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1. On November 17, 1993, a claim against the Government of Argentina was lodged with the Commission regarding the situation of Jorge Alberto Giménez. The claim alleges that the holding of Mr. Giménez in preventive custody since September 1989 in the absence of a sentence violates the rights that are set forth in the American Convention on Human Rights--in particular Article 7(5) (his right to be tried within a reasonable time or to be released without prejudice to the continuation of the proceedings) and Article 8(2) (the right to presumption of innocence).

I. THE FACTS

2. Mr. Giménez was taken into custody on September 29, 1989 and the order of pretrial detention was issued shortly thereafter. He has on various occasions asked that he be conditionally released from prison, but those requests have been denied, both by the judge of the lower court and the Court of Appeals.

3. A conviction handed down in December of 1993 in proceeding No. 1757 of the Letter "W" Sentencing Court found Jorge Alberto Giménez guilty of aggravated robbery plus two counts of automobile theft, considered to be joint offenses. He was then sentenced to serve nine years in prison--a term which will expire on September 28, 1998. On March 14, 1995, the Appeals Court of the Federal Capital confirmed the sentence handed down by the first instance court and sentenced Mr. Giménez to 9 years in prison.

II. LEGAL PROCEEDINGS

4. The petitioner has repeatedly asked to be released on bail.

5. On October 6, 1989, the lower court denied his request, and that judgment was upheld by the court of appeals on December 19 of that same year.

6. The adverse decision of October 6, 1989 was based on the impossibility of imposing a conditional penalty pursuant to Article 379, Section 1 of the Code of Criminal Procedure, given the existence of a previous sentence, issued on September 30, 1980, to three years' imprisonment for automobile theft, which he was held to have committed on more than one occasion (joint offenses). The conditionality of the sentences imposed on December 23, 1977 and December 31, 1978 was then revoked.

7. On January 8, 1991, the judge denied his petition, and the Court of Appeals ratified the decision on January 31, 1991.

8. On May 22, 1991, the judge of the lower court again rejected the petition.

9. A new appeal was denied on September 30, 1991, and that decision was upheld by the Court of Appeals on January 28, 1992. This petition for release on bail was lodged when Mr. Giménez was accused by the Public Prosecutor's Department. At that time, the prosecutor recommended that a penalty of seven years and six months of prison plus related penalties be imposed on him as the perpetrator of repeated instances of automobile theft, combined with unlawful deprivation of freedom (joint offenses). His participation in the robbery in a populated area was considered to be a single offense.

10. To substantiate his denial of the appeal, the judge stated in his verdict that:

... the case might fall within the provisions of Article 379, Section 6 of the Code of Criminal Procedure, which guarantees that the accused will not be subject to prolonged proceedings and assures him that--if court proceedings have not been instituted within the period of two years set by Article 701, either by means of an indictment or a verdict from the lower court, which would afford some possibility of estimating what the outcome of the case may be--the order to release him must be given.

11. In its decision of November 28, 1991, the Court of Appeals confirmed the lower court's decision based on the following: in the abstract, the situation of the appellant might be viewed in light of the premise cited in Article 379, Section 6 of the Code of Criminal Procedure; the nature of the offense he is accused of committing; his personal circumstances; the previous sentence; and the prospect of a severe penalty facing him, given the public prosecutor's accusation. All of these factors combined were deemed to warrant application of Article 380 of the Code--which empowers the courts to deny a request for release on bail when an objective assessment of the nature of the deed and the personal characteristics of the accused are grounds for presuming that he will attempt to escape the law.

12. The special remedy utilized by the defendant to counter that ruling was disallowed by the Federal Supreme Court on January 28, 1992. The Court concurred with the reasoning adduced by the National Court of Appeals prosecutor, to the effect that in the case of Mr. Giménez no serious impairment of constitutional rights was apparent. In the view of the prosecutor, the fact that the suit had reached the final stage of the plenary proceeding, in which the prosecution had asked for a prison sentence of seven years and six months, combined with the defendant's history of previous convictions, indicated that the finding was not arbitrary.

13. The defendant then appealed to the Federal Supreme Court, alleging that there were no objective grounds for believing that, pursuant to Article 380 of the Code of Criminal Procedure, he might seek to escape judicial action if his request for release from prison were granted.

14. On March 30, 1993, fourteen months later, the Supreme Court rejected the appeal.

15. On April 7 and June 15, 1992, respectively, the examining magistrate and the Court of Appeals rejected another request for release from prison. Further requests were similarly denied on September 30 and December 11, 1992, and again on January 6 and February 25, 1993.

16. On December 27, 1993, the defendant presented a writ of habeas corpus.

17. On December 28, 1993, an examining magistrate disallowed the writ, based on the claimant's criminal record and the fact that "he is legally held in custody where he would be available for sentencing by the court since the prerequisite conditions set forth in Article 3 of Law 23.098 are not met."

18. Following a review, this finding was upheld by the Federal Supreme Court on December 29, 1993.

19. On September 6, 1994, a further remedy of habeas corpus was presented on behalf of Mr. Giménez. It was denied that same day on the grounds that this had not been the proper remedy to challenge a judicial proceeding or to question a penal system whose failings "are public and notorious." On September 7, 1994, the Court of Appeals upheld the lower court judge's ruling, on the grounds that the event in dispute did not fall within any of the hypothetical cases set forth in Article 3 of the habeas corpus law.

20. On December 1, 1994, Mr. Giménez was released on bail, by virtue of Article 379.5 of the Code of Criminal Procedure. The decision concluded that Giménez had served in pre-trial detention two-thirds of his sentence, "in accordance to the system established by Law 24,390".[FN1]

[FN1] On November 1994, Law N° 24.390 was passed in Argentina, limiting the duration of preventive detention. Articles 1, 2 and 7 state as follows:

1. The length of preventive detention shall not exceed two years. However, when the number of crimes the defendant is charged with, or the evident complexity of the cases have impeded the finalization of the proceedings in the aforementioned deadline, this may be extended one more year by judicial decision, which shall be immediately notified to the corresponding court of appeals for appropriate control.

2. The above mentioned deadlines shall be extended six more months in the case that they expire after a conviction which is not final.

7. Once the two-year deadline mentioned in Article 1 has expired, every day in preventive detention shall be counted as two days of conviction or one of reclusion.

III. PROCEEDINGS BEFORE THE COMMISSION

21. On November 17, 1993, the Commission received Mr. Giménez's complaint.
22. In a note dated February 23, 1994, the Commission relayed the complaint in pertinent part to the Government of Argentina, with the request that any relevant information by the Government be sent to the Commission within 90 days.
23. On April 26, 1994, the Commission acknowledged receipt of the additional information submitted by the petitioner.
24. In a note dated May 12, 1994, the Government requested an extension in order to gather information regarding the case. That request was granted by the Commission in a note dated May 20, 1994.
25. In a note dated May 26, 1994, the Government of Argentina requested another extension, and it was granted.
26. On June 9, 1994, the Commission sent the Government of Argentina a note confirming the terms stipulated in its May 20 note.
27. On June 2, 1994, the Commission received the petitioner's additional information.
28. In notes dated June 9 and June 27, 1994, the Government of Argentina submitted its observations on the case, which were transmitted in pertinent part to the petitioner.
29. In a note dated August 15, 1994, the petitioner set forth his observations concerning the Government's response. A note dated September 28, 1994 transmitted the pertinent parts to the Government.
30. In a note of October 12, 1994, the Commission acknowledged receipt of the additional information provided by the petitioner.
31. On October 26, the Government presented its final observations regarding the case.
32. In a note dated November 14, 1994, the Government's observations were transmitted in pertinent part to the petitioner.
33. On November 21, 1994, the petitioner submitted additional observations on the case, receipt of which was acknowledged in a note dated November 29, 1994.
34. On February 23, 1995, the Commission sent both parties a letter putting itself at their disposal in order to reach a friendly settlement of the case. In a note dated March 21, 1995, the Government informed the Commission that it was unable to negotiate a settlement.

IV. POSITION OF THE PARTIES

A. The Petitioner

35. In his original petition, Mr. Giménez alleges that he has remained under arrest pending trial for 49 months, and that there appears to be no possibility that the lower court will arrive at a sentence in his case. The extension of his preventive custody, according to Mr. Giménez, constitutes an infringement of Article 7(5) of the American Convention and of Article 379, paragraph 6 of the Code of Criminal Procedure. This provision of Argentina's domestic law, he argues, presents a maximum time frame or reasonable period of preventive custody which in his case has been breached.

36. In his presentation of July 14, 1994, Mr. Giménez broadened the scope of his original petition, alleging that the prolongation of his incarceration in the absence of a conviction violated Articles 7.3 and 8(2) of the Convention. Mr. Giménez argues that his protracted custody had become arbitrary detention, and that his right to the presumption of innocence has been infringed.

37. The petitioner also argues that the State has violated his right to personal integrity as set forth in Article 5 of the American Convention, given that the conditions of his incarceration have resulted in psychological and moral injury to him. Such injury, according to the plaintiff, also entails a social dimension, in that his family has suffered from the worry produced by his uncertain situation as well as from financial losses. The petitioner considers that the damage caused his family constitutes a violation of Article 5.3 of the Convention, which states that punishment shall not be extended to any person other than the criminal, as read in conjunction with Article 17 of the Convention.

38. In addition, he alleges a violation of Article 5.6 of the Convention, which stipulates that punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners; of Article 11, paragraph 1, which speaks to the right to have one's personal honor respected and dignity recognized; of Article 24 guaranteeing equality before the law; and of Article 25.1 on the right to judicial protection.

39. In his written response to the Government's observations, the petitioner contends that--given the absence of a federal crime--the refusal of the Supreme Court of Justice to admit the special remedy he had sought to oppose the Court of Appeals' finding against his release from prison violates his right to be judged by a competent, independent and impartial court, as well as his right to the presumption of innocence.

40. He goes on to say that the fact that a sentence was handed down by the lower court does not change his status as an accused prisoner, since the sentence in question was not a final judgment (not appealable) since an appeal had been presented but had yet to be resolved. He adds that, given the reservation expressed in the federal context pursuant to Article 14 of Law 48, in the event that a sentence is determined at the appeal level, the Supreme Court of Justice will still be required to rule on the special remedy. Only then will his trial have reached its conclusion.

41. He maintains, further, that the lower court's sentence convicted him for crimes that fell outside the scope of the criminal accusation, thereby violating the principle of "congruence which must exist between accusation and defense," as well as Article 8 of the American Convention.

42. He goes on to say that his trial has remained at a standstill for more than two years and six months when the tally includes nonworking days, legal holidays and the suspension of activities by civil servants in the judiciary. The petitioner also adds the 14 months during which the original docket remained at the Supreme Court of Justice, due to the appeals procedure he himself had instituted. He maintains that the original ought never have been sent. Certified photocopies should have been submitted instead to avoid interrupting the course of justice and to prevent the resulting delay, which he termed "unwarranted and arbitrary."

43. As to the application of Article 380 of the Code of Criminal Procedure in his case, the petitioner's position is that the domestic law precept in question cannot be invoked by the Argentine Government, pursuant to Article 27 of the Vienna Convention on the Treaty Law, simply in order to justify a violation of international law. The petitioner argues that the American Convention takes precedence over Argentina's domestic law; and that, as of the date said Convention entered into effect in the country's law, Article 380 automatically ceased to apply. He goes on to point out that application of the precept in question inflicts a twofold stigma on the individual, since it deems him suspect and in addition spawns the suspicion of future felonious conduct without any evidence that such suspicion is justified.

B. The Government

44. The Government understands that application of Article 379 Section 6 of the Code of Criminal Procedure is not automatic. That provision vests a power in the judge, for use at his or her discretion. It therefore follows, according to the Government, that the tenor of Article 380 in that same source enables the judge to deny release on bail when an objective assessment of the facts and the personal history of the accused in essence permit the presumption that he or she will seek to evade justice.

45. The Government cites the criterion adopted by this Commission in its report on case 10.037 (Annual Report of the Inter-American Commission on Human Rights for 1988-1989, page 59). In that report, the Commission stated that the provisions in question grant the judge broad authority to order the release of the prisoner, or not to do so.

46. It considers that the reasonable nature of the imprisonment--i.e., the proportionality which should exist between a means and the end which it is hoped to achieve--should be examined in each instance, pursuant to an inherent and specific context, in the absence of any generally valid criteria for that purpose.

47. It understands that a general ruling regarding the length of preventive imprisonment cannot be set without taking into account the specific circumstances of each concrete instance.

48. The Government notes that it has taken specific steps to avoid prolonging the preventive custody of the accused. To that end, it reproduces part of the text of decrees 56/92 and 406/92, issued by the Ministry of Justice, which instruct the representatives of the Attorney General's Office to conduct a case-by-case study of the feasibility of a request for release of persons held for trial in circumstances where the necessary procedures have been unreasonably protracted. The Government of Argentina invokes these norms to show that, in some cases, custody pending trial ceases to be reasonable when two years have elapsed while in others, this is not the case.

49. As criteria to evaluate the time frame in question, the Government of Argentina proposes: a) the actual length of such detention; b) the nature of the offense(s) that have given rise to the proceedings; and c) the legal problems or difficulties entailed in preparation of the case.

50. The Government acknowledges that Mr. Giménez has been held in custody since September 29, 1989 and that no difficulties have arisen in processing of the case other than those to be expected in this type of procedure, given the number of persons held for trial (five in this instance).

51. The Government concludes by maintaining that there is no evidence of unreasonably protracted detention in the case of Mr. Giménez. He has been given procedural opportunities to apply for release from custody and he has exercised them. The requests have been denied, based on an appraisal of the considerations set forth in Article 380 of the Code of Criminal Procedure--and, in particular, on the personal history of the accused and on the fact that his claim has lost merit, since the time which he has already served has been taken into account and will be subtracted from the length of the penalty imposed by the lower court's sentence.

V. ADMISSIBILITY

52. The claim meets the requirements of formal admissibility established in Article 46(1) of the Convention and Article 32 of the Regulations.

53.i. The Commission is competent to hear the case because it presents facts that characterize violations of rights protected in the Convention, namely, article 7 (right to a trial within a reasonable period of time or to be released without prejudice to the continuation of the proceedings) and article 8 (judicial guarantees including the right to be presumed innocent during such time as guilt has not been legally established), in relation to article 1(1).

54. An examination of the petition shows that it is neither manifestly unfounded nor obviously totally without merit. The Government has argued that Mr. Giménez' request is inadmissible because the claim of injury sustained by being held in custody pending trial has lost merit, inasmuch as the verdict sentencing him to nine years in prison for having been found guilty of various counts of robbery took into account the time spent in detention as part of the time he is sentenced to serve.

55. The Commission does not share that opinion because the complaint relates to the period of time spent in prison pending trial. The fact that an individual is subsequently released or

convicted does not vitiate the possible transgression of the reasonable length of time contemplated in the Convention.

56.ii. The petition is not pending before any other international organization, nor does it replicate any petition that has already been reviewed by the Commission.

57.iii. The Commission considers that in the case of Mr. Giménez, the exhaustion of remedies refers to the internal procedural remedies utilized to secure an end to his being held in prison pending conviction. In the context of pre-trial detention, the presentation of the request for conditional release followed by the denial thereof suffices to substantiate the exhaustion of remedies. After having examined the background details adduced in the trial documents, the Commission concludes that Mr. Giménez has exhausted the procedures established by Argentina's law to challenge the legality of his incarceration.

58.iv. As to the possibility of a friendly settlement provided for in Article 48(1)(f) of the Convention and Article 45 of the Commission's Rules and Regulations, the Commission has set itself at the disposal of the parties but an agreement could not be reached.

VI. ANALYSIS

59. The case before us raises the following problems in interpreting the various provisions of the Convention. First is the question of establishing what the entitlement "to be tried within a reasonable time" means in the context of Article 7(5) of the Convention; and, in particular, whether in this case the prolongation of detention has ceased to be reasonable. Another question is the determination of whether prolonged incarceration without trial beyond a reasonable time constitutes a violation of the presumption of innocence guaranteed in Article 8(2). The Commission must also consider whether the prolonged imprisonment of Mr. Giménez also violated his right to a trial with a reasonable time as contemplated by Article 8(1) of the Convention.

A. Relevant domestic law

60. The Argentine courts have based their decisions rejecting the request for release on various provisions of internal positive law.

61. According to Article 366 of the Code of Criminal Procedure, preventive custody may be ordered when the following requirements are met: there is prima facie evidence of a crime; the accused has made a statement during the preliminary examination, or is apprised of the charges against him or her; and there exists a reasonable suspicion as to his or her guilt.[FN2]

[FN2] Article 366 of the Code of Criminal Procedure establishes that the detention shall become custody pending trial when all of the following are present:

1. The existence of a crime is substantiated by inconclusive evidence at least;
2. The detainee has given--or has refused to give--a statement during the preliminary examination, and has been apprised of the reason for his imprisonment; and

3. There are sufficient grounds, in the opinion of the judge, for believing that the defendant has committed the offense.

When the conditions cited in items 1 and 3 have been found without merit, the judge shall officially rescind the order for preventive custody.

62. Article 379 of the Code of Criminal Procedure establishes the conditions under which an accused person can be released on bail. In particular, paragraph 6 states that such release must be granted when the period of preventive custody has exceeded the term specified in Article 701, which may in no case be more than two years.

63. Article 701 of the Code of Criminal Procedure in turn provides that "All cases must be completely terminated within the period of two years, not counting any delays caused by statements of the parties, letters rogatory or requisitions, the testimony of experts or other necessary procedures the duration of which is not governed by action of the court." The Government contends that the two-year period stipulated in Articles 379(6) and 701 provides the foundation for a "reasonable length of time" which corresponds to the guarantees established in Article 7(5) of the Convention. However, the Government rejects the notion that these laws indicate that any period of preventive detention beyond two years has exceeded a reasonable period of time and therefore the application of Article 379(6) must be automatic. Rather, the Government asserts that by using the word "may" in Article 379, the Code of Criminal Procedure bestows upon the judge the authority, but not the obligation, to release an accused from preventive detention.

64. Moreover, the Government argues that this interpretation of Article 379 is reinforced by the provisions in Article 380 of the Code of Criminal Procedure. Article 380 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 that the above said 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.

65. To support its argument, the Government also cites the Commission's decision in its Report No. 17/89, which holds 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." [FN3]

[FN3] See Commission Report No. 17/89, supra, p. 59.

66. Therefore, the Government contends that in each case the definition of a "reasonable length of time" must come from the harmonious consideration of Articles 379(6) and 380.

Preventive detention beyond two years may be "reasonable" under Argentine law if so decided by the national judicial authority in accordance with Article 380.

67. The Commission considers that a "reasonable length of time" for incarceration before conviction cannot be established in the abstract and thus belies the Government's contention that the 2-year period stipulated in Article 379(6) provides a criteria of reasonableness which corresponds to the guarantees found in Article 7(5) of the Convention. A period of pre-trial detention cannot be considered per se "reasonable" simply because it is prescribed by law. Rather, as the Government itself argued in defending its analysis of Article 380, whether a period of detention exceeds a reasonable length of time must be based on the "sound judgement of the judge," using those criteria established by law.

68. Therefore, to determine whether the use of pre-trial detention in the present case is compatible or incompatible with the Convention, the Commission must determine what constitutes a "reasonable length of time" for incarceration without conviction under Article 7(5) of the Convention.

69. In its response to petitioner's allegations, the Argentine government recognized, as did the Commission in its Report 17/89, that the concept of "reasonable time" in the Convention cannot be defined with precision.[FN4] In this regard, the Commission has recognized that member states to the Convention are not obligated to set a fixed period of time for incarceration before conviction independent of the individual circumstances.[FN5] Since it is not possible to establish an abstract criteria for a "reasonable length of time," what is reasonable must be analyzed in light of the specific facts of each case.[FN6]

[FN4] See Report No. 17/89, Case No. 10.037, Firmenich, Annual Report of the Inter-American Commission on Human Rights, 1988-89, p. 62.

[FN5] Id.

[FN6] Id. (This viewpoint is shared by the European Court of Human Rights. In *Stogmuller*, The European Court held that the concept of "reasonable time" in Article 5(3) of the European Convention cannot be translated into a "fixed number of days, weeks, months or years, or into various periods depending on the seriousness of the offence." *Stogmuller*, 4, p. 40.)

70. The Commission has always held that the determination of whether or not a detention is unreasonable inevitably must be analyzed on a case by case basis. However, this does not preclude the possibility of a norm that establishes a general term limit beyond which a detention is considered prima facie illegal no matter the crime charged or the complexity of the case. This would be consonant with the principle of presumption of innocence as well as all other rights associated with due process.[FN7]

[FN7] In this regard the modern tendency is towards establishing objective time limits. See for example the German Procedural Code which establishes a maximum period of 6 months for

preventive detention. The Spanish Constitution (1978) stipulates that the laws must establish a limit for preventive detention.

71. Although the Commission agrees with the government that article 701 of the Argentinean Criminal Procedure Code need not imply an automatic release from pre-trial incarceration, any detention that is prolonged beyond that period should be deemed prima facie unlawful. This follows because any norm that authorizes the release of a prisoner from jail cannot be interpreted so as to allow the preventive detention to be prolonged for a greater length of time than the procedural code deems reasonable for the entire judicial procedure.

72. The State's interest in resolving alleged criminal cases cannot breach the reasonable restriction of the individual's fundamental rights. This concern is evident in the Argentinean legislation which regulates time limits for the criminal prosecution. To this end, it is crucial to note that preventive detention applies only in exceptional cases and its extension must be strictly scrutinized especially when the duration exceeds the time limit stipulated by law for the entire criminal procedure. Preventive detention may be unreasonable without exceeding two years. At the same time, incarceration without conviction may be reasonable, even after the two-year period stipulated in Articles 379(6) and 701 has expired.

73. As a result, since this is an area that in the domestic law of Argentina is largely subject to interpretation by the courts, it is up to the Commission to decide whether the criteria used by the domestic courts are "relevant and sufficient" to justify the length of the detention period.

B. Reasonableness of the length of incarceration without conviction: article 7(5)

74. Article 7(5) of the Convention stipulates that:

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

75. To understand the precise scope of this provision it is helpful to set it in context. Article 7, which begins with an affirmation of the right of everyone to liberty and security of person, specifies the situations and conditions in which derogations from this principle may be allowed. It is in light of this presumption of liberty that national courts, and then the Convention organs, must determine whether the detention of an accused person prior to a final judgment has, at some stage, exceeded a reasonable limit.[FN8]

[FN8] See Eur. Court H.R., Stogmuller Case, judgement of 10 November 1969, Series A, No. 9, 1, p. 30; see also Eur. Court H.R., Neumeister Case, judgement of 27 June 1968, Series A, No. 8, 1, p.23; Eur. Court H.R., Wemhoff Case, judgement of 27 June 1968, Series A, No. 7, 1, p. 14.

76. The rationale behind this guarantee is that no person should be punished without a prior trial which includes a charge, the opportunity to defend oneself, and a sentence. All these stages

must be completed within a reasonable time. The time limit is intended to protect the accused with respect to his or her fundamental right to personal liberty, as well as the accused's personal security against being the object of an unjustified procedural risk.

77. The State must prove guilt within a reasonable period of time in order to ensure and institutionalize confidence in the system's procedural fairness. The statement of guilt or innocence is equally fair as long as due process guarantees are respected. The fairness and impartiality of the procedure are the ultimate ends to be achieved in a state governed by the rule of law.

78. Thus, the principle of the rule of law that establishes the need for criminal prosecution of all crimes by the State, cannot justify an unlimited length of time to resolve the criminal matter. Otherwise, there would be an implicit assumption that the State always prosecutes guilty people and that thus the length of time taken to convict the accused is irrelevant. By international standards, all persons accused of a criminal offense must be considered innocent until proven guilty.

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

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

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

81. The right to defense also guaranteed in the Convention under article 8(2)(f) is threatened by lengthy incarceration without conviction because, in some cases, it increases the defendant's difficulty in mounting a defense. With the passing of time, the limits of acceptable risks that are calculated into the defendant's ability to present evidence and counterarguments are enhanced. The possibility to convene witnesses diminishes as well as the strength of any counterarguments.

C. The prolonged imprisonment of Mr. Giménez was unreasonable

82. In the present case, the Commission must analyze the Argentinean judicial authorities' reasons for repeatedly denying Mr. Giménez' request for release from prison to properly conclude whether the justifications for pre-trial incarceration are "relevant and sufficient" such that the accused's detention is "reasonable" under Article 7(5) of the Convention.[FN9]

[FN9] To this effect, See the European jurisprudence in Clooth, 36, p.14. Also in this connection, the European Court has established, regarding article 5(3) of the European Convention on

Human Rights, that determination of whether preventive detention went beyond a "reasonable time" must be based on the reasons furnished by the national judicial authorities for detention and those undisputed facts put forth by the accused contradicting the judgement of the authorities See Stogmuller, ¶3, p.39. Defending this need to review domestic judicial rulings, the European Court stated:

the examination of the observance of Article 5, paragraph (3), of the Convention would be deprived of all meaning if the Court was prevented from assessing freely, on the basis of the factors determined by the domestic courts and of the true facts mentioned by the Applicant in his applications and appeals, whether the prolongation of the detention was reasonable within the meaning of Article 5, paragraph 3.

83. To this effect, the Commission has developed a two-part analysis to determine whether an accused's pre-trial incarceration violates Article 7(5) of the Convention. First, the national judicial authorities must justify an accused's preventive detention using relevant and sufficient criteria. Second, where the Commission concludes that the findings of the national judicial authorities are adequately "relevant and sufficient" to justify continued detention, it must then examine whether these authorities used "special diligence" in the conduct of the proceedings so that the length of detention would not be unreasonable.[FN10] The Convention organs must determine whether the time that has elapsed, for whatever reason, before judgment is passed on the accused has at some stage exceeded a reasonable limit whereby imprisonment without conviction imposes a greater sacrifice than could, in the circumstances of the case, reasonably be expected of a person presumed innocent.[FN11] Thus, where continued detention ceases to be reasonable, either because the justifications for incarceration are not "relevant or sufficient," or the length of the judicial proceedings is unreasonable, provisional release must be granted.[FN12]

[FN10] To this effect, see the ruling of the European Court in Kenmache, 45, p.36.

[FN11] Wemhoff,p.22.

[FN12] To this effect, see the ruling of the European Court in Neumeister, 4, p.37.

84. The purpose of preventive detention is to ensure that the accused will not abscond or otherwise interfere with the judicial investigation. The Commission stresses that preventive detention is an exceptional measure and only applies in cases where there exists a reasonable suspicion that the accused will either evade justice or impede the preliminary investigation by intimidating witnesses or otherwise destroying evidence. Such a measure is necessarily exceptional because of the preeminent right to personal liberty and the risk that pre-trial incarceration poses for the right to presumption of innocence and due process guarantees, including the right to defense.

85. In the present case, the courts of Argentina based their refusal to grant the release of Mr. Giménez on bail on the nature of the offense he is said to have committed; on his criminal record; and on the prospect of severe punishment. According to those who sit in judgment, those

criteria have led them to believe that if Mr. Giménez were to be released on bail, he would manage to evade the law.

i. Relevant and sufficient Criteria

a. Danger of Absconding, Seriousness of the Crime and the Potential Severity of the Sentence

86. Both the argument based on the seriousness of the crime and that of the severity of the punishment can in principle be taken into account when the risk of the detainee's evasion is examined. The Commission nevertheless believes that since both arguments are inspired by criteria of penal retribution, the use thereof to justify prolonged preventive imprisonment has the effect of impairing the purpose of the preventive measure, converting it, for all intents and purposes, into a substitute for the punishment depriving the prisoner of his freedom. The balance that must be struck between the general interest of society in suppressing crime and the interest of the individual in seeing that his or her fundamental rights are respected breaks down to the detriment of the individual, upon whom a greater sacrifice is imposed.

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

88. The Commission also notes that in such a case the State can perfectly well resort to some other type of cautionary measure to ensure that the accused appears for trial--measures which do not entail further restriction of his or her personal freedom. Furthermore, the Commission finds that the notion that there exists a sense of proportion between the sentence and the pre-trial incarceration is actually a justification for the anticipated punishment, and thus in violation of the presumption of innocence guaranteed in the Convention.

89. Given the fact that pre-trial incarceration is a deprivation of liberty of a person who still benefits from the presumption of innocence, it should be based solely on the probability of the accused's abusing conditional liberty and fleeing, and on whether conditional freedom of an accused is likely to result in some significant risk. Preventive detention should not, however, be based solely on the fact that a suspected crime is deemed particularly socially objectionable.

b. Risk of repetition of offenses

90. Another reason adduced by the domestic courts for denying conditional release is Mr. Giménez' criminal record. This type of consideration is based on an evaluation of the threat the individual may present to society: on how likely it is that his conduct may jeopardize the legal rights of the victim of his crime or those of society.

91. The Commission believes that criteria which focus solely on societal interests cannot be allowed to take precedence in evaluating the future conduct of the accused. Given the fact that pre-trial incarceration is a deprivation of liberty of a person who still benefits from the

presumption of innocence, it should be based solely on the probability of the accused's abusing conditional liberty and fleeing and on whether conditional freedom of an accused is likely to result in some significant risk.

92. The interest of the individual who has committed a felony in becoming rehabilitated and returning to his or her place in society must also be taken into account. To that end, weight should be given to such elements as the individual's subsequent conduct after facing the consequences of his crime; the will or desire to make reparation for the damage caused by the offense; the interest of the accused in adopting socially acceptable rules of conduct; his or her social and family environment; and his or her chances of rehabilitation.

93. Given the length of prison time served, the courts should reach a fair balance of those criteria which address the particular interests of the individual rather than those which serve the public order of society at large, when the time comes to decide whether the accused should be released from prison. In the case sub examine, the Commission considers that there is no proof that the type of crime for which Mr. Giménez is charged has seriously affected public order.

94. The Commission thus concludes that, for the reasons stated, the arguments adduced by the domestic courts to continue holding Mr. Giménez in pre-trial incarceration are neither sufficient nor reasonable.

c. Personal circumstances

95. The decision of October 6, 1989 denying Mr. Gimenez' initial request for release from pre-trial incarceration was based entirely on the fact that he had a history of criminal convictions. These previous convictions of December 1977, December 1978, and September 1980 entailed conditional release which had subsequently been revoked. In its 1989 decision denying Mr. Giménez conditional release, the court relied on the fact that the conditionality of the two 1977 and 1978 convictions had been subsequently revoked as a justification for holding him in pre-trial incarceration for the wholly unrelated case in 1989. The Commission notes that the conditionality of his two earlier convictions could in no way have extended to 1989.

96. The presumption of innocence guaranteed in the Convention is a principle that constructs a presumption in favor of an individual accused of a crime according to which he or she is considered innocent until criminal responsibility is established in the case before the courts.

97. The decision to retain Mr. Giménez in prison without sentence as a result of his earlier convictions contravenes this principle, as well as the concept in criminal law of rehabilitation. Any reliance on these previous convictions to decide a person's guilt or retain them in preventive detention is, in essence, a perpetuation of the punishment. Once the person convicted has completed the sentence or the period of conditionality has lapsed, then the person is returned to his or her full civil status.

98. Thus, the Commission deems that the grounds for keeping Mr. Giménez in preventive detention was unlawful because it directly contravened the principle of presumption of innocence

guaranteed in the Convention. Mr. Gimenez's criminal record is not relevant and sufficient criteria which justifies the extension of pre-trial imprisonment for a period of five years.

ii. Special diligence

99. As discussed earlier, where the Commission finds that the reasons given by the national judicial authorities are relevant and sufficient to justify continued detention, it must turn to whether these authorities use "special diligence" in the conduct of the proceedings so that the length of detention would not be unreasonable.[FN13] In the present case, in addition to finding the reasons for prolonging Mr. Giménez's pre-trial detention insufficient, the Commission considers that the judicial authorities have not acted with the special diligence owed a person in prison pending trial.

[FN13] To this effect, see the ruling of the European Court in Kenmache, 45, p.36. In this connection, the European Court stated in Wemhoff:

In these circumstances, the Court could not conclude that there had been any breach of the obligations imposed by Article 5(3) unless the length of Wemhoff's provisional detention....had been due either (a) to the slowness of the investigation....(b) to the lapse of time which occurred either between the closing of the investigation and the preferment of the indictment....or between then and the opening of the trial....or finally (c) to the length of the trial. It cannot be doubted that, even when an accused person is reasonably detained during these various periods for reasons of public interest, there may be a violation of Article 5(3) if, for whatever cause, the proceedings continue for considerable length of time.

100. The Commission believes that in keeping with Articles 7(5) and 8(2) of the Convention, an accused person in detention is entitled to have his case given priority and expedited by the proper authorities and that this can be accomplished without hindering the judicial authorities, prosecution and defense from carrying out their task with due care.[FN14]

[FN14] To this effect, see the jurisprudence of the European Court in Toth, 77, p.20; see also B v. Austria, 45, p.17.

101. In cases of prima facie unacceptable duration it rests upon the respondent government to adduce specific reasons for the delay. Such reasons will be subject to the Commission's closest scrutiny.

102. The Commission moves on to consider whether the domestic authorities have conducted the internal proceedings with the necessary due diligence to prevent the pre-trial incarceration from becoming unreasonable. For the Commission's purposes, such diligence is required of States pursuant to Articles 7(5) and 8(1) of the Convention, a joint reading of which provides grounds for concluding that the person accused or detained is entitled to have his case decided expeditiously and with priority by the national authorities.

103. In determining whether special diligence was used by the investigating authorities, the complexity and scope of the case, in addition to the conduct of the accused, must be taken into account.[FN15] However, an accused who refuses to cooperate with an investigation or who uses available remedies is merely exercising his or her legal right. Therefore, delay in the proceedings should not be attributed to a detainee unless the system is intentionally abused for the purpose of delaying the process.[FN16] The Commission distinguishes between the petitioner's reliance on procedural rights, failure to cooperate in the investigation or trial, and deliberate obstruction.[FN17] The Government did not articulate any behavior of the petitioner that indicates anything other than his reliance and use of his procedural rights.

[FN15] To this effect, see the judgement of the European Court in Toth, 77, p.21.

[FN16] To this effect, see the findings of the European Commission in Wemhoff, 2, p.14; see also Neumeister, 2, p.23.

[FN17] In this regard, the European Court, in Toth, held that although the case was complex and the applicant filed many appeals, the length of the proceedings was not directly attributable to these factors. Rather, the proceedings were severely delayed by procedural rules of the Austrian Courts which had the effect of suspending investigation on various occasions. The European Court noted that procedures that created such delays in an applicant's release "can hardly be reconciled with the importance attached to the right of liberty" secured under the European Convention.

104. As to the complexity of the case, the Government has recognized in its response to the claim that "there have been no difficulties in the handling of the case other than those usually encountered in this type of procedure, given the number of persons accused."

105. In regard to the conduct of the accused, the Commission considers that sufficient elements have not been provided that indicate bad faith or obstructive designs on his part. It has been established that, in respect to one of his requests to be released, the accused resorted to a special remedy before the Supreme Court. The Commission finds no reason to object to such conduct, since the remedy seems to have been lodged in good faith. On the other hand, the fact that the original file was in the hands of the Supreme Court for more than 14 months during which the court of original jurisdiction was unable to advance in its handling of the case constitutes a dilatory act which can be attributed to the authorities in the procedure, inasmuch as certified copies or photocopies could have been sent to the high court instead of the original file to avoid slowing the procedure to a halt.

106. In the overall evaluation of the diligence displayed by the domestic courts, the Commission concurs with the view expressed by Argentina's Penal Prosecutor in his recommendation 49/PP/93, dated December 17, 1993.[FN18] Issued in response to a query from the petitioner on November 30, 1993, the Attorney General's review of the case:

- a. Found that the length of time for which Mr. Giménez had been held in custody pending trial to be excessive and unreasonable in the light on Argentina's constitutional principles and international commitments.
- b. Observed that the Attorney General's Office had neither represented this anomaly nor complied with the instruction to request that Mr. Giménez be released from prison.
- c. Considered that the prolongation of pre-trial detention could deprive Mr. Giménez of the benefits of progressive adjustment to the penitentiary system, in the event that he is sentenced to prison.
- d. Notified the Ministry of Justice of the anomalously prolonged period of pre-trial detention to which Mr. Giménez had been subjected, and recommended that the Minister of that department instruct the respective agent to request that Mr. Giménez be released from prison.

[FN18] The office of Penal Prosecutor was created pursuant to Decree 1598/93 of July 29, 1993, which calls for the holder of that post to be a civil servant charged with ensuring due protection of the human rights of persons placed within the Federal Penitentiary System.

107. The instructions to the Attorney General's Office cited in the above opinion are those appearing in resolutions 56/92 and 406/92 of the Ministry of Justice. They instruct the representatives of the Public Prosecutor's Department, through the National Attorney General's Office, to examine on a case by case the basis for releasing from prison persons who have been accused and are awaiting trial; and to seek real and concrete enforcement of the American Convention on Human Rights (Articles 7(5) and 8(1)), appearing before the respective courts and requesting the release from prison and the issue of such orders for release as may be necessary, due primarily to the unreasonably prolonged duration of the procedures.[FN19]

[FN19] The Commission's records show that the Ministry of Justice has complied with the recommendation of the Penal Prosecutor, having sent official instructions to the Attorney General of the Republic to comply with resolutions 56 and 406.

108. The Commission thus concludes that the national authorities have failed to act with sufficient due diligence to avoid the prolongation of Mr. Giménez's remand in custody. The fact that the accused has been uninterruptedly deprived of his freedom throughout the course of the procedure constitutes a violation of the right to be tried within a reasonable time as provided by Article 7(5) of the American Convention.

D. The right to trial within a reasonable time: Article 8(1)

109. Article 7(5) and 8(1) are specifically designed to ensure that the charges which the penal procedure places on the individual are not unremittingly protracted and produce permanent harm.

110. Although they are inspired by the same principle, the two provisions do not coincide in their references to what constitutes a reasonable period. A delay that constitutes a violation of the

provision in Article 7(5) may be justified pursuant to Article 8(1). The specificity of Article 7(5) stems from the fact that an individual who is accused and held in custody is entitled to have his or her case resolved on a priority basis and conducted with diligence. The State's ability to apply coercive measures such as pre-trial detention is one of the decisive reasons which justify the priority treatment that should be given to procedures involving the deprivation of liberty for the accused. The concept of reasonable time in Article 7 and in Article 8 differs in that Article 7 establishes the possibility for an individual to be released without prejudice to continuation of the proceedings. The time established for detention is necessarily much shorter than the period allotted for the entire trial.

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

112. Given the absence of complexity in the case sub judice and the judicial authorities' lack of diligence in duly disposing of the case, the Commission finds that the prolongation of the procedure for more than five years without handing down a sentence constitutes a violation of the right to be heard with due guarantees and within a reasonable time established in Article 8(1).

E. Violation of the presumption of innocence as a result of a prolonged detention: Article 8(2)

113. The prolonged imprisonment without conviction, with its natural consequence of undefined and continuous suspicion of an individual, constitutes a violation of the principle of presumed innocence set forth in Article 8(2) of the American Convention. It should nevertheless be noted that the existence of a growing suspicion of a person in the course of the criminal proceeding is not per se contrary to the principle of presumption of innocence. Neither is the fact that such mounting suspicion justifies the adoption of safeguards--such as pre-trial incarceration--in regard to the suspect's person.

114. Article 8(2) requires the States to compile material incriminating the person accused of a crime in order to "establish that person's guilt." The substantiation of guilt calls for the formulation of a judgment establishing blame in a final sentence. If the use of that procedure fails to assign blame within a reasonable length of time and the State is able to justify further holding of the accused in pre-trial incarceration, based on the suspicion of guilt, then it is essentially substituting pre-trial detention for the punishment. Preventive custody thus loses its purpose as an instrument to serve the interests of sound administration of justice, and the means becomes the end. In the instant case the prolonged imprisonment without conviction of Mr. Giménez is in violation of his right, guaranteed under Article 8(2), to be presumed innocent.

VII. GOVERNMENT'S OBSERVATIONS TO THE ARTICLE 50 REPORT

115. On September 14, 1995, during its 90th period of sessions, the Commission approved Report 18/95, pursuant to Article 50 of the Convention. The report was transmitted with confidential status to the Government, according to the second paragraph of the above mentioned Article.

116. The Government of Argentina forwarded its observations to the report on December 7, 1995.

117. Regarding the report's resolutions, the Government reminded the Commission that Law 24,390, which is in effect in Argentina, provides that every day spent in preventive detention without trial, after a period varying from two to three and a half years, shall be counted double once the sentence is handed down, to calculate the time served.

118. The Government has also informed that the National Criminal Court of Appeals (Cámara Nacional de Casación Penal) has established a jurisprudence by which the above mentioned law may be applied to convicted criminals with final sentences, by virtue of the principle of retroactivity of the law most favorable to the accused.

119. This precedent was confirmed by the Supreme Court of Justice of the Nation, which ruled to reject an extraordinary appeal (recurso extraordinario) filed to quash a decision of the National Criminal Court of Appeals applying the doctrine to a different case.

120. Finally, the Argentine Government asserts that the jurisprudence is applicable to Case 11,245 in the sense that was indicated by the Commission's recommendations.

VIII. CONCLUSIONS AND RESOLUTIONS

121. The Inter-American Commission on Human Rights, taking into account the considerations set forth in the instant report, as well as the observations presented by the Government of Argentina with regard to Preliminary Report 18/95, has reached the following conclusions:

122. The legal situation of the petitioner improved significantly after his release from prison, which occurred subsequent to the initiation of the Commission's proceedings in his case. Mr. Giménez remains free pending the final result of his trial.

123. The Commission considers that the new jurisprudence mentioned by the Government in its observations constitutes a positive advance toward compliance with the guarantees established in the Convention, and analyzed in the instant case with respect to Mr. Jorge A. Giménez.

124. The retroactive application of Law 24,390 opens the possibility to benefit a considerable amount of people who have been convicted after a lengthy preventive detention, who have therefore suffered a violation of their rights guaranteed by Articles 7(5), 8(1) and 8(2) of the American Convention on Human Rights.

125. The precedent conclusions notwithstanding, in the particular case of Mr. Giménez, the benefit of sentence reduction did not materialize within the period of time established by the Commission for compliance with the recommendations of Report 18/95.

126. The Argentine State violated Mr. Giménez' right to personal liberty, in particular Article 7(5), the right of a detained person to a trial within a reasonable time or to be released without prejudice to the continuation of the proceedings; Article 8(1), the right to a hearing with due guarantees and within a reasonable time, as well as 8(2), the right to be presumed innocent.

127. Based on these conclusions,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

RESOLVES:

1. To denounce the prolonged incarceration without trial of Mr. Giménez as a violation of the American Convention on Human Rights.
2. To commend the Argentine Government for the significant progress represented by the approval of a law that establishes limits to the duration of pre-trial detention, consistent with the standards of the American Convention which guarantee the right to personal freedom.
3. To recommend to the Argentine Government that this report be taken into consideration in all cases of prolonged pre-trial detention, so as to ensure that the standards of the Convention are complied with, and where applicable, the necessary steps be taken so that prisoners may be released pending sentence.
4. To publish this report in the Annual report to the General Assembly.