Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 17/89; Case No. 10.037
Session:	Seventy-Sixth Session (18 – 29 September 1989)
Title/Style of Cause:	Mario Eduardo Firmenich v. Argentina
Doc. Type:	Resolution
Decided by:	Chairman: Oliver H. Jackman; First Vice-Chairperson: Elsa Kelly; Second Vice-Chairman: Leo Valladares Lanza; Members: Gilda M.C.M. de Russomano; Marco Tulio Bruni Celli; John R. Stevenson; Patrick L. Robinson
Dated:	27 September 1989
Citation:	Firmenich v. Arg., Case 10.037, Inter-Am. C.H.R., Report No. 17/89, OEA/Ser.L/V/II.76, doc. 10 (1988-1989)

BACKGROUND

1. Case 10.037 refers to an alleged violation of the right of personal freedom stipulated I Article 7 of the American Convention on Human Rights (hereinafter the Convention) and, particularly, to the guarantees set out in subsection 5 of the aforesaid provision. According to the complaint, Argentine citizen Mario Eduardo Firmenich, being tried in two proceedings in the regular Argentine courts and currently imprisoned, has been denied the benefit of release requested under Article 379 (title 18), subsection 6, of the Code of Criminal Procedure of the Argentine Republic which, in essence, corresponds to the guarantee established under Article 7, subsection 5 of the Convention.

2. The complaint, dated June 21, 1987 meets the formal requirements of Article 46, (d) of the Convention and Article 32 of the Regulations of the Inter-American Commission on Human Rights (hereinafter the Commission).

3. The complaint has been filed within the six-month term set forth in Article 46; (c) of the Convention, and the appeals filed against said denials, including remedies filed with the Supreme Court.

4. The complaint is not subject to other international procedures and, therefore, meets the requirement of Article 46, (c) of the Convention (Article 39 of the Regulations of the Commission).

5. The complaint is not a repetition of a prior petition examined by the Commission and, therefore, also meets the requirement set out in Article 47 (d) of the Convention (Article 39 (c) of the Regulations of the Commission).

6. As will be observed in the summary of the complaint and as regards the requirement set out in Article 46, 1(a) of the Convention (Article 37 of the Regulations of the Commission), prior to the acceptance of a complaint, all internal remedies must have been exhausted under the generally

acknowledged principles of international law, it should be pointed out that since the problem of the release of the accused is an issue in the trials against Firmenich, the requirement regarding internal remedies has been met by the corresponding requests for release and the decisions rejecting said petitions. Furthermore, the complainant, under rule 397 of the Code of Criminal Procedure, filed an appeal with the Supreme Court and said appeal was rejected. Said measures completed, in the Commission's judgment, all internal actions which the complainant could take requesting application of the guarantees mentioned in Article 7, subsection 5 of the Convention, thereby exceeding the requirement specified in Article 46, 1(a) of the Convention on filing of internal remedies (Art. 37 of the Regulations of the Commission), without prejudice to the proceedings during which said questions were raised.

7. The complaint, dated July 21, 1987, states, in summary:

a. That a petition for the release of the prisoner was submitted on October 2, 1986, to the judges trying the prisoner Firmenich, and that said petition was rejected.
b. That the corresponding appeals were brought against said refusals before the Supreme Court (Art. 397 of the Code of Criminal Procedure) and that said appeals were turned down.
c. That said refusals violated provisions in Article 1 of the Convention stating that the Parties thereto undertake "…to respect the rights and liberties acknowledged herein and to guarantee their full and free exercise by anyone subject to their jurisdiction, without any form of discrimination whatsoever…" as well as the guarantee set out in Article 7, subsection 5, which provides for the possibility of the prisoner's release, "without prejudice to further trial proceedings."
d. That the above mentioned guarantees did not originate in "concessions which States or judges can graciously make according to prevailing political interest or particular criteria of the judge who must apply the law" and that neither are they abstract expressions but instead, must be applied by virtue of the internal law of the States, thereby making it possible to reach the following conclusion: either Article 7 (b) of the Convention is applicable under Argentine law, according to Article 379, 6 of the Code of Criminal Procedure or it is not applicable; according to the first assumption, a reasonable trial period shall depend on the term set out in said provision and not "on the particular criteria of a given judge called upon to apply the rule…"
e. That the fact that Article 379 of the Code of Criminal Procedure states that "release may be granted"… etc., leads to the strange interpretation under which the judicial authority that decides may or may not order that the prisoner be released, according to its particular criteria and that, as a result thereof, the benefit of freedom during trial under Argentine law is subject to the political inclinations, very particular views of the judge and the indiscriminate application of the reservation set out in Article 380 of the above mentioned Code, which states:
In Spite of provisions in the preceding article, a request for release of the prisoner may be rejected when the objective assessment of the characteristics of the act and the personal conditions of the accused could, in essence, make it possible to assume the abovesaid prisoner will attempt to evade justice. The provisions in this article shall not restrict the application of subsections 2, 3, 4, and 5 of the preceding article.
g. That, on the other hand, the above construction overlooks the legislative history which begins with the opinion of the Executive Branch itself, when it stated:
That, on the other hand, it introduces an amendment designed to provide effectiveness for provisions set out in the Federal Code of Criminal Procedure as regards the maximum length for trials, a provision that has remained a dead letter, to the shame of a legally civilized nation.
h. That the abovementioned presentation did not mention any reservation regarding more or less serious trials or more or less relevant accused. In this regard, the complainant cites Congressman Juan L. Cartese, who stated:
As regards sub-section 6 the bill submitted by the Executive introduces a new assumption for the release of prisoners, which fully repairs an actual injustice current even to this date. The rule in Article 701 indicates two years as the maximum duration for a criminal proceeding. When the proceeding exceeds

said limit, the accused has to accept, even to this date, this irregular situation and has to remain in custody. This inclusion will no longer make those individuals who have the misfortune of being on trial bear the burden of the law's delay and, under this assumption, those being held may be released, far beyond any consideration mentioned in other provisions of the law.

i. That this opinion, (shared by other Congressmen) is far beyond the "arbitrary and illegal construction of participating judges when deciding a petition for the requested benefit."

j. That Article 701 of the Code of Criminal Procedure provides that "all trials must be completed within two years; delays resulting from motions by the parties, proceedings related to official letters or letters rogatory, depositions or testimony of expert witnesses or other necessary proceedings, whose length is not dependent on the activity of the courts, shall not be computed."

k. That a confusion could exist in connection with the scope of Article 379 of the Code of Criminal Procedure, as related to Article 701 of the selfsame Code, in deciding whether subsection 6 of Article 379 encompasses the entire text of Article 701 (as is held by the decisions of the trial judges refusing to release Firmenich), although the logical reading indicates that subsection 6 of Article 379 refers only to the two year term mentioned in the first portion of Article 701, even if it cannot be construed that this term is without prejudice to the other circumstances listed in the above mentioned Article 379. In conclusion, the maximum term provided for by law (Article 701) is 2 years, since otherwise the "right granted becomes illusory…"

l. That the judges, "in their persecutory zeal, for reasons beyond legal considerations, make an effort to find a loophole in the provisions set out in Article 380 of the Code of Criminal Procedure that grants the trial judge the discretionary power to deny a prisoner his release pursuant to conditions explicitly set out in said text," which in its literal application, "simply and directly turns not only the letter of the American Convention on Human Rights but the very Code of Criminal Procedure into an abstraction."

m. That the universal principle of innocence of the accused does not exist in favor of Mario Eduardo Firmenich (Article 3, 2 of the Convention and 18 of the Argentine Constitution).

n. That Mr. Firmenich "was never arrested or tried, or brought before Argentine Courts and did appear, when required thereto;" that, as is stated in the brief requesting his release the accused "knew 48 hours in advance that he would be arrested in the city of Rio de Janeiro and that he did therein remain," presumably that he will now avoid justice, furthermore, assuming that "he would be condemned for the allegedly committed crimes," in violation of the letter of the Convention and of the Constitution.

o. That, regrettably, the conclusion must be reached that the "law does not exist, according to the particular criterion of the Argentine courts" for the defendant, since "after February 13, 1984, three and a half years have elapsed since Mario Eduardo FIRMENICH was arrested, without it being possible to foresee the end of the proceedings against him. In only one of the cases brought against him has a sentence of the first instance been handed down. This, however, does not curtail the application of the principle of innocence in favour of the accused, a guarantee, we repeat, of constitutional rank and reflected in the Pact. All of the above, with due consideration for the special characteristics, which did and currently still affect the proceedings against Mario Eduardo FIRMENICH in which the political aspects are more relevant than the legal ones."

p. That appeal, during which evidence can be submitted, are still pending. This would require lengthy proceedings and since there is no assurance as to the date on which a final decision could be given, there is not the slightest possibility of Mario Firmenich recovering his freedom, pursuant to the Convention and internal Argentine law, and that the length of the proceedings could be estimated as six years, three of which have already elapsed, while the accused has been detained all this time.

q. That the complexity of the case or the claim that the term specified in subsection 6 or Article 379 of the Code of Criminal Procedure does not reflect the norm in Article 7, para. 5 of the American Convention are excuses lacking any legal justification. If could be assumed, then, that if subsection 6 Article 379 does not refer to the guarantee created by Article 7 of the Convention, that the situation would be even more serious, since the San Jose Pact could not then be applied, all of which could make it possible to hold "that the complexity of the case does not justify the imprisonment of someone for more

than three years, when the law specifies that under no circumstances should two years be exceeded."

r. That the connection between the particular case of Firmenich and the guarantee stipulated in the Constitution is obvious, since the minimum and reasonable terms have been exceeded; otherwise, it would be necessary to conclude that the letter of the Pact is dead and that the freedom of anyone charged depended on the will of the judge or on the political interests at stake. In this regard, the decision rejecting the request for the release of Firmenich, of Federal Chamber of Appeals of the Federal Capital (Camara de Apelaciones en lo Federal), stated in one of its whereas clauses:

It does not modify the foregoing, when it invokes Article 7, subsection 5 of the Pact of San Jose de Costa Rica, Act 23054, since it leaves to internal law the decision as to whether a preventive detention is reasonable or not.

HENCE, WHAT IS AT ISSUE, UNDER ARGENTINE LAW IS NOT A RIGHT BUT A POWER VESTED IN A JUDGE AND WE HAVE SEEN, ON THE ONE HAND, THAT THE BALANCED INTERPLAY OF THE PROVISIONS OF INTERNAL LAW AND THE PACT MAKE THE RELEASE OF MARIO EDUARDO FIRMENICH MANDATORY. It would seem that according to the particular views of the courts trying these cases that Article 380 of the Code of Criminal Procedure, which is a procedural text, with jurisdiction limited to the Federal Capital and to federal courts or to the subjective will of the judge, can contradict the text of another, which has the rank of a supreme law.

s. That in view of the above, the Chamber does not consider that Argentine law establishes a right and, quite to the contrary, what is involved is a power of a judge since " it would seem that according to the particular opinion of the courts trying these cases Article 380 of the Code of Criminal Procedure, which is a procedural text, with jurisdiction limited to the Federal Capital and to federal courts or to the subjective will of the judge, can contradict the text of another, which has the rank of a supreme law. According to this viewpoint, by way of example, it could be stressed that in the Province of Buenos Aires, and under Act 10.358, November 18, 1985, the scope of the provision set out in Article 7, subsection 5 of the Convention is defined when Article 449 indicates that "preventive imprisonment shall be limited to two years after the date of arrest. If a final decision has not been issued on that date, the prisoner shall be released under bail set by the judge, regardless of the crime for which the prisoner is charged." Firmenich would have been released under said provision "as pertinent under the letter and spirit of the Convention." Similarly, emphasis would be placed, under said wording, on the existing contradiction between legal texts of the same country regarding similar issues. The only difference is that Articles 379 and 300 of the Code of Criminal Procedure are federally applicable, whereas Article 449 is applied only within the Province of Buenos Aires.

t. That, in addition to the above, it must be noted that subsection 6 of Article 379 of the Code of Criminal Procedure was enacted under Act 23.054 on March 1, 1984. Hence, the simultaneous discussion of both rules in the legislature, to a certain extent, can reflect the spirit that moved the legislators since it is not conceivable that the principle set out in subsection 5 of Article 7 "of the Pact of San Josй de Costa Rica would be applied sometime in the future, when both norms have been simultaneously discussed in the Congress."

u. That, finally, the submission requests that the IAHRC discuss the case as serious and urgent (Art. 48, 2 of the Convention), because every additional day that Mario Firmenich remains in prison… is a new violation of the human rights of the petitioner, since over a year and a half have elapsed since the day when he should have been released.

PROCEEDINGS:

8. Commission, in a note dated July 22, 1987, sent the Government of Argentina complaint to as indicated by its Regulations (Article 34, subsections 3 and 5). Copy thereof was sent to the Mission before the OAS on the selfsame date and the petitioner was advised accordingly by letter dated July 22, 1987.

9. The complainant, in a brief delivered to the Commission on December 17, 1987, expanded the

terms of his complaint by attaching supplementary public documents regarding political statements made by the so-called Movimiento Montoneros, of which Mr. Firmenich is a member. The aforementioned attachments set out the support given by Argentine persons and entities and from other parts of the world, whose names and particulars are listed alongside each of them.

10. The Commission transmitted this additional information to the Argentine government on December 28, 1987.

11. The Argentine government answered on February 25, 1988 (VS. 13). There follows a summary thereof:

a. That the Argentine government shares the views of the petitioner in that Article 1 of the Convention implies an obligation to act on the part of the interested State since it imposes the obligation or generally respecting the rights listed in the Convention;
b. That the same can be held as regards Article 2, since a general obligation to act exists when the internal law of an interested State does not include provisions which provide for the application of the rights and guarantees set out in the Convention, because in the absence thereof, the State should adopt those se out therein. The above, insofar as the Argentine stated is concerned, does not imply and obligation to act since the rights and freedoms allegedly violated are duly guaranteed by the internal laws;
c. That the complaint is limited to three types of violations, that is:
i) the right to personal freedom and, particularly, to Article 7, subsection 5 of the Convention;
ii) the principle of innocence of Article 8, subsection 2 of the Convention; and,
iii) the principle of equality before the law (Article 24 of the Convention), the analysis by the petitioner being limited to the violation of personal freedom (Article 7, 5);
d. That, as regards Article 7, 5 (personal freedom) the facts are, as follows:
e. That as regards the petitioner -under Article 379, subsection 6 of the Code of Criminal Procedure (hereinafter the Code), which corresponds to the guarantee in Article 7, subsection 5 of the Convention, as related to Article 701 of the selfsame Code, two years must be computed after the date of arrest of Mr. Mario Firmenich, which would automatically lead to the release of the prisoner;
f. That the interpretation of a provision -based on arithmetical considerations- does not agree with the currently applicable law (including international law) which has indicated that pursuant to legal hermeneutics other criteria, in addition to the above, must also be taken into account, such as judicial discretion in judging a case and the concept of reasonable time according to the Convention thereby demanding a prior consideration of these two concepts or criteria;
g. That, in this case, the concept of the alleged violation of the right of personal freedom would consist of the fact that two years after February 13, 1984 (date on which Firmenich was arrested in Rio de Janeiro, Brazil) the judicial authorities with jurisdiction over the case should have granted the request for release, an opinion which would limit the applicable law to a mere computation, overlooking the consideration of the situations involved and the particular circumstances of each case;
h. That the definitions of criminal acts describe certain conducts and the aggravating or mitigating factors related to criminal responsibility, which must be taken into account for a proper consideration of each case, something the "applicant attempts to ignore when he holds that a refusal to release him under Article 380 of the Code reflects the arbitrariness of the judge or his subjective will," since the referenced article cannot be partially understood and must be considered as the natural extension of Article 379 of the Code which, in fact, sets out the authority of the trial judge to approve a release if the legal requirements set out therein are met, whereby the lawgiver appeals to the "sound judgment" of the judge. This power -not obligation- of the judge to release a prisoner is expressly defined or limited by Article 380 of the Code of Criminal Procedure;
i. That the above implies that Article 380 of the Code "confirms the discretionary nature of a decree ordering that the prisoner be released as defined according to the according of Article 379;"
j. That it is absolutely unreasonable to believe that provisions in Article 379, subsection 6 of the

Code are automatically applied, that is, after the sole passage of time, since if this were the case "all that would be required would be that in difficult cases the defense raise several issues according to law and thereby manage to exceed the time limitations, without enabling the courts to render a verdict in the case;"

k. That even after admitting, for the sake of argument, that the remission of Article 379, subsection 6 of Article 701 of the Code "refers only to the time mentioned in the latter (Article)," it is clear that the obstacle to Firmenich's release is not the manner of computing time of detention but certain constraining factors, assessed in Article 380 of the Code;

l. That on the other hand it cannot be disputed, and this is the result of the congressional reference to the scope of Article 379 in connection with 701 of the Code, quoted by the petitioner, that the clarification of these provisions in the Senate (which stated that the period could never exceed two years) was designed to establish the real meaning of the remission mentioned in Article 701, and that the petitioner overlooks the fact that the aforesaid clarification also brought into play another aspect when "globally reviewing a petition for release, that is, the existence of circumstances which would make it possible to reasonable assume that the accused will attempt to evade justice if released;"

m. That the applicability of Article 380 to the hypothesis stated in subsection 6 of Article 379 is clearly evident according to the very text of Article 380 which, in its second paragraph indicates "…the provisions in this article shall not limit the application of subsections 2, 3, 4, and 5 of the preceding article," that is, that it can limit the application of subsections 1 and 6 of Article 379;

n. That (the applicant holds that) such a power granted to a trial judge is an arbitrariness "equivalent to disqualifying in the same terms of criminal law in modern States …since in all of them is the judge, and the judge only, who is under the obligation and has the power to administer justice." To hold the opposite view, that is that the accused must be automatically released "is equivalent to denying the power to judge, denaturing the actions of justice which would, thereby, be more likely to be biased;"

o. That the IACHR has repeatedly set out at length its views on the role of the judge in connection with human rights. As regards this issued, the Government repeats what is stated in the Seventh Report on the Situation of Human Rights in Cuba (OAS/Ser.L/V/II. 61, doc. 29, Rev. 1, October 1є, 1983, pp. 67-68), concluding that, according thereto, it would be up to the prudent discretion of the judge to assess the "feasibility and the legality of granting a release within the parameters set out by the law applicable in the country;"

p. That a second particularly relevant issue involved in this case is the concept of "reasonable length of time," mentioned in Article 7, subsection 5 of the Convention, since neither the Pact of San Josй nor the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950), whose connection to the Pact is, undoubtedly explicit in this sense, refer to it; therefore, to clarify this issued other criteria would have to be applied, according to the general rule on the interpretation of treaties which, set out in Article 31 of the Vienna Convention of the Law of Treaties refers to a "a practice generally accepted as law," an international …norm, and as a result of which "a treaty should be interpreted in good faith, according to the usual meaning which must be attributed to the terms of a treaty in the context thereof, bearing in mind their object and purpose," as set out in the referenced norm;

q. That according to the above, Article 7, 5 of the Convention, which refers to "reasonable length of time," is applicable only to personas "arrested or held," imposing on the States parties the obligation to be diligent in their proceedings to avoid the extension thereof beyond what is reasonable;

r. That precedents in the Inter-American System (based on the Pact of San Josй) are not abundant in this regard since the Inter-American Court has not yet acted with regard to Article 7, 5 of the Convention and the IACHR has done so only with regard to the American Declaration and within contexts that are different from those of this case, thereby making it necessary to turn to concepts in the European System (Article 5, 3 of the Rome Convention), such as:

i. That the accused must be considered innocent and the purpose of the provision analyzed is basically that the prisoner be released when to continue to hold him ceases to be reasonable;

ii. That the European Court, on November 10, 1969, decided accordingly in the Stogmuller case.

s. That the foregoing makes it necessary to define the concept "reasonable length of time,"

regarding which the adequate means and purposes which the judge has to weigh must also be considered. Therefore, the "reasonableness of a court order or of length of time must be weighed within its own and specific context, that is, there are no general universally valid criteria and what is involved is something that is legally known as a question of fact." Thus, the Stated party is not bound to set a valid time for all cases, independently of the circumstances, because each case is a "microcosm" with its own time, objective circumstances, behavior of the accused and that of his attorneys, etc. This has been the criterion adopted by the European Court of Human Rights when it states that "… it must be acknowledged that it is impossible to translate this concept, in every case into a fixed number of days, weeks, months or years or to modify their number according to the seriousness of the violation" (STOGMULLER Case), ibid., pp. 155-156).

t. That, accordingly, Argentine law has acknowledged the two year standard (Article 379, 6 in relation to Article 380 of the Code of Criminal Procedure) as a basis for a "reasonable, length of time," therefore, two years could be considered as reasonable, after which a judge could take into consideration a request for release without thereby being in any manner forced to forego the objective consideration of the characteristics of the event and the personal characteristics of the accused or being under the obligation to release the prisoner even if there exists doubt about evading justice.

12. After this, the answer of the Argentine government proceeds to analyze to questions, that is: the personal freedom of the petitioner and the alleged violation of equality under the law.

As to the first issue, the Government holds - according to the doctrine of the IACHR - that since "reasonable length of time" is an abstract term it must be considered in the light of certain criteria, factors or elements of the specific case being considered, such as:

- The first criterion is the actual duration of imprisonment: the complainant holds that his detention must be computed (in connection with the two year term being invoked) since the date on which he was arrested by the proper authorities in Rio de Janeiro, on February 13, 1984.

A comment regarding this particular point is that the prisoner was turned over to Argentine authorities "only on October 20 of that selfsame year" and, therefore, it should be understood that this last date is the one to be considered under Article 7, 5 of the Convention because:

- The time required for an extradition is not directly related to the activity of the requesting State, since the authorities to whom a request is submitted who must decide thereon.
- The second factor is the duration of preventive detention in relation to the nature of the acts which gave origin to the trial.

The petitioner was summoned by two different judges for two separate crimes and, therefore, two different proceedings are being conducted: one for homicide with two aggravating circumstances and attempted homicide with two aggravating circumstances with a petition for life imprisonment. This case is being tried in a Federal court, in Buenos Aires and, the other, for doubly aggravated homicide, kidnapping and extortion and a request has been filed for life imprisonment and accessory penalties leading to indeterminate imprisonment. This last case is being tried in the Federal Court in San Martin. Therefore, it is understood that "in view of the penalties which could be imposed the duration of procedural detention does not deprive said detention of its protective nature."

- The third element is the material, moral or other effect of detention when the normal consequences are exceeded.

The Argentine government is of the opinion that the consequences are the same as in the case of other prisoners who have not been released. The complainant is being held in the appropriate facilities, that is, he can receive visitors, engage is sports, read, study and takes exams according to the curriculum of the career he has chosen. As to the political injunction affecting his precandidacy for a seat in Congress, it must be remembered that "Article 3 of the National Electoral Code excludes such a possibility …" It is not a question of someone being politically proscribed but of strict compliance with the letter of the law.

- A fourth criterion would be to observe the behavior of the accused or failure to cooperate during the trial, since it is believed that in both cases the petitioner and his attorneys have contributed to the

lengthening of the procedural stages.
- The fifth factor would have to be judged according to the difficulties faced by the investigation of the case which, because of the characteristics of the alleged crimes have resulted in extensive investigations in each of them, as regards oral testimony and documentary evidence, both in Argentina and abroad. In connection with the first case (Case in Federal Court - San Martin) a decision was handed down in the first instance in May of 1987, which was appealed, a remedy that is still pending. The second case is also pending, since the defense has asked to submit evidence.
- Another consideration is the manner in which the investigation has been conducted: the proceedings have followed the Code of Criminal Procedure, applicable to any defendant within the national jurisdiction, rules of which existed before the events, applied by judges vested with appropriate powers and with absolute respect for the right to defense; that is, the three stages of due process have been completed: investigation, dispute, and evidence according to the rules of evidence, said evidence being weighed according to rules applicable thereto and, hence, without any margin or possibility for the judge to consider it according to his personal opinions.
- Finally, the seventh factor is the manner in which judicial authorities have acted since they "displayed an intense and unceasing investigatory zeal which made possible the filing of charges twelve months after the prisoner had been handed over to Argentine authorities."
The note of the Argentine government then adds that the joint review of the seven criteria defined by the IACHR in this case leads to the conclusion that the period of detention of the petitioner has not exceeded the limits of a "reasonable length of time" mentioned in Article 7, 5 of the Convention.
Nevertheless, other aspects must be also considered when examining Case 10.037, according to opinions of the IACHR on the concept of "reasonable length of time" provided for in Article 5, 3 of the European Convention which has held that to decide such an issue the opinions of the judicial authorities handling a case must be taken into account when deciding petitions for the release of a prisoner, together with the undisputed facts mentioned by the petitioner in his appeals.
In this connection, the petitioner has invoked internal rules of procedure (Article 379, subsection 6 of the Code of Criminal Procedure).
Resolution 10/3/86 of the Federal Judge in San Martin refusing the request states:
Although I agree with the petitioners that the accused has been held for over two years, in this particular case such a circumstance is not enough, by itself, reason enough to immediately release the prisoner…application of subsection 6 of Article 379 of the Code of Criminal Procedure is not automatic and must be harmoniously appraised with the immediately foreseen exception set out in Article 380.
The procedural rules indicates that in the assumption that the referenced Article 379, subsection 6 is applicable, the Judge must make sure whether the nature of the facts and the personal characteristics of the accused, objectively weighed, make it possible to assume with reasons, that the accused will attempt to evade justice.
After such an assessment it is, in my opinion, absolutely illegal to grant the requested release.
The above, without prejudice to the objective seriousness of the accusations made against Firmenich in the light of their definition (it should be remembered that he has been accused of doubly aggravated homicide and kidnapping for extortion), since other factors to be taken into account do not contribute to a favorable prognosis. In fact, a joint analysis of the latter and the defendant's personality cannot fail to lead to the conclusion that the danger of frustrating the investigation of the truth and serving of a sentence which might be imposed on the accused can only be avoided by extending the latter's preventive imprisonment.
To said effect, the judge took into consideration the prosecuting attorney's request for life imprisonment; the defendant's permanent obstruction of the trial, his lack of repentance and dangerousness.
The decree turning down such a request was confirmed in the second instance on November 11, 1986, and in view of the decision of the Criminal Chamber of the Court of Appeals of La Plat, an extraordinary remedy was filed with the Supreme Court of Justice, which declared such a remedy not acceptable on January 27, 1987.
Similarly, Resolution dated 10/3/86, of the National Federal Criminal Court of the First Instance Nє 5 of

the Federal Capital, in one of its whereas clauses, indicates: "The undersigned must also disagree with the construction of the application of Article 380 of the Code of Criminal Procedure by the petitioners. This, because the hypothesis on which Firmenich bases his statement, that he could have avoided Argentine justice when he was in Brazilian territory had he so wished, cannot be verified. Further thereto, full and complete proceedings for extradition, although a right of the person being extradited, are also evidence of his unwillingness to stand trial," followed by: "That the reasonable interpretation of Article 7, subsection 5 of the American Convention on Human Rights leads to the statement that an opinion on the duration of preventive custody must also be related to the circumstances of the case. This conclusion clearly follows the jurisprudence of the European Court of Human Rights with regard to the Convention applicable in this continent, whose Article 5, subsection 3 is worded almost identically to the American provision."

The above resolution was confirmed by the Federal Court of Appeals, Chamber I; when an appeal was taken to the Supreme Court of Justice of the Nation, it was turned down on July 28, 1987.

As to the alleged violation of the right to equality before the law, the Argentine government rejects this allegation by stating that the decisions rejecting petitions for release have been based on the same reasoning applied to other cases decided after the enactment of Article 379, subsection 6 of the Code of Criminal Procedure, while also rejecting the notion that if Article 449 of the Code of Criminal Procedure of the Province of Buenos Aires were to be applied the defendant would already be free, since the referenced article has been amended "in order to exclude any possible automatic application of Article 449."

13. The Commission, in a letter dated March 16, 1988, conveyed to the petitioner the text of the note dated February 25, 1988, requesting comments or observations considered pertinent.

14. The legal representatives of the defendant submitted comments in writing on May 5, 1988. There follows a summary thereof:

a. That all internal remedies have been filed in this case.

b. That according to the Argentine government's answer "it was expressly acknowledged that the 2 year term mentioned in subsection 6 of Article 379 of the Code of Criminal Procedure involves the legal application of a 'reasonable period of time' to which Article 7:5 of the Pact of San Jose refers."

c. That in spite of the above an effort is made to condition it according to provisions in Article 380 of the Code, whereunder the judge may grant such a benefit according to his particular views, an issue that has been duly examined in the accusation.

d. That circumstances or factors claimed by the Government to be elements required to determine whether a petition for release of the prisoner can be accepted or not is based on the possibility that the accused might avoid justice, which in the Firmenich case should be favorably viewed since the latter has offered all guarantees required to ensure his appearance in court, including the possibility of house arrest under conditions to be determined by the courts.

e. That the following factors, which define the so-called "reasonable length of time", should be considered: the detention should be computed since 2/12/84 and not since October of that same year, since that was the date on which extradition proceedings were begun and as a result thereof the prisoner has been in jail 4 years without a final judgment being handed down.

f. That in connection with the penalty which could be imposed according to the alleged crimes should, it must be pointed out, be considered a factor when weighing the possibility of releasing the prisoner, that consideration must be given to the Stogmuller Case (1969) reviewed by the European Court which when referring to Article 5:3 of the Conventions states that "… Article 5:3 is viewed as an independent provision which produces its own effects, regardless of the circumstances under which events which led to the arrest or the circumstances affecting the duration of the trial occurred…"

g. That it is not true that the defendant or his attorneys have used dilatory or abstentionist tactics and which, furthermore, that this is not an issue of major significance in the light of the jurisprudence derived

from the European Court in the Neumeister Case (1968).
h. That is seems necessary to advise the Commission, as follows:
That subsection 6 introduces into the bill sent by the Executive Branch a new assumption for the release of prisoner that fully repairs an injustice which has existed to date. The rule in Article 701 sets two years as the maximum for criminal proceedings. When the proceedings exceeded said limit, the accused had, until now, to bear such a irregular situation and remain under arrest. With this inclusion the individuals who have the misfortune of being tried will no longer have to suffer the law's delay and, under said assumption, their release could be ordered, above and beyond any consideration in the other provisions of the law.

15. The Commission, in a note dated May 18, 1988, conveyed to the Argentine government the complainant's comments.

16. The Argentine government, in a note dated July 6, 1988, commented on the petitioner's document, stating that as regards the full use of all internal remedies, it has been fully admitted in the case under consideration that all internal remedies have been exhausted, a matter on which a coincidence of view had already been expressed by this Government and the petitioner in connection with this motion for the prisoner's release.

As to provisions in Article 1 of the Convention, an essential feature of human rights is the fact that they are not absolute but, instead, subject to regulations; to reasonable regulations, required by a democratic society for the protection of national security and the safety or public order, or to protect public health and morals or the rights and freedoms of others.

As to references to reasonable length of time, that in view of the laws applicable in Argentina, the reasonable period mentioned in the motion for release is related to Article 379, subsection 6 in connection with Article 380, and the decision on the individual case -that is, the rule applicable to the case under review- will always depend on the criterion of the judge. However, what cannot be derived therefrom -as the petitioner seems to do- is that the judge can do whatever the wishes. On the contrary, the rules indicate the channels to be followed by the judge's reasoning, that is: the objective consideration of the features of the case, the personal characteristics of the accused. In addition thereto, it added:

It is therefore advisable to repeat what was stated in item 4.7 of the first Argentine answer, in that:

To hold that granting the judge a power such as this one is equivalent to a legally consecrated arbitrariness is equivalent to using the same expressions to judge all the criminal law of all modern States -regardless of the legal system which they apply-, since in all of them the judge, and only the judge, has the obligation and power to administer justice."
As to the reasonableness of the period, it is said that the correct interpretation of the situation referred to herein indicates that in the case of two year term the judge could reject a motion for the prisoner's release based on the provisions in Article 380. This does not lead, as attorney BEATTI seems to imply, to the view that the period is unreasonable but, on the contrary, it is the existence of the extremes indicated in Article 380 which make the granting of such a motion unreasonable and an extension thereof reasonable. Furthermore, it is said:

In this regard, the European Court of Human Rights has stated, when referring to Article 5.3 of the Rome Convention:

The Tribunal is also of the opinion that to decide, I a particular case, whether the detention of the accused does not exceed the limit of what is reasonable, the national judicial authorities must investigate all circumstances whose nature could aid I accepting or rejecting the idea that public interest could justify the

repeal of the rule on personal freedom (NEUMEISTER Case, decision dated June 27, 1968, TEDH-5.p.83. Legal grounds # 5).

As evident, the criterion on law applicable in the country coincides with the position adopted by the Strasbourg Court.

As to the principle of innocence, the fact that a trial has been held with all the guarantees provided for in the law applicable in the country -including, obviously- the American Convention, and all motions based thereon, cannot be interpreted as a disregard for, or limitation imposed on the effectiveness of the principle of innocence. Consequently, it can be stated that the principle of innocence would be violated if the period were unreasonable which, in this case, does not reach such an extreme.

When the principle of equality is mentioned, the position is, as previously stated in the Argentine answer, that the Government is of the opinion that the aforesaid principle has not been violated, stressing that it must not be construed in arithmetical terms but, instead, and to the contrary, it shares the duty of giving equal treatment and, hence, equal protection to those who find themselves in the same circumstances and that this is the interpretation accepted by all the laws applicable in the country, including the American Convention.

When referring to the seriousness and urgency of the case, the reference is that within the context of the Inter-American System of Protection based on the Convention there are "serious and urgent cases" and "extremely serious and urgent cases."

A first conclusion on this leads this Government to hold that there is no doubt that this particular case is not one of the "extremely serious and urgent cases," for public and evident reasons. Neither is this a serious and urgent case, since the Commission - which is, in the final instance, the body called upon to assess such a condition - has not acted in the manner stipulated in the Convention for cases of this type.

Next, the following statements are made, among others, under the heading "Seven Criteria":

What the Government has made manifest is the direct relationship between the notion of reasonable period of time and judicial indolence; that is, when the latter has been certified, an extension of detention becomes unreasonable.
Consistent with the above, this Government has held that the period between the arrest of FIRMENICH in Rio de Janeiro on February 13, 1984 and the date on which he was turned over to Argentine authorities on October 20 of said year cannot be considered for purposes related to judicial activity for the obvious reason that the accused was not yet before the court. Therefore, if no action was taken during that time in connection with the trial it was because what was required at that stage were certain procedures and formalities during which the accused's right to defense must be guaranteed. Consequently, the Argentine authorities can only proceed after the accused is within their jurisdiction.
Thus, the national judicial authorities begin to act only after October 20, 1984. However, the above does not imply - as has been held - that for sentencing purposes the date to be considered is February 13, 1984. On the contrary, emphasizing what has already been indicated, in extremely complex extradition proceedings the absurd extreme could be reached in which the prisoner might have to be released before the trial begins.
As to the status of the accused Mario Eduardo FIRMENICH, it must be pointed out that he has been sentenced in the first instance in May 1987, in one of the two cases and that said sentence was appealed by the defense.
In the case being tried by the Federal Judiciary in the Federal Capital, sentence was passed in June of 1988. In both cases the judicial decision regarding life imprisonment has been limited to thirty years, under the agreements entered into with the Republic of Brazil.

As to the "duration of preventive imprisonment in connection with the nature of the violation" the paragraph of the STOGMULLER decision quoted by the petitioner is the same one mentioned in paragraph 4.12 of the Argentine answer and as indicated therein, the issue is to define the reasonable length of time.

The reasonableness of the period cannot be translated into a fixed number of days, months or years (c.f. referenced STOGMULLER case, p. 155-156), since it is dependent on other elements, which the judge must consider. In order to set the limits of the prudent discretion of the Judge and to prevent "judicial indolence" the legal system provides the Judge with certain criteria for weighing the circumstances. In the case under review, said criteria are derived from Article 380 of the Code of Criminal Procedure, which sets the rules for interpreting Art. 379, subsection 6.

When considering standards related to the "difficulties faced when investigating the case," the comments repeat statements by Judge CREMONA, which this government shares.

In fact, "the justified duration of an investigation cannot be necessarily (as sometimes seems to be assumed) and automatically extended to include the justified duration of preventive confinement." However, the certified complexity of an investigation can justifiably result in an extension of preventive confinement. In this sense, the decision of the European Tribunal of June 27, 1968, in connection with the WEMHOFF case states>

One must not lose sight of the fact that although an accused and detained prisoner is entitled to an earlier scheduling of his case, the latter must not overlook efforts made by the Magistrates to cast a light on the charges and to offer both to the defense and the prosecution all the assistance required to show their evidence and to stated their reasons and not to judge until after having considered the existence of violations and the penalty (p. 59, Legal grounds, #17).

As to an alleged failure to conduct proceedings in connection with the brief in the Federal Capital, between December 30, 1985, and August 15, 1986, it should be pointed out that not only were mere formalities completed but also specific judicial decrees:

- Documents are requested from the Federal Court Nє 6, Secretariat Nє 16, on December 30, 1985.
- January, 1986: judicial holiday.
- April 7, 1986: various proceedings conducted in the interior (Italian newspapers).
- April 23, 1986: testimony given by Commissioner ALVAREZ, Interpol.
- May 5, 1986: the Prosecutor files documents.
- August 13, 1986: the Prosecutor requests additional extension of the investigation;

reflecting the courts activities during said period. And all of the above, without prejudice to setting out at length everything stated in item 5.2.5.2 of the Argentine answer.

As to the extensions granted which are considered to have covered "twenty four days in all," this Government wishes to point out to the Commission that FIRMENICH's defense waited from October 21 (when notice was given on the accusation filed on the 2nd. Day of the same month) until March 16, 1987, that is, almost five months and not twenty four days, as is claimed, before making an appearance in court. That is the time it took to request the file (October 31, 1986), to request the prisoner's release (to which end the Chamber requests the file on November 10, 1986), the four extensions requested (one of them prior to a submission for the prisoner's release), and the Court holiday (January 1987, which the defense also computed as a holiday).

In summary, as reported in item 5.2.5.2 and set out herein, the course followed by the file is:

- October 2, 1986 -Accusation.
- October 6, 1986 -The case is divided and the courts orders that a single domicile be defined.
- October 16, 1986 -The defense requests photocopies that are certified on the selfsame date.
- October 26, 1986 -Notice given to the defense.
- October 31, 1986 -Delivery of the file.
- November 4, 1986 -First extension requested.
- November 10, 1986 -The Chamber requests the file to decide on a petition for release.
- November 11, 1986 -The Court requests that the file be remanded to the defense.
- December 26, 1986 -File returned to the Chamber and additional notice given.

- January 1987 -Court holiday.
- March 16, 1987 -Notice answered (four (4) extensions granted to date).
- March 25, 1987 -Court ready to receive evidence.
- March 15, 1987 -Prosecution's evidence submitted and entered in the record.
- February 29, 1988 -Defense completes submission of evidence.
- April 29, 1988 -Extension based on Pleadings by the Defense.
- May 6, 1988 -The Prosecutor argues the case.
- June 14, 1988 -Prisoner is sentenced.

As evidence by the above, this case was plagued by difficulties during the investigation, not related to the activities of the magistrates involved. Said difficulties resulted not only from the complexity of the cases themselves but from the positive decision of FIRMENICH's attorneys who, undoubtedly to engage in a better defense, requested several extensions whose legitimacy was duly weighed by the judges when granting them and which cannot be validly used to accuse the authorities of judicial procrastination.

Therefore, what the preceding paragraph attempts to show is that this government has not only considered the criteria indicated by the European Commission but also the standards set by the Court of Strasbourg, all of which lead to the same conclusion: that the preventive detention of FIRMENICH does not violate the Convention since it has not been proved that the term was unreasonable.

As to the reasonableness of the time, from accusation to sentencing, the statement is, as set out in the prior answer, that the Government submit to the Inter-American Commission, in connection with the case being tried by Federal Judiciary with venue in San Martin, that a verdict of guilt was handed down in May, 1987; that in the case tried in federal courts of the Federal Capital, the accusation was filed in October of 1986 and a verdict has already been entered.

In brief, Mario Eduardo FIRMENICH has currently been tried and sentenced in the first instance as a result of sentences handed down by the Federal Judges in the Federal Capital and in San Martin to life imprisonment and accessory penalties, limited to thirty years under an extradition agreement. Similarly, that when his brief was submitted to the Commission, on July 21, 1987, he had already been sentenced in connection with the case related to the kidnapping and ransom of the BORN brothers and the homicides of Alberto BOSCH and Juan Carlos PEREZ according to a sentence passed in May of 1987.

17. The Commission, in addition to written procedures listed above, held hearings, with the participation of representatives of both the claimant and the Argentine government. Said hearings were held on September 9, 1988 (session 994€), during the 74th period. The parties had an opportunity to make their views known at length, during which pleadings they summarily reiterated the statements already made to the IACHR.

CONCLUSIONS:

A review of Case 10.037 has led the Commission to draw the following conclusions:

First. The petition meets all the formal requirements for a hearing set out in Article 46, 1 (b, c and d) of the Convention, since it has been submitted within six months after the date on which the competent judicial authorities turned down the requests for release filed by Mr. Eduardo Firmenich and said decisions were confirmed by the Supreme Court on January 27, 1987, and July 28, 1988, the definitive judicial decisions on said motions; the issue under review is not being considered before any other international proceedings and meets the requirements of name, nationality, profession, domicile, and signature of the claimant and a description of the facts denounced and causa pretendi.

Second. The claimant, according to the record, has exhausted all internal remedies, understood as those related to the motions submitted to the national judicial authorities or, in other words, the request for release of Mr. Firmenich while proceedings instituted against him were completed, even though the aforesaid motions did not have a direct bearing on the fundamental issue of said cases. The Commission

understands that when the Supreme Court turned down the remedies against the decisions, which rejected the requests for release submitted to the courts of first instance and appeals, no other internal actions were available to the petitioner and therefore the petitioner could turn to the international body.

Furthermore, it should also be borne in mind that requests for the release of Mr. Firmenich must be viewed, from the standpoint of national law, as motions in trials against said person, without prejudice to consideration of whether denials of release imply or could imply disguised penalties since they deprive the accused of personal liberty before sentencing, even if the first instance. The foregoing is important because, as far as the IACHR is concerned, the claim is based on the alleged violation of the fundamental guarantee of the right to personal freedom, stipulated in the text of Article 7, subsection 5 of the Convention.

Third. That three issues are at stake in the complaint:

i. National law and the guarantee set out in Article 7, 5 of the Convention;
ii. The jurisdiction of the judge when weighing the causes listed in Article 379 of the Argentine Code of Criminal Procedure;
iii. The scope of Article 379, 6 as related to Article 701 of the selfsame Code and the concept of "reasonable period of time" to which the Convention refers (Article 7, 5).

Fourth. As to the second issued, that is whether the trial judge is empowered to weigh the grounds listed in Article 380 of the Code of Criminal Procedure, in order to release or not a prisoner, the Commission takes it that the prudent judgment of the judgment of the judge when weighing "the characteristics of the case" and the "personal characteristics of the accused" in order to determine whether there are reasonable grounds for believing that the "accused will not attempt to evade justice" is not per se a violation of Article 7, subsection 5 of the Convention, in that said power could lend itself to the application "of particular criteria of the judge called upon to apply the law," as mentioned by the claimant in his original complaint (p. 2).

This power, vested under Article 380, is in fact an exception to what has been granted to the judge by Article 376, which grant him broad authority to order the release of a prisoner when the grounds set out in subsections 1 to 6 are met. It could be said, as the Argentine Government points out that "When vesting this power, the legislator is appealing to the 'sound judgment' of the judge". In other words, what is involved is a regulated power, not an obligation and hence, the release of the prisoner is something that is within the discretionary powers of the judge.

On this point the Commission holds with what has been expressed by the Public Prosecutor in Case Nº 26.094 against Firmenich and in connection with the latter's request for release, in that "there always existed a rule equal or similar to the one set out in Article 380, as the last tool provided by the law to judges to decide cases in which the strict application of ritual rules would lead to flagrant injustice or mockery of the law" and they add: "In fact, that an individual accused of the most serious crimes and for which life imprisonment has been requested together with an additional penalty of indeterminate imprisonment, should be entitled to enjoy freedom slightly after two years by using legal measures of sibylline combination, does not resist the most elementary logical and legal analysis."

The Commission believes that it is precisely the prudent judgment of the court, when considering the legal requirements that set the standards for granting or denying the release, what evidences the independence of the judiciary to which the Commission has positively referred to on several occasions as the indispensable requirement for the proper administration of justice. Further, in this case, the conditions mentioned in number 1 of Article 379 are adverse to the prisoner, because the penalties which could be imposed and for which his arrest was ordered, exceed 8 years of imprisonment and would not correspond,

as in this instance they do not correspond, to a conditional serving of time and for which reason the release could not be ordered.

The Commission also shares (moreover, in this regard) the interpretations criteria of the Argentine scholar, Mr. Ledesma, mentioned above, in that "the personal characteristics of the defendant" and the "characteristics of the facts" (punishable) must be jointly weighed and, under the text of Article 380 of the Code of Criminal Procedure, since that is the only manner in which the objectivity required to decide whether a release can be ordered is to be achieved. The Commission also shares the interpretative criteria applied by Mr. Ledesma since to adequately consider the conditions stipulated in Article 380 the judge must also bear in mind the "motives, the behavior prior to and after the events, the procedural behavior of the defendant during the trial against him for said events and any other circumstance directly or indirectly related to the event or events for which he is charged."

The Commission does not overlook the fact that the complainant was accused of most serious crimes under aggravating circumstances such as the alleged execution of persons by a gang or by two or more material perpetrators, in the alleged classification of kidnapping for ransom, whose presumed violation of the human rights of the victims would be superfluous to stress; without having to examine the alleged motives or purposes of said crimes against life and property of the victims, all of which -as has been previously indicated- negatively influence consideration of the status of the accused and, consequently, the refusal being analyzed.

Sixth. The reasoning of the complainant that refusal to release the prisoner is a way or method of political proscription or an indirect refusal or constraint of the political rights of same is not admissible, bearing in mind the possibility of his election to parliament.

This is not - although obvious must be stated - among the grounds stipulated in the law, that is, the Code of Criminal Procedure (Articles 379 and 380) as law applicable to the case nor is it included in the Convention.

According to the above it must be stressed that these grounds, not defined in the law, are not admissible, as others of the same nature. Thus, for example, it could not be held that following a sentence that legally deprives the accused of freedom, the right of residency and movement is violated or the right to establish a family, etc. Similar views would make it possible for many or almost anyone held in jails or other facilities to obtain their freedom by turning to pretexts or grounds that go far beyond the limits of the pertinent laws. This portion of the petition lacks, in fact, any legal basis or grounds and is, therefore, disregarded without additional comments.

Seventh. The analysis of the third item (3, iii), related to the scope of Article 379, 6 of the Code of Criminal Procedure, together with Article 701 of said Code and the concept of "reasonable length of time" mentioned in Article 7, 5 of the Convention, is of the essence of the complaint. The guarantee mentioned in the referenced article of the Convention would have been infringed because of "judicial procrastination" during proceedings against Firmenich, since the above mentioned term had been exceeded.

In summary, the petitioner states that since more than three and a half years have elapsed since the arrest of Mario Eduardo Firmenich, the period mentioned in Article 379, 6 of the Code of Criminal Procedure as well as the one mentioned in Article 701 of the same Code has been exceeded by far, said periods consecrating in internal law the "reasonable length of time" mentioned in the Convention within which a person is entitled to be tried or "to be set free, without prejudice to continuing trial." The claimant states, in keeping with the above, that Article 379, 6 is the instrument ("inclusion") of Article 7, subsection 7 of the Convention in the Argentine legal system, since if this were not the case, the foregoing would

represent a void that prevents the application of the guarantee in Article 7, subsection 5 and would also be a violation of the Convention by Argentina in view of provisions in Articles 1 and 2 thereof.

The Argentine Government, also in summary, rejects the criterion of the complainant, commenting that "Argentine law must be construed as having adopted the two year term, mentioned in Article 379, subsection 6 in connection with Article 380, as one of the foundations of a "reasonable length of time" and that, "therefore, two years could be considered a reasonable period, after which the judge can consider a request for release but which is not, at all, imposed on the judge without consideration for the personal characteristics of the accused, nor should said period be computed as if it consisted of calendar days, overlooking the behavior of the parties and its effect on the greater or lesser speed of the proceedings."

As mentioned when considering the first question, the Commission understands that in connection with this assumption, Argentine law does not suffer from an absence of law or legal "gap" in this case and that Article 379, subsection 6 of the Code of Criminal Procedure is a guarantee which corresponds to Article 7, subsection 5 of the Convention.

The Commission believes that subsection 6 of Article 379 is supplemented and "moderated" by Article 380 of the said Code, so that the definition of a "reasonable length of time" in Argentine's internal law is the result in each case of the harmonious consideration of these two provisions, leaving said consideration to the judge's criterion, since he must decide based on the parameters specifically determined by law for their joint weighing. As the Argentine Government states: "…the norm indicates the channels to be followed by the judge's criterion, that is: the objective assessment of the characteristics of the event and the personal characteristics of the accused." The judge fulfill a natural role entrusted to him: administering justice with the means expressly provided thereto by law.

Two important concepts are derived from the above in connection with the problem of a "reasonable length of time": first, that it is not possible to define this period in abstracto, but, instead, that is shall be defined in each case after the circumstances mentioned in Article 380 have been considered and weighed. The Commission, in connection with these comments, agrees with the opinion that the referenced State party is "not bound (by the Convention) to fix a valid period for all cases, independently from the circumstances." This viewpoint is also shared by the European Court; second, releasing prisoners under conditions such as those in which Mario Eduardo Firmenich finds himself cannot be done based on a simple chronological consideration of years, months, and days. This has also been made explicit by the European Court in the infra mentioned case, since the concept of "reasonable period" is left to the consideration of "the seriousness of the violation," when determining whether the detention has ceased to be reasonable.

The pronouncement of the European Court coincides, in this case, with what has been stated by the Court in San Martin, when deciding on the remedies submitted by counsel for Mr. Firmenich and stating:

Said norm only requires that the person charged be tried within a reasonable period and, if not, be released on bail. The "amount" of reasonable length of time does not have to be set as being two years, as is claimed without additional basis, since if that period is appropriate for a simple and easily investigated case is might no be, when related to another, such as this one, whose complexity, scope and difficulties impose a longer period for it to expire. This last reasoning has been reflected by legislation in the very Article 701 of the ritual order, when it includes the caveat that a trial can take longer than two years when as in this case, the delays cannot be attributed to the Judge's activity.

In view of the above, it must be concluded that the reasonableness of the period is set by the extremes of Article 380 of the Argentine Code of Criminal Procedure, together with the assessment thereof by the trial

judge. This conclusion coincides with what has been stated by the European Court, when it states:

The Court also believes that to decide whether, in a given case, the detention of the accused does not exceed the limits of what is reasonable, it behooves the national judicial authorities to investigate all circumstances which, because of their nature, lead to acknowledge or reject the existence of true public interest which justifies the repeal of the rule of respect for individual liberty (NEUMEISTER Case, sentence dated June 27, 1968, TEDH-5.P.83, Legal Consideration #5).

Eighth. It does seem necessary, for brevity's sake, to engage in a detailed analysis of the criteria or factors which the European Commission of Human Rights examined in connection with the problem of a "reasonable period" in order to define an old and vague concept of international law. Both the interested petitioner and Government have made their views known at length.

Nevertheless, the Commission wishes to refer to three factors or features:

a. The actual duration of imprisonment; b. the nature of the acts which led to proceedings against Firmenich; and, c. the difficulties or judicial problems encountered when conducting said trials.

a. The duration of imprisonment

The claimant holds that the term indicated in Article 379, 6 as related to Article 701 of the Code of Criminal Procedure must be computed starting on February 13, 1984, when he was arrested in Rio de Janeiro (Brazil).

The Government holds that the accused was turned over to Argentine authorities on October 20, 1984, and that, therefore, the "reasonable period" mentioned in Article 7, subsection 5 of the Convention must be computed as of that date, "…without prejudice to the time between both dates which must be credited to the sentence."

The Commission believes that the opinion of the claimant cannot be entertained since between the date of arrest in Rio and the delivery of the prisoner to the Argentine authorities, extradition proceedings were conducted and that they and the pertinent decision are subject (except insofar as the filing of the petition by the requesting State is concerned) to the authorities with jurisdiction in the State to whom the request for extradition is submitted, according to the latter's internal law and terms of the treaty applicable between both States, if any, or in the absence thereof, international practice.

The foregoing is also valid when applied to the petitioner's claim that the procedural responsibility of the accused cannot be taken into consideration during the extradition proceedings since the latter takes place without the participation of the accused. Firmenich's extradition followed provisions set out in the treaty applicable between Argentina and Brazil (1961), whose Article V indicates that the individual whose extradition is requested must be granted "the opportunity to exercise all the remedies and appeal to all instances foreseen by the legislation of the Stated receiving the request", remedies and instances which were actually employed by Mr. Firmenich to prevent or delay his extradition.

b. The nature of the crimes

The claimant was extradited for trial in connection with two different crimes (non bis in idem): one by the Federal courts (in Buenos Aires) for charges of double aggravated homicide in connection with attempted homicide, also with doubly aggravating circumstances and a request for life imprisonment; the other (Federal Court in San Martin), for twofold homicide with aggravating circumstances and kidnapping for ransom and a request for life and additional imprisonment.

In conclusion and in the light of the provisions in Article 380 of the Argentine Code of Criminal Procedure, the Commission is of the opinion that the characteristics of the (punishable) actions as described in the initial briefs of these proceedings and the penalties which could be imposed on the accused make it possible to assume, on a solid basis, that measures must be taken to forestall an avoidance of justice and that, hence, a request for release must be turned down.

c. Difficulties encountered during the trials

In the two trials against the claimant as is evidenced by the record, an intense investigation was conducted

with the active participation of the accused, so that:

i. Case tried in San Martin (Province of Buenos Aires) wherein charges were filed in November of 1985, and the defense requested several extensions to answer the charges. Testimony was frequently waived, or offered extemporaneously on other occasions, "new facts" were introduced and international letters rogatory were dispatched to elicit depositions and during which the judge declared the defense negligent in submitting evidence or portions thereof. Summary investigations lasted one year, trial starting in approximately November of 1986, as far as the Commission is able to deduce from the evidence submitted to it. Approximately 50 witnesses and an indeterminate number of accused, but not tried, and linked in one way or another to the case testified during the trial. It must be pointed out that, according to the record, some testimony was given after difficult proceedings and international letters rogatory requested by the defense. The trial phase, as such, was completed in 1987 and sentence passed in May of that year. The sentence of the first instance has been appealed by the defense, and the appeal is still pending. The sentence is prior to submission of the case to the IACHR.

ii. The case before the federal courts (Federal Capital): As evidenced by the record, the investigation was interrupted from February 1982 until February 1984. The accused was charged in October of 1986. Ninety witnesses testified, 3 ballistic tests were conducted, two tests were conducted on explosives, 2 expert witnesses testified in connection with scopametorics, 2 handwriting experts testified, one expert witness testified on mechanics and another on typewriters during the investigation. Thirty Official Letters were sent, many through Interpol and others through the Ministry of Foreign Affairs, requesting evidence, which would serve information purposes. Charges were made on October 2, 1986, but the defense made an appearance only on March 16, 1987, because of request for release it had submitted and 3 requests for extension which were granted by the judge. On May 15, 1987, the defense suggested taking depositions from several witnesses outside the country, that a mechanical expert be called and 40 letters be sent, all of which was done in addition to granting a 90 day (extraordinary) term for submission of evidence, which had twice to be extended. On June 14, 1988, sentence was passed in the first instance.

The foregoing makes it possible to draw the conclusion that although four years is not a reasonable period, in this case because of its unique features and the complexity of the reasons affecting its progress such a period is not an unjustified delay I the administration of justice.

Ninth. As to the defendant's allegation that a violation of the guarantee of the principle of innocence (Article 8, subsection 2 of the Convention) is occurring in these proceedings and when his request for release is turned down, the Commission believes such an allegation to be inadmissible, since the record does not show that the proceedings have been conducted in a manner contrary to law, nor that the refusal to release the prisoner is a violation of due process because: the cases have been conducted according to the Code of Criminal Procedure which preexisted the actions for which he is accused and that it is applied to all Argentines accused of the crimes therein defined; that the rules were applied by judges with jurisdiction or "natural", called upon to hear these cases and that the proceedings followed the rules set out in the Code itself.

Tenth. Neither does the Commission believe that the allegation of the petitioner should be considered, when he claims that this a "serious and urgent" case (Article 48, 2 of the Convention) since the record shows that the accused is not being subjected to cruel, inhuman or degrading treatment, that he enjoys the defense of learned counsel and judicial guarantees required by his defense in court and that, therefore, the case does not justify such a treatment.

Eleventh. In view of the foregoing conclusions, the Commission has decided to declare that no violation of the American Convention on Human Rights has occurred in connection with Case 10.037, the subject of this report and that notice of this finding be given to the claimant and the Government of the Argentine Republic.