Institution:	Inter-American Commission on Human Rights
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Title/Style of Cause:	Alfonso Rene Chanfeau Orayce, Agustin Eduardo Reyes Gonzalez, Jorge Elias Andronico Antequera, Juan Carlos Andronico Antequera, Luis Francisco Gonzalez Martinez, William Robert Millar Sanhueza, Jorge Rogelio Marin Rossel, Luis Armando Arias Ramirez, Jose Delimiro Fierro Morales, Mario Alejandro Valdes Chavez, Jorge Enrique Vasquez Escobar and Jaime Pascual Arias Ramirez, Juan Carlos Perelman, Gladys Diaz Armijo, Luis Alberto Sanchez Mejias, Francisco Eduardo Aedo Carrasco, Carlos Eduardo Guerrero Gutierrez, Maximo Antonio Gedda Ortiz, Joel Huaiquinir Benavides, Guillermo Gonzalez de Asis, Lumy Videla Moya, Eulogio del Carmen Ortiz Fritz Monsalve and Mauricio Eduardo Jorquera Encina v. Chile
Doc. Type:	Report
Decided by:	Chairman: Carlos Ayala Corao; First Vice Chairman: Robert K. Goldman; Second Vice Chairman: Jean Joseph Exume. Commissioner Claudio Grossman, a Chilean national, did not participate in the deliberations or the voting on these cases, in accordance with article 19.2.a. of the Regulations of the Commission.
Dated:	7 April 1998
Citation:	Chanfeau Orayce v. Chile, Case 11.505, Inter-Am. C.H.R., Report No. 25/98, OEA/Ser.L/V/II.102, doc. 6 rev. (1998)
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I. BACKGROUND

1. The Inter-American Commission on Human Rights has continued to receive complaints against the State of Chile based on the continued effective application in that country of the amnesty law - Decree Law 2191 promulgated on March 10, 1978 under the regime of General Augusto Pinochet. It is alleged in these complaints that the very existence of the amnesty law, the admissibility of which the Chilean tribunals uphold, causes numerous acts of violation of the right to justice. A number of these acts are included in the petitions considered in this report. The complaints allege that under this law, crimes committed between 1973 and 1978 are pardoned; the investigation and punishment of such crimes are hindered, and the perpetrators of crimes of atrocity are unpunished. The complaint notes that the law is applied under a Supreme Court ruling confirming its conformity with the Constitution and that its repeal has been blocked by the Legislature.

2. In this way, according to the petitioners, the State of Chile violates international customary and conventional law, in particular the American Convention on Human Rights, which Chile ratified on August 21, 1990, under which it is bound to ensure compliance with the rights and guarantees established therein. It is also bound to adjust its internal legislation to the norms contained in the Convention. Failure to comply with these provisions gives rise to the violations of the human rights of the persons on whose behalf these complaints are being made

3. The cases of the persons included in this report are registered under the following numbers and names:

11.505, Alfonso René Chanfeau Orayce; 11.532, Agustín Eduardo Reyes González; 11.541, Jorge Elías Andrónico Antequera and his brother Juan Carlos and Luis Francisco González Martínez; 11.546, William Robert Millar Sanhueza and Jorge Rogelio Marín Rossel; 11.549, Luis Armando Arias Ramírez, José Delimiro Fierro Morales, Mario Alejandro Valdés Chávez, Jorge Enrique Vásquez Escobar and Jaime Pascual Arias Ramírez; 11.569, Juan Carlos Perelman and Gladys Díaz Armijo; 11.572, Luis Alberto Sánchez Mejías; 11.573, Francisco Eduardo Aedo Carrasco; 11.583, Carlos Eduardo Guerrero Gutiérrez; 11.585, Máximo Antonio Gedda Ortiz; 11.595, Joel Huaiquiñir Benavides; 11.652, Guillermo González de Asís; 11.657, Lumy Videla Moya; 11.675, Eulogio del Carmen Ortiz Fritz Monsalve; and 11.705, Mauricio Eduardo Jorquera Encina.

4. The petitioners request in their complaints that the Commission declare Decree Law 2191 incompatible with Article XVII of the American Declaration on the Rights and Duties of Man and Articles 1, 8 and 25 of the American Convention on Human Rights; recommend that Chile adopt all the necessary measures to establish the whereabouts of the victims and punish those responsible for the disappearances and extra-judicial executions; and recommend that Chile award compensation to the families of the victims on account of the violation of their right to justice.

5. As the allegations and claims contained in these petitions are essentially the same, they are all at virtually the same stage of processing and the issue at hand is basically one of Law, since the facts of the cases are not in dispute, but rather whether the validity, application and effects of Decree Law 2191 are in conformity with the American Convention on Human Rights. The Commission has decided to group them under one case, so they may be given joint consideration.

II. THE COMPLAINTS AND PROCEEDINGS BEFORE THE COMMISSION

11.505. The Commission received a complaint, dated April 3, 1995, against the State of Chile, regarding the violation of the right to justice and the state of impunity with respect to the case of Mr. Alfonso René Chanfreau Orayce, as a result of the application of the amnesty law. He was abducted on July 30, 1974, by agents of the National Intelligence Directorate of Chile, (DINA), and last seen by his spouse on August 13, 1974. The petitioners have taken the following legal action under domestic legislation: a writ of amparo was filed on August 7, 1974 and rejected on December 17, 1974; an inquiry was held in the Criminal Court into the disappearance of the victim; in October, 1977, the case was temporarily suspended and

subsequently reopened; it was again suspended in April 1980; the case was again reopened in May 1980, and on this occasion, evidence was found against DINA agent Osvaldo Romo Mena, whose extradition from Brazil was sought and effected; the military court then formally contested the competence of the court in question and won a favorable ruling from the Supreme Court; on December 20, 1994, the Military Court ordered the dismissal of the case under the amnesty law. The petitioners have alleged denial of justice as a result of the application of the amnesty law.

11.532. The Commission received a complaint dated April 3, 1995, against the State of Chile, regarding the violation of the right to justice and the state of impunity in respect of the case of Agustín Eduardo Reyes González, as a result of the application of the amnesty law. A craftsman and activist of the Movimiento de Izquierda Revolucionario (MIR) (Revolutionary Leftist Movement), Mr. Reyes González was detained on May 27,1994 by DINA agents. The petitioners took the following legal action under domestic legislation: a writ of amparo was filed on June 3, 1974 and rejected definitively in December 1974. The investigation begun by the Criminal Court in January,1975 was suspended and subsequently reopened; the investigation confirmed the responsibility of the DINA agents; in March 1981, the civil court declared that it was not competent to rule and submitted the case to the Military Court, which, in July 1995, by virtue of the amnesty law, dismissed the case. The Supreme Court confirmed this decision on July 11, 1996 and declared that the provisions of the amnesty precluded the payment of any damages claimed by the relatives of the victim.

11.541. The Commission received a complaint dated April 7, 1995, against the State of Chile of the violation of the right to justice and the state of impunity in respect of the case of Jorge Elías Andrónico Antequera, his brother Juan Carlos and Luis Francisco González Manriquez as a result of the application of the amnesty law. They were detained on October 3, 1974 by DINA agents, transferred to the precinct on José Dominguez Cañas street, at the corner with República de Israel street, and thereafter to the Cuatro Álamos detention center from which they were taken to an unknown destination. They were last seen on November 11, 1974. Under the internal jurisdiction of Chile, the petitioners took the following legal actions: a writ of amparo was filed on October 11, 1974, and declined on January 11, 1975. In the same year, the San Miguel Criminal Court began an inquiry which was temporarily stopped and then re-opened in 1978. The investigation confirmed the criminal responsibility of the DINA agent Fernando Laureani. The San Miguel Appeals court ruled in November 1991 that the claim for amnesty and statute of limitations were inadmissible; following an appeal to the Supreme Court, this decision was confirmed on January 28, 1993; at the insistence of the military court a new judgment was issued by the Supreme Court on July 15, 1993, providing instead for the return of the proceedings to the military tribunals; in August 1994 the investigation was suspended under the amnesty law. This ruling was confirmed definitively by the Military Court in January 1995.

11.546. The Commission received a complaint, dated August 21, 1995, against the State of Chile, regarding the violation of the right to justice and the state of impunity in respect of the case of William Robert Millar Sanhueza and Jorge Rogelio Marín Rossel, as a result of the application of the amnesty law. The two Socialist Party activists were detained on September 24, 1973, when they went voluntarily to the Iquique Investigation Center. They were moved on September 29 of the same year to the Iquique Telecommunications Center, where they were seen

by numerous witnesses--and then disappeared. The petitioners took the following legal action under domestic legislation: in December 1986 proceedings were brought before the Iquique Criminal Court in respect of crimes of kidnapping and homicide. The trial was suspended on August 22, 1991 and reopened in November, 1994. The civil court declared itself not competent to rule on the matter and on October 24, 1994, the investigation was transferred to the Military Court, which dismissed the case on November 23 on the basis of the amnesty law. On July 13, 1995, the Martial Court approved the definitive application of the amnesty law.

11.549. The Commission received a complaint dated May 20, 1995, against the State of Chile on the violation of the right to justice and the situation of impunity of the case of Luis Armando Arias Ramírez, José Delimiro Fierro Morales, Mario Alejandro Valdés Chávez, Jorge Enrique Vásquez Escobar and Jaime Pascual Arias Ramírez as a result of the application of the amnesty law. The victims were abducted from their homes on September 22, 1973 by Carabinero officials, who then assassinated them in a sand pit close to their homes, leaving them for dead and failing to notice that one of them was still alive. The petitioners took the following legal action under the internal jurisdiction of Chile: at the end of 1991, criminal charges were brought before the ordinary judge of the 15th. Criminal Court in Santiago, where it was established that a member of the Carabineros of Chile was linked with the crime. The Supreme Court ruled that the case be brought before a military tribunal, as a result of which it was referred to the military courts. The military judge of Santiago granted a complete and definitive dismissal of the case by virtue of the Amnesty Decree Law; on January 11, 1995, the Martial Court confirmed the application of the amnesty law.

11.569. The Commission received a complaint, dated December 18, 1995, regarding the violation of the right to justice and the situation of impunity in respect of the case of Mr. Juan Carlos Perelman, by virtue of the application of the amnesty law. Mr. Perelman and his companion, Gladys Díaz Armijo, were abducted by DINA agents at 10:30 am on February 20, 1975. They were both taken to secret premises at Villa Grimaldi. On February 28, 1975, Mr. Perelman and other abducted persons were taken from the premises. None of them have been seen since that date. Under Chilean internal jurisdiction, the petitioners have taken the following legal action; on March 10, 1975, they filed a writ of amparo, which was rejected in the following month of April. An investigation was undertaken in the Criminal Court and temporarily stopped in March 1976; after a few years, the Military Public Ministry requested that the amnesty be applied in this case, which request was granted by the military judge on July 16, 1993. An appeal against the suspension was brought before the Martial Court, which confirmed the application of the amnesty law in December, 1994. The petitioners filed an appeal against the decision with the Supreme Court, which on October 19, 1995 upheld the admissibility of the amnesty law.

11.572. The Commission received a complaint, dated January 19, 1996, against the State of Chile regarding the violation of the right to justice and the situation of impunity in the case of Mr. Luis Alberto Sánchez Mejías, as a result of the application of the amnesty law. He was arrested at his home in San Gregorio on October 7, 1973, by Carabinero agents who were carrying out an operation there, and executed that same night. The petitioners have taken the following legal action under Chilean internal jurisdiction: on November 22, 1991, criminal proceedings were instituted on the basis of the facts that had been brought before the 10th. Criminal Court of San Miguel; the case was subsequently transferred to the military court; on

August 2, 1994, a Military Judge dismissed the case on the basis of the amnesty law. On January 10, 1995, the Martial Court upheld the ruling of the Military Judge; an appeal was lodged in January, 1995; and on October 25, 1995, the Supreme Court declined the appeal, upholding the admissibility of the amnesty law.

11.573. The Commission received a complaint, dated January 23, 1996, against the State of Chile regarding the violation of the right to justice and the state of impunity in respect of the case of Mr. Francisco Eduardo Aedo Carrasco, as a result of the application of the amnesty law. He was detained on September 7, 1974 by agents of DINA. On the basis of reports from former detainees, it has been established that Mr. Aedo Carrasco was kept in detention in the Cuatro Álamos Detention center up to March, 1975. The petitioners took the following legal action under Chilean internal jurisdiction: on September 9, 1974, they submitted a writ of amparo, which was rejected. A second writ of amparo was lodged in November, 1974, but this was also denied; proceedings were brought before the Criminal Court for suspected violations and for the disappearance; a stay was ruled in the proceedings for suspected violations and the case was referred to the military court, which in September 1982 ruled a stay in the proceedings. The Military Public Ministry requested that the amnesty law be applied and this was granted by the Military Judge on October 30, 1989; an appeal was lodged before the Martial Court, which overturned the stay; a stay in proceedings was again ruled on the basis of the statute of limitation; the ruling was appealed before the Martial Court, which in December 22, 1995 upheld the definitive dismissal; an appeal was lodged before the Supreme Court and rejected on October 25, 1994.

11.583. The Commission received a complaint, dated February 8, 1996, against the State of Chile regarding the violation of the right to justice and the situation of impunity of the case of Carlos Eduardo Guerrero Gutiérrez, as a result of the application of the amnesty law. Carlos Eduardo Guerrero Gutiérrez was arrested on December 31, 1974, by DINA agents. The petitioners carried out the following legal actions under Chilean internal jurisdiction: on January 8, 1975, they lodged a writ of amparo which was denied on April 4 of the same year; the action was referred to the 8th. Criminal Court of Santiago for an inquiry and on October 24, 1975, a stay was ruled; at the request of the Catholic Church, the investigation into the case was re-opened in July 1979 and continued until December of the same year, when jurisdiction was transferred to the Military Court; in November 1980 the Military Judge granted a stay of proceedings, a ruling which was confirmed by the Martial Court on August 18, 1981, following an appeal; in 1989 the Military Court reopened the present case, among many others, and then dismissed it definitively on the basis of the amnesty law; the definitive dismissal of the case was appealed and the ruling upheld by the Martial Court on October 30, 1990; a complaint was filed with the Supreme Court on November 8, 1990 and rejected on December 13, 1993.

11.585. The Commission received a complaint dated February 14, 1996 against the State of Chile regarding the violation of the right to justice and the state of impunity of the case of Máximo Antonio Gedda Ortiz, as a result of the application of the amnesty law. Mr. Gedda Ortiz was detained on July 16, 1974 and taken to a secret compound located on Londres 38, in Santiago. His detention was never recognized by the authorities. The petitioners took the following legal action under domestic legislation: a writ of amparo was filed on July 18, 1974 and rejected on March 31, 1975; on July 22, 1974 charges of kidnapping were brought before the

8th. Criminal Court of Santiago; on May 28, 1975, a stay in the proceedings was granted; the Supreme Court reopened the investigation in April 1979, at the request of the Catholic Church; the trial was moved to the military court on May 19, 1980, due to the imposition of a restraining order on the investigating magistrate; on December 2, 1981, the military judge granted a stay in the proceedings; on May 25, 1983, this ruling was confirmed by the Martial Court; in December 1989, the Military Public Ministry requested that the case be reopened in order that the amnesty law could be applied and the stay changed to a dismissal; the military judge agreed to the request and on October 16, 1990 the Martial Court granted the dismissal; an appeal was submitted to the Supreme Court and on November 12, 1991 it was declined; an appeal for the reinstatement of the case was filed on November 15 and refused on June 30, 1993.

11.595. The Commission received a complaint, dated February 22, 1996, against the State of Chile regarding the violation of the right to justice and the situation of impunity of the case of Joel Huaiquiñir Benavides by virtue of the application of the amnesty law. He was detained at the home of his friend Guillermo Naveas by agents of the National Intelligence Directorate (DINA) on July 27, 1974 and taken to premises at Londres 38, in Santiago; on August 19 of the same year, he was transferred to the Cuatro Álamos camp; subsequently. In September 1974, he was taken from the camp and nothing further was heard of his whereabouts. The petitioners took the following legal steps under internal jurisdiction: on August 2, 1974, a writ of amparo was filed; when it became known that the person in question had been detained and later freed, the writ of amparo was rejected; on December 23, 1974, charges of suspected violations were brought; on June 9, 1975, the civil proceedings were halted and a stay ruled; on July 14, 1975, the Court of Appeal approved this ruling; on August 14, 1991, criminal charges were filed before the Criminal Court and the suspended trial was resumed; on November 11, 1993, the Supreme Court upheld a challenge to the court's competence and the trial was transferred to the military court; on January 12, 1995, the Martial Court confirmed the ruling of the military court that the trial be dismissed by virtue of the amnesty; this ruling was contested before the Supreme Court, which on August 1, 1995 upheld the dismissal, citing also that the statute of limitation applied.

11.652. The Commission received a complaint, dated May 20, 1996, against the State of Chile in respect of the violation of the right to justice and the situation of impunity in the case of Guillermo González de Asís, as a result of the application of the amnesty law. Mr. González de Asís, an activist in the Leftist Movement was abducted on December 12, 1975. The petitioners took the following legal action under domestic legislation: a writ of amparo filed on January 27, 1976 was rejected on February 11, 1976; on February 26, 1976, charges of illegal arrest were brought before the Criminal Court; on January 3, 1978, the judge declared that he was not competent to rule and transferred the case to the military court, where it was dismissed; the ruling was appealed before the Martial Court, which on December 7, 1978 confirmed the stay of proceedings, but on a temporary basis; a complaint was lodged before the Supreme Court, which on April 25, 1980 rejected the appeal; the case was not touched until July 13, 1993 when the military prosecutor requested that it be reopened and that the ruling be changed from a temporary stay to an absolute dismissal, by virtue of the amnesty law and the statute of limitation; on July 16, 1993, the military judge acceded to that request; on August 3, 1993, an appeal was filed; on January 11, 1995, the Martial Court confirmed the definitive dismissal; on January 18, 1995, a complaint was lodged before the Supreme Court, which was rejected on January 30, 1996.

11.655. The Commission received a complaint, dated July 18, 1996, against the State of Chile regarding violation of the right to justice and the situation of impunity of the case of Humberto Menanteau Aceituno and José Carrasco Vásquez, as a result of the application of the amnesty law. The petitioners took the following legal steps under internal Chilean jurisdiction: on December 4, 1975 they brought charges of illegal detention before the 7th. Criminal Court of Santiago; on October 6, 1976 a stay in the proceedings was ruled; at the same time another trial was undertaken in the Buin Maipo Court, due to the discovery of the bodies of these persons; in 1991, the investigation was reopened on the basis of information provided by the Truth Commission; in September 1991, charges of kidnapping, homicide and illegal inhumation were brought against DINA agents; the military court lodged an appeal against the competence of the court and on March 23, 1993, the Supreme Court upheld the decision of the military court; the Military Court of Santiago ruled that the trial be dismissed by virtue of the application of the amnesty law; on December 14, 1994 the Martial Court upheld the dismissal and closed the case; the ruling was challenged before the Supreme Court, which on May 16, 1996, upheld the admissibility of the amnesty law.

11.657. The Commission received a complaint, dated July 29, 1996, against the State of Chile regarding the violation of the right to justice and the situation of impunity in the case of Lumy Videla Moya and her companion Sergio Pérez Molina, as a result of the application of the amnesty law. Ms. Videla Moya, an activist of the Central Committee of the Leftist Revolutionary Movement and her companion were abducted from their home in September 1974 by DINA agents. In November of the same year, Lumy Videla was murdered and her body dumped in the inner courtyard of the Embassy of Italy in Chile. Sergio Pérez Molina is still classified as disappeared. The petitioners took the following legal action under internal jurisdiction: on October 3, 1974, they filed a writ of amparo; on November 7, 1974, murder charges were brought; in 1979, the Supreme Court appointed a Special Investigator to examine the cases of persons who had disappeared during the first years of the military dictatorship; on August 14, 1992, further criminal charges were brought against the DINA in respect of illegal association, torture, kidnapping and homicide; on November 26, 1992 an arrest warrant was issued in respect of former agent Osvaldo Romo Mena. During the investigation, it had been established that Lumy Videla Moya had been subjected to terrible acts of torture before being assassinated and that one of the perpetrators had been former agent Osvaldo Romo Mena; on March 10, 1994, the trial was dismissed by virtue of the applicability of the statute of limitation to the criminal proceedings. This ruling was appealed on March 18, 1994 and on September 27, 1994, the Appeals Chamber of Santiago de Chile overturned the ruling, citing the violation of human rights conventions and the inadmissibility of the statute of limitation in respect of international crimes; on September 29, the accused agent Romo appealed this ruling; on January 30, 1996, the Criminal Chamber of the Supreme Court granted the appeal, annulled the decision of the Appeals Court and upheld the dismissal of the trial on the basis of the amnesty law.

11.675. The Commission received a complaint, dated August 26, 1996, against the State of Chile regarding the violation of the right to justice and the situation of impunity of the case of Eulogio del Carmen Ortiz Fritz Monsalve, as a result of the application of the amnesty law. He was assassinated on February 21, 1975 by DINA personnel. The petitioners took the following legal steps under internal jurisdiction: on October 30, 1990, a complaint was brought before the 10th. Criminal Court of Santiago; on November 18, 1993, charges were filed against DINA

agent Basclay Zapata Reyes; the judge of the 10th. Criminal Court declared himself not competent to try the case; on April 12, 1995, a military judge dismissed the application on account of the amnesty law; on May 12, 1995, an appeal was lodged with the Martial Court; on October 26, 1995, the dismissal of the trial was confirmed by the Martial Court; an annulment was sought on November 2, 1995 and was granted by the Supreme Court on July 24, 1996, confirming the dismissal of the trial by virtue of the amnesty law.

11.705. The Commission received a complaint, dated November 7, 1996, against the State of Chile regarding the violation of the right to justice and the situation of impunity of the case of Mr. Mauricio Eduardo Jorquera Encina, as a result of the application of the amnesty law. Mr. Jorquera, an activist with the Revolutionary Leftist Movement (MIR), was detained on a public thoroughfare by agents of the DINA on August 5, 1974. He was transferred, injured, to the DINA prison in the center of Santiago, where he was seen by other political prisoners, who later confirmed having seen him there and at other locations. His name appeared in a list of 119 Chilean nationals who had supposedly died while abroad in 1975. The petitioners took the following legal steps under internal jurisdiction: on August 20, 1974, a writ of amparo was submitted; on April 1, 1975, a decision was taken to reject the writ; the file was transferred to the Criminal Court. Investigations confirmed the responsibility of DINA agent Osvaldo E. Romo Mena; on October 7, 1994, the Military Court filed a motion challenging the competence of the Criminal Court, requesting it to disqualify itself and turn over the file. This motion was denied by the judge of the criminal court; on July 20, 1995, the Supreme Court annulled the competence of the criminal court and awarded jurisdiction of the proceedings to the Military; on December 20, 1995, the Military Judge ruled in favor of a dismissal by virtue of the amnesty; on June 25, 1996, the petitioners filed an appeal before the Supreme Court for an annulment of that decision; on October 7, 1996, the second chamber of the Supreme Court rejected the appeal.

III. THE ADMISSIBILITY OF THE CASES

6. The Commission is competent to consider these cases pursuant to Article 44 of the American Convention on Human Rights, to which Chile is a State Party, these being claims alleging violations of rights guaranteed under Article 25, regarding the right to effective legal protection, as well as Articles 1.1, 2, and 43 on the duty of States Parties to comply with and ensure compliance with the Convention, to adopt provisions within their domestic legislation in order to ensure observance of the norms set forth in the Convention. They also have a duty to inform of this to the Inter-American Commission on Human Rights.

7. The complaints fulfill the formal requirements of admissibility set forth in Article 46.1 of the Convention and Article 32 of the Regulations of the Commission. Their files indicate that the petitioners have exhausted the remedies provided for under Chilean domestic law or, pursuant to the special provision of paragraph 2 of Article 46, are exempt from this requirement, insofar as, in accordance with jurisprudence established by the Supreme Court itself, they can expect no amparo in their claims against the application of the amnesty law.

8. The claims are not pending settlement in another international proceeding, neither are they a repeat of a previous petition already examined by the Inter-American Commission on Human Rights.

IV. FRIENDLY SETTLEMENT

9. The friendly settlement procedure set forth in Article 48.1 (f) of the Convention and Article 45 of the Regulations of the Commission was repeatedly proposed by the Commission to the parties but no settlement was reached.

10. As no friendly settlement was reached, the Commission must comply with the provisions of Article 50.1 of the Convention and issue its findings and recommendations on the matter placed before it.

V. IMPLEMENTATION OF THE PROCEEDINGS SET FORTH IN THE Convention

11. In observance of established rules of procedure, the Commission has in the course of the proceedings granted equal opportunity to the Government of Chile and to the petitioners to defend their case, and has weighed with absolute objectivity the evidence and allegations submitted by the party. It has complied with and exhausted all the legal and regulatory proceedings set forth in the American Convention on Human Rights and the Regulations of the Commission.

VI. ALLEGATIONS PRESENTED BY THE STATE OF CHILE

12. The State of Chile alleges that it has not issued any amnesty law that is incompatible with the American Convention on Human Rights, as Decree Law 2191 was issued in 1978 under the de facto military regime. It requests that the Commission, in considering these cases, take into account the historical context surrounding the events and the special situation of the return of the country to a democratic regime which obliged the new government to accept the rules imposed by the de facto military regime, which could only be modified in accordance with the law and the Constitution.

13. The Government has sought to have the Decree Law repealed, but the relevant constitutional provision requires that any initiatives concerning matters of amnesty be tabled from the Senate (Article 62 (2) of the Constitution), where a majority in favor does not exist because of the number of persons in that Chamber who were not elected by popular vote. Furthermore, the democratic government has called upon the Supreme Court to declare that the amnesty cannot be an obstacle to the investigation and punishment of crimes.

14. The report of the National truth and Reconciliation Commission has identified the victims of the violations of fundamental rights, under the military dictatorship, and the cases of the persons included in these complaints are among them; the report recognized that the cases of these persons represented serious violations in which state agents had been implicated and as it was not possible to establish the whereabouts of the victims, they had been listed as "disappeared detainees".

15. Law 19.123 passed at the initiative of the democratic government grants to the family members of the victims a life-long pension in an amount no less than the average income of a

family in Chile; provides a special procedure for the declaration of presumed death; grants special attention from the state in matters of health, education and housing; writes off any educational, housing and tax debts as well as other debts to state enterprises, and exempts the children of the victims from obligatory military service.

16. The democratic Government expressed its conformity with the judgment of the petitioners with respect to the nature of Decree Law No. 2191 of 1978, under which the most serious crimes committed in the history of Chile remained unpunished and the appeals for redress suspended and rejected. However, it requested that the Inter-American Commission on Human Rights state in its final report that the democratic Government of Chile is not liable or responsible in any way for the human rights violations listed in the claims of the petitioners in the present case.

VII. OBSERVATIONS OF THE COMMISSION ON THE ALLEGATIONS OF THE PARTIES

A) Preliminary Considerations

a. Competence of the authorities which issued the amnesty

17. The Amnesty law 2191 of 1978 emanated from the military regime which overthrew the constitutional Government of President Salvador Allende in September, 1973. It emanates, therefore, from authorities which lack the credentials and right, as they were not elected or appointed in any way, but usurped power after deposing the legitimate Government, in violation of the Constitution. A de facto Government lacks the legal authority, for if a State has adopted a Constitution, anything which runs counter to it also runs counter to the Law.

18. Not even in the interest of preserving judicial integrity can a de jure government be placed on the same juridical standing as an arbitrary and illegitimate government that has usurped power and whose existence is by definition responsible for the lack of judicial integrity. Such governments deserve constant repudiation in defense of the Constitutional State of Law and the respect for the democratic way of life and the principle of sovereignty of the people, based on full respect for human rights.

19. Those that benefited from the amnesty in the cases dealt with in this report were not disinterested parties, but the very accomplices of the acts perpetrated in keeping with the plans of the former military regime. It is one thing to have to legitimize acts of the society as a whole (so as to prevent chaos) and acts implying international responsibility, because obligations assumed in this area cannot be evaded. But it is an entirely different matter to grant equal treatment to those who acted with the illegitimate government, in violation of the Constitution.

20. The Commission considers that it would be absurd to pretend that the usurper and its supporters could invoke the principles of Constitutional Law, which they violated, in order to benefit from the type of protection that is only justified and merited by those who adhere strictly to its precepts. The actions taken by the usurper can under no circumstances be considered valid or legitimate, including when these actions are taken in behalf of the illegal or de facto officials.

If those who collaborate with illegal and usurper regimes can be assured of impunity of conduct due to their association with such regimes, there can be no difference between what is legal and what is illegal, between what is constitutional and what is unconstitutional, and between what is democratic and what is not.

21. The Chilean constitutional order must necessarily allow the Government to fulfill its fundamental obligations and release it from limitations imposed by the military usurper regime and which are contrary to the Law, since it is not juridically acceptable that the constitutional Government should be limited in its efforts to consolidate democracy; neither is it acceptable that the actions of the de facto regime be given the attributes of a de jure Government. The de jure Government recognizes its legitimacy not in the norms emanating from the usurper, but in the will of the people, the sole repository of a nation's sovereignty.

b. Chilean constitutional law

22. The foregoing is consistent with Chilean Constitutional Law. Article 158 of the Chilean Constitution of 1833 provided that "any resolution adopted by the President of the Republic, the Senate or the Chamber of Deputies in the presence of or at the command of an army, a general in command of the armed forces, or any gathering of people, with or without arms, which should fail to heed the authorities, ceases to have legal effect and is null and void under the law". The 1925 Constitution, for its part, declared that: "No magistrate, no person or group of persons may ascribe to itself any authority or rights unless expressly conferred under the law, not even on the grounds of force majeure. Any action in contravention of this article is null and void." (Article 4)

23. The very Constitution which was approved by Decree Law under the military regime, provided as follows: "No Magistrate, no person nor group of persons may ascribe to itself any authority or rights other than those expressly conferred by the Constitution or laws. Any action in contravention of this Article is null and void, and shall give rise to the liabilities and sanctions under the law." (Article 7, second paragraph)[FN1] While Article 5 of the same document provides that: "the exercise of sovereignty is constrained by respect for the basic rights which derive from human nature," adding that no sector of the society or individual may ascribe onto itself its exercise.

[FN1] Political Constitution of the Republic of Chile, approved by Decree-Law No. 3.464 of August 11, 1980.

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c. Fundamental rights and liberties of persons, and the State

24. Fundamental rights and liberties do not cease to exist under a de facto government. These rights take precedence and are not the creation of any State or Constitution and as such, must be recognized and guaranteed at all times. It is therefore wrong to affirm that a de facto regime has limitless illegitimate or unconstitutional authority. Therefore, a government which is charged with the systematic violation of the fundamental rights of its subjects, by exonerating itself through an amnesty, commits a serious abuse of power.

25. In this regard, Professor Christian Tomuschat: " To maintain that in certain cases we must comply with invalidated laws and their unrelenting enforcers, would be tantamount to conferring on the State a divine quality untainted by the most hateful and atrocious acts." See "On the fight against human rights violations", UNESCO, 1984, p. 26).

d. International Human Rights Law

26. International human rights law reaffirms this concept, in the light of which Articles XX of the American Declaration and 23.1a and b., of the Convention have been established, and are made irrevocable under Article 27.2 of the Convention.

27. The foregoing is also reaffirmed in Article 3 of the OAS Charter, in that the principle of the solidarity of American States rests on the common denominator of "the effective functioning of representative democracy."

The Inter-American Court of Human Rights

28. The Inter-American Court of Human Rights defines as "law", "a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of the States Parties for that purpose". (our underlining) (OC/6, para. 38). This definition was based on the analysis of the principles of "legality" and "legitimacy" and of the democratic regime within which the inter-american system of human rights is included functions (OC/6, paras. 23 and 32.), as set for in its OC/13, para. 25. For the Court, "there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law" (OC/8, para. 24). This unequivocal adherence to the democratic regime has been noted by the Court: "Representative democracy is the determining factor through out in the system of which the Convention is a part." (OC/13, para. 31). This completes the criteria on "the just principles of democracy" which must guide the interpretation of the Convention , and particularly of those injunctions specifically relating to the preservation and function of democratic institutions (OC/5, para. 44; 67 and 69). Neither must we forget the basic precept of the Court which stresses the importance of the elected legislature in the protection of fundamental rights (OC/8, paras. 22 and 23) and the position with regard to the control of the legitimacy of the acts of executive Authority by the Judiciary. (OC/8, pars.29 and 30; OC/9, para. 20)

The Inter-American Commission on Human Rights

29. The IACHR has declared its position on this matter on many occasions. For instance it has stated that "democracy is a necessary element for the establishment of a societal model where the highest of human values can flourish. [see, Ten Years of Activities 1971-1981, p.331], alluding to the excessive power accorded to organs which do not represent the will of the people [id.p.270]. This was also expressed in the report on Panama (1978) p. 114. para. 3. Annual Report 1978/80 pp.123/24; in an analysis of a draft political Constitution for Uruguay; in its report on Suriname dealing with public participation even at the level of formulating constitutional provisions (1983), p. 43 para. 41; in questioning the validity of the Chilean

election which took place during the suspension of public liberties [Report 1978/80, p.115]; and in the decision of the Ríos Montt vs. Guatemala case.

The universal system

30. With reference to the universal system it is fitting to note a) the United Nations Charter and its preamble ("We, the peoples of the United Nations.."); in its reference to the "free self-determination of peoples" and to the "development and fostering of the respect for human rights and the fundamental liberties of all peoples..."; b) Article 29 of the Universal Declaration; c) the International Covenant on Civil and Political Rights and d) the statement by the Human Rights Committee on Ngaluba vs. Zaire, paras. 8.2 and 10 about the denial of the right to participation on an equal basis in the conduct of public affairs as a result of sanctions imposed on eight parliamentarians.

Usurper government and democracy

31. The Commission considers therefore, that representative democracy is the fundamental premise upon which the political and legal organization of the American States is based. De facto governments do not therefore conform to the requirements of the American Convention on Human Rights.

B) General Considerations

32. The petitioners are raising a point of law. They are seeking to determine whether the above-mentioned Decree-Law and the manner in which it was applied by the Chilean courts is in accordance with the Convention, to the extent that none of the alleged acts have been disputed and that it is not necessary to confirm any of the acts.

33. The democratic government denied all responsibility for the acts perpetrated by the military dictatorship but recognized its obligation to investigate past human rights violations and established a Truth Commission to ascertain the facts and publish its findings. As a gesture to the families of the victims, ex-President Aylwin sought their forgiveness on behalf of the State of Chile. In addition, the ex-President publicly protested the decision of the Supreme Court that the Amnesty Decree Law should be applied in a manner which would suspend all investigations into the facts.[FN2] The Democratic Government, citing its inability to change or repeal the Amnesty Decree-Law and its obligation to respect the decisions of the Judiciary, maintained that the measure already adopted would be sufficiently effective to fulfill Chile's obligations under the Convention, and that any further steps were thereby rendered unnecessary.

[FN2] Former President Aylwin has pointed out that: "Justice also demands that the whereabouts of the disappeared and the identity of those individuals responsible for their fate be revealed. With regard to their whereabouts the truth set forth in the report (of the Commission for Truth and Reconciliation) is incomplete, since in most of the cases involving detainees who disappeared or persons executed, their remains have not been returned to the families and therefore the Commission had no way of tracing them."

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34. The petitioners, while recognizing the effort of the government, maintain that these efforts have been insufficient and ineffective and that the Government has an immutable obligation to make a thorough investigation of the facts, to establish who should be held accountable, and to punish those responsible for the human rights violations which have taken place.

35. As has already been revealed, the adoption of the Amnesty Decree Law did not conform to the constitutional provisions in effect in Chile when it was passed. However, independent of the legality or constitutionality of the laws in relation to the Chilean jurisprudence, the Commission is authorized to examine the legal effects of a legislative, judicial or any other measure, insofar as it may be incompatible with the rights and guarantees enshrined in the American Convention.[FN3]

[FN3] The Court has declared that "Within the terms and attributes granted by Articles 41 and 42 of the Convention, the Commission is competent to find any norm of the internal law of a State Party to be in violation of the obligations the latter has assumed upon ratifying or adhering to it. I/A Court H.R. Advisory Opinion No. 13, July 16 1993, Operative Part I.
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36. On the question of international responsibility with regard to the issuing and applying laws in violation of the Convention (Articles 1 and 2 of the Convention), the Court stated that: "As a result of the foregoing, the Commission may recommend to a State the derogation or amendment of a conflicting norm that has come to its attention by any means whatsoever, whether or not that norm has been applied to a concrete case."[FN4]

[FN4] I/A Court H.R. Advisory Opinion No. 14, December 9, 1994, para. 39.
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37. The Convention established in Article 2 the obligation of the States parties to adopt "such legislative or other measures" to give full effect to the rights and liberties enshrined in the Convention. Therefore, the Commission or the Court are authorized to examine--in the light of the Convention--domestic laws which are alleged to suppress or violate rights and liberties established in the Convention.[FN5]

[FN5] Report No.29/92, Annual Report of the Inter-American Commission on Human Rights 1992-1993, para.32.
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38. Considering the nature and the seriousness of the crimes which are affected by the amnesty decree, it is important to bear in mind that the military government which was in power in the country from September 11, 1973 until March 11, 1990, carried out a systematic strategy

of repression which resulted in thousands of victims of "disappearances", summary executions without trial, and tortures. The Commission, referring to the practices of that military Government, noted that:

....that Government [had] used practically every known method to physically eliminate all dissidents, including: disappearances, summary executions of individuals and groups, executions ordered during proceedings held without legal guarantees, and tortures.[FN6]

[FN6] Inter-American Yearbook on Human Rights 1985, Martinus Nijhoff Pub. 1987, p. 1063.

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39. Some of these crimes are considered sufficiently serious to justify the adoption in various international instruments, of specific measures to avoid their impunity, including universal jurisdiction and the non-prescriptibility of the crimes.[FN7]

[FN7] The Inter-American Convention to Prevent and Punish Torture as well as the Inter-American Convention on Forced Disappearance of Persons established universal jurisdiction for the crimes in question (Article 11 and Articles V and VI respectively). The Convention on Forced Disappearance also established in its Article VII, the invalidity of the statute of limitations or, if that proves impossible, the application of the limitation which applies to the gravest of crimes.

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40. On the question of the practice of disappearances the General Assembly of the Organization of American States has declared "that the forced disappearance of persons in the Americas is an affront to the conscience of the hemisphere and constitutes a crime against humanity."[FN8] In its 1988 decision in the case of Velásquez Rodríguez the Inter-American Court observed that international principles and practice have repeatedly characterized the disappearances as a crime against humanity.[FN9] The Inter-American Convention on Forced Disappearance of Persons reaffirms in its preamble that "the systematic practice of forced disappearance of persons constitutes a crime against humanity."[FN10] The society's need for a clarification and investigation of these crimes must not be equated with the normal demands of a mere common crime.[FN11]

[FN8] Res. AG/RES. 666 (XIII/O/83).
[FN9] I/A Court H.R. Velásquez Rodriguez Case, Judgment of July 29, 1988, para. 153.
[FN10] Inter-American Convention on the Forced Disappearance of Persons, Resolution adopted during the seventh plenary session, June 9, 1994 OAS/Ser P AG/doc. 3114/94 rev.
[FN11] See AG/RES. 443 (IX-0/79); 742 (XIV-0/84); 950 (XVIII-0/88); 1022 (XIX-0/89) and 1044 (XX-0/90 and IACHR, Annual Reports 1978; 1980-81; 1981-82; 1985-86; 1986-87 and other special reports such as that of Argentina (1980), Chile (1985) and Guatemala (1985).

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a) The question of the Amnesty Decree Law

41. The problem of amnesties has been considered by the Commission on various occasions, in claims made against States parties to the American Convention which, seeking mechanisms to foster national peace and reconciliation, have resorted to amnesties. By so doing, they have abandoned an entire group, including many innocent victims of violence, who feel deprived of the right to seek remedy in their rightful claims against those who committed acts of barbarity against them.[FN12]

[FN12] See Annual Report of the Inter-American Commission on Human Rights 1985-1986, p. 193.

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42. The Commission has repeatedly noted that the application of amnesties renders ineffective or invalid the international obligation of States parties imposed by Article 1.1 o the Convention. Consequently they constitute a violation of said Article and they eliminate the most effective measure for the exercise of those rights - the trial and punishment of the responsible individuals.[FN13]

[FN13] Reports No. 28/92, Argentina, and 29/92, Uruguay, Inter-American Commission on Human Rights 1992-1993.

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43. As the petitioners have clearly stated, their claims do not concern human rights violations resulting from the illegal detention and disappearance of the persons mentioned in their claims, acts which had been perpetrated by agents of the State of Chile during the former military regime, but rather the fact that Amnesty Decree Law 2191, which was enacted by the military government, has not been repealed and has consequently remained in effect under the democratic government, even after Chile has ratified the American Convention and acceded to its conditions. Their claims concern the fact that there has been neither trial nor identification of those responsible nor punishments meted out against the perpetrators of these acts and that this situation which began during the military regime still prevails under the rule of the democratic and constitutional government.

44. The democratic Government of Chile recognizes the close relationship existing in these cases between amnesty and impunity, and for that reason it enacted law No. 19.123, which compensated the relatives of the victims of human rights violations. By the same token, it considers as a whole the violation of the rights of the victims, from the moment of their arrest to the denial of justice.

45. The denounced acts cause on the one hand the non-fulfillment of the obligation assumed by the Chilean State to bring the provisions of its domestic law in line with the precepts of the American Convention. This violates Articles 1.1 and 2 and on the other hand, its application, the

wrongful denial of the right to due legal process for the disappeared persons named in the claims. This violates Articles 8 and 25 in connection with 1.1.

46. The Commission has taken into account that the democratic government went to the Supreme Court in March 1991, urging that it consider that the amnesty in effect should not and could not legally be an obstacle to the investigation and the identification of those responsible and that it has vetoed a law which could have lent further support to the Amnesty.

47. The Commission recognizes and advocates the importance of the creation of the National Commission for Truth and Reconciliation and also the work which the latter has carried out in gathering antecedents on prior cases on human rights violations and detainees who disappeared, out of which came a report identifying individual victims--and among them cases of persons named in the claims--tried to establish their whereabouts and measures of compensation and redress for each one. It recognized that the cases of these persons constitute serious violations of fundamental rights on the part of State agents. These victims, whose whereabouts have not been determined, are classified as "disappeared detainees".

48. Law No. 19.123, an initiative of the Democratic Government, deserves equal recognition. It grants the relatives of the victims a) a lifetime pension in an amount no less than the average income of a Chilean family; b) special process for the declaration of presumed death; c) special State concessions in the areas of health, education and housing; d) exemption from certain taxes and educational, housing and other debts owed to statutory bodies; and e) exemption from compulsory military service of the children of the victims.

49. The Chilean State has asserted that the revoking of the decree law of amnesty will not have an effect on the defendants as a consequence of the principle of non-retroactivity of the criminal law contemplated in Article 9 of the American Convention and 19.3 of the Constitution of Chile. In this regard, the Commission notes that the principle of non-retroactivity of the law means that no one can be sentenced for actions and omissions that in the moment of being committed were not a crime according to the applicable law, could not be used by those granted amnesty since at the moment in which the punishable events that were alleged to have occurred were stipulated and punished by the Chilean law in force.

50. These measures, however, are not sufficient to guarantee the human rights of the petitioners, in keeping with the terms set forth in Articles 1.1 and 2 of the American Convention on Human Rights, for as long as they continue to be denied the right to justice.

b) The denial of justice

51. In such cases, the violation of the right to justice and the consequent impunity that it generates represent, as has been established, a confluence of events which begin when the military government issues for its own benefit or for the benefit of the agents of the state who committed violations of human rights, a series of regulations designed to create a complex juridical web of impunity. These developments began formally in 1978, when the military government adopted Decree Law 2191 on amnesty.

52. The democratic government also condemns the Decree Law on amnesty and its effects, and has stated the following: " The constitutional government cannot but agree with the petitioners contesting Decree Law 2191, of April 1978, which sought to absolve responsibility for the most serious crimes ever committed in our history".

53. Consequently, the Chilean State, through its Legislature, is liable for the failure to amend or repeal Decree Law 2191 of 19-4-78, which is a violation of the obligations assumed by this State to ensure conformity of their laws with the precepts of the Convention, pursuant to Articles 1.1 and 2.

c) The violation of the right to judicial guarantees (Article 8)

54. The complaint alleges that the juridical consequences of the amnesty are incompatible with the Convention, as they violate the right of the victim to a fair trial, as provided for in Article 8, which protects the right of all persons to due process "in the substantiation of any criminal accusation brought against them...".

55. While the State has an obligation to make available effective remedies (Article 25), which should be "substantiated in accordance with the rules of due legal process" (Article 8.1),[FN14] it is noteworthy that in many criminal law systems in Latin America, the victim has the right to file charges in a criminal action. In the Chilean system which allows this, the victim of a crime has the fundamental right of recourse to the tribunals.[FN15] This right is vital in the operation and advancement of criminal proceedings. The amnesty decree clearly affected the right of the victims conferred under Chilean law to institute criminal proceedings before the courts against those persons accused of human rights violations.

[FN14] I/A Court H.R. Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26 1987, para. 91.

[FN15] Chilean Code on Criminal Procedure, Title II, " Of Penal Action and Civil Action in Penal Process", Articles 10-41.

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56. Even if these cases did not involve crimes against the public good which are subject to prosecution, the State has the legal, exclusive and irrevocable right to investigate them. For this reason in any event, the State of Chile is the repository of the legal action, and is obliged to promote and advance the various stages of the proceedings, in accordance with its duty to guarantee the right to justice of the victims and their families. This responsibility should be assumed by the State as a juridical duty in its own right and not respond to or depend on special interests, or the supply of evidence by them.[FN16]

[FN16] I/A Court H.R. Velásquez Rodríguez Case, Judgment of July 29, 1988, para. 79.

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57. The Decree Law also precluded the families of the victims from obtaining compensation in civil tribunals. Article 8 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... for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature,

58. The right to bring a civil suit, under Chilean legislation, is not necessarily linked to the result of the criminal trial. Nevertheless, a civil suit must be filed against a specific person in order that liability may be determined in respect of the alleged events and the payment of compensation decided. The failure of the State to investigate made it physically impossible to establish liability before the civil tribunals. Notwithstanding the fact that the Supreme Court has stressed that civil and criminal proceedings are independent of each other,[FN17] the manner in which the amnesty was applied by the tribunals affected the right to seek compensation under civil law as a direct result of the impossibility of identifying any individuals responsible

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[FN17] Supreme Court of Chile. Decision on inadmissibility of Decree-Law 2191, August 24, 1990, para. 15; and Decision on clarification, September 28, 1990, para. 4.

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59. The amnesty law, as applied and interpreted by the Chilean tribunals, prevented the petitioners from exercising their right to a fair trial to determine their civil rights, as provided for in Article 8.1 of the Convention.

d) The violation of the right to judicial protection (Article 25)

60. The complaint alleges that the victims and their families were deprived of the right to effective recourse, as provided for in Article 25 of the Convention, which confers protection from any acts which violate their rights.

61. On the question of the legal obligation of states to make available effective internal remedies, the Inter-American Court of Human Rights has stated the following:

Under the Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8 (1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1).[FN18]

[FN18] I/A Court H.R. Velásquez Rodríguez Case, Preliminary Exceptions, June 26, 1987, para. 91.

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62. The Court has further added that suitable remedies "are those which are suitable to address an infringement of a legal right."[FN19]

... the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Convention or by law or that it be formally recognized, but rather it must be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress.[FN20]

[FN19] I/A Court H.R. Velásquez/Rodríguez Case. Judgment of July 29, 1988, para. 64.
[FN20] I/A Court H.R. OC-9/87. para. 24.

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63. The amnesty decree was a general procedure by virtue of which the State declined to punish certain serious crimes. Moreover, the manner of application of the decree by Chilean courts not only precluded the possibility of punishment of the perpetrators of human rights violations, but also prevented any charges from being brought and the names of those responsible for the violations (beneficiaries of the decree) from being revealed; under the law, they were therefore considered as not having committed any illegal act.

64. The amnesty decree law gave rise to juridical inefficacy with respect to crimes; the victims and their families were left with no legal recourse by which perpetrators of human rights violations committed under the military dictatorship could be identified and the corresponding punishment imposed.

65. By promulgating and ensuring compliance of de facto Decree Law 2191, the Chilean State ceased to guarantee the rights to legal protection provided for under Article 25 of the Convention.

e) Non-compliance with the obligation to investigate

66. In its interpretation of Article 1.1 of the American Convention on Human Rights, the Inter-American Court stipulates that "The second obligation of the States Parties is to "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction... As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention..."[FN21]The Court pursues its analysis in several paragraphs:

What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible.[FN22] The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure

the victim adequate compensation.[FN23] If the State apparatus acts in such a way that the violations goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.[FN24] With respect to the obligation to investigate, the Court points out that such investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government."[FN25]

[FN21] I/A Court H.R. Velásquez Rodríguez Case, Judgment of July 29, 1988. para. 166.
[FN22] Idem, para. 173.
[FN23] Idem, para. 174.
[FN24] Idem, para. 176.
[FN25] Idem, para. 177.

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67. The National Truth and Reconciliation Commission established by the democratic Government to investigate human rights violations committed in the past, examined most of the total number of cases and granted reparation to the victims and their families. Nevertheless, the investigation carried out by the Commission into cases involving the violation of the victims' right to life as well as the victims of other violations provided no legal recourse or any other type of compensation.

68. Moreover, the National Truth and Reconciliation Commission was not a judicial organ and its work was restricted to establishing the identity of victims of the violation of the right to life. By the very nature of its mandate, that Commission was not authorized to publish the names of persons who had committed the crimes nor impose any type of sanction. For this reason, despite the important role it played in establishing the facts and granting compensation, the Truth Commission cannot be seen as a viable alternative to judicial process.

69. The Truth Commission concluded in its Report that:

From a strictly preventative viewpoint, this Commission considers that an indispensable element for achieving national reconciliation and thus avoiding the repetition of past events, could be the full exercise by the State of its punitive faculties. Full and effective protection of human rights is only conceivable in a real state of law. A real state of law presupposes that all citizens are subject to the law and judicial tribunals; it further presupposes the use of sanctions provided for under penal legislation, to be equally applied to all who transgress the provisions governing the protection of human rights."[FN26]

[FN26] Retting Report (1991), Vol. 2, p. 868.

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70. The admission of responsibility by the Government, a partial investigation of the facts and the subsequent payment of compensation are not, in themselves, sufficient to fulfill the obligations provided for in the Convention. In accordance with the provisions of Article 1.1 of the Convention, the state has the obligation to investigate violations committed within its jurisdiction, in order to identify those responsible, to impose the necessary sanctions and ensure adequate reparation to the victim.[FN27]

[FN27] I/A Court H.R. Velásquez Rodríguez Case, Judgment of July 29, 1988, para. 174.

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71. By authorizing de fact Decree Law 2191 on amnesty, the State of Chile failed to comply fully with the obligation stipulated in Convention Article 1.1, and thus violated, to the detriment of the claimants, the human rights recognized by the American Convention.

f) The international responsibility of the State

72. The Commission in this present case is not considering the allegations with respect to the responsibility of the Executive, Legislative and Judiciary of Chile, but rather the international responsibility of the State of Chile.

73. The active and passive participation of agents of the Chilean States in the actions reported in this case has been established, and at no time has the government denied such participation.

74. The Government of Chile acknowledges the following: that Decree 2191 is contrary to Law; that there is a close link between amnesty and impunity; that the successive acts of violation of the right to justice are an integral part of the violation of the victims' rights, from the moment of their detention to when justice is denied them; it further states that the amnesty decree law "represents in itself a whole policy of systematic and mass violation of human rights which in the case of forced disappearances, starts with the kidnapping of the victim followed by the secret detention and death, continues with a denial of the facts and concludes with the amnesty offered to public agents."[FN28]

[FN28] Government of Chile. Note of May 20. 1994, p. 5, para. 17.

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75. As an organ of the Executive, the Government of Chile considers that it is not liable in any way for the violations denounced by the petitioners, since the democratic government has promulgated no law on amnesty; that it has not been possible to repeal the law for reasons already stated; that the same limitation exists with respect to the bringing of domestic provisions in line with the American Convention on Human Rights; that with respect to the application of the Amnesty Decree, it can only act within the confines of the law and the constitution which determine its competence, responsibilities and capabilities.

76. Amnesty Law 2191 and its legal effects are part of a general policy of human rights violations by the military regime that governed Chile from September 1973 to March 1990. Although this law was enacted under the regime of General Augusto Pinochet, it is still applied each time a complaint of human rights violation is brought against the military government or its agents in Chilean courts. The continued application of the amnesty law by a democratic government even after the end of the military regime which enacted this law, has legal implications which are incompatible with the provisions of the American Convention on Human Rights.

77. Even if the Executive, Legislative and Judicial Powers are separate and independent within Chile, these three organs of the State comprise the one and indivisible State of Chile, which in the international sphere, cannot be treated as three separate entities. Chile therefore assumes international responsibility for acts carried out by its public authority which may contravene international commitments deriving from international treaties.[FN29]

[FN29] Brownlie, Ian Principles of Public International Law. Clarendon Press. Oxford 1990, 4th ed. P. 446-52; Benadava, Public International Law. Ed. Jurídica de Chile, 1976, p. 151.

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78. From the standpoint of international law, the State of Chile cannot justify non-compliance with the Convention by asserting that the Amnesty Decree was issued by the previous government or that the refusal or omission of the legislative in the derogation of the law or that actions by the Judiciary which confirm its application are all independent of the position and responsibility of the democratic Government, since the Vienna Convention on the Law of Treaties established in Article 27 that a State may not invoke the provisions of its domestic law to justify non-compliance with a treaty. The Inter-American Court has asserted that: "under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law."[FN30]

[FN30] I/A Court H.R. Velásquez Rodríguez Case. Judgment of July 29 1988, para. 170.

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79. Notwithstanding the regime that issued the law or the State organs that applied it or facilitated its application, the State of Chile is responsible for the violations incurred by Decree Law 2191, which was not repealed by the present Legislative and which was applied by the Judiciary. Although the events occurred under the previous military regime, the State of Chile still bears responsibility , as these events have still not been investigated, nor has any punishment been meted out. In accordance with the principle of the continuity of the State, international responsibility exists independently of changes of government. To this effect, the Inter-American Court on Human Rights has stated that "According to the principle of the continuity of the State in international law, responsibility exists both independently of changes of government over a period of time and continuously from the time of the act that creates responsibility to the time when the act is declared illegal. The foregoing is also valid in the area of human rights although,

from an ethical or political point of view, the attitude of the new government may be much more respectful of those rights than that of the government in power when the violations occurred."[FN31]

[FN31] Ibidem, para. 184.

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80. The non-compliance by the State so Chile with the provision of Articles 1 and 2 of the Convention is demonstrated by the fact that Decree Law 2191 enacted under the military dictatorship which took power between 1973 and 1990 has not been derogated by the present Legislative, but has remained in force; that the domestic legislation of Chile has not been adapted to comply with the norms of the Convention; and that as was stated by the present judicial organ, such domestic legislation prevails for ongoing judicial processes.

81. Following ratification of the American Convention of Human Rights, the failure by the Legislative and the Judiciary, within their respective areas of competence, to adapt domestic provisions of Chile to give full effect to the Convention, the non-derogation of the de fact Decree Law, as well as the consequent application of such law in the case under consideration have caused the State of Chile to be in violation of the Convention.

82. Notwithstanding that the amnesty decree was promulgated before the democratic Government came to power and before the Convention was ratified, the responsibility imputable to the State of Chile derives from the fact that its domestic legislation has not been amended to comply with the terms of the Convention and that the judicial organs has (arbitrarily) declared such decree constitutional; its effects have therefore been maintained over time, as may be seen in the application of this decree which has the power to violate human rights.

83. A representative of the military regime which seized power from President Allende declared before the United Nations Committee on Human Rights that the Covenant on Civil and Political Rights has been in force in Chile since 1976.[FN32] For its part, in accordance with Article 5.2 of the Political Constitution of Chile, conformity of national provisions with international ones is obligatory for the purpose of Chilean tribunals.[FN33]

[FN32] See: Committee, 4th Session. Examinations of the reports presented by the States Parties... Preliminary reports... Chile CCPR/C/1 add. 25, p. 48, April 27, 1976.

[FN33] See: Detzner: "Chilean Courts and International Law on Human Rights". Chilean Commission on Human Rights/Academia de Humanismo Cristiano. Santiago, 1988. Chapter IV, p. 182.

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84. The States Parties to the Convention undertake the responsibility and obligation to ensure respect for and guarantee to all persons under their jurisdiction the rights and liberties recognized by the Convention; and to change or adapt their legislation to ensure the full effect and exercise

of these rights and liberties. The State of Chile by not complying with this obligation is in violation of Articles 1 and 2 of the Convention.

The Right to Know the Truth

85. Pursuant to the American Convention, the State has the duty to ensure the right of the victims' families and of society as a whole, to know the truth of the facts connected with the serious violations to human rights which occurred in Chile, as well as the identity of those who committed them. Such an obligation is primarily established in Articles 1.1, 8, 25 y 13 of the Convention.

86. According to Article 1.1, States Parties must "respect" the rights enshrined in the American Convention as well as "ensure" their free and full exercise. Such a duty, as explained by the Inter-American Court, involves the true "obligation to do something" in order to effectively guarantee such rights.[FN34] Pursuant to this obligation, the Chilean State is in a position where it has the legal obligation to reasonably prevent human rights violations. It must also, according to the means at its disposal, investigate the violations committed within its jurisdiction, identify those responsible and impose the pertinent sanctions on them, as well as ensure the adequate reparation of the consequences suffered by the victim.[FN35]

[FN34] "The second obligation of the States Parties is to "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation." I/A Court H.R Velásquez Rodríguez Case, Judgment of July 29 1988, Series C No. 4 (1988), para. 166, Godínez Cruz Case, Judgment of January 29 1989, Series C No. 5 (1989), para. 175.
[FN35] I/A Court H.R. Velásquez Rodríguez Case, Ibidem., para. 174; Case Godínez Cruz, ibidem, para. 184.

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87. The interpretation of the generic obligations established in Article 1.1 made by the Court in the Castillo Páez Case[FN36] and in other cases, allows for the conclusion that the "right to truth" is a basic and indispensable consequence for every State Party. The disregard for the facts connected with the violations is translated into a system of protection which, in practice, cannot guarantee the identification and eventual punishment of those responsible. In the specific case of forced disappearances, we are concerned with violations of a continuous nature.[FN37] The Court has interpreted that in such cases the duty to investigate the facts extends for as long as the uncertainty over the final fate of the disappeared person exists.[FN38]

[FN36] I/A Court H.R ., Castillo Páez Case, Judgment of November 3 1997, para. 86.

[FN37] Article 3, Inter-American Convention on Forced Disappearance of Persons, OEA/Ser.P AG/Doc.3114/94 Rev.1.
[FN38] Velásquez Rodríguez Case, ibidem, para. 181.

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88. The right to truth constitutes both a right of a collective nature which allows society as a whole to have access to essential information on the development of the democratic system, and an individual right which allows the families of the victims to have access to some kind of reparation in those cases in which amnesty laws are in force. The American Convention protects the rights to access and receive information in the case of disappearances. In such cases both the Court and the Commission have established that the State has the obligation to determine the whereabouts of the individuals "disappeared". The Court has noted that "the duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared... the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains".[FN39] The Court has also said that "the State has a legal duty to... use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation"[FN40].

[FN39] Ibidem.
[FN40] Ibidem, para. 174.

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89. The right to truth is also related to Article 25 of the Convention, which provides for the right to a simple and prompt remedy to protect the rights therein enshrined. The mere existence of factual or legal impediments (such as an amnesty law) to access relevant information connected to the facts and circumstances where the violation of a fundamental right has occurred, constitutes an open violation to Article 25 of the American Convention; apart from the fact that such impediments prevent the availability of domestic remedies allowing for the judicial protection of the fundamental rights established in the Convention, the Constitution and the statutes.

90. The Commission has already expressed its opinion in this area in the context of the cases decided against the Argentine Republic on the enactment of the so called "Due Obedience" and "Full Stop" laws, and the presidential pardons issued after the aforementioned State ratified the Convention[FN41]. There was a similar situation with Uruguay[FN42].

[FN41] Report No. 28/92, Annual Report of the Inter-American Commission on Human Rights 1992-1993, p. 42-53.
[FN42] Report No. 29/92, Annual Report of the Inter-American Commission on Human Rights 1992-1993.

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91. The Commission has consistently expressed the view that whenever amnesties are being enforced, States must adopt "the measures necessary to clarify the facts and identify those responsible for the human rights violations that occurred during the de facto period[FN43]. "The State has the obligation to investigate all violations that have been committed within its jurisdiction, for the purpose of identifying the persons responsible"[FN44]; and "recommend to the State of Chile that it amend its domestic legislation to reflect the provisions of the American Convention on Human Rights, so that violations of human rights by the "de facto" military government may be investigated, with a view to identifying the guilty parties, establishing their responsibilities and effectively prosecuting them, thereby guaranteeing to the victims and their families the right to justice that pertains to them."[FN45]

[FN43] Ibidem, Resolves para. 3.
[FN44] Report No. 36/96, Chile, Annual Report of the Inter-American Commission on Human Rights 1996, para. 77.
[FN45] Ibidem, para. 111.

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92. The Commission has also said that "Every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetitions of such acts in the future. Moreover, the family members of the victims are entitled to information on what happened to their relatives. Such access to truth presupposes freedom of speech; the establishment of investigating committees whose membership and authority must be determined in accordance with the internal legislation of each country, or the provision of the necessary resources so that the judiciary itself may undertake whatever investigation may be necessary"[FN46].

[FN46] Annual Report of the Inter-American Commission on Human Rights 1985-1986, p. 193.

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93. The United Nations Human Rights Committee has established on several occasions, and specifically when the violation of the right to life is involved, that--due to the lack of information on the circumstances within which such violation was committed against their next of kin and on the identity of those responsible--the families of the victims have the right to be compensated.[FN47] On this subject the Committee has made it clear and has insisted that the duty to repair the consequences of the violation is not satisfied merely by offering an amount of money. The first step towards offering reparation to the families of the victims consists of putting to an end the state of uncertainty and ignorance in which they are. That can only be achieved by completely and openly revealing the truth.[FN48]

[FN47] United Nations Human Rights Committee, Case No. 107/1981, Elena Quinteros Almeida and María del Carmen Almeida de Quinteros v. Uruguay; Cases No. 146/1983 and 148-154/1983, Johan Khemraadi Baboeram et al v. Suriname; Case No. 161/1983, Joaquín David Herrera Rubio v. Colombia; and Case No. 181/1984, A. and H. Sanjuán Arévalo v. Colombia.

[FN48] Theo Van Boven, Special Rapporteur, UN Human Rights Commission, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Economic and Social Council, Subcommission on Prevention of Discrimination and Protection of Minorities, 45º period of sessions, E/CN.4/Sub.2/1993/8, July 2, 1993. See also L. Joinet, "Question of Impunity of perpetrators of Violations of Human Rights (Civil and Political Rights)", Final Report, U.N. ESCOR, Commission on Human Rights, 48th Session, Provisional Agenda Item 10, U.N. Doc. E/CN.4/Sub.2/1996/18 (1996).

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94. Apart from the families of the victims, which are directly affected by the violation of human rights, society as a whole is also entitled to be informed.[FN49] The Commission has already noted that "Every society has the right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future."[FN50]

[FN49] Amnesty International, Peace-Keeping and Human Rights, AI Doc. IOR 40/01/94 (1994), p. 38. International Commission of Jurists, "Comunicación escrita presentada a la Subcomisión de Prevención de Discriminaciones y Protección a las Minorías", 44th period of sessions, E/CN.4/Sub.2/1992/NGO/9.
[FN50] Annual report of the Inter-American Commission on Human Rights 1985-1986, p. 193.

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95. Both the right of every person and the right of society to know the whole truth on the facts, the circumstances and the participants in a human rights violation is part of the reparation owed as a satisfaction and a commitment not to repeat the violation in the future.[FN51] The right of society to know about its past does not only constitute a reparation and a way to shed light on the facts which have occurred, but also serves the purpose of preventing future violations.

[FN51] The UN Special Rapporteur, Theo Van Boven, has identified four avenues to ensure the effectiveness of the right to a reparation: restitution, monetary compensation, rehabilitation and satisfaction and undertaking of non repetition. Theo Van Boven, op.cit., Chapter IX, p. 64-65.

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96. States which have resorted to the enactment of amnesty legislation while in search of mechanisms for national pacification and reconciliation, have abandoned the very part of the their population which includes many of the innocent victims of violence. They have abandoned the victims who are denied the right to justice when claiming against those who have committed excesses and abhorrent acts of violence against them.[FN52] In situations such as this, the international obligation established in Article 1.1 of the Convention is left inoperative and worthless. It constitutes a clear case of disregard of the obligation to effectively redress the rights that have been violated.[FN53]

[FN52] Report No. 36/96, Case 10.843, Chile, para. 49, in connection with Annual Report 1985-1986, p. 193.
[FN53] Reports No. 28/92 and 29/92, Ibidem.

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97. In the particular case of Chile, the Truth and Reconciliation Commission carried out a commendable task, by gathering information on human rights violations and on the situation of those "disappeared", with a view to establishing their whereabouts, as well as the corresponding measures to redress their rights and clear their name. However, neither the investigation of the crimes committed by State agents nor their identification and punishment was allowed. Through the amnesty decree, the Chilean State impeded the realization of the right of the survivors and the families of the victims to know the truth.

VIII. FINAL PROCESSING OF THE PRESENT CASE

98. On October 16, 1997, in the course of its 97th Regular Session (September 29 through October 17, 1997), the Commission adopted Report 51/97, which was then sent to the Government of Chile with the request that the Government submit such observations as it might deem pertinent within 60 days of the date of the report's transmittal.

99. The Government of Chile has still not replied to the Commission's note asking for its observations, if any, on the aforesaid Report 51/97, dated October 17, 1997. Neither has it requested an extension for that purpose.

IX. CONCLUSIONS

100. Based on the consideration set forth in this report, the Commission concludes;

101. That Amnesty Decree Law No. 2191 issued in 1978 under the military regime in Chile is incompatible with the provisions of the American Convention on Human Rights ratified by the State of Chile on August 21, 1990.

102. That the ruling of the Supreme Court of Chile of August 28, 1990 and its confirmation on September 28 of the same year wherein the judiciary declares that Decree Law No. 2191 is constitutional and must be applied, at a time when the American Convention had already entered into force in Chile, violate the provisions of Article 1.1 and 2 of such Convention.

103. That the legal decisions of dismissal in criminal trials, brought as a result of the detention and disappearance (or summary execution) of case 11,505, Alfonso René Chanfeau Orayce; 11.532, Agustín Eduardo Reyes González; 11.541, Jorge Elías Andrónico Antequera and his brother Juan Carlos as well as Luis Francisco González Manriquez; 11.546, William Robert Millar Sanhueza and Jorge Rogelio Marín Rossel; 11.549, Luis Armando Arias Ramírez, José Delimiro Fierro Morales, Mario Alejandro Valdés Chávez, Jorge Enrique Vásquez Escobar, Jaime Pascual Arias Ramírez; 11.569 Juan Carlos Perelman and Gladys Díaz Armijo; 11.572 Luis Alberto Sánchez Mejías; 11.573, Francisco Eduardo Aedo Carrasco; 11.583, Carlos

Eduardo Guerrero Gutiérrez; 11.585, Máximo Antonio Gedda Ortiz; 11.595, Joel Huaiquiñir Benavides; 11.652, Guillermo González de Asís; 11.657, Lumy Videla Moya; 11.675 Eulogio del Carmen Ortiz Fritz Monsalve; and 11.705, Mauricio Eduardo Jorquera Encina, on whose behalf these proceedings were instituted, not only aggravate the situation of impunity, but also doubtlessly violate the right to justice of the families of the victims, the right to identify the perpetrators, establish their liability, impose fitting sanctions and obtain legal redress.

104. That with respect to the persons on whose behalf this case has been instituted, the State of Chile has failed to comply with its obligation to recognize and guarantee the rights set forth in Articles 8 and 25 in connection with Articles 1.1 and 2 of the American Convention on Human Rights to which Chile is a State Party.

105. That the State of Chile has failed to comply with the provisions of Article 2 of the American Convention on Human Rights due to the fact that it has not adapted its legislation on amnesty to the provisions of such Convention. Without prejudice to the above, the Commission positively evaluates the government's initiatives to adopt the necessary measures, whether these be legislative or of any other nature and in accordance with prevailing constitutional and legal procedures, to ensure the full exercise of the right to justice of the above-mentioned persons.

106. That the State of Chile has not responded, within the period established, to the Commission's note which transmitted Report 51/97 of October 6, 1997 and asked that State to formulate such observations as it might deem pertinent; nor has that State provided grounds which show the events as described to be false, or evidence that suitable steps have been taken to resolve the situation denounced.

107. That during the processing of the present case, all of the legal and regulatory formalities established in the American Convention on Human Rights and in the Commission's Regulations have been observed.

X. RECOMMENDATIONS

108. In light of the foregoing, the Inter-American Commission on Human Rights, based on its analysis of the facts and in accordance with the international provisions invoked,

AGREES:

109. To recommend that the State of Chile adjust its domestic legislation by derogating Decree-Law 2191 enacted in 1978, in order to comply with the provisions of the American Convention on Human Rights, in order that the human rights violations of the military de facto government may be investigated and the perpetrators may be identified, their responsibility established and that they may be effectively punished, thus guaranteeing for the victims and their families the right to justice.

110. To recommend that the State of Chile make it possible for the families of the victims mentioned in this case to receive fair and effective compensation for the damages incurred.

111. The Commission hereby decides to transmit the present report to the State of Chile, granting it a period of 60 days to carry out the foregoing recommendations.

112. The Commission decides to transmit the present report to the State and the petitioners who will not be allowed to make it public until the Commission decides on its publication.

XI. PUBLICATION

113. On March 2, 1998, pursuant to Articles 51.1 and 2 of the American Convention, the Commission transmitted Report 25/98 adopted in the present cases to the State of Chile, which was granted the period of one month to adopt the measures necessary to comply with the recommendations formulated above and thereby remedy the situation examined.

114. On March 23, 1998, the State requested an extension of time to present information relative to compliance with the recommendations. The State based its request on the complexity of the cases, which it indicated, "justify a more thorough study of the recommendations of the Commission, as well as the requirement of gathering additional bases ...."

115. On April 7, 1998, the Commission decided that it would not grant the extension requested because sufficient elements had not been presented to justify the extension of a period the object of which is to take measures to fully remedy the damage caused. This notwithstanding, the Commission hopes that the State of Chile will adopt the recommendations set forth in the present report in conformity with its constitutional and legal procedures.

XII. ANALYSIS AND FINAL CONCLUSIONS

116. In its preliminary Report 51/97, adopted during its 97th period of sessions, the Commission found the State of Chile responsible for having violated the Convention, and formulated a series of recommendations designed to fully repair the consequences of the violations. Having again considered the matter during its 98th period of sessions, the Commission confirmed that the State had failed to provide a response within the two month period stipulated in the foregoing report. While final Report 25/98 has been approved, and the State notified, there is still no evidence that the State has adopted the measures necessary to repair the consequences of the violations found by the Commission.

117. By virtue of the foregoing considerations, and the dispositions of Articles 51.3 of the American Convention and 48 of its Regulations, the Commission decides to confirm the conclusions and recommendations set forth in sections IX and X, supra, to publish the present report and to include it in its Annual Report to the General Assembly of the OAS.

CONCURRING VOTE OF COMMISSIONER

DR. OSCAR LUJÁN FAPPIANO

I agree in full with the report that the Commission has prepared. I wish merely to make the following additions to the “preliminary considerations” contained in chapter VI, part "A)" of that report:

BY WAY OF INTRODUCTION

1. It is worthwhile emphasizing that the role of the Commission, in analyzing the question brought for its consideration, consists in determining the sense of the standards in the American Convention according to the interpretative methods of juridical science, and that in this work of the Commission there is no place for ideological connotations, which it does not profess, nor for any partiality in favor of, or any bias against, any government, persons or group of persons, which it does not entertain.

THE QUALITY OF THE AUTHORITIES THAT DECREED THE AMNESTY

2. In light of the foregoing, the question is to establish, at the outset, whether the so-called “amnesty law” constitutes an arbitrary act of the authorities that arose upon the military overthrow of the constitutional government of Dr. Salvador Allende, and whether for that reason those authorities had no right or legitimacy, since they were neither elected nor appointed by any legitimate means, but were installed in power by force, after the legal government had been deposed in violation of the constitution. In this case, in the strict application of juridical orthodoxy, we are dealing with a “usurper government”.

3. In fact, although they are commonly known under the generic term of “de facto” governments, there are two kinds of illegal governments: de facto and usurper. The first is a government which, while it may not have been appointed under the terms of the constitution and prevailing laws, acts “under a veneer of legitimacy” because its authority derives, seemingly, from a regular appointment or election. The second, on the other hand, lacks all legitimacy, since it was neither elected nor appointed in any manner, but was installed in power by force.[FN1]

[FN1].1.Constantineau: "Tratado de la doctrina de facto". Ed. Depalma. Bs.As., 1945. To. I, pp. 31 ff. Antokoletz: "Tratado de derecho constitucional y administrativo". Bs.As., 1933. Vol.I, p. 60.

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4. A government de facto is not a government de jure, because it is outside or contrary to law, because it has no legal basis and because if a State has taken to itself a constitution, then anything that departs therefrom is illegal. It is consistent with neither the letter nor the spirit of a constitution to overthrow a duly instituted government. The installation of a de facto government is the product of force rather than of consent, which of course causes no compunctions to those who regard might as the source of all right, and who see the “rule of law” and the “constitutional state" as merely “schemes” that will collapse in the face of the “realism” of a dictatorship, such as those that have plagued our hemisphere.[FN2]

[FN2].Cf.: Bielsa: "Régimen de facto y ley de acefalía". Ed. Depalma. Bs.As., 1963. pp. 26/30.
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5. But to those who would argue thus, we may reply with the words of Bluntschli: "Just as they recognize no rights other than those of their momentary triumph, so they admit no error other than the overthrow itself. In their eyes, any rebellion deserves to be punished if it fails, but is perfectly legal if it succeeds. Any usurpation they will condemn if it collapses in the attempt, just as they will recognize any that achieves its objective. The only standard in their eyes is that of change, even when it comes to law. They allow themselves to be swept along by opinion and they change their color and loyalties whenever they feel the mood shifting. They would have us believe that they are defending the status quo, but in reality they are destroying it. They pride themselves on their ability to bring about real transformation, and yet they concern themselves only with the immediate business at hand. They have no ethical or intellectual concept of law."[FN3]

[FN3].Antokoletz: op./loc. cit.

ILLEGAL GOVERNMENTS AND THE INVALIDITY OF THEIR ACTS

6. The acts of a usurper have no juridical value, whatever their nature. We cannot speak here of “objective legality”, since the mere observance of the forms of “true legality” is not sufficient if the usurper lacks the constitutional authority that would give him legal standing to act. Nor can we speak of laws or “decree-laws” as such, and much less can we speak of these as acts of “delegated legislation”, since the Congress did not, and could not, delegate anything to a de facto regime.[FN4]

[FN4].See Bielsa: "Régimen"..., cit. pp.17; 23; 24, n.5; 35 y ss. Id.: "Estudios de derecho público". Ed. Depalma. Bs.As. 1952. To. III, pp. 431/78.
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7. Not even for the laudable goal of preserving juridical security can we place on an equal footing the constitutional legality of a de jure government with the authoritarian and unconstitutional illegality of a usurper government, whose very existence is the fountain of juridical insecurity. To accord any such recognition would be to place a seal of approval on such governments and become their accomplice, whereas we should steadfastly repudiate them in defence of the rule of law, constitutional order, commitment to democracy and the principle of the sovereignty of the people, based on the full respect of human rights. If those who collaborate with such governments are assured of impunity for their conduct under a usurping and illegitimate regime, then there will be no difference between good and evil, between legal and illegal, between constitutional and unconstitutional, between right and wrong, between democratic and authoritarian, and there would be no reason to refuse to be an accomplice of such illegitimate regimes. What juridical security can we hope for if we place on an equal footing “de

jure" rule - which means basing our security on the constitution - and the "de facto" rule of the usurpers who have disrupted and violated that constitution?

8. We cannot give the stamp of legitimacy to something that owes its very existence to the trampling of legitimacy.

9. We cannot allow that solid line to be erased that separates constitutional rule from those who refuse to live under its system of freedoms, rights and guarantees that is the hard-won prize of so many struggles and sufferings by the men and women of our hemisphere, who have sought to live in peace and tolerance and mutual respect for our human dignity.

10. Hence, the most important point to establish is the inviolability of the juridical regime conceived as the rule of law. In the face of acts and presumptuous laws of a government imposed solely by force, the first point to make clear, without hesitation, is their glaring invalidity, their absolute nullity. They cannot be even suggested to have the slightest shred of legitimacy, since they are the unacceptable result of rebellion against the fundamental law, which is the pillar of juridical security.

11. The foregoing applies a fortiori in the present case, where the beneficiaries of the amnesty are not foreigners or third parties but integral participants in the designs of the usurper. It is one thing to proclaim the need to legitimize the acts of society as a whole, or those taken under international responsibility, when they stem from obligations that cannot be avoided without plunging the country into chaos, and it is quite another thing to extend equal treatment to acts that imply complicity with an illegitimate government. It is simply absurd to pretend that the usurper and his henchmen can invoke the principles of constitutional law, which they themselves have violated, in order to enjoy the benefits of security that are only justified and merited for those who adhere rigorously to that law. Complicity and bad faith can never be protected, even in acts that are otherwise legal. Crime does not give rise to rights.

12. We are trying here to interpret the Constitution correctly, starting from the need to invalidate any act that violates or contradicts it. We are trying to apply the weight of that law, now that it is once again fully in force. We are trying, in short, to ensure the supremacy of a democratic regime that has recovered its full strength, which it should never have lost, and whose stability the Commission must promote and defend, because the solidarity of the American States rests on the common denominator of the "effective exercise of representative democracy" (OAS Charter, Article 3), and because "no problem that any State member might encounter can justify the disruption of a representative democratic regime" (Declaration of Managua. AG/OAS. Nicaragua, 1993).

13. To the arguments heard during the present case to the effect that it is impossible to abrogate the self-amnesty, we must respond that the now-restored constitutional order must of necessity guarantee the government the ability to fulfill its fundamental duties, free of the inconceivable limitations imposed on it by the usurper. Indeed, the whole structure would collapse if it did not. This point is consistent, for example with the doctrine of the United States Supreme Court established long ago in the case of "Horn v. Lockhardt", in 1873: "We accept that acts taken in wartime by those (Confederate) States as individual entities, through their different

branches of government - executive, legislative and judicial - must be deemed, in general, to be valid and compelling, to the extent that they do not affect or tend to affect the supremacy of the national authority and of the just rights of citizens that are guaranteed by the Constitution." Along the same line of thought, the Supreme Court of Argentina held that to deny to a constitutional government the power to annul the validity of its effects would imply, directly, “a harmful limitation on its efforts to consolidate the democratic system, and moreover would mean granting it - the de facto act in question - the full validity that can only be reasonably attributed to legitimate acts of a de jure power."[FN5]

[FN5]."Gamberale de Manzur v/ U.N.R."., decision of 6 April 1989.

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14. Even the most steadfast supporters of the notion of legal continuity of the state admit the validity of actions of a de facto government only with respect to third parties, since they draw a clear distinction between the official with “plausible investiture” and the usurper with “the veneer of legitimacy”. As stated by Antokoletz, “the Anglo-American model only admits the acts of ‘de facto’ officials as valid as far as they affect the public: i.e., to the extent that they are of public benefit. It does not regard them as legitimate in themselves, nor to the extent that they benefit the illegal official. The official’s responsibility for having performed his public functions improperly does not disappear."[FN6]

[FN6].Antokoletz: op. citada, pp. 72/73.

AMERICAN CONSTITUTIONAL LAW

15. The constitutional law of the states of the region is concordant with this doctrine. Antokoletz points out that those systems that deem illegitimate any power not emanating from the Constitution declare all of the acts of such a power to be null. This concept of nullity is expressly established in the constitutions of Honduras, Nicaragua, Costa Rica, Peru, El Salvador, Venezuela and Chile.[FN7]

[FN7].Antokoletz: op./loc. cit. in previous note.

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16. A survey that we conducted of the constitutions of member states of the Organization confirmed this statement. The thesis of nullity of the acts of a usurper is enshrined in the following constitutions: Bolivia (1967), Article 3; Costa Rica (1949), Article 10 (earlier, Article 17); Chile (1980), Articles 5 and 7; Dominican Republic (1966), Article 99; Guatemala (1985), Article 152; Honduras (1982), arts. 2 and 3; Paraguay (1992), Article 138; Peru (1993), Articles 45 and 46; Venezuela (1961), arts. 119 and 120. As a result of the reforms introduced to its text in 1994, the Constitution of Argentina has incorporated a similar provision to make explicit what had previously been known as the “unwritten clause”, as the logical consequence of the precepts

in its Articles 22 and 33. In effect, the current Article 36, first paragraph, provides: “This Constitution shall take precedence even if its observance should be interrupted by acts of force against the constitutional order and the democratic system. Those acts shall be irredeemably null”.. In its following provisions, it makes the authors of such acts liable for punishment such as that reserved for the infamous “traitors of their country."

17. On the basis of the precept cited from the earlier Constitution, the Argentine Congress was able validly to revoke the so-called “self-amnesty” decreed by the military regime (law 23040), and to adopt law 23062 which, with respect to the point at issue, establishes the following: “In defence of the republican constitutional order based on the principle of popular sovereignty, no juridical validity whatsoever shall attach to any law or administrative act issued by de fact authorities who have taken power through an act of rebellion...even if they pretend to base them on powers acquired by right of revolution."

18. The 1833 constitution of Chile declares in Article 158: “Any resolution issued by the President of the Republic, the Senate or the Chamber of Deputies, in the presence or at the instigation of an army, or of a general leading an armed force, or of any group of people, whether armed or not, that would disobey the authorities, is null and void and can produce no effect whatsoever."[FN8] The Constitution of 18 November 1928, in turn, declares similarly: "No entity, no person or group of persons may take upon itself, even under the pretext of extraordinary circumstances, any authority or rights other than those expressly conferred upon it by law. Any action in contravention of this Article is null”. Even the “constitution” issued by decree-law No. 3464 of 11 August 1980 repeats the Article of its predecessor almost letter for letter (Article 7).

[FN8].Adopted as a precedent by J.B. Alberdi in writing the draft text of a constitution for the Province of Mendoza (Argentina).

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19. Consequently, we can say that American constitutional law is unanimous in its concept of the people’s sovereignty, and therefore a de facto government is repugnant to the Constitution, and hence, the overthrow of the constitutional authorities creates no rights in favor of the seditious military leader or rebel. A fortiori, there can be no presumption to any legitimacy when the case involves not a single de facto functionary, but an entire regime that is unconstitutional, since a regime that is totally de facto is neither democratic nor republican.

20. Many centuries ago the Romans inscribed over an archway the words “Senatus Populusque Romani" to give expression to the harmonious unity of governed and governors.

21. Pursuing the line of thought upheld by the Commission in its report No. 30/93, it should be noted also that in the present case, the nullity of the acts of a usurper is a normal constitutional clause with a solid tradition in the hemisphere.[FN9]

[FN9].Case 10.804. "Ríos Montt v/ Guatemala". CIDH Annual Report 1993, p. 296, para. 29.

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22. It is also instructive to compare the jurisprudence of some of the Region's courts. The Argentine Supreme Court did not hesitate to declare the illegality of laws created by de facto governments, and to refuse to recognize in such laws those qualities that can for good reason only be attributed to legitimate acts of a de jure power. In the words of the Court,[FN10] "there can be no question as to the illegitimacy of an act dictated under the shadow of a de facto legislative power that is not instituted by our Fundamental Charter".

[FN10]."Gamberale de Manzur v/ U.N.R.", decision of 6 April 1989. Note that this pronouncement predates the constitutional reform of 1994.
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23. But above all, we must point to the transcendental judgment of the Constitutional Court of Guatemala, issued in light of the events surrounding ex-President Serrano.[FN11]

[FN11].See: "La Corte y el Sistema Interamericano de Derechos Humanos". Rafael Nieto Navia Editor. San José, Costa Rica. 1994, pp. 199 y ss.

PARLIAMENTARY DEBATE AS A GUARANTEE

24. Moreover, constitutional law establishes an irreplaceable procedure for formulating and adopting laws, which is in essence a guarantee that arbitrary acts, misnamed "laws", of a de facto government, drafted and issued behind closed doors, sometimes by their own beneficiaries, as in the heyday of the absolute monarchies, are absolutely and irrevocably null and void.

25. Such arbitrary acts are not subject to healthy public debate. Such debate represents not only homage to democracy, but also fulfillment of constitutional precepts dealing with the formulation and adoption of laws, and which serve as authentic guarantees of fundamental rights and freedoms, as we now see reaffirmed in the provisions of Article 23.1 of the Convention.

26. The omission of public debate, moreover, causes grave damage to the people, since it destroys their trust in the law, it undermines their sense of legality and destroys the "legal fiber" of the country, as the philosopher Vanni has put it.[FN12]

[FN12].Bielsa: "Régimen...", citado, pp. 36; 38; 41; 42; 46 and 68.

FUNDAMENTAL RIGHTS AND THE STATE

27. Our fundamental rights and freedoms are not extinguished by a de facto government, because they predate both the state and the constitution, which merely recognize and guarantee

them, but did not create them. Thus it is an error to claim that a de facto regime has no limits on its arbitrary and unconstitutional powers, i.e. that it can proceed "de legibus solutus" [exempt from the laws], or according to the maxim of "quod principii placuit, legis habet vigorem" [What pleases the ruler has the force of law]. Hence, an amnesty dictated by a government that stands accused of grave and systematic violations of human rights and that attempts in this way to exculpate itself is just such a practice and is therefore an abuse of power.

28. In this regard, Tomuschat writes: "A regime that makes a practice of genocide loses even the appearance of legitimacy. To maintain that in certain cases we must obey a corrupt law and yield to the demands of its perpetrators, would be to make of the State a divinely inspired fetish, unstained by the most atrocious and odious acts."[FN13]

[FN13].Tomuschat: "On Resistance to Violations of Human Rights", UNESCO, 1984, p. 26.

THE INTERNATIONAL LAW OF HUMAN RIGHTS

29. This dimension is confirmed by the provisions of Article 3 of the OAS Charter, Articles XX and XXVIII of the American Declaration, the preamble to the Convention and its Articles 23.1 a and b, which cannot be suspended, according to its Articles 27.2, 29 and 32.

30. In order to convert human rights into a legal reality, the first requisite is to ensure a stable constitutional state, which embraces, in effect, two other requisites: a) for a state to be free, the people who comprise it must have the ability to choose their own destiny (the principle of self-determination), and b) the people must determine, freely and by means of generally applicable (not personal) laws, the legal system that is to establish their human rights (the rule of law).[FN14]

[FN14].Vasak: "Human Rights as legal reality." In: "The International Dimensions of Human Rights." UNESCO. Barcelona. 1984. Vol. 1, p. 27.

THE INTER-AMERICAN COURT OF HUMAN RIGHTS

31. The approach taken here accords with the judgments of the Inter-American Court of Human Rights, which has defined “laws” as “a general legal norm tied to the general welfare, passes by democratically elected legislative bodies established by the constitution, and formulated according to the procedures set forth by the constitution or the States Parties for that purpose." (OC/6, paragraph 38). It arrived at this definition on the basis of analyzing the principles of “legality” and “legitimacy” and of the democratic regime within which the inter-American system of human rights must be comprehended(OC/6, paragraphs 23 and 32), as is explicit in its OC/13, paragraph 25. For the Court, “the principle of legality, democratic institutions and the rule of law are inseparable” (OC/8, paragraph 24). Strict adherence to a democratic regime has been stressed by the Court in these terms: “Representative democracy is

the determining factor in the entire system of which the Convention is a part" (OC/13, paragraph 34), and this stands in complement to its standards on "the just demands of democracy" that must guide the interpretation of the Convention, especially of those precepts that are critically related to the preservation and functioning of democratic institutions (OC/5, paragraphs 44; 67 and 69). Nor should it be forgotten that the doctrine of the Court stresses the importance of the elected legislature in guarding our fundamental rights (OC/8, paragraphs 22 and 23), and it also stresses the role of the Judiciary in reviewing the legitimacy of the acts of the Executive Power (OC/8, paragraphs 29 and 30; OC/9, paragraph 20).

THE INTER-AMERICAN COMMISSION

32. The Commission has been blazing similar trails in its work, as follows: a) when it states that the democratic context is a necessary element for the establishment of a political society in which human values can flourish freely ("Ten Years...", p. 331); b) when it alluded to the granting of overriding powers to bodies that are not representative of the popular will (id., p. 270. Report on Panama, 1978, p. 114, paragraph 3. Annual Report 1978/80, p. 123/24, analyzing a new draft constitution for Uruguay); c) when it sets out its criteria for public participation at the drafting stage for constitutions (report on Suriname, 1983, p. 43, paragraph 41); d) when it question the validity of the plebiscite in Chile, for having been held during a time when public freedoms were suspended [Report 1978/80, page. 115]; and e) in its Report 30/93 on the case of Ríos Montt v/Guatemala.

THE UNIVERSAL SYSTEM

33. With respect to the universal system, the following should be noted: a) the Charter of the United Nations and its preamble ("We, the people of the United Nations..."), in its reference to the "free self-determination of peoples" and to "developing and encouraging respect for human rights and fundamental freedoms for all..."; b) the Universal Declaration, in its Article 29; c) The International Covenant on Civil and Political Rights and d) the statement by the Human Rights Committee in "Ngaluba v/Zaire", paragraphs. 8.2 and 10 on the denial of the right to participate, under conditions of equality, in the management of public affairs, due to sanctions imposed on eight parliamentarians.[FN15]

[FN15].For a more recent, full and analytic discussion of this topic, see Cançado Trindade: "Democracia y Derechos Humanos..." in the collection: "La Corte y el Sistema Interamericano de Derechos Humanos", op. cit.

USURPER GOVERNMENTS AND DEMOCRACY

34. For the above reasons, it can be concluded that democracy and rights are inseparable terms in one and the same equation that has been postulated in the philosophy that underlies the political and institutional organization of the American States, and consequently any act taken by a usurper or de facto government is in and of itself incompatible with the letter and the spirit of the American Convention.

CHILE AND THE INTERNATIONAL TREATIES

35. We have already reviewed the Chilean constitutions as relates to the treatment they have accorded “governments” by usurpation. We have seen that even the “Constitution” promulgated by the military regime itself declares the nullity of acts of a usurper. We shall now look at another aspect of the title of this paragraph.

36. Article 27 of the Vienna Convention on the Law of Treaties was accorded special recognition by Chile at the adopting Conference. Its representative, Mr. Barros, stated: “There is nothing to prevent a state from invoking its constitution as grounds for refusing to sign a treaty, but once a state has committed itself under a treaty, it cannot subsequently attempt to circumvent its commitments by invoking its constitution, still less its ordinary national legislation."[FN16]

[FN16].See Diaz Albónico: "la Convención de Viena...", in: "Estudios". 1982. Sociedad Chilena de Derecho Internacional, pp. 147/74.

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37. Moreover, the regime that arose from the military overthrow of President Allende maintained before the Human Rights Committee that the Covenant on Civil and Political Rights had been in force in Chile since 1976.[FN17]

[FN17].See Comité, fourth session. Review of reports submitted by the States Parties... Initial reports... Chile. CCPR/C/1Add. 25, 48pp. 27 April 1976.

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38. Again, according to the provisions of Article 5.2 of the Constitution of Chile, it is a mandatory duty of the courts to reconcile international and national standards.[FN18]

[FN18].See Detzner: "Tribunales chilenos y derecho internacional de derechos humanos". Comisión Chilena de Derechos Humanos/Academia de Humanismo Cristiano. Santiago, 1988. Cap. IV. p. 182.

A FINAL WORD

39. The Commission can only applaud the efforts made in this hemisphere and around the world to anathematize, now and forever, all those who would disrupt constitutional order and overthrow democratic regimes; to affirm that in the Americas the only route to power is through direct or indirect suffrage, and not by coup d’état; and to demonstrate that constitutions and the standards they uphold are not, as some seem to believe, so weak that they will crumble at the first shout of a mob. The Commission affirms the sanctity of the principle of legality, of

democratic institutions, of the rule of law and the sovereignty of the people, in full respect for human rights, since this was the reason for which it was created.

40. Reviewing the political history of our peoples brings to mind the compelling statement of Ramella: “What we have before us is a somber spectacle indeed. The destruction of institutions by de facto governments has disrupted the constitutional order, and has created a climate of disrespect for the legitimate authorities and sown scepticism about the political process in the minds of our youth.”[FN19]

[FN19].Ramella: "Derecho Constitucional". Depalma. Bs.As. 1986, 2da. ed., p. 700.

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41. There is among our people a certain scepticism about laws and the meaning of constitutions.

42. To paraphrase Bielsa, we may say that in times such as these, when history seems to be unfolding so rapidly and unexpectedly, we must take advantage of the few lucky things that have happened to the peoples of America. America has something better to offer. There are many--the vast majority--who have remained loyal to the Constitution, to the law and to civic virtues, and who ardently desire to see democratic regimes firmly established. There are citizens of sound conduct who not only reproach transgressors, but all manifestations of mis-government, who do not lust after the trappings of power, and who do not believe that public duty means seizing power outside the law.[FN20]

[FN20].Bielsa: "Régimen...", cit., pp. 66/67.

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43. It is with those citizens, with those young generations of America to whom Ramella alluded, that the Commission makes its pact, and that commitment can only be fulfilled if we give an example of standing up for democracy in a way that will banish their disbelief and help to strengthen their faith in the rule of law and the constitutional state.

44. To that end, we must approach this question with our eyes firmly set on the highest statement of our principles, for a jurist, a man of law, cannot abandon a doctrine just because it has been put to ill use. The lawyers of America, at their 21st Inter-American Conference, issued a ringing call: “...In the face of the many distortions that these principles have suffered at the hands of various autocratic forms of government...we must seek to proclaim clearly and categorically that the lawyers of America stand squarely for the survival of a form of government that meets the tests of a constitutional and pluralist democracy...".[FN21]

[FN21].San Juan, Puerto Rico, 1979.

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45. Again, at the 22nd Conference, they declared: “...If we conceive of representative democracy as the system that offers the greatest respect for people’s rights, then it is incumbent upon us, wherever there is a change of regime or whenever a government sets itself up in defiance of the constitution, to preserve inviolate the principle that the people are sovereign, and also that public authority must be exercised in full respect for the inherent values of human dignity.[FN22]

[FN22].Quito, Ecuador, 1981.

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46. This means that, while social upheavals cannot always be avoided, the only honest response when they do occur is to remain steadfastly loyal to the rule of law, which is the only way of life in a democratic society.

47. A former member of the Inter-American Juridical Committee, Jorge R. Vanossi, writes: “Over this long journey, the price to be paid has been very high: disregard for legality, acquiescence in autocratic lawgivers on a more-or-less frequent and more-or-less permanent basis, confusion between what is anomalous and ephemeral and what is normal and lasting, the breakdown, if you will, of a certain constitutional rigidity. The almost unthinking comparison between legislation that is 'de jure' and laws that are 'de facto' leads inevitably to identifying any 'government' by the mere fact that it makes its dictates effective (however coercively), in utter disregard for legal procedures and organs that have come to be viewed by the predominant juridical conscience as irrelevant. We must recant in this matter.... but all men of law are called upon to examine carefully all those tendencies of resigned obedience to validating doctrines, and to offer an analytic and thoughtful alternative for reformulating them so that we may avoid yet another manifestation--perhaps the most discouraging of all--of that phenomenon that Ripert referred to as 'the decline of law'."[FN23]

[FN23].Vanossi: "El estado de derecho en el constitucionalismo social". EUDEBA. Bs.As. 1987, pp. 468/469.

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48. And that alternative so dramatically evoked by Vanossi for escaping from the “monologue and the mausoleum” to which, in the unforgettable phrase of Octavio Paz, every dictatorship is inevitably consigned, is the one that an enlightened man of this land once opened for us: “That we here highly resolve that these dead shall not have died in vain, that this nation, under God, shall have a new birth of freedom, and that government of the people, by the people and for the people shall not perish from the earth.".[FN24]

[FN24].Lincoln. Gettysburg Address.
