

**WRITTEN TESTIMONY OF JERJES ENRIQUE JUSTINIANO ATALÁ
BEFORE THE "HOUSE COMMITTEE ON FOREIGN AFFAIRS,
SUBCOMMITTEE ON AFRICA, GLOBAL HEALTH, AND HUMAN RIGHTS"
IN THE EVENT CALLED "SEEKING FREEDOM FOR AMERICAN
TRAPPED IN BOLIVIAN PRISON"**

AUGUST 1, 2012

Mr. Chairman and members of this Committee:

My name is **JERJES ENRIQUE JUSTINIANO ATALÁ**, I am Bolivian, I am 41 years of age, married, I have four children and since 2000 I am a lawyer and my only activity is the exercise of the profession.

I have a degree and expertise in criminal law, I completed a Masters Program in Criminal Law and I am waiting to present my thesis.

I work mainly in criminal proceedings since 2000 and my experience in Bolivia spans almost as long as the length of time that the new penal system has been in place, because in 2001, Bolivia introduced a new penal system.

Importantly, in my professional career, I do not advocate for drug-related issues because of my principles and personal conviction. In this regard, before accepting my current client, Jacob Ostreicher, I thoroughly analyzed all the evidence that was against him, which is why I finally decided to accept the case, given that there does not exist a single concrete evidence against him, direct and convincing to prove the offenses alleged.

In addition and prior to the details of the case, I must point out that unfortunately the Bolivian judicial system is not something that I feel particularly proud of. The levels of corruption, economic and political interference and lack of professional competence of judges, has significantly weakened the Bolivian judicial system. These aspects have influenced my client's case, for as we shall see later in the testimony, from the beginning of the process there have been illegalities surrounding it.

This testimony, particularly for me, is very difficult for two reasons, one personal and another procedural. Personal, because I consider that in this process, the Bolivian government, through the Ministry of Government, has had and continues to directly interfere. This becomes personally difficult, because my father has been designated as Ambassador of Bolivia to the neighboring country of Brazil and in a way, my role as a lawyer in this case, affects the relationship. This difficulty, however, is resolved because both, my father and I, are moved by ethical and moral principles, so it is merely a small inconvenience.

On the other hand, the difficulty lies in the fact that I am testifying on various illegalities committed in a judicial process which is different than the one you have in this country.

Therefore, I consider it appropriate to do a preliminary introduction to my testimony by providing a brief description of the Bolivian criminal procedure, so you can understand better the illegality that my client, Jacob Ostreicher, was a victim of.

I. BRIEF DESCRIPTION OF THE CRIMINAL PROCESS IN BOLIVIA. -

1. PHASES OF THE CRIMINAL PROCESS. -

For purposes of this statement, the criminal process has three main stages, the first of these is discovery or investigation, the second is the trial and the third phase is appeals or “resources.” Each phase is comprised of sub-phases.

We will cover the first phase in this testimony, given that this is the phase we are in with Mr. Ostreicher’s case.

The discovery phase has two sub-phases, the first one called Preliminary Investigation and the second called Preparatory Stage.

The preliminary investigation begins with a complaint (applied in criminal proceedings). Under Article 300 of the Criminal Procedure Code (CPP), this phase should last 20 days, after which, the prosecutor must provide one of four options: a) formal charge, i.e., provisionally attribute to the person the commission of a crime; b) extend the

investigation up to 90 days, unless the investigation is complex, in which case it can be expanded up to 180 days; c) reject the complaint or grievance, and d) request an alternative outlet to criminal process, such as an abbreviated procedure, conditional suspension of the process, etc.

2. RESOLUTIONS SUBSTANTIATED. -

Importantly, as in any legal proceedings, all resolutions issued by the prosecutors (art. 73 CPP) and judges (art. 124 CPP) should be sufficiently reasoned, and the lack of such reasoning leads to nullity for infringement of the rules of due process.

3. FORMAL CHARGES. -

If the prosecutor decides to charge the person, it must satisfy the requirements of Article 302 of the CPP, i.e., there should be sufficient prima facie evidence on the participation of the accused (defendant) of the crime under investigation.

Having filed formal charges, the second sub-phase of the first phase begins, called Preparatory Stage, which should last up to 6 months, except in the case of crimes related to organized crime, in which case the judge in the criminal procedure will be asked to expand the investigation for no more than 18 months. In any case, this period begins to run from the time the judge notifies the defendant of the formal charge.

4. PRECAUTIONARY MEASURES. -

Within this phase, usually after the formal charges, the prosecutor may request the application of interim measures, which are ultimately decided by the judge.

There are two types of precautionary measures, personal and material. The former is intended to ensure the presence of the accused in the development of the process and the implementation of the law, and the latter seeks to repair the damage.

The personal precautionary measures are of two kinds, first, preventive detention (art. 233) and second, alternatives to detention (art. 240).

For the imposition of a precautionary measure, whichever one, there must be at least two requirements under section 233 of the CPP.

There must be probability of authorship, that is, sufficient evidence that the accused committed the crime he is accused of, and there must also be procedural risks, which may be either flight risk (art. 234 CPP) or risk of obstruction (art. 235 CPP).

It is important to note that, to establish whether any of these procedural risks are present, there must be sufficient objective and material evidence that the defendant created any of these procedural risks. This means that precautionary measures are imposed in response to conduct by the accused in the development of the investigation, similar to a procedural penalty imposed because of the defendant's conduct.

In any case, the judge's decision must be well founded, as explained in section 2, otherwise the detention is illegal.

Given the possibility of imposition of a preventive detention measure, an injunction proceeding exists called termination of preventive detention, that is, when there is new evidence that undermines the foundation that was the basis for preventive detention, the person can request the court to remand such preventive detention and provide alternatives to the same.

In any case, be it the imposition of precautionary measures or the termination of same, if the party is dissatisfied with the ruling, it can request an appeal to a higher court which can review the judge's conduct.

5. RESTRICTION OF FREEDOM BY THE PROSECUTOR. -

The Bolivian Code of Criminal Procedure allows the prosecutor to order an arrest for the sole purpose of bringing him before the judge for a ruling on his legal status. As is stated above in paragraph 2, this should be on the basis of a reasoned decision in which the prosecutor commits to the same requirements as the judge to order the preventive detention, that is, that there is a probability of authorship and the existence of procedural risks, otherwise the arrest is illegal.

6. INVESTIGATION PROCESS. -

During the development of the preparatory phase, the prosecutor must present the investigation, giving knowledge to the accused of all the information, so that the accused may know the investigation and exercise his right of defense, because the purpose of the preparatory phase (art. 277 CPP Bolivia) is the collection of evidence that will form the basis to enable the prosecution and the defense of the accused.

7. CONCLUDING REQUIREMENT. -

After the investigation, the prosecutor must issue a concluding order (art. 323 CPP), which can be one of three types: a) provide for an indictment, if it believes it has sufficient grounds to prove the accused is the offender, b) provide for any alternative solution, which as stated, may be conditional suspension of the proceedings, summary proceedings, etc., or c) provide for the dismissal, if it is shown that the act did not occur, that there was no crime, or that the accused has not participated in the same or there are not enough elements to provide the basis for the accusation.

8. PRESUMPTION OF INNOCENCE. -

This is a procedural principle that is present throughout the development process, under Article 6 of the CPP, and it not only means that the accused should be treated as innocent until proven guilty in a final judgment, but essentially means that the burden of proof is on the accuser. This means that if the prosecutor has charged the accused, he must prove the accusation and the defendant has no obligation to prove anything. This procedural principle is also guaranteed by the Constitution in Article 116.

II. REPORT OF A PARTICULAR CASE. -

Considering the above is important to analyze the case of Mr. Jacob Ostreicher, so in my opinion he is being subjected to improper processing, with an illegal arrest. In this sense we must take into account three issues, namely:

1. ILLEGAL ARREST BY THE PROSECUTOR. -

The essential arguments of the prosecutor to order the arrest on June 3, 2011, were as follows:

a) Claudia Liliana Rodriguez Espitia purchased farms, with funds from a group of investors, including my client, that totaled over \$23,000,000.

b) Regarding these purchases, there is a business relationship between Claudia Liliana Rodriguez, Ozzie Espitia, and Maximilian Gold, the last two people with criminal records in Brazil for drug trafficking and money laundering.

c) Furthermore, according to the prosecutor, there is a company called Lagro with some kind of relationship with the other people with links to drug trafficking. This company was said to be owned by Claudia Liliana Rodriguez.

d) Notwithstanding the foregoing, the main basis for the prosecutor to arrange the apprehension was that JACOB OSTREICHER HAD NOT JUSTIFIED OR CREDITED WITH SUFFICIENT DOCUMENTATION THAT THE MONEY HE INVESTED IN BOLIVIA CAME FROM A LAWFUL SOURCE AND BECAUSE HE WAS NOT ABLE TO PROVE THIS, IT WAS PRESUMED THAT THE MONEY'S SOURCES WERE ILLEGAL.

e) His apprehension was also arranged due to his relationship with Swiss citizen André Zolty, because this citizen was allegedly wanted in his country.

f) In addition, detention was ordered because according to intelligence Jacob Ostreicher wanted to leave the country.

g) Finally, his arrest was set because the minimum penalty for the offense of laundering of illicit proceeds (money laundering) is five years imprisonment, so it would be feasible under Article 226 of the CPP.

This resolution is an illegal arrest because of the following:

a) All statements made by the prosecutor are not properly grounded, i.e. they violate Article 73 of the CPP. There is no objective evidence regarding the statements. Indeed, the

prosecutor reaches his conclusion as a product of Jacob Ostreicher's statement, when the legal approach is to reach that conclusion based on objective factors, which do not exist in this resolution.

b) It is not even explained how he would have committed the crime, that is, there is no proof of what profits were being legitimized, those of the alleged drug traffickers or those of Jacob Ostreicher. This lack of substantiation violates the rules of due process provided for in the Constitution in Article 115, II.

c) By requiring that the defendant demonstrate and prove with appropriate documentation that the money invested is of legal origin, there was a violation of Article 6 of the CPP and of Article 116 of the Constitution. You can not force the defendant to prove his innocence.

d) For these violations of legal norms, **THE ARREST ORDERED BY THE PROSECUTOR IS ILLEGAL.**

2. PREVENTIVE DETENTION UNLAWFUL BY THE JUDGE. -

Once the defendant was arrested, he was brought before the examining judge, in this case Judge number 3, who after hearing the arguments of each of the parties, ordered the arrest of Jacob Ostreicher. This arrest was based on the following:

a) First, the judge noted that it was not proved that Jacob Ostreicher was not in Bolivia as the legal representative of André Zolty.

b) According to the judge, neither was it proved that Jacob Ostreicher was not related to Maximilian and Ozzie Dorado, who were both wanted in Brazil.

c) The judge indicated that there were procedural risks, because the existence of a family in Bolivia was not established, which means there were not enough natural roots in the country.

d) The existence of legal activity in the country was not proven.

e) The judge merely mentioned that there were others in the case, such as Maximilian, Ozzie Dorado, André Zolty, and Claudia Liliana Rodriguez, so there was an criminal organization.

f) The judge said that, if left free, evidence could be destroyed or altered or witnesses or other participants could be influenced not to participate because the person apprehended has a lot of money.

g) Finally, and in the worst form of legal aberration, the judge indicated that in crimes of legitimization, the court should not apply the presumption of innocence because the test is reversed, i.e., the defendant must prove that he is innocent.

ILLEGAL TO RESOLUTION:

a) The resolution is not well founded, it fails to reflect any single element or material target, that is, it is based on mere assertions by the prosecutor. This violates Article 124 of the CPP, regarding the lack of grounds for judicial decisions.

b) Organized crime is referenced simply because of the fact that there are others involved, without stating or providing a basis for what would be the level of participation. If it is organized crime, the level of participation should be at least be stated, including who is the leader, on behalf of whom the accused was acting. In the absence of this basis, Article 124 of the CPP is violated again, as well as the Constitution because norms of due process protected in Article 116 of the Constitution are being violated.

c) Noting that, if freed, he would destroy or hide evidence or influence witnesses and participants, rather than providing an objective basis, also violates Article 12 of the CPP, because the parties are not treated equally and only what was said by the prosecutor is considered, without considering that Jacob Ostreicher, while he was released, never engaged in any of these behaviors. If the analysis had been objective, the judge should have reached a different conclusion.

d) Using the term “could” gives rise to a determination by the judge that there is no certainty, that there is doubt. Having ordered the arrest despite the existence of doubt, there

is a violation of articles 7, 221 and 222 of the CPP, and also of Article 116 of the Constitution, which says that, when in doubt, a judge must always make the decision that is the most favorable to the accused.

e) Finally, the worst of the violations is when the judge said that, for these types of crimes, the presumption of innocence does not apply because the burden shifts to the defendant. I am including here verbatim the text of the criminal law regarding the offense of laundering of illicit proceeds:

“He who acquires, converts, or transfers property, resources or rights connected with the crimes of: processing, trafficking in controlled substances, smuggling, corruption, criminal organizations, delinquent associations, trafficking and human trafficking, trafficking in human organs, trafficking weapons and terrorism, in order to conceal or disguise the nature, origin, location, destination, movement or ownership, shall be punished with imprisonment from five to ten years disqualification from public office and / or elected officials and a fine of two hundred to five hundred days.

This offense will also apply to the conduct described above although the crimes of which come from the proceeds of crime which have been committed wholly or partly in another country, provided that such acts are considered criminal in both countries.

The person who facilitates, or encourages the commission of this offense shall be punished with imprisonment from four to eight years.

This confirms that the offense of laundering of illicit proceeds is autonomous and will be investigated, prosecuted and sentenced without previous conviction in respect of the offenses mentioned in the first paragraph,”

f) Having indicated that in this case proof governs, there is obviously a violation of the provisions of Article 116 of the Constitution.

g) In this case, as in all others, the procedural guarantees of the presumption of innocence should govern, i.e., that the person is not required to prove anything, and the accuser, the prosecutor in this case, must provide proof. Fully expressing what the judge

and prosecutor state, until Jacob Ostreicher's money is proven illegal, its source must be found legal and lawful.

3. DENIAL OF FREEDOM BY JUDGE IS ILLEGAL. -

Finally, as part of this analysis, I should indicate that once the arrest was issued, Jacob's lawyer at the time argued that instead of filing an appeal, it was desirable to request a termination of the preventive detention, so that after nearly two months after an order of arrest, on September 23, 2011, there was a hearing regarding the termination of preventive detention.

This hearing was not conducted before the same judge who ordered the detention, but in front of another judge, who was at the same level.

That judge initially made a correct and proper evaluation of the new evidence submitted by the defense of Mr. Ostreicher:

a) Indicated that the defense had introduced new elements as established in Article 239, 1) of the CPP, which make the defendant's status change.

b) Noted that the certification of UBS Bank of Switzerland, showed the nearly USD \$24,000,000 entered the financial system, so there is no evidence of illicit money.

c) Noted that the Certification of UBS Bank of Switzerland, regarding the client Andre Zolty, could prove that he is a person with prestige, because UBS Bank has indicated that he is a person with a flawless credit relationship.

d) Proved with the appropriate documentation that Jacob Ostreicher was the legal representative of André Zolty.

e) Indicated that the certification of the Swiss Federal Police demonstrated that Andre Zolty is not wanted, neither he nor his company, and he does not even have a criminal record.

f) In addition, the judge made a comprehensive assessment of the conduct of Mr. Ostreicher, stating he had been summoned three times by prosecutors, having attended and

provided all the assistance that was requested. He stated that there was no indication that the accused has been hampering the investigation.

g) Finally, he stated that there was doubt as to the participation of Jacob Ostreicher in the commission of the crimes attributed to him, so according to him, the procedural guarantee of presumption of innocence should apply. The judge granted termination of preventive detention, ordering the release of Jacob Ostreicher.

h) Curiously and mysteriously, the judge, six days after providing this fair judgment, changed his mind and issued a new decision by his own initiative, that is, without being prompted, revoking his own order.

i) Worst of all was that, to make this new resolution, he violated Article 124 of the CPP, because after indicating that it had erred in assessing the evidence, he did not indicate what the error was, in violation of so that Article and Article 115 II of the Constitution. Thus, maintaining the illegal detention by the Bolivian justice.

j) As I state above, it is strange and mysterious that the judge changed his mind. In the opinion of the defense there was illegal pressure from prosecutors, because if they disagreed with the ruling on September 23, 2011, they should have filed the appeal but instead, were benefited by a change in attitude and decision of the judge. Just as another curious fact, a few months later, the judge was promoted to a senior position.

4. CURRENT STATUS OF PROCEDURE. -

Once the judge changed his decision to maintain the Jacob Ostreicher illegally detained, the decision was kept despite having filed an appeal and having the superior court order him to issue a new resolution.

After this, Jacob Ostreicher requested a new hearing to request the termination of preventive detention, the same that was developed in April, but after a suspension for three or four days, to date there has not been a new date scheduled for the hearing, despite it being suspended more than 20 times.

What has attracted the attention of the defense is that in recent months, the Ministry of Government has directly interfered in the proceedings through its agents, Fernando Rivera Tardío and Denis Rodas Limachi, who have caused the suspensions in recent hearings for our client. They have been given the task of bringing challenges against judges, reaching even to threaten them with lawsuits against them if they do not leave the case alone and suspend the hearings.

This approach demonstrates a clear interference by the executive on the judiciary, an interference which not only affects the case of Jacob Ostreicher, but democracy itself because, as we all know, among the pillars of democracy is the separation and division of powers.

These ways of acting, have made the outlook for Mr. Ostreicher uncertain, so I can say without a doubt that to date it has not only been an unfair trial, but moreover it is essentially an illegal and unjust detention, reaching even to seriously jeopardize Mr. Ostreicher's own life. Despite having gone on a hunger strike, Mr. Ostreicher's claims were not addressed, and despite being in poor health and with an order of admission to a hospital, he has not been transferred to a hospital given the ridiculous excuse that Palmasola jail does not have enough guards, and finally, because the living conditions at the penitentiary, are not the most sanitary, reaching even to inhuman conditions.

This evidently shows that, in the words of the title of this hearing, our client is "trapped" and even "kidnapped" in that prison.

Finally, I would like to indicate that I do not understand how an American citizen can be treated this way, having invested in Bolivia and given jobs to indigenous Bolivians, reaching higher salaries than the government itself pays to the police. All of this only shows that there is a great illegality and injustice.

Thank you very much.