REPORT No. 135/11
CASE 12.167
MERITS
HUGO OSCAR ARGUËLLES ET AL.
ARGENTINA
October 31, 2011

I. SUMMARY

1. Beginning on June 5, 1998 until October 28, 1998, the Inter-American Commission on Human Rights (Commission) received a series of petitions filed on behalf of 21 individuals, all members of the Argentine military: (1) Hugo Oscar Arguëlles, (2) Enrique Jesús Aracena, (3) Carlos Julio Arancibia, (4) Julio Cesar Allendes, (5) Ricardo Omar Candurra, (6) Miguel Oscar Cardozo, (7) José Eduardo di Rosa, (8) Carlos Alberto Galluzzi, (9) Gerardo Felix Giordano, (10) Aníbal Ramón Machín, (11) Miguel Angel Maluf, (12) Ambrosio Marcial (deceased), (13) Luis José López Mattheus, (14) José Arnaldo Mercau, (15) Felix Oscar Morón, (16) Horacio Eugenio Oscar Muñoz, (17) Juan Italo Obolo (18) Alberto Jorge Pérez, (19) Enrique Luján Pontecorvo, (20) Miguel Ramón Taranto, and (21) Nicolás Tomasek against the Argentine Republic (State) for violation of their rights to personal liberty, guarantees of due process and judicial protection, Articles 1.1, 5, 7, 8, 10, 24 and 25 of the American Convention on Human Rights (American Convention). On the basis of the substantial similarity of the allegations of fact and law presented, the respective petitions were accumulated into one file and given the number 12.167 for purposes of the admissibility report. The following have acted as petitioners in representation of one or more of the alleged victims in the proceedings before the Commission: Hugo Oscar Arguëlles; attorneys Ruth Irene Friz (since deceased), Alberto Antonio De Vita and Angel Mauricio Cueto; attorney Eduardo Barcesat; and attorney Juan Carlos Vega (the petitioners).

2. The petitioners emphasized that the case must be understood within its context and stated that the proceedings were initiated against the alleged victims during a situation of institutional exceptionalism, which lasted from March 24, 1976 until December 9, 1983. According to the petitioners, the Armed Forces had to resolve the financial disequilibrium produced in their respective areas, both for what had been done during the so called "anti-subversive struggle" as well as subsequently for the War of the Malvinas and the South Atlantic. The alleged victims were prosecuted and convicted for military fraud and forgery in proceedings initiated in September of 1980. The crimes at issue spanned three years (1978-1980) and were committed in 14 various departments and installations of the military and concerned the handling and channeling of military funds. The record of the trial comprises 73 principal parts and numerous annexes. The judicial proceedings terminated in April 1998 when the Supreme Court dismissed their final domestic remedy, an appeal (*recurso de queja/ hecho*) against their convictions.

3. The petitioners contend that the alleged victims were deprived of their human rights to due process and access to justice during the course of the military and civilian proceedings against them, in particular, because the provisions of the Code of Military Justice (CMJ) did not conform to the international standards for due process set forth in the American Convention. The crux of their complaint is not that they were innocent of the crimes of military fraud and forgery for which they were convicted, but that procedural errors were committed in the processing of their cases that allegedly violated their fundamental human rights and warrant the nullification of their convictions. Specifically, the petitioners allege that they were arbitrarily and illegally deprived of their liberty because they were held in preventive detention for periods exceeding the prison terms to which they were eventually sentenced; they maintain that they were held in incommunicado detention for periods of days in excess of that permitted by law; they maintain that they were not tried within a reasonable time and suffered multiple violations of their right to judicial protection and

guarantees, including lack of adequate legal representation, of the right not to be compelled to testify against oneself, of the right to appeal a judgment to a higher court and the systematic transgression of the principle of equality of arms between the prosecution and defense.

4. The petitioners alleged that the proceedings to which the alleged victims were subjected gave rise to violations of the rights to personal liberty (Article 7), due process and judicial protection (Articles 8 and 25), equal protection of the law (Article 24), entitlement to the benefit of a lesser penalty enacted subsequent to the commission of the offense (Article 9) and compensation for having been sentenced by a final judgment through a miscarriage of justice (Article 10) recognized in the American Convention.

5. The State maintained that the alleged victims, members of the military at the time of the offenses for which they were prosecuted, were duly tried in accordance with the military justice system, which protects specific values and necessarily has special characteristics. The State emphasized that the proceedings at issue were complex, involving numerous defendants in various locations, an extensive case file, and a highly technical investigation of accounting and fraud issues. To summarize, the State considered the petition inadmissible, first, because the principal allegations raised were addressed by the competent military and judicial authorities and found to lack merit. Second, the State argued that the alleged victims never invoked judicial remedies to seek the compensation they now pursue before the Commission. Third, the State indicated that, in any case, the petitioners have failed to set forth any facts characterizing a violation of the Convention.

6. In this merits report, the Commission concludes that Argentina is responsible for the violation of the right to personal liberty, (Article 7 of the American Convention) and the right to a fair trial (Article 8), read in conjunction with the obligation to respect and ensure the rights set forth in the Convention enshrined in Article 1.1 and Articles I, XXV and XXVI of the American Declaration concerning the deprivation of liberty and due process for those events that occurred prior to Argentina's ratification of the American Convention, to the detriment of the 21 victims named in paragraph 1 of this decision. The Commission finds no violation of the right to the right to personal integrity (Article 5), compensation for miscarriage of justice (Article 10), the right to equal protection before the law (Article 24), or the right to access to justice (Article 25 of the Convention).

II. PROCESSING BY THE COMMISSION AFTER THE ADMISSIBILITY REPORT

7. The Commission approved Admissibility Report Nº 40/02 on October 9, 2002.[1] The report was transmitted to the respondent State and to the petitioners on November 18, 2002. The Commission requested the State and the petitioners to indicate, as soon as possible, whether they were willing to enter into an attempt to reach a friendly settlement of the matter and, in addition, the petitioners were requested to present their observations on the merits of the case within a period of two months counted from the date of the communication (i.e. November 18, 2002).

A. Friendly settlement

8. In a communication received on December 12, 2002, Dr. Juan Carlos Vega, one of the petitioners indicated his disposition to begin the friendly settlement procedure on behalf of

[1] In Admissibility Report Nº 40/02, issued on October 9, 2002, the Commission concluded that it was competent to take cognizance of the petitioners' complaints concerning alleged violations of Article 1, 5, 7, 8, 10, 24 and 25 of the American Convention and to the extent necessary Articles I, XXV and XXVI of the American Declaration on the Rights and Duties of Man (American Declaration).

alleged victim Miguel Angel Maluf. By letter received December 23, 2002, Hugo Oscar Arguëlles, Alberto Antonio De Vita and Angel Mauricio Cueto, three other petitioners, informed the Commission that they accepted the offer to enter into a friendly settlement of the matter on behalf of the 21 alleged victims whom they represent.

9. In a communication dated December 22, 2002, the State submitted its observations on the merits. Attached to the State's response was a copy of Opinion Nº 24047 from Rear Admiral Auditor Jose Agustin Reilly, Judge Advocate General of the Armed Forces of the Ministry of Defense, who was of the opinion that the friendly settlement procedure should not be commenced because the matter was not susceptible to being resolved by means of a friendly settlement.

10. In a communication received January 7, 2003, Hugo Oscar Arguëlles, Alberto Antonio De Vita and Angel Mauricio Cueto stated that all the information had been presented regarding the merits of the case, and that they had summarized the concept in the request that the issue be considered one of pure law.

11. Following a meeting held in Buenos Aires, Argentina by Robert Goldman, Rapporteur for Argentina, with the petitioners and representatives of the State during the period August 25 – September 1, 2003, it was noted on September 11, 2003 that the parties would initiate a friendly settlement procedure.

12. On March 4, 2004, during its 119th period of sessions, the Commission held a hearing on the merits in this case that had been solicited by petitioner Eduardo Barcesat and was attended also by Messrs. Arguelles, Cueto and Vega and representatives of the State. It was decided to move forward with the friendly settlement procedure, to formalize it in writing and to report to the Commission on their progress every 60 days.

13. On July 20, 2004, the representatives of the petitioners (Drs. Barcesat, Vega, Cueto and De Vita), the representatives of the State (Admiral Jose Agustin Reilly and Lieutenant Colonel Manuel Omar Lozano), Ambassador Alicia Oliveira, the Special Representative for Human Rights at the International Level of the Ministry of Foreign Affairs, and Dr. Mirta Sassone, the Representative of the Human Rights Secretariat of the Ministry of Justice met in the Argentine Ministry of Foreign Affairs to sign an agreement to reach a friendly settlement of the case. The Argentine Government informed the Commission of this agreement by Note SG 206 dated August 2, 2004.

14. On January 15, 2005 the petitioners informed the Commission of the status of the friendly settlement and requested active involvement of the Commission. This letter was followed by other communications dated January 21, and February 11, 2005 and other diverse electronic e mails. These communications were transmitted to the State on April 12, 2005 and a response was requested within one month. The State responded by Note 115/05 on May 12, 2005, reaffirming its interest in a friendly settlement of the case.

B. Termination of the friendly settlement procedure

15. By letters dated February 9, 2007, March 6 and March 17, 2007, the petitioners informed the Commission that they considered the friendly settlement process to have terminated given the failure of political will of the State and requested that the Commission present the case to the Inter-American Court of Human Rights (Inter-American Court).

1. Derogation of the Code of Military Justice (CMJ)

16. In a letter dated April 19, 2007 from the Executive Branch to the Congress, the Executive proposed the derogation of the CMJ, in the context of commitments assumed by Argentina in the successful friendly settlement in case Nº 11.758 – entitled "*Rodolfo Correa Belisle v. Argentina*" and in case No. 12.167- entitled "*Arguelles y otros v. Argentina*" on the docket of the Inter-American Commission on Human Rights.[2]

17. The derogation of the CMJ and all the norms, resolutions and other provisions that regulate it, was approved on August 6, 2008 and promulgated on August 26, 2008.

18. By Note 272 dated October 1, 2007, the State informed the Commission of an alternate proposal presented by the petitioners for a friendly settlement that was under consideration by the State. By letter dated October 6, 2007, Hugo Arguelles informed the Commission that the State erred in saying that "the petitioners" had presented an alternate proposal for friendly settlement since the proposal was presented by Drs. Cueto and De Vita, who only represent 5 of the alleged 21 victims. Dr. Arguelles reiterated that the Commission should consider the friendly settlement process to have terminated and should continue to process the case, pursuant to its Rules of Procedure.

19. By letter dated March 28, 2008, the petitioners Drs. De Vita and Cueto stated that they also considered the friendly settlement process to have been "absolutely exhausted" and requested the Commission to issue its report on the merits in this case, given the advanced age of the alleged victims and in some cases, their fragile state of health. The petitioners reiterated their request that the Commission issue its decision on the merits in its subsequent communications and the State in Note 1115, dated February 22, 2010, also acknowledged that the friendly settlement process did not achieve the necessary consensus in the distinct government agencies required to make it a reality, and that the Commission should proceed to adopt its report on the merits.

III. POSITION OF THE PARTIES

A. Preliminary Considerations

20. The questions of fact and law at issue in the petition arise out of criminal proceedings initiated against a group of 32 defendants, including the 21 alleged victims, on September 9, 1980. The defendants are placed in detention in September 1980. The proceedings were entitled "*Galluzzi, Carlos Alberto y otros s/defraudación militar s/ art 843 del Código de Justicia Militar – causa Nº 56*." All the alleged victims in the instant case were active members of the military, specifically, members of the Air Force, at the time of the proceedings. On August 11, 1987, the National Criminal and Correctional Appeals Chamber of the Federal Capital orders the Supreme Council of the Armed Forces, in application of the American Convention, to release the detainees from preventive detention. On August 19, 1988, the Prosecutor issued the indictment.

21. The case was investigated first before the *Juzgado de Instrucción Militar Nº 12,* and from December 1980 before the *Juzgado de Instrucción Militar Nº 1*. As of October 4, 1982, it was placed before the Supreme Council of the Armed Forces, which issued its judgment on June 5, 1989.[3] Both the prosecution and defense filed appeals which were heard by the on June 14,

[2] Argentine Ministry of Defense, "*El Nuevo Sistema de Justicia Militar, Ley 26.394: Aporte al proceso de modernización institucional de las Fuerzas Armadas*" (2008) p. 13.

[3] The June 5, 1989 decision of the Supreme Council of the Armed Forces comprises Annex 23 of the file Annexes 18-28.

1989. On April 23, 1990, the National Appeals Chamber issued its order admitting certain claims.[4] On December 5, 1990, the Appeals Chamber declared the statute of limitations to have expired on two of the three offenses.[5] The Prosecutor on April 16, 1991 filed an extraordinary appeal against the prescription. That appeal was resolved by the Argentine Supreme Court, which, on July 30, 1991, revoked the decision declaring the prescription.[6] On September 16, 1993, the National Appeals Chamber declared that it was not competent to continue hearing the matter, indicating that competence properly corresponded to the National Court of Criminal Cassation. The latter, on November 16, 1993, declined to exercise competence and returned the case to the National Appeals Chamber, which had admitted the case and undertaken certain actions in furtherance thereof.[7] The jurisdictional conflict was resolved by the Supreme Court, which ruled on February 21, 1994 that competence resided with the National Court of Criminal Cassation. The competence of the National Court of Criminal Cassation was determined by Law Nº 24.050 on the Organization and Competence of the National Criminal Justice system, promulgated on April 24, 1992, which reorganized the criminal justice system. The National Chamber of Criminal Cassation issued its ruling on the appeals filed by the petitioners and the Prosecutor of the Armed Forces, against the decision of the Supreme Council of the Armed Forces, on March 20, 1995 (the resolution and April 3, 1995 the considerations).[8] The petitioners filed an extraordinary writ (*recurso extraordinario*) against the judgment of the National Chamber of Criminal Cassation dated April 20, 1995.[9] The *recurso extraordinario* was denied by the National Chamber of Criminal Cassation on July 7, 1995.[10] The petitioners on August 7, 1995 filed an appeal (*recurso de queja*) against the denial of the *recurso extraordinario*, but raised the same issues, before the Argentine Supreme Court.[11] On April 28, 1998, the majority of the Supreme Court issued its decision, which stated that since the

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[4] *See* the April 3, 1995 decision of the National Chamber of Criminal Cassation for the summary of the proceedings. This decision comprises Annex 27 of the file Annexes 18-28.

[5] The December 5, 1990 decision of the National Chamber of Criminal Cassation is in file Annex III.

[6] The July 30, 1991 decision of the Argentine Supreme Court is in file Folder 2.

[7] The decision of the National Chamber of Criminal Cassation dated November 16, 1993 comprises Annex 16 of the file Anexos 1-17.

[8] The March 20, 1995 decision of the National Chamber of Criminal Cassation is in file Anexos III. The April 3, 1995 decision, *supra* note 4.

[9] The presentation of the *recurso extraordinario* on behalf of Gerardo Giordano, Nicolas Tomasek, Jose Mercau, Carlos Arancibia, Hugo Arguelles, Miguel Cardozo and Eugenio Muñoz, comprises Annex 4 of file Annexes 1-17, Annex 20 of File Annexes 17-28 and Annex VI (dated April 19, 1995) on behalf of Enrique Aracena and Felix Moron is in file Petition 1. Articles 14 and 15 of Law 48, in accordance with Article 6 of Law 4055 and 256 of the Civil and Commercial Code of Procedure permit an appeal to the Argentine Supreme Court when issues of the compatibility of domestic law with the Constitution or international treaty law are involved.

[10] The decision of the National Chamber of Criminal Cassation re Aracena and Moron is dated July 7, 1995 and is in Anexo VI of file Petition 1.

[11] The *recurso de queja por denegación de recurso extraordinario* on behalf of Gerardo Giordano, Nicolas Tomasek, Jose Mercau, Carlos Arancibia, Hugo Arguelles, Miguel Cardozo and Eugenio Muñoz, comprises Annex 5 of the file Annexes 1-17. The *recurso de hecho* filed on behalf of Enrique Aracena and Felix Moron comprises Annex VIII of file Petition 1. The petitioners raised issues of the failure of the National Chamber of Criminal Cassation to consider the tolling of the statute of limitations, the failure to take into consideration the applicability of the two amnesty laws and the failure to consider the alleged actions of unconstitutionality raised by the defense. In addition, the petitioners raised issues seeking nullification of the proceedings. One alleged act considered unconstitutional related to the supposed coercion of the alleged victims, in the "exhortation" to tell the truth which the petitioners characterized as a violation of the constitutional protection against self-incrimination. In addition, the petitioners suggested that the prolonged state of incommunicado detention, without the designation of a defense lawyer, should be interpreted as unconstitutional and illegal coercion. Only after the interrogatories were completed, were the alleged victims asked if they wished to exercise their right to name a defense lawyer. The petitioners requested that the Supreme Court declare unconstitutional Art 237 of the CJM and nullify all the declarations made by the alleged victims. [*Article 237* (free translation): *"The statements will be taken separately from each of the persons implicated in the crime or misdemeanor, y an oath or the promise to tell the truth can not be required, although they may be exhorted to do so."].*

recurso extraordinario, which motivated the *recurso de queja*, was declared inadmissible (pursuant to Art. 280 of the Code of Civil and Commercial Procedure), consequently, the *queja* was also rejected.[12] Two Supreme Court Judges (Petracchi and Boggiano) dissented and would have nullified the statements taken by the Investigating Military Judge because they violated the constitutional guarantee prohibiting self-incrimination.[13]

22. While there are certain distinctions in the situation of the alleged victims, the claims arise from the criminal proceedings to which they were subjected as a group. The present merits report, as the admissibility report before it, accordingly deals with the positions of the parties with respect to the group.

B. Position of the Petitioners

23. The petitioners alleged the absolute incompatibility of the Code of Military Justice and the obligations of the State under the American Convention, which has the status of constitutional law in Argentina. The judicial proceedings in this case lasted 17 years and nine months. The petitioners alleged violation of a number of fundamental rights set forth as follows.

1. Claims regarding the right to personal liberty (Article 7 of the American Convention)

24. Among the central claims posed by the petitioners the first concerns the length of the criminal proceedings against the alleged victims. The petitioners indicated that the alleged victims were held in preventive detention for periods of more than 7 or 8 and a half years while the proceedings were pending. They allege that this far exceeded the applicable limits under both national and international law.

25. The petitioners emphasized that the alleged victims were held in preventive detention for over twice as long as the prison sentences eventually issued. According to the information provided, 14 of the defendants were sentenced to prison terms between 2 and 4 and ½ years. Two others were sentenced to 5-year terms, one to 6 years and one to 7 years. Additionally, the petitioners argued that the preventive detention orders lacked the necessary foundation in law from the very start of the proceedings.

26. The petitioners maintained that the defendants were held incommunicado when first detained, and that, as a matter of domestic due process, this was not duly authorized, and was unjustifiably prolonged. The information presented suggests that most were held incommunicado in excess of 7 days, for periods of up to 10 or 12 days. They noted that the relevant authorities recognized that certain violations had taken place in this regard, when the Supreme Council and the National Chamber of Criminal Cassation determined that the file contained no grounds for the extension of the incommunicado detention.

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[12] The rejection of the *recurso de queja* on behalf of Gerardo Giordano, Nicolas Tomasek, Jose Mercau, Carlos Arancibia, Hugo Arguelles, Miguel Cardozo and Eugenio Muñoz, by the Supreme Court, dated April 28, 1998, comprises Annex 21 of the file Annexes 18-28. The rejection of the *recurso de hecho* filed on behalf of Enrique Aracena and Felix Moron, dated June 2, 1998 comprises Annex IV of file Petition 1. Article 280 (free translation) provides in relevant part: REJECTION OF THE EXTRAORDINARY REMEDY: "*When the Supreme Court (...), in its discretion, and with the sole invocation of this norm, rejects the extraordinary remedy, for lack of a sufficient federal cause of action or when the questions presented turn out to be insubstantial or lacking in transcendence.*"

[13] The dissent of Judges Petracchi and Boggiano comprises Annex 1 of file Annexes 1-17.

2. Claims regarding due process and fair trial guarantees (Article 8 of the American Convention)

27. With respect to Article 8, the petitioners alleged the violation of the right to be tried within a reasonable time, as well as a series of fair trial guarantees. In particular, they alleged that the prolongation of the proceedings prejudiced the right of the defendants to be presumed innocent, and adversely affected their ability to defend themselves.

28. The petitioners maintain that the right to an adequate legal defense was not respected, first because the defendants had no legal counsel in the initial stages of the process against them. They alleged that the defendants lacked counsel for the first two and a half years of the proceedings. The petitioners indicated that even once they obtained representation, the defenders in question were not lawyers. In this regard, they note that the CMJ provided for the right of an accused to be assisted in presenting his or her defense by a "military defender"--an active or retired member of the military.

29. The petitioners further argued that the American Convention, the Argentine Constitution and Code of Criminal Procedure recognize the right of a defendant not to be compelled to testify against himself, but that the CMJ did not respect that guarantee. They indicated that, consistent with the terms of the CMJ, the judge presiding over the investigation exhorted the accused to tell the truth in their initial declarations and indicated that this would be viewed favorably. They argued that this is especially problematic because the CMJ did not recognize the right of the accused to have counsel present at that stage of the proceedings. They indicated that this constituted pressure for the purpose of obtaining a confession. The petitioners also referred to other largely unspecified threats against the defendants at the time of these initial declarations.

30. Additionally, the petitioners maintain that the designation of expert accountants by the military tribunal prejudiced the defense of the accused. They argued that the three experts – each a military official in charge of an accounting department within the military - were "intimately linked" to the facts then under investigation, and had worked in direct proximity with at least two of the defendants. Consequently, the petitioners alleged that they could not have been independent. They further indicated that: under the terms of the CMJ, the experts were designated without notice to the accused, so there was no opportunity to recuse them; the accused had no opportunity to name their own experts; and the "experts" were not certified public accountants.

31. The petition includes very general allegations to the effect that the quality and quantity of the evidence brought against the accused were insufficient to justify conviction. Further, the petitioners allege that the military tribunal arrived at its judgment following a secret meeting and vote of its members, in violation of the procedures required by the CMJ.

32. As noted above, a number of the defendants were convicted and sentenced to pay monetary sanctions as part of the sentence, as well as other penalties. In this regard, the petitioners maintain that these defendants have been gravely prejudiced by being required to pay high rates of interest for the period of delay attributable to the State. They indicated that with the adjustment for interest over the years, the penalties are approximately doubled. There are ancillary claims to the effect that the parameters for establishing the rates of interest were neither clear nor fair.

3. Claims regarding the competence of the courts that tried them (Articles 8 and 25 of the American Convention)

33. The petitioners raise two allegations concerning the competence of the courts involved in the proceedings that relate to both Articles 8 and 25 of the American Convention. First,

they indicated that the military judge assigned to direct the initial investigation was suffering from psychological problems at the time, was replaced approximately 3 months into the investigation, and was later relieved of his duties for the same reasons. Second, they contend that the National Chamber of Criminal Cassation, which was directed to assume jurisdiction over their appeal by the Supreme Court, was not the proper court of review. Their principal allegation in this regard is that the National Chamber of Criminal Cassation was established in 1992, subsequent to the commission of the offenses at issue, so that the right of the alleged victims to be tried by preexisting courts was violated. They further allege that the Supreme Court improperly denied their final appeal (*recurso de hecho*) absent any substantive examination of the claims raised.

4. Claim regarding equal protection before the law (Article 24 of the American Convention)

34. The petitioners argue that the right of the alleged victims to equal protection of the law under Article 24 of the American Convention was violated because, pursuant to their status as military personnel at the time of the offenses in question, they were processed through military jurisdiction prior to having access to the civilian judicial system. The petitioners emphasized that the military jurisdiction is an administrative tribunal, and not judicial in nature, so that military personnel, such as the alleged victims, were obliged to pass through a procedural stage not required of civilians. The petitioners questioned the compatibility of the military justice system with the requirements of the American Convention, noting, for example, the refusal of the National Chamber of Criminal Cassation to review any questions of fact decided by the Supreme Council.

5. Claim regarding freedom from ex-post facto laws (Article 9 of the American Convention)

35. The petitioners' allegations concerning Article 9 of the American Convention are that the alleged victims were subjected to the harsher of two norms concerning the applicable statute of limitations. They maintain that the Supreme Court violated the alleged victims' right to application of the more beneficial of the two by arbitrarily opting to apply the statute of limitations in the Code of Criminal Procedure, thus permitting the continuation of the proceedings, as opposed to the 10 year statute of limitations applicable under the CMJ, which would have terminated central aspects of the prosecution. Discussion of this claim is omitted since the Commission did not declare this claim admissible.[14]

6. Claim regarding right to compensation (Article 10 of the American Convention)

36. Finally, the petitioners invoke the rights of the alleged victims under Article 10 of the American Convention to receive compensation for having been convicted by a final sentence through judicial error. In this regard, they emphasized, in particular, the right of the alleged victims to be compensated for the time spent in preventive detention in excess of the final prison sentences issued.

7. Claim that the proceedings should have been nullified

37. On the basis of the foregoing arguments, the petitioners maintain that the proceedings against them were flawed from the very beginning, and should have been nullified on the basis of numerous violations of their basic rights.

[14] *Supra* nte 1.

C. Position of the State

1. Preliminary Considerations

38. The State submitted that the petitioners were seeking a fourth instance review of the judgment in case Nº 56 "*Galluzzi Carlos Alberto and others/ Military Fraud / Article 843 bis of the CMJ*" in which 32 members of the military were involved and the twenty-one alleged victims in this case were convicted.[15] The petitioners did not allege their innocence and they acknowledged commission of the acts imputed to them, which typify the crimes of military fraud and forgery, set forth in the CMJ.

39. The case originated on September 9, 1980 and the following judicial bodies had a role: the Supreme Council of the Armed Forced which issued its judgment on June 5, 1989, the National Criminal and Correctional Appeals Chamber of the Federal Capital; the National Chamber of Criminal Cassation and the Argentine Supreme Court.[16] The State noted that the 21 alleged victims shared certain characteristics such as membership in the military and consequently, recognition of the competence of military tribunals since they were military officials when the crimes for which they were adjudged under the CMJ were committed. In addition, all the alleged victims have been free for several years, having completed the prison terms to which they were sentenced. The State noted that the petitioners alleged that Articles 1.1, 7, 8 and 25 of the American Convention were violated, but given the particularities of the different situations in each case, and given that the file is extensive (more than 14,000 pages), and the large number of defendants (32), that the case was heard within a "reasonable time."

2. Competence and Jurisdiction of the Military Tribunal:

40. The State pointed out that the 21 alleged victims were all former members of the Permanent Staff of the Argentine Armed Forces, with military status when the acts occurred. They were accused of "military fraud" a crime set forth in Article 843 *et seq*. of the Code of Military Justice and Law Nº 14.029 (adopted July 4, 1951 and promulgated August 6, 1951). The acts for which they were convicted were committed during the period 1978-1980.

41. The military justice system was created by the Legislative branch of government, pursuant to Article 75(27) of the Argentine Constitution and was independent of both the Judicial and Executive branches of government.

42. Courts martial were tribunals of justice and their sentences could be appealed to the ordinary civilian federal courts, in particular, the National Chamber of Criminal Cassation and to the Argentine Supreme Court. This procedure preserved the principle of the right to appeal a criminal judgment to a higher court. (Art. 23 of Law 23.934 and its amendments).

43. The State noted that military courts were constitutional under the laws and Constitution of Argentina to judge military personnel accused of having committed crimes codified in the CMJ. Consequently, in light of the fourth instance doctrine elaborated by the Commission, it

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[15] Response of the Government of Argentina dated February 16, 2000 in file Folder No. 1.

[16] The actions taken by these Courts may be identified in the following files of these courts: File Nº 1.139.626 FAA Letter S Nº 1423/82 "C" of the National Criminal and Correctional Appeals Chamber of the Federal Capital; Case Nº 56, Chamber IV "*Galluzzi, Carlos and others / Military Fraud Article 445 bis of the Code of Military Justice*" of the National Criminal and Correctional Appeals Chamber of the Federal Capital; and G415 Book XXXI – Volume 31 RHE of the Argentine Supreme Court.

corresponds to the Commission to determine whether the procedures established under the CMJ complied with the norms set forth in the American Convention.

3. Content of the Petition

44. The State indicated that the petitioners, individually and as a group, denounced Argentina for the violation of the following rights set forth in the American Convention:

a) ***Right to Personal Liberty- Article 7 of the Convention,*** because they allegedly suffered arbitrary and prolonged preventive detention, more extensive than the prison term that they were eventually sentenced to. In addition, the State noted, they seek compensation for the time spent in detention exceeding their sentences.

b) ***Judicial guarantees- Article 8 of the Convention***, because they allegedly 1) were not judged in a reasonable time; 2) they did not have legal assistance during the processing of the case in the military court (Art. 8.2.d of the Convention; 3) they were obliged to testify against themselves (Art. 8.2.g and 8.3 of the Convention); 4) they did not have the right to appeal their judgment to a higher court (Art. 8.2.h of the Convention).

c) ***Judicial guarantees – Article 25.2.b of the Convention,*** because allegedly the available remedies were not appropriately dealt with when the Supreme Court rejected their appeal (*recurso de queja*) based on the alleged unconstitutionality of the March 20, 1995 judgment of the National Chamber of Criminal Cassation. The dissenting opinion of two Judges of the Supreme Court made this point.

d) ***The principle of equality before the law- Article 24 of the Convention,*** because they were judged under a separate procedure established in the CMJ.

e) The State submitted that the petitioners alleged that they had exhausted domestic remedies, although it maintained that this was incorrect as regards claims for prolonged preventive detention and indemnification for the time spent in detention that exceeded the length of the sentence.

4. With regard to the alleged violation of Article 7 of the Convention (Right to Personal Liberty):

45. The State indicated that the alleged victims recognized that approximately 10 years ago they were freed, for which reason the complaint should be archived as regards this claim since the reasons for the petition no longer exist. Article 35.c of the Commission's Rules of Procedure establishes that if the reasons for the petition no longer exist, it should be filed.

46. The State noted that as regards the claim for compensation for the period during which they were deprived of their liberty which exceeds the length of time of the sentence imposed upon them, on this point the petitioners did not exhaust domestic remedies as required by Article 46.1.a of the Convention.

5. With regard to the alleged violation of Article 24 of the Convention (Equality before the Law)

47. The State indicated that the alleged victims recognized that when the acts occurred for which they were convicted, they were members of the Argentine Armed Forces and the fraud was committed in dependencies of and to the detriment of the Argentine Air Force. The crimes

committed for which they were tried were set forth in the CMJ and the alleged victims were active members of the military carrying out their functions at the time of the events.

48. The State alleged that it is baseless to question the validity of military tribunals acting within their sphere of competence given the prevalence of military courts in states that make up the international community, without this being considered a violation of equality before the law. Military courts that judge military officials for military crimes are courts independent of the Executive branch and their judgments may be appealed before the National Chamber of Criminal Cassation, in accordance with the principle of the right to appeal a criminal judgment.

49. The State noted that the guarantee of equality before the law prohibits discriminatory treatment in law, but not in situations of fact, as that which results from the claims of the alleged victims. The practice of the European Commission of Human Rights, it alleged, is compatible with this line of reasoning. The European Commission has pointed out in multiple decisions that not all differences of treatment are prohibited as regards the exercise of rights and liberties protected by the European Convention and violate the right to equality of treatment. For a case to violate the European Convention the difference of treatment has to lack an objective and reasonable justification.

50. The State affirmed that the CMJ was applied to situations such as the present case, which was the applicable law prior to the facts of the case, and consequently, results in the fact that there is no violation on the part of the Argentine State to the principle of equality set forth in Article 24 of the Convention.

6. With regard to the alleged violation of Article 8 of the Convention:

a. Regarding the right to a hearing within a reasonable time

51. The State indicated that the "reasonable time" requirement is related to the number of subjects involved, the period of time in which the fraud was committed and the evidence which it was necessary to obtain. It also noted that the modification of the organization and competence of the national justice system in criminal matters had an influence. The case file comprised more than 14,000 pages and involved 32 persons and the fraud was carried out for approximately three years. The State also emphasized that the alleged victims attempted to benefit from the statute of limitations on the criminal action, for which reason the delays in the proceedings cannot be attributed to Argentina.

b. Regarding the lack of legal assistance during the proceedings before the military forum

52. The State indicated that Article 344 of the CMJ did not contemplate the designation of a lawyer for the accused but of a defender who is not a lawyer. The judges in a military investigation also are not lawyers. In the Armed Forces there are Judge Advocates (*Cuerpo de Auditores*), made up of lawyers with military status; officials, who, before entering the military, studied and graduated in law. These legal professionals who are at the same time officials of the Armed Forces can be designated defenders for military proceedings. The State noted that "[A]nyone processed in a military court can freely elect a legal professional to defend him." (*De modo que todo procesado en una causa castrense puede eligir libremente a un profesional del derecho para que lo defienda*.)[17] The State pointed out also that if a non-lawyer defender is selected, in practice, the defender is advised by an Auditor in all the actions and presentations of

[17] Page 6 of the State response dated February 16, 2000 in file Folder 1.

the defense. Consequently, there was no violation of the CMJ for failure to name a legal professional for the alleged victims, since the CMJ only required that the Prosecutor be a lawyer.

c. Regarding the claim that they were obliged to testify against themselves (Articles 8.2.g. and 8.3 of the Convention)

53. First, the State noted that the statements of the alleged victims were taken during the investigative phase before the American Convention was in force for Argentina, that is, prior to September 5, 1984, consequently, this claim should be declared inadmissible since the American Declaration does not contain a provision equivalent to Article 8.2.g of the American Convention. Furthermore, the statements were taken pursuant to the provisions of the CMJ.

d. The right not to be compelled to testify against yourself

54. In addition, the State indicated that Article 237 of the CMJ provided: "Statements will be taken separately from each of the persons implicated in the crime or misdemeanor and an oath or promise to speak the truth cannot be compelled although one may be exhorted to speak the truth."

55. Consequently, the State argued, that the claim of the petitioners that they were allegedly compelled to testify against themselves because the Military Investigative Judge exhorted them to speak the truth in the investigation lacks basis because what is contemplated in Article 237 of the Code of Military Justice is an exhortation to speak the truth.

56. The right not to be compelled to testify against oneself means that a declaration cannot be obtained by means of physical coercion, moral threats or truth serum, circumstances that were not alleged in this case.

57. The State also added that the petitioners were not convicted exclusively on the basis of their investigative declarations, but that other evidence was produced by which the fraud was determined.

e. Regarding the claim that they could not appeal the judgment to a higher court (Article 8.2.h. of the Convention)

58. The petitioners, the State submitted, maintain that Argentina violated Article 8.2.h of the Convention because supposedly they did not have the possibility of appealing their judgment to a higher tribunal.

59. As a result of the acts carried out by the alleged victims, on June 5, 1989, the Supreme Council of the Armed Forces issued its judgment in relation to the facts that gave rise to the judgment of the military criminal court, convicting the alleged victims and sentencing them to different punishments.

60. On April 23, 1990, the Federal Appeals Court declared admissible the remedy presented on behalf of the alleged victims pursuant to Article 445 *bis* of the Code of Military Justice in relation with the judgment issued by the Supreme Council of the Armed Forces.

61. Following a conflict of jurisdiction between the Federal Appeals Court and the National Chamber of Criminal Cassation, which the Supreme Court resolved in the favor of the latter; on March 20, 1995, the National Chamber of Criminal Cassation issued its judgment as the "higher court" with respect to the Supreme Council of the Armed Forces, partially finding for some of the claims of the alleged victims.

62. The competence of the National Chamber of Criminal Cassation is found in Law Nº 24,050 of the Organization and Competence of the National Criminal Justice, promulgated April 24, 1992, by which the integration and competence of the Judiciary in Criminal Matters was restructured, as a consequence of the reforms realized in the National Code of Criminal Procedure.

63. Article 7 of Law 24,050 established the composition and competence of the National Chamber of Criminal Cassation and provides that one of its Chambers is to hear the appeals provided for in Article 445 *bis* of the Code of Military Justice. Article 445 *bis* provided a right of recourse to a civilian appeals court from a decision of a military court of first instance.

64. The State concluded that the National Chamber of Criminal Cassation is the superior court with the competence to hear appeals from judgments issued by the Supreme Council of the Armed Forces, for which reason this claim should be rejected since there is no violation of the right to appeal to a higher court set forth in Article 8.2.h of the Convention.

7. Regarding the claim that the alleged victims were not treated appropriately as regards the remedies they presented to the Court (Article 25 of the Convention):

65. The proceedings before the military tribunal were carried out pursuant to the CMJ for which reason there was no arbitrariness or unconstitutionality. The alleged victims are not in agreement with the judgment, therefore, they seek to have the Commission act as a fourth instance tribunal to review the facts and the evidence.

66. The petitioners seek the revision of a final judgment that is *res judicata* and that imposed penalties involving the deprivation of liberty – which have already been completed, - absolute disqualification , removal from one's post and other accompanying punishments for having committed serious crimes [*Causa Nº 56 Galluzzi Carlos y otros s/ Defraudación Militar s/ art. 445 bis del Código de Justicia Militar*]. The Commission cannot act as a fourth instance tribunal, the State emphasized, on the supposed incorrect application of internal law or an erroneous evaluation of the facts and the evidence by the domestic courts.

a. Remedy before the National Chamber of Criminal Cassation

67. The State noted that the statements during the investigation of the alleged victims were taken pursuant to Article 237 of the Code of Military Justice and this does not mean that they were compelled to testify against themselves or that the norm was unconstitutional.

68. As regards the lack of legal counsel before the military tribunal, Article 97 of the CMJ established that the defender before the Military Courts must be an official in active service or in retirement, and Article 98 of the CMJ established that the defense is an act of service and an active service official cannot be excused from performing it.

69. The State affirmed that after the procedure before the Military Criminal Justice system was concluded, the alleged victims had lawyers, chosen by them and provided by the Argentine State, which should be considered compliance with Article 8.2.e of the American Convention.

70. The State emphasized that the petitioners did not allege their innocence and acknowledged having committed the acts which they are imputed to have committed and for which they were convicted. The petitioners, according to the State, limited themselves to asserting that they were not judged in conditions of equality with persons tried for a crime under the Penal Code to whom the Code of Criminal Procedure is applied.

71. The petitioners were judged at first instance by the Supreme Council of the Armed Forces, their appeal was heard by a Court of Second Instance, the National Chamber of Criminal Cassation, which has competence and since the judgment was adverse, they presented an extraordinary appeal (*recurso extraordinario*) and a writ of "*queja*" to the Argentine Supreme Court for the remedy denied them.

72. The State added that the petitioners did not argue incompetence or lack of independence or impartiality of any judge in any of the instances.

73. The State concluded that judicial protection recognized by the Convention comprehends the right to just, impartial and rapid procedures which offer the possibility, but never the guarantee, of a favorable result. A negative result emanating from a fair trial is not a violation of the Convention; consequently, the State considers that the facts set forth by the alleged victims do not constitute a violation of Articles 8 and 25 of the Convention.

8. Regarding exhaustion of domestic remedies

74. The State argued that the petitioners only exhausted their domestic remedies in regard to the crimes of military fraud and forgery for which they were convicted. It submitted that the petitioners have not exhausted their domestic remedies in relation to the claims for prolonged preventive detention, nor for compensation for the time that they were detained in excess of the terms set forth in the final sentence.

IV. ANALYSIS OF THE MERITS

A. Establishment of the Facts

75. The case was initiated on September 9, 1980, when the Armed Forces were in charge of the government, the so-called "process of national reorganization," during the transition to a democratic government.

76. The acts that gave rise to this case occurred during the period 1978-1980 and resulted in the incommunicado detention of approximately 50 military officials who managed the funds of the different Air Force bases in Argentina. The first stage of the military proceedings (*sumario*) began on September 9, 1980, but was actually carried out during the period September 15-31, 1980. On June 5, 1989, the Supreme Council of the Armed Forces convicted the 24 Air Force officials and acquitted five.[18] Twenty of the 21 presumptive victims were sentenced to prison for 7 to 10 year terms and removed from the military with the additional sanction of "absolute and permanent disqualification", which they termed a "civil death", for the crimes of military fraud (Article 843 of the CMJ), forgery and/or illicit association.[19] Miguel Ramon Taranto,

[18] The June 5, 1989 decision of the Supreme Council of the Armed Forces comprises Annex 23 of the file Annexes 18-28.

[19] Twenty of the presumptive victims were sentenced to the following prison terms: 1. Gerardo Felix Giordano – 7 years and 6 months; 2. Nicolas Tomasek – 8 years and 6 months; 3. Enrique Jesus Aracena – 8 years and 6 months; 4. José Arnaldo Mercau; 5. Miguel Angel Maluf – 8 years and 6 months; 6. Felix Oscar Moron – 9 years and 6 months; 7. Miguel Oscar Cardozo – 7 years and 6 months; 8. Luis Lopez Mattheus – 7 years and 6 months; 9. Julio Cesar Allendes – 7 years and 6 months; 10. Ambrosio Marcial (deceased) – 7 years and 6 months; 11. Alberto José Perez – 6 years; 12.Horacio Ernesto O. Muñoz – 7 years; 13. Juan Italo Obolo – 7 years; 14. Miguel Ramón Taranto – acquitted; 15. Hugo Oscar Arguëlles – 7 years; 16. Carlos Julio Arancibia – 7 years and 6 months; 17. Ricardo Omar Candurra – 8 years and 6 months; 18. Anibal Ramon Machin – 8 years; 19. Enrique Lujan Pontecorvo- 7 years and 6 months; 20. Jose Eduardo di Rosa – 8 years and 10 months; 21. Carlos Alberto Galluzzi – 10 years.

the twenty-first, was acquitted of all charges by the military court. On July 30, 1989, the National Appeals Chamber revoked the judgment of the Supreme Council and ordered their release.[20]

77. Both the Prosecutor of the Armed Forces and the defense filed appeals, pursuant to Article 445 *bis* of the CMJ, which were heard by the National Criminal and Correctional Appeals Chamber of the Federal Capital on June 14, 1989.[21] On April 23, 1990, the National Appeals Chamber issued its order admitting certain claims.[22] On ***December 5, 1990***, the National Appeals Chamber declared the statute of limitations to have expired on two of the three offenses.[23] Dr. Luis Moreno Ocampo, the Prosecutor of the National Chamber of Criminal Cassation then filed an extraordinary appeal against the resolution declaring the prescription, before the Argentine Supreme Court.[24] That appeal was resolved by the Argentine Supreme Court on ***July 30, 1991***, which revoked the decision declaring the prescription.[25]

78. On ***September 16, 1993***, the National Criminal and Correctional Appeals Chamber of the Federal Capital declared that it was not competent to continue hearing the matter, indicating that competence properly corresponded to the National Chamber of Criminal Cassation.[26] The latter, on ***November 16, 1993***, declined to exercise competence and returned the case of the National Appeals Chamber which had admitted the case and undertaken certain actions in furtherance thereof.[27] The jurisdictional conflict was resolved by a majority of the Supreme Court, which ruled that the National Chamber of Criminal Cassation was the competent body to proceed with the remedy set forth in Article 445 *bis* of the CMJ.[28] On ***February 21, 1994***, the National Chamber of Criminal Cassation was seized of the matter.[29] The competence of the National Chamber of Criminal Cassation was established by Law Nº 24.050 on the Organization and Competence of the National Criminal Justice System, promulgated on April 24, 1992, which reorganized the criminal justice system.[30]

79. The National Chamber of Criminal Cassation held hearings on the matter from February 22 – March 20, 1995 and issued its ruling on the appeals filed by the petitioners and the

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[20] See Ampliación Petición, file Petition I.

[21] *See* the April 3, 1995 decision of the National Chamber of Criminal Cassation for the summary of the proceedings.

[22] *See* the April 3, 1995 decision of the National Chamber of Criminal Cassation for the summary of the proceedings.

[23] The December 5, 1990 decision of the National Chamber of Criminal Cassation is in file Annex III. The two offenses were military fraud and forgery. It did not hold that the statute of limitations had tolled on the third offense: illicit association.

[24] *See* the April 3, 1995 decision of the National Chamber of Criminal Cassation for the summary of the proceedings.

[25] The July 30, 1991 decision of the Argentine Supreme Court is in file Folder 2.

[26] *See* the April 3, 1995 decision of the National Chamber of Criminal Cassation for the summary of the proceedings.

[27] The decision of the National Chamber of Criminal Cassation dated November 16, 1993 comprises Annex 16 of the file Annexes 1-17.

[28] *See* the April 3, 1995 decision of the National Chamber of Criminal Cassation for the summary of the proceedings. Article 445 (*bis*) states that the appeal shall be made to the National Appeals Chamber.

[29] *See* the petition filed June 5, 1998 of Dr. Barcesat in file Folder 1 of the case.

[30] Law 24.050 specifies that one of the four chambers of the National Chamber of Criminal Cassation replaces the National Appeals Chamber in hearing appeals pursuant to Article 445 (*Bis*) of Law 14.029 (CMJ).

Prosecutor of the Armed Forces, against the decision of the Supreme Council of the Armed Forces, on March 20, 1995 (the resolution and ***April 3, 1995*** the considerations).[31]

80. The National Chamber of Criminal Cassation rejected the arguments raised by the petitioners that the statute of limitations had tolled, of the applicability of the amnesty laws and of the arguments of unconstitutionality. In its decision of April 3, 1995, the Court of Cassation confirmed the conviction of 21 of the military officials and examined the appeals raised by the defense lawyers and the two prosecutors.[32] It eliminated one of the charges (illicit association) and reduced the prison sentences from 7-10 year terms to mostly 3 year prison terms for 19 of the presumptive victims, which had already been served during preventive detention, and acquitted Ambrosio Marcial of all charges.[33]

81. The petitioners filed a *recurso extraordinario* against the judgment of the National Chamber of Criminal Cassation dated ***April 20, 1995***.[34] The *recurso extraordinario* was denied by the National Chamber of Criminal Cassation on ***July 7, 1995***.[35] The petitioners on ***August 7, 1995*** filed a *recurso de queja* against the denial of the *recurso extraordinario*, but raised the same issues before the Argentine Supreme Court.[36] On ***April 28, 1998,*** the majority of the Supreme Court rejected the remedy, declaring that the *recurso extraordinario*, which had motivated the *recurso de queja*, had been declared inadmissible under Article 280 of the Code of Civil and Commercial

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[31] The April 3, 1995 decision of the National Chamber of Criminal Cassation comprises Annex 27 of the file Annexes 18-28.

[32] The April 3, 1995 decision of the National Chamber of Criminal Cassation comprises Annex 27 of the file Annexes 18-28.

[33] The National Chamber of Criminal Cassation, in its judgment dated March 20, 1995, reduced the sentences of 19 of the presumptive victims, as follows, and acquitted Ambrosio Marcial of all charges: 1. Gerardo Felix Giordano – 3 years and 7 months; 2. Nicolas Tomasek – 4 years and 6 months; 3. Enrique Jesus Aracena – 4 years and 6 months; 4. José Arnaldo Mercau – 5 years; 5. Miguel Angel Maluf – 5 years; 6.Felix Oscar Moron – 6 years; 7. Miguel Oscar Cardozo – 3 years and 6 months; 8. Luis Lopez Mattheus – 3 years; 9. Julio Cesar Allendes -3 years; 10. Alberto José Perez – 2 years and one day; 11. Horacio Ernesto O. Muñoz – 3 years and 6 months; 12. Juan Italo Obolo – 3 years and 6 months; 13. Hugo Oscar Arguëlles – 3 years and 6 months; 14. Carlos Julio Arancibia – 3 years; 15. Ricardo Omar Candurra – 4 years and 6 months; 16. Anibal Ramon Machin -4 years and 6 months; 17. Enrique Lujan Pontecorvo – 3 years and 6 months; 18.Jose Eduardo di Rosa – 4 years and 19. Carlos Alberto Galluzzi – 7 years. The March 20, 1995 decision is included in file Annex III of the case.

[34] The presentation of the *recurso extraordinario* on behalf of Gerardo Giordano, Nicolas Tomasek, Jose Mercau, Carlos Arancibia, Hugo Arguelles, Miguel Cardozo and Eugenio Muñoz, comprises Annex 4 of file Annexes 1-17, Annex 20 of File Annexes 17-28 and Annex VI (dated April 19, 1995) on behalf of Enrique Aracena and Felix Moron is in file Petition 1. Articles 14 and 15 of Law 48, in accordance with Article 6 of Law 4055 and 256 of the Civil and Commercial Code of Procedure (*Código Procesal Civil y Comercial de la Nación*) permit an appeal to the Argentine Supreme Court when issues of the compatibility of domestic law with the Constitution or international treaty law are involved.

[35] The decision of the National Chamber of Criminal Cassation re Aracena and Moron is dated July 7, 1995 and is in Annex VI of file Petition 1.

[36] The *recurso de queja por denegación de recurso extraordinario* on behalf of Gerardo Giordano, Nicolas Tomasek, Jose Mercau, Carlos Arancibia, Hugo Arguelles, Miguel Cardozo and Eugenio Muñoz, comprises Annex 5 of the file Annexes 1-17. The *recurso de hecho* filed on behalf of Enrique Aracena and Felix Moron comprises Annex VIII of file Petition 1. The petitioners raised issues of the failure of the National Chamber of Criminal Cassation to consider the tolling of the statute of limitations, the failure to take into consideration the applicability of the two amnesty laws and the failure to consider the alleged actions of unconstitutionality raised by the defense. In addition, the petitioners raised issues seeking nullification of the proceedings. One alleged act considered unconstitutional related to the supposed coercion of the alleged victims, in the "exhortation" to tell the truth which the petitioners characterized as a violation of the constitutional protection against self-incrimination. In addition, the petitioners suggested that the prolonged state of incommunicado detention, without the designation of a defense lawyer, should be interpreted as unconstitutional and illegal coercion. Only after the interrogatories were completed, were the alleged victims asked if they wished to exercise their right to name a defense lawyer. The petitioners requested that the Supreme Court declare unconstitutional Art 237 of the CJM and nullify all the declarations made by the alleged victims. Article 237 of the CMJ, *supra* note 11.

Procedure and consequently, the *recurso de queja* was also inadmissible for the same reason.[37] Two Supreme Court Judges (Petracchi and Boggiano) dissented and stated that they would have nullified the statements taken by the Investigating Military Judge because the statements violated the alleged victims' constitutional guarantee prohibiting self-incrimination.[38]

82. The facts are not in contention. Both the petitioners and the State accept that the 21 alleged victims were subject to military and civilian proceedings that terminated in a military court first instance judgment and a civilian appeals court judgment, respectively, and that the Supreme Court declined to review the matter. Between the military and civilian proceedings, in 1994, the Argentine Constitution was amended and international human rights treaties were given constitutional ranking in domestic law. As a result, on appeal, the petitioners were able to argue that the military procedures to which they had been subjected violated fundamental constitutional rights and Argentina's obligations under the American Convention. At issue in this case is whether the domestic judicial proceedings violated the alleged victims' rights to due process, judicial protection and personal liberty and/or any other right protected by the American Convention.

B. Considerations of Law

Preliminary considerations

83. The petitioners are requesting the Commission to determine whether military court proceedings against a number of military officials for military crimes met the international human rights standards set forth in the American Convention. The Inter-American Commission and Court, on numerous prior occasions, have developed significant doctrine on the issue of military jurisdiction.[39] Prior cases, however, have all involved either one of two situations: 1) questions relating to the treatment of civilians by military courts or 2) military court proceedings, or the lack thereof, against military officials charged with violations of human rights. The novelty of the question presented by the petitioners in this case, however, goes to the compatibility of a military code of justice, applied within the most restricted scope, and a State's obligations under the American Convention. This is an issue of first impression since it has not been addressed by the Commission before.[40]

84. The first group of cases, referred to above, dealt with the treatment of civilians by military courts, primarily, Peruvian civilians who were charged by the State with crimes of terrorism or treason and summarily tried and convicted by faceless military tribunals.[41] These military court proceedings were subsequently annulled for having failed to afford the requisite guarantees of due

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[37] The rejection of the *recurso de queja* on behalf of Gerardo Giordano, Nicolas Tomasek, Jose Mercau, Carlos Arncibia, Hugo Arguelles, Miguel Cardozo and Eugenio Muñoz, by the Supreme Court, dated April 28, 1998, comprises Annex 21 of the file Annexes 18-28. The rejection of the *recurso de hecho* filed on behalf of Enrique Aracena and Felix Moron, dated June 2, 1998 comprises Annex IV of file Petition 1. Article 280 of the Code of Civil and Commercial Procedure, *supra* note 12.

[38] The dissent of Judges Petracchi and Boggiano comprises Annex 1 of File Annexes 1-17.

[39] *See,* e.g. Manuel Ventura Robles, "*La Jurisdicción Militar en la Jurisprudencia de la Corte Interamericana de Derechos Humanos"* in IIDH, ESTUDIOS SOBRE EL SISTEMA INTERAMERICANO DE PROTECCION DE LOS DERECHOS HUMANOS, Tomo II, 2011, pp.207-237.

[40] The case *Cesti Hurtado v. Peru*, Judgment of September 29, 1999, presented certain similarities, and also involved a military trial for fraud. The significant difference, however, was that the accused in *Cesti* was a retired military officer who, as a civilian, was not subject to military law. In the instant case, all the defendants were active duty military officials.

[41] *See* e.g. I/A Court H.R*., Loayza Tamayo v. Peru*, Judgment of September 17, 1997; *Castillo Petruzzi v. Peru*, Judgment of May 30, 1999; *Cantoral Benavides v. Peru*, Judgment of August 18, 2000, *De La Cruz Flores v. Peru*, Judgment of November 18, 2004 and *Lori Berenson-Mejia v. Peru*, Judgment of November 25, 2004.

process and a fair trial set forth in the American Convention, and the convicted civilians, in most of these cases, were retried by ordinary civilian courts. The second group of cases was more prevalent throughout the hemisphere and involved military proceedings, or the lack thereof, against military officials charged with crimes that constituted human rights violations. The Commission evolved a doctrine that stated "to prosecute ordinary crimes as though they were military crimes simply because they had been committed by members of the military breached the guarantee of an independent and impartial tribunal (...)."[42] A number of recent cases in this group have involved Mexico.[43] Despite Mexico's constitutional prohibition on military jurisdiction extending beyond "the crimes and offenses against military discipline," Article 57 of the Mexican Code of Military Justice extended military jurisdiction to cover crimes of ordinary jurisdiction when they were committed by members of the military.[44] Members of the military who commit crimes that constitute human rights violations must be tried in civilian courts because these crimes are not military crimes committed in the line of duty.[45] In this context, the organs of the inter-American system for the protection of human rights have reiterated that: "[The] military jurisdiction does not fulfill the requirements of impartiality, independence, and competence to hear human rights violations and the submission of the case to this jurisdiction violates the guarantee of a hearing by a competent tribunal" in violation of the due process guarantees set forth in Article 8(1) of the American Convention.[46]

85. As mentioned above, the situation in the instant case poses a question of first impression. The petitioners are requesting the Commission to determine whether military court proceedings against a number of military officials for military crimes met the international human rights standards set forth in the American Convention at a time when the military did not consider challenging the existence of military courts for failure to comply with international human rights standards. In this case, the members of the military were not accused of having committed crimes that constituted human rights violations, such as rape or extrajudicial executions; instead, they were charged principally with the crime of fraud, defined both in the CMJ and in the ordinary Criminal Code. The petitioners in the instant case, subsequent to the constitutional reforms that occurred in 1994 in Argentina, looked to the due process protections afforded by international human rights law to undermine the very existence of a separate code by which members of the military were to be judged.

86. In most cases, military courts do not adhere to international human rights standards and are organizationally and operationally dependent on the Executive branch of government; they do not form part of the Judiciary. Military judges are military personnel on active duty who are subordinate to their respective commanders and subject to the principle of hierarchical or vertical obedience. Military courts remove members of the Armed Forces from judicial supervision, especially in cases of extrajudicial execution, torture and enforced disappearance of civilians; the military courts often deny the victims and their relatives the right to an effective remedy and the right to know the truth. The jurisprudence of the inter-American system is replete with cases of military jurisdictions that fail to investigate gross human rights violations and fail to punish the

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[42] I/A Court H.R., *Genie Lacayo v. Nicaragua*, Judgment of January 29, 1997, para. 53.

[43] *See* e.g. I/A Court H.R., *Fernandez Ortega et al. v. Mexico*, Judgment of August 30, 2010; *Rosendo Cantú et al. v. Mexico*, Judgment of August 31, 2010 and *Radilla-Pacheco v. Mexico*, Judgment of November 23, 2009.

[44] Article 13 of the Mexican Constitution states that "The military jurisdiction subsists for the crimes and offenses against military discipline (...)." Article 57 of the Mexican Code of Military Justice defines "crimes against military discipline" to include crimes "committed by soldiers."

[45] I/A Court H.R., *Fernandez Ortega et al. v. Mexico,* Judgment of August 30, 2010, para. 177.

[46] *Ibid*. para. 173.

members of the security forces who were the perpetrators of these crimes.[47] The Commission has repeatedly pointed out that gross human rights violations carried out by members of the security forces (military or police) cannot be considered military offenses committed in the line of duty.

87. Military codes exist to preserve the separate status of members of the military and to preserve order and discipline within the armed forces.[48] Human rights groups defending civilians tried in military courts in Peru did not seek the abolition of military jurisdiction; they simply sought civilian trials for this group of civilians, letting the assumption stand that military courts were appropriate exclusively for members of the military who had committed offenses set forth in the CMJ. The Inter-American Court has also recognized and justified the existence of military courts in a democratic society in very restricted terms: "The Court has already established that, under the democratic rule of law, military criminal jurisdiction should have a very restricted and exceptional scope and be designed to protect special juridical interests associated with the functions assigned by law to the military forces. Hence, it should only try military personnel for committing crimes or misdemeanors that, due to their nature, harm the juridical interests of the military system."[49] The instant case requires the Commission to determine whether military jurisdiction is compatible with international human rights standards even in the most restricted scope of its application; i.e. with respect to members of the military who commit military offenses in the line of duty. The uniqueness of the current issue merits some reflection on context and tendencies regarding military jurisdiction throughout the world.

88. After World War II, military criminal courts were abolished in some countries, particularly in those countries that lost the war and the armies of which were abolished, such as Germany and Japan.[50] Later, during the 1980s and 90s, military courts in peacetime were abolished in a number of other countries, such as Costa Rica, Denmark, Slovenia, Estonia, France, the Netherlands, the Czech Republic, Guinea and Senegal.[51] Several countries with armies do not have a system of military criminal justice operating in peacetime and responsibility for punishing crimes or lesser offenses falls to the ordinary courts and/ or specialized disciplinary bodies.

89. Different systems of military criminal law criminalize different kinds of unlawful behavior and there is no commonly understood definition of "military offense" to distinguish it from a common crime. In the Argentine judicial system relevant to the instant case, "fraud" was defined as a crime both in the CMJ and in the ordinary Criminal Code. In some systems, codes of military justice consider any offense committed in a military establishment or on a military site, regardless of the nature of the act and whether or not the perpetrator or the victim are members of the military, to be subject to military courts. It is through the use of labels such as "offense in the line of duty"

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[47] *See* e.g. I/A Court H.R., *El Amparo v. Venezuela*, Judgment of January 18, 1995, *Neira-Alegria v. Peru,* Judgment of January 19, 1995; *Caballero Delgado and Santana v. Colombia*, Judgment of December 8, 1995; *Genie Lacayo v. Nicaragua*, Judgment of January 29, 1997; *Benavides-Cevallos v. Ecuador*, Judgment of June 19, 1998; *19 Merchants v. Colombia*, Judgment of July 5, 2004; *Escué-Zapata v. Colombia*, Judgment of July 4, 2007; *Tiu-Tojín v. Guatemala,* Judgment of November 26, 2008.

[48] I/A Court H.R., *19* Merchants *v. Colombia*, *supra* note 47, para. 166.

[49] *Ibid.*, para. 165. *Cf.* I/A Court H.R*., Las Palmeras v. Colombia.* Judgment of December 6, 2001, para. 51; *Cantoral Benavides v. Ecuador,* Judgment of August 18, 2000, para. 113; *Case of Durand and Ugarte v. Peru.* Judgment of August 16, 2002, para. 117; "*Mapiripan Massacre" v. Colombia*, Judgment of March 7, 2005, para. 202;. *Palamara Iribarne v. Chile*, Judgment of November 22, 2005, para. 139; *Pueblo Bello Massacre v. Colombia*, Judgment of January 31, 2006, para. 189; *Almonacid Arellano et al. v. Chile*, Judgment of September 26, 2006, para. 131; *La Cantuta v. Peru*, Judgment of November 29, 2006, para. 142; *Rochela Massacre v. Colombia*, Judgment of May 11, 2007, para. 200; and *Tiu Tojín v. Guatemala*, Judgment of November 26, 2008, para. 118.

[50] *See* International Commission of Jurists, Federico Andreu-Guzmán "*Military Jurisdiction and International Law*" vol. 1, page 158 *et seq*.

[51] *Ibid.*, page 159.

or "service offenses" that military courts have in some instances tried military personnel for human rights violations against civilians that amount to crimes, such as torture, extrajudicial execution and enforced disappearance.

90. In some European countries, legal reforms have been introduced to ensure that judicial guarantees are afforded to military personnel facing trial in military courts. The Irish authorities announced that one of the purposes of their legal reform was to incorporate the provisions of the European Convention on Human Rights into their domestic law. A more radical position, however, was taken by the High Court of South Africa in March 2001, when it ordered the application of the CMJ to be suspended, stating that *prima facie* military criminal jurisdiction was incompatible with the principle of equality before the law and the right to judicial protection guaranteed in the Constitution.[52]

91. The Argentine CMJ included certain provisions that were *prima facie* in violation of Argentina's fair trial and access to justice obligations under the American Convention. The 21 alleged victims in the instant case were tried under the Argentine CMJ and sought to have their convictions nullified by the ordinary appellate court and by the Argentine Supreme Court. Neither the appellate court nor the Supreme Court nullified the convictions, so the petitioners have come to the Inter-American Commission seeking nullification of these judgments.

Violations under the American Convention on Human Rights

C. Due process and judicial guarantees in the military criminal proceedings brought against the alleged victims (Articles 8 and 25 of the American Convention)

92. Article 8 of the American Convention guarantees due process in judicial proceedings of a criminal character:

> 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
> 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
> a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
> b. prior notification in detail to the accused of the charges against him;
> c. adequate time and means for the preparation of his defense;
> d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
> e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
> f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
> g. the right not to be compelled to be a witness against himself or to plead guilty; and
> h. the right to appeal the judgment to a higher court.

[52] *Ibid.*, page 161.

> 3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
> 4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.
> 5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

93. Article 25 (right to judicial protection) of the Convention guarantees access to justice for protection against acts that violate one's human rights:

> 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
> 2. The States Parties undertake:
> a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
> b. to develop the possibilities of judicial remedy; and
> c. to ensure that the competent authorities shall enforce such remedies when granted.

94. In this case, the Commission has been asked to determine if the military and judicial criminal proceedings against the 21 alleged victims observed the guarantees of due process and access to justice set forth in Articles 8 and 25 of the Convention, both in relation with Article 1.1 of the Convention.

95. It is important to reiterate in this case, in which the actions within the framework of a criminal process are being questioned, that the Inter-American Commission is not a fourth instance of appeal or revision of judgments issued at the domestic level.[53] The petitioners have requested that the Commission nullify the judgments issued by two domestic courts. That is not the role of the Commission. Its role is to determine the compatibility of the actions carried out in said processes with the American Convention. When deciding other cases, the Inter-American Court has pointed out that this is not a criminal court where the criminal responsibility of individuals can be analyzed.[54] The application of the criminal law to those who commit crimes corresponds to the national courts. This applies to the present case, which does not refer to the innocence or guilt of the 21 alleged victims with regard to the criminal acts attributed to them, but instead to the conformity of the judicial proceedings with the norms set forth in the American Convention.

96. The Inter-American Court has maintained that the "safeguard of the individual in the face of the arbitrary exercise of power of the State is the primary purpose of the international protection of human rights. In this regard, the lack of effective domestic remedies leaves the person helpless." Article 25.1 of the Convention establishes, in broad terms, the obligation of States to offer to all persons subject to their jurisdiction an effective judicial remedy against acts that violate their fundamental human rights [55]

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[53] *Cf.* I/A Court H.R., *Case of Juan Humberto Sánchez v. Honduras,* Judgment of June 7, 2003, para. 120; *Case of Bámaca Velásquez v. Guatemala,* Judgment of November 25, 2000, para. 189; and *Case of the "Street Children" (Villagrán Morales et al.) v.Guatemala,* Judgment of November 19, 1999, para. 222.

[54] *Cf.* I/A Court H.R., *Case of Castillo Petruzzi and others v. Peru,* Judgment of May 30, 1999, para. 90; *Case of the "Panel Blanca" (Paniagua Morales et al.) v. Guatemala,* Judgment of March 8, 1998, para. 71; and *Case of Suárez Rosero v. Ecuador,* Judgment of November 12, 1997, para. 37.

[55] I/A Court H.R., *Case of Palamara-Iribarne v. Chile*, Judgment of November 22, 2005 (Merits, Reparations and Costs), para. 183.

1. The administration of justice through military tribunals (Articles 8 and 25 of the American Convention)

a. The special status of the military tribunal

97. Article 8 of the American Convention guarantees the right of "every person" to be tried by an impartial judge or court as a fundamental guarantee of due process. The independence of the Judiciary from other State powers is essential for the exercise of judicial functions.[56] It is evident that the Commission has competence to review the claims in this case because the American Convention protects "every one" with no limitation that would exclude members of the military or any other group of individuals possessing a special status in society.

98. Although the petitioners in the instant case sought the abolition of the CMJ in Argentina, the Commission and the Court have recognized that military jurisdiction has a reason to exist but should be limited to trying military personnel for committing crimes or misdemeanors that, due to their nature, harm the juridical interests of the military system. Military justice is designed to preserve discipline and good order in the armed forces. But what about military personnel who allege that during this restricted and legitimate scope of military proceedings, such as the circumstances of the instant case, they were deprived of their fundamental human rights to due process and the right to a fair trial? The 2006 UN Draft Principles Governing the Administration of Justice through Military Tribunals offer some guidance in Principle No. 17[57]:

> In all cases where military tribunals exist, their authority should be limited to ruling in first instance. Consequently, recourse procedures, particularly appeals, should be brought before the civil courts. In all situations, disputes concerning legality should be settled by the highest civil court.
> Conflicts of authority and jurisdiction between military tribunals and ordinary courts must be resolved by a higher judicial body, such as a supreme court or constitutional court that forms part of the system of ordinary courts and is composed of independent, impartial and competent judges.

99. Since military tribunals in Argentina formed part of the Ministry of Defense and consequently, were within the Executive branch, they were not impartial and independent and more importantly, they did not form part of the Judiciary. For that reason, the UN Draft Principles recommend that the decisions of military tribunals be limited to judgments at first instance and appealable to ordinary civilian courts, which do form part of the Judiciary; the Draft Principles do not recommend that military tribunals be abolished but rather that they be established by law, that they respect fair trial guarantees set forth in international human rights standards and that their jurisdiction correspond to strict functional necessity and not encroach on the jurisdiction of civil courts. In the instant case, although the petitioners were in disaccord with the judgment issued by the National Chamber of Criminal Cassation and the failure of the Argentine Supreme Court to consider the case, they never alleged that the Argentine judiciary was not independent or that it did not provide due process.

100. The Supreme Council of the Armed Forces, a military court, issued judgment at first instance in this case on June 5, 1989. At no time did the petitioners allege that this was not the

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[56] I/A Court H.R., *Case of Herrera-Ulloa v. Costa Rica*, Judgment of July 2, 2004, paras. 108-111; *Case of Palamara-Iribarne v. Chile*, *supra* note 54, paras. 145-161.

[57] UN Commission on Human Rights, "*Civil and Political Rights, Including the Question of Independence of the Judiciary, Administration of Justice, Impunity*." Issue of the administration of justice through military tribunals. Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux. E/CN.4/2006/58, 13 January 2006.

appropriate court in which to try the alleged victims or that they should be tried before an ordinary criminal court. The alleged victims were active duty members of the military, who were tried and convicted of military offenses before a military court. As members of the military the alleged victims did not attempt to recuse any of the judges of the Supreme Council for not being their "natural" judge or for any other reason. The alleged victims, during the proceedings at first instance, made no attempt at that time to seek a change of jurisdiction or venue.

b. Appeal to a civilian court - Due process and access to justice (Articles 8 and 25 of the American Convention)

101. The judgment of the Supreme Council of the Armed Forces was appealed by both the prosecution and defense on June 14, 1989. On April 23, 1990, the National Appeals Chamber admitted certain claims and on December 5, 1990, the Chamber declared the statute of limitations to have expired on two of the three offenses. The Prosecutor then filed an extraordinary appeal, which was resolved by the Argentine Supreme Court on July 30, 1991, which revoked the Appeals Chamber's decision declaring the prescription. During the course of the reorganization of the Judiciary, in 1992, the National Chamber of Criminal Cassation was created. On September 16, 1993, the National Appeals Chamber declared that it was not competent to continue hearing the case, indicating that competence was the purview of the newly created National Chamber of Criminal Cassation. The Argentine Supreme Court affirmed the National Chamber of Criminal Cassation's competence. On March 20, 1995, the National Chamber of Criminal Cassation issued its judgment on the appeal. Although the conflict of jurisdiction issue as to which was the appropriate appeals court took five years to resolve, the Argentine Supreme Court was the appropriate body to take the decision.

102. In 1994, the Argentine Government approved a reform of its Constitution and one effect of this reform was that international human rights treaties, to which Argentina is a party, were given constitutional rank in domestic law. The petitioners in this case, invoking the progressive legal developments, sought the nullification of the judgment of the Supreme Council of the Armed Forces by the civilian courts of appeal on the grounds that the Supreme Council had committed procedural violations that deprived them of their human rights, despite the fact that these procedural violations, such as the failure to be assisted by legal counsel of one's own choosing, were permitted in the CMJ and were not complained of by the petitioners during the proceedings at first instance.

103. The petitioners alleged that the National Chamber of Criminal Cassation which was directed to assume jurisdiction over their appeal by the Supreme Court, was not the proper court of review. Their principal allegation was that the National Chamber of Criminal Cassation was established in 1992, subsequent to the commission of the offenses at issue, so that the right of the alleged victims to be tried by preexisting courts was violated. Article 8.1 of the American Convention provides that every person has the right to a hearing with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, "previously established by law." This provision is intended to protect persons from being subjected to *ad hoc* bodies that are not part of the judiciary.[58] Law 24.050, which, in 1992, reorganized the Argentine judiciary, assigned one (Chamber IV) of the four chambers of the newly created National Chamber of Criminal

[58] Both the European Convention on Human Rights ("by an independent and impartial tribunal established by law" Art. 6.1) and the International Covenant on Civil and Political Rights in their equivalent provisions ("by a competent, independent and impartial tribunal established by law" Art. 14.1) make no reference to "when" the tribunal shall have been established; the sense of the provision is that the hearing shall be conducted before a tribunal that was established by law and is not intended to inhibit judicial reorganizations.

Cassation the competence to review appeals from military jurisdiction.[59] Such judicial reorganization is common and did not amount to the creation of an *ad hoc* judicial body, but rather involved the substitution of one judicial body for another.[60] Article 445 *bis* of the CMJ granted members of the military who had been tried and convicted for military crimes before a military tribunal the right to appeal to a civilian court of appeals. Article 7 of Law 24.050 transferred the jurisdiction to hear such appeals from the National Criminal and Correctional Appeals Chamber of the Federal Capital to the National Chamber of Criminal Cassation.[61]

104. The petitioners alleged before the National Chamber of Criminal Cassation that their constitutionally protected human rights had been violated by the procedures of the military court at first instance and requested the Court of Cassation to nullify the proceedings on the basis of these procedural violations.[62] The National Chamber of Criminal Cassation, a civilian court, reviewed the petitioners' claims, accepting some and denying others, but held that there were no grounds under domestic law to nullify the military court's proceedings. Similarly, the Supreme Court rejected review of the Court of Cassation's decision, concluding that the petitioners had failed to raise any substantive issues.[63]

105. The State maintained that the Argentine judicial system functioned in accordance with the domestic law applicable at the time, and pursuant to international standards. It argued that for the Commission to analyze the petitioners' claims would be tantamount to establishing an illegitimate fourth instance of review of judicial decisions that were issued by competent bodies in a democratic society and had acquired the finality of *res judicata*. To subject these decisions to nullification due to the evolution and changes in Argentine domestic law (e.g. the abolition of the CMJ, the adoption of a new Constitution) would subject the finality of many, if not all decisions, issued by the Supreme Council of the Armed Forces, pursuant to the CMJ, to a reopening and re-examination by the Commission. Such an outcome would transform the Commission into a fourth instance review of the Argentine judiciary.

106. It has been the constant jurisprudence of this Commission that it "cannot serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction."[64] In addition, the Commission's jurisprudence

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[59] Article 7 of Law 24.050 provides (free translation): "One of the chambers will judge the remedies foreseen by article 445 *Bis* of Law 14.029." (Code of Military Justice).

[60] Cf. The substitution of the jurisdiction of the Administrative Law Chamber of the Supreme Court for the Constitutional Chamber of the Court of Constitutional Guarantees in IACHR, Admissibility Report Nº 10/02, Petition 12.393, *James Judge v. Ecuador*, February 27, 2002, paras. 12-14.

[61] Article 445 *Bis* (free translation): Paragraph 1: "*In peace time, against the final decisions of military tribunals that refer to essentially military crimes an appeal may be presented to the Federal Appeals Court with competence in the place of the acts that gave rise to the proceedings*."

[62] The petitioners, who claimed a right to have the alleged victims tried by preexisting courts (i.e. The National Criminal and Correctional Appeals Chamber) ignoring the judicial reform that created the National Chamber of Criminal Cassation, ironically sought the nullification of the proceedings of the 1989 preexisting military court of first instance as a result of the constitutional reforms in Argentina of 1994. For this claim to be persuasive, however, the petitioners would have had to raise the issue while the military proceedings were pending, which they unable to do since the reforms occurred five years later. The constitutional reforms of 1994 granted constitutional status to the American Convention on Human Rights and other international human rights treaties. . Article 75(22) of the Constitution provides that international human rights treaties are hierarchically superior to federal laws, so that a subsequent law cannot modify the treaty. Also, it was established that the right invoked, which is based on the existence of an International norm, is self-executing, that is to say, that the right may be automatically invoked before national tribunals.

[63] *Supra* note 12.

[64] *See* IACHR, Admissibility Report Nº 4/02, , Petition 11.685, *Ricardo Neira González v. Argentina*, February 27, 2002; Inadmissibility Report 98/06, Petition 45-99, *Rita Ortiz v. Argentina*, October 21, 2006, para. 49.

clearly establishes that it is not competent to review judgments handed down by national courts acting within the scope of their jurisdiction and observing due judicial guarantees.[65]

107. The Commission is not competent to review the application of domestic law and standards by national courts unless the domestic application thereof constitutes a potential violation of a provision of the American Convention. The Fourth Chamber of the National Chamber of Criminal Cassation, which was determined by the Argentine Supreme Court to be the competent body to consider the appeal of the first instance judgment, performed an exhaustive review of the constitutional challenges presented by the petitioners to the decision of the Supreme Council of the Armed Forces. The petitioners challenged how the proceedings were conducted. In particular, they alleged problems with the expert witnesses and asserted that the quality and quantity of the evidence brought against them was insufficient to justify a conviction. In addition, they alleged that the military tribunal arrived at its judgment following a secret meeting and vote of its members in violation of the CMJ procedures.

108. The Commission's doctrine regarding the prohibition on "fourth instance" review was reiterated in 1996 in an Argentine case, known as the "*Marzioni case*."[66] It noted that: "In democratic societies, where the courts function according to a system of powers established by the Constitution and domestic legislation, it is for those courts to review the matters brought before them. Where it is clear that there has been a violation of one of the rights protected by the Convention, then the Commission is competent to review."[67]

109. The Commission in the *Marzioni* case established exceptions to the fourth instance formula, and stated that under the following circumstances the formula did not apply:[68]

> 61. The Commission has full authority to adjudicate irregularities of domestic judicial proceedings which result in manifest violations of due process or of any of the rights protected by the Convention.
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> 62. For example, if Mr. Marzioni presented information establishing that the trial was not impartial because the judges were corrupt, or were biased for racial, religious, or political reasons against him, the Commission would be competent to examine the case.

110. The petitioners in the instant case were able to argue before the National Chamber of Criminal Cassation that the proceedings before the Supreme Council violated international human rights standards under the American Convention and the Argentine Constitution, but they did not allege that the judges on the Court of Cassation were biased or that the Court had decided the case in an impermissibly discriminatory way. In fact, the National Chamber of Criminal Cassation both reduced the charges against the alleged victims and lowered the prison sentences imposed by the Supreme Council of the Armed Forces, which gave rise to their claims for reparations for the period of time held in preventive detention that exceeded the length of time of the prison sentences imposed. [69] The petitioners alleged that the National Chamber of Criminal Cassation had decided the appeal wrongly and that due to the procedural due process violations of Article 8 of the American Convention, that this judgment should be nullified by the Commission.

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[65] *See* IACHR, Admissibility Report 4/04, Petition 12.324, *Ruben Luis Godoy v. Argentina*, February 24, 2004, para.44.

[66] IACHR, Inadmissibility Report No. 39/96, Case 11.673, *Santiago Marzioni v. Argentina Case*, October 15, 1996; reprinted in the Commission's 1996 Annual Report.

[67] *Ibid.*, para. 60.

[68] *Ibid.*, paras. 61-2.

[69] *Cf*. notes 19 and 32 (*supra*).

111. In view of the foregoing, the Commission concludes that the petitioners enjoyed access to an appropriate, impartial and independent court when their appeal was heard by the National Chamber of Criminal Cassation and that they also exercised their right to appeal to the highest court in the country, to the Argentine Supreme Court. The Argentine Supreme Court is not required to hear every case that comes before it, and it rejected the petitioners' appeal of the Court of Cassation's judgment as not raising an issue of substance. Even if the Argentine Supreme Court's decision were to be "in error" under domestic law, the Commission is explicitly prohibited from second-guessing decisions of national courts or substituting its opinion for that of the national court when a potential violation of the American Convention is not at issue.[70] Consequently, the Commission concludes that Argentina did not incur in a violation of Articles 8 and 25 of the American Convention, regarding the alleged victims' right to due process and access to effective judicial remedies in this case, in compliance with the State's general obligation to ensure to all persons subject to its jurisdiction the free and full exercise of the rights guaranteed by the Convention pursuant to Article 1.1.

2. Right to a fair trial (Article 8 of the Convention) in connection with the obligation to respect human rights (Article 1.1) of the American Convention)

112. Article 8.1 of the American Convention provides that "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal." Even though the Commission is of the view that the alleged victims enjoyed the protection of Articles 8 and 25 and had access to due proceedings and judicial protection in these proceedings, the Commission is mindful of the fact that the military proceedings and the CMJ caused manifest violations of due process, in violation of Article 8 of the Convention, which although recognized by the State in its abrogation of the Code of Military Justice, have not been remedied, as concerns the 21 alleged victims in this case.

113. The petitioners alleged as regards Article 8 of the Convention that they suffered the following violations as a result of the military proceedings and the imposition of the CMJ: 1) they were not tried within a reasonable time; 2) they did not have legal assistance during the processing of the case in the military Court; 3) they were obliged to testify against themselves and 4) they did not have the right to appeal their judgment to a higher court.[71]

a. The right to legal assistance in the preparation of the defense during the proceedings before the military court (Article 8.2.d, e and b of the American Convention)

> 8.2.d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
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> 8.2.e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
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> 8.2.b. prior notification in detail to the accused of the charges against him;

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[70] *See* IACHR, Inadmissibility Report No. 98/06, Petition 45-99, *Rita Ortiz v. Argentina*, October 21, 2006, paras. 37-40.

[71] The allegation that the alleged victims were not tried within a reasonable time will be discussed below in connection with the right to personal liberty (Article 7 of the Convention).

114. The petitioners alleged that they had no legal counsel for the first two and a half years of the proceedings and when they finally obtained representation, the defenders were not lawyers. The State responded that the CMJ provided for the right of an accused to be assisted by a "military defender" on active duty or a retired member of the military.

115. Article 344 of the CMJ did not contemplate the designation of a lawyer for the accused in a military court proceeding. The State concluded that as a result "there was no violation of the CMJ for failure to name a legal professional for the alleged victims." Article 97 of the CMJ did not grant the alleged victims the right to a lawyer but allowed them to be defended by an active or retired military official.[72] The right to a defense lawyer was contemplated in Article 252 of the CMJ after the accused had made his declaration under questioning by the Court.[73] The right to a defense lawyer at all stages of the proceedings, especially as they are initiated and the accused makes his first declaration, is a fundamental human right set forth in Article 8.2.d and e of the American Convention.[74] Consequently, the Commission considers that the State violated the rights of the alleged victims to be assisted by counsel during the proceedings conducted before the military court in violation of Article 8.2.d and e.

b. The right not to be compelled to be a witness against himself (Article 8.2.g and 8.3 of the Convention)

> 8.2.g. the right not to be compelled to be a witness against himself or to plead guilty
>
> 8.3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

116. The petitioners in requesting their extraordinary remedy before the Court of Cassation argued that Article 237 of the CMJ impermissibly allowed the State to "exhort" the alleged victim to tell the truth, which they charged is in flagrant violation of the right not to be compelled to incriminate oneself set forth in Article 18 of the Argentine Constitution and Article 8.2.g and 8.3 of the American Convention.[75] The petitioners argued that the statements made by the alleged victims were made while they were held in incommunicado pre-trial detention in 1980. They claimed that Article 204 of the CMJ permitted incommunicado detention for a maximum of four days and that they had been kept in incommunicado detention in excess of four days, in some cases for as long as ten or twelve days in violation of the CMJ, the relevant domestic law. The petitioners further alleged that the prolongation of the incommunicado detention constituted "a clear form of coercion" contrary to the guarantee of the right not to incriminate oneself.

117. The State defended itself against the charges that the petitioners were exhorted to speak the truth as constituting a violation of the right not to be compelled to incriminate oneself.

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[72] Article 97 (free translation): "The person assuming the defense before military tribunals must always be someone on active duty or retired from the military."

[73] Article 252 of the CMJ (free translation): "*Within twenty-four hours of the detention, the Judge must give the reasons for the detention, on the basis of the investigation carried out, for which preventive detention is established for the accused if the terms of Article 312 apply, or it is determined that the situation falls within the provisions of Article 316*." Article 312 provides as follows (free translation): "*Simple detention is converted into preventive detention when the following three circumstances concur: 1) The existence of an offense which this Code punishes with death, prison, detention, demotion or confinement is duly proven; 2. An investigative declaration has been taken from the detainee and s/he has been informed of the reason for the detention; 3. There are sufficient elements, in the opinion of the Instructor, to believe that the detainee is responsible for the offense under investigation*."

[74] I/A Court H..R., *Case of Tibi v. Ecuador,* Judgment of September 7, 2004, paras. 190-196.

[75] *Ibid.*, para. 55.

Article 237 of the CMJ, the State noted, permitted an "exhortation" to speak the truth and that meant that a declaration could not be obtained by means of physical coercion, moral threats or truth serum, facts that were not involved when the statements were taken from the alleged victims. An exhortation, the State argued, is nothing more than a request; it cannot be considered coercion in the ordinary use of the language. The Commission considers that an exhortation to the alleged victim to tell the truth is not a violation of the right not to be compelled to incriminate oneself set forth in Articles 8.2 and 8.3 of the American Convention.

c. The right to appeal their judgment to a higher court (Article 8.2.h of the American Convention)

> 8.2.h. the right to appeal the judgment to a higher court.

118. The petitioners submitted that they did not have the right to appeal their judgment to a higher court. They contend that the National Chamber of Criminal Cassation was not the proper court of review. Although the Commission has dealt with the issue of the *ex-post facto* establishment of the National Chamber of Criminal Cassation relative to the date of the facts at issue (*supra* para. 103 *et seq*.), it determined that this judicial reorganization did not violate the rights protected under Articles 8 and 25 of the American Convention and will not review this issue further.

C. Violation of the right to personal liberty and reasonableness of the length of proceedings (Articles 7 and 8 of the American Convention) in relation to Article 1(1) thereof

119. Article 7 of the American Convention protects the right to personal liberty and states in relevant part:

> 1. Every person has the right to personal liberty and security.
> 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
> 3. No one shall be subject to arbitrary arrest or imprisonment.
> 4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
> 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
> 6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

120. The central allegations regarding the deprivation of personal liberty to be considered in this case involve the prolonged preventive detention of the alleged victims as well as the prolonged length (a period of approximately 18 years) of the judicial proceedings which began on September 9, 1980, and continued until the dismissal of the claims by the Argentine Supreme Court on April 28, 1998. The petitioners alleged that the length of the criminal proceedings against the alleged victims was impermissibly long and violated Articles 7 and 8 of the American Convention, which guarantee a fair trial within a reasonable time. The alleged victims were held in preventive detention for periods of more than 7 or 8 and a half years and for over twice as long as

the prison terms to which they were eventually sentenced by the National Chamber of Criminal Cassation.

121. The State argued that the victims were freed many years ago and that consequently the reasons for this claim no longer exist. Furthermore, the State argued that the petitioners did not exhaust their domestic remedies for compensation for the period during which they were deprived of their liberty which exceeded the length of time of the sentence imposed upon them.

122. With respect to the reasonableness of the length of time of the entire judicial proceedings, the Commission recalls the jurisprudence of the Inter-American Court. In the *Genie Lacayo case,* the Court invoked the reasoning of the European Court of Human Rights in declaring that "three points must be taken into account in determining a reasonable time within which the trial must be conducted: a) the complexity of the matter; b) the judicial activity of the interested party; and c) the behavior of the judicial authorities."[76] In this case, there is no dispute as regards the elements to be taken into account: a) the parties agree that the matter was complex, the file comprised more than 14,000 pages and there were 32 defendants, b) the State does not charge that the petitioners sought to delay the proceedings, and c) the State does not argue that the proceedings took less than 16 years, In order to determine the length of proceedings the measurement should begin when the proceedings were initiated and terminated on the date of the final judgment. In the Argentine case of *Juan Carlos Bayarri*, the Inter-American Court concluded that Mr. Bayarri's preventive detention of 13 years "not only exceeded the maximum legal limit established, but was clearly excessive," given that the legal limit for preventive detention was 3 years and Mr. Bayarri was ultimately acquitted of the charges against him.[77] In the *Bayarri* case, the Court found that the entire proceedings lasted 16 years without a final judgment. The Court held that there was "a notorious delay in the abovementioned proceedings", with no reasonable explanation and decided that as a consequence, "it [was] not necessary to examine the[se] criteria" established for assessing the reasonableness of the duration of the proceedings.[78] In the instant case, the 18 year duration of the proceedings surpassed the 16 years of the *Bayarri* case proceedings.

123. In the Commission's merits decision in the case of Dayra Maria Levoyer against Ecuador, the victim was held for 39 days in incommunicado preventive detention and then for an additional six years, when all the charges against her were dropped.[79] The entire proceedings lasted nearly eight years, according to the Commission in that case, "well beyond the principle of reasonable time."[80] Ecuador did not provide any evidence to justify that the deprivation of liberty was imposed based on the possibility of flight or the severity of the offense or penalty.[81] As to the parameters of Article 7.5 of the Convention, the Commission has established that whenever preventive detention is extended beyond the period stipulated in domestic law, this should be considered *prima facie* illegal, regardless of the nature of the offense in question and the complexity

[76] I/A Court H.R., *Case of Genie Lacayo v. Nicaragua*, Judgment of January 29, 1997, para. 77.

[77] *See* I/A Court H.R., *Bayarri v. Argentina*, Judgment of October 30, 2008, para. 75. In the Bayarri case, the purported victim was held in preventive detention for 13 years and requested US $3,750,000 in compensation for lost income for the years held. The Court awarded Mr. Bayarri, US$ 50,000 for loss of income during the 13 years of detention (paras. 144-151).

[78] *Ibid., Bayarri v. Argentina*, para. 107.

[79] IACHR, Report No. 66/01, Case 11.992 *Dayra Maria Levoyer Jimenez* (Ecuador), June 14, 2001, para. 1.

[80] *Ibid.*, para. 95.

[81] *Ibid.,* para. 48.

of the case. In such circumstances, the burden of proof in justifying the delay rests with the State.[82[

124. As regards the length of preventive detention, the Commission finds that the State incurred in a violation of Article 7.2 since the CMJ did not set a deadline within which the military court must decide a case of an individual in detention and the State did not seek to justify the delay for any reason. The petitioners note that the Federal Chamber on August 11, 1987 ordered the Supreme Council of the Armed Forces to release them from preventive detention by application of the American Convention. Today, the CMJ no longer exists. Consequently, the Commission finds that the State incurred in a violation of the alleged victims' right to personal liberty by maintaining them in a situation of preventive detention that exceeded the limits of reasonableness, in violation of Articles 7.2 and 7.5, and that the 18 year duration of the proceedings also exceeded the limits of reasonableness, in violation of Article 8.1 of the Convention, read in conjunction with the State's obligations under Article 1.1 thereof.

D. Right to personal integrity (Article 5 of the American Convention)

125. Article 5 of the American Convention provides that every person has the right to have his or her personal integrity respected:

> 1. Every person has the right to have his physical, mental, and moral integrity respected.
> 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
> 3. Punishment shall not be extended to any person other than the criminal.
> 4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
> 5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
> 6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

126. The petitioners claimed that the alleged victims, from the time of their detention until the time that they were brought before the military judge in charge of the investigation when they made their initial declarations, were held incommunicado for several days in violation of Article 204 of the CMJ which permitted a maximum of four days incommunicado detention.[83] In addition, the petitioners maintained that the alleged victims were subject to cruel and degrading treatment. Specifically, the petitioners claimed that the alleged victims were held in small cells, with very little ventilation and natural light. The cells were illuminated by a tiny light bulb.

127. The petitioners' claims alleging cruel and degrading treatment were not included in the petitioners' original complaints but were added in subsequent communications. At no time was any evidence submitted to substantiate these claims. The State responded that claims of "coercion

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[83] Article 204 of the CMJ (free translation): "*The Instructor may hold the detainees in incommunicado detention, provided that there is reason to do so; but the period of incommunicado detention may not exceed the amount of time absolutely necessary in order to carry out the required measures, and for no reason may they exceed four days in each case. The Instructor who violates these provisions will be removed from the investigation and will be arrested on a ship or in a military base. The application of the punishment on the Instructors will be carried out by the authority that ordered it*."

or alleged promises" in order to compel the alleged victims to incriminate themselves were raised before the National Chamber of Criminal Cassation which held that none of these claims had been minimally proven and dismissed the claims of cruel and degrading treatment. The State, however, does not contradict the petitioners' claim that the alleged victims were held in incommunicado detention beyond the prescribed period of four days. It attempted to explain the reason, stating that they were held in isolation in order to prevent any collusion prior to their making their initial statements before the Military Instructor.[84] The proceedings were initiated in September 1980 and the detainees were held in incommunicado detention for a number of days, all under one month, during that time. Since these events occurred prior to the entry into force of the American Convention for Argentina in 1984, the Commission shall deal with them in its consideration of violations under the American Declaration (infra). As regards the claim that the alleged victims were subject to cruel and degrading treatment because they were held in small cells with little ventilation and light, in some cases from 1980-1987 (*supra* note 19), the Commission considers that the petitioners have presented insufficient evidence to substantiate this claim of ill-treatment.

E. Right to compensation (Article 10 of the American Convention)

128. Article 10 of the American Convention provides for the right to compensation for a miscarriage of justice:

> Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.

129. Argentina ratified the American Convention with the interpretative declaration that "Article 10 shall be interpreted to mean that the 'miscarriage of justice' has been established by a national court." In the instant case the petitioners did not provide evidence that they had sought a judicial ruling indicating that there had been a miscarriage of justice in this case. In fact, at the domestic level, both the National Chamber of Criminal Cassation and the Argentine Supreme Court rejected the petitioners' appeals to nullify the judgment of the Supreme Council of the Armed Forces as the result of a miscarriage of justice. Similarly, the Argentine Supreme Court did not consider that the petitioners' claims for nullification of the National Chamber of Criminal Cassation's decision, which have been reiterated in their petition to this Commission, raised substantive claims worthy of the Court's consideration. Consequently, the Commission concludes that a national court did not establish that there had been a miscarriage of justice in these proceedings and finds that the State is not responsible for a violation of Article 10 of the American Convention to the detriment of the alleged victims in this case. This conclusion does not conflict with the State's obligation to provide appropriate reparations to the alleged victims for the violations of certain articles of the American Convention declared by the Commission.

F. Right to equal protection before the law (Article 24 of the American Convention)

130. Article 24 of the American Convention provides that all persons are entitled to equal protection of the law:

> All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

[84] Opinion dated August 4, 2005 of Pablo Maximiliano Tosco, Advisor, Secretariat of Military Affairs of the Ministry of Justice and Human Rights to the Under Secretary of Human Rights, Ministry of Defense in case file Folder #5.

131. The petitioners alleged that the right of the alleged victims to equal protection of the law was violated because, pursuant to their status as military personnel at the time of the offenses in question, they were processed through military jurisdiction prior to having access to the civilian judicial system.

132. The State emphasized that the alleged victims recognized that when the acts occurred for which they were convicted, they were members of the Argentine Armed Forces and that the crime committed for which they were tried was set forth in the CMJ and the alleged victims were active duty members of the military carrying out their functions at the time of the events.

133. The Commission considers that the State is correct in alleging that it is baseless to question the validity of military tribunals acting within their sphere of competence given the prevalence of military courts in the many states in the hemisphere and the international community. The guarantee of equality before the law prohibits discriminatory treatment in law, but not in situations of fact, as are claimed by the alleged victims. For a case of deprivation of equal protection to prosper the difference in treatment must lack an objective and reasonable justification. Consequently, the CMJ was the applicable law at the time of the facts of the case, and although the CMJ violated certain due process provisions protected under Article 8 of the Convention (*supra*) the Commission concludes that there was no violation on the part of Argentina of the principle of equal protection before the law, set forth in Article 24 of the Convention and the State's obligations under Article 1.1.

Violations under the American Declaration of the Rights and Duties of Man

134. The American Declaration of the Rights and Duties of Man provides:

> Article I. Every human being has the right to life, liberty and the security of his person.
>
> Article XXV. No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.
> ...
> Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried, without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.
>
> Article XXVI. Every accused person is presumed to be innocent until proved guilty.
> Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

135. It has been part of the constant jurisprudence of the Inter-American Commission to examine violations of the American Declaration of the Rights and Duties of Man in cases where violations occurred prior to the date on which the State deposited its instrument of ratification or accession to the American Convention on Human Rights.[85]

136. The facts, as recognized by the parties, indicate that the purported victims, after having been held in incommunicado detention for a period longer than that permitted under the

[85] *See, for example*, Report Nº 40/03, Case 10.301, *Parque Sao Lucas (Brasil*) October 8, 2003, para. 11 (Annual Report 2003); see also Report Nº 54/01, Case 12.051, Maria da Penha Maia Fernandes (Brasil), April 16, 2001, para. 27 (Annual Report 2000).

CMJ, were held in arbitrary detention for periods of seven to ten years in violation of their right to liberty. They were not charged with any crime until 1988, which violated their right to have the legality of their detained ascertained without delay by a court and the right to be tried without undue delay or, otherwise, to be released, under Article XXV of the American Declaration.[86]

137. In addition, their long term detention violated their right to due process under Article XXVI of the American Declaration. The detainees were held for eight years before they were even charged with a crime, rendering them guilty of charges that had not even been formulated. Also, pursuant to the CMJ, they were not permitted the assistance of a lawyer of their choice during this long period of preventive detention. All of these rights are protected by the American Declaration on the Rights and Duties of Man and are part of the responsibility of the State for acts that occurred prior to the entry into force of the American Convention.

V. CONCLUSIONS

138. The Inter-American Commission on Human Rights, based on the considerations of fact and law presented above, concludes that in the instant case Argentina is responsible for the violation of the right to personal liberty, (Article 7 of the American Convention) and the right to a fair trial (Article 8), read in conjunction with the obligation to respect and ensure the rights set forth in the Convention enshrined in Article 1.1 and Articles I, XXV and XXVI of the American Declaration concerning the deprivation of liberty and due process for events that occurred prior to Argentina's ratification of the American Convention to the detriment of the 21 victims named in paragraph 1 of this decision. The Commission finds no violation of the right to personal integrity (Article 5), the right to compensation for miscarriage of justice (Article 10), the right to equal protection before the law (Article 24), or the right to access to justice (Article 25 of the American Convention).

VI. RECOMMENDATIONS

139 Based on the foregoing considerations presented in the present report and the conclusions reached, the Inter-American Commission on Human Rights recommends that the State of Argentina:

1. Proceed to grant full reparations, especially adequate compensation, to the 21 victims, named in paragraph 1, for the violations declared in this decision.

[86] *See* note 19.