

INTER-AMERICAN COURT OF HUMAN RIGHTS

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 :
 Allan Brewer-Carías :
 :
 vs. :
 :
 The Bolivarian Republic of Venezuela :
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 Case 12.724 :
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**BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS
 AMICUS CURIAE IN SUPPORT OF PETITIONER
 ALLAN BREWER-CARÍAS**

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 CITY OF NEW YORK

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Dated: New York, New York
 August 30, 2013

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**BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS
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ALLAN BREWER-CARÍAS**

The Association of the Bar of the City of New York (“ABCNY”), as *amicus curiae*, submits this brief to urge the Court to grant the application of the Inter-American Commission on Human Rights (“IACHR” or the “Commission”) to find the Bolivarian Republic of Venezuela (“Venezuela,” “state” or “government”) responsible for violation of Article 8 of the American Convention on Human Rights (“American Convention” or “Convention”), and to order Venezuela to provide relief to Allan Brewer-Carías.

Preliminary Statement

ABCNY has been a leading international bar association since its founding in 1870. Its members include over 23,000 lawyers and scholars from the United States and more than 50 other countries. ABCNY is based in New York City, an international hub of business and diplomacy. ABCNY has long been committed to promoting the rule of law and independent, effective judiciaries all over the world.

The ABCNY asks this Court to reinforce the rule of law and the independence of the Venezuelan judiciary by declaring in this case that Venezuela may not deprive any person of the right to due process by subverting the independence and impartiality of its judiciary.

For over a decade, Venezuela's judicial system has consisted largely of provisional prosecutors and judges who are appointed at the government's will and are removable from office at the government's discretion, without the protections of tenure or any showing of misconduct or other cause. The provisional characteristics of the Venezuelan justice system improperly expose members of the judiciary to intolerable external pressures, including and especially pressure from the executive branch. This executive domination of the judiciary seriously threatens the human and civil rights of all Venezuelans. The pattern of conduct by which the government of Venezuela has undermined the rule of law and the independence of the Venezuelan judiciary has been well documented by independent international organizations. While this pattern began under the leadership of the late President Hugo Chávez, it appears to be continuing unabated under the new President, Nicolás Maduro, the self-proclaimed "son of Chávez." See pp. 6-7, *infra*.

Mr. Brewer-Carías is a prominent Venezuelan jurist, constitutional law scholar, and former elected official in the Venezuelan government. He has had a distinguished career in public service, having served as a senator, minister, and member of the 1999 National Constituent Assembly. Mr. Brewer-Carías has also been a prominent dissenter, criticizing the Chávez regime as undemocratic. He was indicted in 2005 and is currently facing criminal prosecution for his alleged role in the April 2002 coup d'état that temporarily removed President Chávez from office. Mr. Brewer-Carías has publicly denied his involvement in the coup, and has filed a complaint with the IACHR, alleging multiple violations of his rights under the Convention.

The proceedings against Mr. Brewer-Carías have been conducted almost exclusively by temporary judges and prosecutors who lack stability, independence, and impartiality. At least

four interim prosecutors were in charge of the investigation that eventually led to his indictment. Most strikingly, several judges who issued rulings favorable to Mr. Brewer-Carías during the investigation and following his indictment were summarily replaced in the wake of those decisions, turning the proceedings against him into a travesty of justice. The control exerted on the Venezuelan judiciary by the government has deprived Mr. Brewer-Carías of due process, and amounts to a clear violation of Article 8 of the Convention.

This case calls for strong action by the IACHR, both because it presents a particularly egregious example of politically motivated persecution and because it is part of a continuing and pernicious pattern of human rights abuses by the Venezuelan government. The case demonstrates how easily a judiciary that is not insulated from political pressures can be subverted in the pursuit of politically motivated prosecutions. It further demonstrates how decisions rendered by a biased judiciary undermine the values of a democratic society and threaten the rule of law. This Court has previously and consistently found that the unjustified removal and inherent instability of provisional judges and prosecutors in Venezuela violates Articles 8 and 25 of the Convention.¹ Given the clear political motivation behind Mr. Brewer-Carías' prosecution and the denial of his due process rights, this Court should find that Venezuela's failure to ensure Mr. Brewer-Carías access to an independent and impartial judiciary violates Articles 8 and 25 of the Convention.

Statement of Interest

The ABCNY encourages efforts to promote legal regimes that effectively maintain the rule of law and thereby more strongly protect human rights. With this brief, the ABCNY hopes

¹ See, e.g., *Apitz Barbera v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 24 (Aug. 5, 2008); *Reveron Trujillo v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 197 (June 30, 2009).

to assist the Court by describing how a decision granting Mr. Brewer-Carías’ petition would reinforce the rule of law and protect human rights in general.

Mr. Brewer-Carías’ petition is of particular concern to the ABCNY not simply because he is an esteemed international lawyer who has made extensive academic and scholarly contributions throughout the Americas. Rather, it appears that Mr. Brewer-Carías is being prosecuted by the government of Venezuela for his attempt to provide legal advice to a transitional government concerning fundamental constitutional issues. The ABCNY considers the safeguarding of access for all actors in a civil society to legal advice – including the freedom of lawyers to give advice without the fear of reprisal – is imperative to the rule of law and the impartial administration of justice.

In fact, the international promotion of the rule of law and the impartial administration of justice have long been part of the ABCNY’s mission. The ABCNY was founded by lawyers who gathered to protect the independence of the judiciary and the integrity of the legal profession in New York from powerful forces trying to turn judges and lawyers into extensions of the political apparatus. The ABCNY is a purely voluntary, independent and non-partisan organization that exists solely to serve the public interest. As a result, reports and legal analyses of the ABCNY have long enjoyed a high level of credibility with policy makers.

Statement of Facts

The following summary of facts is based on a review of Venezuela’s human rights record, as documented by independent international organizations, and the record in this case.

I. Background: The “Reform” of the Judiciary in Venezuela

Venezuela’s actions against Mr. Brewer-Carías are best understood as a manifestation of the process of politicization of the judiciary that began with the election of President Chávez and the adoption of a new constitution in 1999. At the time, Venezuela’s judiciary was widely

regarded as corrupt.² However, rather than remedying obvious deficiencies, the “reform” effort initiated by the Chávez regime was employed to make the judiciary politically subservient, thereby allowing the government to operate essentially unconstrained by the rule of law. This process has been documented by well-respected international non-governmental organizations³ and has been recognized in previous cases by this Court.⁴

Shortly after the adoption of the 1999 Constitution, the Venezuelan government instituted a judiciary system consisting largely of temporary and provisional judges.⁵ This was portrayed as a transitional measure necessary to address what was perceived as widespread judicial corruption, and was to remain in place only until formal competitions were held to appoint permanent judges. However, no formal, open competitions have been held to date. Instead, temporary and provisional judges’ lack of tenure has been used as grounds for removal, without legal process or just cause, often after these judges rule against the government in high profile political cases.⁶ Meanwhile, temporary judges who demonstrate their apparent loyalty to the regime by rendering decisions favoring the government have been promoted to tenured positions

² The pre-Chávez judiciary has been described as a system in which “justice had often been for sale to the highest bidder,” plagued with “influence-peddling, political interference, and above all, corruption.” Human Rights Watch, *A Decade Under Chávez, Political Intolerance and Lost Opportunities for Advancing Human Rights in Venezuela*, at 40 (September 2008) [hereinafter “HRW 2008 Report”].

³ *See id.*; Human Rights Watch, *Rigging the Rule of Law: Judicial Independence Under Siege in Venezuela* (June 2004) [hereinafter “HRW 2004 Report”]; Inter-American Commission on Human Rights, *Democracy and Human Rights in Venezuela* (December 2009) [hereinafter “IACHR 2009 Report”]; Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Venezuela*, OEA/Ser. L/V/II. 118, doc 4 (December 29, 2003) [hereinafter “IACHR 2003 Report”]; Office of the United Nations High Commissioner on Human Rights, *Preocupante la situación de la justicia en Venezuela*, Press Release (July 2009), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=7567&LangID=S>.

⁴ *See, e.g., Apitz Barbera v. Venezuela*, Inter-Am. Ct. H.R. (ser. C) No. 24 ¶¶ 26-40, 54-67 (Aug. 5, 2008).

⁵ Provisional judges hold their posts until a public competition is held to select a permanent judge; temporary judges are appointed to fill temporary openings, such as when a judge takes parental or sick leave.

⁶ IACHR 2009 Report, *supra* note 3, at 71-75, ¶¶ 285-301 (citing cases in which judges are arbitrarily removed just days after issuing rulings deemed to be disadvantageous to the interests of the government).

without going through the prescribed open-competition process.⁷ The end result is a judiciary that is dependent on and serves at the discretion of the executive branch, and a government that can breach the most basic human and civil rights without concern that it will be called to account by the judicial branch.

Indeed, the Venezuelan government has engaged in widespread breaches of human and civil rights, such as shutting down a television station and several radio stations that were critical of its actions;⁸ confiscating television frequencies from a news channel because its reporting contained a “political tone”;⁹ firing and blacklisting political opponents;¹⁰ denying access to social programs based on political opinions;¹¹ enacting censorship laws and using the laws to prosecute journalists for allegedly insulting public officials;¹² interfering with union elections;¹³ subjecting human rights advocates, opposition leaders, and protesters to criminal investigations and harassment on groundless charges;¹⁴ and improperly using the machinery of the state in electoral campaigns.¹⁵

Following President Chávez’s death earlier this year, and the subsequent election of Nicolás Maduro as Venezuela’s new president, the executive branch’s domination of the judicial branch appears to have continued unabated. This is perhaps unsurprising, given that Mr. Maduro, who served as vice president under President Chávez, is seen as President Chávez’s

⁷ *Id.* at 55-56, ¶¶ 213-16 (explaining that the appointment procedure “grants the stability of tenure to judges who were initially appointed on a totally discretionary basis”).

⁸ HRW 2008 Report, *supra* note 5, at 60-61, 110-117; IACHR 2009 Report, *supra* note 6, at 129-35.

⁹ HRW 2008 Report, *supra* note 5, at 117-19.

¹⁰ *Id.* at 2, 15-27; IACHR 2009 Report, *supra* note 6, at 23-29.

¹¹ HRW 2008 Report, *supra* note 5, at 2; IACHR 2009 Report, *supra* note 6, at 23-29.

¹² HRW 2008 Report, *supra* note 5, at 75-102; IACHR 2009 Report, *supra* note 6, at 90-97.

¹³ HRW 2008 Report, *supra* note 5, at 152-73; IACHR 2009 Report, *supra* note 6, at 275-86.

¹⁴ HRW 2008 Report, *supra* note 5, at 204-10; IACHR 2009 Report, *supra* note 6, at 158-77.

¹⁵ IACHR 2009 Report, *supra* note 6, at 11-17.

“hand-picked political heir,” and has proclaimed himself to be “the son of Chávez.”¹⁶ Indeed, President Maduro’s narrow electoral victory has been widely credited, at least in part, to a court system packed with Chávez loyalists.¹⁷ Consequently, human rights violations have continued to occur in the post-Chávez era, and as the Commission has noted, Venezuela is still “ignor[ing] the entreaties, decisions, recommendations, and orders of the two bodies that comprise the inter-American human rights system.”¹⁸ An enduring lack of independence continues to prevent the Venezuelan courts from acting as a check against the executive, leaving civil society without recourse to enforce the most basic civil and human rights.

II. The Prosecution of Mr. Brewer-Carías Without Due Process

The case against Mr. Brewer-Carías stems from his alleged role in an attempted coup that took place in April 2002, following protests against the Chávez government. On April 11, 2002, the commanders of the Armed Forces publicly repudiated the authority of President Chávez and informed the public that President Chávez had resigned. On April 12, 2002, a transitional government was formed with opposition leader Pedro Carmona (“Carmona”) installed as President. That same day, Carmona requested a legal opinion on a draft constitutional decree (the “Carmona Decree”) from Mr. Brewer-Carías. Mr. Brewer-Carías advised against the decree, opining that its dissolution of institutions protected by the Venezuelan constitution deviated from democratic constitutionalism and violated the Inter-American Democratic

¹⁶ William Neuman, “Political Chaos Grips Venezuela After Legislative Brawl and Rival Marches”, NY Times, May 1, 2013, available at <http://www.nytimes.com/2013/05/02/world/americas/rival-marches-after-legislative-brawl-in-venezuela.html?ref=venezuela>; William Neuman, “Even in Death, Chávez is a Powerful Presence,” NY Times, Apr. 8, 2013, available at <http://www.nytimes.com/2013/04/09/world/americas/even-in-death-chavez-dominates-venezuelas-presidential-race.html?ref=venezuela>.

¹⁷ William Neuman, “Venezuela Gives Chávez Protégé Narrow Victory,” NY Times, Apr. 14, 2013, available at <http://www.nytimes.com/2013/04/15/world/americas/venezuelans-vote-for-successor-to-chavez.html?ref=venezuela>.

¹⁸ Press Release, Inter-American Comm’n on Human Rights, IACHR Deplores Murder in Venezuela of Tenth Member of the Barrios Family, a Beneficiary of Provisional Measures (May 29, 2013), available at http://www.oas.org/en/iachr/media_center/PReleases/2013/038.asp (“May 29, 2013 IACHR Press Release”).

Charter.¹⁹ Contrary to Mr. Brewer-Carías’ opinion, Mr. Carmona ordered the dissolution of the Chávez government and the establishment of a transitional government.²⁰ The coup was unsuccessful, however, and the following day, April 13, 2002, President Chávez was reinstated as President.²¹

Media speculation regarding Mr. Brewer-Carías’ involvement in the attempted coup and his purported authorship of the Carmona Decree began shortly thereafter.²² The National Assembly, Venezuela’s legislative branch, created a Special Parliamentary Commission (“Special Commission”) to investigate the events surrounding the coup, including the political uprising, reported resignation of President Chávez, and the temporary installation of a transitional government (“the April 2002 events”).²³ In July 2002, following multiple hearings (to which Mr. Brewer-Carías was not summoned and which he did not attend), the Special Commission issued a report naming Mr. Brewer-Carías as among those responsible for the April 2002 events, and urging the Prosecutor’s Office to launch a criminal investigation.²⁴ The Special Commission’s report concluded that those listed had “acted in an active and coordinated fashion in the conspiracy and coup d’état” and that Mr. Brewer-Carías’ “participation in the planning and execution of the coup d’état ha[d] been shown.”²⁵ The Special Commission presented no

¹⁹ Representatives from Venezuela signed the Inter-American Democratic Charter on September 11, 2011 in Lima, Peru. The Charter reaffirms the commitment of the member-states of the Organization of American States to have governments built upon democratic values and reflects the collective commitment of those states to maintain and strengthen the democratic system in the Americas. ORGANIZATION OF AMERICAN STATES, <http://www.oas.org/en/democratic-charter/> (last visited July 5, 2013).

²⁰ *Brewer-Carías v. Venezuela*, Case 12.724, Inter-Am. Comm’n H.R., Report No. 171/11, ¶ 87 (Nov. 3, 2011). <http://www.cidh.org>, available at <http://www.oas.org/en/iachr/decisions/court/12.724FondoEng.pdf> [hereinafter “Merits Report”].

²¹ Merits Report ¶ 88.

²² *Id.* ¶ 90.

²³ *Id.* ¶ 92.

²⁴ *Id.*

²⁵ *Id.*

evidence of Mr. Brewer-Carías' participation, and instead expressly stated that Mr. Brewer-Carías' purported authorship of the Carmona decree was a "publicly accepted fact."

The government's ensuing criminal investigation into Mr. Brewer-Carías' role in the April 2002 events lasted from 2002 until 2005, and was led by at least four interim state prosecutors during this time.²⁶ The first interim prosecutor interviewed Mr. Brewer-Carías on July 3, 2002 (upon Mr. Brewer-Carías' voluntary appearance), and also took the testimony of a witness who stated that Mr. Brewer-Carías did not author the Carmona Decree.²⁷ Within six weeks of taking this testimony, the prosecutor was replaced. Two other interim prosecutors were subsequently appointed and replaced before the government appointed Interim Sixth State Attorney Luisa Ortega Díaz to handle Mr. Brewer-Carías' case.²⁸ Prosecutor Díaz brought an indictment against Mr. Brewer-Carías on January 27, 2005, charging Mr. Brewer-Carías with "committing the crime of conspiracy to violently change the Constitution," relating to his alleged involvement with the Carmona Decree, a charge punishable under Article 144.2 of the Criminal Code of Venezuela.²⁹ Prosecutor Díaz was promoted to Venezuelan Attorney General shortly thereafter. Mr. Brewer-Carías left Venezuela to accept an appointment as adjunct professor at Columbia Law School just before this indictment issued in May 2006. He remains in New York to this day, unable to return to Venezuela for fear of arrest.³⁰

²⁶ *Id.* ¶ 94.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Criminal Code of Venezuela, Article 144 ("The following shall be punished by imprisonment of 12 to 24 years. Those who, without the purpose of changing the republican political form that the Nation has given itself, conspire or rise up to violently change the National Constitution.").

³⁰ In June 2006, a Venezuelan judge issued an arrest warrant and forwarded it to INTERPOL. After investigation, INTERPOL concluded that the proceedings underlying the warrant were politically motivated, and vacated the warrant. Merits Report ¶ 116.

Following the indictment, Mr. Brewer-Carías' case progressed through a judicial system staffed with judges who were appointed through an opaque process, lacked tenure, and were removable without cause or explanation by the government. This judicial instability allowed for various judges who presided over this matter to be removed from the bench following actions that were favorable to Mr. Brewer-Carías or insufficiently favorable to the government. For instance, on February 3, 2005, an entire panel of appellate judges was suspended shortly after voting to annul the prohibition order that required Mr. Brewer-Carías to remain in Venezuela.³¹ Similarly, temporary Judge Josefina Gómez Sosa, the district court judge who rendered that prohibition order, was suspended for “fail[ing] to give adequate grounds for that same ban.”³² Subsequently, following the Sixth Provisional Prosecutor's refusal to comply with an order to give the defense full access to the case files, Temporary Judge Manuel Bognanno registered a complaint with the Public Ministry's Senior Prosecutor regarding the temporary prosecutor's “obstructive action.”³³ Rather than investigating this alleged misconduct, the government answered by dismissing Judge Bognanno two days after he filed the complaint.³⁴ The case against Brewer-Carías remains in its preliminary stage, and the provisional judges assigned to the case have been replaced several additional times.³⁵

In January 2008, Mr. Brewer-Carías' defense team requested dismissal of the case under an amnesty decree issued by President Chávez. The district court denied this request that same

³¹ *Brewer-Carías v. Venezuela*, Case 12.724, Inter-Am. Comm'n H.R., Report No. 171/11, ¶ 126 (Nov. 3, 2011). <http://www.cidh.org>, available at <http://www.oas.org/en/iachr/decisions/court/12.724FondoEng.pdf>.

³² *Id.*

³³ *Id.* ¶¶ 146-147.

³⁴ *Id.*

³⁵ *Brewer-Carías v. Venezuela*, Case 12.724, Inter-Am. Comm'n H.R., Executive Summary of Complaint, ¶ 44.

month, and the Appellate Court affirmed the ruling in April of 2008. As a result, Brewer-Carías' case remains pending before the district court.

III. The Inter-American Commission Finds that Venezuela Violated Mr. Brewer-Carías' Rights under Article 8 and 25 of the American Convention

On January 24, 2007, Mr. Brewer-Carías filed this case with the IACHR.³⁶ On November 3, 2011, the Commission issued its Merits Report and concluded that Venezuela violated Mr. Brewer-Carías' rights to a fair trial and an effective judicial remedy, as codified in Articles 8 and 25 of the Convention.³⁷ The Commission recommended that Venezuela adopt measures establishing criteria and guarantees for the appointment, tenure, and removal of judges and prosecutors that adhere to the standards established in the Convention.³⁸ The Commission further recommended that Venezuela take the steps necessary to ensure that the trial of Mr. Brewer-Carías, should it continue, be conducted in accordance with the Convention's standards.³⁹ On March 7, 2012 the Commission submitted the case to the Court. Venezuela has not yet submitted a response.

Argument

Article 8 of the Convention grants every person the right to a hearing, with due process guarantees, before a competent, independent, and impartial tribunal, previously established by law, for the determination of his or her rights and obligations.⁴⁰ Similarly, Article 25 of the Convention provides to everyone 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

³⁶ *Id.* ¶ 1.

³⁷ *Id.* ¶ 166.

³⁸ *Id.* ¶ 167.

³⁹ *Brewer-Carías v. Venezuela*, Case 12.724, Inter-Am. Comm'n H.R., Report No. 171/11, ¶ 167 (Nov. 3, 2011). <http://www.cidh.org>, available at <http://www.oas.org/en/iachr/decisions/court/12.724FondoEng.pdf>.

⁴⁰ Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, Art. 8(1). [hereinafter "American Convention on Human Rights"].

rights recognized by the constitution or laws of the state concerned, or by the Convention, even though such violation may have been committed by persons acting in the course of their official duties.⁴¹ Venezuela’s denial of Mr. Brewer-Carías’ right to be tried by an independent and impartial tribunal is a violation of Articles 8 and 25.

I. Venezuela Has a Duty to Guarantee the Right to Trial by an Independent and Impartial Judiciary under the American Convention on Human Rights

Venezuela is obligated to protect the human rights of its citizens, including guaranteeing every person the right to be tried by an independent and impartial tribunal, as set forth in Article 8(1) of the Convention.⁴² This Court has repeatedly stressed the importance of an independent judiciary in a democratic society.⁴³ In *Reverón Trujillo v. Venezuela*, the Court explained that “[t]he principle of judicial independence constitutes one of the basic pillars of the guarantees of due process,” such that its “scope shall be guaranteed even in special situations, such as the state of emergency.”⁴⁴ Similarly, in *Apitz-Barbera v. Venezuela*, the Court explained that “[t]he purpose of such protection lies in preventing the Judicial System in general and its members in particular, from finding themselves subjected to possible undue limitations in the exercise of their functions, by bodies alien to the Judiciary or even by those judges with review or appellate functions.”⁴⁵ In accordance with the UN Basic Principles on the Independence of the Judiciary, the Court, in *Constitutional Court v. Peru*, concluded that an independent judiciary requires an

⁴¹ American Convention on Human Rights, *supra* note 40, at Art. 25(1).

⁴² *Id.* at Art. 8(1).

⁴³ See, e.g., *Reverón Trujillo v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 197, ¶ 68 (June 30, 2009); *Apitz-Barbera v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 182, ¶ 55 (Aug. 5, 2008).

⁴⁴ *Reverón Trujillo*, ¶ 68.

⁴⁵ *Apitz-Barbera*, ¶ 55

appropriate appointment process, a fixed term in positions with no unjustified or at-will removal, and insulation from external pressures.⁴⁶

The fact that a State utilizes provisional judges does not allow it to sidestep the safeguards necessary for ensuring judicial independence, as these safeguards are to apply regardless of whether the appointments are permanent or provisional.⁴⁷ As the Court explained in *Apitz-Barbera v. Venezuela*, “States are bound to ensure that provisional judges be independent and therefore must grant them some sort of stability and permanence in office, for to be provisional is not equivalent to being discretionally removed from office.”⁴⁸ Further, even though provisional judges are ostensibly entitled to the same safeguards as permanent judges, the Court has recognized that a judicial system that is staffed by a high percentage of provisional judges in and of itself seriously undermines a citizen’s right to justice and a judge’s right to stability in its position,⁴⁹ because provisional judges can be more easily removed when they make decisions that are adverse to government positions.⁵⁰ Venezuela has a duty, therefore, to ensure the stability of judges and prosecutors, regardless of whether the appointments are temporary or permanent, “since the purpose of that stability is to protect the function of the judiciary itself, and, through that, to protect human rights as a whole.”⁵¹

Indeed, history has demonstrated repeatedly that where a nation disregards basic

⁴⁶ *Constitutional Court v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 71 ¶ 75 (Jan. 31, 2001); see also *Reveron Trujillo v. Venezuela*, ¶ 68 (concluding that all judges must have “tenure in their position”).

⁴⁷ *Apitz-Barbera*, ¶ 43; see also *Chocrón Chocrón v. Venezuela*, Application to the Inter-American Commission on Human Rights, Inter-Am. Ct. H.R. (ser. C) No. 12.556, ¶ 73 (Nov. 25, 2009).

⁴⁸ *Apitz-Barbera*, ¶ 43.

⁴⁹ IACHR 2003 Report, *supra* note 6, ¶ 159.

⁵⁰ Report on the Democracy and Human Rights in Venezuela, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II. doc. 54 ¶ 253 (2009) [hereinafter “IACHR 2009 Report”].

⁵¹ *Brewer-Carías v. Venezuela*, Case 12.724, Inter-Am. Comm’n H.R., Report No. 171/11, ¶ 141 (Nov. 3, 2011). <http://www.cidh.org>, available at <http://www.oas.org/en/iachr/decisions/court/12.724FondoEng.pdf>.

principles of judicial independence, the disappearance of justice, human rights, and fundamental freedoms soon follows. The infamous Soviet purge trials of the late 1930s are a classic example of the mockery of justice perpetrated by a government-controlled judiciary. Similarly, the citizens of Cambodia, Haiti, El Salvador, and Rwanda have suffered under dictatorial or military leadership regimes marked by violence and corruption.⁵² Without the checks of an independent judiciary, citizens under these regimes have been denied fair trials and due process rights, and have been subjected to unlimited jail sentences – and worse.⁵³ More recently, the corrosion of judicial independence in Iran has led to a system in which individuals are arrested without warrants, tortured for coerced confessions, and denied access to lawyers. Those arrested in this judicial system face conviction, torture or execution, often in secret, without ever receiving even the minimal due process protections.⁵⁴

History has also demonstrated that restoring independence to a formerly government-controlled judiciary can bring substantial societal benefits. For example, as a result of nearly two decades under the dictatorial leadership of Augusto Pinochet, Chile's judicial system essentially functioned as an arm of the Presidency.⁵⁵ Following its return to democracy in 1990, Chile instituted many reforms designed to bring about judicial independence, including stripping the courts of the broad, largely unconstrained powers granted under Mr. Pinochet, providing training programs for judges, prosecutors, and public defenders, and introducing major legislative

⁵² See U.N. Dep't of Public Information, *Independence of the Judiciary: A Human Rights Priority*, DPI/1837/HR (Aug. 1996) (summarizing judicial reform efforts in Cambodia, Haiti, El Salvador, and Rwanda).

⁵³ *Id.*

⁵⁴ U.N. Secretary-General, *Situation of Human Rights in the Islamic Republic of Iran: Note by the Secretary-General*, ¶¶ 14-56, U.N. Doc. A/67/369 (Sept. 13, 2012).

⁵⁵ Peter DeShazo and Juan Enrique Vargas, *Judicial Reform in Latin America: An Assessment*, CSIS Americas Program (Sept. 2006) at 4-5, available at http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/0609_latin_judicial_reform.pdf.

changes to the criminal justice system.⁵⁶ Chile's reforms have vastly improved efficiency, transparency and the fair administration of justice.⁵⁷ Moreover, a recent study of Chile revealed that these reforms have positively affected both human rights and economic development by reducing the percentage of individuals imprisoned prior to conviction, often on trumped up charges, and increasing regional economic activity.⁵⁸ Thus, the value of judicial independence is not limited to individual human rights, but rather impacts the entire society.

II. Venezuela Violated Mr. Brewer-Carías' Right Under Article 8 to Have the Charges Against Him Heard by an Independent and Impartial Judiciary

Venezuela's extensive reliance on provisional judges and prosecutors and its failure to utilize appropriate appointment and tenure processes for judges, coupled with its shameful and brazen policy of removal of any judge who dared apply the law when it did not favor the government's position, has resulted in a judiciary that plainly lacks even the slightest appearance of independence and is highly susceptible to external pressures. These characteristics have served to deprive Mr. Brewer-Carías of his right to be tried by an independent and impartial tribunal, as required by international law and Article 8 of the Convention.

This Court has already observed that, since Venezuela's restructuring of its judiciary in 1999, its judicial branch has included a high percentage of provisional judges. A 2003 report by the Commission found that more than 80% of the country's judges were provisional.⁵⁹ In 2005, the year Mr. Brewer-Carías was indicted, nearly 82% of judges were appointed on a provisional basis.⁶⁰ Both the IACHR and Inter-American Court have concluded that interim judges and

⁵⁶ *Id.* at 5-6.

⁵⁷ *Id.* at 6.

⁵⁸ Lydia Brashear Tiede, *Legal reform and Good Governance: Assessing Rights and Economic Development in Chile*, 43 J.L. & POL. 237, 258-59 (2012).

⁵⁹ IACHR 2003 Report, *supra* note 6, ¶ 161.

⁶⁰ Annual Report, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.1234 doc. 5 rev. 1, ¶ 292 (2005).

prosecutors in Venezuela have not enjoyed the safeguards necessary to ensure an independent judiciary, including a guarantee against external pressures, especially from other branches of government. Indeed, interim judges and prosecutors in Venezuela have frequently been removed from their positions after making decisions that are unpopular with the government.⁶¹ In addition, the IACHR has concluded that Venezuela has regularized an appointment system that further undermines the independence of the judiciary, as judges are appointed on a discretionary basis, rather than pursuant to an open competition.⁶² This practice also violates the Venezuelan Constitution, which requires a formal process for the suspension and discipline of judges and open competitions for their appointment.⁶³

A recent study by Consorcio Desarrollo y Justicia (“CDJ”), a Venezuelan non-governmental organization affiliated with the Organization of American States, illuminates the subservience of the Venezuelan judiciary to the other branches of government. After conducting anonymous interviews with seventy-six judges, the CDJ found that less than eight percent of the judges interviewed believed that the judiciary was completely independent.⁶⁴ Seventy-seven percent felt that their autonomy was limited. Fifty-six percent felt that certain judicial decisions were unduly influenced by the legislative branch, whereas forty-three percent felt that decisions were improperly influenced by the executive branch. Only 12% believed that judicial decisions were made solely in accordance with the law. Sixty-five percent had no confidence in the

⁶¹ See IACHR 2009 Report, *supra* note 65, ¶¶ 285-301 (summarizing the politically-motivated removal of judges in Venezuela); IACHR 2003 Report, ¶161 (noting the removal of several judges that were suspected to be due to rulings against government interests).

⁶² *Id.* ¶¶ 189-228.

⁶³ Constitution of the Bolivarian Republic of Venezuela. 1999, sec. 6, art. 255 (“Appointment to a judicial position and the promotion of judges shall be carried out by means of public competitions to ensure the capability and excellence of the participants... citizen participation in the process of selecting and designating judges shall be guaranteed by law...Judges shall be removed or suspended from office only through the procedures expressly provided for by law.”).

⁶⁴ Juan Francisco Alonso, *Sólo 7% de los jueces creen que justicia es totalment autónoma*, El Universal (Dec. 20, 2009), available at http://opinion.eluniversal.com/2009/12/20/pol_art_solo-7-de-los-juece_1702345.shtml

process for appointing and giving tenure to judges, and 82% percent had no confidence in the process for disciplining and suspending judges.⁶⁵

The effects of Venezuela's failure to ensure the independence of its judiciary come into sharp relief in Mr. Brewer-Carías' case. First, the investigation and prosecution of Mr. Brewer-Carías has largely been in the hands of provisional judges and prosecutors. At least four provisional prosecutors were involved in investigating the facts relating to the April 2002 events, and five temporary judges oversaw the investigation and preliminary criminal proceedings.⁶⁶ Each of these prosecutors and judges appears to have been appointed pursuant to a discretionary process, rather than by open competition.

Second, it is apparent that the provisional judicial appointments have been used to control the progress and outcome of the prosecution of Mr. Brewer-Carías, as numerous interim judges have been removed from the case after rendering decisions distasteful to the government or interim prosecutors. For example, the appellate judges who voted to annul the order preventing those accused in connection with the Carmona Decree from leaving the country were suspended from duty.⁶⁷ The temporary district court judge who rendered that order was also suspended for failing to render a decision that could not be challenged.⁶⁸ Similarly, the judge who ordered the prosecutor to allow the defense full access to the case files, as Venezuelan law customarily required, was suspended after issuing a complaint to the Public Ministry's Senior Prosecutor

⁶⁵ Juan Francisco Alonso, *80% de jueces no confían en métodos para sancionarlos*, El Universal (Dec. 21, 2009), available at http://opinion.eluniversal.com/2009/12/21/pol_art_80-de-jueces-no-con_174275.shtml

⁶⁶ *Brewer-Carías v. Venezuela*, Case 12.724, Inter-Am. Comm'n H.R., Report No. 171/11, ¶ 125 (Nov. 3, 2011), available at <http://www.oas.org/en/iachr/decisions/court/12.724FondoEng.pdf>; *Brewer-Carías v. Venezuela*, Case 12.724, Inter-Am. Comm'n H.R., Executive Summary of Complaint, ¶ 66.

⁶⁷ *Id.* ¶126.

⁶⁸ *Id.*

regarding the temporary prosecutor's "obstructive action."⁶⁹ These systematic removals send a clear message to other provisional prosecutors and judges that job stability directly correlates with adherence to the government's agenda. In a system where judges and prosecutors are unable to fulfill their duties objectively without fear of being removed or dismissed, those who are prosecuted within that system have no way of receiving a fair trial.

In sum, the facts demonstrate that the threat posed by interim judges and prosecutors to the independence of the Venezuelan judiciary has been fully realized in Mr. Brewer-Carías' case, which has been manipulated from its inception by improper government influence. Accordingly, this Court should find that Venezuela's failure to safeguard Mr. Brewer-Carías' right to be tried by an impartial and independent judiciary constitutes a breach of Article 8 of the Convention.

III. Venezuela Also Breached Its Obligations under Article 25 by Denying Mr. Brewer-Carías Access to Effective Judicial Recourse

Venezuela's violations of Mr. Brewer-Carías' rights under Article 8 of the Convention also constitute violations of Article 25. As noted above, Article 25 of the Convention grants the right to effective recourse by a competent court for protection against acts that violate fundamental rights recognized by domestic laws and under the Convention.⁷⁰ This Court has explained that the right to effective recourse under Article 25 entails more than the mere formal right to petition a court or tribunal when such request would be futile. Indeed, a judiciary's lack of independence and impartiality can itself constitute denial of access to the courts.⁷¹ The facts in this case indicate that, for Mr. Brewer-Carías, no meaningful and effective judicial protection

⁶⁹ *Id.* ¶¶146-147.

⁷⁰ American Convention on Human Rights, *supra* note 40, at Art. 25.

⁷¹ *Judicial Guarantees in States of Emergency*, (Arts. 27(2), 25 and 8, American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶ 27 (Oct. 6, 1987). *See also Aguado Alfaró v. Perú*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158, ¶ 125 (Nov. 24, 2006); *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 61 (Jul. 17, 2005); *Five Pensioners v. Perú*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 98, ¶ 136 (Feb. 28, 2003).

is available, as long as the judiciary is improperly controlled by the other branches of government. Accordingly, the lack of an independent judiciary in Venezuela violated Mr. Brewer-Carías' rights under Article 25, as well as Article 8, of the Convention.

Conclusion

For the foregoing reasons, the ABCNY, as *amicus curiae*, respectfully supports Mr. Brewer-Carías' petition and urges the Court to find that Venezuela violated Articles 8 and 25 of the Convention by prosecuting Mr. Brewer-Carías while failing to ensure his right to an independent and impartial tribunal.

Respectfully submitted,

August 30, 2013

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