CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ
TO THE JUDGMENT OF THE INTER-AMERICAN COURT
IN THE *CASE OF BAYARRI (ARGENTINA),*
OF OCTOBER 30, 2008

1. The examination of the Bayarri case and the Court's judgment give rise to several relevant issues in relation to the protection of human rights within the framework of criminal proceedings, which constitutes a complex and dangerous scenario for the encounter between the powers of the State and the rights of the individual. These issues include the preventive detention of the accused, a topic that has frequently been emphasized in the rulings of the Court – and also, evidently, the practice of criminal prosecution, plagued with defects – which has already produced a "body of legal doctrine" on this matter, whose influence could and should be extended to domestic law and decisions, via formal interpretation of the American Convention.

2. This provides appropriate material for the hoped-for harmonization with international human rights law. Eminent scholars – such as Julio Maier, Martín Abregú and Juan Carlos Hitters – have emitted their founded opinion that it is time to review and perhaps reconstruct criminal proceedings in our countries (which have already undergone notable developments) in light of international human rights law. Moreover, to this source of "new law" should be added (with the same rank and identical spirit), the humanist and democratic tradition that is rooted in the constitutional traditions – their application is another story – of the countries of the Americas. Consequently, this is the dual source or the broad basis of the contemporary law of criminal procedure, characteristic of a democratic society committed to human rights, the reign of justice and the preservation of public security, which also constitutes, evidently, a human right.

3. On other occasions, subsequent to the rulings of the Inter-American Court, I have referred to preventive detention which, strictly speaking, is usually repressive imprisonment, an anticipation of the punishment, a means of social control which goes far beyond the trial in which it is ordered and enforced. I have done so for example, in my concurring opinions to the judgments in *Tibi v. Ecuador* and *López Alvarez v. Honduras.* Recently, an important bibliography has emerged – or, rather, has been renewed – that examines preventive detention under the optic of its rationality (always questioned) and of its scope and limitations in keeping with inter-American case law. Among a growing number of exponents, I can cite, only as examples, the valuable contributions of Paola Bigliani and Alberto Bovino, in Argentina, and Guillermo Zepeda Lecuona, in México, authors of very recent works.

4. Preventive detention, which precedes punitive detention in the trajectory of the deprivation of liberty linked to the actual or future sanction of offenses, comes up against immense ethical and logical obstacles. It is sufficient to recall – evoking the classic Beccaria – that it constitutes a punishment which anticipates the official declaration of the criminal responsibility of the person subjected to it. This fact alerts us against the "justice" of a measure that suppresses, restricts or limits liberty (strictly speaking, several liberties or manifestations of human liberty: ambulatory, evidently, but also others, irremissibly drawn in by the former) even before the State decides, through the pertinent channels, that there are evident and firm grounds for suppressing, restricting or limiting that liberty. Hence, there is an anticipated and, therefore, undue - but not for this less effective - decision concerning the criminal responsibility of the accused.

5. Consequently, it would be difficult to maintain that preventive detention is a "just"

measure, even when it is carried out under the aegis of justice. If it is unjust to punish in order to find out whether it is possible to punish, we need to find other arguments – subject to finding, better still, alternative measures to the deprivation of liberty – to support the legitimacy of such a measure. In other words, we need to establish that the precautionary deprivation of liberty is "necessary" from the perspective of justice itself – in the specific case, evidently – and has been ordered for the reasons and considerations that allow the State to restrict the rights of the individual. There is no absolute law; any law is limited by the rights of others, the common good, the general welfare, the safety and security of all, always within the framework – strict and demanding – of a democratic society (Article 30 and 32 of the American Convention on Human Rights). Incidentally, the same observations should be made with regard to the other element of deprivation of liberty: punitive imprisonment, an authentic punishment that should be reduced to its most indispensable expression. But that is not the subject of this opinion.

6. Preventive detention is just one of the measures used by the State to ensure – in a cautionary or precautionary manner - the satisfactory administration of justice and effective compliance with jurisdictional decisions. In this regard, preventive detention obeys the same factors and should respect the same rules that regulate other precautionary measures. They all anticipate the trial to a certain extent, in order to safeguard the trial, if I may use these terms. However, preventive detention is the most intense and devastating of these measures; incomparably more severe that surveillance by the authority, or the seizure of assets, the prohibition to carry out certain operations or activities, or the limitation of freedom of movement, etc. In reality, all precautionary measures give rise to damage that it is difficult to repair, although it can be compensated: preventive detention causes an absolutely irreparable damage, which is the loss of time of life, with all that this signifies; hence the need to examine it and adopt it with infinite care.

7. Even though it has been said so often, it is worth repeating that there is an almost insoluble tension between the great contribution made by penal liberalism, which rescues the rights of the individual and curtails the powers of the authority: the presumption or principle of innocence (the root of many special rights, and the grounds for numerous public obligations) on the one hand, and preventive detention on the other. The persistence of the latter – not to mention its proliferation and exacerbation – militate directly against that principle. How can we justify the deprivation of liberty of someone who is presumably innocent and should be treated in accordance with that presumption in his favor, which guarantees his rights? How can we imprison an innocent person, render him incommunicado, restrict the exercise of other rights that are inevitably affected, and expose him to the public as presumably – or certainly – guilty?

8. Despite arguments promoting the rational reduction of preventive deprivation of liberty, in several countries we have seen the growing – even disproportionate – use of this measure, which is supposed to be precautionary. This increase is a result of what I have called the "desperation and exasperation" of society (public opinion or the sources that inform and manage it), in the face of the growth in crime. The fear that this imposes on society, as a result of the impotence of the formal and informal instruments of social control – inefficiency, insufficiency, indifference, collusion – suggests a simple and expedient, although questionable and usually ineffective, mechanism to the legislator: the imposing of preventive detention in a growing number of situations. And this is almost always under conditions that are equal to or worse than those that exist in the elevated number of places of confinement that dishonor their designation as centers of readaptation, rehabilitation, re-education, reinsertion, etc. and which are constantly denounced in the rulings of the Inter-American Court.

9. The legal doctrine of the Inter-American Court concerning preventive detention (which includes and clarifies the prevailing standards in this regard in accordance with the circumstances of this hemisphere), is based on several principles that should be recalled and on which it is necessary to insist in order to contain and reduce the tendency to carry to extremes the hypotheses for precautionary deprivation of liberty. It is evident that, under the rule of law, any deprivation of liberty – detention, preventive or precautionary detention, educational or therapeutic internment, administrative or criminal sanction – should be clearly established by law, with moderation and precision. Thus, in this regard, there is a space for the "legal reservation," the principle of legality strictly speaking (formal and substantive law: concepts that the case law of the Inter-American Court has also developed), which precludes authoritarian discretion, as well as lesser norms that are not enveloped in the guarantees that a real law requires: administrative and regulatory provisions; "autonomous" regulations, whose issue depends on regulatory authorities, which determine the hypotheses for deprivation of liberty – the offenses – the corresponding consequences and the procedures for applying the latter.

10. The paramount rule of minimum penal intervention – which has special implications in the matter that I am now examining – leads to reducing the hypotheses for precautionary deprivation of liberty to their minimum expression: not the most, but the least; not the system or the rule, but the exception. This would lead to a deliberate re-formulation of the law to elucidate the space currently occupied by preventive detention. According to case law, this objective is interrelated with the decision that preventive detention is only contemplated when it is truly necessary. However, we can require more – as has been required at times: that it is only contemplated when it is essential.

11. Obviously, the condition of being necessary or "essential" is not left to the whim of the authority or of public opinion, which could characterize as necessary or essential a measure that, in reality, is unnecessary or can be substituted. To comply with the obligation to respect and ensure human rights, the State must organize the public apparatus to this end, using all possible means, with the broadest – not the most restrained or most modest – application of available resources. The same is true as regards the liberty or control of the accused, the development of the investigation, and the preservation of the evidence during the criminal proceedings. Consequently, the State must use as frequently as possible – which is often – precautionary measures other than deprivation of liberty. Is this easy? Is this inexpensive? Perhaps not; but nor is preventive detention simple or economical and, in addition, it is founded on a delicate compromise – a complex transaction – between justice and necessity, which functions in an unstable equilibrium.

12. Preventive detention, I have reiterated, is a precautionary measure; it serves the immediate purposes of the trial; it caters to the latter's most urgent needs; it allows the trial to evolve and conclude in reasonable terms and the judgment to be executed, not evaded. Even though it evidently entails oppressive force, it should not acquire this quality formally: it should not constitute a penal measure or punishment that imposes on the individual the loss or the violation of a fundamental right to respond to other, often remote, purposes of the proceedings against him. Thus, it obeys urgent and immediate procedural requirements, namely: the effective subjection of the accused to the proceedings against him and their satisfactory evolution – the undesirable alternative is a trial *in absentia*, which gives rise to another set of problems. Obviously, both factors for the deprivation of liberty must be sufficiently established; the accuser's allegations or the superficial impression of the judge are not sufficient. It is necessary to prove the real risk that the accused will escape justice and the danger, also real, for the normal evolution of the proceedings. Deprivation of liberty restricts a fundamental right; this is why it must be duly motivated and founded.

13. Other purposes are excluded; even though they may be plausible in themselves and concern State obligations, but they do not figure in the strict – and restricted – nature of the precautionary procedural measure. They include, for example, general crime prevention or social training; even though crime is prevented and society considers that the public powers provide collective security and reduce impunity. The State can and must use different means to deal with these and other aspects of combating crime. Therefore, the Court's case law has rejected provisions that exclude the liberty of the accused in general, based only on the offense that has been committed without respecting the needs of the specific case. This entails a form of legislative "prejudice" with regard to the pertinence of liberty or prison that should be decided in each case – not generically – in keeping with the proven circumstances of each case, considering the presence of the accused at the trial and the normal evolution of the trial.

14. The delicate, difficult, compromising public determination to deprive an individual identified as a "possible or probable" author of a "possible or probable" offense of his liberty, calls for great care in proving the punishable act and linking the accused to it. I am not saying that there must be a firm conviction – which is a requirement for handing down a conviction. Nevertheless the existence of a punishable fact must be sufficiently authenticated (under the denomination provided for by each national system), on condition that it does not exclude constituent elements of the offense that convert admissible conduct into punishable conduct; and the probable participation of the subject in this punishable fact must be reasonably established. These are crucial, essential guarantees, if we do not want to subject liberty to the whim of a tyrannical legislator or an arbitrary enforcer. The reduction of the probative requirements in either extreme – the act and the probable responsibility – is an affront to liberty and a constraint on justice. It is unreasonable to adduce that all will be decided at the hour of judgment, perhaps a long time after the start of the trial and after weeks, months or years of irreparable deprivation of liberty. It is essential that the rights of the individual – that extend to the rights and guarantees of all society – are well protected from the moment in which the power of the State takes away the liberty of the citizen.

15. The foregoing gives rise to other consequences, which also embody principles concerning preventive detention. They include its provisional and limited nature, restricted by both time and the way it is executed. It is inadmissible to lengthen preventive detention when the conditions for imposing it have ceased or when the time needed for a reasonable investigation, conducted seriously and effectively, proves the existence of the offense and the criminal responsibility and thus allows the proceedings to be concluded and a judgment delivered.

Sergio García Ramírez
Judge

Pablo Saavedra Alessandri
Secretary