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Title/Style of Cause:	Jorge, Dante and Jose Peirano Basso v. Uruguay
Doc. Type:	Report
Decided by:	President: Luz Patricia Mejia Guerrero; First Vice President: Victor Abramovich; Commissioners: Sir Clare K. Roberts, Paulo Sergio Pinheiro, Paolo G. Carozza.
Dated:	6 August 2009
Citation:	Peirano Basso v. Uruguay, Case 12.553, Inter-Am. C.H.R., Report No. 86/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009)
Represented by:	APPLICANTS: Carlos Varela Alvarez and Carlos H. de Casas

I. SUMMARY

1. On October 18, 2004, and again on November 30, 2004, Messrs. Carlos Varela Álvarez and Carlos H. de Casas presented a complaint and a request for precautionary measures in favor of Jorge, Dante and José Peirano Basso, three Uruguayan brothers, before the Inter-American Commission on Human Rights (hereinafter "The Commission"), against the Eastern Republic of Uruguay (hereinafter "the State"), for the alleged violation of the right to be judged within a reasonable time, the right to liberty during the judicial proceeding, the right to be heard under conditions guaranteeing due process, the right to a fair and impartial trial and the right to equality before the law, in violation of Articles 5(1) and 2, 7(1) and 3, 8 (1), 9, 24, 25 and 29 of the American Convention.

2. The complaint alleges that the three Peirano Basso brothers are deprived of their liberty since August 8, 2002, without having been formally charged. According to the petitioners, in conformance with the domestic law within which they have been accused, five-year imprisonment is the maximum sentence that may be imposed. Petitioners allege that the requirements for being released from prison will be met by January 2005, when they will have completed two and a half years in prison. The State had imputed them the violation of Law 2.230 (1893), which sanctions managers of companies in dissolution who commit tax evasion and other financial offences. According to the complaint, this offence does not contemplate preventive detention. Notwithstanding this fact, the Peirano Basso brothers have been detained for the "social alarm" provoked by the collapse of the Uruguayan banking system and their alleged responsibility for this collapse.

3. On October 19, 2006, the district attorney of the case, formulated a complaint against the Peirano Basso brothers on the ground that they were the authors of the fraudulent insolvency, foreseen in Article 5° of law 14.095, by virtue of which the district attorney requested that by the time of passing judgment, a six and nine years sentence in penitentiary be imposed to Jorge and Dante Peirano Basso, respectively.

4. On December 4, 2006, the defense of the Peirano brothers answered the complaint asking the Court to acquit his defendants.

5. Since October 2004 to date, the defense has submitted, before the Uruguayan Court, seven requests for release.

6. On December 13, 2006, they were allowed a 48-hours provisional leave for dates December 24, 25 and 31 and January 1st 2007; and from then on, a regime was set for a 48-hours provisional leave per week.

7. The Admissibility Report N° 35/06 of March 14, 2006 concluded that the facts reported, if proven true, could represent violations of the rights protected by Articles 7, 9, 8 and 25 of the American Convention in relation to obligations of Articles 1(1) and 2.

8. Upon analyzing the arguments submitted by the parties, the rights enshrined in the Convention and other evidences included in the proceedings of the case, the Commission concludes in this report that the State is responsible for the violation of the rights of Jorge, José and Dante Peirano, as set in Articles 7(2), (3), (5) and (6), 8(1) and (2), and 25(1) and (2), in compliance with obligations of Articles 1(1) and 2 of the American Convention and, therefore, formulates specific recommendations.

II. PROCEDURES FOLLOWING THE ADMISSIBILITY REPORT N° 35/06

9. The Commission received the indictment on October 18, 2004. On March 14, 2006, during its period of sessions, the Commission adopted the Admissibility Report N° 35/06 and initiated the case 12.553 regarding the aspects involving the grounds and length in preventive detention. On March 22, 2006, the admissibility report was handed down by the Commission to the State and the petitioners.

10. On April 26, the petitioners asked the release of the Peirano brothers before the Supreme Court, based on the admissibility report. The request was rejected unfounded on May 12, within the framework of the assumption foreseen in Article 17 of Law 17.726[FN1].

[FN1] Law 17.726 (issued on January 7, 2004), Article 17.- At any stage of the cause, at the request submitted in written by the defense, the Supreme Court of Justice, prior report of the Technical Forensic Institute, will be able to grant the provisional release, considering the preventive prison they were subject to or the excessive extension of the process.

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11. On May 7, 2006, the petitioners submitted their observations on the admissibility report of the Commission, which was duly handed down to the State on May 9, 2006.

12. On May 15, 2006, the Commission asked the parties if they were interested in initiating a proceeding aimed at a friendly solution. Their decision had to be sent to the Commission within one month. On May 17, 2006, the State informed the Commission that had received the official letter on May 16, 2006 where one month was granted to inform the Commission on its interest in initiating a proceeding aimed at a friendly solution in the case of indictment and also informed the Commission that such deadline should be estimated from that date and not from May 15.

13. On May 22, the American Embassy in Montevideo, Uruguay, published a press release indicating the U.S. Immigration and Customs Enforcement (ICE) has detained in Coral Gables, Florida, Juan Peirano Basso, the fourth brother who was a fugitive. It was informed that the Uruguayan Government had requested the extradition and that Juan Peirano Basso had been imprisoned by virtue of an arrest warrant issued by the Court of District of the United States for the Tennessee District.

14. On May 29, in a radio interview[FN2], the district attorney mentioned the complexity of the trial but stated that the process is being delayed owing to "the delay of administrative processes on the part of the local court for the processing of evidences." He quotes a circumstance where the failure in notifying the defense on the execution of an expertise originated a motion for annulment of such measure. He indicated the possible change of qualification to a repressed offence with a more severe sentence.

[FN2] "Las cosas en su sitio", Radio Sarandí, 690 AM, program directed by Ignacio Álvarez.

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15. On June 8, the petitioners requested the precautionary measure 134-06, with an amicus curiae brief enclosed, undersigned by Alejandro Boulin, which was refused on July 21.

16. On June 28, 2006, the petitioners, together with Dr. Julio A. Barberis, submitted a request for precautionary measures before the Inter-American Court on Human Rights. On July 5, the Inter-American Court informed that, in compliance with Article 63.2 of the American Convention and Article 25.2 of the Court Regulations, a request for precautionary measures can be considered only when a trial is pending before the Commission, if requested by the Commission itself.

17. On July 14, the State answered the observations submitted by the petitioners regarding the admissibility report of the Commission, but no reference was made on a possible friendly solution.

18. On July 28, the petitioners handed down a report of the Working Group on the Arbitrary Detention of the United Nations Commission on Human Rights by means of which they request the Uruguayan Government information on the case to be able to issue an opinion.

19. On August 23, a request for their release was again made to the judge of the trial, which was rejected on August 30.

20. On September 7, the petitioners handed down their observations regarding the State's observations, which were then sent to the State the following day for the submission of further observations within two months.

21. On September 21, the parties were informed that the Commission had decided that a hearing would be held on October 24, during the 126° period of sessions, to discuss questions related to the case.

22. On October 2, an amicus curiae brief, prepared by the Legal Public Interest Clinic of the Autonomous Technological Institute of Mexico (Clínica Legal de Interés Público del Instituto Tecnológico Autónomo de México) was received, which had been submitted before the Supreme Court when the trial was informed.

23. The hearing was held on October 24, within the framework of the 126° period of sessions, and the parties submitted their arguments on the allegations of the trial.

24. On November 8, the State submitted additional observations, which were handed down to the petitioners on the following day.

25. On November 20, a request for the release of Messrs. Peirano Basso was again submitted before the Supreme Court, which was rejected on November 24.

26. On December 13, 2006, a request for precautionary measure 351-06 was submitted by the petitioners, which was rejected on December 22.

27. On December 13, the judge currently in charge of the trial, decided to grant permission for provisional leave during 48 hours per week on December 24-26 and from December 31st, 2006 to January 2, 2007. Moreover, from January 1st, 2007 a regime of 48-hours leave per week was set, under affidavit.

28. Taking into account that the State did not express interest in maintaining negotiations towards a friendly solution, the Commission has decided to continue the merits report of this case.

III. POSITION OF THE PARTIES

A. Position of the petitioners

29. According to the petitioners, on August 8, 2002, the Uruguayan courts ordered the preventive detention of Jorge, José, and Dante Peirano Basso because of the collapse of the Banco de Montevideo in the midst of the worst financial crisis in the history of Uruguay. The Banco de Montevideo was owned by members of the Peirano family, which has been involved in banking in Uruguay for more than 100 years. The petitioners alleged that the Peirano Basso

brothers' rights had been violated because the three brothers spent more than four years in preventive detention before formal charges were presented on October 19, 2006.

30. The petitioners say that the economic and financial crisis in Argentina toward the end of 2001 prompted the Government of that country to order a bank freeze known as "corralito" [FN3]. The freeze on withdrawal of deposits in Argentina led to a massive run in Uruguay, where 35% of bank deposits belong to non-residents, mostly Argentines. Every bank was affected. First the Banco de Galicia, then the Banco Comercial, the state banks, and, finally, Banco de Montevideo. According to the petitioners, on April 2002, the Banco Central de Uruguay intervened the Banco de Montevideo, removing its officers and leaving the institution rudderless. The Banco Central instituted criminal proceedings against the Peirano brothers, which was followed by complaints filed by savers who were unable to withdraw their deposits.

[FN3] The popular Spanish name given to the decision of the Argentine government to prevent all withdrawals of bank deposits, in response to the massive run then taking place in the financial market.

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31. Petitioners say that on March 17, 2005, 15 days after taking office as President of the Republic Dr. Tabaré Vásquez –in fulfillment of one of his election campaign promises– publicly announced that he had decided to transfer the Peirano brothers from the Central Prison to the Santiago Vázquez Prison Complex (Complejo Carcelario de Santiago Vázquez – COMCAR), one of the worst facilities in Uruguay, whose population of almost 3,000 inmates exceeds its holding capacity by more than 300%. He referred to them as "criminals who … committed very serious offences against society that caused great suffering, especially in the most underprivileged sectors." The defense publicly denounced the interference of the President as a violation of the principle of separation of powers.

32. The petitioners say that the words of the President were followed by others –in an even harsher tone– from the Interior Minister and the National Director of Prisons. The defense requested the Supreme Court to suspend execution of the presidential transfer order on the grounds that it was illegal and violated the separation of powers. However, the request was denied. Nonetheless, on March 22, 2005, the Peirano brothers were not transferred to COMCAR but to the Security and Discipline Annex of Libertad Prison (the only maximum-security facility in Uruguay) located 54 kilometers from Montevideo. Since April 16, 2005, the Peirano brothers have been held in La Tablada, along with 180 other inmates.

33. The central argument of petitioners is that on August 8, 2006 Messrs. Peirano Basso had completed four years in preventive detention prior to formal charges, and that such a long period of detention prior to the indictment violates the international standards on human rights. Since August 8, 2002, when the detention of the three Peirano Basso brothers, José, Jorge and Dante, was ordered, owing to the offence indicated in Article 5 of the law 14.095 (economic fraud), for José; for the offence indicated in Article 76 of the Law 2.230 (a law dating from 1893 and that governs liability of directors and administrators of corporations in case of fraudulent transactions) for the two other brothers; and for the offence of association to commit an offence

(accusation that was left aside by the Court of Appeals) for the three brothers, the defense has lodged eight requests for release for Jorge and seven for José and Dante, which have been rejected.

34. Requests for release were mainly based on arguments that may be synthesized as follows: a) before the accusation, the preventive detention was excessive regarding the usual length of sentence because the Peirano brothers had served the two-thirds of the maximum possible sentence for the offence that was imputed on them; b) the "reasonable time" as limit to the detention during the process is recognized in the international instruments recognized by Uruguay; c) the principle of legality has been violated regarding the initial imputation (Article 76 of Law 2.230) owing to the lack of precision of the behavior and the applicable criminal scale; d) the treatment given to defendants has been discriminatory owing to the sanction of the prison decongestion law which excludes them from recovering their freedom, mainly owing to the legal qualification of the imputed offense, given that the conditions of the law had been publicly announced by the Ministry of Interior; e) they have been humiliated by being exhibit in public wearing orange overalls, handcuffed and with shackles in their feet; f) they have been transferred to a maximum security prison complex, in an unjustified manner, as a sanction in advance; g) unlike the interpretations made by the judges, Article 17 of Law 17.726 does not grant prerogative to the Supreme Court to decide when the reasonable length in preventive detention or in the proceeding has been met; therefore, the Supreme Court, at the time of intervention, has used the release from prison by grace; h) the unjustified delays in the procedures are due to a negligent management of the process; i) the Article 7.5 of the Convention cannot be considered a programmatic provision and the mandatory nature of the international right cannot be ignored; and j) after four years, although no new evidence has been incorporated, the district attorney modified the imputation, changing it to a more severe sanction.

35. The petitioners allege that "[c]ontrary to what the Uruguayan State maintains, it has been shown (…) that the presiding Judge has acted with clear and manifest negligence in his conduct of the proceeding, in breach of the domestic laws that prescribe time limits for processing the different stages of the trial, which have been grossly disregarded."

36. On July 28, 2006, the petitioners informed the Commission that the District Attorney, in the case referring to the Bank managers, in parallel to the Peirano Basso brothers' case, had formally accused them for "fraudulent insolvency", and not for violation of Article 76 of Law 2.230; the maximum sanction foreseen for such offence is ten-year imprisonment. The petitioners were afraid that the District Attorney modifies the imputation against Messrs. Peirano Basso to "fraudulent insolvency", which finally happened in the official accusation on October 19, 2006. They allege that this change of qualification was made for the need to justify the extended preventive detention, since new evidences have not been incorporated.

37. They allege that the upshot of the indefinite prolongation of the preventive custody has been to eliminate the presumption of innocence and, in view of the recent political pressures, a conviction seems imminent. The foregoing, the petitioners argue, paints a picture of denial of justice and persecution of the detained men, which clearly shows that the Uruguayan State is in no position to ensure the guarantees of impartiality, due process, and a fair trial.

38. They stated that the defendants had voluntarily surrendered to the process and that; therefore, it was assumed that they would not try to evade the justice.

39. On September 19, 2005, the Uruguayan Parliament passed Law 17.897, also known as the "Prison System Humanization and Modernization Act" (Ley de Humanización y Modernización del Sistema Carcelario) and the "Prison System Decongestion Act" (Ley de Descongestionamiento del Sistema Carcelario). The Government had announced a prison decongestion program to favor inmates who had been in prison for a certain amount of time, which appeared to favor the alleged victims, if the offences for which they were imprisoned had not been expressly excluded from the benefits of the law. This fact would coincide with statements made by the Minister of the Interior before the sanction of the law where it stated that it would not favor Messrs. Perirano Basso. The petitioners allege that when the law was issued, the only persons in detention who remained accused of those offences were the Peirano Basso brothers and a manager on trial in the same proceeding[FN4].

[FN4] Article 1 of Law 17.897 provides: "This law shall not apply to persons on trial for or convicted of the following crimes: a) Homicide involving the aggravating circumstances provided in Articles 311 and 312 of the Criminal Code; b) Very serious injury (Art. 318, Criminal Code); c) Rape and violent offences against sexual morality (Arts. 272 and 273, Criminal Code); d) Corruption (Art. 274, Criminal Code); e) Violent robbery specifically involving the use of firearms, or when it results in injuries to others (Arts. 344, 341(1), 317, and 318, Criminal Code); f) Violent robbery involving deprivation of liberty -occupation with armed violence- and extortion (Arts. 344 bis and 345, Criminal Code); g) Fraudulent and culpable bankruptcy and fraudulent insolvency (Arts. 253, 254, and 255, Criminal Code); h) The crime provided in Article 76 of Law 2.230 of June 2, 1893; i) The crimes provided in Law 8.080 of May 27, 1927, and its modifying provisions; j) The crimes provided in Law 14.095 of November 17, 1972, and its modifying provisions; k) Transnational bribery and corruption as provided in Article 29 of Law 17.060 of December 23, 1998, and money laundering as provided in Article 5 of Law 17.016 of October 22, 1998; l) The crimes provided in Articles 30 to 34 and 55 of Executive Order 14.294 of October 31, 1974 and modifying laws.

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40. The petitioners allege to have been discriminated by both the Legislative, in adopting the "Prison System Humanization Act" –that includes, among the exceptions of such release regime, the offence that led the Peirano Basso brothers to judicial proceedings– and by the Judiciary who freed two co-accused (Messrs. San Cristóbal and Mr. Ratti) in the same case, as well as General Manager Marcelo Guadalupe, who was released on bail at the end of 2005 in a parallel case.

41. According to the petitioners, the Uruguay's procedural laws provide for an inquisitorial and written system, in which the investigating judge also issues the verdict; being, therefore, the judge of his own actions. He sets out the hypothetical facts and collects evidence to bear out his assertions. Unlike most the great majority of modern procedural laws, the Code does not provide systems of control to ensure guarantees; there is no habeas corpus procedure and laws have not been made consistent with the standards contained in international treaties, such as the American

Convention, which Uruguay incorporated in its domestic law without reservation, at least not in these respects.

42. They consider that the imprisonment of the Peirano Basso brothers only prosecutes three objectives: i) to penalize those who are judged regardless the cost that the violation of the domestic judicial system entails, therefore failing in the fulfillment of international treaties; ii) to send a wrong message to the economic sectors creating fear among them not to be submitted to the same kind of proceedings; and iii) to hide the real reason of the financial crisis of Uruguay whose origins lay in the historical and accepted division of power and wealth among the traditional parties of such country.

B. The State's Position

43. The State described Mr. Peirano and Mr. Basso as "the persons responsible for criminal offences that prompted their indictment and imprisonment by the independent system of justice of the Uruguayan State." The State further alleges that the Peirano brothers have been "the perpetrators of the biggest bank fraud on record in Uruguay, as representatives, directors, managers, and administrators of financial intermediation companies."

44. The State says that the Peirano brothers are considered responsible for criminal offences that led to their indictment and detention. They are incarcerated in a recognized prison facility, having been duly revoked the privileges granted to them by the previous Government of Uruguay, which held them in special conditions at the Police Headquarters in Montevideo. The publicity is inherent in these cases.

45. The State argues that the criminal proceeding initiated in 2002 has been extremely complex owing to the sheer magnitude and nature of the offences investigated.

46. The State details the evidence incorporated into the proceeding since 2004 that backs the argument of complexity of the case and illustrates the attitude of the defense during the process. On April 28, 2004 the Public Ministry requested more evidence. From that date to the indictment on October 18, 2006, the following measures were taken: in 2004, it was asked to add two proceedings before other courts; in 2005, two reports were requested to the Banco Central de Uruguay regarding the irregularities of the Banco de Montevideo; and in 2006, the defense encouraged the motion for annulment of an expert evidence in which the Court of Appeal intervened. An official letter was received with the testimony of Juan Peirano Basso in New York before the authorities of the Trade & Commerce Bank (Caiman Islands) and the addition of a proceeding was requested.

47. The State claims that there are several reasons why it must maintain Messrs. Peirano Basso in preventive detention: a) regarding the alleged offence, "there is no evidence that would make it possible to disprove the above presumption", b) the flight risk of the three accused is related to the situation of the fourth brother who remains fugitive, c) owing to the connections of the three defendants with other countries, the risk that the accused will re-offend is high in view of the damages caused to their financial position, d) the complexity of the evidence measures is

alleged, and d) the preservation of public order, due to the threat of public unrest that the release of the accused might cause.

48. The State explains that during the criminal process, the defense has exercised his right to submit writs and related remedies. It says that the defense's delaying practices have contributed to the delay of procedures. Although the district attorney's office had renounced to some means of proof, the defense's proceedings delayed the completion of the pre-trial stage. According to the Public Ministry and the Attorney General's Office, the lawyers' procedural behavior of the other party is a key factor to understand the delay of the accusation in the case.

49. The accusation was issued on October 19, 2006, after the file was sent to the District Attorney's Office, completing the procedure of a request of motion for nullity by the defense. Regarding the legal qualification used, it states that from the first legal proceedings, the Public Ministry indicated the possibility of formulating the indictment for the offence foreseen in Article 5 of Law 14.095 and that the complexity of the matter determined the need to have such typification specified later.

50. It states that the release from prison and substitute measures of the sanction involving custodial measures only apply to cases where the penitentiary sentence is not foreseeable.

51. The State maintains that its position exactly matches to the one held by the Commission in Report 17/89, Case 10.037 (Firmenich v. Argentina), in which, according to the petitioners, the parties to the Convention are under no obligation to establish a set time limit as a criterion to weigh the reasonable length of preventive detention regardless the circumstances of the case.

52. According to the State, the Commission jurisprudence is clear in its statement indicating that the judge of the trial is responsible for establishing a reasonable period of time for a person to stay in preventive prison. The judge should analyze all pertinent elements to establish whether the need to maintain the accused imprisoned is genuine and should so express it in the sentences declared in response to requests of release on bail of the accused. The longer the preventive detention is, the highest should be the efficacy of judicial guarantees.

53. The State concludes, saying it has acted with diligence and accorded priority to the case. The State reiterates that the case of the Peirano brothers has been the most momentous and complicated case in the history of Uruguayan justice, as it concerns fraud committed by directors of companies that has caused irreversible damage to the Uruguayan financial market and economy. The nature and complexity of the offence and its multiple attendant problems required a unique length of time for processing, where the main priority is to protect the rights of the victims and of the accused, which, therefore, justified keeping the accused in prison.

IV. PROVED FACTS

54. Messrs. José, Dante and Jorge Peirano were indicted on August 8, 2002 as the perpetrators of the criminal offences; the first one for criminal offences indicated in Article 5 of the 14.095[FN5] law and the other two for criminal offences indicated in Article 26 of the law 2.230[FN6], and all of them, accused for the offence of criminal association[FN7]. In the same

resolution it was decided their imprisonment "given the seriousness of the criminal charges." Since this proceeding, they have been deprived of their liberty. Subsequently, the Court of Appeal partially revoked that resolution and discarded the charge of criminal association to commit an offence.

[FN5] Law 14.095 (published on November 17, 1972), Article 5. (Fraudulent Society Insolvency) The person that so as to obtain an unfair advantage, for himself or for others, hides, pretends and tries to make total or partially disappear, the company's assets in detriment of a third party, will be charged with a twelve-month-penalty to a 10-year imprisonment.

[FN6] Law 2230 (June 2, 1893) Article 76: "The directors or administrators of corporations who commit fraud, simulation or breach of by-laws or any statute on public matters, shall bee liable to the penalty applicable to fraudulent bankrupts container in Articles 272 and 274 of the Criminal Code"

[FN7] Criminal Code, Article 150. (Association to commit an offence). Those who associate to commit one or more offences, will be penalized, for the fact of having associated to commit an offence, with six to five-years of imprisonment.

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55. The defense requested the release of Messrs. Peirano Basso seven times, being all of them rejected.

56. The Supreme Court, during a visit to prisons in October 2004, rejected the first request for release of the three Peirano Basso brothers.

57. On February 25, 2005, the defense requested once again the release of the imprisoned before the Supreme Court, which on March 30 of that year, did not allowed the release "on bail" given the "ontological seriousness" of the criminal offences and their "social repercussion."

58. On August 16, 2005, in responses to a request submitted on August 8, the judge of the trial denied the release on bail owing the "magnitude of the charges incriminated" and the "scarce precautionary measures that had been served." This resolution was confirmed by the Court of Appeal who, on March 10, 2006, stated: 1) that Article 27 of the Constitution of the Republic only admits release on bail when the circumstances of the case admit the provision of an individualization of the penalty that may not be penitentiary, b) that the special complexity of the case justified the delay of the proceedings, c) that a five-years prima facie sentence would be applied, the maximum legal time to be applied to the offence at that time of the proceeding, d) that the two thirds of the maximum sentence, time that the accused had been imprisoned by the date of the resolution, was undoubtedly long, but that the seriousness of the facts led to the presumption that the sentence for the offence would be close to the legal maximum, e) that the Article 7.5 of the Convention is a programmatic provision and that the establishment of a reasonable term is beyond the judicial function, f) the "unusual seriousness" of the facts justify increasing the severity of the sentence which does not admit their release during the proceedings, and g) the Supreme Court is responsible for determining the reasonability of the length of the pre-trial detention (Article 17 of the law 17.726).

59. On December 6, 2005, during a visit to the prison, the Supreme Court denied a new request for release.

60. On April 26, 2006, a request for release "on bail" was submitted before the Supreme Court, which was denied the following May 12, with reference to the Article 17 of the law number 17.726. [FN8]

[FN8] Law 17.726, Article 17: "At any stage of the cause, at the request in written by the defense, the Supreme Court of Justice, prior report of the Technical Forensic Institute, will be able to grant the release on bail, taking into account the precautionary measures suffered or to the excessive extension of the process."

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61. On August 23, 2006, the defense requested, once again, the release of Messrs. Peirano Basso. On August 30 the judge of the trial declared herself incompetent to understand the "excessive length of the process", however, in spite of this, she rejected the request to consider that the matter could not be solved based on what is stated in Articles 27 of the Constitution[FN9] and 138 of the Criminal Procedure Code[FN10].

[FN9] National Constitution, Article 27: "At any stage of the criminal cause that will not result in penitentiary sentence, the Judges may decide to release the defendant, on bail according to the law."

[FN10] Criminal Procedure Code, Article 138: (Generic admissibility).- The release of the defendant in pre-trial detention may be granted at any stage of the cause, except for those circumstances when there is a "prima facie" that imprisonment will be the final sentence (Article 27 of the Constitution of the Republic)."

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62. On November 24, 2006, in response to a request submitted by the defense on November 20, the Supreme Court again denied, unfounded, the release "on bail" (Article 17 of the law 17.726).

63. On October 19, 2006 the district attorney accused Messrs. Jose, Dante and Jorge Peirano Basso as the perpetrators of fraudulent insolvency (Article 5; law 14.095) and requested a nine-years sentence of imprisonment for the fist two defendants, and a six-years sentence of imprisonment for the third defendant, being the latter charged for his intervention in the collapse of the Banco de Montevideo, by means of various transferences in cash issued from this Bank to the Trade & Commerce Bank (TCB), both banks owned by Messrs. Peirano Basso, and to other companies of the Group, also owned by the defendants, as well as to other stockholders of the Group.

64. The Peirano family was the owner of a financial group integrated by financial organizations and other companies, which operated in Uruguay and other countries, as Argentina, Brazil, Paraguay, Peru and the Caiman Islands.

65. The facts imposed occurred during the economic crisis in Argentina toward the end of 2001. This led to the implementation of the so-called “corralito”[FN11], which led Argentinean savers to try to recover their savings outside the Argentinean financial system, thus affecting Uruguayan financial institutions, whose deposits mostly consisted of funds coming from Argentina. At the same time, such an attitude on the part of foreign savers caused great distrust within the Uruguayan financial establishment on the part of residents, which eventually led to the Uruguayan financial crisis at the beginning of 2002.

[FN11] Cf. note 3.

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66. Part of the legal action against the defendants took place in the midst of the Uruguayan presidential election campaign, where the current Uruguayan President Tabaré Vázquez publicly promised to transfer the Messrs. Peirano to the Santiago Vázquez prison complex, with declarations on their guilt. In addition, the Minister of the Interior and the National Director of Penitentiaries had made similar declarations. On March 22, 2005 the defendants were transferred to the Anexo Seguridad y Disciplina del Penal de Libertad, a maximum-security prison, instead.

67. On December 13, 2006, the defendants were granted permission for provisional leave during 48 hours for dates December 24 and 25 and December 31, 2006 and January 1, 2007; and thereafter, a weekly 48-hours provisional leave was established, under oath in written; based on the defendants’ good behavior, their lack of previous criminal records and for the reason that “the provisional leave from the penitentiary neither jeopardizes the course of legal proceedings, at their present stage, nor poses any risk to society, as nothing leads to suspect that the three attendants would commit another offence whilst they are temporarily out of prison.” (Article 4 of law 16.928[FN12]).

[FN12] Law 16.928 (issued on April 22, 1998) Article 4°: “Article 63 of Decree-Law Nº 14.470, of December 2, 1975, in the edition given by Article 30 of Law Nº 16.707, of July 12, 1995; Law of Citizen Security (Ley de Seguridad Ciudadana), is replaced by the following Article: ‘ARTICLE 63.- Under no circumstances the provisional leave of an imprisoned may be authorized if he/she has not served a precautionary measure of at least 90 days. In the case of defendants whose minimum sentence, established by the law, is the imprisonment, the provisional leave shall not be granted until a third part of such sentence has been served. Likewise, in such cases, the granting of such permission will require the report issued by the National Institute of Criminology (Instituto Nacional de Criminología) or by the pertinent autonomous regional lawyers of the Ministry of Interior, according to jurisdiction. Such report shall be received by the prison authority and implemented within the indicated period, pursuant to the previous Article.”

V. GENERAL CONSIDERATIONS

68. The article 7(5) of the Convention states:

Any person detained shall be brought promptly before a judge or other authorized by law to exercise judicial power and shall be entitled to trial within reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.[FN13]

Article 8(2) also expresses:

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

[FN13] European Convention for Human Rights and Fundamental Freedoms (hereinafter, European Convention on Human Rights), establishes an identical rule in its Article 5.3: "Everyone who is arrested … shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

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69. In virtue of the presumption of innocence, within the framework of a criminal process, the defendant shall remain free, as a rule.

70. Without detriment of the above-mentioned, it is accepted that the State, only as exemption and under certain conditions, is authorized to provisionally arrest a defendant under an incomplete trial, taking into account that the excessive length of such pre-trial detention may cause the risk of inverting the sense of the presumption of innocence, turning this precautionary measure into a sentence in advance[FN14].

[FN14] See I/A Court H.R., López Álvarez Case. Judgment of February, 2006. Series C N° 141, Paragraph 69; García Asto and Ramírez Rojas Case. Judgment of November 25, 2005. Series C N° 137, Paragraph 106; Acosta Calderón Case. Judgment of June 24, 2005. Series C N° 129, Paragraph 75; Case Tibi. Judgment of September 7, 2004. Series C N° 114, Paragraph 180; and Suárez Rosero Case. Sentence of November 12, 1997. Series C N° 35, Paragraph 77.

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71. In this sense, the Commission has stated that, when establishing the legitimate reasons that justify the pre-trial detention, "the universal principles of presumed innocence and respect for the right to physical liberty should be taken into consideration in each case."[FN15]

[FN15] IACHR, Report 2/97 (March 11, 1997), Paragraph 25.

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72. From the principle of innocence stems that a “reasonable” period for pre-trial detention is mandatory, according to which every person under such conditions must be treated as innocent, as long as a condemnatory sentence establishes the opposite.

73. There is here a conflict between the guarantee of not being deprived of individual liberty until a sentence in accordance to the culpability for the offence committed is determined and the State’s obligations of respecting such rights, to prevent that proceedings be affected in its execution by the non-appearance of the defendant or in the obtainment of evidence.

74. The Inter-American Court, in the case “Velásquez Rodríguez”, stated:

… regardless of the seriousness of certain actions and the culpability of the perpetrators of certain offences, the power of the State is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action. [FN16]

[FN16] I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988, Paragraph 154.

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75. As any restriction affecting the human rights, this shall be restrictively interpreted in virtue of the pro homine principle, by means of which, regarding the recognition of rights, the broadest rule and the most extensive interpretation have to be applied; and regarding the restriction of rights, the most restrictive rule and interpretation have to be applied. This is also imposed to avoid that the exception becomes a rule, since such precautionary restriction is applied only to a person who enjoys innocence until a final sentence destroys it. Therefore, restrictions to individual rights need to be imposed during the proceeding and before the final sentence, either of interpretation or of restrictive application, observing that the above-mentioned guarantee is not contradicted.

76. Therefore, the judicial proceedings depriving defendants from their liberty shall be given priority to minimize the need for adoption of restrictive measures of rights[FN17]. Otherwise, there is the risk that the prosecutor has a trend towards imposing a sentence at least equivalent to the pre-trial detention time, in an attempt to legitimate it.

[FN17] See ECHR E.M.K. c. Bulgaria, sentence of January 18, 2005, Paragraph 124; and ECHR. Wemhoff c. Germany, sentence of June 27, 1968, Paragraph 17.

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77. The assumption to decide the deprivation of liberty of a person within the framework of a proceeding entails serious proof elements that relate the defendant to the investigated fact. This is an necessary requirement at the time of imposing any precautionary measure, since that circumstance, the proof that relates the person to the fact, determines that the defendant is innocent and differentiates him from any other defendant who has not been imposed any coercion measure and who is also innocent.

78. This assumption is expressly recognized in the European Convention[FN18], which states that a person can be deprived of his liberty when rational proofs are available, i.e., proof elements that have satisfied an impartial observant in indicating that such person has not committed an offence (Article 5.1.c)[FN19].

[FN18] European Convention on Human Rights, Article 5.1.c: Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: c) the lawful arrest or detention of a person affected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."
[FN19] ECHR Fox, Campbell and Hartley v. UK, sentence of August 30, 1990.

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79. In this respect, the European Court maintained that, while the reasonable suspicion indicating that the person has committed an offence is a sine qua non condition, this fact is not sufficient after a lengthy period of detention has elapsed[FN20].

[FN20] See, inter alia, ECHR. Sulajoa v. Estonia, sentence of February 15, 2005, Paragraph 62; ECHR. Klyakhin v. Russia, sentence of November, 2004, Paragraph 61; ECHR. Nikolova v. Bulgaria, sentence of November 30, 2004, Paragraph 61; ECHR. Stašaitis v. Lithuania, sentence of March 21, 2002, Paragraph 82; and ECHR. Trzaska and Poland, sentence of July 11, 2000, Paragraph 63

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80. Once established this relation between the investigated fact and the accused, present in every coercion measure, the grounds to decide on the liberty during a criminal process shall be established.

81. In its Article 7(5), the Convention foresees that the only legitimate grounds of the preventive detention are the risks of evasion of justice by the defendant or his attempt to obstruct the judicial proceedings: "Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial." The implementation of the precautionary measure seeks the effective execution of the trial by means of the neutralization of the procedural risks against this end.

82. To this respect, the Court has established the following:

From Article 7.3 of the Convention follows the State's obligation of not restricting the liberty of the imprisoned beyond the necessary limits to ensure that he will neither avoid the efficient development of investigations nor evade the action of justice.[FN21]

[FN21] See I/A Court H.R., López Álvarez Case. Judgment of February 1st, 2006. Series C N°. 141, Paragraph 69; I/A Court H.R., Palamara Iribarne Case. Judgment of November 22, 2005. Series C N°. 135, Paragraph 198; I/A Court H.R., Acosta Calderón Case. Judgment of June 24, 2005. Series C N°. 129, Paragraph 111; Tibi Case. Judgment of September 7, 2004. Series C N°. 114, Paragraph 180; and Case of Ricardo Canese. Judgment of August 31, 2004. Series C N° 111, Paragraph 153.

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83. On the other part, the International Covenant on Civil and Political Rights[FN22], in its Article 9.3, states:

"Anyone arrested or detained on a criminal charge … shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."

[FN22] International Covenant on Civil and Political Rights, ratified by the Eastern Republic of Uruguay on April 1°, 1970.

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84. As it has been established, this limitation to the person liberty, as any other restriction, shall be interpreted in favor of the validity of the right, by virtue of the pro homine principle. Therefore, all efforts to sustain the prison during the process that are based, for instance, on preventive purposes, as the dangerousness of the accused, the possibility that he commits offences in the future, or the social impact the fact may cause, should be rejected, not only because of the above-referred principle, but because such causes are sustained on criteria of the material criminal law and not on criteria of the procedural law, which are the pertinent criteria for the punitive answer. These former criteria are based on the evaluation of the past event, which does not respond to the purpose of every precautionary measure that are aimed at preventing or avoiding facts exclusively referred to procedural aspects of the object of investigation, thus violating the presumption of innocence. This principle prevents the application of a consequence to penalize the people who have not been declared guilty within the framework of a criminal investigation.

85. At the same time, the procedural risks of absconding or obstructing the investigations should be based on objective circumstances. Allegations that do not considerate the specific case, do not meet this requirement. Therefore, legislations can only establish iuris tantum presumptions on this risk, based on facts that, if verified in the specific case, can be taken into account by the trial judge to determine if the case allows exceptions to sustain the preventive detention. Otherwise, the procedural risk would not be applicable as grounds for the preventive detention. However, the State can always impose restrictive conditions to the decision of maintaining the deprivation of liberty.

86. To support such considerations, the European Court has sustained that the judicial authorities should, by virtue of the presumption of innocence, examine all the facts for and against the existence of procedural risks and state it in its decisions related to the request for release[FN23].

[FN23] See, ECHR. Rokhlina c. Russia, sentence of April, 2005, Paragraph 68; ECHR. Sulajoa c. Estonia, sentence of February 15, 2005, Paragraph 61; ECHR. E.M.K. c. Bulgaria, sentence of January 18, 2005, Paragraph 121; ECHR. D.P. c. Poland, sentence of January 20, 2004, Paragraph 84; and ECHR. Stašaitis c. Lithuania, sentence of March 21, 2002, Paragraph 82.

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87. Likewise, the Inter-American Court has also established that the national courts should timely evaluate all arguments to determine whether the conditions will justify the preventive detention[FN24].

[FN24] See, I/A Court H.R., López Álvarez Case. Sentence of February, 2006. Series C N° 141, Paragraphs 73, 78 and 81.

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88. The obligation to verify the risk has been previously recognized by the Commission, by stating that:

the preventive detention is an exceptional measure and only applies in cases where there exists a reasonable suspicion that the accused will either evade justice or impede the preliminary investigation by intimidating witnesses or otherwise destroying evidence[FN25].

[FN25] IACHR, Report 12/96 (March 1st, 1996), Paragraph 84.

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89. Both the “seriousness of the offence and [the] severity of the punishment” can be in principle taken into account when the risk of the detainee’s evasion is examined, but with the warning stated on the Report 12/96:

the use thereof to justify prolonged preventive imprisonment has the effect of impairing the purpose of the preventive measure, converting it, for all intents and purposes, into a substitute for the punishment depriving the prisoner of his freedom.”[FN26]

And, “moreover, the anticipation of severe punishment, after a lengthy period of detention has elapsed, is an insufficient criterion for assessing the risk of the detainee’s evasion. The threat that the future sentence represents to the person in prison is vitiated if detention continues, while his or her perception that he or she has already served part of the sentence is heightened[FN27].

[FN26] IACHR, Report 12/96 (March 1st, 1996), Paragraphs 86 and 87.
[FN27] IACHR, Report 12/96 (March 1st, 1996), Paragraph 88. See (ECHR. Klamecki c. Poland (N° 2), sentence of April 3, 2003, Paragraph 122 and Klyakhin v. Russia, sentence of November 30, 2004, Paragraph 65.
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90. The Court has been more categorical by emphasizing "the need, enshrined in the American Convention, to justify the preventive detention in the specific case, after weighing its elements and that, under no circumstances, the application of such precautionary measure will be determined by the type of offences imputed to the individual[FN28]."

[FN28] I/A Court H.R., López Álvarez Case. Sentence of February 1st, 2006. Series C N° 141, Paragraph 81.
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91. Upon determining the sanction to evaluate the procedural risk, the minimum criminal scale or the slightest sanction shall always be considered. On the contrary, the presumption of innocence would be violated because given that the precautionary measure is used only to ensure the process, it cannot refer to a specific sanction that would entail considerations related to the accusations made to the accused. Likewise, by trying to foresee a specific sanction, the impartiality of the judge of the trial and the right to defense during the trial are violated. Particular circumstances, as the commitment of offences or the application of rules preventing the effective fulfillment of the eventual sanction, can be weighed within such context and according to the procedural purpose that is sought, which is incompatible with its use as absolute and definite guidelines. They admit to be valued to estimate the minimum punitive response, which, eventually, will be provided in the case.

92. To this point, this report has detailed the analysis of the preventive detention assumption and grounds. The consideration of the restrictive principles of preventive imprisonment when solving a specific case, is still missing.

93. The guiding principle to establish the legality of the pre-trial detention is the principle of "exceptionality", by virtue of which the preventive detention does not become a rule, impairing its purpose.

94. In this respect, the Commission has sustained, in Report Nº 12/96:

…such a measure is necessarily exceptional because of the preeminent right to personal liberty and the risk that pre-trial incarceration poses for the right to presumption of innocence and due process guarantees, including the right to defense[FN29].

[FN29] IACHR, Report 12/96 (March 1st, 1996), Paragraph 84.
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95. The Court, in the case "López Álvarez c. Honduras"[FN30], highlighted:

"The preventive detention is limited by the principles of legality, presumption of innocence, necessity and proportionality, essential in a democratic society. It is the most severe measure that can be imposed to the defendant and shall, therefore, be applied exceptionally. The defendant's freedom shall be the rule while his criminal responsibility is determined[FN31]."

[FN30] I/A Court H.R., Tibi Case. Judgment of September 7, 2004, Paragraph 106.
[FN31] I/A Court H.R., López Álvarez Case. Judgment of February 1st, 2006. Series C N°. 141, Paragraph 67.

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96. Regarding this matter, the Commission also takes into account the existing international instruments as sources for interpretation of the American Convention.

97. In this respect, the exceptionality of the procedural detention is expressly established in the International Covenant on Civil and Political Rights, in its Article 9.3, where it states that:

…It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear…

98. Likewise, the Principle 39 of the Body of Principles for the Protection of all Persons Under any form of detention or imprisonment, establishes:

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review[FN32].

[FN32] Adopted by the UN General Assembly in its resolution 43/173 (December 9, 1988).

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99. This principle is also outlined in the provision 6.1 of the minimum United Nations Rules for non-custodial measures (Tokyo Rules):

Pre-trial detention shall be used as a means of last resort ….

100. The precautionary measures are established only when they are necessary for the proposed objectives. The pre-trial detention is not an exception to this rule. In compliance with the principle of exceptionality, the pre-trial detention will be appropriate when it is the only way to ensure the purposes of the process and when it has been demonstrated that less damaging measures would be unsuccessful to such purposes. Therefore, if possible, the pre-trial detention has to be replaced for a lower severity measure.

101. In the case “Suárez Rosero”, the Court stated:

…From Article 8.2 of the Convention stems the State’s obligation of not restricting the release of the imprisoned beyond the strictly necessary limits to ensure that he/she will neither avoid the efficient development of investigations nor evade the action of justice, since the pre-trial detention is a precautionary measure, not punitive. This concept is based on several instruments of the international law on human rights and, among others, on the International Covenant of Civil and Political Rights, which states that the pre-trial detention of persons awaiting trial shall not be the general rule (Art. 9.3)…[FN33].

[FN33] I/A Court H.R., Suárez Rosero Case. Judgment of November 12, 1997. Series C N° 35, Paragraph 77.

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102. In this respect, the organ under which the individual is imprisoned shall determine his/her release, when the reasons to sustain such imprisonment, even tried in a criminal court, are no longer valid. Otherwise, a groundless deprivation of liberty would be legitimated.

103. In this respect, the United Nations minimum Rules for non-custodial measures (Tokyo Rules) state:

2. 3 …the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions. The number and types of non-custodial measures available should be determined in such a way so that consistent sentencing remains possible.”

And, “6.2 Alternatives to pre-trial detention shall be employed at as early a stage possible….

104. Therefore, the judge of the trial shall periodically review whether the original reasons sustaining the pre-trial detention are still valid. The specific circumstances of the cause to assume, with founded reasons, that a flight risk exist, should be expressed; otherwise, the precautionary measures that are to be completed and the impossibility of apply them with the imprisoned released, shall be stated. This obligation is based on the need that the State renews its interest in maintaining the pre-trial detention on the basis of current grounds.

105. Being a precautionary measure, the pre-trial detention can be valid only during the period strictly necessary to ensure that the proposed procedural objective will be reached (provisionality).

106. Provision 6.2 of the United Nations minimum Rules for non-custodial measures (Tokyo Rules) states:

… Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 6.1 [investigation of the alleged offence and for the protection of society and the victim]….

107. This provision originates the obligation of having alternative non-custody precautionary measures to ensure the appearance and obligation of the accused, and of replacing them as required by the circumstances of the case.

108. The principle of provisionality imposes the need to control that all the pre-trial detention assumptions are still valid. Once its grounds are no longer valid, the imprisonment shall come to an end.

109. Other limiting principle of the pre-trial detention is related to proportionality, in virtue of which the treatment given to a person allegedly innocent shall not be worse than the treatment given to a sentenced person, nor shall they be given the same treatment. The precautionary measure shall not have the value of a sentence, in quantity or quality (Article 5(4) and (6) of the American Convention). The proportionality refers to an equation between the presumption of innocence and the purpose of the precautionary measure. There is no equivalence. The consideration of the pre-trial detention and the sentence to establish the detention periods shall be differentiated from the consideration of its nature.

110. Thus preventive detention is not an option when the punishment for the alleged offence is non-custodial. Neither can it be used when the circumstances of the case permit the suspension of any eventual punishment. If, in the event of conviction, release on licence is possible, this should also be taken into account.

111. To this end, from the presumption of innocence stems the sanction envisaged for the alleged offence should be considered "in the abstract", as well as the estimation of the imposition of the "minimum" legal of the lightest sentence. This is because any forecast of sentence that is done before the evidence is heard and the sentence passed, and that exceeds this minimum, would infringe the right to defense in court and the guarantee of an impartial judge.

112. There are also procedural requirements, such as legality, suitability for trial and its possibility to be appealed.

113. Article 7(2) of the Convention states:

No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the Constitution of the State Party or by a law established pursuant thereto.

114. On this point, the court , in the “Suárez Rosero” case ruled that no one can be deprived of their personal liberty "except for reasons, cases and circumstances expressly set forth in law (material aspect), but also strictly subject to the procedures objectively defined in the law (formal aspect) (Gangaram Panday case, sentence of January 21st, 1994. Series C N° 16, Paragraph 47).”[FN34]

[FN34] I/A Court H.R., Suárez Rosero Case. Judgment of November de 1997. Series C N° 35, Paragraph 43

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115. The Convention, in Article 7(5), states that, any person detained shall be brought promptly before a judge "or other officer authorized by law to exercise judicial power."

116. This gives rise to the need for a court officer to control the grounds for detention or justification for preventive detention.

117. This is because a judgment on any danger to the proceeding can only be made by the court hearing the case because, as it has been stated, this is the only entity capable of establishing whether the grounds exist in the specific case for denying the accused his liberty. Furthermore, the judicial authorities are responsible for upholding the rights that other powers of the State or individuals infringe.

118. Jurisdictional control does not refer exclusively to the circumstances of detention, but also to the continuation of preventive detention –whether it should declared, terminated or continued– as it is the court's responsibility to "guarantee the rights of the accused, authorize precautionary or coercive measures when strictly necessary and, in general, ensure that the accused is treated in accordance with the presumption of innocence."[FN35][FN36]

[FN35] Cfr. I/A Court H.R., Case of the Gómez Paquiyauri Brothers. Judgment of July 8, 2004. Series C Nº 110, para. 96; Maritza Urrutia Case. Judgment of November 27, 2003. Series C Nº 103, para. 66; and Bulacio Case. Judgment of September 18, 2003. Series C Nº 100, para. 129.
[FN36] I/A Court H.R., Tibi Case. Judgment of September 7, 2004, Paragraph 114.

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119. In this sphere the guarantee of impartiality on the part of the court and the right to be heard are prerequisites for due process [Article 8(1)].

120. Likewise, the Convention states that legislations shall have domestic judicial resources for protection "against acts that violate his fundamental rights recognized by the Constitution or laws of the State concerned or by this Convention, even though when such violation may have been committed by persons acting in the course of their official duties (Article 25)."

121. Provision 6.3 of the United Nations minimum Rules for non-custodial measures (Tokyo Rules) states:

The offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.

122. Once imprisonment is justified, an analysis of whether its length is reasonable should be made.

123. On this point, the Convention states in article 7(5) that:

Any person who is detained … shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings…

124. The principle of proportionality establishes a rational relationship between the precautionary measure and the objective pursued, and sets a limit, which, if exceeded, leads to the measure being inevitably replaced by less severe measure or to the accused being released.

125. Thus the Commission stated the following in its 12/96 report:

…Article 7, which begins with an affirmation of the right of everyone to liberty and security of person, specifies the situations and conditions in which derogations from this principle may be allowed. It is in light of this presumption of liberty that national courts, and then the Convention organs, must determine whether the detention of an accused person prior to a final judgment has, at some stage, exceeded a reasonable limit.

The rationale behind this guarantee is that no person should be punished without a prior trial, which includes a charge, the opportunity to defend oneself, and a sentence. All these stages must be completed within a reasonable time. The time limit is intended to protect the accused with respect to his or her fundamental right to personal liberty, as well as the accused's personal security against being the object of an unjustified procedural risk.

Article 8(2) of the Convention, which guarantees the right to presumption of innocence states:

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

In addition, the risk of inverting the presumption of innocence increases with an unreasonable prolonged pre-trial incarceration. The guarantee of presumption of innocence becomes increasingly empty and ultimately a mockery when pre-trial imprisonment is prolonged unreasonable, since presumption notwithstanding, the severe penalty of deprivation of liberty which is legally reserved for those who have been convicted, is being visited upon someone who is, until and if convicted by the courts, innocent.

The right to defense also guaranteed in the Convention under Article 8.2.f is threatened by lengthy incarceration without conviction because, in some cases, it increases the defendant's difficulty in mounting a defense. With the passing of time, the limits of acceptable risks that are calculated into the defendant's ability to present evidence and counterarguments are enhanced. The possibility to convene witnesses diminishes as well as the strength of any counterarguments[FN37].

[FN37] IACHR, Report 12/96 (March 1st , 1996), Paragraphs 75, 76, 79, 80 and 81.

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126. Both 7(5) and 8(1) of the American Convention seek to ensure that the burdens of criminal proceedings for an individual are not prolonged so as to cause permanent damage.

127. In this sense, in the report above-quoted, the Commission stated:

Although they are inspired by the same principle, the two provisions do not coincide in their references to what constitutes a reasonable period. A delay that constitutes a violation of the provision in Article 7(5) may be justified pursuant to Article 8(1). The specificity of Article 7(5) stems from the fact that an individual who is accused and held in custody is entitled to have his or her case resolved on a priority basis and conducted with diligence. The State's ability to apply coercive measures such as pre-trial detention is one of the decisive reasons, which justify the priority treatment that should be given to procedures involving the deprivation of liberty for the accused. The concept of reasonable time in Article 7 and in Article 8 differs in that Article 7 establishes the possibility for an individual to be released without prejudice to continuation of the proceedings. The time established for detention is necessarily much shorter than the period allotted for the entire trial.

A reasonable length of time for the proceedings as allowed by Article 8 should be measured according to a series of factors such as the complexity of the case… and the diligence of the competent authorities in their conduct of the proceedings. Unlike the right established in Article 7(5), the considerations involved in determining the reasonable length of the procedure are more flexible. The reason is obvious: in the case of Article 7(5), holding the accused in pre-trial incarceration affects his or her right to personal liberty"[FN38].

[FN38] IACHR, Report 12/96 (March 1st, 1996), Paragraphs 110 and 111.

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128. In effect, while the complexity of the case and the diligence of the investigation may be taken into account to define a "reasonable time" in both situations, when prison is used as a precautionary measure such definition should be much stricter and limited because of the underlying violation of the right to liberty[FN39].

[FN39] See, inter alia, ECHR. Rokhlina c. Russia, sentence of April 7, 2005, Paragraph 63; ECHR. Sulajoa c. Estonia, sentence of February 15, 2005, Paragraph 62; ECHR. Mitev c. Bulgaria, sentence of December 22, 2004, Paragraph 104; and ECHR. G.K. c. Poland, sentence of January 20, 2004, Paragraph 82

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129. The complexity of the case should be measured, particularly in relation to the characteristics of the fact and the difficulty of proving it. As a counterpart, the diligence of the court authorities shall be analyzed according to the complexity of the case and the investigation activity.

130. Thus, the procedural activities of the accused and his defense cannot be used to justify the reasonable period of detention as the use of means provided for in law to guarantee due process

should not be discouraged, much less should active intervention during the process be considered in a negative manner.

131. Nevertheless, an accused can justifiably be imprisoned as a preventive measure if he or she deliberately obstructs justice, for example by introducing false evidence, threatening witnesses, destroying documents, fleeing or failing to appear without justification. The pre-trial detention cannot be, under any circumstances, justified by the use of legally established procedural remedies. These have always been intended to guarantee due process for the parties and have been designed for full use.

132. Only someone who defines the defensive strategy in a given case can evaluate the relevance of the legal remedies used. Otherwise, the accused would be being asked to act as judge for deciding when he thinks that his procedural rights will have been "exceeded."

133. It is important that States place all the human and material resources at the disposal of such proceedings so that, in situations of danger that justify pre-trial detention, the investigation is carried out as quickly as possible, thus preventing the restrictions placed on a person who has not been declared guilty from becoming a punishment before trial, violating the right to defense and the principle of innocence.

134. This was upheld by the Commission in report 2/97:

The right to the presumption of innocence requires that pre-trial detention should not exceed the reasonable period mentioned in Article 7.5. Otherwise, this detention becomes a punishment before trial and violates Article 8.2 of the American Convention[FN40].

[FN40] IACHR, report 2/97 (March 11, 1997), Paragraph 12.

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135. When the reasonable period has elapsed, the State has lost the opportunity to continue safeguarding the proceedings by means of depriving the accused of his liberty. In other words, preventive detention may or may not be replaced by other less restrictive precautionary measures, but, in any case, the accused should be released. This is independent of whether there is still a risk to the proceedings. That is, even when the circumstances of the case indicate that, once released, the accused will attempt to evade justice or disrupt the investigation, he or she should no longer be deprived of his or her liberty under the precautionary measure. This is because the need to establish a reasonable time is a response to the need to establish a limit beyond which the preventive detention cannot continue, even when the conditions justifying the measure still exist. Otherwise, the pre-trial detention must cease, not because of the reasonable time has elapsed, but because there are no grounds for it.

136. The “reasonable period" should not be established in the abstract because it is a response to criteria whose existence has to be determined in each case[FN41]. Consequently, the fact that it exists in the domestic legislation does not guarantee that it is in line with the Convention. The

particular characteristics of each case will determine the length of the period, without prejudice to the letter of the law.

[FN41] See, inter alia, ECHR. Sulajoa c. Estonia, sentence of the February 15, 2005, Paragraph 61; ECHR. Klamecki c. Poland (N° 2), sentence of April 3, 2003, Paragraph 118; ECHR. Klyakhin c. Russia, sentence of November 30, 2004, Paragraph 60; ECHR. Stašaitis c. Lithuania, sentence of March 21st, 2002, Paragraph 82; ECHR. Jabloñski c. Poland, sentence of December 21st, 2000, Paragraph 79.

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137. Nevertheless, the Commission considers that a guideline can be set to assist in determining when a reasonable time has elapsed. Thus, after an analysis of the criminal legislation in the countries of the system, the Commission values the fulfillment of a period of two thirds of the minimum legal penalty for the offence in question. This does not authorize the State to retain a person in preventive detention for this period, rather it is a limit and if this limit is exceeded it is presumed prima facie that the period is unreasonable. It does not admit a contrario sensu interpretation to the effect that any period under this limit is presumed to be reasonable. In all cases, the need for this guarantee has to be duly justified in accordance with the circumstances of the case. If this period has been exceeded, the justification should be subject to an even more stringent review.

138. Without prejudice to the above, in those States where an objective limit to proceedings has been established, if domestic legislation grants greater enjoyment of rights than the Convention, they must be applied in virtue of the pro homine principle (Article 29(b) of the Convention).

139. Thus, when a State decides to place limits on its exercise of precautionary measures in a criminal investigation, it has carried out a cost-benefit analysis balancing regarding the rights of the defendant with the power of the State and reached the conclusion that, if this limit is exceeded, the State has gone beyond what is acceptable in using its police powers.

140. Nevertheless, the existence of a legal period of time does not grant the State the right to deprive an accused of his liberty for that period. The period is a maximum limit. Above that limit, the detention is always illegitimate. Below such limit, each case should be reviewed to verify the existence of grounds for detention. In other words, if the period is not fulfilled it does not mean that the detention is legitimate.

141. If a pre-trial detention during proceedings can only be used for precautionary purposes and not as sanction, then the severity of the eventual sentence should not necessarily justify a longer period of preventive detention.

142. Regarding this type of relation, under no circumstance, may the law stipulate that some type of offence be exempted from the established regime for the cessation of pre-trial detention or that some offences receive a different treatment regarding the possibility of release during the proceedings, if the reasons to do so are not grounded on objective and legitimate discrimination

criteria; that is to say, merely indicating the existence of a “social alarm”, “social repercussion”, “dangerousness” or the like, should not be accepted. These judgments are based on material criteria, which impair the nature of the preventive measure, converting it into a real anticipated sanction, because the statement that all accused be sentenced precisely indicates the prior declaration of their culpability.

143. This type of classifications violates the principle of equality, since the different treatment is grounded on the reproachable nature or the negative social consequences of a specific type of offence. Such criteria cannot, therefore, be taken into account to deny the release during the trial. Some people will be automatically excluded from the right to liberty, although having been accused of offences with minor sanctions, in virtue of the social perceptions, which, besides being improvable, are illegitimate to determine the fairness of a pre-trial detention.

144. In this respect, the Inter-American Court has stated that any law containing an exception that “deprives one part of the imprisoned population of a fundamental right in virtue of the offence charged against him or her and that, therefore, intrinsically damages all the members of such category of perpetrators […] per se violates the Article 2 of the American Convention, regardless of whether it has been applied or not [in the concrete case]”[FN42].

[FN42] I/A Court H.R., Suárez Rosero Case. Judgment of November 12, 1997. Series C N° 35, Paragraph 98. See, on the same issue, I/A Court H.R., Acosta Calderón Case. Judgment of June 24, 2005. Series C N° 129, Paragraphs 135 and 138.

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145. Legal limits for the granting of release during the proceeding or the legal imposition of pre-trial detention may not be considered juris et de jure conditions that do not require to be proved in the case and that only require to be claimed. The Convention does not admit that a whole category of alleged, only for such condition, remains excluded from the right of remaining free during the process.

146. Once the release has been provided, it can only be withdrawn again if the reasonable period in the previous detention has not been served, as long as the conditions for such proceedings are gathered.

147. In such cases, the decision on a reasonable period shall take into account the deprivation of liberty served by the offender and, therefore, the estimation of the detention period shall not be resumed.

VI. ANALYSIS OF THE MERITS OF THE CASE

A. Legislation applied in the case

148. The Uruguayan Constitution

Article 27. At any stage of a criminal proceeding which will not result in imprisonment, the Judges may release the accused party, by setting bail according to law." Criminal Procedural Law[FN43]

Article 138. (Generic Admissibility).- At any stage of the proceeding, the defendant subject to preventive imprisonment may be released from prison, unless the law otherwise punishes the attributed crime with minimum time in prison, or when it is "prima facie" estimated that the final punishment to be imposed will be imprisonment (Article 27 of the Constitution).

Article 328. (Early Release).- The defendants imprisoned after the execution of the sentence or who were reintegrated after it, may request their anticipated release in the following cases:

1°) If, the conviction imposes a prison term and the convicted party has completed half of the imposed punishment.
2°) If, the punishment is imprisonment or fine, regardless of the time of imprisonment served.
3°) If a precautionary detention has been enforced, when two thirds of the imposed punishment has been completed.[FN44]

The petition must be filed before the Management of the penitentiary where the convicted person is imprisoned.

The petition shall be forwarded to the enforcing Judge within a period of five days, together with a report from the Management of the penitentiary regarding the qualification of the applicant as an inmate.

Upon receipt of the petition, the Judge shall collect the report from the Institute of Criminology.

Upon the return of the case records, the Judge shall issue his substantiated opinion and shall proceed according to the provisions established in paragraph 4) of the preceding article.

[FN43] Law 15.032 (Published on August 18, 1980).
[FN44] Paragraph 3°, later replaced by Article 11 of law 17.897 (Published on September 19, 2005).
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149. Law 17.897[FN45]:

Article 1°.- The exceptional anticipated and provisional release system established in this law shall apply, only once, to those prosecuted and convicted, that were deprived of their freedom up to March 1, 2005.

This provision shall not apply to those prosecuted and convicted for the following offenses:

H) The crime established in Article 76 of Law N° 2.230, dated June 2, 1893.

J) The crimes established in Law N° 14.095, dated November 17, 1972 and amendments thereof …"

Article 3º.- The Judge or Court hearing the proceeding shall, at its own initiative, and with no further procedure, grant provisional release on their own recognizance, to the defendants comprised in Article 1 of this law, pursuant to the following status of their proceeding:

A) If the case is under a preliminary proceeding upon service of two thirds of the maximum punishment established for the most serious of the crimes charged, if such a term exceeds a maximum of three years. Should it fail to exceed such a term, when half of the punishment established for the most serious of the imputed crimes has been served.
B) If the case is under judicial proceeding upon service of two thirds of the punishment required by the prosecutor's accusation, if it exceeds the maximum term of three years and when half of the punishment has been served if it is less than said term …"
"Article 11. (Anticipated Release).- Replace item 3) of Article 328 of the Criminal Procedural Code, to read as follows:

'3) If the convicted person has served two thirds of the imposed punishment, the Supreme Court of Justice shall grant his early release from prison. It may only deny his release, on the grounds of a substantiated court order, in those cases in which the signs of the rehabilitation of the convicted person are not apparent'.

[FN45] Law 17.897 (enacted on September 14, 2005).
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150. Law 17.726[FN46], Article 17:

Article 17.- At any stage of the proceeding, at the written request of the defense, the Supreme Court of Justice, prior report from the Technical Institute of Forensics, may grant provisional release from prison on pardon, based on the preventive imprisonment already served or due to the excessive extension of the proceeding.

[FN46] Law 17.726 (Published on January 7, 2004).

B. Analysis of the case

151. In this proceeding, Messrs. PEIRANO BASSO were deprived of liberty on August 8, 2002, remaining uninterruptedly in this situation to date.

152. No regulation exists in the Uruguayan legislation that establishes a time limit on preventive detention, the fulfillment of which must be corroborated, for which reason the Commission shall study the grounds offered to reject the successive petitions for their release

from prison in the light of the applicable internal standards and, at the same time, establish their conformity with the Convention.

153. The Commission has developed two aspects to determine whether preventive imprisonment, in a specific case, constitutes a violation of the right to personal liberty and of the judicial guarantees established in the American Convention.

154. First, the local judicial authorities must justify the referred measure according to any of the criteria established by the Commission.

155. As pointed our previously, only on few occasions have the Uruguayan judicial authorities provided grounds for imprisonment during the proceeding and on those occasions, they have failed to answer the arguments of the defense or the grounds have only been apparent, in violation of Article 8(1).

156. The judges of the first-instance issued their decision on two petitions for release from prison. On the first occasion, the petition was denied on the grounds of "the identity of the incriminated fact [and] the short preventive detention served". Despite having declared the incompetence in favor of the Supreme Court, the second resolution of the first instance, denies the provisional release from prison, with no further explanation.

157. The Supreme Court had the opportunity of issuing its decision on five occasions, within the context of the competence allocated in Article 17 of Law 17.726 which would empower it to grant "legal pardon" or "mercy". Only on one of these occasions did it explain its decision. On this occasion, it only referred to "the ontological severity of the offenses charged" and their "damaging repercussion on the economy and social environment".

158. These circumstances are in themselves a violation of the right to a due process whereby, for a defendant to be able to duly exercise the rights acknowledged in the Convention, the decisions that restrict those rights must be substantiated to allow the defense to exercise control and furthermore, violate the guarantee of a fair judge by issuing a decision with no substantiated grounds, thereby evidencing bias, and, consequently, a violation of the presumption of innocence (Articles 7(2), (3), (5) and (6), 8(1) and 8(2.h), and 25(1) and (2.a) of the Convention).

159. With regard to the domestic law, Articles 27 of the Constitution and 138 of the Criminal Procedural Code establish the power of the judge to grant freedom during the proceeding when the final punishment does not involve imprisonment, with reference to the abstract or specific punishment.

160. This rule has been interpreted contrario sensu, in the sense that it imposes an obligation upon the Judge for him to order the arrest in all other circumstances. This fails to consider concurrence in the case of the two legitimate grounds for preventive detention and is contrary to the principles of exceptionality, temporary nature, necessity and proportionality, set forth in this report. In each case, the judge is the one who must establish if this prima facie presumption established by the legislator is based on the need to preserve the purpose of the proceeding.

161. For its part, Law 17.897 establishes the possibility of regaining the liberty for those convicted who have served two thirds of their prison term.

162. While the regulations refer to the convicted defendants, the principle of proportionality imposes that, under no circumstance can a person serving preventive detention, be subject to a precautionary measure that equals or exceeds the term expected to remain in prison as a result of a conviction. Consequently, if this rule were to admit that those defendants convicted would have regained their freedom, it should be applied to the current situation of Messrs. Peirano Basso.

163. In this regard, as referred in the general considerations, the prognosis of the punishment which, in their case, may be applied must be formulated taking into account the minimum legal punishment applicable to the offense charged. In this case, both the punishment applicable for the crime on which grounds they were prosecuted and the legal specification of the charges used in the prosecutor's accusation would have allowed the defendants to regain their freedom in this instance.

164. On the other hand, the Uruguayan judicial authorities have failed to demonstrate that if Messrs. Peirano Basso were to regain their freedom, they would escape the action of the judicial authority or disturb the production of evidence and have merely alleged the serious nature of the offense.

165. On several occasions, the arguments of the "ontological severity of the crimes charged to the defendants", the "detrimental repercussion on the economy and social environment", that the facts are "unusually serious …and deserve an exceptionally severe punishment, in any case restraining the ongoing rights or benefits, and as a result the situation of the defendants or the identity of the incriminated fact cannot be considered a flagrant injustice", have been used.

166. According to the general criteria referred to in this report, the serious nature of the investigated offense does not coincide with the procedural risk criteria established to justify imprisonment as a precautionary measure. On the contrary, it constitutes a response based on a material, not procedural criterion, which has a clear retributive nature that looks at the investigated fact and not at the investigation process. This violates the presumption of innocence contained in Article 8(2), part one, of the Convention.

167. If the references to the magnitude of the fact and its social repercussions are true, the State should have made available to the judicial authorities hearing the case the necessary resources that would have allowed the procedural and, consequently, the precautionary status of Messrs. Peirano Basso, to be resolved within a reasonable term.

168. In turn, when on August 16, 2005, the judge of the first instance resorted to the argument of the short amount of prison time served and related it to the serious nature of the fact charged and the prognosis of the punishment, he discredited, once again, the grounds of the preventive detention: the underlying argument being that the defendants had not served the full term of the punishment which the judge estimated could be imposed in the event of a conviction. At this point in time, the defendants had remained in prison for three (3) years and a few days. The crime for which they had been prosecuted (Article 76 of Law 2.230) entailed a maximum term of

five years imprisonment. The judge made no reference to his prognosis of the punishment but it evidently exceeded the minimum legal term; which constitutes a violation of the presumption of innocence and of the right to a due process [Articles 8(2), part one, and 25(1) and (2.a)] since the judge resorted to criteria unrelated to its nature, to justify the precautionary measure. On the other hand, nor were the objective circumstances weighed in this resolution, which would have allowed to relate the very mention of the "identity of the incriminated fact [and] the short preventive prison time served" to the procedural risks.

169. On March 10, 2006, the Court of Appeals confirmed the previous ruling resorting to a prognosis of the punishment of five years (maximum legal term for the imputed crime at that moment) and justified the delay in processing the proceeding based on its special complexity. Furthermore, it denied the applicability of Article 7(5) of the Convention and it declared itself incompetent to judge the reasonability of the extension of the preventive detention alleging that this is the exclusive authority of the Supreme Court (Article 17 of Law 17.726).

170. The Court of Appeals acknowledged that " the circumstance that, at the date of this judgment, the defendants had served two thirds of the maximum prison term established for the crime for which they were being prosecuted and based on which their preventive detention had been dictated" [could] be considered an undoubtedly extensive preventive term. However, immediately after, it justifies the preventive imprisonment based on the serious nature of the offense and on the possibility that, should they be convicted, the maximum punishment shall be applied, which, as stated in the judgment, would be five years. By that time, the defendants had remained in prison for three years and seven months; however, none of the judicial decisions refer to the legal basis or not of the early or provisional release.

171. In view of the acknowledgement of the excessive duration of the preventive detention, the arguments given to discredit this, fail to coincide with the criteria established as acceptable by the Commission. The decision for the detainees to remain in that situation is based, solely, on the "most severe punishment", two thirds of which term had already been "served" by the defendants on the date of the decision.

172. In terms of the alleged complexity of the case, no description has been made of the obstacles that the judge in charge of the investigation would have had to face. On the other hand, in a radio interview[FN47], the state attorney of the case attributed the delay of the proceeding to "the delay in the administrative procedures of the court to process the evidence" and referred that the failure to notify the defense of the execution of an expert appraisal motivated the request for its annulment, which would have delayed the proceeding even further. At the same time, from the information provided by the State on November 8, 2006, regarding the evidence presented therein, it was established that the adopted measures are scarce and that their nature does not justify the procedural delay. This argument could only have been taken into account to establish whether the authorities acted with due diligence, once the Commission had admitted that the preventive imprisonment had been based on pertinent and sufficient arguments. From the previous considerations it is evident that it was not.

[FN47] “Las cosas en su sitio”, Radio Sarandí, 690 AM, program hosted by Ignacio Álvarez (May 29, 2006).
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173. On August 30, 2006, when the defendants had already served four years and days in prison, the judge in charge of the investigation at the time denied provisional release with no legal justification, despite having declared herself incompetent in that same judgment.

174. The Supreme Court issued its decision on three more occasions, all of them denying the defendants’ release from prison, within the context of the powers established in the referred Article 17.

175. It was not until October 19, 2006 that they were formally accused by the state attorney as the alleged active parties of the crime of fraudulent corporate insolvency (Article 5 Law 14.095), who requested six years of imprisonment for Jorge and nine years imprisonment for Jose and Dante. On that date, the defendants had remained in prison for four years and two months, approximately.

176. With regard to the relation between the precautionary measure and the prognosis of the punishment made prior to the formal prosecutor’s accusation, regardless of whether in this case the preventive detention has not been justified, the principle of proportionality has been violated (Article 7.5). The relation between the restriction of the right and precautionary aim of the measure must not equal the punishment. This relation must be sufficiently unbalanced to prevent it from becoming an anticipated sentence, in violation of the presumption of innocence (Article 8.2, part one). In this case, the reasonable limit has been largely exceeded, even though the defendants have remained in prison for a term that exceeds two thirds of the minimum punishment established for the crimes for which they had been formally prosecuted or accused. This situation has continued beyond that term without any justification.

177. Furthermore, the estimation of the punishment which, in the event of a conviction, would apply according to the circumstances of the case, also constitutes a violation of the right to a fair trial, since the judge prejudged the culpability of the defendants [Article 8(1)]. In this case, it has become evident that, during the course of the different instances, the judges have presumed that the defendants would be convicted and subjected a long prison term.

178. As of last December, the defendants enjoy temporary outings from prison of 48 hours a week, which evidences that the authorities have considered that there are no grounds to justify the current preventive detention of the defendants. On the one hand, the authorities estimated that their release on their own recognizance was sufficient to ensure their return to the penitentiary. All of the foregoing would indicate that the judges were of the opinion that the flight risk is not as bad to justify an economic precautionary measure. At the same time, the danger of disturbing the investigation was ruled out because of the procedural stage of the proceedings.

179. In this judgment, reference is also made to the danger for society and to the possibility that the defendants may commit another felony, both of which were dismissed. These considerations imply that the defendants have effectively perpetrated the offense for which they

have been accused and as such, are dangerous or it is suspected that they may commit "another" felony.

180. These arguments ratify the arguments presented in the previous judgments. The preventive detention is being treated like an anticipated sentence, thereby violating the presumption of innocence and the right of defense in trial, both in terms of the anticipated sentence being applied for the investigated fact and that is applied based on an alleged future fact.

181. Lastly, the interpretation of Article 7(5) insofar that it is a non-self-executing rule that prevents the judges from establishing a term, not legally provided for, is unacceptable. Article 7 acknowledges the internationally enforceable right to personal liberty which, according to Article 1(1), of the States Parties, they have the obligation to honor and guarantee that any person subject to this jurisdiction may freely and fully exercise. As long as such a right cannot be enforced in the internal body of laws, the State has the obligation, by virtue of Article 2 of the Convention, to adopt the necessary measures to guarantee its direct and immediate application.

182. Thus, the Commission concludes that the judicial authorities have failed to apply the principles established in this report to justify the preventive imprisonment, not only in terms of their weak arguments but also because of their failure to justify their actions in some of the cases.

183. The Commission shall not carry out a second analysis in relation to the diligence employed by the judicial authorities to prevent the term of the measure from becoming unreasonable, because it has been concluded that the Uruguayan authorities have failed to provide pertinent and sufficient grounds.

C. Incompatibility of the "Prison System Decongestion Act" or "Prison System Humanization and Modernization Act" with the Convention

184. Law 17.897 stipulates a special system of "anticipated and provisional freedom" for those defendants deprived of liberty until March 1, 2005, but establishes exceptions for those who perpetrated certain types of offenses, based on the social disapproval of certain behaviors.

185. The Commission has had the opportunity to issue its opinion in a similar case, in which it has pointed out that this type of limitation is another element that can be used to impair the presumption of innocence, taking into account that the persons accused for specific offenses are automatically excluded, for that very circumstance, from the restrictions that the State has imposed in this kind of precautionary measure.[FN48] In this case, the defense has argued that the exceptions to the benefits of the referred law applicable to the case were exclusively introduced due to the procedural situation of Messrs. Peirano Basso, allegations which have not been disputed by the State.

[FN48] IACHR, report 2/97 (March 11, 1997), paragraphs 46 et seq.

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186. The legal discrimination to deny liberty during the process, based on the reprehensive nature of certain types of offenses, also violates the principle of equality, which states that those persons in a similar situation must be treated equally. This type of legal distinction is not based on any of the admissible findings to justify the preventive detention.

187. With regard to a similar legal regulation, in the "Suarez Rosero" case, the Inter American Court referred that this type of rule violates, per se Article 2 of the American Convention.[FN49]

[FN49] I/A Court H.R., Case of Suárez Rosero Case. Judgment of November 12, 1997. Series C No. 35, paragraph 98. In this regard, also see, I/A Court H.R. Case of Acosta Calderón. Judgment of June 24, 2005. Series C No. 129, paragraphs 135 and 138.

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188. On that occasion the Court analyzed a provision of the Ecuadorian Criminal Code that upheld the right of detained persons to be released when the conditions indicated existed, but excluded from that provision persons accused of crimes punishable under the Law on Narcotic Drugs and Psychotropic Substances.

189. In that case, the Court pointed out:

…that the exception contained in the aforementioned Article 114 bis violates Article 2 of the Convention in that Ecuador has not taken adequate measures under its domestic law to give effect to the right enshrined in Article 7(5) of the Convention.[FN50]

[FN50] I/A Court H.R., Case of Suárez Rosero. Judgment of November 12, 1997. Series C No. 3, paragraph 99.

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190. Thus, the Commission concludes that the Uruguayan State's sanction and subsequent application of Law 17.897 resulted in a breach of the duties outlined in Article 2 of the Convention.

VII. CONCLUSIONs

191. The Uruguayan Government is responsible for the unwarranted and unreasonable extension of the preventive imprisonment of Jorge, Jose and Dante Peirano Basso, and, consequently, the Uruguayan Government is responsible for violating the right to personal liberty (Article 7(2), (3), (5) and (6)], to a due process [Article 8(1) y (2)] and the commitment to guarantee that the competent authority shall enforce such rights [Article 25(1) and (2)], together with the general obligations of the State to honor and guarantee that such rights are exercised [Article 1(1)] and to adopt, such legislative or other measures as may be necessary to give effect to those rights or freedoms nationwide (Article 2 of the American Convention on Human Rights).

VIII. RECOMMENDATIONS

1. The Uruguayan State must take all the necessary measures to release Jorge, Jose and Dante Peirano Basso while a sentence is pending, without prejudice to the continuation of proceedings.
2. The State must amend its legal or other provisions in order to make them fully compatible with the rules of the American Convention that ensure the right to personal liberty.

IX. PROCEEDINGS FOLLOWING THE ADOPTION OF MERITS REPORT NO. 35/07

192. The Commission examined the present report during its 127° period of sessions and since the members had not had sufficient time to study the report it was resolved to grant a ten day time period, until March 19, 2007, for the members to send their electronic votes to the Secretariat. On May 1, 2007 the dissenting vote of Commissioner Gutierrez was received and on that date the Commission approved Report Nº 35/07 by a vote of 5 votes in favor and 2 against, in accordance with Article 43(2) of its Rules of Procedure. On May 11, 2007, Commissioners Melendez, Carozza, Abramovich, Pinheiro, Fernandez and Roberts approved Resolution 02/07 with regard to Case 12.553. The Report was notified to the State on May 14, 2007, and the State was given a two month period within which to comply with the recommendations, pursuant to Article 43(3) of the Commission's Rules of Procedure. The Report was transmitted to the parties together with the separate vote of Commissioner Gutierrez, as well as Resolution 02/07, adopted by the aforementioned Commissioners. On June 3, 2007, Commissioner Gutierrez sent the Secretariat and the members of the Commission his "separate vote regarding Resolution 02/07" and requested that it be translated, published together with the text of Resolution 02/07 and transmitted to the parties. The Executive Secretariat notified the petitioners of the adoption of the Report and of its transmission to the State, requesting the petitioners' opinion with regard to the submission or not of the case to the Inter-American Court.

193. The State presented a report on July 12, 2007, in which it informed the Commission of a series of measures that had been undertaken to comply with the Commission's recommendations, mentioned above; on July 26, 2007 the Commission received the documentation supporting the State's Report. With respect to the first recommendation, the State reported that on May 29, 2007, the Attorney-Judge of the seventh rota criminal court ordered the release of the Peirano Basso brothers, stating, in several of the preambular paragraphs of her judgment, that she agreed with points made by the IACHR. The Judge ordered the provisional release of Dante, Jorge and José Peirano Basso on bail guaranteed by property or personal guarantee in the amount of US$250,000 each. Dante Peirano was released on June 8, 2007, after paying US$250,000 in the form of a bond. The Judge pointed out in her judgment that, without prejudice to the order for the provisional release of the three Peirano Basso brothers, it was not possible for the court to rule on any pre-trial custody they may be subject to…in other cases, as a result of extradition proceedings under way in their regard, which matter should, where applicable, be raised in each of the courts conducting said proceedings…

194. As regards the second Recommendation, the State announced the establishment of a Commission to Reform the Criminal Code, pursuant to Article 22 of Law No. 17.897

(promulgated on September 14, 2005). The purpose of that law is to eliminate overcrowding in the Uruguayan prison system.

195. On August 6, 2007, the Commission received a request from the State for an extension of six months in order to comply with the Commission's recommendations. The State requested the extension on the understanding that the time period set forth in Article 51(1) of the American Convention would be suspended and that the Government of Uruguay expressly waived the presentation of any preliminary exceptions with respect to compliance with the time period set forth in that article. On August 8, 2007, the Commission granted the extension for four months, in lieu of the six months requested, until December 14, 2007. The Commission requested the State to submit reports on October 15th and November 15th regarding progress made in complying with the recommendations.

196. On September 25, 2007, the Commission received information provided, in writing dated September 7, 2007, from the Supreme Court of Uruguay to the effect that José and Jorge Peirano had not been released for failure to provide US$ 250,000 bond each. It noted that in light of the fact that the extradition of José Peirano to face charges in Paraguay had been granted by the Uruguayan courts, his extradition was pending execution.

197. By means of a communication received October 11, 2007, the State submitted its first report on compliance since having been granted the four month extension. On November 14, 2007, the Commission received the second report on Uruguay's compliance. In the second Report the State noted that it had completely complied with the first recommendation and that as regards the second recommendation, it was in the process of compliance, but that the reform of the Criminal Code and the Criminal Procedure Code required time, especially in order to put the reforms into practice. On December 13, 2007, the State requested a second six-month extension of time in order to continue the process of compliance with the Commission's second recommendation and on December 14, 2007 that extension of time was granted. In conformity with the provisions of its Rules of Procedure, the Commission decided on December 13, 2007, by an absolute majority of its members not to submit the present case to the Inter-American Court of Human Rights, by virtue of the Uruguayan State's substantial compliance with its recommendations. At the same time it requested the State to submit a report in six months time, namely on June 14, 2008, on the measures adopted in compliance with its recommendations. On June 12, 2008, the Commission received the third report on Uruguay's compliance. That report was submitted to the petitioners who presented their observations to the Commission on July 1, 2008.

198. In conformity with the terms of Article 51(1) of the American Convention, the Commission must determine at this stage of the proceedings to what extent the State has complied with its recommendations set forth in report No. 35/07. In continuation, the actions taken by the State in compliance with the recommendations of the Commission will be reviewed.

Recommendation 1: The Uruguayan State must take all the necessary measures to release Jorge, Jose, and Dante Peirano Basso while a sentence is pending, without prejudice to the continuation of proceedings.

199. The State informed the Commission that on June 8, 2007, Dante Peirano was provisionally released from prison following the payment of a bond of US$ 250,000. In the case of José Peirano, his extradition to Paraguay had been granted by the Uruguayan courts and affirmed on appeal and cassation. The decision, the State noted, is simply awaiting execution. As regards José Peirano, a request for extradition has been filed to answer charges in Paraguay, but the extradition has not been decided.

200. On October 31, 2007, the Court of Criminal Appeal ruled that the arrest warrant prepared against brothers Jose and Jorge Peirano Basso was 3rd shift void. That court ruling, according to the State, means a transcendent jurisprudential change, given that since 1940, the State has followed the rule laid down in Article 45 of the Treaty on International Criminal Law "(Law 10,272), which stated that "During the process of extradition, the person shall not be released on bail". The State pointed out that the Peirano brothers have to submit the deposit-$ 250,000 each, in order to effectuate their freedoms, supplemented by the obligation of defendants to surrender their passports to leave the ban in Montevideo, and the obligation to report monthly to the competent judicial authority. The Commission subsequently learned that Jorge Peirano Basso had been provisionally released on December 14, 2007, and that Jose Peirano Bass had been provisionally released on December 18, 2007.

Recommendation 2: The State must amend its legal or other provisions in order to make them fully compatible with the rules of the American Convention that ensure the right to personal liberty.

201. The State reiterated its willingness to comply with the second recommendation and noted that it had already informed the Commission of the establishment of two Commissions – a Commission for the study of the reform of the Criminal Code and a Commission for the study of the reform of the Criminal Procedure Code. Each of these Commissions, the State noted, is comprised of members of the Executive Branch, the Judiciary, Defense Counsel, Offices of the Attorney General, State Prosecutors, the Association of Judges, the Association of Officers of the Court, the Bar Association, and academia. In this context, the State requested the Commission to grant it a prudent amount of time in order to fully comply with this recommendation, which it noted was its intention, since these reforms require time.

202. In the response received by the Commission on June 12, 2008, the State noted that as regards the Comisión for the Reform of the Penal Code, “que la misma ha dado un paso fundamental y cardinal en su labor, habiendo logrado avances importantes en la definición de un anteproyecto referido a la modificación de la Parte General, integrado con 93 artículos, cuya versión final fue presentada el día 21 de diciembre de 2007 a la Comisión de Constitución y Legislación de la Cámara de Senadores del Parlamento Nacional, para el inicio de su tratamiento por parte de ese Poder del Estado. Con este acto, la comisión creada por Ley 17.897 dio cumplimiento a lo dispuesto en lo [que] se refiere al establecimiento de las bases para la reforma del Código Penal uruguayo, que data de 1934.”

203. In regards to the approval procedure by the Congress, the State noted: "The Constitution and Law Committee had already begun work destined for the consideration of the aforementioned project, realizing in the first place, and following the court appearance in their place of members of the Reform Commission, a comparative table of the proposed legislation

and current regulations in the General Part of the Penal Code, which will allow the continuation of the study by the legislators who make up the legislative body (attached). The treatment that the Senators made in the next step is continuing the path with regard to the involvement of multiple technical actors, politicians and members of civil society for the purpose of obtaining instruments consensus on the subject with a broad base of substantiation and support, as befits a democratic society. Notwithstanding, the above members of the Reform Commission believe that it should come back to Parliament for the purpose of studying the draft article by article".

204. As regards the Commission on the Reform of the Criminal Procedure Code, the State informs that this Commission initiated its activities in August 2006. In November 2006 it approved the "minimal basis for the reform (attached), a guide for action to reformist action. At present, the wording of the draft by the President of the Commission, Dr. Dart Preza Restuccia, who was appointed editor, is in its final part. The same will be presented by the Commission on Reform of the CPP to the Committee on Constitution and Regulations of the Senate, the first step in the treatment of a legislative project concerning this issue in particular, in July this year".

205. The State notes further with regard to the Commission's recommendation, that the structure of criminal proceedings to be presented will be extraordinarily short: "Its design, with the determination of a very short time for the court to rule, will have as its main effect, the absolute increase in the speed of the pronouncements. This will change the current situation where a significant number of people are detained without sentence. In June 2007, the Vista Liberties Section of Prisons of the Supreme Court of Justice (SCJ) established that 61.1% of the prison population received sentence and that 38.9% of the prison population continues without receiving their sentence, as a certification of the whole country there were 6779 prisoners, 4171 of them in Montevideo."

206. In addition the State notes "in an adversarial model, the maintenance of the indictment makes no sense because it represents a view about the likelihood of criminal responsibility of the accused. In the preliminary reforms to be presented by the Commission created by Law 17,897, the institute said the indictment will be eliminated. "

207. The State concluded by noting: "It allows us to express that in our opinion, Uruguay is in a state of progress and sustained compliance with Recommendation No. 2 in its report No. 35/07, and therefore reaffirms its full readiness to continue to inform the Commission of all progress in the field".

208. The Commission appreciates the efforts made by the State in the process of complying with the recommendations. It also notes the objections of the petitioners that a State can either comply or not comply but that if it asserts that it is "in a state of progressive and sustained compliance" that means that it has not complied. The petitioners also point out that the State has not pointed out the fact that the Judges Association of Uruguay has withdrawn from the committee for reforming the CPP, which could mean that the legitimacy of the reform process is in question.

209. In light of the foregoing and of the provisions of Article 51.1 and 2. of the American Convention, the Commission decides to request the State to submit a detailed report on compliance and update with the recommendations of Repot 35/07 by September 13, 2008.

X. RESOLUTION 2 / 07

May 11, 2007

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

231. Taking into account the views presented by the Commissioner Freddy Gutiérrez in his rationale to vote Fund Report 35/07 Case No. 12553 Jorge, José and Dante Peirano Basso (Uruguay)

RESOLVES:

1. Reiterates that the process of the case file 12553 Jorge, José and Dante Peirano Basso (Uruguay) is fully consistent with the standards set in the American Convention and the Commission Regulation. Indeed, the Executive Secretariat of the Committee, pursuant to the provisions of Article 13 of the Rules of the Commission prepared a draft report on this case, which was discussed by the Commission during its 126th regular session. On instructions from the Commission, the Secretariat prepared a new draft report on this case and submitted it for consideration by the Commission during its 127th regular session. The Committee agreed, under Article 17, paragraph 5 of its Rules, and decide to continue the discussion on this report electronically, so that all the Commissioners had time to study the case and argue our decision.
2. Stating that the management, planning and coordinating the work of the Executive Secretary the authority of the Executive Secretary of the Commission. In this regard, when the Secretariat presented to the Executive Committee a draft report, the members did not make a distinction based on what lawyers for the draft, the Secretariat worked. By contrast, members of the Commission we are dedicated to making a detailed study based on information provided by the parties in the case to justify our decision strictly on the basis of the international law of human rights enshrined in the Inter-American instruments applicable to the case.
3. Rejecting imaginative elaborations by Commissioner Gutierrez to be charging misconduct by the Committee and the Executive Secretariat and is also meant to give a political tinge to the decision by the Commission, referring to facts and circumstances completely unrelated to matter of the case. The terms of the Commissioner Gutierrez denote lack of professionalism and responsibility, and are inconsistent with the duty of members of the Commission observe a behavior consistent with the high moral authority of his office and the importance of the mission entrusted to the Commission established in Article 9 of the Statute of the Commission.

Publication of this resolution, issued in connection with Case 12553 Jorge, José and Dante Peirano Basso (Uruguay).

XI. PUBLICATION

A. Actions subsequent to issuing Report No. 38/08

232. On July 18, 2008, the Commission adopted Report No. 38/08, in accordance with Article 51.1. of the American Convention. On August 15, 2008, the Commission transmitted the report to the State of Uruguay and the petitioners, as stipulated in Article 51.2 of the American Convention and granted one month to the State to report on its compliance with the recommendations contained in the report. The State requested that the deadline for the observations be moved to September 18th since it received the note on August 15 after the states' offices were closed. On September 4, 2008, the IACHR informed the State that the deadline would be September 18th.

233. In a note received on September 18, 2008, the State submitted a report on the implementation of the recommendations issued by the IACHR Report on the Merits No. 38/08. On September 22 this communication was transmitted to the petitioners. On October 22, 2008, the Commission received information from the petitioners, which was transmitted to the State on January 29, 2009. On February 27, 2009, the Commission received observations from the State, and transmitted them to the petitioners on March 19, 2009. On May 8, 2009, the IACHR received the petitioners' response to the observations of the State.

132. Analysis of compliance with the recommendations

234. In its report on the Merits No. 35/07 of May 11, 2007, the IACHR recommended that the Uruguayan State do the following:

1. Take all the necessary measures to release Jorge, Jose and Dante Peirano Basso while a sentence is pending, without prejudice to the continuation of proceedings.
3. Amend its legal or other provisions in order to make them fully compatible with the rules of the American Convention that ensure the right to personal liberty.

235. In its Report on the Merits No. 38/08 dated July 18, 2008, the IACHR reiterated its second recommendation to the State, since the three brothers had already been released on bail.

236. According to the information provided by the parties after the Merits Report 38/08, in relation to compliance with the recommendations of the IACHR:

237. In reference to the second recommendation of the IACHR, the State reiterated in its communications that "it is in a state of gradual and sustained compliance". On February 27, 2009 the State informed the Commission that in the coming days the draft amendment to the Criminal Procedure Code would be approved by the Commission created by Law 17,897 and sent to Congress for its adoption.

238. The petitioners reported on May 29 2009, that there was no compliance with said recommendation, since no laws had changed and there had been no progress in its discussions. With regards to the first recommendation, the petitioners argued that the prohibition to leave Montevideo imposed to the three brothers as a condition of bail "means an advanced penalty or an unnecessary aggravation of the bail conditions since it has been proven that they always

participated in trial." In addition, it restricts the working conditions and the possibility of family reunification, since the family of José Peirano lives in Buenos Aires.

D. Conclusions

239. Therefore, the Commission concludes that in this case the State of Uruguay has implemented the first recommendation made in Report No. 35/07 and reiterated in Report No. 38/08 to take all the necessary measures to release Jorge, Jose and Dante Peirano Basso while a sentence is pending, without prejudice to the continuation of proceedings.

240. In addition, the Commission concluded that compliance is pending with regards to the second recommendation on amending its legal or other provisions in order to make them fully compatible with the rules of the American Convention that ensure the right to personal liberty.

E. Recommendations

241. Under these considerations and in accordance with Article 51.3 of the American Convention and 45 of its Rules of Procedure, the Commission recognizes once again the actions taken by the State of Uruguay, and progress made on the modification of Penal and Criminal Procedure Codes, to ensure the right to personal liberty in accordance with the standards set out in this report.

242. In this regard, the IACHR considers that although the presentation of the two drafts is a positive step, it still needs a final approval by Congress to fully comply with the recommendation made by the IACHR.

243. The Commission therefore decides to:

1. Reiterate the recommendation that the State amends its legislation, to make it consistent with the rules of the American Convention, which guarantee the right to personal liberty.

244. Finally, the Commission decided to make this report public and include it in its Annual Report to the OAS General Assembly. The Commission, in fulfilling its mandate, will continue to assess the measures taken by Uruguay with respect to the recommendation is pending compliance until it has been completely resolved.

Done and signed in the city of Washington, D.C., on the 6th day of the month of August 2009. (Firmado): Luz Patricia Mejía Guerrero, President; Víctor E. Abramovich, First Vice-president; Sir Clare K. Roberts, Paulo Sérgio Pinheiro, and Paolo G. Carozza, members of the Commission.