appropriate measures to modify domestic legislation, because, obviously, that will depend on the nature of the law to be modified and the circumstances of the specific case. That is why the Court's interpretation is that modification implies adoption of two types of measures, to wit: i) eliminating any laws or practices that imply violations of the guarantees established in the Convention or that ignore or obstruct the exercise of the rights recognized by the Convention, and ii) enacting laws and developing practices aimed at effectively respecting those guarantees.⁷⁵ The Court has interpreted that the first type of obligation is not fulfilled so long as the law or practice which violates the Convention remains as part of the body of laws⁷⁶ and, therefore, it can be satisfied with the modification,⁷⁷ repeal or annulment in some way,⁷⁸ or reform⁷⁹ of those laws or practices as the case may be.⁸⁰

⁷³ I/A Court H.R., *Case Zambrano Vélez et al.* Judgment issued July 4, 2004. Series C No. 166, par. 56; I/A Court H.R., *Case La Cantuta*. Judgment issued November 29, 2006. Series C No. 162, par. 171; and I/A Court H.R., *Case Almonacid Arellano et al.* Judgment issued September 26, 2006. Series C No. 154, par. 117.

⁷⁴ I/A Court H.R., *Case Zambrano Vélez et al.* Judgment issued July 4, 2004. Series C No. 166, par. 56; I/A Court H.R., *Case La Cantuta*. Judgment November 29, 2006. Series C No. 162, par. 171; and Court H.R., *Case "Juvenile Reeducation Institute"*. Judgment issued September 2, 2004. Series C No. 112, par. 205.

⁷⁵ I/A Court H.R., *Caso Zambrano Vélez et al.* Judgment issued July 4, 2004. Series C No. 166, par. 56; I/A Court H.R., *Case La Cantuta*. Judgment issued November 29, 2006. Series C No. 162, par. 172, and I/A Court H.R., *Case Almonacid Arellano et al.* Judgment issued September 26, 2006. Series C No. 154, par. 118.

⁷⁶ I/A Court H.R., *Case Zambrano Vélez et al.* Judgment issued July 4, 2004. Series C No. 166, par. 56; I/A Court H.R., *Case "The Last Temptation of Christ" (Olmedo Bustos et al.)*. Judgment issued February 5, 2001. Series C No. 73, par. 172.

⁷⁷ I/A Court H.R., *Case Zambrano Vélez et al.* Judgment issued July 4, 2004. Series C No. 166, par. 56; I/A Court H.R., *Case Fermín Ramírez*. Judgment issued June 20, 2005. Series C No. 126, paragraphs 97 and 130.

⁷⁸ I/A Court H.R., *Case Zambrano Vélez et al.* Judgment issued July 4, 2004. Series C No. 166, par. 56; I/A Court H.R., *Case Yatama*. Judgment issued June 23, 2005. Series C No. 127, par. 254.

⁷⁹ I/A Court H.R., *Case Zambrano Vélez et al.* Judgment issued July 4, 2004. Series C No. 166, par. 56; I/A Court H.R., *Case Raxcacú Reyes*. Judgment issued September 15, 2005. Series C No. 133, paragraphs 87 y 125.

⁸⁰ I/A Court H.R., *Case Zambrano Vélez et al.* Judgment issued July 4, 2004. Series C No. 166, par. 56; I/A Court H.R., *Case La Cantuta*. Judgment issued November 29, 2006. Series C No. 162, par. 172.

150. With regard to the extent of international responsibility, the Court has indicated

[e]nforcement by state agents or civil servants of a law that violates the Convention triggers the international responsibility of the State, and it is a basic legal principle of the international responsibility of the State, established in international Human Rights Law, that every State is internationally responsible for the acts or omissions of any of its branches or organs that violate rights internationally enshrined, according to Article 1.1 of the American Convention.

The Court is aware that domestic judges and courts are subject to the rule of law and, therefore, they are obligated to impose the laws in force in the legal system. But when a State has ratified an international treaty such as the American Convention; its judges, being part of the State system, are also subject to it and are thus obligated to ensure that the effects of the provisions of the Convention are not diminished by the imposition of laws contrary to the purpose and objectives of the provisions and which, from the beginning, have no legal effect. In other words, the Judicial Branch must exercise a sort of "suitability control" between domestic laws enforced in specific cases and the American Convention on Human Rights. In this endeavor, the Judicial Branch must take into account not only the treaty, but also the Inter-American Court's interpretation of the same since, in the final analysis, the Court is the ultimate interpreter of the American Convention.⁸¹

151. Throughout this application, the Commission has alleged that the Venezuelan State violated; to the detriment of Mister Barreto Leiva, several provisions of the Convention as a consequence of enforcing laws and regulations of the Constitution and of the Code of Criminal Procedure that were in force at the time.

152. Specifically, the Commission considers that Article 73 of the Code of Criminal Procedure as well as Article 60 of the 1961 Constitution, which established that the whole summary investigation phase was secret and closed to the accused and his attorney until an arrest warrant for the accused had been executed, are incompatible with the Convention because, as it has been noted throughout this report, they impede the effective exercise of judicial guarantees.

153. Likewise, the Commission considers that Article 82 of the Code of Criminal Enforcement, which established the general imposition of the precautionary measure of preventive detention so long as there were indications of criminal responsibility, is incompatible with Article 7 of the American Convention which, just as it has been interpreted by the organs of the inter-American system, establishes the purely procedural objectives of deprivation of liberty under the measure of

⁸¹ I/A Court H.R., *Case La Cantuta*. Judgment issued November 29, 2006. Series C No. 162, par. 173; I/A Court H.R., *Case Almonacid Arellano et al.* Judgment issued September 26, 2006. Series C No. 154, paragraphs 123 a 125.

preventive detention which, as it has been reiterated, must be the exception and not the rule.

154. The Commission notes and requests that the Court find that, although this legal framework was replaced by the 1999 Constitution and by the Organic Code of Criminal Procedure of 1998, the fact that the victim was sanctioned by laws that were incompatible with the Convention during the course of the proceedings against him, violated the obligation to adopt domestic legal remedies enshrined in Article 2 of the American Convention.⁸²

VIII. REPARATION AND COSTS

155. Based on the facts alleged in this application, and on *jurisprudence constante* of the Inter-American Court which establishes that "it is a principle of international law that any violation of an international obligation that has caused harm generates the obligation to provide adequate reparation for that harm"⁸³, the Commission submits its views to the Court with regard to reparation and costs that the Venezuelan state must pay as a result of its responsibility for the human rights violations committed in detriment of the victim.

156. Taking into account the Rules of Procedure of the Court, which grant the individual the option of self-representation, the Commission will simply outline the general criteria regarding reparation and costs that, it considers, the Court should impose in this case. The Commission understands that, in accordance with article 63 of the American Convention and article 23 and other articles of the Rules of Procedure of the Court, the burden to substantiate fair compensation rests with the victim and its representative.

A. Obligation to provide reparation

157. One essential role played by the justice system is to remedy harm caused to victims. This role must be expressed in the form of rectification or restitution and not solely through compensation which neither re-establishes the moral balance nor restores that which has been taken.

158. Article 63.1 of the American Convention establishes that :

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be

⁸² With regard to violation of Article 2 of the Convention, even though the laws incompatible with the Convention had been repealed at the time of the Court's pronouncement, see: I/A Court H.R., *Case Montero Aranguren et al. (Retén de Catia)*. Judgment issued July 5, 2006; Series C No. 150, par. 135.

⁸³ I/A Court H.R., *Case Cantoral Huamaní and García Santacruz*. Judgment issued July 10, 2007. Series C No. 167, par. 156; I/A Court H.R., *Case Zambrano Vélez et al.* Judgment issued July 4, 2007. Series C No. 166, par. 103; and I/A Court H.R., *Case Escué Zapata*. Judgment issued June 4, 2007. Series C No. 165, par. 126.

ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

159. As the Court has consistently established in its jurisprudence, "article 63.1 of the American Convention incorporates a common law that constitutes one of the essential principles of contemporary international law with regard to the responsibility of states. Thus, when an illegal act attributable to a state occurs, it immediately triggers the international responsibility of that state for the violation of an international law and the resulting obligation to provide reparation and to put an end to the consequences of the violation"⁸⁴.

160. Reparation is crucial in guaranteeing that justice is done in individual cases and it constitutes the mechanism which elevates the decisions of the Court beyond the scope of moral sanctions. Reparation consists of measures aimed at eliminating the effects of the violations committed. Reparation of the harm caused by the violation of an international obligation requires, if possible, full restitution (*restitutio in integrum*), which consists of returning the situation to what it was before the violation took place.

161. The obligation to pay reparation, every aspect of which is regulated by international law (scope, nature, method and designation of beneficiaries), cannot be modified or ignored by the State obligated to pay it by invoking provisions in its domestic legislation⁸⁵.

162. In this case, the Inter-American Commission has demonstrated that the State has international responsibility for violating the right to personal liberty, the right to judicial guarantees and the right to judicial protection of Oscar Barreto Leiva, as well as for failure to comply with the obligation to align its domestic legislation with the purpose and objectives of the Convention.

B. Reparation measures

163. The United Nations Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms has classified the components of that right according to four general categories: restitution, compensation, rehabilitation, and measures of

⁸⁴ I/A Court H.R., *Case La Cantuta*. Judgment issued November 29, 2006 Series C No. 162, par. 200; I/A Court H.R., *Case of the Miguel Castro Castro Jail*. Judgment issued November 25, 2006. Series C No. 160, par. 414; I/A Court H. R., *Case Montero Aranguren et al. (Retén de Catia)*. Judgment issued July 5, 2006. Series C No. 150, par. 116.

⁸⁵ I/A Court H.R., *Case Cantoral Huamaní and García Santacruz*. Judgment issued July 10, 2007 Series C No. 167, par. 190; I/A Court H.R., *Case Zambrano Vélez et al.* Judgment issued July 4, 2007. Series C No. 166, par. 148; I/A Court H.R., *Case La Cantuta*. Judgment on the merits, reparations and costs. Judgment issued November 29, 2006 Series C No. 162, par. 200; I/A Court H.R., *Case of the Miguel Castro Castro Jail*. Judgment issued November 25, 2006. Series C No. 160, par. 415.

satisfaction and guarantees of non-repetition.⁸⁶ According to the United Nations Special Rapporteur on the Impunity of Perpetrators of Human Rights Violations, those measures include: cessation of existing violations, verification of the facts, mass dissemination of the true facts about the events that took place, an official declaration or judicial order reestablishing the dignity, reputation and rights of the victim and of individuals with ties to the victim, an apology to include public acknowledgment of the facts and accepting full responsibility for them, imposing judicial or administrative sanctions on those responsible for the violations, preventing new violations, etc.

164. For its part, the Court has pointed out that reparation measures tend to eliminate the effects of the violations committed.⁸⁷ Such measures include the different ways in which a State can meet its international responsibility which, under international law, consist of restitution, compensation, rehabilitation, satisfaction and non-repetition measures.⁸⁸

165. Likewise, the United Nations Commission on Human Rights has determined that,

[U]nder international law, States have the duty to adopt, when the situation requires it, special measures in order to provide fast and fully effective reparation. Reparation shall provide legal solutions, eliminating or repairing the consequences of the harm suffered and avoiding the occurrence of new violations through prevention and deterrence. Reparation shall be proportionate to the gravity of the violations and of the harm suffered, and it will include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁸⁹

⁸⁶ Principles and guidelines on the right of victims of grave human rights violations and of violations of humanitarian law to receive reparation, document prepared by Dr. Theodore Van Boven in accordance with resolution 1995/117 of the Sub-Commission on Human Rights. E/CN.4/sub.2/1997/17.

⁸⁷ I/A Court H.R., *Case La Cantuta*. Judgment on the merits, reparations and costs. Judgment issued November 29, 2006 Series C No. 162, par. 202; I/A Court H.R. *Case The Miguel Castro Castro Jail*. Judgment issued November 25, 2006. Series C No. 160, par. 416; I/A Court H.R., *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.)*. Judgment on Preliminary Exceptions, Merits, Reparations and Costs. Judgment issued November 24, 2006. Series C No. 158, par. 144.

⁸⁸ See United Nations, Final report presented by Theo Van Boven, Special Rapporteur for Restitution, Compensation and Rehabilitation of Victims of Grave Human Rights Violations and of Violations of Humanitarian Law, E/CN.4/Sub.2/1990/10, July 26, 1990. Also see: I/A Court H.R., *Case Blake*. Reparations (art. 63.1 American Convention on Human Rights). Judgment issued January 22, 1999. Series C No. 48, par. 31; I/A Court H.R., *Case Suárez Rosero*. Reparations (art. 63.1 American Convention on Human Rights). Judgment issued January 20, 1999. Series C No. 44, par. 41.

⁸⁹ United Nations, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1996/17, *The administration of justice and the human rights of detainees: Revised series of principles and guidelines on the right of victims of grave human rights violations and violations of humanitarian law to obtain reparation*, prepared by Mister Theo Van Boven, in accordance with decision 1996/117 of the Sub-Commission, dated May 24, 1996, par. 7.

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166. In light of the criteria established by Inter-American and universal jurisprudence, the Commission submits its conclusions and demands with regard to appropriate reparation measures in the case of Oscar Barreto Leiva.

1. Satisfaction and guarantees of non-repetition

167. Satisfaction has been understood to be any measure that the perpetrator of a violation must adopt in accordance with international instruments or with common law, for the purpose of acknowledging the commission of an illicit act.⁹⁰ This follows three actions which are generally carried out in aggregate: apology, or any other action acknowledging responsibility for the violation in question; when appropriate, trial and punishment of the individuals responsible for perpetrating the violation, and adopting measures to prevent the recurrence of the harm caused.⁹¹

168. In that sense, the Commission requests the Court to order, among others, the following satisfaction measures:

- to publish in the print media the full text of the sentence the Court will eventually hand down; and
- to publicly acknowledge its international responsibility for the violations perpetrated and for the harm inflicted, in the meaningful and dignified manner that the objectives of the reparation demand, in consultation with the victim and his representative.

169. On the other hand, the Commission considers that the State is obligated to prevent the recurrence of human rights violations such as the ones we are dealing with in this case. Consequently, the Commission requests that the Court order Venezuela to adopt the legal, administrative and any other type of measures necessary to avoid the recurrence of similar actions, independent of the legislative modifications already adopted after the violations in this case had taken place, and which the Commission values as positive steps.

2. Compensation

170. The Court has established the essential criteria that must guide just indemnification aimed at providing adequate and effective monetary compensation for the harm and damage suffered as a result of human rights violations. The Court has also established that indemnification is merely compensatory in nature and that it will be granted for the period of time and in the amount necessary to compensate for all material and immaterial damages caused.⁹²

⁹⁰ Brownlie, *State Responsibility*, Part 1. Clarendon Press, Oxford, 1983, pg. 208.

⁹¹ *Idem*.

⁹² I/A Court H.R., *Case La Cantuta*. Judgment on the merits, reparations and costs. Judgment issued November 29, 2006 Series C No. 162, par. 210; I/A Court H.R., *Case Hilaire*,

2.1. Material Damages

171. The Court's *jurisprudence constante* on reparation has established that material damages include emergent damages and lost wages as well as immaterial or moral harm caused to the victim and, in some instances, to the family of the victim.⁹³

172. Emergent damages is interpreted as direct and immediate material consequences of the violations.⁹⁴

173. Lost wages is interpreted as loss of income or economic benefits due to a specific violation, and which can be quantified based on certain measurable and objective indicators.⁹⁵

174. Without detriment to the demands that the victim and his representative may present at the appropriate time during the proceedings, the IACHR requests that the Court, should it deem it pertinent and in light of its ample powers in this area, grant the same amount in compensation for emergent damages and for lost wages.

2.2. Immaterial damages

175. With regard to immaterial damages, the Court has established that:

(i) Immaterial damages could include suffering and harm caused to the direct victims and their relatives, the undermining of values of great significance to the individuals, as well as non-pecuniary changes in the living conditions of victims or their families. Since it is not possible to assign a precise monetary value to immaterial damages for the purpose of providing integral reparation to the victims, reparation can only be accomplished by two forms of compensation. First, by making a monetary payment or by providing goods and services whose monetary value can be assessed, as determined by the

Constantina and Benjamin et al. Judgment issued June 21, 2002. Series C No. 94, par. 204; I/A Court H.R., *Case Garrido and Baigorria. Reparations* (art. 63.1 American Convention on Human Rights). Judgment issued August 27, 1998, Series C No. 39, par. 41.

⁹³ I/A Court H.R., *Case La Cantuta*. Judgment on the merits, reparations and costs. Judgment issued November 29, 2006 Series C No. 162, paras. 213 and 214; I/A Court H.R., *Case of the Miguel Castro Castro Jail*. Judgment issued November 25, 2006. Series C No. 160, par. 423; I/A Court H.R., *Case Tibi*. Judgment issued September 7, 2004. Series C No. 114.

⁹⁴ Corte IDH. *Case La Cantuta*. Judgment on the merits, reparations and costs. Judgment issued November 29, 2006 Series C No. 162, par. 215; I/A Court H.R., *Case Loayza Tamayo. Reparations* (art. 63.1 American Convention on Human Rights). Judgment issued November 27, 1998. Series C No. 42, par. 147; and I/A Court H.R., *Case Aloeboetoe et al. Reparations* (art. 63.1 American Convention on Human Rights). Judgment issued September 10, 1993. Series C No. 15, par. 50.

⁹⁵ See for example, I/A Court H.R., *Case Carpio Nicolle et al.* Judgment issued November 22, 2004. Series C No. 117, par. 105 and following paragraphs; I/A Court H.R., *Case De la Cruz Flores*. Judgment issued November 18, 2004. Series C No. 115, paras. 151 y 152.

court, commensurate with the judgment and in equitable terms. Secondly, by carrying out public actions aimed at paying tribute to the memory of the victims, acknowledging their dignity, consoling their relatives, or by officially repudiating the human rights violations in the specific case and emphasizing the official commitment to take the necessary measures to prevent the recurrence of such violations.⁹⁶

176. In that context, the Commission requests that the Court, taking into consideration the nature of the case and should it deem it appropriate, set the amount of compensation for immaterial damages.

C. Beneficiary

177. Article 63.1 of the American Convention demands reparation for the consequences of a violation and "that fair compensation be paid to the injured party." The persons who must be compensated are generally those individuals directly harmed by the consequences of the violation in question.

178. In light of the nature of this case, the beneficiary of the reparation ordered by the Court as a result of human rights violations perpetrated by the Venezuelan state is the victim already named in this complaint.

D. Costs and expenses

179. In accordance with the *jurisprudence constante* of the Court, costs and expenses are included in the concept of reparation established in article 63.1 of the American Convention, since efforts made by injured parties or their representatives to gain access to international law imply expenses and financial commitments that must be compensated.⁹⁷

180. Based on the established precedent, the Commission requests, once the victim's representative has been heard, that the Court order the Venezuelan state to pay for necessary and reasonable costs and expenses, appropriately documented, incurred in the process of lodging and pursuing this case in the Inter-American System of Human Rights.

IX. CONCLUSIÓN

⁹⁶ I/A Court H.R., *Case La Cantuta*. Judgment on the merits, reparations and costs. Judgment issued November 29, 2006 Series C No. 162, par. 216; I/A Court H.R., *Case of the Miguel Castro Castro Jail*. Judgment issued November 25, 2006. Series C No. 160, par. 430; I/A Court H.R., *Case of the Ituango Massacres*. Judgment issued July 1, 2006. Series C No. 148, par. 383; I/A Court H.R., *Case of the Pueblo Bello Massacre*. Judgment issued January 31, 2006. Series C No. 140, par. 254.

⁹⁷ I/A Court H.R., *Case La Cantuta*. Judgment on the merits, reparations and costs. Judgment issued November 29, 2006 Series C No. 162, par. 243; I/A Court H.R., *Case of the Miguel Castro Castro Jail*. Judgment issued November 25, 2006. Series C No. 160, par. 455; I/A Court H.R., *Case of the Dismissed Congressional Workers (Aguado Alfaro et al.)*. Judgment on Preliminary Exceptions, Merits, Reparations and Costs. Judgment issued November 24, 2006. Series C No. 158, par. 152.

181. The absence of detailed notification of the victim of the crimes he was being charged with due to the secret nature of the indictment phase prior to the issuance of an arrest warrant for the accused; the infringement on the victim's right to a defense which made it impossible for him to be advised by counsel of his choice during the indictment phase and when testifying as the accused; the denial of the victim's right to question and to cross-examine witnesses, and to examine the evidence being gathered and to introduce evidence to support his version of the facts and discredit the body of evidence against him; the impossibility to appeal the sentence because the victim had been tried and convicted in a court of sole instance by a judge who was not the competent authority; the arbitrary nature and duration of the preventive detention which ignored the right to trial within a reasonable period of time and the guarantee of presumption of innocence; as well as the application of laws during the criminal proceedings that are incompatible with the Convention, constitute violations of the rights recognized in articles 7.1, 7.3, 7.5, 8.1, 8.2.b, 8.2.c, 8.2.d, 8.2.f, 8.2.h and 25.1 and failure to comply with the duty to adopt domestic legal measures as established in article 2 of the same instrument.

X. PETITIONS

182. Based on the facts of the case and on the legal arguments presented, the Inter-American Commission on Human Rights requests that the Court conclude and declare that the Bolivarian Republic of Venezuela, in detriment of Mr. Oscar Barreto Leiva, violated the rights recognized in articles 7.1, 7.3, 7.5, 8.1, 8.2.b, 8.2.c, 8.2.d, 8.2.f, 8.2.h and 25.1 of the American Convention with regards to the general obligation of the State to respect and guarantee those rights and to adopt domestic legislative measures as established in articles 1.1 and 2 of the same instrument.

And, therefore, to order the State

- a) to grant the victim adequate reparation to include full satisfaction for the violation of his human rights;
- b) to publicly acknowledge its international responsibility for the facts in this case;
- c) to adopt legal, administrative and other types of measures necessary to prevent the recurrence of violations similar to those which constitute the basis of this case; and
- d) to pay the costs and legal expenses incurred in pursuing this case in the inter-American system.

XI. SUPPORTING EVIDENCE

A. Documentary evidence

183. The following is a list of documentary evidence currently available

APPÉNDIX 1. IACHR, Report No. 31/08 (admissibility and merits), Case 11.663, *Oscar Barreto Leiva*, Venezuela, July 17, 2008; Appendix 1.

APPENDIX 2. File of the proceedings before the Inter-American Commission on Human Rights.

ANNEX 1. Constitution of the Republic of Venezuela, January 23, 1961.

ANNEX 2. Code of Criminal Procedure of July 13, 1926, partially modified by laws of August 5, 1954; June 26, 1957; January 27, 1962 and December 22, 1995.

ANNEX 3. Organic Law for the Protection of the Public Heritage, December 23, 1982.

ANNEX 4. Citation notice issued by the Superior Court of Protection of the Public Heritage, dated February 4, 1993.

ANNEX 5. Initial testimony of Mr. Oscar Barreto Leiva before the Superior Court of Protection of the Public Heritage.

ANNEX 6. Decision of the Full Supreme Court of Justice, June 8, 1993.

ANNEX 7. Citation notice issued by the Court of Substantiation of the Supreme Court of Justice dated September 29, 1993.

ANNEX 8. Notice of citation agreement issued by the Court of Substantiation of the Supreme Court of Justice, dated December 14, 1993.

ANNEX 9. Testimony of Mr. Oscar Barreto Leiva before the Court of Substantiation of the Full Supreme Court of Justice.

ANNEX 10. Certificate of Good Conduct issued on June 6, 1995, by the office of the Director of the prison *Internado Judicial "El Junquito."*

ANNEX 11. Decision of the Full Supreme Court of Justice dated August 9, 1995.

ANNEX 12. Decision of the Full Supreme Court of Justice dated October 31, 1995.

ANNEX 13. Document addressed to the Supreme Court of Justice by defense attorneys for former president Carlos Andrés Pérez, January 30, 1996.

ANNEX 14. Judgment handed down by the Supreme Court of Justice on May 30, 1996, in the trial of Carlos Andrés Pérez Rodríguez, Alejandro Izaguirre Angeli, Reinaldo Figueredo.

ANNEX 15. Decision of the Supreme Court of Justice, June 13, 1996.

ANNEX 16. Press articles.

ANNEX 17. Copy of the Power of Attorney issued to Carlos Armando Figueredo Planchart.

B. Witnesses

184. The Commission requests that the Court hear the testimony of the victim, Oscar Barreto Leiva, who will testify on the criminal proceedings against him; the obstacles he faced in the search for justice in this case; the consequences suffered in his personal, family and professional life as a result of the human rights violations, among other aspects regarding the purpose and objective of this complaint.

C. Expert witness

185. The Commission requests that the Court hear from an expert on the code of criminal procedure in Venezuela, whose identity will be revealed to the Court at the appropriate time, who will provide expert testimony on constitutional and criminal law and on the laws governing the protection of the public heritage that were in force at the time the criminal proceedings referred to in this complaint were carried out; and on the reforms implemented in those areas following the conviction and sentencing of the victim, among other aspects regarding the purpose and objective of this complaint.

XII. VICTIM INFORMATION

186. Pursuant to the provisions of article 33 of the Rules of Procedure of the Court, the Inter-American Commission submits the following information: the original complaint was filed by Mr. Oscar Barreto Leiva, represented by attorney Carlos Armando Figueredo Planchart.

187. The victim has authorized attorney Carlos Armando Figueredo Planchart to represent him during the legal phase of the proceedings in the Inter-American system.⁹⁸ The representative of the victim has listed his address as:

[REDACTED]

Washington, D.C.
October 31, 2008

⁹⁸ Anexo 17, Copia del Poder de representación otorgado en favor de Carlos Armando Figueredo Planchart.