SEPARATE OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ
REGARDING THE JUDGMENT OF
THE INTER-AMERICAN COURT OF HUMAN RIGHTS
***CASE OF CHAPARRO ALVAREZ AND LAPO ÍÑIGUEZ v.* ECUADOR**
OF NOVEMBER 21, 2007

A) Issues relating to criminal prosecution in the case law of the Inter-American Court of Human Rights

1. In the Judgment delivered by the Inter-American Court of Human Rights on November 21, 2007, in the *Case of Chaparro Álvarez and Lapo Iñiguez* (Ecuador), the Court examines, among other matters, different issues relating to prosecution – a term that I employ in the broadest sense – or due process of law, judicial guarantees, effective judicial protection, comprehensive and satisfactory defense; concepts that, at times, are used as synonyms although, in truth, they are not, and that, in any event, encompass some of the issues that the Inter-American jurisdiction and its European counterpart deal with most often. The extraordinary relevance and the frequent examination of these issues stems from their crucial role for the preservation of all fundamental rights, and the prevalence of the problems, of greater or lesser significance in this regard, that the Inter-American jurisdiction must consider.

2. Hence, the importance of due process and the need to insist on the definition and analysis of its different components. Due process is the touchstone of access to justice – formal, material and preventive; a factor of profound relevance to the preservation of the democratic system, above all when it extends its influence to the relationship between public authorities and the citizen in that critical sphere for the exercise of rights, the criminal proceedings, where the most relevant rights (life, integrity, liberty) are at risk, and the most serious allegations are made of authoritarianism designed to reduce, relativize or eliminate rights and freedoms.

B) Preventive measures in criminal proceedings. Characteristic tensions

3. In the Judgment that this opinion accompanies, among other procedural issues, the Court examines some of the preventive measures regularly used in criminal prosecution, of both a personal (arrest, remand in custody) and material (embargo of property) nature. The former are usually characteristic of criminal proceedings (although, evidently, not exclusive to such proceedings), while the latter are associated, above all, with civil proceedings – but can increasingly be observed in criminal proceedings as an indirect means of combating crime, and a direct means of preserving the subject of the proceedings and the possibility of executing a guilty verdict.

4. In the context of criminal proceedings the preventive system has become particularly prevalent, alongside the stages of the hearing of the case (which it assists) and the execution of Judgment. It runs parallel to the investigation into the facts and the authors of these facts. It uses increasingly incisive and complex methods. Evidently, it always affects the rights of the accused, to a greater or lesser degree and, by definition, this takes place before there are juridical grounds – the Judgment – that decides on the existence of a crime, its characteristics, and the responsibility of a specific person, towards whom the preventive measures adopted by different authorities have been directed – occasionally for a significant length of time. At times these authorities are jurisdictional, and this should be the rule, owing to the need to guarantee the legality and lawfulness of

the measure; at times they are administrative (an increasingly frequent situation), in order to combat criminal acts, based on arguments of urgency and public safety, but certainly disquieting and dangerous.

5. The fact that restrictions to the exercise of the rights of the individual – entailing, if we examine this realistically, a real temporary deprivation of those rights (for example, preventive detention) – occur before a judgment has been delivered (and, often, even before the trial commences), evidently creates tension between such measures, extensively embodied in law and applied in the practice, on the one hand, and the principle or presumption of innocence, on the other hand. The latter is a prized general guarantee for the individual, prior to the time when he faces criminal proceedings or while such proceedings are underway, and the Inter-American Court's case law recognizes this to be the foundation or basis for the rights embodied in the notion of due process. It is difficult to conciliate the presumption that someone is innocent of the unlawful conduct attributed to him or that is being investigated in order to attribute it to him, with the infringement of his rights as a means or instrument – paradoxically – to define whether the alleged conduct exists and to prove hypothetical responsibility.

6. In these circumstances, there is an evident element of injustice in punitive preventive measures that limit rights, invade privacy and restrict liberty. However, there appear to be no doubts about the need or inevitability of adopting measures of this nature in the interest of criminal justice as a whole, the probable rights of victims, public peace, etcetera, factors that help alleviate the tensions to which I referred and "pacify the conscience of justice" with persuasive arguments based, above all, on reasons of security. We have been unable to eradicate – and will be unable to do so for a long time, or perhaps ever – the need for preventive measures that are more or less rigorous. The most we can and, obviously, should do is to reduce them to their most essential form and substitute them, whenever possible, by instruments that have a less harmful effect on rights and that are sufficiently effective for the satisfactory administration of criminal justice.

7. In brief, therefore, as in the case of any other restriction of fundamental rights, punitive preventive measures must be: (a) exceptional, rather than regular, routine and systematic; (b) justified within a precise framework of reasons and conditions that provide them with legitimacy and rationale; (c) agreed on by an independent, impartial and competent jurisdictional authority, that decides on them formally and states the reasons and grounds on which they are based; (d) essential to achieve their legitimate purpose; (e) proportionate to this purpose and to the circumstances in which they are issued; (f) limited, to the extent possible, in intensity and duration; (g) periodically reviewable, by law and at the request of the parties; a review that include the guarantees inherent in a real impugning system (independence, effectiveness and promptness); and (h) able to be revoked or substituted when their reasonable duration has been exceeded, taking into account their characteristics. All of this, which is applicable to the general system of punitive preventive measures, has a special importance if we consider the most severe of such measures: the preventive deprivation of liberty.

C) Preventive deprivation of liberty

a) Conditions

8. It is frequently and rightly said that the criminal justice system – particularly the one used in the countries encompassed by the Inter-American system – makes excessive use of preventive detention and remand in custody. Abundant information exists to illustrate this affirmation. There are many supposed offenses for which the alleged authors

are subjected to preventive deprivation of liberty, while a pre-trial investigation is conducted and a trial is held to decide whether there has been a crime and the criminal responsibility, which constitutes, to evoke Beccaria, a punishment that precedes the verdict.

9. Numerous laws establish inexorably that preventive detention must be imposed on those accused of certain categories of offenses, a provision that deprives the judge of the possibility of weighing individually, as he should, the pertinence of ordering remand in custody in the case he is examining, not merely as an abstract and general category. This order of preventive detention extended to a heterogeneous variety of individuals and proceedings, borders on arbitrariness: legislative rather than judicial, but always related to the State. It suggests – *mutatis mutandis* – similar reflections to those that the Court has made when ruling on "automatic" penalties, such as the mandatory death penalty that some legislations conserve.

10. I have already indicated that the adoption of preventive measures, including deprivation of liberty – appears to be inevitable in criminal proceedings, but it is also essential to review situations that could justify them, established by law and assessed by the judge, under his strict responsibility. Admittedly, this measure is intended to assist the development of the proceedings, with all its implications concerning the preservation of the evidence, the safety of the participants and, when applicable, the possibility of executing the judgment. If this is so – and it would be difficult to go further – it is up to the legislator to limit the possibilities of preventive detention, indicating the elements that could legitimize it, and for the judge to assess whether these elements are effectively present in the case submitted to his jurisdiction. Obviously, none of this would justify the reclusion of entire groups of accused, indiscriminately, because they belonged to a determined "general category"; in other words, under a common heading and based on a *legislative pre-trial*, rather than a *judicial trial*. In summary, the intention is not to abolish preventive detention, but rather to rationalize it. It would not be irrational to establish punitive rationality, here also.

b) Control and determination of lawfulness

11. The Court sets out its considerations regarding the body called on to control the actions of other authorities and to decide on the lawfulness of the deprivation of liberty, an issue established in Article 7 of the American Convention. In this regard, the Court examines, in the terms of *the Case of Chaparro Álvarez and Lapo Íñiguez* and of the domestic laws applicable to it, the nature of this authority and of the proceedings taking place before it. The Convention establishes that the control of lawfulness – and habeas corpus intervenes here – is the responsibility of a judicial authority. I agree that this is so, and that it should be so; the judicial authority, and no other, has the powers – pursuant to the international human rights instrument that binds the States and is applied by the Court – to decide on the pertinence of liberty and on release from prison.

12. I believe it is admissible, however, to expand the sphere of the rights and guarantees of the accused, if this possible and even necessary, taking into account the circumstances in which the detention has taken place and in which its rectification could be broached. When dealing with this point, I abide by the principle that domestic law can expand – rather than restrict – the rights of the individual and improve – rather than weaken – the guarantees that protect the individual. Consequently, I consider that it is possible that a non-judicial official, acting promptly – *very promptly*, perhaps – may end the unlawful detention imposed on an individual. I underscore: this intervention should not entail any condition or requirement, obstacle or delay for the judicial intervention embodied

in Article 9 of the American Convention, but rather an additional benefit, and a prompt and opportune guarantee.

13. By stating this, I am not disagreeing, even remotely, with the judgment I have signed. I am not validating the delivery of habeas corpus to political and administrative authorities (mayors, for example), rather, I am affirming that the violation or error committed by the captor can be corrected without delay by that authority, not by means of habeas corpus and in substitution of the judicial authority or as an instance that precedes the latter, but in order to provide prompt justice, which eliminates the violation and restores liberty. Moreover, I am thinking of the situation that could arise when the administrative authority is able to act promptly, owing to his proximity to the person captured and to the captor, and the judicial authority is at a certain distance that must be covered – promptly, evidently – in order to request this liberty.

c) Formality

14. In the instant case, the Court also examined the characteristics of the act of judicial control (referring to the precedent established in other cases); that is, the presence, action and diligence of the judge who controls the form and duration of the detention. Obviously, the purpose of the guarantees contained in the Convention and in the laws of a democratic society that protect rights and establish guarantees, is not merely an appearance of control, which could derive in the mere presence of a judicial authority at a determined act, more or less distant and even covert. What is needed is an effective presence – conscious, explanatory, investigative, helpful – of the subject before the judge and a real awareness on the part of the judge, as a requirement for genuine control based on a grounded and reasoned decision.

d) Diligence

15. Regarding the diligence in the actions of the authorities required by various provisions under different hypotheses (the decision on detention, pursuant to Article 7 of the American Convention; the development and conclusion of the trial, according to Article 8), the expressions used by the applicable provisions, by case law and legal doctrine, by the *vox populi* and by common sense, and the experience deposited in the discourse of the defendants, all point towards the prompt and expedient action of the authority called on to decide (as rapidly as that authority would wish a decision to be made if he himself was subject to trial, for one moment taking the place of the accused on the defendant's bench) on the reasonable promptness of the decision, the removal of obstacles, and the elimination of delays that postpone the control of the lawfulness or legitimacy of the act, the settlement of a dispute, or the adoption of an urgent measure (particularly for the person who is subject to the action of justice: a temporary resident in the labyrinths of any stage of the proceedings.

16. There can be – and there are – general criteria to assess reasonable time, related to the different hypotheses posed, and accepted in the intention of different expressions. The Court, which deals with developments of European case law under this point, has referred to the complexity of the issues, the conduct of the authorities (judicial and other, who intervene in the proceedings and, through their procedural conduct, influence the latter's development, its "times and movements"), the conduct of the accused (and even more of his legal counsel, who guides the defense "strategy and tactics"). The latter, we must emphasize, does not conclude with the transfer to the individual of "responsibility" for the duration of the process. The Court has never suggested that there has been or there exists such a transfer of responsibility and assignment of prejudice.

17. As I have stated on another occasion, I believe that another factor needs to be added to these elements that help us assess the reasonableness of the time; one embodied in law and in practice, based on the circumstances of the specific case: the impact that the passage of time may have on the legitimate interests and rights of the individual, a point that we have not explored up until now. Beside these general and reasonable references, I consider that it will always be necessary to assess the issue casuistically. What is reasonable in one case may not be in another. It would be difficult to establish a "typical time" to which all proceedings are made to fit, as on Procrustes' bed. Nevertheless, it is not unusual that, even without having this "typical time," which when exceeded allows the actions of the authority to be censured – under the provisions of Articles 7 and 8 – we are confronted with evidently excessive durations: weeks to decide whether a detention is appropriate; years to bring a trial to conclusion.

D) Material precautionary measures

18. In the Judgment in the *Case of Chaparro Álvarez and Lapo Íñiguez*, the Inter-American Court has also referred to material preventive measures in criminal cases, those that affect property and, thus, restrict rights connected directly to such property; particularly, the right to property. Many of the considerations, if not all, that I have formulated with regard to personal preventive measures are also applicable to this type of measure. These include, evidently, the rationality of the measures, based on elements that justify them.

19. It is necessary to be alert when faced with material precautionary measures that constitute, basically, shortcuts to eliminating a right, without the existence of evidence regarding the unlawful act committed, or proof of criminal responsibility, or a judgment declaring both these elements: all factors that restrict or eliminate any right. The Judgment in the case that gives rise to these comments points towards the excesses that may affect property, a delicate issues whose importance increases to the extent that summary instruments are used, unrelated to the declaration of unlawfulness and responsibility, based on conjecture and associated with an inversion of the burden of proof.

20. Thus, we return to the dilemma that has occupied many key decisions and discussions in the criminal sphere: does the end justify the means? We have maintained the inverse proposition, based on the principles of the criminal justice system of a democratic society: the legitimacy of the means legitimizes the end. This has important repercussions at all levels: for the precautionary measures that we are examining, but also for the definition of crimes, the selection of the juridical consequences of a crime, the organization of the proceedings, the admission and assessment of the evidence, the execution of penalties and measures, etcetera.

Judge Sergio García Ramírez
President

Pablo Saavedra Alessandri
Secretary