I. SUMMARY

1. On April 5, 1994, the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission," the "Commission," or the "IACHR") received a petition that Mr. Juan Carlos Bayarri (hereinafter "the petitioner") filed against the Republic of Argentina (hereinafter "the State" or "Argentina") alleging violation of his rights to humane treatment (Article 5), to personal liberty (Article 7), to a fair trial (Article 8) and to judicial protection (Article 25), recognized in the American Convention on Human Rights (hereinafter the "Convention" or the "American Convention").

2. The petitioner alleges that he was arbitrarily detained on November 18, 1991, without a court order. He further alleges that he was tortured and, under torture, confessed to police that he had participated in a number of kidnappings. The following day, the competent judge issued arrest and search warrants against him and criminal proceedings were instituted against him for the commission of several crimes. The charges were based on statements he made in the confession given under torture. The petitioner's legal attorney and his father, Juan José Bayarri, filed legal actions alleging these crimes: one case was instituted for unlawful deprivation of liberty and another for unlawful treatment. Those cases have been subject to unwarranted delays, and as yet no final ruling has been delivered. The petitioner further alleges that he has been incarcerated for more than 8 years. Although he has applied for release several times, the courts have arbitrarily denied his application every time.

3. The State requests that the IACHR declare the case inadmissible on the grounds that the remedies under domestic law in the criminal case against Mr. Bayarri have not been exhausted.

The State alleges that the delay in that case is justified. Rulings in the cases for unlawful deprivation of liberty and for unlawful treatment are still pending. The State also alleges that the petitioner's preventive detention is warranted on several counts and that the petitioner has failed to exhaust the remedies under domestic law. The State also requests that the petition be considered inadmissible because the facts alleged do not constitute violations of rights protected under the Convention.

4. Having examined the instant case, the Commission concludes that it is competent to consider it and that the petitioner's allegations regarding violations of Articles 5, 7, 8 and 25 of the Convention are admissible under Articles 46 and 47 of the Convention.

II. PROCESSING WITH THE COMMISSION

5. The Commission forwarded the petition to the State on April 13, 1994. The latter forwarded its observations in a note dated September 27, 1994. The petitioner sent his comments on November 4, 1998 and January 18, 1995, and the State submitted its response on March 2, 1995. The petitioner filed his comments and additional documentary evidence on March 10, June 23 and November 25, 1995. By note dated February 9, 1996, the State filed its reports with the Commission. The petitioner forwarded additional information on March 18, April 13, and July 13, 1996, and on January 22, 1997.

6. On July 21, 1998, the IACHR requested specific information from both the State and the petitioner concerning the various proceedings instituted in connection with this case. The petitioner sent the requested information on September 15, 1998. The State requested two consecutive extensions, the first on September 24 and the second on October 27, 1998. Both extensions were granted. The petitioner supplied additional information on November 11, 1998. The State sent its observations on December 9, 1998 and April 1, 1999. On May 4, 1999, the petitioner supplied more information, to which the State responded on July 2, 1999. The petitioner provided additional information on July 14, August 9 and October 12, 1999. The State presented its comments on January 10, 2000. More information was forthcoming from the petitioner on February 18, May 30, June 1 and July 12, 2000. On August 13, 2000, the State requested an extension to respond. Its request was granted. On August 22, 2000, the IACHR forwarded to the State more information it had received from the petitioner and gave the State 30 days in which to submit its comments. The State presented those comments on December 5, 2000, and the petitioner responded on December 29.

III. POSITION OF THE PARTIES

A. Petitioner

7. The petitioner recounts that on November 18, 1991, as they were driving down Avenida Mitre, near the intersection with Calle Centenario Uruguayo, in the city of Avellaneda, Province of Buenos Aires, Juan Carlos Bayarri and his father Juan José Bayarri[FN1] were stopped by seven federal police officers in civilian dress and taken to a secret detention facility at the intersection of R.L. Falcón and Lacarre streets in the Federal Capital. At that facility, known as "El Olimpo", Juan Carlos Bayarri was tortured. He alleges that he was beaten and subjected to

sessions of the "plastic hood or dry submarine" and bursts of electric shocks. Under torture and threats against his life and the lives of his family, Juan Carlos Bayarri confessed to involvement in the commission of a number of criminal acts, to Precinct Chief Vincente Palo.

[FN1] While the petitioner mentions actions committed against his father, such as the fact that he was unlawfully detained at the same time as the petitioner was and then released the next day, he does not make any case for a violation of the Convention.

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8. The petitioner further alleges that the following day, November 19, 1991, La Plata Federal Court Nº 1 "legalized" the arbitrary apprehension of Juan Carlos Bayarri and ordered his arrest, which was to be carried out by officers of the Federal Police Fraud Division. That decision was handed down by a letter rogatory from Federal Criminal Examining Court of First Instance Nº 25, which was investigating the unlawful deprivation of liberty of Mauricio Macri and others. On November 20, 1991, the petitioner was transferred to the facilities of the National Police Fraud Division at the Central Police Department. The petitioner alleges that the detention was arbitrary because he was in fact apprehended on November 18, 1991 -not November 19- at the place and time officially reported.[FN2]

[FN2] The petitioner sent the Commission a copy of a statement made by Guillermo Balmaceda, an immediate witness to the events, and a copy of the memorandum where Federal Examining Magistrate Nº 25, Mario Norberto Bonifati, heading up the investigation into the abduction of Mauricio Macri et al., informed the magistrate overseeing the inquiry into the petitioner's unlawful deprivation of liberty that the petitioner "has been in custody since November 18, 1991, at Unit 16 of the Federal Penitentiary Service, by order of this court, indicted on multiple counts of criminal conspiracy and kidnapping for purposes of extortion." He also supplied a copy of the report dated November 21, 1991, prepared by the Office of the Clerk of La Plata Federal Court Nº 1, and intended for Judge Bonifatti. That report states that no action could be taken on the letter rogatory of November 19, 1991, ordering the apprehension of Juan Carlos Bayarri, because the individual in question "was already in custody."

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9. The petitioner contends that the very same day, November 19, 1991, his father, after being abandoned on a street, immediately filed a complaint with the Buenos Aires Provincial Police 4th Precinct, Sarandí-Avellaneda, and later confirmed that complaint with Zamora Criminal Court Nº 4, located in the same province, where the case for unlawful deprivation of the petitioner's liberty was opened. On December 23, 1991, the petitioner's court attorney filed a criminal complaint against members of the Federal Police Fraud Division charging them with the crimes of unlawful detention and unlawful treatment of Juan Carlos Bayarri. The case was instituted in Examining Court Nº 13. No final decision has as yet been handed down.

10. The petitioner bases his allegations of torture on the testimony of medical personnel who had immediate knowledge of his case, and on the nature of the treatment prescribed for

him.[FN3] The medical record prepared on November 29 and indicating injury to the eardrum caused by the torture, disappeared.

[FN3] The petitioner sent the Commission copies of the medical prescriptions.

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11. The petitioner alleges a delay in performing "routine and necessary court measures", such as execution of court decisions affecting the persons recognized to be and identified as co-authors of the crimes of unlawful deprivation of liberty and mistreatment. The inquiries into those crimes began in November and December 1991, respectively. The petitioner points out that on September 11, 1996, the judge of first instance decided "to dismiss, without prejudice," the case concerning the crimes of unlawful detention and mistreatment. On April 1, 1997, Chamber VII of the Federal Appellate Court vacated that decision with regard to Juan Carlos Bayarri and observed that the egregious nature of the allegations "is such that the investigation, which is far from being exhausted, must probe further." The examining judge therefore ordered that certain pieces of evidence be compiled. It was that court's view that the petitioner's version jibed with the version given by his father and by the direct witnesses to the arbitrary detention: Cándido Martínez, Guillermo Balmaceda and Noemí Lata de Caamaño. The petitioner points out that Federal Examining Court Nº 13 has dismissed this case twice because the many pieces of evidence collected were improperly weighed. He alleges that the courts' failure to hand down a final judgment against the federal police officers was a violation of the petitioner's right to judicial protection.

12. The petitioner further points that the Federal Criminal and Correctional Court Nº 6 has had him under indictment for more than nine years, and has still not handed down a final ruling. This, he argues, is a violation of his guarantee of due process within a reasonable period of time. To illustrate the numerous delays in rendering judgment in his case, the petitioner notes that charges were brought on August 11, 1991, and still no judgment has been handed down. In December 1998, the petitioner filed a motion in this case to have his confession thrown out, but thus far no decision has been made on that motion. Under Article 8(3) of the American Convention, a confession obtained under torture has no legal validity. Despite this, the State is using the torture-induced confession as evidence against the petitioner. It is also using information obtained from two anonymous sources: a document naming the petitioner as the author of the kidnapping of entrepreneur Mauricio Macri, and a so-called phone tip supposedly reporting that he was "physically present in a bar when [by that time] more than 36 hours had passed since his apprehension and torture."

13. The petitioner alleges that his right to be tried within a reasonable period or be released is being violated by virtue of the fact that his requests to be released have been repeatedly denied and the criminal case against him has been dragged out. He points out that he exhausted the remedies under domestic law several times over. The first time, on March 30, 1995, the Federal Appeals Court upheld the ruling of the lower court that denied the release. The petitioner filed an extraordinary appeal and that, too, was denied by the Appellate Chamber on June 22, 1995. The second time, on January 25, 1996, the Federal Appellate Chamber upheld the December 18,

1995 decision of Federal Court of First Instance Nº 6, which denied the petitioner's request for release on the grounds that the deadline for filing the request had passed.

14. By the time the petitioner file his third request for release, he had been in preventive detention for 58 months. The court of first instance denied that request on September 12, 1996. In that decision, the court ruled that "the situation of the accused Bayarri has not substantially changed and evidence is about to be taken. Therefore, because the conclusion is in sight, the court cannot justify early release." The court of second instance upheld this decision on October 31, 1996, based on the nature of the crime, the personal circumstances of the accused and the sentence that the charges carried. Based on those considerations, the court reasoned, it "can reasonably assume that were the accused to be released, he would evade court action."

15. The petitioner alleges that he exercised his option for oral proceedings, an option allowed under the new Code of Criminal Procedure, Law 23.984, but that the judge denied his arguments in the aforementioned decision. He alleges that the judge has no legitimate reason to conclude that if released he would evade court action and turn his back on eight years of court suits. Nor is there any chance that he might intimidate some witness, because he had gone through only one line-up. In that line-up, only one of the victims identified him, but then failed to show up to make his statement once the evidentiary phase of the case was underway. The petitioner therefore argues that it is senseless to infer that he might intimidate someone else. The fourth request for release was presented on January 9, 1997, and denied by the court of first instance the next day. On March 6, 1997, the corresponding Court of Appeals upheld the lower court's decision.

B. The State

16. The State alleges that the case is inadmissible for the following reasons. First, where the arrest is concerned the State notes that "according to the case records, the petitioner was in fact detained on November 19, 1991, at Pedro de Mendoza and Ministro Brin in the Federal Capital." It further points out that on December 20, 1991, the arrest of Juan Carlos Bayarri, retired Argentine Federal Police Sergeant First Class, was changed to temporary detention pending trial, on the grounds that "he is considered, prima facie, to be guilty of five counts of criminal conspiracy, kidnapping and extortion." The commission of these crimes was allegedly admitted under questioning, confirming a court deposition.

17. The State reports that the case instituted charging that the petitioner was unlawfully deprived of his liberty is now with Criminal and Correctional Court Nº 4 of the Lomas de Zamora Judicial Department of the Province of Buenos Aires. On May 7, 1997, the case was dismissed without prejudice. The prosecutor appealed that ruling and requested that the evidentiary measures requested by the aggrieved private party be taken. The competent Appeals Court granted that petition. On orders from the judge, the case is now in full progress, after having been delayed by procedural defects whereby there was no aggrieved party in the case.[FN4]

[FN4] The State is citing Article 87 of the Criminal Procedural Code of the Province of Buenos Aires.

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18. With regard to the allegation of torture, the State maintains that the report on the medical examination done of Bayarri at the time of his detention makes no reference to a perforated eardrum. It also contends that these allegations were not reported to the judge who presided over the inquiry. The State also argues that the remedies under domestic law have not been exhausted in the matter of the alleged torture, inasmuch as cases brought by the petitioner are being heard by court authorities who have no association to the proceedings prosecuting the crimes for which the petitioner was deprived of his liberty. According to the State, it cannot be taken as proven fact that the petitioner was tortured or that any torture is attributable to the State. On December 9, 1998, the State presented information in connection with the case involving unlawful treatment–mistreatment or torture-being heard by Federal Criminal Court of First Instance Nº 13, which on July 6, 1998, at the request of the Public Prosecutor's Office, had ordered that the case be dismissed. The pretrial proceedings were moved to Chamber VII of the Federal Appeals Court by virtue of the appeal that the petitioner filed as plaintiff in the case.[FN5]

[FN5] Case file 6.306 was added to this case ad efectum videndi et probandi. Case file 6.306 contains the decision on the petition of habeas corpus filed by the petitioner's father on November 19, 1991, which was denied on November 26, 1991, on the grounds that it was inadmissible because the petitioner was in custody by order of a court in another jurisdiction.

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19. With regard to the delay in the proceedings on the criminal case being heard by Criminal and Correctional Court Nº 6, where the petitioner is charged with several crimes, the State argued that the proceedings are now in full progress and that the ruling of first instance has not been delivered. On December 19, 1994, the plenary phase began with the prosecutors' formal writ of indictment, which was amplified on December 27, 1995. On September 16, 1996, the evidentiary phase of the proceedings got underway. The State argues that there were difficulties with the preliminary phase of the criminal proceedings. One was the fact that the inquiry was transferred from the Federal Capital's Examining Court Nº 25, where it began in August 1991, to Federal Court Nº 6. That change was ordered by the Federal Appeals Court as a result of a motion filed by one of the defendants alleging that the judge presiding over the case was not competent. The State also argued that given that the case involved ten defendants and because of the nature of the crimes charged, prosecution of this case was very complex.

20. Concerning the right to be brought to trial within a reasonable time period or to be released, in its initial responses the State argues that for purposes of application of Article 7(5) of the Convention, exhaustion of the remedies under domestic law refers to the remedies available to appeal the reasonableness of the detention, not the consideration of the merits of the case. The State reports that on March 30, 1995, the Federal Appeals Court upheld the lower court ruling denying the petitioner's first request for release; on June 22, 1995, the corresponding chamber dismissed the extraordinary appeal filed by the petitioner. The State alleges that the second time the petitioner requested release, his petition was denied on the grounds that it was filed late. The

State reports that the corresponding court of first instance denied the petitioner's third petition for release on September 12, 1996, a ruling then upheld by the higher court on October 31, 1996. That court then held that if the petitioner's situation had changed since the time his request for release was denied on September 12, 1996, then he would have to again exhaust the remedies under domestic law under Article 46 of the Convention. Finally, the State argues that the last request for release was presented on January 9, 1997, and denied by a ruling of the court of first instance the following day. That ruling was upheld by the court of second instance on March 6, 1997. Since then, the State alleges, the petitioner has not availed himself of any other mechanism available to him to exhaust the remedies under domestic law. On December 5, 2000, the State argued that the petitioner had not exhausted all the legal mechanisms that the law provides to appeal the decisions denying his first, third and fourth petitions for release, specifically the federal remedy provided under Law 48, whereby the highest court in the land could decide the matter.

21. In regard to the case in which the petitioner was charged with a number of crimes, the State argues that the following factors have to be considered: a) the petitioner's is a very complex case because there are a number of defendants, all charged with various counts of kidnapping for purposes of extortion, one of which ended in a death; b) significant headway has been made in the investigation; there is an indictment, and the respective volumes of evidence are being processed; c) the case is being prosecuted in accordance with the Code of Criminal Procedure, Law 2372. According to the State, the defendants had the option of choosing oral proceedings, an option allowed under the new Code of Criminal Procedure, Law 23.984. By agreement with the other defendants and to have the same defense tactic, the first defendant to appear opted to be prosecuted under the earlier Code and thus sealed the fate of the other defendants, one of whom was the petitioner, thus making any allegations regarding a delay in the proceedings relative; d) under Argentina's system for written and oral criminal proceedings, there are effective remedies to challenge an unwarranted delay in rendering judgment. One such remedy is the complaint, which is an extraordinary, summary proceeding of which the petitioner has never availed himself.[FN6]

[FN6] "The petition of complaint may be filed: 1) when the judge denies the petitions of appeal and nullification, or only the petition of appeal, which must be done by court order; 2) when the legal time limits are allowed to lapse without the pertinent decision being issued, provided none of the cases in which the delay causes automatic loss of jurisdiction obtains; or 3) when pending proceedings in the circumstance provided for in Article 442 have not been ordered." Article 514 of Argentina's Code of Criminal Procedure (1888 Law 2372).

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22. In the instant case, the State argues that the "reasonableness of the petitioner's detention" has been established and that the preventive detention pending trial that was ordered and maintained is not a violation of Article 7(5) of the Convention.[FN7] As for the duration of the detention, the State alleges that: a) the decisions denying the petitioner's requests for release, decisions upheld on appeal, were based not on the length of time of incarceration but on other considerations and the personal circumstances of the petitioner, such as the number and gravity of the crimes with which he is charged, the danger that the commission of those crimes posed

and the fact that as a senior noncommissioned officer of the Argentine Federal Police, he used knowledge and means obtained as a police officer to commit the crimes; b) under Article 10 of Law 24.390, persons accused of crimes that carry penalties or are committed under aggravating circumstances equivalent to those cited in paragraphs 7 to 11 of Law 23.737 may be disqualified.[FN8] According to the indictment, this exception would apply in the petitioner's case.[FN9] Article 11 of Law 23.737 would also apply in his case, since one of the persons kidnapped for purposes of extortion was a minor under the age of 18; c) the crimes with which the petitioner was charged were such that they had a profound impact upon the country. The sense of defenselessness they created within the population was reminiscent of the former military dictatorship and was mirrored in the newspapers and magazines released during that period. Hence, according to the State, preventive detention pending trial was based on a reasonable suspicion that the petitioner could take flight or obstruct justice by intimidating witnesses, whose personal safety also had to be assured.

[FN7] The State cites Report Nº 12/96, Argentina, case 11.245, March 1, 1996, IACHR, paragraphs 69 and 70.

[FN8] Article 10 of Law 24.390 (Official Gazette 22/11/94) states that: "Those charged with the crime provided for in Article 7 of Law 23.737 and those to whom the aggravating circumstances provided for in Article 11 of that law apply shall be expressly precluded from the scope of the present law."

[FN9] The State is citing the indictment: "That he is charged with four counts of criminal conspiracy and kidnapping for purposes of extortion, in combination with the crime of concealing a person for the purpose of forcing the victim or a third party to do or tolerate something against his will; in one case, the kidnapping resulted in the death of the victim. The prosecutor is therefore seeking a sentence of life imprisonment, absolute and life-long disqualification and the other penalties that the law allows."

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23. The State points out that not all remedies under domestic law have been exhausted, since judicial proceedings that concern the petitioner are still in progress. For that reason, the State argues, the petition should be considered inadmissible under Article 46 of the Convention.

IV. ANALYSIS ON ADMISSIBILITY

A. Competence of the Commission ratione materiae, ratione personae, ratione temporis and ratione loci

24. The Commission is competent to examine the petition filed by the petitioner. The petitioner contends that the State violated rights recognized in Articles 5, 7, 8 and 25 of the Convention. The facts alleged in the petition would have affected persons subject to the State's jurisdiction at a time when the obligation to respect and guarantee the rights recognized in the Convention was already binding upon the State.[FN10]

[FN10] The instrument of ratification was deposited with the General Secretariat of the Organization of American States on September 5, 1984.

B. Other admissibility requirements

a. Exhaustion of the remedies under domestic law

25. Under Article 46(1)(a) of the Convention, for a petition lodged with the Commission to be admissible, "the remedies under domestic law [must] have been pursued and exhausted in accordance with generally recognized principles of international law." Article 46(2) of the Convention sets forth three specific hypotheticals wherein the rule of prior exhaustion will not apply: a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them, or c) there has been an unwarranted delay in rendering a final judgment under the aforementioned remedies.

26. While the three exceptions are closely related to the determination of possible violations of rights and guarantees recognized in the Convention--among them the right to due process of law within a reasonable period of time and the right to judicial protection, recognized in Convention Articles 8 and 25--,[FN11] the Commission considers that Article 46(2), by its very nature and purpose, is an autonomous norm vis-à-vis the rights and guarantees recognized in the Convention. Consequently, the Commission's practice has been to examine the question of exhaustion of domestic remedies separately, before going into the merits of the case. The standards it uses to gauge whether those exceptions are present are different from the standards used to determine whether violations of the rights and guarantees have occurred. For purposes of admissibility, the standard of analysis used for the prima facie assessment of the adequacy and effectiveness of the remedies under domestic law is not as high as the one required to determine whether a violation of Convention-protected rights has been committed.

[FN11] The Inter-American Court of Human Rights has held that: "Under [the rule of prior exhaustion of domestic remedies], States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1). Thus, when certain exceptions to the rule of non-exhaustion of domestic remedies are invoked, such as the ineffectiveness of such remedies or the lack of due process of law, not only is it contended that the victim is under no obligation to pursue such remedies, but, indirectly, the State in question is also charged with a new violation. Thus, the question of domestic remedies is closely tied to the merits of the case." See: Velásquez Rodíiguez Case, Preliminary Objections, Judgment of June 26, 1987, Series C Nº 1, para. 91 and Inter-American Court of Human Rights, Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987, Series A Nº 9, par. 24.

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27. To determine whether a remedy is "adequate" and, by extension, whether there is a probability that relief for the violations claimed by the alleged victim will be granted, the Commission must examine whether that remedy is set forth in the domestic laws in such a way that it can be used to remedy the violations being alleged. Here, the IACHR need not determine a priori whether the allegations have any foundation or can be characterized as or constitute violations of the Convention. Instead, it has to assume that probability, albeit on a strictly provisional basis, as a kind of working hypothesis. Using this criterion, the Commission must determine whether one or more of the remedies mentioned is or are relevant for purposes of Article 46(1)(a) of the Convention,[FN12] and whether there is some special circumstance present that would exempt the alleged victim from having to exhaust those remedies.[FN13] When examining the exception provided for in Article 46(2)(b) of the Convention, where the domestic laws make no provision for due process to protect the right allegedly violated,[FN14] the standard for the prima facie assessment of whether such remedy exists is not as high as the standard required to determine whether the right to effective remedy provided for in Article 25 of the Convention has been violated.

[FN12] The Inter-American Court of Human Rights has ruled that adequate domestic remedies are those "which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable." Inter-American Court of Human Rights, Velásquez Rodríquez Case, Judgment of July 29, 1988, Series C Nº 4, paragraphs 63 and 64. Godínez Cruz Case, Judgment of January 20, 1989, Series C Nº 5, paragraphs 66 and 67; Fairén Garbi and Solís Corrales Case, Judgment of March 15, 1989, Series C Nº 6, paragraphs 87 and 88; Caballero Delgado y Santana Case, Preliminary Objections, Judgment of January 21, 1994, Series C No.17, par. 63; Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Series A Nº 11, par. 36. As an example of an "inadequate" remedy, the Inter-American Court of Human Rights has expressly stated that "a civil proceeding specifically cited by the Government, such as a presumptive finding of death based on disappearance, the purpose of which is to allow heirs to dispose of the estate of the person presumed deceased or to allow the spouse to remarry, is not an adequate remedy for finding a person or for obtaining his liberty." See: Velásquez Rodríquez Case, Judgment of July 29, 1988, Series C Nº 4, paragraph 64. The IACHR has stated that certain remedies are not "adequate" to remedy the violations being alleged. In Report Nº 71/00, case 11.676,"X" and "Z", Argentina, decision of October 3, 2000, par. 31, the Commission stated that "with regard to the complaints that the petitioner filed in criminal court, the IACHR notes that they referred to the possibly criminal conduct on the part of public officials [and] would not have constituted a remedy for the alleged violations having to do with her daughter's return to Spain." In Report Nº 57/00, Case 12.050, La Granja, Ituango, Colombia, decision of October 2, 2000, par. 41, the Commission stated that "disciplinary proceedings do not meet the obligations established by the Convention in the area of judicial protection, since they are not an effective and sufficient means for prosecuting, punishing, and

making reparation for the consequences of the extrajudicial execution of persons protected by the Convention. Therefore, in the context of this case, the disciplinary measures cannot be considered remedies that must be exhausted under Article 46(1). As regards exhaustion of the contentious-administrative jurisdiction, the Commission has already indicated that this type of proceeding is exclusively a mechanism for supervising the administrative activity of the State aimed at obtaining compensation for damages caused by the abuse of authority." (Report Nº 15/95, Annual Report of the IACHR 1995, par. 71; Report Nº 61/99, Annual Report of the IACHR 1999, par. 51). "In general, this process is not an adequate mechanism, on its own, to make reparation for human rights violations; consequently, it is not necessary for it to be exhausted when, as in this case, there is another means for securing both reparation for the harm done and the prosecution and punishment demanded." (Report Nº 5/98, case 11.019, Alvaro Moreno Moreno, Annual Report of the IACHR 1997, par. 61).

[FN13] On the matter of the efficacy of the remedies, the Inter-American Court of Human Rights has ruled as follows: "A remedy must also be effective – that is, capable of producing the result for which it was designed." On the other hand, the mere fact that a "remedy does not produce a result favorable to the petitioner does not in and of itself demonstrate the inexistence or exhaustion of all effective domestic remedies. For example, the petitioner may not have invoked the appropriate remedy in a timely fashion. It is a different matter, however, when it is shown that remedies are denied for trivial reasons or without an examination of the merits (…) In such cases, resort to those remedies becomes a senseless formality. The exceptions of Article 46(2) would be fully applicable in those situations and would discharge the obligation to exhaust internal remedies since they cannot fulfill their objective in that case." See: Velásquez Rodríguez Case, Judgment of July 29, 1988, Series C Nº 4, paragraphs 66-68; Godínez Cruz Case, Judgment of January 20, 1989, Series 1989, Series C Nº 5, paragraphs 69-71; Fairén Garbi and Solís Corrales Case, Judgment of March 15, 1989, Series C No.6, paragraphs 91-93; Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Series A Nº 11, paragraphs 34-36. In these rulings, the Court has cited the following as an example of the "inefficacy" of remedies: "Procedural requirements can make the remedy of habeas corpus ineffective, if it is powerless to compel the authorities."

[FN14] The Inter-American Court of Human Rights has ruled as follows: "Article 46(2)(a) applies to situations in which the domestic law of a State Party does not provide appropriate remedies to protect rights that have been violated (…) These provisions thus apply to situations where domestic remedies cannot be exhausted because they are not available either as a matter of law or as a matter of fact." See: Inter-American Court of Human Rights, Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Series A Nº 11, par. 17.

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28. When examining the exception provided for in Article 46(2)(c) of the Convention, which concerns an unwarranted delay in rendering a final judgment on the adequate remedies invoked, the standard for the prima facie assessment of that delay is not as high as the one required to determine whether the right to due process within a reasonable period of time, recognized in Article 8(1) of the Convention, has been violated. There, the Inter-American Court has required that different criteria be considered: the conduct of the defendant, the complexity of the case, the conduct of the State. However, those criteria are not factored in when the admissibility of a case

or a petition is examined.[FN15] The same can be said of the exception provided for in Article 46(2)(b) of the Convention, for cases in which the party whose rights have been violated is not given access to the remedies under domestic law or is prevented from exhausting them.[FN16]

[FN15] In Report Nº 29/98, Walter David Bulacio, Argentina, decision of May 5, 1998, par. 40, the Inter-American Commission on Human Rights rendered a previous and separate decision on the exception established in Article 46(2)(c). There, the Commission stated the following: "The State has not disputed that there has been a delay in pursuing the criminal action to investigate the facts, but maintains that this has been justified for different reasons, among these the exercise of the defendant's right to defense and the interest that justice should be done. In this respect, the Commission observes that over seven years have elapsed since April 1991. It is clear from the description of the steps taken in Argentina to determine the circumstances of the arrest and death of Walter Bulacio that the investigation has not resulted in those responsible being punished. Consequently, prima facie, there has been an unwarranted delay in rendering a final judgment in the present case." In Report N° 74/99, Case 11.810, Sebastián Sánchez López et al., Mexico, May 4, 1999, the Commission found "prima facie that there has been an unreasonable delay in the decision on the jurisdictional remedies presented by the petitioners in Mexico. Therefore, the IACHR applies the exception of Article 46(2)(c) of the Convention." See, also, Report N° 87/99, Case 11.506, José Victor Dos Santos et al., Paraguay, September 27, 1999; Report N° 87/99, case 11.506, José Victor Dos Santos and Waldemar Gerónimo Pinheiro, Paraguay, decision of September 27, 1999; Report Nº 30/00, Case 12.095, Mariela Barreto Riofano, Peru, March 23, 2000, par. 20.

[FN16] The Inter-American Court of Human Rights has held that: "A remedy must also be effective –that is, capable of producing the result for which it was designed (…) [resort to those remedies becomes a senseless formality] if there is proof of the existence of a practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from invoking internal remedies that would normally be available to others. (...) The exceptions of Article 46(2) would be fully applicable in those situations and would discharge the obligation to exhaust internal remedies since they cannot fulfill their objective in that case." An example of the "ineffective" remedies cited by the Court is that "Procedural requirements can make the remedy of habeas corpus ineffective (…) if it presents a danger to those who invoke it; or if it is not impartially applied." See: Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, Series C Nº 4, paragraphs 66-68; Godínez Cruz Case, Judgment of January 20, 1989, Series C Nº 5, paragraphs 69-71; Fairén Garbi and Solís Corrales Case, Judgment of March 15, 1989, Series C No.6, paragraphs 91-93; Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Series A Nº 11, paragraphs 34-36. The Court has also held that "if an indigent needs legal counsel to effectively protect a right which the Convention guarantees and his indigency prevents him from obtaining such counsel, he does not have to exhaust the relevant domestic remedies. That is the meaning of the language of Article 46(2) read in conjunction with Articles 1(1), 24 and 8." Inter-American Court of Human Rights, Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Series A Nº 11, par. 31. In Report 129/99, Case 11.565, Ana, Beatriz and Celia González Pérez, Mexico, November 19, 1999, the Commission concluded that "for different

reasons, exhaustion of domestic remedies in Mexico was not possible, even though five years have elapsed since the facts allegedly occurred. Consequently, the Commission applies to the instant case the exception provided for in the second part of Article 46(2)(b) of the American Convention. The causes and effect of the lack of exhaustion of domestic remedies shall be analyzed in the report that the Commission will adopt on the merits, in order to determine whether they constitute violations of the American Convention." In Report 89/00, Case 11.495, Juan Ramón Chamorro Quiroz, Costa Rica, decision of October 5, 2000, paragraphs 35 and 36, the Commission pointed out that: "Mr. Chamorro was not 'materially' able to invoke domestic legal remedies before leaving the country because he was taken directly from where he was captured to the place where he was deported. (…) detaining undocumented immigrants for several hours before deporting them is an administrative measure, taken within highly summary, almost automatic, proceedings, that does not allow them the opportunity of filing or attempting to seek any domestic remedy, including habeas corpus. In addition, since they had no papers and no means of economic support, they were unable to reenter Costa Rica to formulate complaints or invoke the applicable legal remedies, as claimed by the State (…) the Commission believes that the victim is exempted from the requirement of exhausting the internal legal remedies of Costa Rica, given the existence of the exception set forth in Article 46(2)(b)."

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29. As the Commission has repeatedly stated, the decision on the admissibility of a case involving a Convention Article 46(2) exception to the rule requiring exhaustion of domestic remedies, does not imply a prejudgment of the merits. Quite the contrary, such a determination is very much to the purpose of the system for the international protection of rights since otherwise the rule of prior exhaustion would invariably detain or delay any proceeding on the victim's behalf to the point that it became futile. That is why Article 46(2) of the Convention establishes exceptions to the rule of exhaustion of domestic remedies, precisely in situations where, for various reasons, those remedies are ineffective or inadequate. The practice of the Commission and of other international organizations for the protection of human rights confirms that the timing of the decision on the exceptions to the rule of exhaustion of domestic remedies depends upon the circumstances of each specific case. Where the decision on the admissibility of the present case is concerned, the Commission sees no reason why its analysis of the rule requiring exhaustion of remedies under domestic law and the exceptions to it should be postponed until a later stage in the process, such as when the merits of the case are examined.[FN17]

[FN17] In the Velásquez Rodríguez case (cited above, paragraph 95) the Inter-American Court of Human Rights decided to postpone consideration of the arguments on the exceptions to the rule of exhaustion of domestic remedies until it examined the merits of the case in order, inter alia, to receive the parties' evidence and hear their arguments.

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30. As for the distribution of the burden of proof for establishing whether the rule requiring exhaustion of local remedies has been met, the Commission reiterates that a State alleging non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective.[FN18] If the State alleging the failure to exhaust local remedies proves that

there are domestic remedies that should have been used, the petitioners will have to show that those remedies were exhausted or that one of the exceptions provided for in Article 46(2) of the Convention obtains. The Inter-American Court has ruled that "It must not be rashly presumed that a State Party to the Convention has failed to comply with its obligation to provide effective remedies."[FN19]

[FN18] The Court has repeatedly held that "the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective." See: Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987, Series C Nº 1, par. 88; Fairén Garbi and Solís Corrales Case, Preliminary Objections, Judgment of June 26, 1987, Series C Nº 2, par. 8; Godínez Cruz Case, Preliminary Objections, Judgment of June 26, 1987, Series C Nº 3, par. 90; Gangaram Panday Case, Preliminary Objections, Judgment of December 4, 1991, Series C No.12, par. 38; Neira Alegría et al. Case, Preliminary Objections, Judgment of December 11, 1991, Series C No.13, par. 30; Castillo Páez Case, Preliminary Objections, Judgment of January 30, 1996, Series C Nº 24, par. 40; Loayza Tamayo Case, Preliminary Objections, Judgment of January 31, 1996, Series C Nº 25, par. 40; Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Series A No.11, par. 41.
[FN19] Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, Series C No 4, paragraphs 59 and 60; Godínez Cruz Case, Judgment of January 20, 1989, Series C Nº 5, paragraphs 62 and 63; Fairén Garbi and Solís Corrales Case, Judgment of March 15, 1989, Series C Nº 6, paragraphs 83 and 84; Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Series A Nº 11, par. 41.
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31. In the instant case, the petitioner alleges that under the exception provided for in Article 46(2)(c) of the Convention, he is exempt from the rule requiring exhaustion of local remedies because of procedural delays in the following: a) the case prosecuting the petitioner's unlawful treatment; b) the case prosecuting the unlawful deprivation of liberty of the petitioner;[FN20] and c) the case in which the petitioner, Juan Carlos Bayarri, is charged with various crimes. The State notes that the remedies under domestic law have not been exhausted in any of these cases. It argues that the first two are still in progress, and that the delay in the third case is justified on several counts. On December 5, 2000, the State alleged that the petitioner had not filed the remedies that domestic law affords. Thus, even though this case was instituted in 1994, it was not until December 2000 that the State alleged the petitioner's a failure to file the petition of complaint to challenge the courts' delay in rendering a final judgment. Also, while the most recent petition for release was exhausted in 1997 with the ruling of the Appellate Chamber, it was only then that the State brought up the failure to exhaust the extraordinary appeals. The State's reference to those remedies is vague. It neither cites the specific applicable norms nor defends the adequacy and effectiveness of those remedies under domestic law. The IACHR will now examine whether the petitioner met the requirement stipulated in Article 46(1)(a) or if the exceptions provided for in Article 46(2) of the Convention apply.

[FN20] The State alleged that the case is continuing by order of the judge; because of a number of procedural defects, there was no one in the role of injured party. The State is citing Article 87 of the Code of Criminal Procedure of the Province of Buenos Aires.

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32. The IACHR will examine the various court cases that the petitioner in the instant case cites. First, the petitioner alleges that there has been an unwarranted delay in the criminal cases for unlawful treatment and unlawful deprivation of liberty, in which the petitioner is seeking relief for alleged violations of Articles 5 and 7 of the Convention, and in which no final decision has been rendered thus far. The State, for its part, argues that the remedies under domestic law have not been exhausted precisely because those cases are still in progress. The Commission considers that the more than nine years that have elapsed since those cases were first instituted in 1991, constitutes prima facie an unwarranted delay in those criminal proceedings. The hypothetical set forth in Article 46(1)(a) of the Convention has thus materialized. Hence, the rule set forth in Article 46(1)(a) of the Convention requiring exhaustion of domestic remedies does not apply.

33. Second, the petitioner alleges that the criminal case being prosecuted before Federal Criminal and Correctional Court of First Instance Nº 6, in which the petitioner is charged with several crimes, violates Article 8(1) of the Convention because of the unwarranted delay in rendering a final judgment. The State, for its part, argues that the delay is justified for several reasons and contends that the petitioner has not exhausted the remedy of complaint to challenge the court's delay in rendering a judgment. While the State does not cite the specific norm or the law that it is asserting, the IACHR assumes it is referring to the remedy of complaint stipulated in Article 514 of the Code of Criminal Procedure (Law 2372 of 1888), which was in effect at the time the events transpired.[FN21] Even if this is the norm that the State is trying to invoke, it does not specify how this remedy is adequate or how it might have been effective in redressing the violation alleged by the petitioner. The IACHR reiterates that the State alleging failure to exhaust remedies under domestic law bears the burden of proving that the remedies that it believes should have been exhausted are both adequate and effective (see paragraph 30 ut supra). The failure to discharge this burden of proof is sufficient to quash the State's argument of a failure to exhaust domestic remedies. Hence, the question of whether, according to the principles cited in paragraph 27 ut supra, those remedies are adequate and effective to remedy the violation alleged by the petitioner, is academic and need not be examined. Consequently, the Commission finds that the exception provided for in Article 46(2)(a) of the Convention applies.[FN22]

[FN21] Article 514 of Argentina's Code of Criminal Procedure (1888 Law 2372) reads as folllows: "The petition of complaint may be filed: 1) when the judge denies the petitions of appeal and nullification, or only the petition of appeal, which must be done by court order; 2) when the legal time limits are allowed to lapse without the pertinent decision being issued, and provided none of the cases in which the delay causes automatic loss of jurisdiction obtains; or 3) when pending proceedings in the circumstance provided for in Article 442 have not been ordered."

[FN22] In Report Nº 75/99, Case 11.800, César Cabrejos Bernuy, Peru, decision of May 4, 1999, par. 20, the IACHR pointed out the following: "Inasmuch as the State failed to fulfill its procedural duty to indicate the specific domestic remedies that remained available and effective for the victim to have the aforementioned June 5, 1992 judgment of the Supreme Court of Justice enforced, the Commission finds that this case falls under the exception set forth in Article 46(2)(a) of the Convention."

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34. The petitioner also alleges that Article 8(3) was violated inasmuch as the statement made to police under torture was taken into consideration in the inquiry investigating his responsibility for various crimes. The petitioner has stated that in the criminal case being prosecuted in Federal Criminal and Correctional Court of First Instance Nº 6, in which the petitioner is charged with various crimes, the petition he filed in December 1998 to retract his confession has still not been decided. The State has remained silent on this point, and has not asserted a failure to exhaust domestic remedies in respect of this right. Hence, it can be assumed to have tacitly waived its objection asserting failure to comply with this requirement. The Commission believes, moreover, that the fact that more than two years have passed since that petition was filed constitutes prima facie an unwarranted delay. Therefore, because the hypothetical situation posited in Article 46(2)(c) is present, the rule set forth in Article 46(1)(a) of the Convention, which requires exhaustion of remedies under domestic law, does not apply.

35. Third, with regard to the right to be brought to trial within a reasonable period of time or to be released, in the petitioner's original submission to the IACHR he alleged that he had been incarcerated since November 18, 1991, which he argued was an unreasonable period and thus a violation of Article 7(5) of the Convention. In its reply, the State alleged that the petitioner had not petitioned for release in the domestic courts. It also pointed out that for purposes of Article 7(5) of the Convention, exhaustion of domestic remedies refers to remedies available to challenge the reasonableness of a detention, not to examine the merits of a case. It further asserted that "the denial of the benefit of release is not final inasmuch as it does not preclude the possibility of review when requested by the party."

36. Later, during the processing of the case with the Commission, on several occasions the petitioner reported that he had applied for release on "personal recognizance" based on Articles 379, subparagraph 6, under Article 701 of the Code of Criminal Procedure because the time period stipulated in Articles 1 and 7 of Law 24,390 had expired.[FN23] The courts denied all his petitions seeking release. In previous cases, the Commission has found that a request for release based on lack of grounds to justify continued preventive detention is an effective remedy against protracted preventive detention.[FN24] The following is a narrative of the various occasions when Mr. Bayarri availed himself of that remedy and the State's position thereon.

[FN23] Law 24.390, enacted in November 1994, was regarded as progress by the Commission, which stated the following in Report Nº 2/97, par. 61, point (i): "The Inter-American Commission on Human Rights acknowledges the significant progress achieved by Argentina with approval of the law establishing limits on the duration of preventive detention."

[FN24] See: Report Nº 12/96, Argentina, Cases 11.245, decision of March 1, 1996, and Report Nº 2/97, Argentina, Cases 11.205, 11.236, 11.238, 11.239, 11.242, 11.243, 11.244, 11.247, 11.248, 11.249, 11.251, 11.254, 11.255, 11.257, 11.258, 11.261, 11.263, 11.305, 11.320, 11.326, 11.330, 11.499, and 11.504, decision of March 11, 1997.

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i. The first time, the parties informed the Commission that on March 30, 1995, the Federal Appeals Chamber upheld the lower court's ruling that denied the petition for release. The extraordinary appeal that the petitioner filed was also denied by the Appellate Court on June 22, 1995. On December 5, 2000, the State alleged that the petitioner had not exhausted the federal remedy provided for in Law 48 whereby the highest court in the land would decide the matter.

ii. The second time he applied for release, the parties informed the Commission that on December 18, 1995, the magistrate on the bench of Federal Criminal and Correctional Court of First Instance Nº 6 of the Federal Capital denied the request for release. On January 25, 1996, the Federal Criminal and Correctional Appellate Court dismissed the appeal filed by the defense on the grounds that it was filed late. By note of February 10, 1996, the State alleged that a reading of the decision reveals that "while the judge does not accept the defense' argument regarding release based on an interpretation of Law 24.390, it is also true that he does not rule out the application of the law when appropriate." The State points out that the legal norm stipulates that every day of preventive detention will be double counted when said detention exceeds a period of two to three and a half years, depending on the case concerned. On December 5, 2000, the State alleged that the petitioner's appeal had been denied on the grounds that the deadline had passed.

iii. On September 23, 1998, the petitioner alleged that the Court of First Instance had arbitrarily denied another request for release on September 12, 1996. On October 31, 1996, the corresponding Appellate Court upheld the lower court's ruling. On December 9, 1998, the State alleged that if the petitioner believed that his situation had changed since the time his petition for release had been denied, then he should exhaust the remedies under domestic law, in accordance with Article 46 of the Convention. Concerning this remedy, on December 5, 2000, the State alleged that the petitioner had failed to exhaust the federal remedy provided for in Law 48, allowing the highest court in the land to decide the matter.

iv. On August 9, 1999, the State informed the Commission that the petitioner had filed his most recent application for release on January 9, 1997, which the court of first instance denied the following day. The court of second instance upheld the lower court's ruling on March 5, 1997. The State has also alleged that the petitioner did not exercise another remedy available to him to exhaust remedies at the federal level. On February 17, 2000, the State alleged that if the petitioner felt that his situation had changed since his application for release was denied on September 12, 1996, then he had to exhaust the remedies under domestic law in accordance with Article 46 of the Convention. Concerning this remedy, on December 5, 2000 the State alleged that the petitioner had not exhausted the federal remedy provided for in Law 48, whereby the highest court in the land would decide the matter.[FN25]

[FN25] The State did not attach copies of the court rulings on this request for release.

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37. As this process has unfolded, the State has consistently maintained that the remedies under domestic law have not been exhausted. The second time the petitioner exhausted the remedy of release, the parties both concluded that the appeal was denied for late filing; in other words, it was denied because it did not fulfill the procedural requirement that remedies be filed within the time periods stipulated in the Argentine laws applicable in the case. The IACHR believes that the remedies under domestic law have not been exhausted in the sense understood in Article 46(1)(a) of the Convention, when a remedy has been declared inadmissible because it did not satisfy the procedural filing requirements that the domestic law stipulates.[FN26] Moreover, the case does not reveal any particular circumstances that would acquit the petitioner of the obligation to file his petitions in timely fashion, in accordance with generally recognized principles of international law. Therefore, the petitioner did not exhaust this second petition for release in accordance with the provisions of Article 46(1)(a) of the Convention.

[FN26] Inter-American Commission on Human Rights, Report Nº 6/98, case 10.382, Ernesto Máximo Rodríguez, Argentina, decision of February 21, 1998, par. 62. There, the Commission stated that: "The facts in the case indicate that the petitioner opted for a procedural route that, as the Supreme Court ruled, made a review of his case impossible. In this particular case, the Commission cannot question this judgment: if the highest court of the land has stated that an apparent lack of procedural expertise on the part of the petitioner made it impossible for him to secure a review of the penalty imposed on him, it is not for the Commission to try to determine or assess whether the Court was mistaken. The rules that govern procedural law reflect methological criteria intended to ensure the orderly use of judicial actions and to make the work of the courts more efficient and effective." (underlining added by the Commission).

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38. In the case of the first, third and fourth remedies the petitioner filed, the State alleged that he did not file the federal remedy provided in Law 48, whereby the highest court of the land would decide the matter. The IACHR notes that the State does not indicate the specific provision of Law 48 it is invoking; however, the IACHR believes that the State is alluding to the federal remedy to which Articles 14 and 15 of that law refer, which allows access to the Supreme Court in very precise, exceptional circumstances.[FN27] In earlier cases, the Commission has acknowledged that in certain circumstances, extraordinary appeals can be adequate remedies that must be exhausted.[FN28] However, whether or not these are the provisions that the State seeks to invoke, the Commission notes that the State has not explained how they would be adequate and effective remedies to redress the violation alleged by the petitioner. In effect, the Commission is reiterating that the State invoking a failure to exhaust domestic remedies bears the burden of proving the adequacy and effectiveness of the remedies that it believes must be exhausted (see paragraph 30 ut supra). Consequently, the Commission believes it is unnecessary to examine whether the remedies invoked by the State are adequate and effective to remedy the violation alleged by the petitioner according to the principles set forth in paragraph 27 ut supra. The Commission concludes that with the judgments of the corresponding appeals courts that reviewed the petitions that the petitioners filed on June 22, 1995, October 31, 1996 and March 6, 1997 seeking his own release, the petitioner has complied with the rule requiring exhaustion of local remedies, provided for in Article 46(1)(a) of the Convention with respect to the right to be tried within a reasonable period or to be released.

[FN27] Article 14 of Law 48 reads as follows: “Once a case is with the provincial courts it shall remain there through sentencing and conclusion; final rulings handed down by provincial superior courts may only be appealed to the Supreme Court in the following cases: 1) when in the course of litigation the validity of a treaty, a law passed by Congress or an authority exercised at the federal level has been questioned and the decision has been to rule the treaty, law or authority in question invalid; 2) when the validity of a provincial law, decree or authority has been challenged as contrary to the National Constitution, treaties or laws of Congress, and the decision has upheld the validity of the provincial law or authority; 3) when the sense of some clause in the Constitution, treaty or act of Congress, or a commission performed in the Nation’s name has been challenged and the decision goes against the validity of the title, right, privilege or exemption that is based on that clause and is the subject of litigation.” Article 15 ejusdem states that: “When the remedy of appeal authorized under the preceding article is filed, the complaint should be based on the provisions of that article so that the arguments are based on the court records and go, both directly and indirectly to the issues of the validity of the articles of the Constitution, laws, treaties or commissions being challenged. It shall be understood that the interpretation or application of the civil, penal, commercial and mining codes by the provincial courts shall not be used as grounds for the complaint solely by virtue of the fact that they are acts of Congress under the provisions of subparagraph 11, Article 67 (now subparagraph 12, Article 75) of the Constitution.”

[FN28] In Report Nº 104/99, Case 11.400, Eolo Margaroli y Josefina Ghiringhelli de Margaroli, Argentina, decision of September 27, 1999, paragraph 53, the Inter-American Commission dismissed the State’s argument that local remedies remained to be exhausted, because the State had failed to show that those remedies were adequate and effective. There, it held that: “regarding the exhaustion of the extraordinary unconstitutionality remedy referred to by the State, the Commission recognizes that in some cases unconstitutionality remedies, which are in principle extraordinary, offer appropriate and effective remedies for human rights violations. In the case at hand, however, the State has neither claimed nor shown that a decision on the unconstitutionality of Article 29 of Law 21.499 and Ordinance 43.529/89 would have in any event resolved the alleged violations described by the petitioners.”

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b. Deadline for filing

39. Article 46(1)(b) of the American Convention provides that for a petition to be admitted, it must be “lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment." Under Article 46(2)(c), that requirement will not apply when “there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.”

40. In the preceding section, the Commission concludes that the Article 46(2)(c) exception to the rule requiring exhaustion of the remedies under domestic law applies in the following cases: a) the criminal case instituted against the petitioner for commission of a number of crimes; b) the inquiry being conducted to ascertain the responsibility for the alleged torture; c) the inquiries concerning the petitioner’s preventive detention pending trial, and d) the motion the petitioner

filed to retract his confession. In view of the circumstances herein examined, the Commission considers that the six-month time period established in the Convention for filing a petition does not apply on this point. Concerning the criminal case being prosecuted in Federal Criminal and Correctional Court Nº 6, wherein Mr. Bayarri is charged with a number of crimes, the Commission has concluded that the exception provided for in Article 46(2)(a) applies, which means that the rule set forth in Article 46(1)(b) of the Convention does not apply.[FN29]

[FN29] Concerning the State's waiver of any objection based on the rule stipulating the time period for filing a petition, the Inter-American Court has held that: "Since that period depends on the exhaustion of domestic remedies, it is for the Government to demonstrate to the Commission that the period has indeed expired. Here again, the Court's earlier decision regarding the waiver of non-exhaustion of domestic remedies is relevant: Generally recognized principles of international law indicate, first, that there is a rule that may be waived, either expressly or by implication, by the State having the right to invoke it, as the Court has already recognized (see Viviana Gallardo et al., Judgment of November 13, 1981, Nº G 101/81. Series A, para. 26)." Inter-American Court of Human Rights, Caso Neira Alegría et al., Preliminary Objections, Judgment of December 11, 1991, Series C No.13, par. 30. The Inter-American Commission on Human Rights has followed the Court's reasoning in, inter alia, Report Nº 22/00, Case 11.732, Horacio Anibal Schillizzi Moreno, Argentina, decision of March 7, 2000, par. 30: "At no time during the processing of this case before the Commission did the State allege there was a failure to meet the deadline requirements for the remedies exhausted by Mr. Schillizzi. Consequently, the State may be considered to have tacitly abandoned any objection based on failure to comply with this requirement. Consequently, the Commission concludes that the petition complies with the requirement established in Article 46(1)(b) of the Convention."

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41. Concerning the petitioner's allegation of his protracted preventive detention without a final judgment, the Commission observes that the Court authorities handed down final judgments on several occasions since the petitioner lodged his petition with the Commission. The IACHR notes that the parties themselves mention the decisions the Argentine courts handed down on June 22, 1995, October 31, 1996, and March 6, 1997, wherein requests for release were denied. The Commission further notes that by those dates, the case was already in process with the Commission. Therefore, the deadline requirement established in Article 46(1)(b) of the Convention has been satisfied.

c. Duplication of proceedings and res judicata

42. Under Article 46(1)(c), one requirement for the admissibility of a communication or petition is that the subject is not pending in another international proceeding for settlement. Further, under Article 47(d) of the Convention, any petition shall be considered inadmissible when it is substantially the same as one previously studied by the Commission or by another international organization. Neither of the hypotheticals posited in those articles is present in the instant case. The parties have neither alleged nor proven that the subject matter before the Commission is pending with another international arrangement for settlement or has been decided by some other international organization. Nor is the petition substantially the same as

one already studied by the Commission or another international organization. Hence, the Commission concludes that the petition satisfies those requirements.

d. Characterization of the facts

43. Article 47(b) of the Convention provides that the Commission shall consider inadmissible any petition or communication that "does not state facts that tend to establish a violation of the rights guaranteed by this Convention." In the instant case, the petitioner alleged that the following Convention provisions were violated: a) Article 5, by virtue of the fact that the petitioner was tortured; Article 7(1) and (2), by virtue of the fact that police authorities unlawfully deprived the petitioner of his liberty on November 18, 1991. The petitioner alleges that his arrest was arbitrary, as it was recorded as having occurred the following day, November 19, 1991; b) Articles 8(1) and 25 of the Convention, because the cases for his unlawful treatment and unlawful deprivation of his liberty and the case in which he is charged with several crimes began between November and December 1991 and approximately nine years have passed with no definitive judgment being rendered in any of the three; c) Article 7(5) because he has been subjected to protracted and unreasonable preventive detention pending trial in the case against him; d) Article 8(3) because the statement he made to police under torture has been taken into consideration in the proceedings wherein his responsibility for various crimes is being investigated. After examining the parties' positions, the IACHR considers that the facts alleged could constitute violations of the Convention. Consequently, the Commission concludes that the petition satisfies the requirement set forth in Article 47(b) of the Convention.

V. CONCLUSIONS

44. The Commission concludes that it is competent to consider this case and that, based on the preceding analysis, the petitioner's allegations relative to Articles 5, 7, 8 and 25 of the Convention are admissible under Articles 46 and 47 of the Convention.

45. Based on the foregoing arguments of fact and of law, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present case admissible, with regard to the petitioner's allegations of violations of Articles 5, 7, 8 and 25 of the American Convention.
2. To notify the parties of this decision.
3. To continue with the analysis of the merits of the case.
4. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the 19th day of January in the year 2001. (Signed): Hélio Bicudo, Chairman; Claudio Grossman, First Vice-Chairman; Juan Méndez, Second Vice-Chairman; and

Commission members Marta Altolaguirre, Robert K. Goldman, Peter Laurie and Julio Prado Vallejo.