



INTER - AMERICAN COMMISSION ON HUMAN RIGHTS  
COMISION INTERAMERICANA DE DERECHOS HUMANOS  
COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS  
COMMISSION INTERAMÉRICAINÉ DES DROITS DE L'HOMME

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**ORGANIZATION OF AMERICAN STATES**  
WASHINGTON, D.C. 2 0 0 0 6 USA

November 12, 2010

**Ref.: Case No. 12.703**  
***Raúl José Díaz Peña***  
**Venezuela**

Mr. Secretary:

I am pleased to address you on behalf of the Inter-American Commission on Human Rights in order to file Case No. 12.703, *Raúl José Díaz Peña v. the Bolivarian Republic of Venezuela* (hereinafter "the State," "the Venezuelan State" or "Venezuela"), before the jurisdiction of the Inter-American Court of Human Rights. The State ratified the American Convention on Human Rights on August 9, 1977, and accepted the contentious jurisdiction of the Court on June 24, 1981.

The Commission has designated Commissioner Paulo Sérgio Pinheiro, and Executive Secretary of the IACHR, Santiago A. Canton, as its delegates. Likewise, Elizabeth Abi-Mershed, Deputy Executive Secretary, and Silvia Serrano Guzmán and María José Veramendi, attorneys of the Executive Secretariat of the IACHR will serve as legal advisors.

In accordance with Article 35 of the Rules of Procedure of the Inter-American Court, the Commission is enclosing to this communication a copy of report 84/10 prepared in compliance with Article 50 of the American Convention, as well as a copy of the entire file before the Inter-American Commission (Appendix 1.) Said merits report was notified to the Venezuelan State by means of communication of August 12, 2010, granting it a two-month term to inform on the implementation of the recommendations. The State did not reply to the request of the Commission.

The Commission submits the instant case to the jurisdiction of the Inter-American Court due to the need to obtain justice for the victim in view of the State's failure to comply with the recommendations. As established throughout the report on the merits, the State arbitrarily and illegally arrested Raúl José Díaz Peña and subjected him to a pre-trial detention regime that exceeded the limits established under criminal law on grounds of the presumption of absconding. During the time he remained in pre-trial detention the victim was not granted an effective judicial review of his situation. Likewise, Raúl José Díaz Peña was subjected to a proceeding plagued with irregularities that resulted in the criminal proceedings lasting approximately five years and two months from the time of his arrest to the conviction handed down against him. During the period he remained in State's custody, Raúl José Díaz Peña was subjected to conditions of detention that had a severe impact on his health and he was not given the timely medical care he required.

Mr.  
Pablo Saavedra Alessandri, Secretary  
Inter-American Court of Human Rights  
P.O. Box 6906-1000  
San José, Costa Rica

Enclosures

In addition to the need to obtain justice for the victim in the instant case, the Commission deems it relevant that the Inter-American Court pronounces on the incompatibility of the presumption of absconding for determining the lawfulness of pre-trial detention, enshrined in Article 251 of the Organic Criminal Procedure Code of Venezuela, norm which is currently in force in said country.

On the other hand, the Commission points out that some of the due process violations found by the Commission in its report on the merits, particularly those relating to the independence and impartiality of the Judicial Branch and General Prosecution (*Ministerio Público*) officials who learnt about the case, were the result of a series of problems in the Venezuelan judicial system that have been observed and examined by the IACHR through various mechanisms. Specifically, the Commission has referred to these problems in its Report on the Situation of Human Rights in Venezuela 2003, in its annual reports for 2004, 2005, 2006, 2007 and 2008, and in its recent report "Democracy and Human Rights in Venezuela" of 2009.<sup>1</sup> The Commission considers it necessary that the Inter-American Court takes into special consideration the more general problems of lack of independence and impartiality of certain judicial and General Prosecution authorities in Venezuela for the purpose of analyzing the way in which those problems were reflected in the instant case in the terms described in the report on the merits.

The Commission submits to the jurisdiction of the Court all the facts and human rights violations described in the merits report 84/10 and requests the Court to conclude and declare the international responsibility of the State by Venezuela for:

- a) The violation of the rights to not be illegally deprived of his liberty and to be informed of the reasons for his detention, enshrined in Articles 7(1), 7(2), and 7(4) of the American Convention, in relation with Article 1(1) of the same, to the detriment of Raúl José Díaz Peña.
- b) The violation of the right to not be arbitrarily deprived of his liberty, enshrined in Articles 7(1), and 7(3) of the American Convention, in relation with Articles 1(1) and 2 of the same, to the detriment of Raúl José Díaz Peña.
- c) The violation of the right to be tried within a reasonable time or to be released and to the presumption of his innocence, enshrined in Articles 7(1), 7(5) and 8(2) of the American Convention in relation with Article 1(1) of the same, to the detriment of Raúl José Díaz Peña.
- d) The violation of the rights to recourse to a judge or competent tribunal to decide on the legality of the detention, and to judicial protection, enshrined in articles 7(1), 7(6) and 25(1) of the American Convention, in relation with Article 1(1) of the same, to the detriment of Raúl José Díaz Peña.
- e) The violation of the right to be tried within a reasonable time by a judge or an independent, and impartial tribunal, enshrined in Article 8(1) of the American Convention, in relation with Article 1(1) of the same, to the detriment of Raúl José Díaz Peña.

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<sup>1</sup>Follow-up Report on Compliance by the State of the Bolivarian Republic of Venezuela with the Recommendations made by the IACHR in the Report on the Situation of Human Rights in Venezuela (2003), available at <http://www.cidh.oas.org/annualrep/2004sp/cap.5d.htm>, Chapter IV of the Annual Report of the Inter-American Commission on Human Rights 2005, 2006, 2007 and 2008, available at <http://www.cidh.oas.org/annual.eng.htm> and IACHR, Democracy and Human Rights in Venezuela Report, OEA/Ser.L/V/II. Doc 54, December 30, 2009, available at <http://www.cidh.oas.org/countryrep/Venezuela2009eng/VE09.TOC.eng.htm>.

- f) The violation of the right to humane treatment enshrined in Articles 5(1) and 5(2) of the American Convention, in relation with Article 1(1) of the same, to the detriment of Raúl José Díaz Peña.

Accordingly, the Commission requests the Inter-American Court of reparatory measures stipulating:

- a) Provide reparations to Raúl José Díaz Peña for material and moral damages suffered, including a public acknowledgment of international responsibility and the publication of the judgment eventually rendered by the Inter-American Court.
- b) Adopt administrative, disciplinary or other measures regarding the conduct of State agents that contributed to the violations declared in the present report, including the lack of adequate and timely medical attention, as well as the delays in several phases of the proceedings.
- c) Implement measures to modify the conditions of detention at the Department of Intelligence and Prevention Services (DISIP), now Bolivarian Intelligence Services (SEBIN).
- d) Adopt effective measures to ensure that persons deprived of their liberty at the Department of Intelligence and Prevention Services (DISIP), now Bolivarian Intelligence Services (SEBIN), have access to adequate and timely medical attention.
- e) 5. Adapt the first paragraph of Article 251 of the Organic Criminal Procedural Code to Venezuela's international obligations in the area of preventive detention.

In addition, the Commission offers the following expert declarations related to issues of the inter-American public interest in the instant case:

- a) Alberto Arteaga Sánchez, who will declare about pre-trial detention in Venezuela. The expert witness will refer to the regulation –in Article 251 of the Organic Criminal Procedural Code- concerning danger of absconding and its presumption in certain cases, as well as to the implementation of such rules in the practice.
- b) Expert whose name will be informed, who will declare about International standards applicable to provisional judges and the effects in the judicial and due process guarantees on a person who is tried by a judge in that situation.

The *curricula vitae* of the experts proposed by the Inter-American Commission are attached. Likewise, the Commission requests the Court to incorporate to this case the expert witness reports submitted by Antonio Canova González and Román Duque Corredor, in the cases of *María Cristina Reverón Trujillo v. Venezuela* and *Apitz Barbera et.al. v. Venezuela*, respectively.

The Commission informs the Court that, by means of a communication of September 12, 2010, after the notification of the report 84/10, the petitioner -in addition to informing of the victim's interest in submitting the case to the Inter-American Court- mentioned the following next of kin of Raúl José Díaz Peña: Alberto Esteban Díaz Arvelo, father; Algi Josefina Peña de Díaz, mother; and Claudia Elena Díaz Peña, sister. Likewise, the petitioner included a reference to "physical alterations" and "lifestyle" of each of these persons, as a consequence of the human rights violations to the detriment of Raúl José Díaz Peña. This communication from the petitioners is in the file before the Inter-American Commission (Appendix I.)

Finally, in accordance with the information available to the IACHR, the representative of the victim in the procedure before the Inter-American Court is Mrs. Patricia Andrade from the Organization Venezuela Awareness Foundation. The contact information provided to the Commission is:

Venezuela Awareness Foundation

[REDACTED]

USA

Telephone [REDACTED]

Fax [REDACTED]

Please allow me to greet you and express my appreciation.

Santiago A. Canton  
Executive Secretary

**REPORT No. 84/10**  
**CASE 12.703**  
**MERITS**  
**RAÚL JOSÉ DÍAZ PEÑA**  
**VENEZUELA<sup>2</sup>**  
**July 13, 2010**

**I. SUMMARY**

1. On October 12, 2005, the Inter-American Commission on Human Rights (hereinafter "the Commission", or "the IACHR") received a petition presented by Patricia Andrade of the organization *Venezuela Awareness Foundation* alleging the responsibility of agents of the Bolivarian Republic of Venezuela (hereinafter "the State", "the State of Venezuela", or "Venezuela") for the alleged illegal imprisonment of Raúl José Díaz Peña on February 25, 2005, irregularities in the criminal proceedings against him, and the conditions of detention at the Department of Intelligence and Prevention Services (DISIP)<sup>3</sup> in El Helicoide, Caracas. After the initiation of these proceedings, Jackeline Sandoval Escobar of the Due Process Foundation (FUNDEPRO) joined the proceedings as a co-petitioner.

2. On March 20, 2009, the Commission declared admissible the claim presented by Patricia Andrade of the organization *Venezuela Awareness Foundation* and Jackeline Sandoval Escobar of the Due Process Foundation (FUNDEPRO) (hereinafter "the petitioners") on the alleged violation of the rights to personal liberty and personal integrity, judicial guarantees and judicial protection laid down in Articles 5, 7, 8, and 25 of the American Convention on Human Rights (the "Convention" or the "American Convention"), in relation to Articles 1.1 and 2 of the same Treaty.

3. After analyzing the basis of fact and law submitted by the parties, the Commission concluded that the State is responsible for the violation of Articles 2, 5, 7, 8 and 25 of the Convention as well as the non-fulfillment of the general obligations to respect and guarantee the rights protected in the Convention and to adopt legislative or other measures at the domestic level, established in Articles 1.1 and 2 of the said Treaty.

**II. PROCEEDINGS BEFORE THE COMMISSION**

**A. Processing of Case 12.703**

4. After receipt of the original petition, the Commission decided to register it under number 1133-05 and initiated the proceedings. On March 20, 2009, after substantiating the admissibility phase, the Commission declared the case admissible via the adoption of Report 23/09.<sup>4</sup> On March 31, 2009, the Commission sent the Admissibility Report to the parties and granted the petitioners a time limit of two months to present their allegations on the merits. In the same letter, the Commission placed itself at the parties' disposal in order to reach a friendly settlement of the claim for the purpose of which it requested them to indicate their interest as soon as possible.

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<sup>2</sup> In accordance with the provisions of Article 17.2 of the Commission's Rules of Procedure, Commissioner Luz Patricia Mejía Guerrero, of Venezuelan nationality, did not participate in either the deliberations or the decision on the present report.

<sup>3</sup> In December 2009, the DISIP was replaced by the recently created Bolivarian Intelligence Service (SEBIN).

<sup>4</sup> IACHR, Report No. 23/09, Petition 1133-05, March 20, 2009, IACHR Annual Report 2009.

5. On May 13, 2009, the petitioners requested an extension of time, which was granted by the IACHR. On July 7, 2009, the petitioners' observations on the merits were received by the Commission and sent to the State on July 16, 2009 with a time limit of two months to present a response. On September 15, 2009, the petitioners presented a brief containing additional information, which was transmitted to the State for its observations. On November 24, 2009, the State's observations on the merits were received at the Commission and were sent to the petitioners for their information. On May 25, 2010, the petitioner submitted additional information which was sent to the State for its information.

#### **B. Processing of Precautionary Measures MC 250-05**

6. On October 12, 2005, the petitioners filed a request for precautionary measures on behalf of Raúl José Díaz Peña who remains deprived of his liberty at the Investigatory Division of the Headquarters of the Department of Intelligence and Prevention Services (DISIP), El Helicoide Headquarters, Caracas, since February 25, 2004. According to the information supplied by the petitioners, Raúl José Díaz Peña had suffered various illnesses due to the quantity of dust and the humidity and had not received medical treatment for a serious hearing condition.

7. On October 31, 2005, the Commission requested that the State of Venezuela adopt precautionary measures to protect the life and health of Raúl José Díaz Peña. More specifically, the IACHR requested the State: to instruct the competent authorities to undertake medical examinations which would allow an evaluation of the health of the beneficiary and provide him any specialized treatment he might require; to transfer Raúl José Díaz Peña to a preventive detention center which would guarantee access to acceptable conditions for living, for natural light, fresh air and exercise; that until Raúl José Díaz Peña's transfer from the DISIP to a preventive detention center is complete, to ensure him the necessary guarantees to preserve his physical, psychological and moral integrity; and to guarantee that Raúl José Díaz Peña does not suffer any reprisals by reason of the proceedings underway in the Inter-American system of human rights.<sup>5</sup>

8. On December 12, 2005, the Commission received a brief from the petitioners stating a failure to implement the precautionary measures. On December 19, 2005, the Commission reiterated its October 31, 2005, request for information to the State and sent the petitioners' brief with a time limit of ten days to present observations. On January 27, 2006, the Commission received a brief with observations from the State, which was sent to the petitioners for observations within a time limit of 15 days. The petitioners requested an extension, which as allowed by the Commission. On March 15, 2006, the Commission received information from the petitioners indicating the progressive deterioration in Raúl José Díaz Peña's health, which was sent to the State for observation with a time limit of 15 days.

9. On July 13, and 31, 2006 the petitioners submitted briefs that were sent to the State for observation with a time limit of ten days. In the same letter, the Commission repeated its March 23, 2006, request for information from the State. On October 13, 2006, the petitioners lodged a brief informing that Raúl José Díaz Peña had been transferred to the Otohospital Institute where a specialist had conducted a cleansing and draining of his right ear, and that Raúl José Díaz Peña's prison conditions had not altered. The brief was sent to the State for observation within a time limit of 15 days.

10. On November 28, 2006 the petitioners submitted a brief that was sent to the State for observation with a time limit of 15 days. On December 7, 2006 the petitioners filed a brief informing of a delay in the medical treatment on Raúl José Díaz Peña's ear, as well as other health

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<sup>5</sup> IACHR, *Annual Report 2007*, Chapter III, Provisional Measures granted by the IACHR in 2005.

problems affecting him. On December 13, 2006, the Commission sent the above brief to the State and repeated its requests for information previously made.

11. On March 14, and May 22, 2007 the petitioners filed briefs which were sent to the State for observations. In a brief of June 29, 2007, the petitioners asked the Commission to request provisional measures from the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") for the beneficiary of the precautionary measures. The above brief was sent to the State on July 5, 2007, for its observations, within a time limit of seven days.

12. On August 14, 2007, a brief from the petitioners was received by the Commission repeating their request that the Commission present a request for provisional measures to the Inter-American Court. This was sent to the State on August 23, 2007 for observation within a time limit of 15 days. On September 8, 2007, the Commission received written information from the petitioners relating that a specialist physician had diagnosed the beneficiary with "acute auditory loss" as well as the necessity of performing surgical intervention on him. This brief was sent to the State for observation within a time limit of seven days.

13. On October 4, 2007, the Commission requested additional information from the petitioners in order to give a follow-up to the current precautionary measures and to evaluate the request to present a request for provisional measures to the Court. On October 12, 2007, the petitioners' response was received, which was then sent to the State for observation within a time-limit of seven days and a request for information previously made to the State was repeated.

14. On November 6, 2007, the State sent a brief,<sup>6</sup> which stated that it had responded to the previous requirements via a brief dated September 25, 2007,<sup>7</sup> which was resubmitted as an annex. The State's brief was sent to the petitioners for observation within seven days.

15. On November 8, 2007, the Commission requested additional information from the State about the report issued by Doctor Vallenilla, after visiting Raúl José Díaz Peña on October 31, 2007. On November 13, 2007, the petitioners asked for an extension of time to present observations on the information submitted by the State, which was granted by the Commission. On November 27, 2007, the Commission received a brief from the petitioners, which, *inter alia*, repeated their request that the Commission present a request for provisional measures to the Inter-American Court. This was sent to the State for observation within a time limit of 15 days. On December 24, 2007, the State requested an extension, which was granted by the Commission.

16. On January 30, 2008, the Commission received a brief from the petitioners, which, *inter alia*, repeated their request that the Commission present a request for provisional measures to the Inter-American Court. On February 15, 2008, the State sent a brief<sup>8</sup> indicating that "it is not possible to ascertain whether surgical intervention is necessary without medical examinations that the Venezuelan judicial authorities have duly ordered to be carried out" and repeated that "there is no situation of extreme gravity and urgency which implies a risk of irreparable harm to the citizen

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<sup>6</sup> Note No. AGEV/001130 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, November 6, 2007.

<sup>7</sup> Note No. AGEV/001059 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, September 25, 2007.

<sup>8</sup> Note No. AGEV/000168 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, February 15, 2008

[Raúl José Díaz Peña]; and as such, the procedure for provisional measures requested by the Inter-American Commission on Human Rights is rendered entirely unfounded."<sup>9</sup>

17. On February 20, 2008, the Commission requested information from the State on points related to the state of health of, and medical treatment for, Raúl José Díaz Peña, as well as the State's position in regard to his conditions of imprisonment. The Commission requested that the State submit the information before March 3, 2008. On March 3, and 5, 2008,<sup>10</sup> the State sent information to the IACHR, which was sent to the petitioners for observation within 30 days.

18. On October 2, 2008, the petitioners sent a brief reiterating their request that the Commission present a request for provisional measures to the Inter-American Court, which was sent to the State for observation within a time limit of one month. On December 31, 2009, and February 16, 2010, the Commission received briefs from the petitioners that repeated their request that the Commission present a request for provisional measures to the Inter-American Court. On February 22, 2010, within a time limit of 15 days, the Commission requested information from the petitioners as to Raúl José Díaz Peña's state of health in order to ascertain whether it was appropriate to maintain the precautionary measures in force. On March 9, 2010, the petitioners requested an extension of ten days, which was granted by the Commission. On March 23, 2010, the Commission received the petitioners' reply, which was sent to the State on March 31, 2010 with a time limit of seven days to present additional information as to Raúl José Díaz Peña's state of health.

19. On April 12, 2010, the State requested an extension, which was granted by the Commission with a time limit of seven days. As at the date of the approval of this report, the State has not submitted the information required by the Commission and the precautionary measures remain in force.

### **III. POSITION OF THE PARTIES ON THE MERITS**

#### **A. Petitioners' Position**

20. During the processing of the petition and the case before the Commission, the petitioners submitted a number of facts that in their view are part of a context of interference by the Executive Branch in the Judicial Branch and with the Public Prosecution Service, as well as a politicizing of investigations and criminal proceedings undertaken against persons opposed to the Government which they believe has resulted in the absence of guarantees in substantiating the proceedings conducted against Raúl José Díaz Peña. Among the facts set out they underline the presence of Raúl José Díaz Peña, as well as many other Venezuelans, in the demonstrations which took place at that time in the Plaza Francia de Altamira in Caracas,<sup>11</sup> his imprisonment for the bomb attacks occurring on February 25, 2003, directed against the Consulate-General of the Republic of Colombia and the International Commercial Office of the Kingdom of Spain, due to which various persons with whom Raúl José Díaz Peña had contact in the Plaza Altamira - Pedro Sifontes, Luis Chacín and Daniel Mérida - were prosecuted for the above attacks and, as the petitioners allege,

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<sup>9</sup> Note No. AGEV/000168 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, February 15, 2008.

<sup>10</sup> Note No. AGEV/00027 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, March 3, 2008 and Note No. AGEV/ of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, March 5, 2008.

<sup>11</sup> The petitioners point out that at that time a group of members of the military gathered at the Plaza de Altamira in Caracas alleging compliance with Article 350 of the Constitution of the Bolivarian Republic of Venezuela. Petitioners' Brief on the merits received by the IACHR on July 7, 2009.

were submitted to physical and psychological torture. In general, they allege that the politicizing by the Executive of the trial for the embassy attacks has denied Raúl José Díaz Peña any possibility of benefitting from the guarantees to a fair trial.

21. They allege that on January 19, 2004, then Prosecutor, Gilberto Alfredo Landaeta Gordon, acting in his capacity as 62nd Prosecutor for the Metropolitan District of Caracas, presented a written indictment against the victim, Raúl José Díaz Peña, before the 11th Control Court, under Judge Deyanira Nieves, which requested the arrest of Raúl José Díaz Peña for committing the crimes of public intimidation, against public and private interests, damaging public property, minor injuries and aiding and abetting the crime of conspiracy.

22. They allege that on January 22, 2004, the Eleventh First Instance Control Court of the Criminal District of the City accepted the entirety of the Prosecutor's indictment and agreed to rule on the imprisonment measure against Raúl José Díaz Peña without the proof showing the victim's involvement in the acts. At the same time, the Judge also ruled that the place of detention would be the DISIP, El Helicoide, where Raúl José Díaz Peña is still deprived of his liberty. They state that on September 18, 2007, the Fourth Trial Court of First Instance for the Criminal District of the City of Caracas, constituted as a single-judge court, under Judge Migdalia María Añez González, started the trial stage, in the presence of the Eighth Prosecutor of the National General Prosecution Service with Full Competence, Mery Gómez, and Prosecutor 39 of the National General Prosecution Service with Full Competence, Jhonny Méndez, and Prosecutor 73 of the General Prosecution Service for the Metropolitan District of Caracas, Narda Sanabria.

23. They point out that the concluding period took place on April 28, 2008, and on April 29, 2008, the ruling of the judgment was announced, sentencing Raúl José Díaz Peña to seven years and four months imprisonment, and which was formally published on June 17, 2008. They maintain that on July 23, 2008, the Eighth Court with Executory Function received the ruling of the Fourth Court and on July 15, 2008, carried out the sentence and ruled that the alleged victim could make use of the benefits established by law for fulfilling his sentence.

24. The petitioners maintain that the necessary requests were made so that Raúl José Díaz Peña could make use of alternative means for serving his sentence for which he had to be the object of various reports by a Multi-Disciplinary Commission attached to the Ministry for People's Power for Justice and Internal Relations, the General Department for Penitentiary Services, and the Department for Social Re-integration. This Commission issued Technical Report 0412/09 of July 9, 2009, which made an "unfavorable" prognosis for granting the alternative means for the following reasons: "he presents an abnormal relationship to society and has a lax view of its rules, he does not acknowledge his participation in the crime, there are no signs that his time in prison has caused him to reflect in a way as to make a positive social change, his self-criticism does not show signs of reflection since his conduct in the criminal act."<sup>12</sup> Finally, they maintain that on July 28, 2009, and based on the said Technical Report, the Seventh First Instance Court with Executory Function of the Metropolitan Criminal District of Caracas decided to deny Raúl José Díaz Peña the alternative means for serving his sentence.

25. The petitioners allege that the State is internationally responsible for the violation of Article 5 of the American Convention by reason of the prison conditions to which Raúl José Díaz Peña was subjected in the DISIP headquarters and that formed the object of the request for precautionary measures before the Commission on October 31, 2005. They point out that Raúl José Díaz Peña is in a cell with no ventilation or natural light; that he only has artificial white light;

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<sup>12</sup> Technical Report 0412/09 of July 9, 2009, Annex to petitioners' additional information brief received by the IACHR on Annex to September 15, 2009.

and that to reduce the high temperatures, fans are used. They stress that the artificial light altered Raúl José Díaz Peña's biological clock and caused the loss of 10 kilograms in weight in the first 19 months confinement. They allege that his conditions of confinement started to cause respiratory illness, dust allergies and a serious inflammation of his middle ear generating a risk of hearing loss in his left ear, among other health problems.

26. They allege that after the Commission granted precautionary measures, the General Director of Human Rights of the Justice and Interior Ministry, Mayerling Rojas Villasmil, together with a commission of employees of the Ministry, went to the DISIP on January 27, 2006, compiled a report signed by Raúl José Díaz Peña in which the former stressed that "he was in good health" after being examined by the DISIP doctor who was not a specialist and did not possess the specialized medical equipment, and that she also stressed that "he wished to remain in the DISIP". They point out that in May 2006, Raúl José Díaz Peña was sent to the forensic medicine area of the Body for Investigatory Criminal Sciences (CICPC) where he was examined by a general physician who determined that he should be seen by a specialist. They maintain that on October 13, 2006, Raúl José Díaz Peña was transferred to a specialist (Otorhinolaryngologist), Doctor José Gutiérrez, who treated him, pointing out to him that if he failed to improve, he should be operated on as he was at risk of losing his hearing.

27. Raúl José Díaz Peña's health continued to deteriorate, and on August 24, 2007, Doctor José Gutiérrez issued a new medical report repeating the necessity for surgical intervention. On October 8, 2007, a new medical report confirmed the symptoms of a chronic discharging inflammation of the left ear, with resistance to anti-bacterial treatment, concluding that Raúl José Díaz Peña would progressively lose his hearing. They indicate that other medical examinations, ordered by Judge Migdalia Añez, were performed on Raúl José Díaz Peña, concluding that specialist medical examinations should be undertaken. These were performed at a clinic staffed with Cuban medial personnel, with specialist medical equipment. They confirmed Doctor José Gutiérrez's diagnosis of Raúl José Díaz Peña and the urgent necessity of surgical intervention.

28. They allege that to date no surgical intervention has been performed due to the negligence of the State of Venezuela, causing irreparable harm to Raúl José Díaz Peña who has lost his hearing. They stress that, in addition, Raúl José Díaz Peña suffers from severe pain, fever, constipation, and rectal bleeding, and was diagnosed by a DISIP doctor with a peri-anal abscess, recommending that he be operated on. He has been treated with medicines producing a slight improvement; nevertheless, the abscess is recurring, and in fact requires a fistulectomy. They maintain that surgical intervention on the abscess requires certain health and convalescence conditions that Venezuelan prison centers do not offer.

29. The petitioners maintain that the DISIP personnel's treatment of Raúl José Díaz Peña has been proper. They also point out that improvements have been noted, such as air conditioning, a gymnasium area and limited-time use of the Internet. They stress that the confinement area is kept clean due to the fact that the inmates are in charge of cleaning. Nevertheless, they allege that despite some improvements, Raúl José Díaz Peña remains in a delicate state of health and has been the victim of irreparable harm to this personal integrity due to the negligence of the State of Venezuela.

30. The petitioners also allege that the State of Venezuela is internationally responsible for the violation of Articles 7.3, 7.4 and 7.5 of the American Convention by reason of the fact when Raúl José Díaz Peña was arrested by agents of the DISIP, he was never shown an arrest warrant, nor did they inform him of his attendant rights as laid down in Article 49 of the Constitution of the Bolivarian Republic of Venezuela and in Article 125 of the Organic Code of Criminal Procedure (COPP). They point out that the agents that arrested Raúl José Díaz Peña merely told him "sorry, but you'll have to come with [us]".

31. They allege that after Raúl José Díaz Peña's Toyota Samuray vehicle was impounded by employees assigned to the DISIP on September 10, 2003, for being allegedly connected to the Colombian and Spanish embassy bombings, he was summoned to provide testimony before the DISIP and the CICPC on September 10 and 11, 2003. On January 25, 2004, more than four months later, Raúl José Díaz Peña was charged, without having had the opportunity of exercising his right to a defense nor having participated in the investigation, in other words, he could not bring motions in his favor nor challenge legality of his detention.

32. In this regard, they maintain that the Prosecutor charged with moving the investigation forward requested the preventive detention of Raúl José Díaz Peña on January 16, 2004, which was granted by the Control Court on January 22, 2004, in other words, the Prosecutor made sure he already had an arrest warrant before proceeding to charge Raúl José Díaz Peña in order that the latter could not make the required submission to avoid imprisonment, and thereby exercise his rights as an accused person. They allege that despite the issuance of the arrest warrant, Raúl José Díaz Peña was arrested without being informed of its existence and without the requirements set down by law. They also indicate that the agent who arrested him registered false information in the record as to the circumstances surrounding the method, time and place of the arrest in contravention of Article 117 of the COPP.

33. They indicate that Raúl José Díaz Peña's preventive detention exceeded the two-year limit set out in Article 244 of the COPP, and that he had been in preventive detention for four years when his sentence was pronounced on April 28, 2008. They indicate that, according to the law, whenever the detention exceeds the lapse of time laid down by law without a trial sentencing him, and without the Prosecutor or the complainant requesting the extension provided for in the said Article 244 of the COPP, the accused has the right and the duty to request his release on his own behalf, through his defense lawyer, or through any person.

34. They also allege that the judicial preventive detention, must be subject to permanent review, since the original conditions giving rise to the said detention may have undergone alterations and may produce changes making it appear disproportionate or unnecessary, thus justifying its substitution or revocation. They allege that Raúl José Díaz Peña's defense requested the revision and/or substitution of the precautionary measure on numerous occasions, all such requests being denied.

35. More specifically, they allege that on January 26, 2004, his defense requested the review of the precautionary measure when Raúl José Díaz Peña was put at the disposition of the 11th Control Tribunal, which was denied on June 15, 2004. His defense requested the review of the measure when the preliminary hearing before the 11th Control Tribunal took place, which was denied, on the ground that the reasons for granting the imprisonment had not changed. On September 15, 2004, his defense requested before the 28th Control Court the substitution of detention for a different measure, which was denied. On December 20, 2004, the defense again requested before the 28th Control Court the substitution of the judicial detention order, which was denied. On March 29, 2006, his defense requested a review of the measure before the 23rd Court of Justice, which was declared unfounded. On April 17, 2006, after two years of detention without, his defense requested the substitution of the imprisonment measure, which was denied.

36. In addition, they maintain that his defense lodged an *amparo* remedy in accordance with Article 244 of the COPP for, *inter alia*, a violation of the principle of proportionality considering the time spent in preventive detention, which was declared inadmissible by the First Special Accidental Chamber of the Court of Appeals for the Metropolitan Criminal Court District of Caracas on February 26, 2007.

37. The petitioners also allege that the State has violated Articles 8 and 25 of the American Convention. They stress that in the decisions of the courts there is no precise determination of the circumstances of time, method and place in which Raúl José Díaz Peña is alleged to have committed the acts for which he was charged and then sentenced. They point out that during Raúl José Díaz Peña's prosecution, the legal charges were altered in respect of his involvement without his being informed within the time-limit laid down by law, in the trial stage prior to the conclusions, but was made directly when sentencing him. They also allege that in the trial against Raúl José Díaz Peña, value was given to evidence given by referential witnesses, as well as testimony obtained under torture.

38. They allege that although, formally, there are legal remedies in Venezuela, in practice the Judicial Branch does not enjoy independence and impartiality, and remedies, despite being laid down in law, are dismissed without reasons. More specifically, they indicate that the Prosecutors and Judges involved in the proceedings against Raúl José Díaz Peña committed a series of acts leading to delays. They also allege that the proceedings were under the jurisdiction of at least 50 judges in four years that were removed or decided to refrain from hearing the case due to its political connotations.

39. Based on the above, the petitioners request that the Commission declare the State responsible for the violation of Articles 5, 7, 8, and 25, in relation to Article 1.1 of the American Convention, to the prejudice of Raúl José Díaz Peña.

#### **B. Position of the State**

40. In its observations on the merits, the State makes allegations on admissibility and insists that Raúl José Díaz Peña has not exhausted domestic remedies since he could have appealed his sentence or requested judicial review. It also points out that at the time when the petition was presented, the Venezuelan courts continued to be seized of the case against Raúl José Díaz Peña, which proved the failure to exhaust domestic remedies and hence the petition's inadmissibility.

41. In its observations on the merits, the State alleges that the facts of the case have developed in a context in which "Venezuelan sectors of opposition, civil and military have been trying for ten years to discredit Venezuelan institutions in order to destabilize the State of Venezuela".<sup>13</sup> In this respect it identifies three of the petitioners' allegations on the violation of the American Convention, that is: the alleged prolonged preventive detention to which Raúl José Díaz Peña was subjected, the irregularities in the criminal proceedings conducted against him, the deterioration in his health allegedly due to his conditions of imprisonment and the alleged negligence in administering adequate and timely medical attention.

42. With regard to the first allegation, the State maintains that Raúl José Díaz Peña's preventive detention was carried out in accordance with the National Constitution and the provisions of the COPP. It indicates that after his capture on February 25, 2004, the detainee was rendered before the Court of Control - the court that has issued his arrest warrant - in order to charge him with the acts for which he was under investigation. It stresses that after hearing the parties' positions, the Judge took into account the reasons determined by law and ordered Raúl José Díaz Peña's judicial preventive detention. It alleges that in order to come to the above conclusion, the Control Judge analyzed the entire context of all aspects surrounding the acts that occurred in Caracas on February 25, 2003, from explosions taking place at the General Consulate of the Republic of Colombia and the International Commercial Office of the Embassy of the Kingdom of

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<sup>13</sup> Note No. AGEV/000537 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, November 12, 2009, page 20.

Spain, as well as the control of the investigation led by the Prosecutors resulting in the arrest warrant against him. In this context, the State alleges that both the indictment and sentence against Raúl José Díaz Peña were made in full compliance with the principles of due process and the rights of the defense, and thus his imprisonment was legal and within the limits set out in the Constitution and the COPP.

43. With regard to the second allegation relating to the irregularities in the criminal proceedings against Raúl José Díaz Peña, the State alleges that neither Raúl José Díaz Peña nor his supporters or defense attorneys alleged any irregularity in the criminal proceedings which followed on legally and culminated in a sentence against him. The foregoing proves that the Court of Appeals decided the appeal proceedings against the sentence lodged by his co-accused Felipe Orlando Rodríguez Ramírez, "and concluded that there was no error or irregularity whatsoever in the criminal proceedings brought against [Felipe Orlando Rodríguez Ramírez] and therefore, against the appellant Raúl José Díaz Peña."<sup>14</sup> It also alleges that the petitioners did not expressly identify which, in their view, are the violations committed by the Venezuelan courts.

44. In respect to the third allegation, relating to the deterioration in Raúl José Díaz Peña's health allegedly due to conditions of detention and the alleged negligence in the provision of adequate and timely medical attention, the State alleges that it took the prognostication and observations legally required, as well as taking into account the considerations of the International Red Cross and stresses that the environment in which Raúl José Díaz Peña remained detained is "quite acceptable". It also points out that at its facilities, the DISIP has areas for physical recreation, places for visits by friends and family, an electric kitchen, domestic appliances, refrigerators to keep food cool, an area for conjugal visits with its own bathroom in acceptable sanitary conditions, cells provided with various fire extinguishers distributed in the different hallways of the said space.

45. With regard to Raúl José Díaz Peña's state of health, the State stresses that the DISIP performs medical evaluations on the inmates. More specifically, the State refers to the medical evaluation carried out on Raúl José Díaz Peña on September 9, 2009, which shows he is "in a generally good state of health."<sup>15</sup> It also points out that he had outings in the fresh air, as recommended by the International Red Cross, which take place on Saturdays and Sundays from 8:00 am until 10:00 am.

46. In respect of the pre-release measures, the State alleges that it has given a timely response to the requirements or benefits requested by Raúl José Díaz Peña. In this regard, the Seventh First Instance Criminal Execution Judge for the Metropolitan Criminal Judicial Circuit of Caracas points out that on July, 16, 2009, a technical report was carried out on Raúl José Díaz Peña in order to assess his eligibility to choose alternative ways of serving out his sentence by working but produced an unfavorable result and pointed out that

the criminal action with which the detainee was involved must be seen in its impulsiveness, a lack of feeling to the pain of others and the search for opportunities taking advantage of a political path that he believe inevitable; coupled with those which was aided by associating with persons with dysfunctional behavior. In actual fact, the detainee does not show deep self-introspection and there is no genuine behavioral change [...].<sup>16</sup>

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<sup>14</sup> Note No. AGEV/000537 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, November 12, 2009, page 26.

<sup>15</sup> Report No. 100-300001933 of October 2, 2009, annexed to Note No. AGEV/000537 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, November 12, 2009.

<sup>16</sup> Technical Report 0412/09 of July 9, 2009, annexed to Note No. AGEV/000537 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, November 12, 2009.

It alleges that in view of the unfavorable outlook, the Seventh Execution Judge, based on Article 500.3 of the COPP,<sup>17</sup> denied the alternative means of serving out the sentence by working.

47. With regard to the right to judicial guarantees and judicial protection, the State alleges that it offered Raúl José Díaz Peña access to the appeals established in the domestic judicial procedure, without any distinction or discrimination whatsoever, for the exercise of the defense of his rights and interests. It also maintains that the Venezuelan court organs who took into account the said appeals, issued their judgments with strict independence and autonomy [in carrying out their function,] over and above the judicial interpretation that other jurists considered having a particular interest in the present case, always respecting his fundamental rights and guarantees, especially due process and the right of the defense which are protected both domestically and internationally.

48. Finally, the State requests that the Commission dismiss the arguments put forward by Raúl José Díaz Peña and his legal representatives as being untrue and unfounded, that it declare the present case inadmissible, and that it declare that the State has respected Raúl José Díaz Peña's human rights.

#### **IV. ANALYSIS OF THE MERITS**

##### **A. Determinations of Fact**

##### **1. Background**

49. The initial facts of the present case took place against the background of a number of demonstrations in the Plaza de Altamira starting in October 2002 and continuing into part of 2003. In its report on the Situation of Human Rights in Venezuela of 2003, the Commission referred to the situation of the demonstrations in the Plaza de Altamira as follows

[...] from the beginning of the failed coup d'état a rupture at the heart of the armed forces was evident. In effect, this schism came to the surface when on October 22, [2002], a group of 14 army chiefs declared their "legitimate disobedience" towards the Government and called on other members of the armed forces to join them. The generals pointed out that they considered the Plaza Francia "liberated territory", that it was the physical place where the reading of their declaration of disobedience had taken place.<sup>18</sup>

50. On February 25, 2003, two explosive devices detonated near the embassies of Spain and Colombia. According to press releases, in the area of the attacks were leaflets of the Bolivarian Liberation Front with slogans supporting the government of President Hugo Chavez.<sup>19</sup> The press releases also indicate that on November 26, 2003, the Justice and Interior Minister, the Director of the Body for Investigatory Criminal Sciences (CICPC) and the Commissioner of the DISIP gave a press conference at which they provided evidence by virtue of which these said organs

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<sup>17</sup> The State refers to Article 500 of the COPP: "The Court may authorize labor outside the facility to those detainees who have served at least a quarter of the sentence imposed [...] In addition, for each one of the cases previously mentioned, the following circumstances shall be present: 3. Likelihood of favorable behavior of the detainee, issued in accordance with an evaluation undertaken by a technical team constituted [...]". Note No. AGEV/000537 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, November 12, 2009, page 33.

<sup>18</sup> IACHR. Report on the Situation of Human Rights in Venezuela, OEA/Ser.L/V/II.118, Doc. 4 rev. 1, October 24, 2003, para. 286.

<sup>19</sup> Press Information available at: [http://news.bbc.co.uk/hi/spanish/latin\\_america/newsid\\_2797000/2797977.stm](http://news.bbc.co.uk/hi/spanish/latin_america/newsid_2797000/2797977.stm).

concluded that various military personnel present in the Plaza Altamira were involved in many of the terrorist type of attacks, such as the explosions at the Colombian and Spanish embassies.<sup>20</sup>

## **2. The Criminal Proceedings Undertaken against Raúl José Díaz Peña**

### **2.1 The Investigation and Detention of Raúl José Díaz Peña**

51. Raúl José Díaz Peña, 28 years of age at the time of the acts, used to participate in events in the Plaza de Altamira, where he received the nickname "Phoenix", as a participant in matters of security.<sup>21</sup>

52. On September 9, 2003, the 22nd First Instance Control Judge authorized agents from the DISIP to impound the vehicle "Toyota make pick-up truck, Samuray Model, color yellow, license plates ATJ-706, which must be placed under the control of the 62nd Prosecutor [...], for a reasonable and unextendable period of time, in order that the necessary forensic evidence to clarify the facts under investigation is undertaken by the said organ [...] in relation to the detonation of explosive devices in the embassies of the Diplomatic Missions of the Republics of Colombia and Spain."<sup>22</sup> This vehicle used to belong to his father.<sup>23</sup>

53. Raúl José Díaz Peña was summoned on numerous occasions to make a statement about the February 25, 2003 attacks, and he appeared at all the pretrial proceedings.<sup>24</sup> More specifically, Raúl José Díaz Peña was summoned on September 11, 2003, to the headquarters of the CICPC<sup>25</sup> and the DISIP,<sup>26</sup> on September 12, 2003, to the headquarters of the CICPC<sup>27</sup> and on December 4, 2003 to the Department of Counter-Terrorism Investigations of the CICPC.<sup>28</sup>

54. On September 12, 2003, Raúl José Díaz Peña appeared before the CICPC in an interview where he pointed out that on September 10, 2003, "between ten and eleven in the

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<sup>20</sup> Press Information available at: <http://www.rnv.gov.ve/noticias/?act=ST&f=2&t=1780>.

<sup>21</sup> "[...] OTHER: Tell me, did you used to or have you been present at the events that took place in the Plaza Francia de Altamira? REPLY: "Yes". OTHER: Tell me, how did you participate in the events that took place in the Plaza Francia de Altamira? REPLY: "Assistant". OTHER: Tell me, when you participated in the events that took place in the Plaza Francia de Altamira, were you called by any name or nickname? REPLY: "Yes, Phoenix". OTHER: Tell me, what type of assistance did you provide in the Plaza Francia de Altamira? REPLY: "Security [...]" Justice and Interior Ministry, Body for Investigatory Criminal Sciences (CICPC), Homicide Investigation Division, Interview with Raúl Díaz Peña, September 12, 2003. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>22</sup> 22nd First Instance Court with Control Functions of the Metropolitan Criminal Judicial Circuit of Caracas, September 9, 2003. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>23</sup> Justice and Interior Ministry, Body for Investigatory Criminal Sciences (CICPC), Homicide Investigation Division, Interview with Raúl Díaz Peña, September 12, 2003. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>24</sup> Petitioners' allegation in the original petition received by the IACHR on October 12, 2005. Not disputed by the State.

<sup>25</sup> CICPC summons to appear on September 11, 2003 at 9:00 AM (summons undated). Annex to the original petition received by the IACHR on October 12, 2005.

<sup>26</sup> DISIP summons of September 10, 2003 to appear on September 11, 2003 a las 8:30 AM. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>27</sup> CICPC summons of September 11, 2003 to appear on September 12, 2003 a las 9:00 AM. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>28</sup> CICPC summons of December 4, 2003 to appear the same day December 4, 2003 at 3:00 PM. Annex to the original petition received by the IACHR on October 12, 2005.

morning<sup>29</sup> a commission of the DISIP came to his house with a warrant from the Prosecutor to impound his yellow Toyota Samuray pick-up truck in order to perform a forensic examination of it.<sup>30</sup> The agents of the DISIP impounded it and informed him that expert tests would be carried out on the pick-up truck that same day and that he could come before this organ at 2:00pm.<sup>31</sup> When Raúl José Díaz Peña turned up at the DISIP headquarters at 2:00 pm, the expert testing had already begun, therefore his representative complained to the 62nd Prosecutor, who continued with the expert testing.<sup>32</sup>

55. As shown in the expert report on November 5, 2003, the designated expert concluded, "the waxy whitish colored substance present in the studied sweeps and indicated, respectively, as No. 1 (the Cargo Zone) and No. 2 (rear floor - left side) corresponds to the high explosive know as C4 or HARRISITIE".<sup>33</sup>

56. On January 15, 2004, Gilberto Landaeta, 62nd Prosecutor Auxiliary to the Prosecutor for the Metropolitan Area of Caracas, requested that the 11th Control Court for the Metropolitan Criminal Judicial Circuit of Caracas issue a judicial arrest warrant against Raúl José Díaz Peña as an accomplice in the crimes of conspiracy,<sup>34</sup> public intimidation,<sup>35</sup> offences against the preservation of public and private interests,<sup>36</sup> criminal damage to public property<sup>37</sup> and minor

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<sup>29</sup> Justice and Interior Ministry, Body for Investigatory Criminal Sciences (CICPC), Homicide Investigation Division, Interview with Raúl Díaz Peña, September 12, 2003.

<sup>30</sup> Justice and Interior Ministry, Body for Investigatory Criminal Sciences (CICPC), Homicide Investigation Division, Interview with Raúl Díaz Peña, September 12, 2003.

<sup>31</sup> Petitioners' allegation in brief received by the IACHR on June 29, 2007. Not disputed by the State. In a report of November 5, 2003, signed by employees of the Microanalysis Department of the CICPC that on September 10, 2003, at 2:45pm, they were taken to the headquarters of the DISIP in order to undertake technical investigations on the Toyota vehicle, Samuray model, yellow in color, in the presence of the 62 Auxiliary Prosecutor of the Public Prosecution Services of the City of Caracas, Gilberto Landaeta Gordon. Memorandum No. 9700-035-5583 of the Microanalysis Department of the Investigatory Criminal Sciences (CICPC), November 5, 2003. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>32</sup> Petitioners' allegation in the original petition received by the IACHR on October 12, 2005. Not disputed by the State.

<sup>33</sup> Memorandum No. 9700-035-5583 of the Microanalysis Department of the Investigatory Criminal Sciences (CICPC), Expert Report issued by Principal Expert Andrés M. López, November 5, 2003. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>34</sup> Article 287 of the Criminal Code of the Bolivarian Republic of Venezuela states: "When two or more persons associate together with the aim of committing offenses, each one shall be sentenced, for the mere act of association, to between two and five years imprisonment."

<sup>35</sup> Article 297 of the Criminal Code of the Bolivarian Republic of Venezuela states: "Every individual who illegally imports, manufactures, carries, keeps, provides or conceals explosive or incendiary substances or articles, shall be punished with a prison sentence of between two and five years. Whosoever, with the sole object of provoking public terror, of rousing a crowd, or of causing public disorder, shall discharge firearms or throw explosive or incendiary substances against persons or property, shall be sentenced to between three and six years imprisonment, without prejudice to the corresponding sentences for the offense which they have incurred using said firearms."

<sup>36</sup> Article 344 of the Criminal Code of the Bolivarian Republic of Venezuela states: "Any individual who has set fire to any building or other construction, products of the soil even ungathered or unharvested, or deposits of combustible materials, shall be sentenced to between three and six years imprisonment. It the fire was caused to buildings designed to be a home or to public buildings, or designed to be for public use, for a public utility company or industrial plant, for the exercise of worship, warehousing or storage for industrial or agricultural equipment, merchandise, raw materials, inflammatory or explosive materials, or mining, highway, railway, pit, arsenal or shipyard materials, the prison sentence shall be between four and eight years. The same sentence shall be incurred by whoever causes damage to buildings or other industrial or commercial installations by other means. Any individual who has damaged the means used to transmit electricity or gas, or who has caused an interruption in their supply, shall be sentenced to between two and six years imprisonment." Article 347 states: "The sentence established in Article 344 shall be applied, respectively, to whomsoever, with the object of destroying, in whole or in part, buildings or houses referred to in the said Article, has prepared or planted mines, incendiaries, bombs, or other constructed explosive devices and also to all who prepare or place inflammable materials

injuring<sup>38</sup> in relation to Article 84, para.1 of the Criminal Code.<sup>39</sup> The arrest warrant points out that as the investigations progressed it was determined that Raúl José Díaz Peña knew of the planning of the terrorist attacks against the Colombian and Spanish embassies.<sup>40</sup> The evidentiary basis of the arrest warrant were the statements of Raúl José Díaz Peña,<sup>41</sup> the forensic report conducted on the Samuray Model Toyota pick-up truck, the witness statement of Pedro Antonio Sifontes Núñez, the witness statement of Vanessa Mariel Napolitano Salazar, and the witness statement of Silvio Daniel Mérida Ortiz.<sup>42</sup>

57. On January 22, 2004, the 11th First Instance Control Court for the Judicial District of the Metropolitan Area of Caracas decided to issue a preventive detention order against Raúl José Díaz Peña,<sup>43</sup> which was notified to the 62nd Prosecutor that same day. On February 18, 2004, the 62 Prosecutor sent a summons to Raúl José Díaz Peña that he should appear in order to make a statement with a trusted lawyer on February 25, 2004.<sup>44</sup>

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...continuation

capable of producing the same effect." Article 355 states: "When any of the acts or actions laid down in the preceding Articles has endangered the life of any person, the sentences established in the same shall be increased by one half."

<sup>37</sup> Article 475 of the Criminal Code of the Bolivarian Republic of Venezuela states: "Any individual who has, howsoever, destroyed, annihilated, damaged or spoiled items, moveable or immovable, belonging to another shall be punished, at the initiative of the aggrieved party, with imprisonment of one to three months. Imprisonment shall be between forty five days and eighteen months, if the action is committed in any of the following circumstances: 1) with revenge against a public official, due to his duties; 2) by violence against persons, or by any of the means indicated in paragraphs 4 and 5 of Article 455; 3) in public buildings or those designed to be for public use, or public utility or the exercise of worship; or in buildings or constructions of the kind specified in Article 351, or in public monuments, cemeteries or their dependencies; 4) in docks, levees or other constructions designed for repairing a disaster or in the equipment and signaling of any public utility; 5) in canals, locks and other constructions designed for irrigation; 6) in sugar-cane, coffee or cacao plantations, in tree plantations or fruiting orchards or fields of lesser crops." Article 476 states: "Whenever the conduct set out in the preceding Article has been committed with violence or in resisting authority, or in a group of ten or more individuals, all those participating in the offense shall be punished thus: in the first case, with imprisonment up to four months; and in the case of the second section, with imprisonment between one month and two years, always proceeding *ex officio*."

<sup>38</sup> Article 415 of the Criminal Code of the Bolivarian Republic of Venezuela states: "Whosoever, without the intention to kill, but to cause injury, has caused physical suffering to another individual, or an injury to the health or an impairment in the intellectual faculties of, another individual, shall be punished with imprisonment between three and twelve months." Article 418 of the Criminal Code of the Bolivarian Republic of Venezuela states: "If the offense set out in Article 415 was inflicted on the injured person, the injury only needing medical assistance at the time for him to go about his ordinary business or normal occupation, the sentence shall be between three and six months detention."

<sup>39</sup> Article 84.1 of the Criminal Code of the Bolivarian Republic of Venezuela states: "Those participating in the commission of the offense in following ways, shall receive half of the corresponding sentence: 1. By reinforcing the perpetrator's resolution to commit the offense or promising assistance and help once it has been committed [...]. The reduction of sentence provided for in this rule is not applicable to those in the specified cases whenever, without their participation, the conduct would not have taken place."

<sup>40</sup> Communication FMP-62-0038-04 of the 62nd Prosecutor for the Metropolitan District of Caracas. Request for arrest warrant, January 15, 2004. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>41</sup> The 62nd Prosecutor stressed that "[...] although it is clear that [Raúl Díaz Peña's statement] cannot be taken as an element of responsibility, it is no less certain that it can serve to corroborate and confirm the statements and expert reports which will effectively be overwhelming evidence to show the involvement of the above citizen in the acts under investigation." Communication FMP-62-0038-04 of the 62nd Prosecutor for the Metropolitan District of Caracas. Request for arrest warrant, January 15, 2004. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>42</sup> Communication FMP-62-0038-04 of the 62nd Prosecutor for the Metropolitan District of Caracas. Request for arrest warrant, January 15, 2004. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>43</sup> 11th First Instance Court with Control Functions for the Judicial Circuit of the Metropolitan Area of Caracas January 22, 2004. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>44</sup> 62nd Prosecutor for the Judicial District of the Metropolitan Area of Caracas, Summons, February 18, 2004. Annex to the original petition received by the IACHR on October 12, 2005.

58. On February 25, 2004, Raúl José Díaz Peña was arrested. The Commission points out that there are two versions about the way in which his arrest was carried out. As regards the petitioners, an amparo appeal lodged on August 14, 2006, by Raúl José Díaz Peña's defense, indicates

[...] As soon as my client left the headquarters of the General Prosecution Services together with his father in order to take the metro, they were stopped by agents [of the DISIP] who did not show him the arrest warrant and proceeded to arrest my client, and some belongings were handed over to his father; however, in the arrest report, these agents stated that they were walking just outside the General Prosecution Services's building and realized that there was an individual acting suspiciously whom they asked for an identification and once they requested a background check, they realized that the individual (Raúl Díaz Peña) appeared to have an arrest warrant issued against him and they took him to the DISIP.<sup>45</sup>

59. As for the State, in Police Report, dated February 25, 2004, the Sub-Commissioner, Melvin Collazos, assigned to the DISIP, recorded the following:

I was on my way to the Headquarters of the 62nd Prosecutor's office in the company of employees Chief Inspectors Raúl Machado and Pedro González, Inspectors Arnaldo Sandoval and Emiliano Hernández, in order to interview the client of the same lawyer Gilberto Landaeta. As soon as we reached the said place we spotted in the surroundings of the said Prosecutors office a citizen dressed in a dark gray flannels, Levi Jeans and blue Nike sneakers, who, becoming aware of our presence, began to behave nervously and suspiciously so that we immediately began to comply with the rigorous procedures laid down by law. We identified ourselves as police officers of this office, showing the reason for our action in a clear voice as clearly stated in Article 205 of the Organic Code of Criminal Procedure we proceeded to undertake a body search; he was immediately asked for his national identity document which when required through a transmission from the officer of our Service's Division of Information and Documentation he informed that this citizen was required in the arrest warrant No. 002-04 of 22/01/04 issued by the 11 Control Judge of the First Instance for the metropolitan district of Caracas, Deyanira Nieves Bastidas.<sup>46</sup>

60. On February 26, 2004, a hearing took place to present the detainee before the 11th Control Court,<sup>47</sup> and on February 27, 2004, the same Court issued Judicial Decision of Preventive Detention against Raúl José Díaz Peña, based upon the existence of sufficient elements of conviction to prove the commission, as an accomplice, of the crimes for which he had been arrested.<sup>48</sup>

61. On April 6, 2004, the representative of the General Prosecution Services formally filed charges against Raúl José Díaz Peña. On April 22, 2004, Raúl José Díaz Peña's defense lodged a brief requesting an entire nullification for failure to fulfill the forms and conditions laid down by law, more specifically for the breach of procedural unity which affected the right to a defense and equality of arms; the nullity of the expert evidence filed by the General Prosecution

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<sup>45</sup> Amparo appeal lodged on August 14, 2006. Annex to petitioners' brief received by the IACHR on August 28, 2006.

<sup>46</sup> Police Report of February 25, 2004, cited in the Judicial Decision for Preventive Detention, Case No. CO-11-2565-03, 11th First Instance Court with Control Functions for the Judicial Circuit of the Metropolitan Area of Caracas February 27, 2004. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>47</sup> Minutes of the Hearing for Presentation of the Accused, File No. CO-11-2565-03, 11th First Instance Court with Control Functions for the Judicial Circuit of the Metropolitan Area of Caracas February 26, 2004. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>48</sup> Judicial Resolution for Preventive Detention, Case No. CO-11-2565-03, 11th First Instance Court with Control Functions for the Judicial Circuit of the Metropolitan Area of Caracas February 27, 2004. Annex to the original petition received by the IACHR on October 12, 2005.

Services for violating the guarantees of due process; they challenged the indictment drawn up by the Prosecutor alleging that the prerequisites laid down in Article 326, paragraphs 2, 3 and 4 of the COPP<sup>49</sup> had not been fulfilled, and requested the annulment of the detention measure.<sup>50</sup>

## 2.2 Preliminary Hearing and other Judicial Proceedings

62. On May 24, 2004, Raúl José Díaz Peña's defense received notice in which the proceedings of the first hearing were fixed in the matter being undertaken against Silvia Daniel Mérida Ortiz and Raúl José Díaz Peña for June 15, 2004, "with the object of preserving the unity of the proceedings"<sup>51</sup> so that via this measure the trials of Raúl José Díaz Peña and Silvia Daniel Mérida Ortiz were consolidated. On June 15, 2004, the 11th First Instance Control Court of the Metropolitan Criminal Judicial Circuit of Caracas opened the proceedings of a preliminary hearing, in which the indictment issued against Raúl José Díaz Peña was admitted in its entirety, accepted the legal qualification of the acts made by the Prosecutor, determined the opening of the oral public trial, and considered it well-founded to maintain the preventive detention measure "given the gravity of the facts alleged there is a presumed danger of absconding".<sup>52</sup> In the same procedural step, the Court declared unfounded the exceptions and requests for annulment lodged by Raúl José Díaz Peña's defense.<sup>53</sup> On July 6, 2004, the 62nd Auxiliary Metropolitan Prosecutor of Caracas, Sol Leylimar Domínguez Alvarenga, ruled with respect to the nullity request made by Raúl José Díaz Peña's defense and requested that the decision issued by the 11th First Instance Control Court of the Metropolitan Criminal Judicial Circuit of Caracas be confirmed.<sup>54</sup>

63. On September 7, 2004, Raúl José Díaz Peña's defense requested the review of the preventive detention measure,<sup>55</sup> which was denied on September 15, 2004, by the 28th Court by reason of the existence of evidence based on the participation of the alleged victim in the attacks and the presumption of absconding set out in Article 251 of the COPP,<sup>56</sup> since, if the liability of the

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<sup>49</sup> Article 326 of the Organic Code of Criminal Procedure states: "Indictment. When the Public Prosecutor considers that the investigation provides serious grounds for the public indictment of the accused, he shall present the indictment before the court of control. The indictment shall contain: [...] 2. A clear, precise and justified link of the offense attributed to the accused; 3. The grounds of the accusation, expressing the elements of conviction justifying it; 4. A statement of the applicable judicial principles [...]"

<sup>50</sup> Brief filed before the 11th First Instance Court with Control Functions of the Criminal Judicial Circuit of the Metropolitan Area of Caracas, April 22, 2004. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>51</sup> Notification, 11th First Instance Court with Control Function of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, May 24, 2004. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>52</sup> Preliminary Hearing Order, 11th First Instance Court with Control Function of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, June 15, 2004, accused: Raúl José Díaz Peña and Silvio Daniel Mérida Ortiz. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>53</sup> Minutes of the Preliminary Hearing, 11th First Instance Court with Control Function of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, June 15, 2004, Accused: Raúl José Díaz Peña and Silvio Daniel Mérida Ortiz. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>54</sup> 62nd Prosecutor for the Metropolitan Area of Caracas, July 6, 2004. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>55</sup> Raúl José Díaz Peña's Defense Request to the 28th First Instance Court with Judicial Function of the Judicial District of the Metropolitan Area of Caracas, September 7, 2004. Annex to the original petition received by the IACHR on October 12, 2005. Article 264 of the Organic Code of Criminal Procedure: "Examination and Review. The accused may request the revocation or substitution of the judicial detention measure whenever he considers it relevant. In every case the Judge shall examine the necessity of maintaining the precautionary measures every three months, and when he considers it appropriate, he shall substitute less serious measures. The refusal of the court to revoke or substitute the measure is not appealable."

<sup>56</sup> Article 251 of the Organic Code of Criminal Procedure provides: "[...] First Paragraph: A danger of absconding shall be presumed in the cases of offences leading to imprisonment whose maximum term is equal to or greater than ten years. In this case, the prosecutor of the General Prosecution Services, and if the circumstances in Article 250 are met, shall

accused were established, the sentence that might be imposed could exceed ten years.<sup>57</sup> For the purpose of the oral public trial, on December 13, 2004, the Court fixed a new extraordinary jury impaneling to choose the jurors for December 20, 2004, since the citizens who had been subpoenaed had not attended.<sup>58</sup> From the case file it is not apparent when the previous jury impaneling took place.

64. On December 16, 2004, the application of a less severe measure in favor of Raúl José Díaz Peña<sup>59</sup> was requested. The request was denied by the 28th First Instance Court of the Metropolitan Criminal Judicial Circuit in a decision of December 20, 2004.<sup>60</sup> On February 21, 2005, Raúl José Díaz Peña's defense requested the review of the preventive detention measure, which was turned down by the 28th First Instance Court of the Metropolitan Criminal Judicial Circuit in a decision of February 24, 2005.<sup>61</sup>

65. On March 11, 2005, Raúl José Díaz Peña's defense requested that the trial proceedings should be conducted by a single-judge court, and on March 16, 2005, the Court accepted the constitution of the Single-Judge Court, a decision that was ratified by Raúl José Díaz Peña and Silvio Mérida Ortiz on April 1, 2005. It is also shown that on April 4, 2005, the 28th Trial Court with granted the constitution of the Court and fixed a date for the oral public trial for April 27 2005.<sup>62</sup>

66. On April 18, 2005, the Deputy Judge in charge of the 28th Court, Ludmila Pulido recused herself in view of the fact that she intervened in the case while at the 11th Court of Control. The recusal was acknowledged on May 16, 2005. On April 21, 2005, after a new distribution, the 22nd Court with Judicial Functions under the charge of Judge María Mercedes Prado received the case file and on May 5, 2005, fixed the oral public trial for May 26, 2005. On May 26, 2005, the oral public trial was adjourned for July 14, 2005, in view of the fact that the Prosecutor representation did not attend.<sup>63</sup>

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...continuation

request the Judicial Preventive Detention Measure. In any case, the Judge may, according to the circumstances, which must be reasonably explained, reject the Prosecutor's petition and impose an alternative precautionary measure on the accused. The decision issued may be appealed by the Prosecutor or the accused, whether defended or not, within five days following its announcement."

<sup>57</sup> 28th First Instance Court with Judicial Functions of the Criminal Judicial Circuit of the Metropolitan Area of Caracas, decision of September 20, 2004. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>58</sup> Note No. AGEV/000600 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, May 3, 2007.

<sup>59</sup> Raúl José Díaz Peña's defense request to the 28th First Instance Court with Judicial Function of the Judicial District of the Metropolitan Area of Caracas, December 16, 2004. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>60</sup> 28th First Instance Court with Judicial Functions of the Criminal Judicial Circuit of the Metropolitan Area of Caracas, decision of December 20, 2004. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>61</sup> Summary of the proceedings in the Resolution of the 23rd First Instance Court with Judicial Function of the Criminal Judicial Circuit for the Metropolitan Area of Caracas of March 29, 2006. Annex to petitioners' brief received by the IACHR on June 14, 2006.

<sup>62</sup> Summary of the proceedings in the Resolution of the 23rd First Instance Court with Judicial Function of the Criminal Judicial Circuit for the Metropolitan Area of Caracas of March 29, 2006. Annex to petitioners' brief received by the IACHR on June 14, 2006.

<sup>63</sup> Summary of the proceedings in the Resolution of the 23rd First Instance Court with Judicial Function of the Criminal Judicial Circuit for the Metropolitan Area of Caracas of March 29, 2006. Annex to petitioners' brief received by the IACHR on June 14, 2006.

67. On June 9, 2005, the application of a less severe measure in favor of Raúl José Díaz Peña<sup>64</sup> was again requested, which was rejected by the 22nd First Instance Court for the Metropolitan Criminal Judicial Circuit of Caracas in a decision of July 8, 2005.<sup>65</sup> On July 30, 2005, Raúl José Díaz Peña's defense also requested his transfer from the DISIP to the Reclusion Center located in the Police Training School on humanitarian grounds in view of his health problems,<sup>66</sup> which was declared unfounded on July 13, 2005, by the 22nd First Instance Court for the Metropolitan Criminal Judicial Circuit of Caracas since the said Reclusion Center is exclusively for the use of police employees.<sup>67</sup>

68. On July 14, 2005, the holding of the oral public trial was adjourned for August 12, 2005, in view of the fact that a representative of the Prosecutor did not attend. On September 19, 2005, it was again adjourned from August 12, 2005 until October 19, 2005 since on this day the Court decided not to hold activities. On the same September 19, 2005, a substitution for the precautionary measure was requested in favor of Raúl José Díaz Peña.<sup>68</sup> On October 19, 2005, the holding of the public and oral trial was adjourned for November 2, 2005, in view of the non-attendance of a Prosecutor's representative. On November 2, 2005, the holding of the public and oral trial was adjourned for November 16, 2005, in view of the non-attendance of the General Prosecution Services's representation. On November 16, 2005, the oral public trial was adjourned for November 29, 2005, by virtue of Judge María Mercedes Pardo's dismissal.<sup>69</sup>

69. On November 2, 2005, on occasion of another deferral of the oral public trial in view of non-attendance, for the fourth consecutive time, of a representative of the General Prosecution Services, Judge Prado issued two reports. One requesting that the General Prosecution Services take disciplinary measures against the Prosecutor in charge of the case, Gilberto Alfredo Landaeta Gordon, due to the fact that, according to the petitioners, the procedural delays caused by the non-attendance violated due process. The other indicating that on November 7, 2005, the expiration of the time limit of two years of imprisonment without sentence in respect of Silvio Mérida Ortiz, charged together with Raúl José Díaz Peña, forced her to impose a precautionary measure less grievous than deprivation of liberty in conformity with Article 244 of the COPP.<sup>70</sup>

70. The petitioners also presented a video of a press conference of Judge María Mercedes Prado which took place on November 7, 2005, in which the dismissed Judge pointed out that her questioning of the procedural workings of the Prosecutor in charge of the case caused the

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<sup>64</sup> A summary of the procedural steps was included in the decision of the 23rd First Instance Court with Judicial Function of the Criminal Judicial Circuit for the Metropolitan Area of Caracas of March 29, 2006. Annex to petitioners' brief received by the IACHR on June 14, 2006.

<sup>65</sup> 22nd First Instance Court with Judicial Function of the Judicial District for the Metropolitan Area of Caracas, decision of July 8, 2005. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>66</sup> Raúl José Díaz Peña's defense request to the 22nd First Instance Court with Judicial Function of the Judicial District for the Metropolitan Area of Caracas, June 30, 2005. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>67</sup> 22nd First Instance Court with Judicial Function of the Judicial District for the Metropolitan Area of Caracas, decision of July 13, 2005. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>68</sup> Raúl José Díaz Peña's defense request to the 22nd First Instance Court with Judicial Function of the Judicial District for the Metropolitan Area of Caracas, September 19, 2005. Annex to the original petition received by the IACHR on October 12, 2005.

<sup>69</sup> A summary of the procedural steps was included in the decision of the 23rd First Instance Court with Judicial Function of the Criminal Judicial Circuit for the Metropolitan Area of Caracas of March 29, 2006. Annex to petitioners' brief received by the IACHR on June 14, 2006.

<sup>70</sup> Petitioners' Brief received by the IACHR on June 14, 2006. Not disputed by the State.

speedy intervention of the Court Inspectorate and the Judicial Commission of the Supreme Court of Justice, and her subsequent dismissal.<sup>71</sup>

71. On November 29, 2005, the holding of the oral public trial was adjourned for December 2, 2005, due to the unavailability of recording equipment.<sup>72</sup> On December 2, 2005, there was a procedural step to confirm the court for the oral public trial against Raúl José Díaz Peña and Silvio Mérida Ortiz before the 22nd First Instance Court for the Metropolitan Criminal Judicial Circuit of Caracas constituted as a single judge court by Judge Yngrid Bohórquez Manrique. In the above proceedings Silvio Mérida Ortiz stated that

During those two long years of confinement, I made a summary of what has occurred in this event that has affected myself and my family a lot. On 31.10.2003, while at the office where I live, I was approached by a friend and 3 armed individuals, who shouted at me without identifying themselves, I ignored them, they fired several shots into the air, took me by force, put me in a black van with three people inside, bound my hands, took my pocketbook and asked me whether I knew anything about the bombs, they said to me that they had a lot of information about me, I told them yes I was in the Plaza de Altamira because I directed the sound to the plaza, I was in captivity, they injected me with substances, I have medical check-ups on these acts, they asked me whether I was Dacosta, one of them told us we were lying, I was obliged to make a video blaming some individuals, among them this Raúl Díaz, I don't know him and only saw him in the Plaza Altamira, they threatened me with my children, they showed me pictures of them and they told me the streets of the cinema that my daughter goes to, asking forgiveness to the people that were involved. I was subject to torture. When they moved me to the 11th control, they showed me pictures of my children, I did not want to name them, the Prosecutor Danilo Anderson was one of the prosecutors who was going to the DISIP. I retract my statement, I will put my children at risk, they are as safe as they can be. I want the judges to be impartial; may be they named me and put me on the back of a motorcycle, I was in the Plaza Altamira, it was a job, I was managing the sound in the Plaza Altamira; neither the Public Prosecution Services nor any laws (sic) have investigated my detention, they have found nothing, there is the medical check-up, the time that I was [launched] during 7 days, that's all.<sup>73</sup>

72. On December 5, 2005, Judge Yngrid Bohórquez Manrique recused herself from hearing the case in view of the fact that " Silvio Daniel Mérida Ortiz, the accused in the present case, is a close blood relative (the brother) of citizen Miguel Mérida Ortiz, with whom I have had a close friendship for approximately 20 years, with ties, esteem and affection towards him, all of which may compromise my impartiality".

73. On December 8, 2005, once redistributed, the case was remitted to the 14th Criminal Judicial Circuit. On January 23, 2006, in a decision of Chamber No.04 the recusal of Judge Yngrid Bohórquez Manrique was declared unfounded, and the case was remitted again to the 22nd Court. On January 26, 2006, the 22nd Court ordered the consolidation of case No. 378-06 against Felipe Orlando Rodríguez Ramírez with case No. 347-05 against Raúl José Díaz Peña and Silvio Mérida Ortiz. From this moment on, the cases against Raúl José Díaz Peña and Silvio Mérida Ortiz remained consolidated under the same procedure as the case against Felipe Rodríguez.

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<sup>71</sup> Video Annex to petitioners' brief received by the IACHR on June 14, 2006. Not disputed by the State.

<sup>72</sup> Summary of the proceedings in the Resolution of the 23rd First Instance Court with Judicial Function of the Criminal Judicial Circuit for the Metropolitan Area of Caracas of March 29, 2006. Annex to petitioners' brief received by the IACHR on June 14, 2006.

<sup>73</sup> 22nd First Instance Court with Judicial Function for the Criminal Judicial Circuit of the Metropolitan Area of Caracas, verification of the hearing in the oral trial, December 2, 2005. Annex to petitioners' brief received by the IACHR on June 14, 2006.

74. On January 30, 2006, Judge Yngrid Bohórquez Manrique recused herself for a second time from hearing the case and on February 21, 2006, the case was remitted to the Seventh First Instance Court. On February 23, 2006, the case was remitted once again to the 22nd Court, and on March 3, 2006, Judge Yngrid Bohórquez Manrique recused herself for a third time from hearing the case. Thereafter, after a new distribution, the defense of the accused Felipe Rodríguez recused the 22nd Judge,<sup>74</sup> and on March 7, 2006, the case was remitted to the 13th Court of Justice under the charge of Gardenia del Carmen Delgado Varela. On March 14, 2006, the 13th Judge proceeded to recuse herself and on March 16, 2006, after a new, the case was remitted to the 23rd First Instance Judicial Court under the charge of Judge Yeliz Jiménez Omaña.<sup>75</sup>

75. On March 24, 2006, after the lapse of two years since the imprisonment of Raúl José Díaz Peña, his defense lodged an appeal review of the detention measure, in accordance with Article 244 of the COPP,<sup>76</sup> and on March 29, 2006, the 23rd Court ruled that the review of the detention measure was unfounded.<sup>77</sup> On April 17, 2006, the defense lodged appeal proceedings against the above decision. On May 12, 2006, the Eighth National Prosecutor with Plenary Jurisdiction, Gilberto Landaeta Gordon, exercised his right to answer the appeal proceedings making reference to a judgment of the Supreme Court of Justice on December 9, 2005, which indicated that "crimes against humanity, violations of human rights and war crimes remain excluded from the benefits such as alternative precautionary measures, in case the judge is considering imprisoning the accused."<sup>78</sup> In this context, he indicated that "the acts attributed to [Raúl Díaz Peña] are of a terrorist nature, every terrorist act is a grave violation of human rights"<sup>79</sup> and concluded by requesting that the appeal be declared unfounded. The appeal was admitted on June 12, 2006, and thereafter declared to be unfounded on June 19, 2006 by the First Specialized Chamber of the Court of Appeals and, in its place, upheld the decision of the 23rd Judge.<sup>80</sup>

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<sup>74</sup> Summary of the proceedings in the Resolution of the Fourth First Instance Criminal Court with Judicial Function of the Criminal Judicial Circuit for the Metropolitan Area of Caracas of April 23, 2006. Annex to petitioners' brief received by the IACHR on May, 7, 2007

<sup>75</sup> Summary of the proceedings in the Resolution of the 23rd First Instance Court with Judicial Function of the Criminal Judicial Circuit for the Metropolitan Area of Caracas of March 29, 2006. Annex to petitioners' brief received by the IACHR on June 14, 2006.

<sup>76</sup> Article 244 of the Organic Code of Criminal Procedure states: "Proportionality. An individual coercive measure may not be ordered when it appears disproportionate to the gravity of the offense, the circumstances surrounding its commission and the probable sentence. In no case may it exceed the minimum sentence for each offense, nor exceed two years. In exceptional cases, the General Prosecution Services or the defendant may request a suspension from the control Judge, which may not exceed the minimum sentence for the crime [...]."

<sup>77</sup> 23rd First Instance Court with Judicial Function of the Criminal Judicial Circuit of the Metropolitan Area of Caracas, Resolution on the Request to Review the Precautionary Measure, March 29, 2006, which determined that "it is clear that the procedural delay is not the fault of this court and it is also clear that the two years have not passed in order that a less serious measure may be granted". Annex to petitioners' brief received by the IACHR on June 14, 2006.

<sup>78</sup> Judgment of the Supreme Court of Justice, Judge Rapporteur Jesús Eduardo Cabrera, November 9, 2005 cited in: Eight National Prosecutor with Full Jurisdiction, May 12, 2006. Annex to petitioners' brief received by the IACHR on August 28, 2006.

<sup>79</sup> Judgment of the Supreme Court of Justice, Judge Rapporteur Jesús Eduardo Cabrera, November 9, 2005 cited in: Eight National Prosecutor with Full Jurisdiction, May 12, 2006. Annex to petitioners' brief received by the IACHR on August 28, 2006.

<sup>80</sup> First Special Chamber of the Court of Appeals for the Criminal Judicial Circuit of the Metropolitan Area of Caracas Hearing Cases of Offenses Related to Terrorism, Judge Rapporteur Maikel José Moreno, Judgment on Appeal, June 19, 2006. Annex to petitioners' brief received by the IACHR on June 14, 2006.

76. The First Specialized Chamber pointed out among its reasons that

although it is clear that there has been a lapse of time greater than two (02) years [...] the Constitutional Chamber of the Supreme Court of Justice, has jurisprudential dicta [...] in which it is irrefutably established that all the aforementioned crimes against humanity, violations of human rights and war crimes, remain excluded from the benefits such as alternative precautionary measures, in case the judge is considering imprisoning the accused.<sup>81</sup>

Also, as regards the presumption of absconding set out in the first paragraph of Article 251 of the COPP, it pointed out that

Through the abovementioned Article, the Legislator considered it necessary for the implementation or carrying out of the Precautionary Detention Measure when there is danger of absconding by the accused, and the State's punitive power may be illusory. In that sense, it established certain basic assumptions or some circumstances which authorize the judicial detention of the accused, setting as one of the circumstances or assumptions which indicate a Risk of Absconding, the sentence that may be imposed on the accused and the scale of the harm caused by the act under investigation and to be punished.<sup>82</sup>

It also stated that "the Attorney General, according to its investigations, was able to verify that citizen Raúl José Díaz Peña took part in the planning of the [attack(s) against the Colombian Consulate and the Spanish Embassy],<sup>83</sup> which constitute "the types of crimes which considerably exceed that set out in the first paragraph of Article 251".<sup>84</sup>

77. On June 22, 2006, Raúl José Díaz Peña's defense lodged a revocation appeal against the decision denying the appeal proceedings,<sup>85</sup> which was declared unfounded on June 28, 2006.<sup>86</sup>

78. In a brief of the petitioners it is evident that the defense of the co-accused Felipe Rodríguez requested the recusal of participating Judge of the 23rd Court,<sup>87</sup> which was ruled justified, and the case was assigned to the Fourth First Instance Court with Judicial Function, under

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<sup>81</sup> First Special Chamber of the Court of Appeals for the Criminal Judicial Circuit of the Metropolitan Area of Caracas Hearing Cases of Offenses Related to Terrorism, Judge Rapporteur Maikel José Moreno, Judgment on Appeal, June 19, 2006. Annex to petitioners' brief received by the IACHR on June 14, 2006.

<sup>82</sup> First Special Chamber of the Court of Appeals for the Criminal Judicial Circuit of the Metropolitan Area of Caracas Hearing Cases of Offenses Related to Terrorism, Judge Rapporteur Maikel José Moreno, Judgment on Appeal Petition, June 19, 2006. Annex to petitioners' brief received by the IACHR on June 14, 2006.

<sup>83</sup> First Special Chamber of the Court of Appeals for the Criminal Judicial Circuit of the Metropolitan Area of Caracas Hearing Cases of Offenses Related to Terrorism, Judge Rapporteur Maikel José Moreno, Judgment on Appeal Petition, June 19, 2006. Annex to petitioners' brief received by the IACHR on June 14, 2006.

<sup>84</sup> First Special Chamber of the Court of Appeals for the Criminal Judicial Circuit of the Metropolitan Area of Caracas Hearing Cases of Offenses Related to Terrorism, Judge Rapporteur Maikel José Moreno, Judgment on Appeal Petition, June 19, 2006. Annex to petitioners' brief received by the IACHR on June 14, 2006.

<sup>85</sup> Raúl Díaz Peña's defense Brief, June 22, 2006. Annex to petitioners' brief received by the IACHR on June 14, 2006.

<sup>86</sup> First Special Chamber of the Court of Appeals for the Criminal Judicial Circuit of the Metropolitan Area of Caracas Hearing Cases of Offenses Related to Terrorism, Judge Rapporteur Maikel José Moreno, Resolution of June 28, 2006. Annex to petitioners' brief received by the IACHR on August 28, 2006.

<sup>87</sup> Petitioners' Brief received by the IACHR on June 29, 2007.

the charge of Judge Migdalia María Añez González.<sup>88</sup> On May 8, 2006, the Fourth Court fixed the date for an extraordinary jury selection process for May 23, 2006, on June 16, 2006, it fixed another selection process for July 3, 2006, and on July 12, 2006, and it fixed the jury clearance for August 10, 2006. On August 10, 2006, the jury clearance took place with objections from the parties regarding its constitution so that on August 11, 2006, a new jury selection process was fixed and took place on September 18, 2006.<sup>89</sup>

79. On October 18, 2006, the Fourth Judge of First Instance recused herself from hearing the case,<sup>90</sup> as a result of which it was assigned to the 29th Court. Nonetheless, on October 20, 2006, the Court of Appeals declared the recusal was unfounded<sup>91</sup> and the case returned to the Fourth Court.

80. On April 17, 2007, Raúl José Díaz Peña's defense requested the Fourth First Instance Court to review the detention measure, which was declared unfounded on April 23, 2007, considering that the circumstances under which it was initially ordered had not changed, and there were circumstances present to presume a risk of absconding, since the sentence that could be imposed on Mr. Raúl José Díaz Peña could be "considerable".<sup>92</sup>

## **2.2 The Oral Public Trial**

81. On September 18, 2007, the Fourth First Instance Court of the Metropolitan Criminal Judicial Circuit of Caracas, constituted as a single-judge court, began the oral phase of the trial.

82. The period of final conclusions was on April 28, 2008 and on April 29, 2008, the verdict was read out, and was formally published on June 17, 2008. In the judgment Raúl José Díaz Peña was sentenced to nine years four months imprisonment as he was found to be the perpetrator responsible for committing the crimes of conspiracy, aggravated arson as facilitator, and concealing explosive substances. Also, Raúl José Díaz Peña was sentenced to accessory punishment established in Article 13 of the Criminal Code.<sup>93</sup>

## **2.3 Execution of the Sentence**

83. On July 23, 2008, the Eighth Court (for Enforcement) received the verdict from the Fourth Court and on July 25, 2008, proceeded to definitively compute the sentence where they

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<sup>88</sup> Summary of the proceedings in the Resolution of the Fourth First Instance Criminal Court with Judicial Function of the Criminal Judicial Circuit for the Metropolitan Area of Caracas of April 23, 2007. Annex to petitioners' brief received by the IACHR on May 7, 2007.

<sup>89</sup> Summary of the proceedings in the Resolution of the Court of Appeals of the Criminal Judicial Circuit of the Judicial District of the Metropolitan Area of Caracas, File No. 2146-2006 (CI) S-6, October 20, 2006. Annex to petitioners' brief received by the IACHR on November 22, 2006.

<sup>90</sup> Fourth Court of First Instance of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, Act of recusal, October 18, 2006. Annex to the petitioner's brief received at the IACHR November 22, 2006.

<sup>91</sup> Court of Appeals of the Criminal Judicial Circuit of the Judicial District for the Metropolitan Area of Caracas, Case No. 2146-2006 (CI) S-6, October 20, 2006. Attached to petitioner's brief received at the IACHR November 22, 2006.

<sup>92</sup> The petitioners quote the Fourth Court of First Instance with Judicial Function of the Criminal Judicial Circuit of the Judicial District of the Metropolitan Area of Caracas, April 23, 2007. Annex to petitioners' brief received by the IACHR on May 7, 2007.

<sup>93</sup> Fourth Court of First Instance with Judicial Function of the Criminal Judicial Circuit of the Metropolitan Area of Caracas, Minutes of the Oral Trial, Case No. 4J-397-06, April 28 and 29, 2008. Annex to petitioners' brief received by the IACHR on October 2, 2008.

pointed out that "in consideration of the sentence imposed on [Raúl Díaz Peña] (9 years and 4 months imprisonment), and of the time of his preventive detention (4 years and 5 months), there is express evidence that he still has to serve the remaining sentence of four (4) years and eleven (11) months, this sentence will be completed on June 25, 2013".<sup>94</sup>

84. As regards the early release scheme, the Execution Judge ruled that Raúl José Díaz Peña has no option to the measure of a Conditionally Suspension Sentence, since he was sentenced to punishment greater than five years. As regards the alternative measures of labor outside the prison facilities and the destination to open penitentiary, he ruled that Raúl José Díaz Peña has already opted for these measures, without prejudice to the resulting remissions and the determination of the requirements laid down in Article 65 of the Law of the Prison System and Articles 1 and 4 of the COPP. It also indicated that on May 15, 2010, he may opt for the alternative conditional parole measure, and on February 25, 2011, he may choose the grace of commuting his sentence or house arrest.<sup>95</sup>

85. From the case file it appears that on September 23, 2008, Raúl José Díaz Peña's defense presented a written brief before the First Chamber of the Court of Appeals of the Metropolitan Criminal Judicial Circuit of Caracas requesting that execution of the sentence be continued in view of the prisoner's serious health condition. The defense also renounced their right to present appeal proceedings before the judgment and requested that a certified copy of the case file of the Fourth Court of Justice be remitted to the Eighth Court so that it could proceed to execution. The said request was denied by the Chamber in view of the fact that it was seized of appeal proceedings lodged by Felipe Rodríguez's defense so that the judgment was not definitively final.<sup>96</sup> To be more specific the First Chamber pointed out that

although it is certain that every citizen protected by our Fundamental Law has the constitutional right to health, it is no less certain that the case before us today is not definitively final as to the effects established in Article 478 *et seq.* of the Criminal Procedural Code; therefore a judgment that is not final cannot be executed. Raúl Díaz Peña has been convicted but not sentenced and therefore any request regarding the abovementioned constitutional right must be considered in this instance together with the fact that there is only one original of this file and it is not possible for a superior court to issue a sentence on the basis of a copy<sup>97</sup>.

86. Raúl José Díaz Peña's defense pointed out the incompatibility with the said decision and filed a new request of the same nature. On October 21, 2008, the First Chamber of the Court of Appeals decided to declare the request unfounded "by virtue of the fact that the same must be lodged before the Execution Court once the judgment becomes definitively final".<sup>98</sup> On February 19, 2009, the Court of Appeals for the Metropolitan Criminal Judicial Circuit of Caracas, 07

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<sup>94</sup> First Instance Court of the Criminal Judicial Circuit of the Judicial District of the Metropolitan Area of Caracas, Eighth Court of Execution, Case No. 8-E-1755-08, July 25, 2008. Annex to petitioners' brief received by the IACHR on October 2, 2008.

<sup>95</sup> First Instance Court of the Criminal Judicial Circuit of the Judicial District of the Metropolitan Area of Caracas, Eighth Court of Execution, Case No. 8-E-1755-08, July 25, 2008. Annex to petitioners' brief received by the IACHR on October 2, 2008.

<sup>96</sup> First Chamber of the Court of Appeals for the Criminal Judicial Circuit of the Area of Caracas, Decision of October 21, 2008. Annex to petitioners' brief received by the IACHR on December 3, 2008.

<sup>97</sup> First Chamber of the Court of Appeals for the Criminal Judicial Circuit of the Area of Caracas, Decision of October 21, 2008. Annex to petitioners' brief received by the IACHR on December 3, 2008.

<sup>98</sup> First Chamber of the Court of Appeals for the Criminal Judicial Circuit of the Area of Caracas, Decision of October 21, 2008. Annex to petitioners' brief received by the IACHR on December 3, 2008.

Chamber, declared the appeal proceedings lodged by Felipe Rodríguez to be unfounded.<sup>99</sup> On April 7, 2009, the Eighth Execution Judge addressed the Regional Coordinator of Non-Institutional Treatment of the Ministry of Popular Power for Justice and Internal Relations in order to request a designation of the multi-disciplinary team that would carry out the psychological evaluation on the future behavior of Raúl José Díaz Peña, who chose the early release work detachment measure.<sup>100</sup>

87. By virtue of the judicial rotation, Judge Gabriela Salazar Uzcátegui remained in charge of the Eighth Execution Court and then recused herself from hearing the case by virtue of her friendship with Felipe Rodríguez's lawyer.<sup>101</sup> Thereafter, the case was sent to the Third Execution Court under Judge Elías Álvarez, who in turn recused himself, and lastly the case was sent to the Seventh Execution Court under Judge Ricardo Hecker, seized the case on July 13, 2009.<sup>102</sup>

88. On May 29, 2009, the psychological evaluation was performed on Raúl José Díaz Peña and on July 9, 2009, the multi-disciplinary team issued Technical Report No. 0421/09, with a diagnosis that "the criminal conduct in which the detainee is involved has to be seen with his impulsiveness, the absence of sensitivity to the pain of others and the search for opportunities to of a political change which he believed was inevitable; taking advantage of a political path that he believe inevitable; coupled with those which was aided by associating with persons with dysfunctional behavior. In actual fact, the detainee does not show deep self-introspection and there is no genuine behavioral change."<sup>103</sup> Lastly, the Report concluded with an unfavorable outlook in view of the fact that Raúl José Díaz Peña "he presents an abnormal relationship to society and has a lax view of its rules, he does not acknowledge his participation in the crime, there are no signs that his time in prison has caused him to reflect in a way as to make a positive social change, his self-criticism does not show signs of reflection since his conduct in the criminal acts."<sup>104</sup>

89. On July 28, 2009, the Seventh Court of Execution denied Raúl José Díaz Peña the alternative measure of serving his sentence in a place of work "due to the absence of a favorable outlook on the detainee's future conduct"<sup>105</sup> based on the psychological evaluation. Raúl José Díaz Peña's defense presented a brief containing their disapproval of the Technical Report and indicated that "there appears from the last two paragraphs an incoherent inference of my client's personality

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<sup>99</sup> Court of Appeals for the Criminal Judicial Circuit of the Metropolitan Area of Caracas, February 19, 2009. Annex A to the Note No. AGEV/000537 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, November 12, 2009.

<sup>100</sup> Communication No. 661-09, First Instance Court of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, Eighth Execution Judge, April 7, 2009.

<sup>101</sup> Petitioners' Brief received by the IACHR on September 15, 2009. Not disputed by the State. See also Seventh First Instance Court of Execution for the Criminal Judicial Circuit of the Metropolitan Area of Caracas, Oficio No. 2252-09, October 20, 2009. Annex C to the Note No. AGEV/000537 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, November 12, 2009.

<sup>102</sup> Petitioners' Brief received by the IACHR on September 15, 2009. See also the Seventh First Instance Court of Execution for the Criminal Judicial Circuit of the Metropolitan Area of Caracas, Oficio No. 2252-09, October 20, 2009. Annex C to the Note No. AGEV/000537 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, November 12, 2009.

<sup>103</sup> Technical Report 0412/09 of July 9, 2009 Annex to petitioners' additional information brief received by the IACHR on September 15, 2009 and to the Note No. AGEV/000537 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, November 12, 2009.

<sup>104</sup> Informe Técnico 0412/09 of July 9, 2009. Annex to petitioners' additional information brief received by the IACHR on September 15, 2009 and a la Note No. AGEV/000537 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, November 12, 2009.

<sup>105</sup> Seventh First Instance Court of Execution of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, July 28, 2009. Annex to petitioners' additional information brief received by the IACHR on September 15, 2009.

when indicating that he denies his involvement in illegal acts when discovered, which this defense understands, would appear as an interest in having my client confesses his involvement and admit responsibility in criminal acts in exchange for a positive result of the study in question."<sup>106</sup> In the same brief the defense requested that new psychological assessments be undertaken by the Forensic Psychiatry Department of the CICPC. In reply, the Seventh Court of Execution indicated that the assessment in question ought to be carried out by a multi-disciplinary team, which was not possible within the CICPC as an investigatory police organ.<sup>107</sup> Nevertheless, the Court considered another psychosocial evaluation necessary by a technical team different from the one that prepared the previous report,<sup>108</sup> and thus made a written order on August 14, 2009, addressed to the Director of Social Re-integration of the Ministry of Popular Power for Justice and Internal Relations.<sup>109</sup>

90. From the case file it appears that Raúl José Díaz Peña's defense requested the reduction in the sentence due to work and study so that on August 4, 2009, the Seventh Execution Tribunal corresponded with the DISIP to request the remission of Raúl José Díaz Peña's work, study and behavioral records.<sup>110</sup>

91. On May 13, 2010, the Eighth Court of Execution granted Raúl José Díaz Peña the open prison measure,<sup>111</sup> and consequently he was released.<sup>112</sup> On May 17, 2010 Raúl José Díaz Peña was notified that the open prison regime had to be completed in the José Agustín Méndez Urosa Community Treatment Center and that for the first few days he would have to remain locked-up for 24 hours. Once the representative of the Ministry for Public Power for Justice and Internal Relations releases a report on Raúl José Díaz Peña's behavior, the Judge can change the measure in order that he may work during the day and return to the penitentiary center as indicated between 8:00pm and 5:00am until the Judge should determine whether he may benefit from conditional parole.<sup>113</sup>

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<sup>106</sup> Raúl Díaz Peña's defense Brief directed to the Seventh First Instance Court of Execution of the Criminal Judicial Circuit for the Metropolitan Area of Caracas. Annex to petitioners' additional information brief received by the IACHR on September 15, 2009.

<sup>107</sup> Seventh First Instance Court of Execution of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, August 14, 2009. Annex to petitioners' additional information brief received by the IACHR on September 15, 2009.

<sup>108</sup> Seventh First Instance Court of Execution of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, August 14, 2009. Annex to petitioners' additional information brief received by the IACHR on September 15, 2009.

<sup>109</sup> Seventh First Instance Court of Execution of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, Communication No. 1960-09, August 14, 2009. Annex to petitioners' additional information brief received by the IACHR on September 15, 2009.

<sup>110</sup> Seventh First Instance Court of Execution of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, August 4, 2009. Annex to petitioners' additional information brief received by the IACHR on September 15, 2009. See also: Oficio No. 2252-09, Seventh First Instance Court of Execution of the Criminal Judicial Circuit for the Metropolitan Area of Caracas, October 20, 2009. Annex C to the Note No. AGEV/000537 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, November 12, 2009.

<sup>111</sup> Article 501 of the Organic Code of Criminal Procedure provides: "Work outside the Penitentiary, Open Regime and Conditional Parole. The court of execution may authorize work outside the penitentiary to those inmates who have served at least one quarter of their imposed sentence. The open prison regime may be granted by the court of execution when the inmate has served at least one third of the imposed sentence. Conditional parole may be granted by the court of execution when the inmate has served at least two thirds of the sentence imposed. In addition, for each one of the cases mentioned above, the following circumstances must be fulfilled: 1. The inmate does not have a background of convictions prior to the one for which he is requesting the benefit; 2. That he has not committed any offense or error during his period of incarceration; 3. That there is a favorable outlook on the inmate's future behavior, issued by a multi-disciplinary group, preferably headed by a forensic psychiatrist; 4. That no other alternative means of serving the sentence which has been previously granted to him has been revoked; and 5. That good behavior has been noted."

<sup>112</sup> Information of the petitioners in a brief received by the IACHR on May 25, 2010. Not disputed by the State.

<sup>113</sup> Information of the petitioners in a brief received by the IACHR on May 25, 2010. Not disputed by the State.

## 2.3 The Constitutional Amparo Appeal

92. On August 14, 2006, Raúl José Díaz Peña's defense filed a constitutional amparo appeal based on the fact that the 'unfounded' judgment in the appeal proceedings denying the review of Raúl José Díaz Peña's detention measure issued by the 23rd First Instance Court on March 29, 2006, violated his rights to personal liberty, due process, the presumption of innocence, and the restoration of the judicial situation, which were breached by judicial error, set out in Articles 44, 49.1, .2, .3, .4, and .8 and 257 of the Constitution of the Bolivarian Republic of Venezuela.<sup>114</sup> In the amparo appeal there were allegations of, *inter alia*, procedural delays not attributable to Mr. Díaz Peña, the conditions in which his imprisonment were conducted, the absence of sufficient evidence against him, his remaining in preventive detention for a period longer than that established by law, and the constant violation of his right to the presumption of innocence.<sup>115</sup> On December 19, 2006, the Constitutional Chamber of the Supreme Court of Justice ruled that it was incompetent to hear the constitutional amparo proceedings and remitted the case file to the corresponding Court of Appeals.<sup>116</sup>

93. On February 26, 2007, the First Special Accidental Chamber of the Court of Appeals of the Metropolitan Criminal Judicial Circuit of Caracas ruled that it was competent to hear the amparo proceedings and declared them inadmissible by virtue of the provisions of Article 6.5 of the Organic Amparo Law on Constitutional Rights and Guarantees, i.e. for "not exhausting the complaints the ordinary measures laid down in the criminal procedural code, without full compliance with legal requirements for the amparo action to succeed".<sup>117</sup> On March 2, 2007, Raúl José Díaz Peña appealed against the declaration of inadmissibility<sup>118</sup> and on May 11, 2007, the Constitutional Chamber of the Supreme Court of Justice declared the appeal unfounded and upheld the decision of the First Special Accidental Chamber of the Court of Appeals.<sup>119</sup> The decision of the Constitutional Chamber held that

the petitioner was able to lodge appeal proceedings, which in effect was done, against the decision which is the subject of the amparo action, which denied a review of a detention measure due to the expiration of more than two (2) years without being adjudicated, by reason of which this is inadmissible in conformity with the requirements of Article 6.5 of the Organic Amparo Law on Constitutional Rights and Guarantees, as held in the ruling of the First Special Accidental Chamber of the Court of Appeals of the Metropolitan Criminal Judicial Circuit of the Judicial District of Caracas.<sup>120</sup>

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<sup>114</sup> *Amparo* filed on behalf of Raúl Díaz Peña. Annex to petitioners' brief received by the IACHR on August 28, 2006.

<sup>115</sup> Constitutional Chamber of the Supreme Court of Justice, Judge Rapporteur Marcos Tulio Dugarte Padrón, File No. 06-1245, December 19, 2006. Annex to petitioners' brief received by the IACHR on January 23, 2007.

<sup>116</sup> Constitutional Chamber of the Supreme Court of Justice, Judge Rapporteur Marcos Tulio Dugarte Padrón, File No. 06-1245, December 19, 2006. Annex to petitioners' brief received by the IACHR on January 23, 2007.

<sup>117</sup> First Special Chamber of the Court of Appeals for the Criminal Judicial Circuit of the Metropolitan Area of Caracas with Competence to Hear Cases of Offenses Related to Terrorism at the Constitutional Jurisdiction, Case No. S7-3119-07, February 26, 2007. Annex to petitioners' brief received by the IACHR on March 28, 2007.

<sup>118</sup> Appeal before the Constitutional Chamber of the Supreme Court of Justice, March 2, 2007. Annex to petitioners' brief received by the IACHR on May 7, 2007.

<sup>119</sup> Constitutional Chamber of the Supreme Court of Justice, Judge Rapporteur Arcadio Delgado Rosales, File No. 07-0376, May 11, 2007. Annex to petitioners' brief received by the IACHR on May 16, 2007.

<sup>120</sup> Constitutional Chamber of the Supreme Court of Justice, Judge Rapporteur Arcadio Delgado Rosales, File No. 07-0376, May 11, 2007. Annex to petitioners' brief received by the IACHR on May 16, 2007.

### 3. Prison Conditions and Raúl José Díaz Peña's Health Situation

#### 3.1 Raúl José Díaz Peña's Conditions of Detention at the Department of Intelligence and Prevention Services (DISIP)

94. Raúl José Díaz Peña was arrested on February 25, 2004 and imprisoned in the DISIP in cells without natural ventilation, or outings for air and with artificial white light.<sup>121</sup> During his six years of imprisonment, he suffered health problems and did not receive adequate medical attention resulting in the loss of hearing in one ear and recurring perianal abscesses.

95. At the time of the request for precautionary measures in his favor, on October 12, 2005, Raúl José Díaz Peña had not seen natural sunlight since his imprisonment in February 2004 and had not place available for physical activity or any other type of activity. They also indicated that on June 24, 2004, Raúl José Díaz Peña was shut in for 24 hours in a punishment cell measuring 2.5m by 3m, with no light, windows, toilet, called, "the little tiger" in the DISIP.<sup>122</sup>

96. The petitioners have periodically mentioned Raúl José Díaz Peña's prison conditions. The petitioners pointed out that at first, Raúl José Díaz Peña's fresh air outings were sporadic, he only used to receive one hour of sun per week,<sup>123</sup> sometimes he was not allowed to see the sun for more than a month,<sup>124</sup> and afterwards he was only allowed to go out in the sunshine once per month.<sup>125</sup> In June 2007, the petitioners pointed out that the outings to the sunshine took place every two months,<sup>126</sup> and this happened on a ramp over which vehicles cross and during the outing he is guarded by security measures formed of heavily armed officers, at the same time as DISIP helicopter surveillance.<sup>127</sup> The petitioners recently noted that Raúl José Díaz Peña went out into the sunshine for two hours every 15 days.<sup>128</sup> For its part, the State pointed out that the DISIP allows daily activities in the open air and that Raúl José Díaz Peña used to go out into the sunshine once per week in accordance with an established routine.<sup>129</sup>

97. In regard to characteristics of his place of detention, the petitioners and the State agree in pointing out that Raúl José Díaz Peña was imprisoned in the Investigations Center of the Detainee's Sub-Control Processing, B block, cell No.6, 2.65m long, by 2.36m wide, by 2.87m high<sup>130</sup> for the time of his imprisonment in February 25, 2004 until his release on May 13, 2010.

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<sup>121</sup> Brief requesting precautionary measures received by the IACHR on October 12, 2005. The petitioners allege that the reason for the incarceration was for having sent a letter to a radio station, which was read out on air by a journalist.

<sup>122</sup> Brief requesting precautionary measures received by the IACHR on October 12, 2005. The petitioners allege that the reason for the incarceration was for having sent a letter to a radio station, which was read out on air by a journalist.

<sup>123</sup> Petitioners' Brief received by the IACHR on March 15, 2006.

<sup>124</sup> Petitioners' Brief received by the IACHR on July 14, 2006.

<sup>125</sup> Petitioners' Brief received by the IACHR on November 20, 2006.

<sup>126</sup> Petitioners' Brief received by the IACHR on June 29, 2007.

<sup>127</sup> Petitioners' Brief received by the IACHR on June 29, 2007.

<sup>128</sup> Petitioners' Brief received by the IACHR on February 16, 2010.

<sup>129</sup> Note No. AGEV/000600 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, May 3, 2007, page 10. See also Annex B to the Note No. AGEV/000537 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, November 12, 2009, which contain the leaflets "Control of Fresh Air Outings of Detained Citizens" corresponding from August 29, 2009 to September 13, 2009, from 8:00 a 10:00 (unspecified whether morning or night) both signed by Raúl Díaz Peña.

<sup>130</sup> Petitioners' Brief received by the IACHR on June 29, 2007 and Note No. AGEV/000600 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, May 3, 2007, page 9. In their communication of June 29, 2007, the petitioners described the corridors and cells of the DISIP based on a drawing made by Raúl Díaz Peña "[t]he corridors of the cells can be described thus: entrance to the headquarters of the investigation reception area, you walk 10

The petitioners added that Raúl José Díaz Peña shared the cell with another detainee already sentenced for murder, Pedro Sifontes, and that he slept on a concrete bed with a small mattress on top.<sup>131</sup>

98. As regards security, the State states that the cell is equipped with a locked gate. It also stresses that a button was placed in the hallways and in the recreation room to deal with any emergency call. The petitioners point out that Raúl José Díaz Peña is well guarded, and his security is guaranteed.<sup>132</sup> With regard to the bell, they state that this was placed in reception with the DISIP guards who watch over the inmates and the buttons in each passage. However, they stress that the key to the access gate to the passages is held at the entrance, so that the officers stationed in reception must wait until one of the officers at the entrance brings the key. They state that sometimes it takes more than 20 minutes to arrive when they are notified of an emergency suffered by the inmates.<sup>133</sup>

99. The cells were locked shut between 10pm and 7am,<sup>134</sup> so when the inmates consequently wished to go to the bathroom at night they had to do it in plastic bags and clean themselves with newspaper.<sup>135</sup> The State did not respond to the petitioners' allegations about the locking of the cells at night, but pointed out that the bathroom was at the end of the passage.<sup>136</sup>

100. Regarding ventilation, the petitioners indicate that the place has no natural ventilation, is warm and dusty<sup>137</sup>. They also indicate that Raúl José Díaz Peña and his cellmate each had a fan that causes Raúl José Díaz Peña to fall ill continuously with flu, phlegm and earache.<sup>138</sup> They also indicate that there is only one very high window of 0.50 by 0.50 meters with railings facing a ramp by which cars circulate 24 hours a day.<sup>139</sup> For its part, the State alleges that the cells have a ventilation system with fans and air extractors in the corridors.<sup>140</sup> The petitioners

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...continuation

[meters] down a corridor, turn right down a corridor leading to various offices, there are twelve steps going down about 30 [meters], then you reach a main grill where the employees guarding the inmates are. In this area there is a dormitory where the guards sleep, to the left there is an air-conditioned area to receive visitors (tiles on the floor, painted, colonial rustic furniture, 2 small fans on the wall). Between the guards' dormitory and the visiting area, there are two grills for the entrance to a corridor at the end of which is the air-conditioned area for the gymnasium, which also has bars. Halfway down the hall to the right is a cell and a window [...] which you cannot lean out of as it is out of reach due to its height, to the left there is a corridor leading to two others each with grills. Raúl Díaz is in the first corridor. To the left of these corridors are the famous 'little tigers', which are actually used as cells, which also have bars. Each corridor has 8 or 6 cells per corridor, at the end is the communal bathroom, the other corridor is also [...]". Petitioners' Brief received by the IACHR on June 29, 2007, page 40.

<sup>131</sup> Petitioners' Brief received by the IACHR on June 29, 2007.

<sup>132</sup> Petitioners' Brief received by the IACHR on March 15, 2006.

<sup>133</sup> Petitioners' Brief received by the IACHR on June 29, 2007.

<sup>134</sup> In the petitioners' brief received July 14, 2006 they stated that Raúl Díaz Peña's cell is padlocked from 8pm until dawn.

<sup>135</sup> Petitioners' Brief received by the IACHR on June 29, 2007.

<sup>136</sup> Note No. AGEV/000600 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, May 3, 2007, page 10.

<sup>137</sup> Petitioners' Brief received by the IACHR on November 20, 2006.

<sup>138</sup> Petitioners' Brief received by the IACHR on June 29, 2007.

<sup>139</sup> Petitioners' Brief received by the IACHR on June 29, 2007.

<sup>140</sup> Note No. AGEV/000600 of the Minister of Public Power for External Relations of the Bolivarian Republic of Venezuela, May 3, 2007, page 10.

indicate that the air extractors must be turned off at intervals because their noise upsets the inmates.<sup>141</sup>

101. Regarding nutrition, the State indicates that the DISIP has a general dining area which provides three meals: breakfast, lunch and dinner<sup>142</sup>. It also indicates that the inmates have at their disposal several white goods to cover their everyday needs.<sup>143</sup> The petitioners indicate that the inmates have contributed ceramics, paint, lighting, fans and other building materials and that they have refurbished the detention area themselves.<sup>144</sup>

102. Regarding recreational activities, the petitioners have indicated that after his detention Raúl José Díaz Peña did not carry out recreational activities<sup>145</sup>. The State indicates that there is a gym area with exercise machines that can be used freely from 8 am until 9 pm<sup>146</sup>. It also indicates that the DISIP has a permanent area for verbal communication and another one for educational activities where English and grammar are taught by inmates with a "high degree of personal achievement"<sup>147</sup>. The petitioners indicate that the gym area was furnished by the inmates in a space authorized by DISIP authorities.<sup>148</sup> That area is used during the day and given its reduced size, the inmates agree when to use it.<sup>149</sup> They identify the verbal communication area as a number of one-meter wide hallways where the inmates can talk with each other until they are locked in their cells.<sup>150</sup> Finally, they indicate that the two-hour English and grammar classes are an initiative of the inmates and are given by one of them.<sup>151</sup>

103. Regarding the visitation regime, the State indicated that visiting takes place invariably on Thursdays from 11 am to 2 pm and Sunday from 11 am to 5 pm and that it takes place in an area destined and prepared to that end that is in perfect condition.<sup>152</sup> The petitioners indicate that only parents, spouses and children are allowed as visitors and that Raúl José Díaz Peña, who is unmarried and has no children, can only be visited by his parents and not by his sister.<sup>153</sup>

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<sup>141</sup> Petitioners' Brief received by the IACHR on June 29, 2007.

<sup>142</sup> The State alleges that the meals provided to the inmates are the same as those available daily to the members of the DISIP. Note AGEV/000600 of the Ministry of the Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, May 3, 2007.

<sup>143</sup> The State indicates that, among other white goods, they have at their disposal fridges, microwave ovens, blender, toaster and electric oven. Note AGEV/000600 000600 of the Ministry of the Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, May 3, 2007.

<sup>144</sup> Brief of the Petitioners received on June 29, 2007.

<sup>145</sup> Brief of the Petitioners received on November, 2006.

<sup>146</sup> Note AGEV/000600 000600 of the Ministry of the Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, May 3, 2007 pages 9-10.

<sup>147</sup> Note AGEV/000600 000600 of the Ministry of the Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, May 3, 2007 pages 9-10.

<sup>148</sup> Brief of the Petitioners received on June 29, 2007.

<sup>149</sup> Brief of the Petitioners received on June 29, 2007.

<sup>150</sup> Brief of the Petitioners received on June 29, 2007.

<sup>151</sup> Brief of the Petitioners received on June 29, 2007.

<sup>152</sup> Note AGEV/000600 000600 of the Ministry of the Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, May 3, 2007 page 11.

<sup>153</sup> Brief of the Petitioners received on June 29, 2007.

104. In its observations on the merits, the petitioners finally indicate that despite the improvements, the area still has no natural ventilation, which continues to cause damage to the physical integrity of Raúl José Díaz Peña.<sup>154</sup> As an annex to its observations on the merits of November, 2009, the State filed a report with pictures of the DISIP which is offered as

Evidence [...] of absolute compliance with the rules on sanitation and cleanliness [and that the premises] have areas for physical activity, visiting of family members and friends, electric oven, white goods, fridges to preserve food, areas for conjugal visits in acceptable sanitary conditions with its own bathroom, cells with fire extinguishers in the hallways [...].<sup>155</sup>

And concludes that the environment in which Raúl José Díaz Peña is detained is "quite acceptable."

105. In a communication received at the IACHR on November 27, 2007, the petitioners filed the same report with pictures as that later sent by the State with its observations on the merits. In that opportunity the petitioners highlighted that the DISIP is a clean place thanks to the fact that the inmates are in charge of the clearing,<sup>156</sup> but that there is no natural ventilation because of the lack of windows.<sup>157</sup>

106. During the processing of the precautionary measures and the petition, the petitioners requested the transfer of Raúl José Díaz Peña to a different detention center. Specifically they indicate that on July 11, 2006, Raúl José Díaz Peña was visited by Fundamental Rights Prosecutor No.82, and it was agreed that he would initiate the steps to transfer him to the National Center for Militaries in Preventive Detention of Ramo Verde.<sup>158</sup> They also indicate Prosecutor 82 proposed as an alternative the Old Area 2 detention center of the Metropolitan Police.<sup>159</sup> They indicate that the transfers did not materialize "due to the lack of interest of the State."<sup>160</sup>

107. In a communication received by the IACHR on May 25, 2010, the petitioners indicated that Raúl José Díaz Peña is currently subjected to an open regime at the José Agustín Méndez Urosa Community Treatment Center where he performs tasks like cleaning and shares a sleeping area with 55 inmates under the same regime. They indicate that the Center has a patio for sports and that Raúl José Díaz Peña has access one hour of sunlight, daily.<sup>161</sup>

### **3.2 Raúl José Díaz Peña's Health Condition**

108. In the precautionary measures request of October 12, 2005, the petitioners presented information on Raúl José Díaz Peña's health condition. They indicated that as a consequence of exposure to the white electric light used at the detention center, Raúl José Díaz

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<sup>154</sup> Brief of the Petitioners received on July 7, 2009.

<sup>155</sup> Note AGEV/000600 000600 of the Ministry of the Popular Power for Foreign Affairs of the Bolivarian Republic of November 12, 2009, page 29. See also Annex B to Note No. 100-300001933 of October 2, 2009 from the National Intelligence and Prevention Directorate referring a communication with pictures under the reference "Conditions of Detention."

<sup>156</sup> Merits brief received on July 7, 2009.

<sup>157</sup> Annex D to the petitioner's brief of November 27, 2007.

<sup>158</sup> Precautionary measures file. Petitioner's report of July 14, 2006.

<sup>159</sup> Precautionary measures file. Petitioner's report of August 7, 2006.

<sup>160</sup> Merits brief received on July 7, 2009.

<sup>161</sup> Petitioner's additional information brief of May 25, 2010.

Peña has lost his sense of time, his biological cycles have changed, his skin has lost pigmentation, and he lost ten kilograms during the first 19 months of imprisonment.<sup>162</sup>

109. The information in the petition and in the precautionary measures file indicate that Raúl José Díaz Peña has received basic medical attention and that only in three occasions he received specialized medical attention from an ear, nose and throat expert MD.<sup>163</sup>

110. Through out the processing of the case, the petitioners have filed medical certifications issued by Carmen Yajaira Peña MD, specialist in family medicine, and José Ramón Gutiérrez MD, expert in ear, nose and throat, which in their view, evidence the deterioration of Raúl José Díaz Peña's health. For its part, the State has submitted medical certifications of CICPC, DISIP and Dr. Salvador Allende Health Center experts –also submitted by the petitioners- which in the State's view evidence that Raúl José Díaz Peña is in good health.

111. In the case file before the IACHR there is a communication, dated March 18, 2005, from Raúl José Díaz Peña's legal representatives addressed to the 28 Trial Court in which attention is drawn to the medical report signed by ear, nose and throat expert Liliana Viseras indicating "the lack of necessary equipment to perform the tests required" in view of the symptoms suffered by Raúl José Díaz Peña. In that brief, his legal representatives requested that the test be performed as a matter of urgency at the Ear, Nose and Throat Medical Group with the intervention of Raúl José Díaz Peña's doctor, José Ramón Gutiérrez MD.<sup>164</sup>

*Doctor Carmen Yajaira Peña's Medical Report of September 26, 2005*

112. The report indicates that Raúl José Díaz Peña is a

[p]atient[...] with a history of chronic bilateral internal otitis that in 1999 required the insertion of a ventilating tube and a later intervention in the eardrum of the right ear. His present condition started in July 2004 with medium and strong intensity pain in the left ear, fetid and progressive secretions, diminished hearing; probably as a consequence of humidity and lack of ventilation at the place of detention, and his medical history. At the time he received treatment [...] with little result and he was then evaluated by an ear, nose and throat specialist (whose report is not available) who requested special; tests (CAT scan of middle ear and mastoids, hearing test, the requests are enclosed) in order to define the definitive treatment. These tests have not been performed.<sup>165</sup>

113. The State indicates that on November 21, 2005 the Human Rights Directorate of the Ministry of the Interior and Justice visited the DISIP "in order to verify the health and human rights" of Raúl José Díaz Peña. It indicated that after the visit, the General Director of Human Rights at the Ministry of the Interior and Justice, Mayerling Rojas Villasmil, and other members of that Directorate, signed a document attesting that

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<sup>162</sup> Request for precautionary measures of October 12, 2005.

<sup>163</sup> Ear, Nose and Throat Medical Group, H.C. #: 21415, Medical Report of September 15, 2009, José Ramón Gutiérrez. MD enclosed with the petitioner's brief of October 13, 2006; Ear, Nose and Throat Medical Group, Medical Report of August 24, 2007, José Ramón Gutiérrez MD. Enclosed with the petitioner's brief of September 5, 2007; Medical report of November 8, 2007, Efraín González Pardo MD, Ear, Nose and Throat Specialist. Annex A to the petitioner[s] brief of November 27, 2007.

<sup>164</sup> Brief of Raúl Díaz Peña's legal representatives of March 18, 2005. Annex to the request for precautionary measures of October 12, 2005.

<sup>165</sup> Medical Report of September 26 2005, Carmen Peña MD. Annex to the request for precautionary measures of October 12, 2005.

1. DISIP's medical personnel indicates that citizen Raúl José Díaz Peña's health is satisfactory even when an evaluation by an ear, nose and throat specialist MD is required and will be carried out by DISIP personnel.
2. Citizen Raúl José Díaz Peña declared not to have been subjected to physical or psychological mistreatment by DISIP's authorities or personnel
3. Regarding nutrition, he declared that he had been treated satisfactorily until then at the DISIP and that he consumes the same foods consumed by the personnel of the Police during the following meal times: breakfast from 7:00 to 8:00 am, lunch from 12:00 to 1:00 pm and dinner from 5:00 to 6:00 pm.
4. Regarding security he stated that there are police personnel at the DISIP tasked with the corresponding custodial activities.
5. Citizen Raúl José Díaz Peña is visited by family and friends on Wednesday and Saturdays and by his attorneys on Mondays and Wednesdays.
6. He declared that he feels safe at the DISIP, commanded by General Henry Ramírez Silva, and that it is preferable for him to remain detained there.<sup>166</sup>

*Medical Report of Doctor Carmen Yajaira Peña of March 7, 2006*

114. The report indicates that the patient

[...] speaks of moderate to severe pain and fetid secretions in the left ear and progressive loss of hearing; despite the treatment [...] there is temporary improvement with the persistent recurrence of symptoms, with the exception of the hearing loss that is now permanent. The patient required a CAT scan of the otomastoids and a hearing test by an ear, nose and throat specialist, which to this date have not been authorized by the authorities. The tests are essential to establish the degree of deterioration of Díaz Peña's hearing and to decide on a course of action by the specialist regarding treatment. Also the conditions of the environment have not improved in terms of exposure to natural ventilation and sunlight which is not positive for the patient. In view of the how long his condition has extended (2004) any damage to hearing could become permanent if adequate treatment is not applied.<sup>167</sup>

115. The State indicates that on June 16, 2006 the Public Prosecution Services commissioned the 82 Prosecutor to visit the DISIP in the company of the medical doctor of the CICPC's Forensic Services in order to perform an Official Medical Recognition on Raúl José Díaz Peña. The State indicates that the medical recognition was performed, together with an inspection of the place of detention of Raúl José Díaz Peña, as indicated in the statement drawn to that effect. This statement was not filed as part of the State's submission.<sup>168</sup>

*Medical Report of Doctor José Ramón Gutiérrez of September 15, 2006*

116. The State indicated that on August 16, 2006 the alleged victim was taken, with the knowledge of the Fourth Trial Judge of the First Instance of the Criminal Judicial District of the City of Caracas, to the Ear, Nose and Throat Medical Group where he was treated by his specialist who cleaned his left ear.<sup>169</sup>

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<sup>166</sup> Signed statement of November 21, 2005 of the Vice Ministry of Legal Safety, Human Rights Directorate. Annex to Note 000131 of the Ministry of Foreign Affairs of the Bolivarian Republic of Venezuela, January 27, 2006.

<sup>167</sup> Medical Report of March 7, 2006 by Carmen Peña MD. Annex to the petitioners' brief received at the IACHR on March 15, 2006.

<sup>168</sup> Note No. AGEV/000600 of the Ministry of the Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, May 3, 2007, page 12.

<sup>169</sup> Note No. AGEV/000600 of the Ministry of the Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, May 3, 2007, pages 12-13.

117. The petitioners indicate that on September 15, 2006 Raúl José Díaz Peña was taken to the Otophysical Institute to receive medical attention by his specialist. They indicate that the doctor drained his right ear and issued a prescription for nasal allergies. In the medical report, the doctor indicated that “[i]n the left ear there is a retraction causing periodic infection and that should the problem persist, surgery in the right ear will be required.” The doctor indicated that the patient should return in a month for a check up.<sup>170</sup> These consultations with specialists took place between 10 and 11 months after the granting of precautionary measures on behalf of Raúl José Díaz Peña.

*Medical Report of Doctor Carmen Yajaira Peña of November 27, 2006*

118. The patient indicates that

[...] since the beginning of November 2006 he suffers from abdominal pain, flatulence and diarrhea. His stools test (annex) reveals an infection with *Blastocystis Hominis* [...]. On November 17 there is a recurrence of the diarrhea that prompts a request for a series of stools test during three days, which cannot be performed because of the patient’s condition. Only one sample is obtained (annex), it reveals abundant *Blastosporas* in the stools (fungus infection) and a new treatment is indicated [...]. If symptoms persist, an evaluation by a gastroenterologist is recommended [...].<sup>171</sup>

119. The State indicates that on November 28, 2006 Raúl José Díaz Peña was taken once again to the Ear, Nose and Throat Medical Group in order to perform a medical evaluation and cleaning his left ear. They indicate that on February 14, 2007 the 82 Prosecutor requested the head of CICPC’s Forensic Medical Services a new Official Medical Recognition.<sup>172</sup>

*Medical Report of Carmen Yajaira Peña MD of February 22, 2007*

120. The doctor indicated that

[...] after the fungus caused diarrhea in November 2006, the patient had pain in the perianal region and difficulty to adopt sedentary positions. During a December 2008 evaluation a protrusion on the anus with a diameter of 1.5 x 1.5 cm was found. It was violet and painful to the touch which prevented its reduction. The indicated medical treatment [...] reduced the pain. Later there was rectal bleeding [...] which persists until today.<sup>173</sup>

121. The State indicates that on March 30, 2007 Raúl José Díaz Peña was evaluated by medical doctors María Fosis, from the CICPC Forensic Medical Services; Luis Algora from the DISIP Health Coordination and a team of ear, nose and throat experts, who indicated that Raúl José Díaz Peña is undergoing treatment for hemorrhoids and is in good health. It indicates that the same day a Commission from the Public Prosecution Services inspected Raúl José Díaz Peña’s cell and had no news to report.<sup>174</sup> It indicated also that on April 20, 2007 Raúl José Díaz Peña was evaluated by

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<sup>170</sup> Ear, Nose and Throat Medical Group, H.C. #: 21415, Medical Report of September 15, 2006, José Ramón Gutiérrez MD. Annex to the brief of the petitioners of October 13, 2006.

<sup>171</sup> Medical Report of November 27, 2006 by Carmen Peña MD. Annex to the petitioners’ brief received at the IACHR on December 7, 2006

<sup>172</sup> Note No. AGEV/000600 of the Ministry of the Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, May 3, 2007, page 13.

<sup>173</sup> Medical Report of February 22, 2007, Carmen Peña MD. Annex to the petitioner’s brief received on March 14, 2007.

<sup>174</sup> Note No. AGEV/000600 of the Ministry of the Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, May 3, 2007, pages 13 – 14. The State highlights that throughout 2006 a number of non governmental

doctor Elisaul Morales, from the DISIP Health Coordination and reported that he was in good health.<sup>175</sup>

*Medical Report of Carmen Yajaira Peña MD of May 30, 2007*

122. The diagnostic was "Chronic Otitis on the Right Side, Suppurating Otitis on the Left Side [...] Secondary Loss of Hearing [...]"<sup>176</sup>. It also states that "due to Díaz Peña's conditions of detention without natural light or ventilation, the environment is propitious for the development of this germ and its eradication more difficult with the risk of complications."<sup>177</sup>.

*Medical Report of José Ramón Gutiérrez MD of August 24, 2007*

123. The State indicates that in compliance with the order issued by the Fourth Trial Tribunal of First Instance for the Criminal District of the City of Caracas, Raúl José Díaz Peña was taken to the Ear, Nose and Throat Medical Group to be evaluated by medical doctor José Ramón Gutiérrez.<sup>178</sup> The doctor indicated that Raúl José Díaz Peña

[...] has been my patient for many years and had an intervention in his right ear, presently he is undergoing similar processes and infections due to bad hygiene conditions which can affect his operated ear and also require surgery on his left ear which is experiencing severe hearing loss. His sinusitis requires medical treatment and his left ear requires surgery if environmental conditions allow for it.<sup>179</sup>

*Medical Report of Carmen Yajaira Peña MD October 8, 2007*

124. It indicates that

[...] the patient has suffered since 2004 chronic suppurating otitis in the left ear with resistance to usual treatment against bacteria which caused the progressive and severe loss of hearing. In view of the recurrence of his condition, a sample of the secretions was extracted for a culture and it revealed growth of the Gram-Klebsiella Sp bacteria. It is recommended an evaluation by a specialist of ear, nose and throat who has treated him for ten years for a similar condition in his opposite ear, who recommends surgery. [...] The conditions of Mr. Díaz's detention at his DISIP cell [...] are not propitious for the post-operation recovery.

*Medical Report of Joel Vallenilla MD October 31, 2007*

125. On October 1, 2007 the Fourth Trial Judge of First Instance for the District of the City of Caracas authorized a complete medical evaluation of Raúl José Díaz Peña by the CICPC's medical personnel in order to establish whether he suffered from a pathology requiring surgery.

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...continuation

organizations visited the DISIP, such as the International Committee of the Red Cross (20 and 21 of June, 2006), Archbishop of Caracas (September 11, 2006) and the Venezuelan Program of Education – Action in Human Rights (PROVEA).

<sup>175</sup> Note No. AGEV/000600 of the Ministry of the Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, May 3, 2007, page 14.

<sup>176</sup> Medical Report of May 30, 2007, Carmen Peña MD. Annex to the petitioners' brief of June 29, 2007.

<sup>177</sup> Medical Report of May 30, 2007, Carmen Peña MD. Annex to the petitioners' brief of June 29, 2007.

<sup>178</sup> Note No. AGEV/001059 of the Ministry of the Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, State Agency for Human Rights, September 25, 2007, page 1.

<sup>179</sup> Ear, Nose and Throat Medical Group, H.C. #: 21415, Medical Report of August 24, 2007, José Ramón Gutiérrez MD. Annex to the brief of the petitioners of September 5, 2007.

126. On October 31, 2007 Joel Vallenilla MD, from the CICPC's Forensic Medicine Service visited the DISIP in order to perform a medical evaluation on Raúl José Díaz Peña. As a result of the evaluation he prepared an expert's report where he concluded *inter alia* that

General state: SATISFACTORY

[...]

Suggestions: CAT scan of middle ear and mastoid and hearing test by an otologist.<sup>180</sup>

127. The State indicates that by virtue of test results and their suggestions, on November 6, 2007 the Fourth Trial Tribunal of First Instance for the District of the City of Caracas ordered a CAT scan of the middle ear and mastoid with a hearing test by an otologist, and therefore requested DISIP's General Director to take citizen Raúl José Díaz Peña to the Clinic of the National Guard of Caracas. It also indicates that with the purpose of obtaining additional information the Tribunal ordered another medical evaluation by doctor Efraín González Prato, ear, nose and throat specialist of the DISIP.<sup>181</sup>

*Medical Report of Efraín González Prato MD November 8, 2007*

128. The petitioners and the State point out on Judge Migdalia Añez Raúl's order, José Díaz Peña was examined by the otorhinolaryngologist, Dr. Efraín González Prato, who shows that

Solely on physical examination it can be determined that anatomically at the level of his ears, the patient presents with scarring of the right tympanoplasty, and in the left ear there appears to be no physical abnormality in formation, to determine damages to functioning and to objectively perform a diagnosis of a diminution in the auditory threshold requires tonal and vocal audiometric equipment, and to determine damage to the ears from the anatomical point of view a CT scan of the middle ear and mastoids, the same cannot be performed in this institution.

In the nasal area, the patient presents with septum, central, and increase in volume of the inferior cornets, without obstruction, without rhinorrhea; in order to evaluate paranasal areas and determine rhinosinusitis symptoms it is necessary to perform a CAT scan of axis and crown cuts, a procedure that is unavailable at the institution.

Therefore, in my expert opinion, without the aforementioned studies it cannot be established whether the patient requires surgery.

Presently, the patient suffers from a nasal obstructive syndrome due to allergies, which requires treatment [...], the following studies are required: 1. Tone and vocal audiometry; 2. CAT scan of middle ear and mastoids; 3. CAT scan of paranasal areas, axis and crown cuts.<sup>182</sup>

129. On November 14, 2007, officers of the DISIP transferred Raúl José Díaz Peña to the National Guard Clinic to comply with the Fourth Court's order, but the examinations could not be performed because the specialized equipment was damaged. As a result, the Court ordered Raúl José Díaz Peña's transfer to the Dr Salvador Allende Health Clinic in order to perform the specialist

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<sup>180</sup> File No. 43-397-2006, Joel Vallenilla MD, November 5, 2007. Annex A of Note No. AGEV 000168 of the Ministry of the Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, State Agency for Human Rights, February 15, 2008.

<sup>181</sup> Note No. AGEV 000168 of the Ministry of Public Power for External Relations, State Human Rights Agency, February 15, 2008.

<sup>182</sup> Medical Report, Dr. Efraín González Pardo, Otorhinolaryngologist, November 8, 2007, Annex A to the Petitioner's Brief received by the IACHR on November 27, 2007 and Note No. AGEV 000168 of the Ministry of Public Power for External Relations, State Human Rights Agency, February 15, 2008.

studies. On January 28, 2008, the imaging scan was made on Raúl José Díaz Peña, which diagnosed "chronic bilateral mastoiditis".<sup>183</sup>

130. The Fourth Court stated that it had sent a copy of the imaging study undertaken on Raúl José Díaz Peña to Dr. Segundo Urbina, General Chief Coordinator of the DISIP, so that the study could be evaluated by a specialist and that a general report of the situation could be sent to the Court. At the date of approval of the present report, the State has not sent the above report. Also, on January 21, 2008, the Fourth Court in procedural step 037-08, ordered that the General Director of the DISIP should have Raúl José Díaz Peña examined by an otologist in the Diagnosis Center, and in case this examination could not be performed, it was ordered that he be examined by specialist otologist.<sup>184</sup> At the date of the approval of the present report, the parties have not sent information on whether the examination has been performed by a specialist otologist.

131. The State emphasizes in the present case that,

[...] the Court in the case must resort to the [CICPC]'s aid, as an organ of State criminal investigations, as well as of other public medical institutions of the State of Venezuela, with the aim of obtaining an official statement surrounding the state of health of citizen Raúl Díaz Peña, as an indispensable requirement for adopting any decision that might be associated with his medical condition.<sup>185</sup>

and indicates that "the only medical statement which expressly mentions his pathology [...], was issued by a private physician closely connected with the alleged victim, and for such reasons lacks credibility in the eyes of the judicial authorities".<sup>186</sup>

132. In a brief of February 11, 2010, the petitioners pointed out that Raúl José Díaz Peña is still in an area without natural ventilation, has lost hearing in one ear and shows progressive loss of hearing in the other ear. They state that Raúl José Díaz Peña maintains a strict regime from private doctors who undertake personalized medical supervision, which is authorized by the DISIP authorities and that he follows a strict diet of a private dietician and the food is provided by his immediate family.<sup>187</sup>

*Dr. Carmen Yajaira Peña's Medical Report of March 12, 2010*

133. This shows that

Male patient, 25 years of age, imprisoned for 6 years. The patient has been diagnosed with and treated for recurring chronic suppurative otitis in the left ear progressing to the gradual loss of auditory acuity in the mentioned ear: he was examined by an otorologist, who indicated surgical intervention to place a ventilation tube in the tympanum, which was not done due to Mr. Díaz Peña's conditions of imprisonment, which might lead to an irreversible

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<sup>183</sup> Dr. Salvador Allende Integral Health Center, Department of Diagnostic Imaging, Free Examinations, Report No. 43-397-2006. Annex C to the Note No. AGEV 000168 of the Ministry of Public Power for External Relations, State Human Rights Agency, February 15, 2008.

<sup>184</sup> Communication No. 132-08 of the Fourth Judge of First Instance with Judicial Functions of the Judicial Circuit of the Metropolitan Area of Caracas, February 27, 2008. Annex D to Note No AGEV/00238 of the Ministry of Public Power for External Relations, State Human Rights Agency , March 5, 2008.

<sup>185</sup> Note No. AGEV/00238 of the Ministry of Public Power for External Relations, State Human Rights Agency , February 15, 2008.

<sup>186</sup> Note No. AGEV/00238 of the Ministry of Public Power for External Relations, State Human Rights Agency , February 15, 2008.

<sup>187</sup> Precautionary Measures File, Petitioners' Brief received by the IACHR on February 16, 2010.

loss in hearing. At the same time, the patient presented four times with a perianal abscess, finding at the last episode an anal fistula, which was corroborated by the gastroenterologist of the DISIP, which have been drained and treated by the patient himself, hence its recurrence. Although Mr. Díaz Peña is in apparent good physical condition, these recurring infections, together with sinusitis, gingivitis and occasional gingivorragia will lead to a worsening in his physical and emotional health.<sup>188</sup>

## **B. Determinations of Law**

134. The Commission observes that, in its written brief on the merits, the State made allegations on admissibility, which do not belong in this stage of the proceedings, thus resulting in their being untimely. On this basis, the Commission does not believe it necessary to pause again in the analysis of these findings, since they formed the object of its examination in the admissibility report.

### **1. Right to Personal Liberty**

135. Article 7 of the American Convention provides, so far as is relevant:

1. Every person has the right to personal liberty and security.

2. 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 concerned or by a law established pursuant thereto.

[...]

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. 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 proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

[...]

136. The Inter-American Court of Human Rights has ruled that "any violation of subparagraphs 2 to 7 of Article 7 of the Convention entails the violation of Article 7(1) thereof, because the failure to respect the guarantees of the person deprived of liberty leads to the lack of protection of that person's right to liberty."<sup>189</sup>

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<sup>188</sup> Precautionary Measures File, Medical Certificate of March 12, 2010, Dra. Carmen Peña. Annex to petitioners' brief received by the IACHR on March 23, 2010.

<sup>189</sup> I/A Court HR, *Case of Chaparro Álvarez and Lapo Íñiguez. vs. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007, Series C, No. 170, para. 54.

## 1.1 The Legality of the Detention (Article's 7.2 and 7.4 of the American Convention)

137. As the Inter-American Court has pointed out, Article 7.2 "recognizes the main guarantee to the right to physical liberty: the legal exception, according to which the right to personal liberty can only be affected by a law."<sup>190</sup>

138. Also, the Court has established that Article 7.4 of the American Convention

sets forth a mechanism to avoid unlawful or arbitrary conduct from the very act of deprivation of liberty on, and to ensure defense of the detainee. Both the detainee and those representing him or with legal custody over him have the right to be informed of the motives of and reasons for the detention and about the rights of the detainee.<sup>191</sup>

139. The Constitution of the Bolivarian Republic of Venezuela establishes that

Article 44.1. Personal Liberty is inviolable, thus:

1. No one may be arrested or detained but by judicial warrant, unless they be apprehended in flagrante. In this case, they shall be brought before the judicial authorities within a time no greater than forty-eight hours from the moment of their arrest. They shall be ordered released, except for the reasons laid down by law and determined by the judge in each case.

[...]

Article 49. Due process shall be applied to all judicial and administrative determinations, and thus:

1. The right to a defense and judicial assistance are inviolable rights at each stage and degree of the investigation and proceedings. Everyone has the right to be notified of the charges for which he is being investigated, to have access to the evidence and to have the time and adequate means to exercise his defense. Evidence obtained after a violation of due process shall be null and void. Everyone declared guilty has the right to appeal the decision, with the exceptions established in this Constitution and by law.

140. For its part, the COPP establishes

Article 250. Background. The control judge, at the request of the Attorney General, may order the accused's preventive detention if the following are established:

1. An offense that merits a prison sentence and whose means of prosecution is not evidently proscribed;

2. Basic elements of proof showing that the accused was the perpetrator or participated in the commission of a punitive act;

3. A reasonable inference, from an assessment of the circumstances of a particular case, of a risk of absconding or the obstruction in the search for the truth in respect of an actual procedural step in the investigation underway. Within twenty-four hours of the Prosecutor's request, the control Judge shall decide with respect to the request made. If the judge decides that the requirements set out in this article for the grant of preventive judicial detention are met, he shall issue an arrest warrant for the accused against whom the measure is requested.

Within forty-eight hours subsequent to his arrest, the accused shall be brought before the Judge, who, in the presence of the parties and the victims, if any, shall decide whether to maintain the measure imposed, or substitute it for less severe measures.

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<sup>190</sup> I/A Court HR, *Case of Chaparro Álvarez and Lapo Íñiguez. vs. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007, Series C, No. 170, para. 56.

<sup>191</sup> I/A Court HR, *Case of Tibi vs. Ecuador*. Judgment of September 7, 2004. Series C No.114, para. 109.

[...]

Article 117. Rules for Police Conduct. The investigatory police authorities shall detain the accused's in those cases where this Code so orders, fulfilling the following principles of conduct:

[...]

5. To identify themselves, from the moment of apprehension, as an authority agent, and make sure of the identity of the person or persons against whom they are proceeding, being prohibited from apprehending anyone different from that referred to in the corresponding arrest warrant. The identification of a person to be arrested shall not be required in cases of in flagrante;

6. To inform the detainee about his rights;

7. To inform the immediate family or other persons related to the detainee of the facility where the detainee is being held;

8. To record the place, day and hour of the arrest in an unalterable log.

Article 125. Rights. The accused shall have the following rights:

1. That he be informed in a clear and specific manner of the facts attributed to him;

[...]

141. The Court has emphasized that "if it is established that the State has not informed the victims of the 'causes' or 'reasons' for their arrest, the arrest is illegal, and, thus, contrary to Article 7.2 of the Convention."<sup>192</sup> Also, it has established that informing the accused of 'the motives or reasons' for the arrest must be done "at the time", which "constitutes a mechanism for avoiding illegal or arbitrary detentions from the actual moment of the arrest, and, in turn, guarantees the right of defense of the individual."<sup>193</sup>

142. In this respect the Court has stressed that

the information about the motives and reasons for the arrest necessarily supposes, first, providing information on the arrest itself. The detained person must understand that he is being detained. Second, the agent who carries out the arrest must inform him in simple language, free of technical terms, about the essential legal grounds and facts on which the arrest is based. Article 7(4) of the Convention is not satisfied by the mere mention of the legal grounds.<sup>194</sup>

143. In accordance with the facts as proved, the 62nd Prosecutor, sent a summons to Raúl José Díaz Peña so that he should appear to make a statement on February 25, 2004.<sup>195</sup> Also, it has been proved that Raúl José Díaz Peña was arrested on February 25, 2004. Raúl José Díaz Peña stresses that he was not informed of the reasons for his arrest and the Police Log does not contradict this. Thus, in the present case the State has not controverted the allegation relating to the DISIP agents' arrest of Raúl José Díaz Peña, they did not inform his of the reasons for his arrest, nor of his rights available to him, which results in a violation of Article 7.4 of the American Convention.

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<sup>192</sup> I/A Court HR *Case of Chaparro Álvarez and Lapo Íñiguez. vs. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 69.

<sup>193</sup> *Case of Juan Humberto Sánchez vs. Honduras. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 7, 2003. Series C No. 99, para. 82. I/A Court HR *Case of Chaparro Álvarez and Lapo Íñiguez. vs. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 70.

<sup>194</sup> I/A Court HR *Case of Chaparro Álvarez and Lapo Íñiguez. vs. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 71.

<sup>195</sup> 62nd Prosecutor for the Judicial Circuit of the Metropolitan Area of Caracas, Summons, February 18, 2004. Annex to the original petition received by the IACHR on October 12, 2005.

144. In view of the above considerations, the Commission finds that that State did not inform Raúl José Díaz Peña of the motives and reasons for his arrest, nor of the rights available to him which constitutes a violation of Article 7.4 of the American Convention. Equally, in view of the fact that the duty to inform the detainee about his rights is set out in domestic law, the violation of the said domestic law constitutes a violation of Article 7.2 of the American Convention. In consequence, the Commission concludes that the State violated Raúl José Díaz Peña's right to personal liberty envisaged in Article 7.1 of the American Convention, in relation to the duty with respect to Article 1.1 of the same.

## **1.2 Arbitrary Detention and the Duty to Adopt Provisions of Domestic Law (Articles 7.3 and 2 of the American Convention)**

145. Article 7.3 of the American Convention guarantees the right of every person not to be subjected to arbitrary detention or imprisonment. In this regard the Inter-American Court has held that

in order to restrict the right to personal liberty using measures such as remand in custody, there must be sufficient evidence to allow reasonable supposition that the person committed to trial has taken part in the criminal offense under investigation. Nevertheless, even in these circumstances, the deprivation of liberty of the accused cannot be based on general preventive or special preventive purposes, which could be attributed to the punishment, but [...] based on a legitimate purpose, which is: to ensure that the accused does not obstruct the proceedings from being conducted or elude the system of justice.<sup>196</sup>

146. For its part, the Commission has pointed out that the principle of necessity that should govern preventive detention implies that the granting authority must support in a sufficient way, the reasons for which the existence of signs of responsibility relate, in the specific case, to the appropriate course of the investigations. Also, it implies that they must establish the reasons why they proceeded to grant preventive detention and not a less severe measure.<sup>197</sup>

147. The Court has repeated that the personal characteristics of the alleged perpetrator and the seriousness of the crime imputed to him are not, of themselves, sufficient grounds for remanding in custody, which should be understood as a precautionary and not a punitive measure.<sup>198</sup>

148. In light of the foregoing findings, it must be pointed out that in the request for an arrest warrant, the 62nd Prosecutor stressed that in compliance with the requirements of Articles 250, 251, and 252 of the COPP, the offenses for which Raúl José Díaz Peña was under investigation warranted imprisonment and the action was not proscribed, there were general

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<sup>196</sup> I/A Court HR. *Case of Barreto Leiva vs. Venezuela*. Merits, Reparations and Costs. Judgment of November 17, 2009. Series C No. 206, para. 111. *Cf.* I/A Court HR. *Case of Chaparro Álvarez and Lapo Íñiguez vs. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 101 and 103 and I/A Court HR *Case of Servellón García and others vs. Honduras*. Merits, Reparations and Costs. Judgment of September 21, 2006. Series C No. 152, para. 90 and I/A Court HR, *Case of Acosta Calderón vs. Ecuador*, Merits, Reparations and Costs. Judgment of June 24, 2005. Series C No. 129, para. 111.

<sup>197</sup> IACHR. Complaint in the *Case of Barreto Leiva vs. Venezuela*, October 31, 2008, para. 143.

<sup>198</sup> I/A Court HR. *Case of Barreto Leiva vs. Venezuela*. Merits, Reparations and Costs. Judgment of November 17, 2009. Series C No. 206, para. 133. *Cf.* I/A Court HR, *Case of López Álvarez vs. Honduras*. Judgment of February 1, 2006. Series C No. 141, para. 69; I/A Court HR, *Case of García Asto and Ramírez Rojas vs. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2005. Series C No. 137, paras. 137; I/A Court HR, *Case of Acosta Calderón vs. Ecuador*, Merits, Reparations and Costs. Judgment of June 24, 2005. Series C No. 129, para. 75 and I/A Court HR. *Case of Tibi vs. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004. Series C No. 114, para. 180.

grounds for conviction as it may be shown that the accused was an accomplice to an offense, and the certainty beyond a reasonable doubt that the accused may abscond by virtue of the sentence that may be imposed upon him.<sup>199</sup>

149. Article 250 of the COPP stresses as a requirement for ordering the imprisonment of the accused, *inter alia*, "a reasonable presumption, assessed in the light of the circumstances of the particular case, of a danger of absconding or of obstructing the search for the truth regarding a specific procedural step in the investigation [...]."

150. Also, the COPP states as regards the danger of absconding that

to decide on the danger of absconding the following circumstances shall be taken into account, especially:

1. Permanent links to the country, determined by domicile, habitual residence, family or business or work holdings, and the means to definitively abandon the country or remain hidden;
2. The sentence that may be imposed in the case;
3. The scale of the harm caused;
4. The behavior of the accused during the proceedings, or in prior proceedings, demonstrating his willingness to submit to criminal proceedings.
5. The predelictual behavior of the accused.

[...]

First Paragraph: The danger of absconding is presumed in cases of acts punishable with imprisonment with a length of tens years or more.

151. As a result of reading these rules and the practice of the judicial authorities at the time of the acts, preventive detention formed the general rule and not the exception, since there would always be a reasonable presumption of a risk of absconding, which would automatically apply in those cases of acts punishable with prison sentences equal to or greater in time than ten years. Both the Prosecutor who requested the arrest warrant as well as the Judge who granted it based themselves on the automatic presumption of a danger of absconding.

152. According to the Commission's precedents, "[i]f a pre-trial detention during proceedings can only be used for precautionary purposes and not as a sanction, then the severity of the eventual sentence should not necessarily justify a longer period of preventive detention".<sup>200</sup> On the other hand, the application in a general way, without individualized assessment, is incompatible with the requirements of Article 7. In the same sense, the Inter-American Court has established that a law which contains an exception that "deprives a part of the prison population of a fundamental right, on the basis of the crime for which it is accused, and, hence, intrinsically injures everyone in that category [...] violates per se Article 2 of the American Convention, whether or not it was enforced [in the instant case]."<sup>201</sup>

153. In this sense, the Commission considers that the imposition of preventive detention based solely on the presumption of a risk of Raúl José Díaz Peña's absconding, without a individual assessment of the specific circumstances of the case, even though it is laid down by law, was

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<sup>199</sup> Request FMP-62-0038-04 of the 62 Prosecution Unit of the City of Caracas. January 15, 2004. Annex to the original petition of October 12, 2005.

<sup>200</sup> IACHR, Report No. 86/09, Case 12.553, Merits, *Jorge, José and Dante Peirano Basso*, Uruguay, August 6, 2009, paragraph 141.

<sup>201</sup> I/A Court HR, *Case of Suárez Rosero vs. Ecuador*. Judgment of November 12, 1997. Series C No. 35, para. 98. See in the same sense, I/A Court HR, *Case of Acosta Calderón vs. Ecuador*. Judgment of June 24, 2005. Series C No. 129, paras. 135 and 138.

arbitrary and as such, to his prejudice, constituted a violation of the right enshrined in Article 7.3 of the American Convention. Consequently, the Commission concludes that the State violated Raúl José Díaz Peña's right to personal liberty envisaged in Article 7.1 of the American Convention, in relation to the obligation to respect rights established in Article 1.1 of the same. Also, the punishment and later application of the first paragraph of Article 251 of the COPP and its jurisprudential exception,<sup>202</sup> which served as a basis for granting and maintaining the preventive detention scheme, has resulted in the State of Venezuela's failure to respect Article 2 of the American Convention.

### **1.3 The Right to be Tried Within a Reasonable Time or Be Released and the Presumption of Innocence (Articles 7.5 and 8.2 of the American Convention)**

154. Article 7.5 of the American Convention guarantees the right to any detained person to be brought promptly before a judge or other officer authorized by law to examine the legality and reasonableness of his detention and to be tried within a reasonable time.

155. In this sense the Inter-American Court has stressed that when the time of preventive custody "exceeds a reasonable time, the State can restrict the liberty of the accused by other means that are less harmful than deprivation of liberty by imprisonment, that ensure his presence at the trial," and that this right also entails "the judicial obligation to process the criminal proceedings in which the accused is deprived of his liberty with greater diligence and promptness."<sup>203</sup>

156. Also, based on the right to the presumption of innocence enshrined in Article 8.2 of the Convention, the State has the obligation not to

restrict the liberty of the detained person beyond the limits strictly necessary to ensure the efficient development of an investigation and that he will not evade justice; preventive detention is, therefore, a precautionary rather than a punitive measure. This concept is laid down in a goodly number of instruments of international human rights law, including the International Covenant on Civil and Political Rights, which provides that preventive detention should not be the normal practice in relation to persons who are to stand trial (Art. 9(3)). This would be tantamount to anticipating a sentence, which is at odds with universally recognized general principles of law.<sup>204</sup>

157. In the present case, Raúl José Díaz Peña was subjected to preventive detention from February 25, 2004 until his conviction on April 29, 2008 which means that his preventive detention extended for four years and two months. In this context, the domestic legal framework establishes in Article 244 of the COPP that

Coercive measures shall not be imposed when disproportionate with the seriousness of the crime, the circumstances in which it has been perpetrated and the likely sentence. In no case should they exceed the minimum sentence provided for each crime nor a two- year time limit.

Exceptionally, the Public Prosecution Service or the plaintiff may request the Judge the granting of an extension not exceeding the minimum sentence provided for he crime in order to maintain the personal coercive measures due to expire, whenever justified by serious reasons duly grounded by the Prosecutor or the Plaintiff. In this circumstance, the Judge must

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<sup>202</sup> See, *infra* para. 163.

<sup>203</sup> I/A Court HR. *Case of Barreto Leiva vs. Venezuela*. Merits, Reparations and Costs. Judgment of November 17, 2009. Series C No. 206, para. 120. I/A Court HR. *Case of Bayarri vs. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 30, 2008. Series C No. 187, para. 70.

<sup>204</sup> I/A Court HR, *Case of Suárez Rosero vs. Ecuador*. Judgment of November 12, 1997. Series C No. 35, para. 77.

summon the individual under investigation and the parties to a hearing in order to issue a decision and taking into account the proportionality principle when establishing the extension.

158. In view of the above rule, the Commission observes that in the present case the preventive detention of Raúl José Díaz Peña exceeded the two-year limit established therein. Also, it is not evident from the facts of the case that the Public Prosecution Services requested an extension prior to the expiration of the time limit legally established in the aforementioned provision even when several judges reviewed the measure preventing his liberty at the request of Raúl José Díaz Peña's legal representatives.

159. The Commission reiterates that "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."<sup>205</sup>

160. Following the Court's case law, the Commission considers that "preventive imprisonment is the most severe measure that may be applied to the person accused of a crime, for which reason its application must be exceptional, since it is limited by the principles of lawfulness, presumption of innocence, necessity, and proportionality, indispensable in a democratic society."<sup>206</sup>

161. The Commission observes that on March 24, 2006 having transpired two years from Raúl José Díaz Peña's detention, his defense filed a request for review of the detention pursuant to Article 244 of the COPP. It has also been established that on March 29, 2006 the 23 Tribunal denied the request to review the order to maintain his detention<sup>207</sup>. The 23 Tribunal based its decision upon

the case law of the Supreme Tribunal of Justice indicating that "in effect, the lawmaker established two years as a maximum time limit for personal coercion measures, independently of their nature, considering it a period sufficient for the conduction of the proceedings".

From the analysis of the case it is evident that the procedural delay, is not attributable to this court and that the two years required to grant a less costly measure have not yet elapsed.

In this sense, it has been the practice of this Tribunal to follow and apply the decisions of the Constitutional Chamber of the Supreme Tribunal of Justice which in this case has issued a decision indicating that "crimes against humanity, human rights violations and war crimes are excluded from benefits such as substitution measures, whenever the judge considers preventive detention applicable."<sup>208</sup>

162. From the facts demonstrated it is also clear that on April 17, 2006, the defense filed appeal proceedings against the said decision, which was declared unfounded on June 19, 2006 by

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<sup>205</sup> IACHR, Report No. 86/09, Case 12.553, Merits, Jorge, José and Dante Peirano Basso, Uruguay, August, 2009, para. 140.

<sup>206</sup> I/A Court HR. *Case of Tibi vs. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004. Series C No. 114, para. 106.

<sup>207</sup> 23rd First Instance Court with Judicial Function of the Criminal Judicial Circuit of the Metropolitan Area of Caracas, Resolution on the request for review of the precautionary measure, March 29, 2006. Annex to petitioners' brief received by the IACHR on June 14, 2006.

<sup>208</sup> 23rd First Instance Court with Judicial Function of the Criminal Judicial Circuit of the Metropolitan Area of Caracas, Resolution on the request for review of the precautionary measure, March 29, 2006. Annex to petitioners' brief received by the IACHR on June 14, 2006.

the First Special Chamber of the Court of Appeals, and, in turn, the decision of the 23rd Judge was upheld.<sup>209</sup>

163. The First Special Chamber underlined among its reasoning that

although it is certain that a period greater than two (02) years has passed [...] the Constitutional Chamber of the Supreme Court of Justice, has expressed in its judgments [...] that it is irrefutably established that all those offenses against humanity, offenses against human rights or war crimes, remain excluded from benefits such as alternative precautionary measures, in the case where the Judge considers imposing a custodial sentence on the accused.<sup>210</sup>

Also, it stressed that in the present case the "offences [...] exceed that set out in the first paragraph of Article 251"<sup>211</sup> which provides that "a danger of absconding is presumed in cases of acts punishable with sentences of imprisonment, with a length of tens years or more." It also points out in making an anticipatory analysis of guilt, that "according to his enquiries, the Attorney General could conclude that citizen Raúl José Díaz Peña participated in the planning of the [attack against the Colombian Consulate and the Spanish Embassy]."<sup>212</sup>

164. It is also proved that on June 22, 2006, Raúl José Díaz Peña's defense lodged a review appeal against the decision denying the appeal proceedings,<sup>213</sup> which was declared groundless on June 28, 2006.<sup>214</sup>

165. In this respect, the Commission observes that basis for declaring the review of the precautionary measure unfounded used by both the 23rd Court as well as the First Special Chamber of the Court of Appeals may be summarized in three points. In the first place, that the delay in the criminal proceedings was the fault of Raúl José Díaz Peña's defense (without explaining the reasons); in the second place, that the case-law exception applied, relating to the exclusion, from alternative measures, for crimes against humanity, war crimes and violations of human rights; in the third place, that Raúl José Díaz Peña might be sentenced to imprisonment exceeding ten years and therefore there was a presumed danger of absconding.

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<sup>209</sup> First Special Chamber of the Court of Appeals for the Criminal Judicial Circuit of the Metropolitan Area of Caracas Hearing Cases of Offenses Related to Terrorism, Judge Rapporteur Maikel José Moreno, Judgment on Appeal Petition, June 19, 2006. Annex to petitioners' brief received by the IACHR on June 14, 2006.

<sup>210</sup> First Special Chamber of the Court of Appeals for the Criminal Judicial Circuit of the Metropolitan Area of Caracas Hearing Cases of Offenses Related to Terrorism, Judge Rapporteur Maikel José Moreno, Judgment on Appeal Petition, June 19, 2006. Annex to petitioners' brief received by the IACHR on June 14, 2006.

<sup>211</sup> First Special Chamber of the Court of Appeals for the Criminal Judicial Circuit of the Metropolitan Area of Caracas Hearing Cases of Offenses Related to Terrorism, Judge Rapporteur Maikel José Moreno, Judgment on Appeal Petition, June 19, 2006. Annex to petitioners' brief received by the IACHR on June 14, 2006.

<sup>212</sup> First Special Chamber of the Court of Appeals for the Criminal Judicial Circuit of the Metropolitan Area of Caracas Hearing Cases of Offenses Related to Terrorism, Judge Rapporteur Maikel José Moreno, Judgment on Appeal Petition, June 19, 2006. Annex to petitioners' brief received by the IACHR on June 14, 2006.

<sup>213</sup> Raúl Díaz Peña's Defense Brief, June 22, 2006. Annex to petitioners' brief received by the IACHR on June 14, 2006.

<sup>214</sup> First Special Chamber of the Court of Appeals for the Criminal Judicial Circuit of the Metropolitan Area of Caracas Hearing Cases of Offenses Related to Terrorism, Judge Rapporteur Maikel José Moreno, Resolution of June 28, 2006. Annex to petitioners' brief received by the IACHR on August 28, 2006.

166. The Commission has stressed that

[...] 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.

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.<sup>215</sup>

167. From the facts as proved it is apparent that during the four years and two months that Raúl José Díaz Peña's preventive detention lasted, his defense requested on seven occasions<sup>216</sup> the review of the preventive detention based on Article 264 of the COPP.<sup>217</sup> The Commission observes that all the requests were denied based on the presumption of the danger of absconding in Article 251 COPP.

168. The Inter-American Court has stressed that "the need, enshrined in the American Convention, that the preventive detention be justified in each specific case, through the weighing of the elements that concurred in the same, and that in no case shall the application of said precautionary measure be determined by the crime with which the individual is being charged."<sup>218</sup>

169. In this context, the Commission has referred to the relationship between the principle of proportionality and the presumption of innocence in the sense that

[...] 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.<sup>219</sup>

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<sup>215</sup> IACHR, Report No. 86/09, Case 12.553, Merits, *Jorge, José and Dante Peirano Basso*, Oriental Republic of Uruguay, August 6, 2009, paras.130-131.

<sup>216</sup> Requests of April 22, 2004, September 7, 2004, December 16, 2004, February 21, 2005, June 9, 2005, September 19, 2005, and April 17, 2007. See, *supra*, Chapter IV.A.2.

<sup>217</sup> The review of precautionary measures is authorized by Article 264 of the COPP, which provides: "[t]he accused may request the revocation or substitution of the judicial detention measure whenever he considers it relevant. In every case the Judge shall examine the necessity of maintaining the precautionary measures every three months, and when he considers it appropriate, he shall substitute less serious measures. The refusal of the court to revoke or substitute the measure is not appealable."

<sup>218</sup> I/A Court HR, *Case of López Álvarez vs. Honduras*. Judgment of February 1, 2006. Series C No. 141, para. 81.

<sup>219</sup> IACHR, Report No. 86/09, Case 12.553, Merits, *Jorge, José and Dante Peirano Basso*, Oriental Republic of Uruguay, August 6, 2009, para. 91.

170. The Commission has stressed 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.<sup>220</sup>

171. According to its decisions, the Commission observes that the Venezuelan judicial authorities have not demonstrated that if Raúl José Díaz Peña were released he would obstruct the efficient progress of the investigations or evade justice but they have alleged a presumed danger of absconding, in view of the fact that the sentence that might be imposed on Raúl José Díaz Peña may exceed ten years.

172. In conclusion, the Commission observes that the application of the presumed danger of absconding based on the crimes alleged does not reply to the criteria of procedural dangers - obstructing the efficient progress of the investigations or evading justice - established to justify imprisonment as a precautionary measure. The said presumption was applied based on an anticipated forecast of the sentence imposed by the Venezuelan judicial authorities, and would constitute a violation of the right to the presumption of innocence enshrined in Article 8.2 of the American Convention.

173. In view of the foregoing considerations, the Commission concludes that the four years and two months preventive detention imposed on Raúl José Díaz Peña exceeds "the right to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings", recognized in Article 7.5 of the Convention, and the right to the presumption of innocence enshrined in Article 8.2 in connection with Article 1.1 of the same instrument. Consequently, the Commission concludes that the State has violated Raúl José Díaz Peña's right to personal liberty contemplated in Article 7.1 of the American Convention, in relation to the duty of respect established in Article 1.1 of the same.

#### **1.4 Remedies Available to Contest Raúl José Díaz Peña's Imprisonment (Article 7.6 and 25.1 of the American Convention)**

174. The Commission observes that Raúl José Díaz Peña's defense lodged an amparo appeal on August 14, 2006 in order to question the legality of continuing his preventive detention.

175. Article 7.6 of the American Convention establishes that anyone who is deprived of his liberty "shall be entitled to recourse to a competent court [...] without delay" in order that it may decide on the lawfulness of his arrest or detention. The Inter-American Court has pointed out that "protection of the individual against arbitrary exercise of public authority is a fundamental objective of international human rights protection. In this regard, non-existence of effective domestic remedies places the individual in a state of defenselessness."<sup>221</sup>

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<sup>220</sup> IACHR, Report No. 86/09, Case 12.553, Merits, *Jorge, José and Dante Peirano Basso*, Oriental Republic of Uruguay, August 6, 2009, para. 137

<sup>221</sup> I/A Court HR, *Case of Tibi vs. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 130

176. The Commission mentions that Article 7.6 of the Convention requires that an appeal such as the present must be decided promptly by a judge or competent court. Also, following the cases of the Inter-American Court, it is stressed that Article 25.1 of the Convention, in broad terms, the States' duty to offer to everyone under its jurisdiction effective judicial recourse against acts that violate their fundamental rights.<sup>222</sup> On this view, the Court has stressed that for the State to comply with this provision in the cited Article 25.1 of the Convention it is not sufficient that recourses exist formally, but they must provide results,<sup>223</sup> in other words, they must grant to the individual the real possibility of lodging simple and effective recourse that allows him to reach, in his case, the required judicial protection. The Court has repeatedly stressed that the existence of these guarantees "constitutes one of the basic pillars, not only of the American Convention, but also of the Rule of Law in a democratic society as per the Convention."<sup>224</sup>

177. It is equally proved that on August 14, 2006, Raúl José Díaz Peña's defense lodged a constitutional amparo appeal based on the declaration of 'unfounded' of the appeal proceedings denying the review of Raúl José Díaz Peña's preventive detention issued by the 23rd First Instance Court on March 29, 2006, was a breach of the rights to personal liberty, to due process, the presumption of innocence and the reestablishment of the judicial situation that is breached due to judicial error set out in Articles 44, 49.1, 2), 3), 4), and 8) and 257 of the Constitution of the Bolivarian Republic of Venezuela.<sup>225</sup> The above in view of the existence of procedural delay not attributable to Mr. Díaz Peña, the conditions in which his detention was imposed, the lack of sufficient evidence against him, his remaining in preventive detention for a period greater than that established by law and the continued violation of his right to the presumption of innocence.<sup>226</sup>

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<sup>222</sup> I/A Court HR, *Case of Maritza Urrutia vs. Guatemala. Merits, Reparations and Costs*. Judgment of November 27, 2003. Series C No. 103, para. 116; I/A Court HR, *Case of Cantos vs. Argentina. Merits, Reparations and Costs*. Judgment of November 28, 2002. Series C No. 97, para. 52; I/A Court HR, *Case of del Tribunal Constitucional vs. Peru*. Judgment of January 31, 2001. Series C No. 71, para. 89; I/A Court HR, *Case of Tibi vs. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 130.

<sup>223</sup> I/A Court HR, *Case of Maritza Urrutia vs. Guatemala. Merits, Reparations and Costs*. Judgment of November 27, 2003. Series C No. 103, para. 117; *Case of Juan Humberto Sánchez vs. Honduras*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 7, 2003. Series C No. 99, para. 121; I/A Court HR, *Case of Cantos vs. Argentina. Merits, Reparations and Costs*. Judgment of November 28, 2002. Series C No. 97, para. 52; I/A Court HR, *Case of Tibi vs. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 131.

<sup>224</sup> I/A Court HR, *Case of Tibi vs. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 131; I/A Court HR, *Case of Maritza Urrutia vs. Guatemala. Merits, Reparations and Costs*. Judgment of November 27, 2003. Series C No. 103, para. 117; I/A Court HR, *Case of Juan Humberto Sánchez vs. Honduras*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 7, 2003. Series C No. 99, para. 121; I/A Court HR, *Case of Cantos vs. Argentina. Merits, Reparations and Costs*. Judgment of November 28, 2002. Series C No. 97, para. 52; I/A Court HR, *Case of the Comunidad Mayagna (Sumo) Awas Tingni vs. Nicaragua*. Preliminary Objections. Judgment of February 1, 2000. Series C No. 66, para. 111; I/A Court HR, *Case Bámaca Velásquez vs. Guatemala*. Merits. Judgment of November 25, 2000. Series C No. 70, para. 191; I/A Court HR, *Case of Cantoral Benavides vs. Peru*. Merits. Judgment of August 18, 2000. Series C No. 69, para. 163; I/A Court HR, *Case of Durand and Ugarte vs. Peru*. Merits. Judgment of August 16, 2000. Series C No. 68, para. 101; I/A Court HR, *Case of de los "Niños de la Calle" (Villagrán Morales and others) vs. Guatemala*. Reparations and Costs. Judgment of May 26, 2001. Series C No. 77, para. 234; I/A Court HR, *Case of Cesti Hurtado vs. Peru*. Judgment of September 29, 1999, para. 121; I/A Court HR, *Case of Castillo Petruzzi and others vs. Peru*. Judgment of May 30, 1999. Series C No. 52, para. 184; I/A Court HR, *Case of de la "Panel Blanca" (Paniagua Morales and others) vs. Guatemala*. Judgment of March 8, 1998. Series C No. 37, para. 164; I/A Court HR, *Case of Blake vs. Guatemala*, Judgment of January 24, 1998. Series C No. 36, para. 102; I/A Court HR, *Case of Suárez Rosero vs. Ecuador*. Merits. Judgment of November 12, 1997. Series C No. 35, para. 65; and I/A Court HR, *Case of Castillo Páez vs. Peru*. Judgment of November 3, 1997. Series C No. 34, para. 82.

<sup>225</sup> *Amparo* proceedings lodged by Raúl Díaz Peña's defense. Annex to petitioners' brief received by the IACHR on August 28, 2006.

<sup>226</sup> Constitutional Chamber of the Supreme Court of Justice, Judge Rapporteur Marcos Tulio Dugarte Padrón, File No. 06-1245, December 19, 2006. Annex to petitioners' brief received by the IACHR on January 23, 2007.

178. In February 26, 2007, the First Special Chamber of the Court of Appeals of the Metropolitan Criminal Judicial Circuit of Caracas declared itself competent to hear the *amparo* action and declared it inadmissible by virtue of the provisions of Article 6.5 of the Organic *Amparo* Law on Constitutional Rights and Guarantees,<sup>227</sup> a decision upheld on May 11, 2007, by the Constitutional Chamber of the Supreme Court of Justice.<sup>228</sup> The basis of the declaration of inadmissibility was founded on the fact that Raúl José Díaz Peña's defense lodged appeal proceedings against the decision the object of the *amparo* proceedings, which denied a review of the preventive detention for a lapse of more than two years without trial, i.e. it is under the provisions of Article 6.5 of the Organic *Amparo* Law on Constitutional Rights and Guarantees, which provides:

5) When the appellant has chosen to have recourse to the ordinary judicial methods or has made use of pre-existing judicial means. In such a case, after alleging the violation or a threatened violation of a constitutional right or guarantee, the Judge shall have recourse to the proceedings and the intervals established in Articles 23, 24, and 26 of the present Law, in order to grant the provisional suspension of the effects of the questioned act.  
[...]

179. In this respect, the judgments of the Supreme Court of Justice has stressed that "so that Article 6.5 is not inconsistent, it is necessary, not only to admit the *amparo* in cases of non-constitutional breaches, even supposing that the appellant has chosen the ordinary jurisdiction, but also, not admit it if the former could have lodged ordinary appeals but has not exercised it beforehand."<sup>229</sup>

180. The Commission observes that even though Raúl José Díaz Peña's defense had made use of the ordinary appeals, there were allegations of violations of constitutional principles in the *amparo* appeal, which guarantee personal liberty and due process, so that in principle, Articles 23, 24, and 26 of the Organic *Amparo* Law on Constitutional Rights and Guarantees apply. These state:

Article 23: If the Judge does not choose to immediately restore the breached legal situation, in accordance with the preceding article, he shall order from the authority, entity, social organization or the individuals alleged to have violated or threatened the constitutional rights and guarantees, within a period of forty eight hours (48), starting from the respective notification, a report on the alleged violation or threat which has lead to the *amparo* request.

The absence of a corresponding report shall be taken as an acceptance of the incriminating facts.

Article 24: The report referred to in the previous Article shall contain a brief and succinct summary of the evidence on which the alleged wronged individual intends to base his defense, without prejudice to the power of assessment conferred on the Judge by the present Law.

Article 26: The Judge hearing the *amparo*, shall provide, within ninety-six hours (96) hours subsequent to the presentation of the report before the allegedly aggrieved individual or from the end of the corresponding period of time, the opportunity for the parties or their legal

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<sup>227</sup> First Special Chamber of the Court of Appeals for the Criminal Judicial Circuit of the Metropolitan Area of Caracas with Competence to Hear Cases of Offenses Related to Terrorism, Causa No. S7-3119-07, February 26, 2007. Annex to petitioners' brief received by the IACHR on March 28, 2007.

<sup>228</sup> Constitutional Chamber of the Supreme Court of Justice, Judge Rapporteur Arcadio Delgado Rosales, File No. 07-0376, May 11, 2007. Annex to petitioners' brief received by the IACHR on May 16, 2007.

<sup>229</sup> Supreme Court of Justice, Constitutional Chamber, Judge Rapporteur José M. Delgado Ocando, November 23, 2001.

representatives to express, in an oral and public way, their respective arguments. Once this procedural step has been made, the Judge shall order a deadline of twenty four (24) hours for deciding the constitutional amparo request.

181. Also, the Commission observes that Article 4 of the Organic Amparo Law used by Raúl José Díaz Peña's defense as a basis for lodging the appeal provides that the request must be drafted in a short, summary and effective manner. More specifically, the appeal was lodged on August 14, 2006, almost four months afterwards, without there being any procedural progress, the Constitutional Chamber of the Supreme Court of Justice ruled that it was unfounded and the case file was sent back to the corresponding Court of Appeals. After more than two months the First Special Chamber of the Court of Appeals ruled that the appeal was inadmissible, which was appealed on March 2, 2007. On May 11, 2007, after two months, the Constitutional Chamber of the Supreme Court declared the appeal unfounded and upheld the decision of the Appeals Court. That is to say, the resolution of the appeal up to the second instance took up nine months, which does not correspond to requirement of brevity in Article 5 of the Organic Amparo Law or Article 7.6 of the American Convention.

182. In view of the foregoing considerations, the Commission concludes that the State violated, to the prejudice of Raúl José Díaz Peña, the right to be brought before a judge or competent tribunal, so that there might be a prompt determination on his continuing preventive detention, as well as the right to judicial protection, enshrined in Articles 7.6 and 25.1 of the American Convention. As a result, the Commission concludes that the State has violated Raúl José Díaz Peña's right to personal liberty envisaged in Article 7.1 of the American Convention, in relation to the duty of respect established in Article 1.1 of the same.

## **2. The Right to Judicial Guarantees (Article 8 of the American Convention)**

183. Article 8 of the American Convention establishes, so far as is relevant, the following minimum guarantees:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:  
[...]  
c. adequate time and means for the preparation of his defense;  
[...]

184. The Commission has emphasized in the past that Article 8 of the Convention "includes a number of rights and guarantees linked to common legal values that, when considered as a whole, conform a sole right, not specifically defined, with the unequivocal purpose of ensuring that every person has a right to a fair trial."<sup>230</sup>

185. The petitioners allege that the State of Venezuela violated Raúl José Díaz Peña's right to trial within a reasonable period of time.

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<sup>230</sup> IACHR. Report No. 52/97, Case 11.218, *Arges Sequeira Mangas*, Nicaragua, February 18, 1998, para. 102.

186. In this respect the Inter-American Court has determined that the period of time to consider whether or not the right to be heard within a reasonable time in accordance with Article 8.1 of the Convention has been violated, starts from the moment when the alleged victim was imprisoned, that is to say February 25, 2004, and ends at the moment when a final and firm judgment is pronounced in the case, when the proceedings cease, that is to say April 29, 2009. The Court has stressed that "particularly in criminal matters, that time must cover the entire proceeding, including any appeals that may be filed."<sup>231</sup>

187. It should be pointed out that in the present case, the petitioners stated that Raúl José Díaz Peña expressly renounced lodging appeals against his first instance sentence so that execution of the sentence followed. In accordance with the decisions of the Inter-American Court, the right to trial within a reasonable time, recognized in Article 8 of the Convention "is not an easily defined concept." In this sense, the decisions of the Commission and the Inter-American Court have determined that the reasonableness of the time for trial must be evaluated in the light of three points, i.e. the complexity of the case, the procedural activity of the interested party and the conduct of the judicial authorities.<sup>232</sup>

188. For its part, the State alleges that neither Raúl José Díaz Peña or his supporters or defense lawyers alleged any irregularity in the criminal trial legally conducted against him that ended in a sentence against him. Also, it alleges that it offered Raúl José Díaz Peña access to the appeals established by domestic judicial procedure and that the Venezuelan courts seised of these appeals, issued their judgments with strict independence and autonomy.

189. The criminal trial against Raúl José Díaz Peña from his arrest until the sentence given against him lasted four years and two months. The Commission observes that the State has not presented elements to demonstrate that the case was especially complex. It observes that there was a number of persons tried, more specifically three accused. It does not appear from the case file that Raúl José Díaz Peña did not take procedural steps that held up the case. For its part, from the evidence in the case file, it seems that the delay of more than four years in processing the criminal proceedings is attributable to the behavior of the judicial authorities.

190. A summary of the principal procedural steps in the case against Raúl José Díaz Peña from his arrest until his conviction includes five recusals, one from Judge Ludmila Pulido, three from Judge Yngrid Bohórquez, one from Gardenia del Carmen Delgado Valera and one from Judge Migdalia María Añez; the dismissal of Judge María Mercedes Pardo; five adjournments of the public oral trial, two due to the absence of the representative of the Prosecutor, one due to the fact that the Court decided not to convene and another due to the lack of available reproduction equipment, among other procedural delays.

191. In this respect, the IACHR has stressed at various times its concern about factors that might affect the impartiality and independence of some employees of the Attorney General and the judicial branch in Venezuela.<sup>233</sup> In its Report on Democracy and Human Rights in Venezuela, the

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<sup>231</sup> I/A Court HR, *Case of Suárez Rosero vs. Ecuador*. Merits. Judgment of November 12, 1997. Series C No. 35, para.71.

<sup>232</sup> Report No.66/01, Case 11.992, Daría María Levoyer Jiménez, Ecuador, June 14, 2001, IACHR, Report No. 12/96, Case 11.245, Admissibility and Merits, Jorge A. Giménez, Argentina, March 1, 1996; I/A Court HR, *Case of Suárez Rosero vs. Ecuador*. Merits. Judgment of November 12, 1997. Series C No. 35, para. 25; I/A Court HR, *Case of Genie Lacayo vs. Nicaragua*, Judgment of January 29, 1997, Series C No. 30, para. 77. See also European Court of Human Rights, Series A 195; *Ruiz Mateos vs. Spain*, Series A 262 (1993).

<sup>233</sup> Follow-up Report on Compliance by the State of Venezuela with the Recommendations made by the IACHR in its Report on the Situation of Human Rights in Venezuela (2003) available at <http://www.cidh.org/annualrep/2004eng/chap.5b.htm>, Reports Chapter IV of the Annual Report of Inter-American

Commission stressed that during the last few years, it has become aware of cases in which members of the judicial authorities have expressly shown the support for the Executive, giving signs of the lack of independence of this organ. Also, it indicated that it has been able to observe how certain failures caused by a lack of judicial independence are marked in those cases with political overtones, and as a consequence undermines society's confidence in the judiciary.<sup>234</sup>

192. The Commission also indicated that another area with lack of independence is the system for the distribution of cases in the Public Prosecution Services. In that regard it indicated

the Commission has been told that the Attorney General's Office does not have an objective system for assigning cases, and that matters are 'cherry-picked'. As proof of this it is claimed that in spite of there being more than 1,000 prosecutors at the national level, all investigations related to the interests of the ruling party and the executive branch are handled by a small group of prosecutors. It is further claimed that several of these prosecutors have been challenged by the accused in various cases, but that the Attorney General has not upheld any of those challenges.<sup>235</sup>

193. Also, the Commission finds that the dismissal of Judge María Mercedes Pardo in the present case, before issuing decisions relating to Raúl José Díaz Peña's situation, has affected his right to be heard by an independent and impartial judge. In this respect, the IACHR pointed out in its 2005 Annual Report that:

[a]nother negative effect of the provisional status of judges has to do with the lack of guarantees safeguarding them from removal and replacement, actions that are described as retaliation for having ruled against the Government. In [one] case, the Judicial Commission of the Supreme Court of Justice struck down the designation of the 22nd Trial Judge, María Mercedes Prado, who was about to order the conditional release of one of the persons accused of carrying out attacks against the Spanish and Colombian embassies, considering that the persons deprived of liberty were about to have completed [sic] their second year in detention.<sup>236</sup>

194. In view of the foregoing considerations, the Commission concludes that the State has violated, to the prejudice of Raúl José Díaz Peña, the right to trial within a reasonable period of time, established in Article 8.1 of the American Convention, in relation to the obligation to respect rights established in Article 1.1 of the same.

### **3. Right to Personal Integrity**

195. Articles 5.1 and 5.2 of the American Convention establish that:

1. Every person has the right to have his physical, mental, and moral integrity respected..

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...continuation

Commission on Human Rights 2005, 2006, 2007 and 2008, available at <http://www.cidh.oas.org/anual.esp.htm> and IACHR. Report. Democracy and Human Rights in Venezuela, OEA/Ser.L/V/II. Doc 54, December 30, 2009, available at <http://www.cidh.org/countryrep/Venezuela2009eng/VE09.TOC.eng.htm>.

<sup>234</sup> IACHR. Report. Democracy and Human Rights in Venezuela, OEA/Ser.L/V/II. Doc 54, December 30, 2009, para. 302.

<sup>235</sup> Civil Association of the Penal Forum of Venezuela *Report presented by the Civil Association of the Penal Forum of Venezuela on its third anniversary*. June 6, 2008, pages 58-59 in IACHR. Report. Democracy and Human Rights in Venezuela, , OEA/Ser.L/V/II. Doc 54, December 30, 2009, para.308.

<sup>236</sup> IACHR. Annual Report 2005, Chapter IV: Venezuela, paras. 295 and 297 available at <http://www.cidh.org/annualrep/2005eng/chap.4d.htm>

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

196. In this regard, the Commission has emphasized that

[a]mong the fundamental principles upon which the American Convention is grounded is the recognition that the rights and freedoms protected thereunder are derived from the attributes of their human personality. From this principle flows the basic requirement underlying the Convention as a whole, and Article 5 in particular, that individuals be treated with dignity and respect. Accordingly, Article 5(1) guarantees to each person the right to have his or her physical, mental, and moral integrity respected, and Article 5(2) requires all persons deprived of their liberty to be treated with respect for the inherent dignity of the human person. These guarantees presuppose that persons protected under the Convention will be regarded and treated as individual human beings, particularly in circumstances in which a State Party proposes to limit or restrict the most basic rights and freedoms of an individual, such as the right to liberty.<sup>237</sup>

197. The Inter-American Court has established that "according to Article 5 of the Convention, all persons deprived of their liberty shall be treated with regard for their inherent dignity. The State, as the entity responsible for detention centers, must guarantee prison inmates the existence of conditions that respect their fundamental rights and a decent life."<sup>238</sup>

198. As well as the rights and obligations established in Article 5 of the Convention, it is important to mention the regional and universal standards especially applicable to the protection of personal integrity, prison conditions and the health of detained persons contained in the Standard Minimum Rules for the Treatment of Prisoners,<sup>239</sup> the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,<sup>240</sup> and the Declaration of Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.<sup>241</sup>

199. In the facts as proved, the Commission has outlined Raúl José Díaz Peña's conditions of detention in the DISIP. Among these conditions were the lack of ventilation and natural light, lock-down at night between 10pm and 7am without access to sanitary facilities, and the fresh air outings limited to two hours every 15 days.

200. In this regard the Inter-American Court has stressed that

[...] the poor physical and sanitary conditions existing in detention centers, as well as the lack of adequate lightning and ventilation, are per se violations to Article 5 of the American Convention, depending on their intensity, length of detention and personal features of the

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<sup>237</sup> IACHR, Report No. 38/00 of April 13, 2000, Case 11.743, Baptiste (Grenada), para. 89.

<sup>238</sup> I/A Court HR. *Case of Chaparro Álvarez and Lapo Íñiguez. vs. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 170. The Inter-American Commission has issued guidelines to the States in the interpretation of their obligations established in Article 5 of the American Convention in the Declaration of Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. See Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, available at <http://www.cidh.org/basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm>.

<sup>239</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977.

<sup>240</sup> Adopted by the General Assembly of the United Nations in its resolution 43/173 of December 9, 1988.

<sup>241</sup> Document approved by the Inter-American Commission on Human Rights in its 131st Period of Ordinary Sessions held from March 3 until 14, 2008.

inmate, since they can cause hardship that exceed the unavoidable level of suffering inherent in detention, and because they involve humiliation and a feeling of inferiority.<sup>242</sup>

201. As regards the lack of ventilation and natural light, the State submits and the petitioners agree that the cells have a ventilation system through floor level grills and extractors in the passages, and the light is white artificial light, nevertheless the cells do not have natural ventilation or light. The petitioners indicated that there is only one barred window 0.50m by 0.50m and high up it gives out onto a ramp over which cars pass twenty-four hours. This information has not been disputed by the State. In this regard, Rule 11 of the Standard Minimum Rules for the Treatment of Prisoners<sup>243</sup> establishes that

[i]n all places where prisoners are required to live or work: a) the windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation; b) artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.

202. Also, from the facts it emerges that personnel of the DISIP lock Raúl José Díaz Peña's cell every night from 10pm until 7am, making it impossible for him to visit the toilet facilities if need be. The petitioners indicated, as related above, that when the detainees want to go to the toilet at night they do so in plastic bags and clean themselves with newspaper. In this sense, Rule 12 of the Standard Minimum Rules for the Treatment of Prisoners<sup>244</sup> establishes that "the sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner" and in Principle XII.2 of the Declaration of Principles and Best Practices on the Protection of Persons Deprived of Liberty in Americas provides "persons deprived of liberty shall have access to clean and sufficient sanitary installations that ensure their privacy and dignity. They shall also have access to basic personal hygiene products and water for bathing or shower, according to the climatic conditions."<sup>245</sup>

203. Finally, as regards fresh air outings, the petitioners maintain that Raúl José Díaz Peña goes out into the fresh air for two hours every 15 days. For its part, the State alleges that Raúl José Díaz Peña goes out into the sunshine once a week. In this regard, Rule 21.1 of the Standard Minimum Rules for the Treatment of Prisoners<sup>246</sup> establishes that "[e]very prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits."

204. From the facts proved, it is apparent that the detention conditions, coupled with the lack of adequate medical attention provided to Raúl José Díaz Peña has had an affect on his health. In accordance with the facts proved, there has been a deterioration in the health of Raúl José Díaz

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<sup>242</sup> I/A Court HR, *Case of Montero Aranguren and others (Retén de Catia) vs. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 5, 2006. Series C No. 150, para. 97

<sup>243</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977.

<sup>244</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977.

<sup>245</sup> Document approved by the Inter-American Commission on Human Rights in its 131st Period of Ordinary Sessions held from March 3 until 14, 2008.

<sup>246</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977.

Peña since his detention, such as the loss of hearing in one ear and recurring peri-anal abscesses. The petitioners have presented medical certificates showing Raúl José Díaz Peña's deteriorating health. For its part, the State has presented medical certificates that according to their diagnosis show that Raúl José Díaz Peña is in a good state of health.

205. For its part, the Commission observes that the State has not afforded Raúl José Díaz Peña adequate medical treatment for his health condition, specifically access to a specialist otorhinolaryngologist. In accordance with the proven facts, Raúl José Díaz Peña was only examined by a otorhinolaryngologist on three occasions and all the required examinations were not performed to treat his health condition since he was not transmitted to suitable locations for undertaking the examinations or because the necessary instruments were unavailable to undertake them or even that they were not working.

206. In this respect, the Inter-American Court has emphasized that in accordance with Article 5 of the American Convention "the State has the duty to provide regular medical examinations and care to the detainees, as well as adequate treatment when required. The State must also allow and facilitate examination of the detainees by a physician of their choice or chosen by their legal representative or custodian".<sup>247</sup>

207. According to the last medical report provided by the petitioners

The patient has been diagnosed with and treated for recurring chronic suppurative otitis in the left ear progressing to the gradual loss of auditory acuity in the mentioned ear [...] the patient presented four times with a perianal abscess, finding at the last episode an anal fistula, which was corroborated by the gastroenterologist of the DISIP, which have been drained and treated by the patient himself, hence its recurrence. Although Mr. Díaz Peña is in apparent good physical condition, these recurring infections, together with sinusitis, gingivitis and occasional gingivorrhagia will lead to a worsening in his physical and emotional health.<sup>248</sup>

208. At the moment of the adoption of the present report, Raúl José Díaz Peña is receiving treatment by private doctors who, with the DISIP's authorization, carry out personalized medical treatment.

209. The Inter-American Court has stressed that

[...] the lack of adequate medical assistance does not satisfy the minimum material requisites of a treatment consistent with the human condition as stipulated in Article 5 of the American Convention.<sup>159</sup> The State has the duty to provide detainees with regular medical checks and care and adequate treatment whenever necessary. Besides, the State must allow and facilitate medical assistance to detainees by a professional physician of their choice or selected by their legal representatives,<sup>160</sup> although this does not imply the existence of a duty to satisfy all wishes and preferences of a person deprived of liberty regarding medical assistance, but only those real needs consistent with the actual circumstances and condition of the detainee. Assistance by a physician not related to prison or detention center authorities is an important safeguard against torture and physical or mental ill treatment of inmates.<sup>249</sup>

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<sup>247</sup> I/A Court HR, *Case of Tibi vs. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 156.

<sup>248</sup> Precautionary Measures File. Medical Certificate of March 12, 2010, Dra. Carmen Peña. Annex to petitioners' brief received by the IACHR on March 23, 2010.

<sup>249</sup> I/A Court HR, *Case of Montero Aranguren and others (Retén de Catia) vs. Venezuela*. Judgment of July 5, 2006. Series C No. 150, para. 102 and 103; I/A Court HR, *Case of García Asto and Ramírez Rojas vs. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2005. Series C No. 137, paras. 226 and 227; I/A Court HR, *Case of De la Cruz Flores vs. Peru*. Judgment of November 18, 2004. Series C No. 115, para. 132; and I/A Court HR, *Case of Tibi vs. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 157.

Consequently, persons deprived of their liberty are under the control of the State authorities and are in an especially vulnerable situation, so that the competent authorities have a special obligation to adopt measures for the protection of the physical integrity and dignity inherent in the human condition.<sup>250</sup>

210. Principle X of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas establishes that "[p]ersons deprived of liberty shall have the right to health, understood to mean the enjoyment of the highest possible level of physical, mental, and social well-being, including amongst other aspects, adequate medical, psychiatric, and dental care; permanent availability of suitable and impartial medical personnel; access to free and appropriate treatment and medication [...]."<sup>251</sup>

211. Principle XXIV of the Protection of All Persons under Any Form of Detention or Imprisonment establishes that "[...] every detained person [...] shall be offered [...] medical care and treatment shall be provided whenever necessary [...]."<sup>252</sup> Rule 22 of the Standard Minimum Rules for the Treatment of Prisoners<sup>253</sup> establishes that

[a]t every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality. 2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers. 3) the services of a qualified dental officer shall be available to every prisoner.

212. In view of the foregoing, in the case of persons detained, the States' obligation to respect the physical integrity and to respect the dignity inherent in human beings, extends to guaranteeing access to adequate medical attention.

213. Following the case law of the Court, the Commission establishes that despite the seriousness of his health condition, Raúl José Díaz Peña did not receive treatment or adequate and timely medical attention at the detention center with negative consequences for his current health and concludes that the deficient medical attention received by the alleged victim violates Article 5 of the American Convention.<sup>254</sup>

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<sup>250</sup> See also U.N. Doc. HRI/GEN/1/Rev.7 at 176 (1992), Human Rights Committee, General Observation 21, para. 3; European Court of Human Rights, *Case of Dzieciak v. Poland*, Application no. 77766/01, Judgment of December 9, 2008; European Court of Human Rights, *Case of Slimani v. France*, Application no. 57671/00, Judgment of 27 July, 2004, para. 28.

<sup>251</sup> Document approved by the Inter-American Commission on Human Rights in its 131st Period of Ordinary Sessions held from March 3 until 14, 2008. Principle X: Health.

<sup>252</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Adopted by the General Assembly of the United Nations in its resolution 43/173, of December 9, 1988, Principle 24. In the same sense, I/A Court HR, *Case of De la Cruz Flores vs. Peru*. Judgment of November 18, 2004. Series C No. 115, para. 133 and I/A Court HR, *Case of Tibi vs. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004. Series C No. 114, para. 154.

<sup>253</sup> Adopted by the First United Nation Congress on Crime Prevention and Treatment of Offenders, held in Geneva in 1955, and adopted by the Social and Economic Council on Resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977.

<sup>254</sup> I/A Court HR, *Case of Tibi vs. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 157.

214. In view of the above, the Commission concludes that the State violated Article 5.1 and 5.2 of the Convention in connection with Article 1.1 of the same instrument against Raúl José Díaz Peña.

## **V. CONCLUSIONS**

215. On the basis of the allegations of fact and law described above, the Commission concludes that the State is responsible for the violation of the rights to physical integrity, personal liberty, judicial guarantees, due process and the duty to adopt provisions in its domestic law provided for in Articles 5, 7, 8 and 25 in connection with Articles 1.1 and 2 of the same instrument, against Raúl José Díaz Peña.

## **VI. RECOMMENDATIONS**

216. On the basis of the allegations of fact and law described above,

**THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS RECOMMENDS THAT THE STATE:**

1. Provide adequate reparations for material and moral damages caused by the violations of human rights perpetrated against Raúl José Díaz Peña as set out in this report.

2. Adopt administrative, disciplinary or other measures regarding the conduct of state agents contributing to the violations found in the present report, including the lack of adequate and timely medical attention, as well as the delay in several phases of the proceedings.

3. Implement measures to modify the conditions of detention at the then Directorate of the Intelligence Services and Prevention (DISIP), now Bolivarian Intelligence Services (SEBIN).

4. Adopt effective measures to ensure that persons deprived of their liberty at the then Directorate of the Intelligence Services and Prevention (DISIP), now Bolivarian Intelligence Services (SEBIN) have access to adequate and timely medical attention.

5. Adapt paragraph one of Article 251 of the Organic Criminal Procedural Code to Venezuela's international undertakings in the area of preventive detention, in the terms established in the present report.

## **VII. NOTIFICATION**

217. The Commission decides to send this report to the State of Venezuela with a time limit of two months to comply with the recommendations. This time limit will be considered as from the date of transmission of the present report to the State. The State is not authorized to make the report public. The Commission also decides to notify the petitioner that a report under Article 50 of the American Convention has been adopted.