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THE EXHAUSTION OF DOMESTIC REMEDIES AND THE NOTION OF AN EARLY STAGE IN THE CASE OF BREWER CARÍAS. IS THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AT RISK?

Angel Gabriel CABRERA SILVA[1*]

ABSTRACT. *This note analyzes the judgment delivered by the Inter-American Court on Human Rights in the case of Brewer Carías v. Venezuela. It argues that the criteria that allowed the preliminary objection of non-exhaustion of domestic remedies contravenes the precedents of the Inter-American line of case law. By examining the origin and implications of the newly-introduced concept of an "early stage" in domestic proceedings, this note then reaches to the conclusion that it could endanger the accessibility and impact of the Inter-American Human Rights System.*

KEY WORDS: *Exhaustion of domestic remedies, Inter-American Court on Human Rights, preliminary objection, early stage.*

RESUMEN. *Esta nota analiza la sentencia dictada por la Corte Interamericana de Derechos Humanos en el caso Brewer Carías vs. Venezuela. Se sostiene que los criterios utilizados para admitir la excepción preliminar de falta de agotamiento de recursos internos, contraviene los precedentes establecidos en la línea jurisprudencial del Sistema Interamericano. Mediante un estudio del origen e implicaciones del recién introducido concepto de una "etapa temprana" en los recursos internos, se concluye que esta noción podría implicar un riesgo para la accesibilidad y el impacto del Sistema Interamericano de Derechos Humanos.*

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PALABRAS CLAVE. *Agotamiento de recursos internos, Corte Interamericana de Derechos Humanos, excepción preliminar, etapa temprana.*

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On May 26th, 2014 the Inter-American Court on Human Rights (hereinafter referred to as the I/A Court H.R.) delivered its judgment on the Case of *Brewer Carías v. Venezuela*[2] (hereinafter referred to as the case of *Brewer).* This decision allowed a preliminary objection of non-exhaustion of domestic remedies based on unprecedented criteria.

This note analyses the aforesaid judgment and sustains that the standards contained therein establish a judicial precedent that could affect the accessibility and impact of the Inter-American Human Rights System (hereinafter referred to as IAHRS). This work has been divided into four sections: the first one briefs the facts and the decision delivered in the Case of *Brewer;* the second section elucidates about the generalities concerning the procedural exigency to exhaust domestic remedies; the third part explains how this requisite has been applied by the IAHRS, in order to describe the changes that were introduced through the Case of *Brewer* particularly regarding the concept of an "early stage" in domestic proceedings*;* the last section exposes the consequences of these changes, and proposes a way for the Inter-American Commission on Human Rights (hereinafter referred to as the IACHR) to counter its negative effects.

I. THE CASE OF BREWER IN BRIEF[3]

Professor Allan Brewer Carías filed a petition before the IACHR in order to challenge a criminal prosecution instigated against him for his alleged participation during the

[2] *Allan R. Brewer Carías* case, 2014 Inter-Am. Ct.H.R. (Ser.C) No. 278, (May 26, 2014).

[3] This chapter summarizes the facts and legal arguments that were presented by the petitioner before the IACHR, as they were published in: *Allan R. Brewer Carías v. Venezuela*, case 12.724, Inter-Am C.H.R., Report 171/11, (November 3, 2011) at 8-53.

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Venezuelan *coup d'état* attempt of 2002 lead by Pedro Carmona against President Hugo Chávez. Professor Brewer was suspected to have taken part in drafting the *Carmona Decree,* which was the document establishing a transitory government after the temporary suspension of Chávez's authority.

Starting from 2002, various provisory prosecutors conducted the criminal investigation against Professor Brewer. The first appointed prosecutor did not file any accusation and neither did the second; as a consequence they were both removed and one of them was even killed. Subsequently, the third appointed prosecutor finally accused Professor Brewer of committing conspiracy against the government.

The case was then brought before a provisory criminal judge who was substituted after having delivered a restriction order that was revoked by the Court of Appeals. The second judge was also suspended on his functions and a third provisory judge was appointed to subpoena the parties to the public hearing in which the court had to deliver a decision on the admissibility of the accusation.

After the prosecutor filed the accusation and while a third provisory judge conducted the first stage of the criminal process, Mr. Brewer moved to the city of New York in order to assume a position as Professor of the University of Columbia. Subsequently, the judge issues a detention order against Prof. Brewer in 2006, whose execution remains pending after a couple of failed extraditing attempts. Up to this moment, as the detention order remains valid, Professor Brewer would be incarcerated if he returns to Venezuela.

Brewer's absence from Venezuela has kept him from being detained, however it has also caused an indefinite suspension of his criminal trial, as the domestic law does not allows an accused person to be judged *in absentia*.

Consequently, in order to raise Professor Brewer's claims before the domestic courts and as a mean for terminating the criminal accusation without having to suffer from a detention, the defendant's attorney requested a declaration of nullity against the criminal proceedings as a whole. Nevertheless, in spite of the defendant's arguments, the court deemed that such a request for annulment had to be decided during the public hearing in which Professor Brewer's attendance was necessary.

At present, both the criminal trial and the request for the declaration of nullity are still suspended and awaiting that Professor Brewer returns to Venezuela in order to attend the public hearing, which would also imply that he presents himself to be detained and

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incarcerated. Therefore, as the Venezuelan law does not provide any other mean for legal redress, Professor Brewer considered that his case was suitable to be presented before the IACHR.

The petition was filed on January 24, 2007 and claimed that the provisory character of the prosecutors and judges deprived Professor Brewer of his judicial guarantee to an impartial trial, as those officials were always subject to the authority of their hierarchical superiors' political interests. It also denounced several irregularities that presumably affected his rights of defense and judicial protection.

Regarding the admissibility requirements, the petitioner contended that he ought to be exempted from exhausting domestic remedies in accordance to Article 46.2 of the American Convention on Human Rights (hereinafter referred to as the ACHR) because:

a) The domestic law does not affords due process of law for the protection of his rights as the structural deficiencies in the Venezuelan justice system establish a provisory character to prosecutors and judges.

b) He has been denied access to remedies under domestic law, as he was arbitrarily prevented from exhausting the request for annulment by conditioning its processing to the appearance of the defendant before the court, although that would mean he would be subject to detention.

c) There had been an unwarranted delay in the processing of his request for annulment, as more than 3 years had passed since it was filed without it been decided.

II. A GENERAL APPROACH TO THE RULE OF EXHAUSTION OF DOMESTIC REMEDIES

The rule of exhaustion of domestic remedies (hereinafter referred to as "the rule of exhaustion") is a principle of International Law that reaffirms the subsidiary and complementary character of international organizations. This general principle was incorporated as a procedural rule of the mechanisms implemented by the international human rights law,[4] since then, it has developed a particular content to provide States

[4] This rule is laid down in Article 46.1 of the American Convention on Human Rights, as well as in Article 35 of the European Convention on Human Rights, 56.5 of the African Charter on Human and People's Rights, 2 of the Optional Protocol to the International Covenant on Civil and Political Rights, and 3.1 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

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with the opportunity to remedy any given violation to a human right committed by its' officials without suffering international intervention.

Practically every international organization with competence to process individual petitions regarding human rights issues has recognized that the rule of exhaustion refers only to available and effective means of legal redress,[5] that is to include only those remedies that are able to rectify the grievances and are capable of producing the result for which they were conceived.[6]

However, in spite of this consensus, various international organizations have shaped some criteria about the rule of exhaustion in a different manner. It is relevant for this note to distinguish nuances in the flexibility with which this rule is applied. For instance, whereas the I/A Court H.R. has considered that the only remedies that need to be exhausted are those that existed at the moment of any given violation,[7] the European Court on Human Rights (hereinafter referred to as the ECHR) has dismissed petitions for the non-exhaustion of remedies that were created after a violation occurred, as long as they were accessible to the petitioner by the moment when the petition was filed.[8]

The different legal instruments that are subject to interpretation underlie these distinctions in the criteria of international courts. It is not surprising that more restrictive criteria has been stablished within the European System than in the IAHRS, if we take into account that the I/A Court H.R. can rely on rules that explicitly allow to increase the

[5] INTER-AMERICAN SYSTEM: *Velásquez Rodríguez* case, 1988 Inter-Am Ct.H.R. (Ser. C) No. 4 (July 29, 1988) at 63; *Landaeta Mejías Brothers* and others case, 2014 Inter-Am Ct.H.R., (Ser. C) No. 281 (August 27, 2014) at 22. EUROPEAN SYSTEM: case of *Kemmache v. France*, 14992/89 Eur. C.H.R., (June 17, 1990); case of *Nada v. Switzerland*, 10593/08 Eur. Ct. H.R., GC, (September 12, 2012) at 140. AFRICAN SYSTEM: case of *Tanganyika Law Society and Legal and Human Rights Centre v. The United Republic of Tanzania*, Afr. Ct. H.P.R. at 82.1 (June 14, 2013); case of *Sir Dawda K. Jawara v. The Gambi*a, Afr. C. H. P. R., Communication N° 147/95, (May 11, 2000) at 31-32. UNIVERSAL SYSTEM: case of *Farid Faraoun v. Argelia*, UN H.R.C., Communication N°1884/2009 (October 18, 2013) at 6.4.

[6] HÉCTOR FAÚNDEZ, EL AGOTAMIENTO DE LOS RECURSOS INTERNOS EN EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS 59 and 78 (Estudios de Derechos Humanos Caracas, 2007).

[7] *Cf.* Case of *Claude Reyes* and others, 2006 Inter-Am Ct. H.R., (Ser. C) No. 151 at 140 (September 19, 2006); case of *Liakat Ali Alibux*, 2014 Inter-Am Ct.H.R., (Ser. C) No. 276 (January 30, 2014) at 19.

[8] *Cf.* Case of *Andrasik* and others *v. Slovakia*, 57984/00 Eur. Ct. H.R. (October 22, 2002) at 11-12.

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flexibility of the rule of exhaustion, while the ECHR is limited by its necessity to expand the scope of narrower rules.[9]

III. THE RULE OF EXHAUSTION WITHIN THE INTER-AMERICAN SYSTEM: PRECEDENTS AND CHANGES

The line of case law designed by the I/A Court H.R. distinguishes itself for setting parameters that facilitate the petitioners to comply with the rule of exhaustion or to be exempted thereof.[10] The few times a claim has been rejected because the non-exhaustion of domestic remedies demonstrates that the I/A Court H.R. has minimized its application.[11] An important factor leading to this trend is that the rule of exhaustion has not been understood as an unbreakable principle, but rather as a guarantee that can be handed down by the States and whose consideration by the I/A Court H.R. is conditioned to some formalities.

International bodies created by the International Human Rights Law have established several conditions that must be met in order for an objection of non-exhaustion to be allowed. For instance, the I/A Court H.R. takes into account the timeliness of its presentation within the procedure before the IACHR, the specificity of the State's claim regarding the existence of a domestic remedy that meets with the effectiveness standard,

[9] Whereas the I/A Court H.R.'s criteria on admissibility is based on the exceptions laid down in article 46.2 of the American Convention on Human Rights, the ECHR has to deliver a systematic interpretation of article 35 of the European Convention on Human Rights, in relation to articles 6 and 13 of the said legal instrument. Former Commissioner of the IACHR agrees with this perception in: Dinah Shelton, *The Jurisprudence of the Inter-American Court on Human Right*s, Vol. 10, AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW, 1994, at 344.

[10] An academic paper has even tried to claim that, within the IAHRS, the rule of exhaustion has lost its effectiveness as a mean of defense for the States. *Cf.* Andrés González, La excepción preliminar: Falta de agotamiento de recursos internos ¿Un mecanismo efectivo de defensa estatal?, Prolegómenos. Derechos y valores, 2011.

[11] It is interesting to note that, within the last 5 years (2009-2014) the I/A Court H.R. has analyzed more than 29 cases where the State raised the preliminary objection of non-exhaustion of domestic remedies. However, only 3 of those cases allowed the objection (cases of *Chitay Nech v. Guatemala, Díaz Peña v. Venezuela and Brewer Carías v. Venezuel*a). This is only an illustrative statement about a general trend; we are aware that a more profound analysis will need to classify the reasons that lead to the rejection of the preliminary objection; however, that's not the purpose of this note.

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and the adequacy of proof provided by the defendant State in order to sustain the soundness of its claim.[12]

Nevertheless, recently, this reasoning has ceded before a more rigid interpretation regarding the rule of exhaustion. This section will analyze the medullar aspects of this modification in the Inter-American jurisprudence, principally in relation to the Case of *Brewer.* However, before analyzing that particular decision, it is imperative to briefly revise a previous case that was the anteroom for the modification in the line of case law.

In 2010 the I/A Court H.R. decided the case of *Díaz Peña v. Venezuela.* This judgment redirected the admissibility criteria set by the IAHRS up to that moment, which defined that the exhaustion of one suitable mean of redress is sufficient to comply with the rule of exhaustion according to the procedural regulation of the American Convention on Human Rights.[13] In that case, the I/A Court H.R. considered that the legal actions pursued by the victim in order to remedy an allegedly arbitrary imposition of preventive detention were not sufficient to comply with the rule of exhaustion, although they could have provided an effective mean to achieve a pretrial release decision.

The victim of that case, José Raúl Díaz Peña, was convicted because of his alleged participation in the protests of "Plaza de Francia" and the bombings occurred in Caracas on February 23, 2003. The criminal proceedings against the petitioner lasted for 4 years and 5 months.[14] The trial, having been conducted before several provisory judges, was contested for not been impartial.[15] Díaz Peña was held in preventive detention throughout the duration of the proceedings and until a definitive judgment was delivered;

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[12] We can highlight that both, the I/A Court H.R. and the ECHR, apply similar criteria regarding the specificity with which the preliminary objection of non-exhaustion of domestic remedies has to be raised by the States, and also concerning the burden of proof to sustain this objection. *Cf.* Mayagna Community (Sumo) Awas Tingni case, Inter-Am Ct.H.R., (Ser. C) No. 66 at 53 (February 1, 2000); case of *McFarlane v. Ireland*, 31333/06 Eur. Ct. H.R., GC, at 107 (September 10, 2010)

[13] *Cf. Raúl José Díaz Peña v. Venezuela*, Petition 1133-05, Inter-Am C.H.R., Report 23/09 at 45 (March 20, 2009) compared to: *Humberto Antonio Palamara Iribarne v. Chile*, case 11.571, Inter-Am C.H.R., Report 77/01 at 36, (October 10, 2001). This criteria was recently reiterated in*: Daniel Urrutia Labreaux v. Chile*, Petition 1389-05, Inter-Am C.H.R., Report 51/14, OEA/Ser.L/V/II.151 at 22 (July 21, 2014).

[14] Case of *Díaz Peña,* 2012 Inter-Am. Ct. H.R., (Ser. C) No. 244 (June 26, 2012) at 87.

[15] *Raúl José Díaz Peña v. Venezuela*, case 12.703, Inter-Am C.H.R., Report 84/10 (July 13, 2010) at 38.

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during this time, the defendant's attorneys presented numerous remedies that were suitable to review the proportionality of the preventive detention. However, the final judgment was not appealed on the merits.

The petition filed before the IACHR claimed that the criminal process was lacking impartiality and that the preventive detention was not proportional; it also denounced inappropriate conditions of detention. This latter issue was the only one on which the I/A Court H.R. delivered a final decision.

Even if it was foreseeable that the claims regarding the procedural irregularities were inadmissible for not having exhausted the final appeal for review against the final judgment, the claims concerning the preventive detention were surprisingly rejected because the I/A Court H.R. accepted the preliminary exception of non-exhaustion of domestic remedies raised by the State of Venezuela.[16]

Although the petitioner had exhausted several requests for the review of his preventive detention during the years he was subject to criminal proceedings, the I/A Court H.R. did not analyze the suitability of those remedies.[17] On the contrary, the I/A Court H.R. only noted that the final decision of conviction had not been appealed, and that this would have been a suitable mean to redress procedural irregularities, as well as an effective way to raise his claim against the preventive detention which he considered to be a violation to the right to liberty protected by article 7 of the ACHR.[18]

The modification in the criteria to apply the rule of exhaustion was not as evident in the case of *Díaz Peña,* nor this judgment was as controversial as the decision delivered in the case of *Brewer.* While the change in the line of case law was barely noticeable on the former, the implications and consequences of this approach are most conspicuous on the latter.

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[16] In its report on admissibility, the IACHR considered that the several request for revision of the preventive detention were sufficient to comply with the rule of exhaustion. *Raúl José Díaz Peña v. Venezuela*, Petition 1133-05, Inter-Am C.H.R., Report 23/09 at 42, 50 (March 20, 2009).

[17] Consequently, the I/A Court H.R. used a standard that is even stricter than the criteria applied by the ECHR. In fact, the ECHR has considered that, when multiples suitable remedies exist, compliance with the rule of exhaustion only requires for the petitioner to pursue all of the vertical instances for one of such means of redress. Cf. *Case of Kozacioglu v. Turkey*, 2334/03 Eur. Ct. H.R., GC (February 19, 2009) at 40.

[18] Case of *Díaz Peña,* 2012 Inter-Am. Ct. H.R., (Ser. C) No. 244 (June 26, 2012) at 123, 125.

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While analyzing the judgment delivered in the case of *Brewer,* on the one hand, it stands out that there was a change on the adjective criteria to evaluate the timeliness, specificity and burden of proof concerning the preliminary objections for non-exhaustion of domestic remedies. Following some of the arguments presented by the dissenting judges,[19] modifications may be briefed as follows:

a) The specificity requirement would normally oblige a State to mention the remedy that should have been exhausted in order to comply with the rule of exhaustion. Moreover, when a petitioner has already exhausted a domestic remedy, this requisite forces the State to explain why such a remedy should not be taken into account while assessing compliance with the rule of exhaustion. However, in this case the Court adopted a more flexible interpretation by allowing Venezuela to simply state that the criminal proceedings had not been concluded, and that an appeal, a cassation and review where available to remedy the grievances (even if a request for annulment was already presented by the petitioner).

b) According to the requisite of timeliness, a State must present its preliminary objections during the admissibility stage before the IACHR. Consequently, in this case Venezuela could not amend the lack of specificity regarding its preliminary objection of non-exhaustion. However, the Court considered that the way the State raised its' objection before the Commission sufficed to comply with this requirement.

c) Finally, the exigencies normally placed upon the state regarding the burden of proof would have required Venezuela to present sound arguments and evidence that the pending domestic remedy would have met the Inter-American standards of effectiveness and adequateness. Nevertheless, the Court did not study how the proposed remedies would have provided sufficient relief to all of Mr. Brewer claims; instead, the Court based its decision on the sole precedent that could sustain this approach: the case of *Díaz Peña v. Venezuela.*

In addition to these adjective (or secondary) modifications, the most substantial change was the use of the concept of an "early stage" in domestic proceedings. By using this newly introduced notion, the Court vaguely explained that Mr. Brewer had filed the

[19] Joint Dissenting Opinion of Judges Manuel E. Ventura Robles and Eduardo Ferrer Mac-Gregor Poisot, to the I/A Court H.R. judgment on the *Allan R. Brewer* Carías case, 2014 Inter-Am Ct. H.R., (Ser. C) No. 278, Dissenting Opinion (May 26, 2014) at 33-45.

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petition in an untimely manner because he presented it before the appropriate moment according to domestic law, that is, before the start of oral proceedings. Nevertheless the I/A Court H.R. did not provide a clear definition of what it understood as an "early stage", even so, this concept was used as a main argument to allow the preliminary objection of non-exhaustion of domestic remedies.

Fortunately, the joint dissenting opinion of judges Ferrer and Ventura did offer important remarks to better comprehend the notion of an "early stage."[20] In brief, the dissenting judges explained that the use of the concept of an "early stage" would prevent the Court to determine any violation to the due process that could find a remedy at an ulterior stage of the proceedings. As judges Ferrer and Ventura noted, this would mean that the I/A Court H.R. would rank the severity of violations according to the procedural stages and not the actual impact over the human rights related to the due process of law. This approach would allow the States to take advantage of an unwarranted delay, as any procedural violation could not contravene the ACHR, while the trial before a national court remains pending.

This description sheds enough light to understand that the I/A Court H.R. created this concept based on the essentially similar notion of a *premature case* used by the ECHR. Just as the notion of an "early stage," the ECHR refers to a "premature case" in order to reject claims presented before the last procedural stage that could remedy a grievance. However, although both concepts may share a similar origin, the manner in which the I/A Court H.R. used the concept of "early stage" differs notably from the way that the ECHR would normally use the "premature case" notion. As a point of comparison, we can exemplify two situations, somewhat similar to the case of *Brewer,* in which the ECHR rejected a petition for being a *premature case*:

a. The ECHR has dismissed allegations that challenged a definitive decision within a process, when the decision, in order to materialize a violation, depends on the execution of further acts that could be subject to an independent judicial revision.[21]

[20] Joint Dissenting Opinion of Judges Manuel E. Ventura Robles and Eduardo Ferrer Mac-Gregor Poisot, to the I/A Court H.R. judgment on the *Allan R. Brewer Carías* case, 2014 Inter-Am Ct. H.R. (Ser. C) No. 278, Dissenting Opinion (May 26, 2014) at 46-64.

[21] Cf. Case of *Vijayanathan and Pusparajah v. France*, 17550/09 Eur. Ct.H.R (August 27, 1992).

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b. In a similar fashion, the ECHR has considered that a claim that challenges a process because a lack of impartiality at its first instance is inadmissible if the decision could be challenged through an appeal before a superior court that, evidently, will provide that guarantee.[22]

These examples illustrate that the concept of a *premature case* must be linked to the understanding of the judicial process "as a whole,"[23] that is, that the Court cannot simply reject a claim because it is on an initial stage, without previously assuring that the further stages will evidently provide the guarantees of a due process of law. The Human Rights Committee and the I/A Court H.R. have shared these understanding of the process "as a whole" and have applied it consistently through the interpretation of the right to a judicial review.[24] From this perspective, the notion of an "early stage" could be compatible with the IAHRS' precedents if it was understood in the same way as the ECHR comprehends a *premature case*.

Nonetheless, the extent of the concept, as applied in the case of *Brewer,* goes far beyond. Its application ignored precedents that would have rose on the necessity of joining the analysis on admissibility with the merits,[25] and ensued an advanced judgment lacking of sufficient analysis on the allegations brought before the Court.

This irregularity was pointed out in the dissenting opinion to the sentence, where it was made evident that, while evaluating the exception provided by Article 46.2, Section b of the ACHR, the I/A Court H.R. had to assess the impact that the lack of impartiality at the first stage of the domestic proceedings would have in the rest of the trial (in order to

[22] Cf. Case of *Barry v. Ireland*, 41957/98 Eur. Ct.H.R. (July 6, 2000); Case of *Muscat v. Malta*, 69119/10, Eur. Ct.H.R., (September 6, 2011).

[23] The ECHR establishes that its competence is limited to analyze if the procedure "as a whole" reunites all of the elements required by the due process of law. *Cf.* Case of *Doorson v. The Netherlands*, 20524/92 Eur. Ct.H.R. (March 26, 1996) at 67; case of *Barry v. Ireland*, 41957/98 Eur. Ct.H.R. (July 6, 2000).

[24] Mainly in the cases where these bodies have specified that these rights imply an integral revision of the process. *Cf.* Case of *Barno Saidova v. Tajikistan*, UN C.H.R., Communication 964/2001 (August 20, 2004) at 6.5; The I/A Court H.R. has settled that the second instance is granted in order to allow an adverse ruling to be reviewed by a different judge or court of higher rank." *Mohamed* case, 2012 Inter-Am Ct.H.R., (Ser. C.) No. 255 (November 23, 2012) at 98.

[25] *Velásquez Rodríguez* case, 1987 Inter-Am Ct.H.R., (Ser. C) No. 1, (June 26, 1987) at 96; *Ríos* and others case, Inter-Am Ct.H.R., (Ser. C) No. 194 (January, 18, 2009) at 40.

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analyze if the petitioner was in fact deprived of the due process of law). Furthermore, regarding the exception contained in Article 46.2, section c of the ACHR, it would have been crucial to identify the reason that caused the 3 years delay in deciding the request for annulment filed before the domestic court, and to deliver a decision on whether such a delay was unwarranted or not.[26]

Therefore, even if the concept of an "early stage" could have been compatible with the precedents of the Inter-American line of case law, its application on the case of *Brewer* contravened them. Relying on this notion, the I/A Court H.R. sustained an argument that was substantially inconsistent.

Although it would be hasty to affirm that the claims should have been accepted on the merits, it is evident that the judgment, as delivered, has brought some direct and indirect consequences that could have been prevented if the petition had undergone a deeper substantial analysis. Not only the I/A Court H.R. may have failed to protect the rights of the petitioner, but by dismissing the case solely on a newly created procedural ground ("early stage"), the I/A Court H.R. decided to covertly reject the claims brought by Mr. Brewer without providing a direct response to his arguments. Instead of serving justice the I/A Court H.R. may have planted a seed that would threaten to undermine some of the most valuable pillars of the Inter-American jurisprudence.

IV. THE CONSEQUENCES OF INTRODUCING THE CONCEPT OF AN "EARLY STAGE" IN THE INTER-AMERICAN JURISPRUDENCE

After the decision of the case of *Brewer,* it is reasonable to expect that defendant states will start using the concept of an "early stage" as a jurisprudential ground to sustain the inadmissibility of petitions filed against them before the IAHRS. Both the IACHR and the I/A Court H.R. will have to decide whether to reiterate the soundness of such an allegation or to reinstate the previous line of case law.

This section will focus on the acceptance of the preliminary exception of the non-exhaustion of domestic remedies regarding the lack of impartiality of prosecutors during

[26] *Cf.* Joint Dissenting Opinion of Judges Manuel E. Ventura Robles and Eduardo Ferrer Mac-Gregor Poisot, *Allan R. Brewer Carías* case, 2014 Inter-Am Ct. H.R., (Ser. C) No. 278, Dissenting Opinion (May 26, 2014) at 19-26.

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the first stage of the criminal trial (that is to say on the inapplicability of Article 46.2, Section b of the ACHR in the case of *Brewer*). However, it is important to note that these conclusions may also be applicable in other cases where the impartiality is contested against judges during the initial stage of judicial proceedings (which could have also been the case of Mr. Brewer, had he decided to present himself before a Venezuelan Court to continue his trial in detention).

In relation to that claim, according to the I/A Court H.R's judgment, it would have been necessary for the petitioner to be subjected to a trial he deemed to be *ab initio* lacking of impartiality in order to overcome the obstacle raised by the concept of an "early stage". In other words, the Court considered that the rule of exhaustion required the deliverance of a final domestic decision in order to eventually appeal a conviction order issued against Prof. Brewer and challenge every procedural irregularity, including the lack of impartiality during the prosecution.

If the bodies of the IAHRS were to incorporate the concept of an "early stage" and decide to apply it in a similar fashion as in the case of *Brewer,* the principal and most evident consequence would be a significant decrease in the capacity and effectiveness of the IAHRS to protect human rights. Simultaneously, this notion could bring a serious increase in the rigidity and formalism at the stage of admissibility, which would reduce the accessibility to the IAHRS and will cut off its potential impact, depriving both petitioners and States from the opportunity to amend or prevent further human rights violations.

Regarding the accessibility to the IAHRS, the concept of an "early stage" will have two effects. On the one hand, on the normative aspect, it would imply that the exception provided by Article 46.2, Secction b could not rely on allegations related with procedural irregularities whose effects are bound to verification, even if they exist *ab initio*,[27] but

[27] E.g. the necessity to prove the consequences of the claim related to the lack of impartiality of the control judges that, because of their temporariness, were removed at the initial stage of the process followed against Brewer. A similar situation would arise regarding a claim about the lack of guarantees of due process in a trial pursued under Decree-Laws 25.659 and 25.708 in Peru, in the case where a military court had assumed jurisdiction without having delivered a final judgment. On this subject, the IACHR has considered unnecessary to exhaust domestic remedies because those Decree-Laws were challenged for not providing the guarantees of due process; *Cf. Castillo Petruzzi* and other case, 1998 Inter-Am Ct.H.R., (Ser. C) No. 41 (September 4, 1998) at 51-53.

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rather on reasons that are external to the process.[28] On the other hand, from an empirical perspective, it would require that, in order to raise a claim about an intra-procedural irregularity, the victim would have to yield to the trial that he or she intends to challenge *ab initio*.[29]

Regarding the consequences related with the potential impact of the IAHRS, the formalism imposed by the concept of an "early stage," would hamper the future development of the Inter-American case law and the regional standards for the protection of human rights.

For instance, without prejudging about the claims raised by Professor Brewer, we consider that an analysis on the merits would have brought, at the least, an opportunity for the I/A Court H.R. to make a statement about the lack of impartiality of the judiciary in Venezuela, from the perspective of the accused party in a criminal process before provisionary prosecutors and judges.[30] The case would have also presented a chance to develop the Inter-American standards regarding the institutional guarantees that must be respected in order to preserve the impartiality of prosecutors and assure the existence of a due process of law.

On this matter, in order to provide a less speculative example about the negative impact of this precedent, it is useful to analyze the consequences that the concept of an "early stage" would have brought upon the IAHRS if it had been used in the case of *Tristán Donoso v. Panamá.*

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[28] E.g. The situation where a victim suffers from indigence, when the competent Court has interrupted its functions, etc.

[29] Thus, in order for his petition to be admissible, Mr. Brewer would have to return to Venezuela and submit to the trial that he considers irregular *ab initio* and to the detention decreed against him, to subsequently challenge it through the domestic remedies, which will include the appeal of the criminal process if we take into account the criteria laid down by the I/A Court H.R. in: case of *Díaz Peña,* 2012 Inter-Am. Ct. H.R., (Ser. C) No. 244 (June 26, 2012) at 123-124.

[30] On this matter, the IACHR has delivered opinions through its monitoring mechanisms (particularly through the IV chapter of its annual report), while the I/A Court H.R. has only delivered judgments in cases where the victims were the judges affected by their provisional appointment. *Cf. Chocrón Chocrón* case, 2011 Inter-Am Ct.H.R., (Ser. C) No. 227 (July 1, 2011); *Reverón Trujillo* case, Inter-Am Ct.H.R. (Ser. C) No. 197 (June 30, 2009); *Apitz Barbera* and others ("First Court of Administrative Disputes") case, Inter-Am Ct.H.R. (Ser. C) No. 182 (August 5, 2008).

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Several similarities exist among the procedural standing before the rule of exhaustion during the admissibility analysis of the case of *Brewer,* and that of the petition filed by Mr. Tristán Donoso:[31]

a) The petitioner had been accused for a crime he deemed to be contrary to his right to freedom from *ex post facto* laws, and consequently he contended that the criminal proceeding was *ab initio* affected of nullity.

b) The petition was filed before the IAHRS while the criminal trial was still being processed before the domestic court.

c) The State of Panama did not provide sufficient proof to sustain that the unconcluded domestic criminal proceeding met the adequacy and effectiveness standards in relation to the human rights violations alleged by the petitioner.

d) The State's allegations did not pointed to the existence of any other specific domestic remedy adequate to redress the alleged violations with sufficient specificity.

Were the concept of an "early stage" exist before the filing of Mr. Donoso's petition, his main claim would have been rejected, as the rule of exhaustion would have required him to await until a decision was delivered through an appeal for the review of the final judgment.[32]

If the I/A Court H.R. would have made such a decision the consequences would not have been minor. Firstly, it would have kept the I/A Court H.R. from determining the unconventionality of a sanction intended to restrict the freedom of speech; secondly, the

[31] Case of *Santander Tristán Donoso v. Panamá,* case 12.360, Inter-Am. C.H.R., Report 71/02 (October 24, 2002).

[32] This case was deemed admissible before the final judgment was delivered in the domestic criminal trial, mainly because: 1) The State did not comply with the specificity to claim the non-exhaustion of domestic remedies, and; 2) the criminal trial was challenged ab initio, due to the alleged unconventionality of the crime definition of defamation. If the criteria used on the Case of Brewer had been applied, the lack of specificity would not have entailed the preliminary objection and a definitive judgment would have been necessary, in order to raise a petition before the IAHRS. *Cf. Santander Tristán Donoso v. Panamá*, Petition 12.360, Inter-Am C.H.R., Report N°71/02 (October 24, 2002) at 17, 22.

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Court would have lost an opportunity to advance an important statement concerning the impartiality of prosecutors during the investigation.[33]

However, the most notorious drawback for the development of Inter-American Human Rights Law would have been that, by rejecting the case of Tristán Donoso, the I/A Court H.R. would have withhold the opportunity to deliver the first judgment addressing the violation of the right to privacy trough the illegal intervention of communications.

This example makes it evident that the concept of an "early stage" could provoke an over-rigidity of the rule of exhaustion that would pose a serious threat to the objective and development of the IAHRS.

First of all, by undermining its accessibility, the notion of an "early stage" would be discouraging the individuals to look up to the IAHRS as a mean to obtain justice and it would simultaneously hamper the system's mission, which is to promote and defend human rights.

However, what is most preoccupying is that, by stiffening its admissibility criteria, the IAHRS would be brought to reject petitions that would otherwise present an opportunity to develop standards that would assist States to comply with the provisions of the ACHR. This would deprive domestic courts of precedents that could orientate their reasoning towards the Inter-American standards.

Up until this point, we have succinctly described the main consequences that could be generated by the introduction of the concept of an "early stage" in the Inter-American jurisprudence. Our objective, beyond criticizing the judgment delivered on the case of *Brewer*, was to present an analysis of its potential negative effects.

On a brighter side, we must take into account that this regressive criteria has not yet been reiterated. A chance exist to prevent the foreseeable consequences if the IACHR exercises its autonomy[34] and does not incorporate the concept of an "early stage" in its decisions on admissibility, or if it starts to shape it in a way that is compatible with the line of case law that preceded the judgment delivered in the case of *Brewer.* Furthermore,

[33] These precedents are important within the IAHRS even if, in the concrete case, the crime definition was not found to violate the ACHR, and the lack of impartiality of prosecutors was not proven. Cf. *Tristán Donoso* case. Inter-Am Ct.H.R., (Ser. C) No. 193 (January 27, 2009) at 130.

[34] *Cf.* Advisory Opinion OC-19/05, Inter-Am Ct.H.R., (Ser. A) No. 19 at opinions 1, 3 (November 28, 2005).

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Mr. Brewer may still hold a last chance to obtain justice if the IACHR would decide to act in accordance to its autonomy.

The structure of the Inter-American Human Rights System grants the IACHR total autonomy to regulate and oversee the quasi-jurisdictional procedure before it. In fact, in a recent case the I/A Court on H.R. has emphazised that "it is outside this Court's competence to conduct a control of legality in the abstract —merely with a declarative purpose— of the processing of a case before the Commission."[35] Accordingly, the IACHR is not obliged to defer to any admissibility criteria set forth by the Court, as far as it does not deprives a State from its right to defense.

By affirming its autonomy, the IACHR would grant the I/A Court H.R. with the chance to retake its previous criteria or at the least, it would ensure that the proceedings before the IACHR maintain a higher level of accessibility and impact.

Moreover, the exercise of the IACHR's autonomy may also provide a solution in favor of Mr. Brewer. Following the precedent of the case of *Alfonso Martín del Campo Dodd vs. Mexico*, the independence of the procedures before the Commission allows it to overview State's compliance of its recommendations, even after the I/A Court H.R. had deemed a case inadmissible. This possibility would offer a last chance to serve justice in the case of Mr. Brewer.

Through the case of *Alfonso Martín del Campo Dodd vs. Mexico*, the IACHR found Mexico responsible for violating the human rights of the petitioner after imprisoning him based on proofs obtained by torture.[36] Subsequently, the State failed to comply with the recommendations issued by the IACHR and the Commission filed the case before the I/A Court H.R. However, the Court rejected the case by allowing the preliminary objection *ratione temporis,* based on a dubious definition of the extent in which the effects of torture can persist through time.[37]

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[35] *Rodríguez Vera & others* (Palacio de Justicia) case, 2014 Inter-Am Ct.H.R., (Ser. C) No. 287 (November 14, 2014) at 54.

[36] Case of *Alfonso Martín del Campo Dodd v. Mexico*, case 12.228, Inter-Am. C.H.R., Report 81/01 (October 10, 2001).

[37] The IACHR noted that the torture had occurred at a moment before Mexico had accepted to submit to the jurisdiction of the Court, however, the Commission contended that even if the torture had ceased, the effects of the proofs obtained by it would remain and persist through time. On the other hand, the I/A Court H.R.

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In spite of this decision, the IACHR continued supervising its original recommendations. While debating if the Commission was actually entitled to this competence under articles 50 and 51 of the ACHR, it was stated that, "by rejecting the complaint on this formal ground, the Commission maintains material jurisdiction to follow up on its recommendations."[38] Because of this decision, the initial report on the merits continued to be supervised until Mr. Martín del Campo was released from prison in March, 2015.

If the IACHR decided to act in a similar fashion, Mr. Brewer may still have a chance to obtain a remedy through the overview of an international quasi-jurisdictional body. Since the I/A Court H.R. did not make any decision on the merits, the Commission still counts with enough legal attributions to follow up on its initial findings and recommendations. Even if the Court's decision may have deprived Mr. Brewer from a quicker response to his grievances, a remedy to the violations suffered may be reachable on the long run.

considered that the torture cannot have continuous effects as it is in act that extinguishes as soon as the torture ceases. In that sense, the Court considered that it lacked legal competence to analyze the case, as the principle of non-retroactivity had to apply to torture that happened before Mexico's acceptance to the jurisdiction of the Court. *Martín del Campo Dood v. Mexico*, 2004 Inter-Am Ct.H.R., (Ser. C) No. 113 (September 03, 2014).

[38] Case of *Alfonso Martín del Campo Dodd v. Mexico*, case 12.228, Inter-Am. C.H.R., Report 117/09 (November 12, 2001).

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