

**REPORT No. 23/11**  
CASE 12.519  
MERITS  
LEOPOLDO GARCÍA LUCERO AND NEXT OF KIN  
CHILE<sup>1</sup>  
March 23, 2011

**II. SUMMARY**

1. The organization *Seeking Reparation for Torture Survivors* ("REDRESS") (hereinafter "the petitioners") filed a complaint with the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission," "the IACHR" or "the Commission") against the Republic of Chile (hereinafter "the State," "the Chilean State" or "Chile") for alleged violation of the rights protected under Articles 5(1), 8 and 25 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention"), in conjunction with violation of the general obligations undertaken in Articles 1(1) and 2 thereof, and Article 9 of the Inter-American Convention to Prevent and Punish Torture for its failure to investigate alleged acts of torture that occurred between September 16, 1973 and June 12, 1975, and the lack of adequate and timely redress of the harm caused to Mr. Leopoldo García Lucero (hereinafter "Leopoldo García Lucero", "Mr. García Lucero" or "the alleged victim"). Mr. García Lucero and his family currently reside in the United Kingdom, which granted him refugee status since he was expelled from Chilean territory by virtue of a June 1975 decree issued by the Ministry of the Interior. The petitioners contend that Mr. García Lucero is vulnerable on two fronts –which the State has not duly considered- inasmuch as he is in exile and suffers a permanent disability as a result of torture.

2. The State, for its part, alleges that this case is only about Mr. García Lucero's reparations and not about the acts of torture, the State's investigation thereof, and the existence of an amnesty law in Chile. The State contends that in this case the Commission only has competence to examine the State's obligations since the American Convention entered into force with respect to Chile on August 21, 1990. The State also argues that, like thousands of Chileans, Mr. García Lucero was a beneficiary under the Reparations Program that the State created and that he has in fact received compensation and that he may be able to claim other benefits under the Program for Reparations and Comprehensive Health Care -PRAIS- as other victims of torture have done.

3. In the present report, the IACHR concludes that the Chilean State is responsible for violation of the rights recognized in Article XVIII of the American Declaration of the Rights and Duties of Man (hereinafter "the American Declaration"), Articles 5(1), 8(1) and 25(1) of the American Convention, in relation to the obligations undertaken in Articles 1(1) and 2 thereof, and the obligation contained in Article 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Mr. García Lucero and his next of kin.

4. Therefore, the Commission is making the following recommendations to the Chilean State: (1) fully and adequately compensate Leopoldo García Lucero and his next of kin for the human rights violations established in this report, given his particular situation as a person living in exile and his permanent disability; (2) ensure that Leopoldo García Lucero and his family have access to the medical and psychiatric/psychological care needed to assist with their physical and mental recovery in a specialized facility of their choosing and near their place of residence, or the means to obtain that care; (3) adopt the measures needed to permanently void the effects of Decree

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<sup>1</sup> Commission member Felipe González, a Chilean national, did not participate in the examination of and voting on this report, in keeping with Article 17(2) of the Commission's Rules of Procedure.

Law No. 2191 –given its lack of effects due to its incompatibility with the American Convention, since it can prevent or hinder the investigation and punishment of persons responsible for serious human rights violations- so it does not pose an obstacle to the investigation, prosecution and punishment of other similar violations that occurred in Chile, and the rights of the victims to truth, justice and reparations; (4) to immediately proceed to investigate, impartially, effectively and within a reasonable time frame the facts in the terms established in the present report, with the objective of completely clarifying them, identifying those responsible and punish them accordingly. In the State's compliance with this obligation, it can not allege the fact that the Decree Law No. 2191 is in effect in Chile. The Commission also decided to send this report to the State, giving it two months in which to comply with the Commission's recommendations. Finally, the IACHR decided to notify the petitioners that a report had been approved under Article 50 of the American Convention.

### III. PROCESSING SUBSEQUENT TO REPORT No. 58/05

5. On October 12, 2005, the Commission adopted Report No. 58/05, declaring Case 12.519 admissible as regards the alleged violations of the rights protected under Articles 8 and 25 of the American Convention, in relation to Articles 1(1) and 2 thereof. By a communication dated December 5, 2005, the Commission forwarded the admissibility report to the parties and gave them two months in which to submit any additional observations on the merits of the case. The Commission also took that opportunity to offer its good offices to the parties with a view to arriving at a friendly settlement, in keeping with Article 48(1)(f) of the American Convention. By a communication received on December 27, 2005, the petitioners requested an extension for their reply, which the Commission granted on January 5, 2006.

6. By a communication received on February 17, 2006, the petitioners expressed their interest in arriving at a friendly settlement with the State. That communication was forwarded to the State on March 7, 2006, and again on October 25 of that year.

7. On September 11, 2007, the petitioners requested a working meeting, which the Commission agreed to. By a communication received October 3, 2007, the petitioners requested that the hearing be postponed because of a delay in obtaining a visa for Mr. García Lucero. Further communications were received from the petitioners on December 6, 2007, February 15, and March 4 and 12, 2008. These communications were duly forwarded to the State.

8. On March 11, 2008, during the Commission's 131<sup>st</sup> period of sessions, a working meeting was held at the Commission headquarters, with the petitioners and the State in attendance, as part of the friendly settlement process. On March 24, 2008, the IACHR sent a communication to the parties in which it included the commitment undertaken by the State at that working meeting, which was to provide certain information and take certain measures within 60 days. The State replied via a communication received on April 4, 2008, in which it indicated that it would send the requested information. The petitioners sent another communication on May 16, 2008. The State also sent another communication, which was received on October 14, 2008.

9. On October 27, 2008, during its 133<sup>rd</sup> period of sessions, the Commission held a hearing at its headquarters. At the close of that hearing, the Commission said that its impression was that the State was not interested in pursuing the friendly settlement process.

10. The petitioners presented observations in communications received on October 28 and December 22, 2008, February 19, May 29, and December 9, 2009, August 18, September 30 and December 2, 2010. The petitioners' communications were duly forwarded to the State, which presented its observations via communications received on December 8 and 9, 2008, April 28 and October 5, 2009. Those communications were duly forwarded to the petitioners.

#### IV. POSITIONS OF THE PARTIES

##### A. The petitioners

11. In the initial complaint the petitioners alleged that the Chilean State was responsible for violations of Articles 5, 7, 8 and 25 of the American Convention, in relation to articles 1(1) and 2 thereof, and violation of Articles 1 and 9 of the Inter-American Convention to Prevent and Punish Torture. Thereafter, the petitioners clarified that their complaint in this case did not concern the human rights violations committed as a result of the petitioner's unlawful detention, torture and expulsion, as described in the initial complaint; instead, the complaint concerned his access to justice and reparations.

12. The petitioners' allegations can be classified into three groups: (i) the alleged violation of the right of access to criminal justice as a result of the failure to repeal Amnesty Decree-Law No. 2191, which prevented identification of those responsible for the acts, their prosecution and punishment; (ii) the alleged violation of the right of access to justice on the matter of reparations; and (iii) the alleged inhuman treatment caused by the denial of justice and of adequate compensation. In this regard, the petitioners contend that the State has violated the principle of a reasonable time period, recognized in Articles 8(1), 25, 1(1) and 2 of the American Convention, by virtue of the fact that 18 years after the State's ratification of the American Convention and more than 30 years after the acts of torture were committed, the State has still not repealed Decree Law 2191 or declared it unconstitutional, nor has it undertaken, at its own initiative, an investigation into the facts of the case nor provided an effective remedy to the victims of torture. They also allege a violation of Article 5 of the American Convention, because of the harm caused to the personal integrity of Mr. García Lucero and his wife by the delay in obtaining justice and reparations, as well as a violation of Article 9 of the Inter-American Convention to Prevent and Punish Torture on the subject of compensation.

13. As for the background to the allegations, the petition states that on September 16, 1973, Mr. García Lucero was arbitrarily detained and tortured in various ways by the Chilean Police (*Carabineros de Chile*). With regards to the torture, the complaint alleges that every two or three hours he was tied by the hands and feet, blindfolded, beaten on the head and forced underwater; also that he was beaten with a rifle which caused a severe cut in his forehead, as a result of which he almost lost sight in one eye. It is alleged that they sat him in a blood-stained chair, and according to his torturers the blood belonged to people who had been executed before. He was then allegedly told that if he did not confess his daughter would be executed there, in his presence. After two days of torture and constant abuse, he was taken to the National Stadium where the torture intensified. The following were among the most common forms of torture: tying his hands to a pole and then elevating it in the air with the use of a crane, submerging him in barrel of water and then applying electric shock. The complaint alleges that he was held in the National Stadium for two months, without any contact with his family. When his wife finally discovered his whereabouts and went to visit him, she was allowed to see him for only a half hour before he was transferred to "Chacabuco", a concentration camp in Antofagasta, two thousand miles from Santiago. He was held there for approximately thirteen months, where he was operated on for a hernia in his groin caused by the torture to which he had been subjected to. The complaint alleges that he is still suffering the psychological and physical aftereffects of the torture that he suffered between 1973 and 1975. These aftereffects include (i) learning difficulties, such as an inability to learn English; (ii) an inability to work; (iii) various mental and physical health problems. Mr. García Lucero is now 77 and is alleged to be in frail health.

14. The petition alleges that in November 1974, the Ministry of the Interior issued the first decree ordering 100 persons be expelled from Chilean territory, one of whom was the alleged

victim. In compliance with the decree, Mr. García Lucero was escorted to the airport on June 12, 1975, where he left for the United Kingdom. He and his family live there to this day.

15. On April 8, 1978, the then Military Government issued Decree-Law 2191, which, according to the petitioners, "legitimized and legalized impunity in Chile for the commission of crimes against humanity during the dictatorship and thereafter," by granting amnesty to all persons who had committed criminal acts during the military dictatorship. The petitioners contend that while the Supreme Court and various appeals courts have, since 2007, been more consistent in finding that Decree-Law No. 2191 cannot be applied, it still remains in force. The petitioners argue that the courts' position with regard to cases of torture is unclear; by October 2008, only two verdicts had been handed down that held that the decree did not apply to persons who committed acts of torture during the dictatorship. The petitioners further maintain that the fact that the decree remains in force is an obstacle for Mr. García Lucero to have access to effective judicial remedies for the investigation, prosecution and punishment of the acts of torture, in violation of the right recognized under Article 25 of the American Convention, in relation to Article 1(1) thereof. They further contend that the Amnesty Decree prevents victims from seeking compensation before civil courts.

16. The petitioners also presented various arguments having to do with Chilean law. They contend, first, that Chile has not adapted the crime of "torment" in its laws to conform to international standards. More specifically, the petitioners allege that in Chile, this offense is criminalized under Articles 150A and 150B of the Chilean Criminal Code and Article 330 of the Military Code of Criminal Justice. The petitioners contend that these provisions have the following problems: none uses the terms "torture" or "cruel, inhuman or degrading treatment"; they apply only in the case of persons deprived of liberty, do not include an attempt to commit torture, and set 10 years as the statute of limitations, in violation of international law which holds that the crime of torture, being a crime against humanity, is not subject to a statute of limitations. The petitioners also allege that according to the domestic laws and regulations acts of torture committed by members of the Army or police officers are to be investigated in the military criminal justice system. In conclusion, the petitioners contend that these provisions of Chilean domestic law violate Articles 2 and 8(1) of the American Convention.

17. As for access to adequate reparations, the petitioners state that once democratic order was restored in Chile in 1990, a period of transition led to a number of reforms, including reforms to the domestic reparations system. However, the petitioners point to a number of obstacles that prevent the alleged victim from obtaining adequate and full compensation. First, in Chile the only way for obtaining compensation for acts of torture is under the provisions of the Criminal Code that concern torts. According to the petitioners, the crime of torture is treated as a simple wrongful act leading to liability, which is incompatible with Article 25 of the American Convention, as it does not constitute an adequate and effective legal remedy; it is also a violation of Article 9 of the Inter-American Convention to Prevent and Punish Torture, in which States undertake to incorporate into their national laws regulations guaranteeing suitable compensation for victims of torture. Second, a civil suit within the criminal courts or civil courts is futile in a case of torture since, under Chilean law, the defendants must be identified –which is virtually impossible in cases of torture. The situation is even further complicated by the Amnesty Law. Third, the petitioners contend that because the Chilean Judiciary has not been consistent in its position on this subject, the question of whether civil claims to seek reparations are time barred or not renders the alleged victim's right to adequate compensation illusory.

18. The petitioners argue that the report of the National Commission on Political Imprisonment and Torture (the "Valech Commission"), which identifies Mr. Garcia Lucero as a victim, is not in itself a comprehensive measure of reparation. Specifically, they contend that this report reveals the atrocities reported by more than 35,000 Chileans, but omits the names of the

torturers as that information is being kept "secret" for 50 years. The petitioners argue that this means that investigation and punishment of those responsible, which is part of the duty to provide adequate reparation, is impossible. Law 19,992 ("Law on reparations for recognized victims of political imprisonment and torture") -adopted on December 24, 2004- establishes a compensatory pension and other benefits for those persons identified in the Valech Commission's report. However, it does not include those persons who opted for the benefits provided under the 1993 Law 19,234, which established the "*Programa de Reconocimiento al Exonerado Político*" intended to compensate State employees who, under the dictatorship, lost their jobs due to their political ideology. Under Law 19,992, if an individual opted to receive compensation as an employee who was fired for political reasons ("*exonerado político*"), he or she was only entitled to reparations in the form of a one-time bonus of three million pesos (approximately USD 5,847). In the instant case, the alleged victim opted for this option (to receive this one-time payment) for a number of reasons, one of which was that under this law he would be able to pass his pension to his heirs. The petitioners contend that there is no reason why persons should be required to choose between these benefits, since the reason for the reparations under the two laws is radically different.

19. As for the reparations obtained for being an "*exonerado político*", the petitioners allege that for seven years the State delayed granting Mr. García Lucero his status as an "*exonerado político*", which meant that he did not begin to exercise his rights under that law until 2000, when he began receiving a monthly pension of 79,776 Chilean pesos (the equivalent, according to the petitioners, to approximately USD 155). The petitioners point out that the amount of the pension is insignificant, especially given the high cost of living in the United Kingdom. They further contend that the State recognized Mr. García Lucero as a beneficiary of the special compensatory bonus of 1,900,000 pesos (which according to the petitioners is the equivalent of USD 3,010) for "*exonerados políticos*" under Law 20,134 of 2006. However, the petitioners contend that the State still owes Mr. García Lucero a percentage withheld for taxes, since the amount in question was not subject to taxation. They argue that the alleged victim has had enormous difficulties in getting the bonuses to which he is entitled as an "*exonerado político*". They further argue that the State has not been diligent in this regard and has not taken the necessary steps to ensure that persons in exile have easy access to the information and procedures necessary to claim their rights. The petitioners also contend that these reparations, which are in the form of a pension, have been given to Mr. García Lucero as a result of being considered an "*exonerado político*", and are not reparations to compensate for his arbitrary detention and torture or for the denial of justice of more 20 years since Chile ratified the American Convention.

20. The petitioners argue further that these amounts do not account for the lost wages that he ceased to receive and the lost savings; also that they fail to take into account his disability. The petition states that after further clarifications, the alleged victim was informed that although Laws 19,234 and 19,582 took into consideration the victims' physical and mental disability, the reasons for those disabilities were not considered in determining the amounts and that the Ministry had discretionary authority to make a decision on the matter.

21. The petitioners also contend that because he was expelled from Chile, the alleged victim lost the savings he had in an account with an association then called AHORRANET, and that the State should compensate him for his lost savings. In response to the State's contention that at any time in the period between 1975 and 1990 Mr. García Lucero could have arranged to collect his savings, the petitioners contend that he was not in an adequate physical and mental condition to be able to conduct those transactions from the United Kingdom.

22. The petitioners argue that Mr. García Lucero cannot claim the housing, health and education benefits to which victims of torture in Chile are entitled under the Program for Reparations and Comprehensive Health ("*Programa de Reparación y Ayuda Integral en Salud y Derechos -PRAIS-*") because he does not live in Chile and there is no international agreement with

the United Kingdom under which benefits of this kind would be afforded to exiled Chileans residing in the UK. The petitioners allege that the State should sign cooperation agreements with other countries, as it did in the case of Argentina, so that Chileans living in exile have access to reparations measures that include medical and psychological treatment. They also argue how important it would be if the educational benefits could be passed down to one's children, since the torture victims are adults and most are not in any mental condition to undertake academic study. The petitioners also contend that unlike the case of Almonacid Arellano, the next of kin of García Lucero –or at least his wife, who since 1975 has had to devote herself entirely to his care-, has not received any monetary, health or education benefits.

23. The petitioners contend that as a result of the torture the alleged victim suffered, his health continues to deteriorate. They also point out that the British Health System is not able to provide him with either the medical treatment he needs for his back problem or psychological treatment. The petitioners attach psychiatric evaluations of the alleged victim and his wife, carried out in the United Kingdom in 2007, stating their frail mental health as a result of the facts alleged. Those reports state that until the present case is resolved, any treatment the alleged victim might receive would be useless.

24. The petitioners maintain that Mr. García Lucero is vulnerable on two fronts: on the one hand, he is a survivor of torture living in a foreign country; on the other, he has a permanent disability that prevents him from working. The petitioners also make reference to the consequences that the alleged victim suffers as a person in exile (a breaking-off with one's country of origin, a break of family ties, the expenses and burdens of moving to another country, the fact that the United Kingdom is far from Chile, the problems created by having to live in a country that speaks a language different from one's own). These problems have allegedly inflicted harm that has not been properly redressed. The petitioners acknowledge the policies the State has adopted for persons returning from exile, but point out that Mr. García Lucero is elderly, in frail health, vulnerable and fearful of becoming the target of persecution; all of which are factors that prevent Mr. García Lucero from returning to his home country. As for the disability caused by the torture, the alleged victim alleges that he cannot work or learn English, which means that he and his family limited financial resources.

25. In their arguments on the merits, the petitioners contend that impunity and the inability to obtain adequate and timely compensation constitute inhuman and degrading treatment to the detriment of Mr. García Lucero and his wife, in violation of Article 5 of the American Convention.

## **B. The State**

26. The State argues that this case is solely about the facts that have been alleged with respect to reparations, and not about those concerning the harm done to Mr. García Lucero as a result of the torture of which he was victim during the military dictatorship or the implementation of Amnesty Decree Law 2191. According to the State, the torture and implementation of Decree Law 2191 are not within the Commission's competence *ratione temporis*. It also contends that the petitioners have not filed any complaint or suit in Chile alleging that the alleged victims were denied justice by virtue of the existence of Decree Law 2191 or the fact that civil suits are not the proper recourse to obtain reparations. Hence, the State argues that the petitioners cannot contend that the alleged victim was denied access to justice in Chile or that the courts have been manifestly unfair to him.

27. On the matter of Decree Law 2191, the State contends that it is public knowledge that this law "has not been an obstacle to the implementation of reparations policies, policies of which the alleged victim could be and has been the beneficiary." The State goes on to argue that

"it has been shown that at the present time the domestic courts are not [applying the Amnesty law] given the courts' understanding that this law is not in conformity with international treaties and human rights principles, which establish the obligation to prosecute and punish persons responsible for crimes against humanity, no matter when those crimes were committed." The State makes reference to a Supreme Court ruling of September 24, 2009 (No. 8113-08) which concerned cases of torture under the military dictatorship. In that ruling the Supreme Court held that Decree Law 2191 cannot be applied to cases of human rights violations and that crimes against humanity cannot be declared time barred under the statute of limitations; it also held that amnesty laws do not apply in the case of crimes against humanity, because crimes such as torture are egregious human rights violations. The State maintains that this Supreme Court ruling denied the remedies of cassation filed by the accused, who were ultimately sentenced to prison and accessory penalties, among them disqualification to hold public office. The Supreme Court also upheld the civil suit brought against one of the perpetrators, and ordered him to pay 10 million pesos (approximately USD 18,315). The State goes on to say that this ruling refutes the petitioners' allegations that the criminal courts in Chile are not friendly to cases in which torture is alleged; it also refutes their allegation that one cannot claim reparations through civil action. The State also asserts that this Supreme Court ruling contradicts the petitioners' allegation that torture is classified as a simple suit under domestic torts law and not as a crime against humanity.

28. As for reparations, the State asserts that the States' obligation to make reparations to victims of human rights violations has been interpreted as a general principle of public international law and international human rights law. As for the scope of this obligation, the State asserts that "reparation requires that the facts be brought to light, that those responsible be identified and punished, and that the authorities acknowledge what happened; summing up, it means that the State must take responsibility for redressing the harm caused as fully as possible." The State further states that reparations in cases of human rights violations have been interpreted in two different ways. The first from an international law perspective, where reparations include "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition." The State also asserts that "in the process of the transition to democracy, in which massive and systematic human rights violations needed to be addressed, these criteria had to be redefined." On this last point, the State's position is that the objective is that the reparation be adequate, effective, prompt and in proportion to the seriousness of the violations and the harm suffered.

29. The State asserts that as public policy, the driving principles of any reparations plan must be to make it victim-centered and comprehensive so that it takes into account not just the material aspects, but also the moral and social aspects. The State contends that its compliance with the obligation to make reparations has been exemplary; and that it has been internationally recognized that the public policy the State of Chile has fostered -referred to as the "Reparations Plan or Program"- has been reparations-oriented.

30. In response to the petitioners' allegation that the State has not made adequate reparations, the State points out some of its most important steps taken in the area of reparations for the violations committed during the military dictatorship, namely: (i) the National Truth and Reconciliation Commission (known as the "Rettig Commission"); (ii) the National Corporation for Reparation and Reconciliation, whose functions were later taken over by the Continuity Program under Law No. 19,123 and the Ministry of the Interior's Human Rights Program; (iii) the Program on Recognition of Persons Fired due to their Political Ideology ("*Programa de Reconocimiento al Exonerado Político*"); (iv) the laws under which assistance was provided to Chileans who had been in exile; (v) the laws adopted under the human rights proposal titled "No Tomorrow Without Yesterday," which was an initiative of President Lagos (Law 19,980 and Law 19,962); and (vi) the "National Commission on Political Imprisonment and Torture to Clarify the Truth about Human Rights Violations in Chile," also known as the Valech Commission, and Law No. 19,992, which establishes a reparations pension and other benefits (a benefit for minors born in prison or while

their parents were in detention and medical and educational benefits). The State contends that a total of 1.6 billion dollars have been paid out under its policy of comprehensive reparations. The State also mentions the book titled "*Memoriales en Chile, Homenaje a las Víctimas de Violaciones a los Derechos Humanos*" [Memorials in Chile, Tribute to the Victims of Human Rights Violations] so that the Commission can see for itself the efforts that the State has made to carry out a reparations policy.

31. The State argues that Mr. García Lucero is among the many persons who have benefited by these reparations. It contends that thanks to Law 19,992, as of June 2006 a total of three million pesos, the equivalent of US\$ 5,535 had been deposited in his savings account with the *Banco del Estado*. On October 13, 2000, he was granted a non-taxable monthly pension as an "*exonerado político*" (person who was fired due to his/her political ideology) for an initial amount of 79,776 Chilean pesos (the equivalent of 140 dollars per month), which was retroactive to September 1998; which as of October 2009, the amount given under that pension was 133,059 Chilean pesos (the equivalent of US\$ 243). As for the alleged failure to return the taxes withheld on the special bonus for "*exonerado político*", provided for in Law 20,134, the State contended the petitioners' allegation and claimed that the amount in question had been returned to Mr. García Lucero. As for the allegations concerning the difficulties encountered in collecting the monetary compensation and alleged lack of access for persons in exile, the State contends that during his visits to Chile, or through the Chilean Consulate in London or family members who remained in Chile, Mr. García Lucero, like thousands of Chileans who remained abroad, could have learned everything about these benefits; indeed, he must have known about them considering that there is record that these payments were made to his account.

32. Concerning the loss of savings allegedly sustained by Mr. García Lucero, the State argues that *Ahorranet* became part of a single organization called the *Asociación Nacional de Ahorros y Préstamos* (ANAP) [National Savings and Loan Association], which ceased to exist under a law enacted in 1990. Also that according to the Office of the Deputy Secretary for the Treasury, Mr. García Lucero had the opportunity –either on his own or through his legal representative- to arrange to have these savings recognized and collected while that savings system was still in effect in the country, which was any time between 1975 and 1990. As for the housing benefit under the reparations program, the State reports that given Mr. García Lucero's particular situation, either he or his spouse could qualify for a State subsidy to acquire housing, provided they returned to live in Chile. The State explains that Mr. García Lucero also qualifies for "additional points" toward housing as the Valech Commission recognized him as a victim. As for the health issue, the State's contention is that in Chile Mr. García Lucero is eligible for the Program for Reparations and Comprehensive Health Care (PRAIS).

33. In view of these considerations, the State asks the IACHR to dismiss the petitioners' arguments and acknowledge the responsible and concrete effort exerted by Chile to make reparations for the massive, serious and systematic human rights violations that occurred under the dictatorship, as the Inter-American Court acknowledged in the *Case of Almonacid Arellano*.



## V. ESTABLISHED FACTS

### A. Background: events that occurred between September 16, 1973 and June 12, 1975

34. First, the Commission understands that the facts that occurred during this period are not within the Commission's competence *ratione temporis*<sup>2</sup> and that in making their case the petitioners did not include any arguments related to the commission of acts of torture. However, those events are being included in the section on facts established only in order to contextualize the facts in the instant case.

35. Concerning the facts that occurred under Chile's military dictatorship, the National Commission on Political Imprisonment and Torture to Clarify the Truth about Human Rights Violations in Chile "the Valech Commission", created by Supreme Decree No. 1040 and published in Official Gazette dated November 11, 2003, wrote in its final report that "it had been morally persuaded that these distinctive features of political imprisonment verified in the period from September 11, 1973 to March 10, 1990, were present in all the cases examined. The inevitable conclusion is that during that period there was a repressive policy organized by the State and conducted from its highest authorities." The Commission documented 33,221 detentions and 27,255 victims, and indicated that 94% of the persons detained said they had been tortured.<sup>3</sup>

36. This National Commission documented the fact that Mr. Leopoldo García Lucero was detained and tortured.<sup>4</sup> At the time of his detention, Mr. García Lucero had been actively involved in political activity in support of Allende's Socialist Party, and in political events where he appeared together with Minister Hernán de Canto and President Salvador Allende.<sup>5</sup>

37. On September 16, 1973, he was arbitrarily detained by *Carabineros* in Santiago, five blocks from the *Palacio de Gobierno*. He was taken to the building that housed UNCTAD (United Nations Conference on Trade and Development) where he was held *incommunicado*, without charges or accusations against him.<sup>6</sup> While at the Police Precinct, he was subjected to various forms of torture: his hands and feet were tied, he was blindfolded, beaten on the head and forced underwater; and hit in the head which almost cost him his eyesight. He was threatened that his daughter would be killed in his presence.<sup>7</sup> After two days of torture, he was transferred to the National Stadium, where the torture intensified: his hands were tied to a pole which was then lifted

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<sup>2</sup> As the Commission wrote in its report on the admissibility of this case, "The Commission has jurisdiction *ratione temporis* because the petition does not ask the Commission to pronounce itself on events that occurred prior to August 21, 1990. (...)The Commission considers that in this case the allegations refer only to events that occurred after August 21, 1990. (...) As to the State's argument that the Commission should declare the petition inadmissible because the events began prior to March 11, 1990, the Commission rejects this argument because the judicial proceedings constitute events independent of the summary executions." IACHR, Report No. 58/05, Petition 350/02, Admissibility, Leopoldo García Lucero, Chile, October 12, 2005, paragraphs 32, 34.

<sup>3</sup> Annex 1. National Commission on Political Imprisonment and Torture ("Valech Commission") Report, 2004, Chapter IV, pp. 228 – 229; Annex 2. National Commission on Political Imprisonment and Torture ("Valech Commission") Report, 2004, section: List of Persons Recognized as Victims, p. 8.

<sup>4</sup> Annex 2. National Commission on Political Imprisonment and Torture ("Valech Commission") Report, 2004, List of Persons Recognized as Victims, Number 9581, "García Lucero, Leopoldo Guillermo", RUN: 2.471.218-4, p. 241.

<sup>5</sup> Annex 3. Original petition from the petitioners dated May 15, 2002, p. 1. Allegation made by the petitioners and not contested by the State. Nothing in the record of the case with the Commission suggests otherwise.

<sup>6</sup> Annex 3. Original petition from the petitioners dated May 15, 2002, p. 1. Allegation made by the petitioners and not contested by the State. Nothing in the record of the case with the Commission suggests otherwise.

<sup>7</sup> Annex 3. Original petition from the petitioners dated May 15, 2002, p. 1. Allegation made by the petitioners and not contested by the State. Nothing in the record of the case with the Commission suggests otherwise.

into the air with the use of a crane; he was submerged in a barrel, after which electric shock was applied with a “cattle prod”. The beatings left him with no teeth; his left arm was broken; and he was repeatedly beaten on the head with a rubber truncheon.<sup>8</sup> In his own words, Mr. García Lucero described his experience:

(...) they put me in a cell where I could neither sit down nor even move; they put me in a very narrow space, with electric wires on me. There were 6 or 7 *carabineros* pointing their machines guns at me all night. Psychological torture. They said things like: “we’re going to get your daughter, the youngest one.” Her name was Francisca. She was about seven years old. They said “we’re going to kill her first, and then we’ll kill you. We’re going to do it so you can see how the first bullet will go straight into one of her eyes”.<sup>9</sup>

38. In December 1973, his wife managed to ascertain his whereabouts. She went to visit him but was only allowed to see him for half an hour. This was before he was taken to the “Chacabuco” Concentration Camp in Antofagasta, two thousand kilometers from Santiago. He remained there for 13 months, where he underwent emergency surgery for a hernia in his groin, which was the result of the torture he endured while at the National Stadium. During his time in the concentration camp he was permitted to see his family only twice.<sup>10</sup> He was then transferred to Ritoque, where he remained incarcerated for one month under very rigorous conditions. From there he was transferred to *Tres Álamos* where he was held for three months and was permitted to see his family once a week.<sup>11</sup> He was ordered expelled from Chile by a decree issued by the Ministry of the Interior in November 1974<sup>12</sup> and was escorted from the “Tres Álamos” facility to the airport on June 12, 1975, from where he departed for the United Kingdom where he lives with his family to this day.<sup>13</sup>

## **B. Decree Law 2191 or Amnesty Law**

39. On April 18, 1978, the Military Junta headed by General Pinochet approved Decree Law 2191, the Amnesty Law. Article 1 of that law reads as follows: “[a]n amnesty is hereby granted to all those persons who, as authors, accomplices or aiders and abettors, may have committed criminal acts while the State of Siege was in effect between September 11, 1973 and March 10, 1978, provided they are not either already under indictment or convicted.” As of the date of approval of this report, Decree Law No. 2191 is still in effect in Chile.

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<sup>8</sup> Annex 3. Original petition from the petitioners dated May 15, 2002, p. 2. Allegation made by the petitioners and not contested by the State. Nothing in the record of the case with the Commission suggests otherwise.

<sup>9</sup> Annex 4. Testimony of Mr. Leopoldo García Lucero, taped on October 1, 2008, submitted by the petitioners at a public hearing held during the Commission’s 133rd session, October 27, 2008. Audio available at <http://www.cidh.oas.org/>. See also the transcript of the testimony attached as “Annex 4” to the communication received on October 28, 2008. Evidence not contested by the State.

<sup>10</sup> Annex 3. Original petition from the petitioners dated May 15, 2002, pps. 2-3. Allegation made by the petitioners and not contested by the State. Nothing in the record of the case with the Commission suggests otherwise.

<sup>11</sup> Annex 3. Original petition from the petitioners dated May 15, 2002, p. 3. Allegation made by the petitioners and not contested by the State. Nothing in the record of the case with the Commission suggests otherwise.

<sup>12</sup> Annex 3. Original petition from the petitioners dated May 15, 2002, p. 3. Allegation made by the petitioners and not contested by the State. Nothing in the record of the case with the Commission suggests otherwise.

<sup>13</sup> Annex 3. Original petition from the petitioners dated May 15, 2002, p. 4. Allegation made by the petitioners and not contested by the State. Nothing in the record of the case with the Commission suggests otherwise.

## C. Facts related to the reparations system in Chile

### 1. Reparations System adopted by the State in connection with the events that occurred during the military regime, as they pertain to the instant case

40. For a number of years, the Chilean State has been adopting a series of initiatives as part of its program to make reparations for the crimes committed and the events that occurred under the military dictatorship between 1973 and 1990.

41. By Supreme Decree No. 355 of April 25, 1990, the State created the National Truth and Reconciliation Commission, commonly known as the "Rettig Commission." Its main purpose was to help uncover the truth behind the most serious human rights violations committed in the 1973-1990 period.<sup>14</sup> In its final report, this Commission certified that it had received 3,550 complaints. Of these, 2,296 were deemed to qualify as human rights abuses.<sup>15</sup> To follow through with that Commission's work, Law No. 19,123 created the National Corporation for Reparation and Reconciliation (known as the Reparation and Reconciliation Act), which included programs to uncover other cases of victims and to provide social and legal assistance to relatives of victims.<sup>16</sup> Under this law, victims of human rights violations were granted economic benefits, which included pensions, educational benefits, and welfare and health care benefits<sup>17</sup>.

42. In the case of persons whose employment situation was affected for political reasons during the military dictatorship ("*exonerados políticos*"), the State adopted, *inter alia*, laws 19,234 and 20,134. Law 19,234, adopted in 1993 and its amendments -Law No. 19,582 (adopted to correct certain problems with Law 19,234) and Law 19,881 (adopted to extend the deadline for claiming the status of "*exonerado político*")-, allowed the creation of the Program on Recognition of Persons Fired due to their Political Ideology, which provided pensions and other benefits to *exonerados políticos*. As will be shown, since 2000 Mr. García Lucero has received, under Law 19,234, a monthly pension as an "*exonerado político*"; a pension which was made retroactive to 1998.

43. Law 20,134 –enacted on November 8, 2006 and published the following November 22- established a special bonus of approximately US\$ 3,009.90 for *exonerados políticos*.<sup>18</sup> As will be shown, Mr. García Lucero received this bonus, minus –it is alleged- a percentage withheld for taxes.

44. The State also adopted a number of laws to benefit those who endured exile, namely (i) Law 18,994, which created the National Office for Return (*Oficina Nacional de Retorno* -

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<sup>14</sup> Annex 5. Webpage of the Ministry of the Interior and Public Security, Human Rights Program, [http://www.ddhh.gov.cl/ddhh\\_rettig.html](http://www.ddhh.gov.cl/ddhh_rettig.html).

<sup>15</sup> Annex 5. Webpage of the Ministry of the Interior and Public Security, Human Rights Program, [http://www.ddhh.gov.cl/ddhh\\_rettig.html](http://www.ddhh.gov.cl/ddhh_rettig.html).

<sup>16</sup> Annex 6. Communication from the State received April 28, 2009. Allegation by the State not contested by the petitioners; nothing in the case file suggests otherwise.

<sup>17</sup> Annex 6. Communication from the State received April 28, 2009. Allegation by the State not contested by the petitioners; nothing in the case file suggests otherwise.

<sup>18</sup> Annex 7. Law 20,134, which gives a one-time special compensatory bonus to "*exonerados políticos*" for the reasons highlighted. Date of coming into force: November 8, 2006. Article 1 of this law reads as follows: "A special one-time bonus, payable according to Article 3 of this law, is hereby granted to former workers in the private sector and employees of the State's autonomous businesses, exonerated for political reasons between September 1973 and September 1975, who were granted a non-contributory pension under paragraph three of Article 12 of Law No. 19,234, and to the beneficiaries of the survivor's pensions paid out of those non-contributory pensions. All persons are to have received that pension as of February 28, 2005 and the date of publication of this law."

ONR) -which ceased operations in 1994- to facilitate the return of Chileans living in exile following the military regime; these measures included those adopted to assist them to rejoin the workforce, as well as assistance in the economic, health care and mental health, education, housing, and legal areas, and measures of international cooperation with a number of countries to ensure that they continued to receive their retirement benefits; (ii) Law 19,128 which established certain tax benefits, and (iii) Law 19,749, which also granted certain economic benefits.<sup>19</sup>

45. On the matter of reparations for victims of human rights violations during the military regime, a number of laws were adopted as part of the human rights plan entitled “No Tomorrow Without Yesterday”, an initiative of President Lagos,<sup>20</sup> namely (i) Law 19,980, which amended the Law on Reparation and Reconciliation (Law 19.123, mentioned earlier) in order to expand and add new monetary reparations and health benefits for relatives of disappeared and executed detainees;<sup>21</sup> and (ii) Law 19,962 which eliminates certain criminal records that appear in the General Record of Military and Regular Court Convictions for events that occurred during the military dictatorship in connection with crimes against the security of the State, arms control and terrorism, which were punished under laws adopted at that time.<sup>22</sup>

46. The “National Commission on Political Imprisonment and Torture to Clarify the Truth about Human Rights Violations in Chile,” also known as the Valech Commission, was created by Supreme Decree No. 1040 of November 11, 2003, to determine which persons endured imprisonment and torture for political reasons. According to the report the Commission adopted, at least 33,221 detentions were confirmed and 27,255 persons were victims of political imprisonment, the vast majority of whom were tortured.<sup>23</sup>

47. For its part, Law 19,992 –enacted on December 17, 2004 and published on December 24- provides for a reparations pension and grants other benefits to the victims directly affected by human rights violations whose names appear in the “List of political prisoners and victims of torture” included in the Valech Commission’s Report. However, under Law 19,992 and its Regulations, if a person has been granted a pension under Law 19,234 (“Programa on Recognition of Persons Fired due to their Political Ideology - *“Programa de Reconocimiento al Exonerado Político”*”) he or she had to choose between these two pensions. If the interested party chose the latter, he/she shall be entitled to a bonus of three million pesos. Verbatim, the pertinent clauses of Law 19,992 read as follows:

ARTICLE 2 – The annual pension (...) shall be \$1,353,798 pesos for those beneficiaries under 70 years of age, \$1,480,284 for those beneficiaries age 70 to 75, and \$1,549,422 for those beneficiaries who are 75 or older. This pension will be paid in 12 monthly installments of equal amounts, and will be adjusted in accordance with Article 14 of Decree 2,448 of 1979, or the legal provisions that replace that law.

**The pension established in the above paragraph shall be incompatible with those granted under laws numbers 19,234, 19,582 and 19,881; anyone in that situation may opt for one of these benefits in the manner established in the Regulations.**

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<sup>19</sup> Annex 6. Communication from the State received April 28, 2009. Allegation by the State not contested by the petitioners; nothing in the case file suggests otherwise.

<sup>20</sup> Annex 6. Communication from the State received April 28, 2009. Allegation by the State not contested by the petitioners; nothing in the case file suggests otherwise.

<sup>21</sup> Annex 8. Webpage of the Government of Chile; Ministry of the Interior and Public Security, Human Rights Program, available online at: [http://www.ddhh.gov.cl/historia\\_programa.html](http://www.ddhh.gov.cl/historia_programa.html).

<sup>22</sup> Annex 6. Communication from the State received April 28, 2009. Allegation by the State not contested by the petitioners; nothing in the case file suggests otherwise.

<sup>23</sup> Annex 2. National Commission on Political Imprisonment and Torture (“Valech Commission”) Report, 2004, Chapter IV, section: List of Persons Recognized as Victims, p. 8.

**Those persons who opt for the above option shall be entitled to a bonus of \$3.000.000 pesos, which shall be paid on a one-time basis within the month following the date on which the option is elected.**

On the other hand, those who were beneficiaries of the pension to which the first paragraph of this article refers and who subsequently obtained any of the incompatible benefits mentioned herein, shall be entitled, in the form of the bonus provided for in the preceding paragraph, to the difference between the total amount received as a pension under this law, for the duration of the period prior to the time when the incompatible benefit was granted and the amount of the bonus indicated above. If the total amount received as a pension is higher than the amount of the bonus, the beneficiary shall not be required to return the excess amount.<sup>24</sup>

48. As the following section will show, upon selecting the above option, Mr. García Lucero received the bonus of three million pesos.

## **2. Benefits that Mr. García Lucero receives under the Reparations System**

49. At the present time, Mr. García Lucero has received or continues to receive three types of monetary compensation under different laws. The first is a monthly pension that, as of September 1998, was 79,776 Chilean pesos; by December 2008, it was 133,059 Chilean pesos.<sup>25</sup> Mr. García Lucero has been receiving this pension since 2000,<sup>26</sup> when the order was issued that he was to be paid this benefit retroactive to September 1998,<sup>27</sup> under the 1993 Law 19,234 "Program on Recognition of Persons Fired due to their Political Ideology" ("*Programa de Reconocimiento al Exonerado Político*")<sup>28</sup> and to which he had applied in 1994.<sup>29</sup> In December and October 2000, Mr. García Lucero requested that this benefit be paid retroactively, at least as of February 1996. However, he received no answer to his request.<sup>30</sup> According to the petitioners' calculations, by 2008 Mr. García Lucero had received a total of US\$ 14,880 dollars under this pension;<sup>31</sup> but, by the State's calculation by 2009 he had received a total of US\$ 25,500.<sup>32</sup> Either way, the case file with the IACHR contains a certification issued by the *Instituto de Normalización Previsional* which shows that between 1998 and 2008, a total of 14,188,016 Chilean pesos were paid to Mr. García Lucero, plus 234,626 pesos under the heading of "*aguinaldo*" (an additional amount).<sup>33</sup>

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<sup>24</sup> The emphasis (bold letters) has been added.

<sup>25</sup> Annex 9. Certification from the Instituto de Normalización Previsional, Unit in charge of Pensions Paid to Exonerated Persons, Attachment to the State's communication received on October 5, 2009.

<sup>26</sup> There is a discrepancy as to the month and day in 2000 when the pension was allegedly approved. The State claims that it was approved as of October 13, 2000 (see Annex 10. Communication from the State received on October 5, 2009), while the petitioners claim that it was approved effective May 22, 2000 (see Annex 11. Communication from the petitioners dated December 19, 2008 and received on December 22, para. 24). However, and more pertinent to the purposes of the present report, the two parties agree that Mr. García Lucero received the pension retroactive to September 1, 1998.

<sup>27</sup> Annex 11. Communication from the petitioners dated December 19, 2008 and received on December 22, para. 24. Annex 10. Communication from the State received on October 5, 2009.

<sup>28</sup> Annex 12. Law 19,234 establishing benefits to "exonerados políticos" and authorizing the *Institute de Normalización Previsional* to do out-of-court settlements in situations that it indicates. Date of coming into force: August 5, 1993.

<sup>29</sup> Annex 11. Communication from the petitioners dated December 19, 2008 and received on December 22, para. 24.

<sup>30</sup> Annex 11. Communication from the petitioners dated December 19, 2008 and received on December 22, para. 25.

<sup>31</sup> Annex 11. Communication from the petitioners dated December 19, 2008 and received on December 22, para. 47.

<sup>32</sup> Annex 11. Communication from the State received on October 5, 2009.

<sup>33</sup> Annex 9. Certification from the *Instituto de Normalización Previsional*, Unit in charge of Pensions Paid to "exonerados políticos". Attachment to the State's communication received on October 5, 2009.

50. Another monetary benefit consisted in a special compensatory bonus, paid to him pursuant to Law 20,134 of 2006<sup>34</sup> by virtue of his status as an "*exonerado político*". Under this law he was entitled to the sum of 1,900,000 Chilean pesos. This bonus was deposited into Mr. García Lucero's account on January 29, 2008;<sup>35</sup> however, a total of 140,943 pesos was discounted for taxes, so that the sum actually paid at that time was 1,759,057 Chilean pesos.<sup>36</sup> The parties differ as to whether the amount discounted for taxes was returned to Mr. García Lucero: the State claims that in December 2008, it paid Mr. García Lucero the sum of 140,943 pesos to reimburse the sum deducted for taxes, since initially it had been determined that the bonus was going to be subject to taxation;<sup>37</sup> for their part, the petitioners allege that the sum in question was never returned.<sup>38</sup>

51. On June 14, 2006, Mr. García Lucero received a one-time bonus of three million pesos<sup>39</sup> under the 1994 Law 19,992<sup>40</sup> and its 2005 Rules of Procedure,<sup>41</sup> as he had opted to receive the pension for "*exonerados políticos*". Mr. García Lucero decided to continue his status as "*exonerado político*" –rather than the victim-of-torture status- because that way his wife would be able to inherit his pension when he died.<sup>42</sup>

#### **D. Current situation of Mr. García Lucero and his wife, Mrs. Elena García. Effects of torture and exile**

52. Mr. García Lucero was born on September 15, 1933; so as of March 2011, he is 77 years old.<sup>43</sup> His wife, Mrs. Elena García, was born on November 1, 1930, which means that as of March 2011 she is 80 years old.<sup>44</sup>

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<sup>34</sup> Annex 7. Law 20,134, which gives a one-time special compensatory bonus to "*exonerados políticos*" for the reasons highlighted. Date of coming into force: November 8, 2006.

<sup>35</sup> Annex 13. Communication from the petitioners received December 9, 2009, para. 7. Annex 10. Communication from the State received on October 5, 2009.

<sup>36</sup> Annex 13. Communication from the petitioners received December 9, 2009, para. 7.

<sup>37</sup> Annex 10. Communication from the State received on October 5, 2009.

<sup>38</sup> Annex 13. Communication from the petitioners received December 9, 2009.

<sup>39</sup> Annex 14. Communication from the State received December 10, 2008. See also Annex 11. Communication from the petitioners dated December 19 and received on December 22, 2008, para. 47.

<sup>40</sup> Annex 15. Law 19,992 establishing a reparations pension and granting other benefits to the persons indicated. Date of coming into force: December 24, 2004, Articles 2 and 4.

<sup>41</sup> Annex 16. Rules of Procedure for the granting and payment of the pension and bonuses established under Law 19,992. Date these Rules of Procedure were published in Chile's *Diario Oficial*: March 14, 2005. Articles 5 and 6.

<sup>42</sup> Allegation made by the petitioners and not contested by the State. Annex 11. Communication from the petitioners dated December 19, 2008 and received on December 22, para. 46. See also Article 15 of the Law 19,234 that establishes the possibility of heirs of "*exonerados políticos*" to receive their pensions. Annex 12. Law 19,234 establishing benefits to "*exonerados políticos*" and authorizing the *Institute de Normalización Previsional* to do out-of-court settlements in situations that it indicates. Date of coming into force: August 5, 1993.

<sup>43</sup> Annex 17. Psychiatric Report on Leopoldo García Lucero, Dr. Nuria Gené-Cos (*LMS, MRCPsych, Consultant Psychiatrist, Trauma Specialist & Section 12 Approved Doctor*), December 11, 2007. Report supplied by the petitioners marked as "Annex 5" to the communication received October 28, 2008. Report not contested by the State. Original version in English.

<sup>44</sup> Annex 17. Psychiatric report on Elena García, Dr. Nuria Gené-Cos (*LMS, MRCPsych, Consultant Psychiatrist, Trauma Specialist & Section 12 Approved Doctor*), December 11, 2007. Report supplied by the petitioners marked as "Annex 5" to the communication received October 28, 2008. Report not contested by the State. Original version in English.

53. Mr. García Lucero was diagnosed as having severe and complex Post Traumatic Stress Disorder (PTSD), and suffers from severe depression.<sup>45</sup> As a result of this disorder, the alleged victim has intrusive and recurring recollections of what he experienced and continues to live in constant fear; his fear has only become worse since the petitioners filed their complaint with the IACHR.<sup>46</sup> The required treatment consists of weekly therapy (including family therapy) for a period of two years. However, in the opinion of the psychiatrist who evaluated him, his post traumatic stress disorder cannot be treated until the case with the IACHR is over, given his general mental state of insecurity and feelings of vulnerability.<sup>47</sup> His depression should improve with anti-depressants; but while the symptoms of post traumatic stress disorder might improve with therapy, their effects on his personality may never be resolved.<sup>48</sup> As for his medical history, he is said to have (i) heart problems, for which he takes a medication called “Warfarin”; (ii) high cholesterol and high blood pressure, for which he takes medication; (iii) glaucoma in both eyes, for which he takes eye drops on a daily basis; (iv) severe back and leg problems with restricted mobility and needs to use a walking stick: he is unable to walk up more than a few steps.<sup>49</sup> Mr. García suffers from a deviated disc in his back as a result of the torture to which he was subjected to.<sup>50</sup>

54. As for the therapy required, the psychiatrist who evaluated Mr. García Lucero said that he will need weekly 50-minute sessions for two years, but that the service that specializes in post traumatic stress disorder in the British health system: (i) has a waiting list, which means that he would be unable to receive treatment immediately; (ii) as a rule, the treatments consist of 10 or 12 sessions, which in his case would not be enough; and (iii) it is very difficult to find a therapist who speaks Spanish.<sup>51</sup> Therefore, the psychiatrist recommended that Mr. García Lucero receive private therapy sessions, which cost an estimated £75 per session (equivalent approximately to

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<sup>45</sup> Annex 17. Psychiatric Report on Leopoldo García Lucero, Dr. Nuria Gené-Cos (*LMS, MRCPsych, Consultant Psychiatrist, Trauma Specialist & Section 12 Approved Doctor*), December 11, 2007. Report supplied by the petitioners marked as “Annex 5” to the communication received October 28, 2008. Report not contested by the State. Original version in English.

<sup>46</sup> Annex 17. Psychiatric Report on Leopoldo García Lucero, Dr. Nuria Gené-Cos (*LMS, MRCPsych, Consultant Psychiatrist, Trauma Specialist & Section 12 Approved Doctor*), December 11, 2007. Report supplied by the petitioners marked as “Annex 5” to the communication received October 28, 2008. Report not contested by the State. Original version in English.

<sup>47</sup> Annex 17. Psychiatric Report on Leopoldo García Lucero, Dr. Nuria Gené-Cos (*LMS, MRCPsych, Consultant Psychiatrist, Trauma Specialist & Section 12 Approved Doctor*), December 11, 2007. Report supplied by the petitioners marked as “Annex 5” to the communication received October 28, 2008. Report not contested by the State. Original version in English.

<sup>48</sup> Annex 17. Psychiatric Report on Leopoldo García Lucero, Dr. Nuria Gené-Cos (*LMS, MRCPsych, Consultant Psychiatrist, Trauma Specialist & Section 12 Approved Doctor*), December 11, 2007. Report supplied by the petitioners marked as “Annex 5” to the communication received October 28, 2008. Report not contested by the State. Original version in English.

<sup>49</sup> Annex 17. Psychiatric Report on Leopoldo García Lucero, Dr. Nuria Gené-Cos (*LMS, MRCPsych, Consultant Psychiatrist, Trauma Specialist & Section 12 Approved Doctor*), December 11, 2007. Report supplied by the petitioners marked as “Annex 5” to the communication received October 28, 2008. Report not contested by the State. Original version in English.

<sup>50</sup> Allegation made by the petitioners and not contested by the State. The case file contains nothing to suggest any other conclusion. Annex 4. Testimony of Mr. Leopoldo García Lucero, taped on October 1, 2008, presented by the petitioners at a public hearing held during the 133<sup>rd</sup> Session, October 27, 2008. Audio available at [www.cidh.org](http://www.cidh.org). See also the transcript of the testimony submitted in an appendix marked as “Annex 4” to the communication received on October 28, 2008. Evidence not contested by the State.

<sup>51</sup> Annex 18. Communication from Dr. Nuria Gené-Cos, “Addendum to report written 11<sup>th</sup> December 2007”, dated October 5, 2008. Supplied by the petitioners, marked as “Annex 5” to the communication received on October 28, 2008; not contested by the State. Original version in English; the terms used are those of the IACHR.

US\$ 120); the first session costing £250 (equivalent approximately to US\$ 400).<sup>52</sup> In addition to this individual therapy, his case would also require family therapy, with the same frequency and associated costs of the individual therapy.<sup>53</sup>

55. As for his back, for a number of years Mr. García Lucero has been receiving neuropathic pain relief in a London hospital, which uses a machine that emits varying strengths of electrical pulses; every session with the machine provides him pain relief lasting for 5 to 7 days on each application.<sup>54</sup> The hospital told the petitioners that Mr. García Lucero would be an ideal candidate to use this service at home for self-administration; but that the British health system –i.e. the National Health Services (NHS)- could not cover the costs involved, which would be around £500 (approximately US\$ 800).<sup>55</sup> An estimate obtained by the petitioners indicates that the treatment would cost between £1,059.73 and £1,056.91 (which would be approximately US\$ 1,695).<sup>56</sup>

56. A psychiatric evaluation was also done of Mr. García Lucero's wife, Mrs. Elena García. As to the medical history, during her husband's detention, Mrs. Elena García experienced heavy stress and suffered gastric hemorrhaging, for which she had to be hospitalized and receive a blood transfusion. This was attributed to the stress she endured fearing that her husband would be killed while he was being held.<sup>57</sup> Mrs. García does not suffer from psychiatric conditions. Nevertheless, she says that on the day she arrived in the United Kingdom in 1975, she suffered an Adjustment Disorder, characterized by the psychological difficulty to cope having to leave her mother, brother, cousins and friends in Chile and arriving in a country where she neither spoke the language nor understood the culture.<sup>58</sup> She still resents Mr. García Lucero for not allowing her to see her mother when she was on her deathbed, because he was fearful of returning to Chile.<sup>59</sup> When she lived in Chile, she had a good job, but was never able to find employment in the United Kingdom, in part because she had to care for her husband. She says that she does not feel she

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<sup>52</sup> Annex 18. Communication from Dr. Nuria Gené-Cos, "Addendum to report written 11<sup>th</sup> December 2007", dated October 5, 2008. Supplied by the petitioners, marked as "Annex 5" to the communication received on October 28, 2008; not contested by the State. Original version in English; the terms used are those of the IACHR.

<sup>53</sup> Annex 18. Communication from Dr. Nuria Gené-Cos, "Addendum to report written 11<sup>th</sup> December 2007", dated October 5, 2008. Supplied by the petitioners, marked as "Annex 5" to the communication received on October 28, 2008; not contested by the State. Original version in English; the terms used are those of the IACHR.

<sup>54</sup> Annex 19. Communication from Guy's and St. Thomas' NHS, NHS Foundation Trust of December 11, 2007, addressed to the petitioners. Supplied by the petitioners and marked as "Annex 6" to the communication received on October 28, 2008; not contested by the State. Original version in English.

<sup>55</sup> Annex 19. Communication from Guy's and St. Thomas' NHS, NHS Foundation Trust del December 11, 2007, addressed to the petitioners. Supplied by the petitioners and marked as "Annex 6" to the communication received on October 28, 2008; not contested by the State. Original version in English; the terms used are those of the IACHR.

<sup>56</sup> Annex 20. Communication sent by Stephen Brown, Sales Director, Squadron Medical Ltd to the petitioners dated March 7, 2008. Supplied by the petitioners and marked as "Annex 6" to the communication received on October 28, 2008; not contested by the State. Original version in English; the terms used are those of the IACHR.

<sup>57</sup> Annex 17. Psychiatric report on Elena García, Dr. Nuria Gené-Cos (*LMS, MRCPsych, Consultant Psychiatrist, Trauma Specialist & Section 12 Approved Doctor*), December 11, 2007. Report supplied by the petitioners marked as "Annex 5" to the communication received October 28, 2008. Report not contested by the State. Original version in English; the terms used are those of the IACHR.

<sup>58</sup> Annex 17. Psychiatric report on Elena García, Dr. Nuria Gené-Cos (*LMS, MRCPsych, Consultant Psychiatrist, Trauma Specialist & Section 12 Approved Doctor*), December 11, 2007. Report supplied by the petitioners marked as "Annex 5" to the communication received October 28, 2008. Report not contested by the State. Original version in English; the terms used are those of the IACHR.

<sup>59</sup> Annex 17. Psychiatric report on Elena García, Dr. Nuria Gené-Cos (*LMS, MRCPsych, Consultant Psychiatrist, Trauma Specialist & Section 12 Approved Doctor*), December 11, 2007. Report supplied by the petitioners marked as "Annex 5" to the communication received October 28, 2008. Report not contested by the State. Original version in English; the terms used are those of the IACHR.



belongs either in Chile or in the U.K. According to the psychiatrist, “[u]sually treatment is possible after the court case is over and the possible compensation has been settled; as the feeling of abuse and injustice does not usually decrease, unless the victims have received appropriate compensation and recognition of what they have been through. Access to justice is the most significant way in which Mrs. García will be able to gain a sense that her experience of abuse of human rights has been recognised as such. This public acknowledgment enables victims of abuse to find the resources to work through the damage and start the grieving process.”<sup>60</sup>

57. Mrs. Elena García and her daughters María Elena, Gloria and Francisca were deprived of their husband and father, respectively, in September 1973, and lived in a constant state of uncertainty, anguish and pain, which created serious problems within the family.<sup>61</sup> The family’s living conditions the change, as they had to adapt to a new life and a different language once exiled from Chile.<sup>62</sup>

58. Mr. García Lucero described the consequences of the torture that persist to this day, in the following words:

(...) with the problems of the torture that I experienced, I applied for hundreds of jobs, even jobs like I had in Chile; but because of [my lack of proficiency in] English, I couldn’t; the torture, the blows have left me virtually paralyzed. It would have been better if I had died and buried. I relive it all minute by minute, and there’s no solution to it (...) when I bath or shave, I will always see this in the mirror, to the day I die (he touches a visible scar on his forehead, above the left eyebrow). Pinochet did this to me, and that’s the truth.

(...) the torture that they inflicted on my head left me unable to speak; and I can’t speak English. So I’m boxed in: I go out and I don’t understand anything; I go the store, and I don’t understand a thing. And all that is the result of what? It’s the result of the torture.

(...) I have three daughters; they have all married here; their husbands are British. What is it that makes one want to kill oneself? Well, I don’t understand a thing my grandchildren say to me, because they speak English, they are British (...) I am asking the Commission to consider that I do not speak English and am unable to communicate with them. I would like to take them to school and pick them up, to play with them, to do many things, but I can’t; I am condemned to this life.

(...) The torture took a terrible toll on me; I feel practically dead, because I am unable to do anything. I can’t go to the stores, I can’t go out alone.<sup>63</sup>

59. As for the need for justice, Mr. García Lucero indicated:

(...) They were unable to bring Pinochet and the others to trial, so their crimes went unpunished. That means that Chilean justice is one of the worst justice systems in the world; that is a problem that has to be solved, they have to find ways to solve the problem in Chile (...) For me, justice is very important. (...) And how could justice change my life? It has to change; for example, I would like to die in peace and contentment. And what does that mean? That the [Inter-American] Court (...) gives me (...) a small grain of rice, that it gives

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<sup>60</sup> Annex 17. Psychiatric report on Elena García, Dr. Nuria Gené-Cos (*LMS, MRCPsych, Consultant Psychiatrist, Trauma Specialist & Section 12 Approved Doctor*), December 11, 2007. Report supplied by the petitioners marked as “Annex 5” to the communication received October 28, 2008. Report not contested by the State. Original version in English.

<sup>61</sup> Allegation made by the petitioners and not contested by the State. Annex 21. Communication from the petitioners received December 6, 2007.

<sup>62</sup> Allegation made by the petitioners and not contested by the State. Annex 21. Communication from the petitioners received December 6, 2007.

<sup>63</sup> Annex 4. Testimony of Mr. Leopoldo García Lucero, taped on October 1, 2008, presented by the petitioners at a public hearing held during the Commission’s 133rd session, October 27, 2008. Audio available at <http://www.cidh.oas.org/>. See also the transcript of the testimony attached as “Annex 4” to the communication received on October 28, 2008. Evidence not contested by the State. Free translation made by the IACHR.

me a hand. I could die at any time. But if I could eat a little piece of beef, a steak, I would die happy. I would at least be able to eat it, because a small opening was found (...) As I see it, justice in the [Commission] has taken some time. It has been (...) very difficult, because it has dragged on for so long, and I have still not gotten anything I wish for.<sup>64</sup>

60. Concerning the pension given by Chile, Mr. García Lucero said that “the pension that [I have] is minimal in comparison to the three salaries that (...) I earned [in Chile] because they granted me a really really bad pension (...). My family and I can’t live on that pension.”<sup>65</sup>

61. About his present situation in the United Kingdom, the effects of exile and his life before the military coup in Chile, Mr. García Lucero observed the following:

(...) we would have liked to have cooperated with England, to have produced something, to have worked (...) My wife is also unable to work, she (...) understands very little English (...), not enough to hold down a job. (...) We (...) have very much wanted to go to Chile, but we don’t because we don’t have the money. The money we have week has to be spent on food; the money is not even enough to buy a handkerchief; (...) in Chile I (...) worked all the jobs at the race track (...) In my house we lived very well, (...) we had someone to do the cleaning and (...) the cooking, because I had money to pay for it; we don’t have that kind of life in England. So, we lost a very good lifestyle in Chile.  
(...) The benefit (...) is very, very small, because what the State gives here in England is enough to eat only once a day, and a very poor meal. If I was working in England, things would be different, I would eat very well, I would have what everyone else has; but I can’t because I was unable to learn English.<sup>66</sup>

## **VI. ANALYSIS OF THE LAW**

### **A. Preliminary considerations**

62. The Commission must begin by pointing out that since the petitioners reformulated their petition -limiting the facts alleged to the State’s duty to investigate and redress the alleged torture- in its admissibility report, the Commission focused on these arguments. As a result, in the examination of this case, the Commission did not consider the arguments that had been originally presented by the petitioners concerning the Chilean State’s responsibility for acts of torture.

63. Second, the IACHR observes that the facts alleged by the petitioners regarding the failure to investigate the acts of torture began prior to the date on which Chile deposited its instrument of ratification of the American Convention. However, this does not prevent the Commission from examining that State’s alleged violations of its obligations under the American Declaration. The Inter-American Court of Human Rights explicitly recognized the binding force of the American Declaration when it wrote that “[a]rticles 1(2)(b) and 20 of the Commission’s Statute define the competence of that body with respect to the human rights enunciated in the Declaration,

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<sup>64</sup> Annex 4. Testimony of Mr. Leopoldo García Lucero, taped on October 1, 2008, presented by the petitioners at a public hearing held during the Commission’s 133rd session, October 27, 2008. Audio available at <http://www.cidh.oas.org/>. See also the transcript of the testimony attached as “Annex 4” to the communication received on October 28, 2008. Evidence not contested by the State. Free translation made by the IACHR.

<sup>65</sup> Annex 4. Testimony of Mr. Leopoldo García Lucero, taped on October 1, 2008, presented by the petitioners at a public hearing held during the Commission’s 133rd session, October 27, 2008. Audio available at <http://www.cidh.oas.org/>. See also the transcript of the testimony attached as “Annex 4” to the communication received on October 28, 2008. Evidence not contested by the State. Free translation made by the IACHR.

<sup>66</sup> Annex 4. Testimony of Mr. Leopoldo García Lucero, taped on October 1, 2008, presented by the petitioners at a public hearing held during the Commission’s 133rd session, October 27, 2008. Audio available at <http://www.cidh.oas.org/>. See also the transcript of the testimony attached as “Annex 4” to the communication received on October 28, 2008. Evidence not contested by the State. Free translation made by the IACHR.

with the result that to this extent the American Declaration is for these States a source of international obligations related to the Charter of the Organization".<sup>67</sup>

64. The Commission's analysis of the State's obligations will be done chronologically, following the order of the dates on which the various instruments applicable to the present case entered into force for Chile. Chile deposited its instrument of ratification of the American Convention on August 21, 1990. Therefore, the Commission's analysis of the Chilean State's obligations in the present case for the facts alleged to have occurred prior to that date is on the basis of that State's obligations under the American Declaration. Facts that occurred as of and subsequent to August 21, 1990, are analyzed on the basis of the State's obligations under the American Convention. Chile deposited its instrument of ratification of the Inter-American Convention to Prevent and Punish Torture on September 30, 1988. The same criterion for examining the State's obligations will be applied in the case of that instrument.

**B. Right to a fair trial (Article XVIII of the American Declaration); right to a fair trial, to judicial protection and to personal integrity, in conjunction with the obligation to ensure and the duty to adopt domestic legislative measures (Articles 8(1), 25(1), 5(1), 1(1) and 2 of the American Convention), and Article 8 of the Inter-American Convention to Prevent and Punish Torture.**

65. Article XVIII of the American Declaration provides that:

Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

66. Article 8(1) of the American Convention reads as follows:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

67. Article 25(1) of the American Convention provides that:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

68. In application of the principle *iura novit curia*, the IACHR considers that the instant case requires an examination of the effect on the right to personal integrity protected under Article 5(1) of the American Convention, because of the duty to ensure the free and full exercise of rights and freedoms, which includes investigation of and reparations for violations of that right. In the final analysis, the present case is centered on the question of whether the State complied with its duty to ensure the right to personal integrity in the case of Mr. García Lucero and his next of kin (and the obligations that follow from that duty). Therefore, the Commission must also analyze that right –in its procedural dimension-. Article 5(1) of the American Convention provides that "[e]very person has the right to have his physical, mental, and moral integrity respected."

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<sup>67</sup> I/A Court H.R., Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, July 14, 1989, para. 45.

69. Article 1(1) of the American Convention provides that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

70. Article 2, for its part, provides that States have a duty to adopt domestic legislative measures, and reads as follows:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

71. Again in application of the principle of *iura novit curia*, in this merits phase of the case the Commission will examine the application of Article 8 of the Inter-American Convention to Prevent and Punish Torture as it provides that States have an obligation to investigate "if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction," applicable to the facts of the present case as of the time that the Convention entered into force with respect to the Chilean State. That provision reads as follows:

The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.

Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State.

72. The States' obligation to ensure means that 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"<sup>68</sup> The central issue that the Commission is called upon to examine in the instant case is whether or not the State complied with its duty to ensure the free and full exercise of the rights of Mr. García Lucero and his family, particularly the obligations incumbent upon the Chilean State by virtue of that duty to ensure with respect to the investigation of and reparations for the acts of torture. The Commission will now examine the facts contested in the present case as regards those two obligations that follow from the duty to ensure the right to personal integrity protected under Article 5(1) of the American Convention, in its procedural dimension. Additionally, as it relates to the obligation to investigate in the instant case, the Commission will also examine the Chilean State's duty to adopt domestic legislative measures.

## 1. Obligation to investigate

73. The Inter-American Court has held that "the right to judicial access must secure the right of the alleged victims or their next of kin to have every measure taken such that the truth of

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<sup>68</sup> I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*. Judgment of July 29, 1988. Series C No. 4, para. 166.

the events may be known within a reasonable time and that those eventually found responsible be punished.”<sup>69</sup> The Court has also written that from Article 8 of the American Convention it follows that “victims of human rights violations or their next of kin must have ample opportunities to be heard and to take part in the respective proceedings, both in order to shed on the facts, to see that those responsible are punished, and to seek the reparations to which they are entitled.”<sup>70</sup> The Court has held that States have an obligation to combat impunity by every legal means available, since “impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives” and that impunity means the “failure to investigate, prosecute, take into custody, try and convict those responsible for violations of rights protected by the American Convention”.<sup>71</sup>

74. In its Article XVIII, the American Declaration protects the right to a fair trial. As the IACHR has observed, in its preamble the American Declaration states “that juridical and political institutions of states have as their principal aim the protection of human rights” and, therefore, “these provisions of international law impose on the State the basic obligation to respect and guarantee, in consequence of which every violation of the rights recognized by the Declaration (...) that may be ascribed under the rules of international law to acts or omissions by any public authority constitutes an act for which the State is responsible.”<sup>72</sup> In others cases of serious violations of human rights such as the right to life, the IACHR has decided that the State is responsible for violation of Article XVIII of the American Declaration when it has failed in its duty to investigate human rights violations in an adequate, timely and effective manner.<sup>73</sup>

75. The organs of the inter-American system have held that the State has an obligation to conduct an effective, prompt and efficient investigation in cases of torture. Thus, for example, the IACHR has written that “in light of the general obligation of the States party to respect and ensure the rights of all persons under their jurisdiction, contained in Article 1(1) of the American Convention, the State has the duty to immediately and *ex officio* begin an effective investigation to identify, try, and punish those responsible, when there is a complaint or there are grounds to believe that an act of torture has been committed in violation of Article 5 of the American Convention.”<sup>74</sup>

76. According to the case law of the inter-American system, the obligation to investigate human rights violations is among the positive measures that States must take to ensure the rights

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<sup>69</sup> I/A Court H.R., *Rochela Massacre v. Colombia Case*. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163, para. 146; I/A Court H.R., *Case of the Miguel Castro Castro Prison v. Peru Case*. Judgment of November 25, 2006. Series C No. 160, para. 382; I/A Court H.R., *Case of Vargas Areco*. Judgment of September 26, 2006. Series C No. 155, para. 101; and I/A Court H.R., *Case of the Ituango Massacres*. Judgment of July 1, 2006. Series C No. 148, para. 289.

<sup>70</sup> I/A Court H.R., *Case of Cabrera García and Montiel Flores v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 26, 2010. Series C No. 220, para. 192 [translation ours]; I/A Court H.R., *Case of Fernández Ortega et al. v. Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 30, 2010. Series C No. 215, para. 192, and I/A Court H.R., *Case of Rosendo Cantú et al. v. Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 31, 2010. Series C No. 216, para. 176.

<sup>71</sup> I/A Court H.R., *Case of Loayza Tamayo v. Peru*. Reparations (Art. 63(1) American Convention on Human Rights). Judgment of November 27, 1998. Series C No. 42, para. 170 citing I/A Court H.R., *Case of the “White Van” (Paniagua Morales et al.) v. Guatemala*. Judgment of March 8, 1998. Series C No. 37, para. 173.

<sup>72</sup> IACHR, Report No. 60/99, Case No. 11.516, Ovelário Tames, Brazil, April 13, 1999, para. 29.

<sup>73</sup> See, for example, IACHR, Report No. 24/98, Case 11.287, João Canuto de Oliveira, Brazil, para. 67; IACHR, Report No. 60/99, Case No. 11.516, Ovelário Tames, Brazil, April 13, 1999, paragraphs 40-42.

<sup>74</sup> IACHR, Report 88/08, Case 12.449, Teodoro Cabrera García and Rodolfo Montiel Flores, October 30, 2008, para. 158, citing I/A Court H.R., *Case of Tibi*. Judgment of September 7, 2004. Series C No. 114, para.159. See also I/A Court H.R., *Case of Gutiérrez Soler v. Colombia*. Judgment of September 12, 2005. Series C No. 132, para. 54.

recognized in the Convention.<sup>75</sup> The Court has written that the duty to investigate must be assumed by the State as its own legal duty, and 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.<sup>76</sup> Given that duty, once the state authorities have been apprised of the facts, the State has the obligation to initiate, *ex officio* and immediately, an efficient, impartial and effective investigation,<sup>77</sup> which must be carried out by all available legal means with the aim of getting at the truth.<sup>78</sup>

77. The Court has also held that the obligation to ensure the right enshrined in Article 5 of the American Convention “embodies the duty of the State to investigate possible acts of torture and other cruel, inhuman or degrading treatment,”<sup>79</sup> an obligation reinforced by the provisions of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, whereby the State has an obligation “to take [...] effective measures to prevent and punish torture within its jurisdiction.”<sup>80</sup> In a recent case in which the Court held that the State had failed to comply with its obligation to investigate acts of torture, it maintained that the State had violated its obligation to investigate *ex officio*, in violation of Article 8(1) of the American Convention and Article 8 of the Inter-American Convention to Prevent and Punish Torture.<sup>81</sup>

78. The Inter-American Court has elaborated upon the general obligation to ensure set forth in Article 1(1) with respect to the right to personal integrity, by holding that “there is a state obligation to start *ex officio* and immediately an effective investigation that allows it to identify, prosecute, and punish the responsible parties, when there is an accusation or well-grounded reason to believe that an act of torture has been committed.”<sup>82</sup> The Court underscored the importance of States’ complying with this obligation in the following terms:

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<sup>75</sup> I/A Court H.R., *Case of Fernández Ortega et al. v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2010. Series C No. 215, para. 191; I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*. Judgment of July 29, 1988. Series C No. 4, paragraphs 166 and 176; I/A Court H.R., *Case of Valle Jaramillo et al. v. Colombia*. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 192, para. 98; I/A Court H.R., *Case of Garibaldi v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 23, 2009. Series C No. 203, para. 112.

<sup>76</sup> I/A Court H.R., *Case of Fernández Ortega et al. v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2010. Series C No. 215, para. 191. I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*. Judgment of July 29, 1988. Series C No. 4, para. 177; I/A Court H.R., *Case of Radilla Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2009. Series C No. 209, paragraphs 192 and 233, and I/A Court H.R., *Case of Chitay Nech et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 25, 2010. Series C No. 212, para. 192.

<sup>77</sup> I/A Court H.R., *Case of Fernández Ortega et al. v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2010. Series C No. 215, para. 191; I/A Court H.R., *Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations and Costs*. Judgment of January 31, 2006. Series C No. 140, para. 143; I/A Court H.R., *Case of Perozo et al. v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195, para. 298, and I/A Court H.R., *Case of González et al. (“Cotton Field”) v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 290.

<sup>78</sup> I/A Court H.R., *Case of Fernández Ortega et al. v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2010. Series C No. 215, para. 191 [translation ours].

<sup>79</sup> I/A Court H.R., *Case of Bueno Alves v. Argentina*. Judgment of May 11, 2007. Merits, Reparations and Costs. Series C. No. 164, para. 88, citing the following judgments: I/A Court H.R., *Case of the Miguel Castro Castro Prison v. Peru*. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160, para. 344; I/A Court H.R., *Case of Vargas Areco v. Paraguay*. Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 155, para. 78, and I/A Court H.R., *Case of Ximenes Lopes v. Brazil*. Merits, Reparations and Costs. Judgment of July 4, 2006. Series C No. 149, para. 147.

<sup>80</sup> I/A Court H.R., *Case of Bueno Alves v. Argentina*. Judgment of May 11, 2007. Merits, Reparations and Costs. Series C. No. 164, para. 88.

<sup>81</sup> I/A Court H.R., *Case of Cabrera García and Montiel Flores v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 26, 2010. Series C No. 220, para. 193.

<sup>82</sup> I/A Court H.R., *Case of Bueno Alves v. Argentina*. Judgment of May 11, 2007. Merits, Reparations and Costs. Series C. No. 164, para. 89, citing the following judgments: I/A Court H.R., *Case of the Miguel Castro Castro Prison v. Peru*.

the duty to investigate constitutes an imperative obligation of the state that derives from international law and cannot be disregarded or conditioned by domestic acts or legal provisions of any nature. As has been stated by the Court, in cases of serious breaches to fundamental rights the imperious need to avoid the repetition of said facts depends, to a great extent, on the avoidance of their impunity and satisfying the right of both victims and society as a whole to have access to the knowledge of the truth of what happened. The obligation to investigate constitutes a means to guarantee said rights, and failure to comply with it brings about the State's international responsibility.<sup>83</sup>

79. The Commission must emphasize that in the instant case the acts of torture that created the State's obligation to investigate *ex officio* occurred in the context of egregious and large-scale violations of human rights, in which at least 33,221 detentions and 27,255 victims of political imprisonment were confirmed, the vast majority of whom were tortured.<sup>84</sup>

80. It is the Commission's understanding that the State has not launched any investigation with respect to the acts of torture committed against Mr. García Lucero. It notes the State's argument, made during the merits stage, to the effect that the alleged victim had not filed any complaint with respect to the acts of torture. At the same time, however, it observes the circumstances under which Mr. García Lucero was exiled from Chile in 1975 –and has been living in exile ever since– and the petitioners' allegation that the existence of Decree Law 2191 poses an obstacle to an effective investigation into these acts.

81. The IACHR must point out that the name of the alleged victim in this case appeared on the list of Persons Recognized as Victims in the Report of the National Commission on Political Imprisonment and Torture (known as the Valech Commission); a report that has been in the public record since November 28, 2004. In the instant case, the petition was forwarded to the State on November 23, 2004. Therefore, at least since November 2004, the Chilean State has been fully aware of the claims alleging its failure to investigate the torture to which Mr. García Lucero was subjected. However, the State has not since launched any investigation into these allegations of torture, a clear failure to comply with its obligations under the American Convention.

82. Time and time again, the organs of the inter-American system have held that amnesty laws which purpose is to obstruct the investigation and punishment of those responsible for serious human rights violations like torture are incompatible with the American Convention, as such conduct is prohibited because they violate non-derogable rights recognized by international human rights law.<sup>85</sup> Amnesty laws "leave victims defenseless and perpetuate impunity for crimes

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Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160, para. 345; I/A Court H.R., *Case of Vargas Areco v. Paraguay*. Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 155, para. 79, and I/A Court H.R., *Case of Gutiérrez Soler v. Colombia*. Merits, Reparations and Costs. Judgment of September 12, 2005. Series C No. 132, para. 54.

<sup>83</sup> I/A Court H.R., *Case of Bueno Alves v. Argentina*. Judgment of May 11, 2007. Merits, Reparations and Costs. Series C. No. 164, para. 90, citing the following judgments: I/A Court H.R., *Case of the Miguel Castro Castro Prison v. Peru*. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160, para. 347; I/A Court H.R., *Case of Vargas Areco v. Paraguay*. Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 155, para. 81; I/A Court H.R., *Case of Goiburú et al. v. Paraguay*. Merits, Reparations and Costs. Judgment of September 22, 2006. Series C No. 153, paragraphs 164 and 165, y I/A Court H.R., *Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 5, 2006. Series C No. 150, paragraphs 137, 139 and 141.

<sup>84</sup> Annex 2. National Commission on Political Imprisonment and Torture ("Valech Commission") Report, 2004, Chapter IV, section: List of Persons Recognized as Victims, p. 8.

<sup>85</sup> The Inter-American Court has written that: "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extra-legal, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by

against humanity. Therefore, they are overtly incompatible with the wording and the spirit of the American Convention, and undoubtedly affect rights embodied in such Convention. This constitutes in and of itself a violation of the Convention and generates international liability for the State.”<sup>86</sup> When laws of this type were enacted in countries like Argentina and Uruguay, the Commission wrote that those States had failed in their obligation to ensure the right of access to justice, thereby violating the rights protected under Articles 8(1), 25(1) and 1(1) of the American Convention.<sup>87</sup>

83. The Commission has highlighted that Decree-Law No. 2191, known as the “self-amnesty” law in Chile, is incompatible with Articles 8(1), 25(1), 1(1) and 2 of the American Convention.<sup>88</sup> Specifically, the Commission has affirmed that:

(...) the application of amnesty laws, which bar access to justice in cases concerning serious human rights violations, render ineffective the obligation of the States Parties to respect the rights and freedoms recognized in the Convention and to ensure their free and full exercise by all persons subject to their jurisdiction, without discrimination of any kind, as established in Article 1(1) of the Convention. Such laws therefore eliminate the most effective means of enforcement of human rights, that is, the adjudication and punishment of those responsible.<sup>89</sup>

84. With respect to the compatibility of Decree Law 2191 with the American Convention and the State’s duty to adapt its domestic legal system to the provisions of the American Convention in order to ensure the exercise of the human rights protected therein, the Inter-American Court has held that:

Pursuant to Article 2 of the Convention, such adaptation implies the adoption of measures following two main guidelines, to wit: i) the annulment of laws and practices of any kind whatsoever that may imply the violation of the rights protected by the Convention, and ii) the passing of laws and the development of practices tending to achieve an effective observance of such guarantees.<sup>90</sup> It is necessary to reaffirm that the duty stated in i) is only complied when such reform is effectively made.<sup>91</sup>

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international human rights law.” I/A Court H.R., *Case of Almonacid Arellano et al. v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, para. 112, citing I/A Court H.R., *Case of Barrios Altos v. Peru*. Merits. Judgment of March 14, 2001. Series C No. 75, para. 41.

<sup>86</sup> I/A Court H.R., *Case of Almonacid Arellano et al. v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, para. 119, I/A Court H.R., *Case of Barrios Altos v. Peru*. Interpretation of the Judgment on the Merits (Art. 67 American Convention on Human Rights). Judgment of September 3, 2001. Series C No. 83, para. 18.

<sup>87</sup> See IACHR, Report No. 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 y 10.311, Argentina, October 2, 1992, paragraphs 37, 39 and 41; and IACHR, Report No. 29/92, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Uruguay, October 2, 1992, paragraphs 45, 46, 49 and 51.

<sup>88</sup> IACHR, Report No. 34/96, Cases 11.228, 11.229, 11.231 y 11.282, Chile, October 15, 1996, paragraphs 104 and 107.

<sup>89</sup> IACHR, Report No.133/99, Case No. 11.725, Carmelo Soria Espinoza, Chile, November 19, 1999, para. 66, citing two earlier Commission cases, namely: IACHR, Reports 28/92 (Argentina) and 29/92 (Uruguay). See also the following reports that deal with Chile’s Decree Law 2191: IACHR, Report No. 25/98, Cases 11.505 and others, Chile, April 7, 1998, and IACHR, Report No. 34/96, Cases 11.229 and others, Chile, October 15, 1996.

<sup>90</sup> I/A Court H.R., *Case of Ximenes Lopes v. Brazil*. Merits, Reparations and Costs. Judgment of July 4, 2006. Series C No. 149, para. 83; I/A Court H.R., *Case of Gómez Palomino v. Peru*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 136, para. 91; y I/A Court H.R., *Case of the “Mapiripán Massacre” v. Colombia*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134, para. 109.

<sup>91</sup> I/A Court H.R., *Case of Raxcacó Reyes v. Guatemala*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 133, para. 87; I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 100; and I/A Court H.R., *Case of Caesar v. Trinidad and Tobago*. Merits, Reparations and Costs. Judgment of March 11, 2005. Series C No. 123, paragraphs 91 and 93.”



Amnesty laws with the characteristics as those described above (...) leave victims defenseless and perpetuate impunity for crimes against humanity. Therefore, they are overtly incompatible with the wording and the spirit of the American Convention, and undoubtedly affect rights embodied in such Convention. This constitutes in and of itself a violation of the Convention and generates international liability for the State.<sup>92</sup> Consequently, given its nature, Decree Law No. 2.191 does not have any legal effects and cannot remain as an obstacle for the investigation of the facts inherent to the instant case, or for the identification and punishment of those responsible therefore. Neither can it have a like or similar impact regarding other cases of violations of rights protected by the American Convention which occurred in Chile.<sup>93</sup>

On the other hand, even though the Court notes that Decree Law No. 2.191 basically grants a self-amnesty, since it was issued by the military regime to avoid judicial prosecution of its own crimes, it points out that a State violates the American Convention when issuing provisions which do not conform to the obligations contemplated in said Convention. The fact that such provisions have been adopted pursuant to the domestic legislation or against it, "is irrelevant for this purpose."<sup>94</sup> To conclude, the Court, rather than the process of adoption and the authority issuing Decree Law No. 2.191, addresses the *ratio legis*: granting an amnesty for the serious criminal acts contrary to international law that were committed by the military regime.<sup>95</sup>

85. In the course of performing its functions of promoting and protecting human rights, the IACHR has received information from the Chilean State concerning the progress made in connection with Decree Law No 2191, particularly the drafting of two bills, namely: (i) Bulletin 6422-07 dated March 31, 2009, which establishes a law of interpretation that adjusts Chilean criminal law to conform to the international treaties on the subject of human rights (a bill that, as of August 2010, was in the second phase required under the Constitution – "*segundo trámite constitucional*"); and (ii) Bulletin 6491-17 of April 30, 2009, which amends Article 675 of the Code of Criminal Procedure and establishes a new mechanism for reviewing cases of human rights violations (a bill that as of August 2010 was in the first phase required under the Constitution – "*primer trámite constitucional*").<sup>96</sup> In this regard, the Commission has noted that it welcomes the State's efforts and expects to receive further information on the progress made on the enactment of these two bills as soon as possible.<sup>97</sup>

86. The Commission takes note of the State's argument referring to a Chilean Supreme Court ruling of September 2009 in which Decree Law 2191 was not applied. The petitioners have made the same argument. In the Commission's view, under Article 2 of the American Convention the State has an obligation to ensure that Decree Law 2191 does not continue to pose an obstacle

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<sup>92</sup> I/A Court H.R., *Case of Almonacid Arellano et al. v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, para. 119; I/A Court H.R., *Case of Barrios Altos v. Peru. Interpretation of the Judgment on the Merits* (Art. 67 American Convention on Human Rights). Judgment of September 3, 2001. Series C No. 83, para. 18.

<sup>93</sup> I/A Court H.R., *Case of Barrios Altos v. Peru*. Merits. Judgment of March 14, 2001. Series C No. 75, para. 44.

<sup>94</sup> I/A Court H.R., *Certain Attributes of the Inter-American Commission on Human Rights* (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights). Advisory Opinion OC-13/93 of July 16, 1993, Series A No. 13, para. 26.

<sup>95</sup> I/A Court H.R., *Case of Almonacid Arellano et al. v. Chile*. Preliminary Objections, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, paragraphs 118-120.

<sup>96</sup> Annex 22. Report of the Chilean State, dated August 18, 2010, in Case No. 12,057 - Almonacid Arellano, received by the Inter-American Court of Human Rights on August 23, 2010. Annex 23. Observations on Compliance with the Judgment presented by the IACHR to the I/A Court H.R. on November 23, 2010.

<sup>97</sup> Annex 23. Observations on Compliance with the Judgment, presented by the IACHR to the I/A Court H.R. on November 23, 2010.

to the investigation and, where appropriate, punishment of all persons found responsible.<sup>98</sup> As the Inter-American Court has observed, this provision of the Convention makes it the legislative obligation of States to formally and materially repeal provisions that are in violation of the Convention. In this regard, the Court has stated the following:

Since it ratified the American Convention on August 21, 1990, the State has kept Decree Law No. 2.191 in force for sixteen years, overtly violating the obligations set forth in said Convention. The fact that such Decree Law has not been applied by the Chilean courts in several cases since 1998 is a significant advance, and the Court appreciates it, but it does not suffice to meet the requirements of Article 2 of the Convention in the instant case. Firstly because, as it has been stated in the preceding paragraphs, Article 2 imposes the legislative obligation to annul all legislation which is in violation of the Convention, and secondly, because the criterion of the domestic courts may change, and they may decide to reinstate the application of a provision which remains in force under the domestic legislation.<sup>99</sup>

87. Thus, Article 2 requires that there be no provisions in force that violate the American Convention, irrespective of what the case law of the domestic courts may be. The Commission concurs with the Court's observation that the criterion of the domestic courts can change; they could begin to apply Decree-Law 2191, since that law is still in effect in the domestic legal system. As a result, the domestic courts could still order dismissal of a case against perpetrators of massive violations of human rights committed under the Chilean dictatorship. The IACHR has noted that court rulings that dismiss these type of cases based on the Chilean amnesty law "not only aggravate the situation of impunity, but also definitively violate the right to justice to which the members of the victims' families are entitled: to identify the persons responsible and to establish the responsibilities borne and the penalties to be paid by those persons, and to obtain legal compensation from the guilty parties."<sup>100</sup>

88. In its recent concluding observations regarding Chile, the United Nation Committee against Torture wrote the following:

The Committee notes that the Chilean courts, and in particular the Supreme Court, are handing down judgements in which they rule that the Amnesty Decree-Law (under which people who committed human rights violations between 11 September 1973 and 10 March 1978 cannot be punished) is inapplicable, citing international human rights instruments as the legal basis for that finding. Nonetheless, the Committee feels that, in line with the ruling of the Inter-American Court of Human Rights in the case of *Almonacid Arellanos y otros* (sic) of 26 September 2006, the fact that this decree-law remains in force leaves the application of the amnesty up to the judgement of the domestic courts. The Committee has learned of recent Supreme Court decisions that appear to take the existence of that decree-law into account, particularly in reducing the applicable penalties for serious crimes committed during the dictatorship (art. 2).

**The Committee recommends that, in keeping with its earlier recommendations, the State party abrogate the Amnesty Decree-Law. The Committee draws the State party's attention to paragraph 5 of its general comment No. 2 on the implementation of article 2 of the Convention by States parties, wherein it considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability. The Committee also recommends that all necessary steps be taken to ensure that cases of torture and other**

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<sup>98</sup> I/A Court H.R., *Case of Almonacid Arellano et al. v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154.

<sup>99</sup> I/A Court H.R., *Case of Almonacid Arellano et al. v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, para. 121.

<sup>100</sup> IACHR, Report No. 34/96, Cases 11.228, 11.229, 11.231 and 11282, Chile, October 15, 1996, para. 106.

**cruel, inhuman or degrading treatment or punishment be thoroughly and promptly investigated in an impartial manner, that the culprits be subsequently tried and punished, and that steps be taken to compensate victims in accordance with the Convention.<sup>101</sup>**

89. Furthermore, in cases related to Peruvian amnesty laws No. 26.479 and No. 26.492, the Court held that they were “incompatible with the American Convention on Human Rights and, consequently, lack[ed] legal effect”<sup>102</sup> and that “[e]nactment of a law that is manifestly incompatible with the obligations undertaken by a State Party to the Convention is *per se* a violation of the Convention for which the State incurs international responsibility [and] given the nature of the violation that amnesty laws No. 26.479 and No. 26.492 constitute, the effects of the decision [...] are general in nature.”<sup>103</sup>

90. It is worth noting that in compliance with the Court’s judgment in the *Barrios Altos Case*, the Peruvian State reported that a series of measures had been adopted toward the repeal of the amnesty laws, to which the Commission replied that those laws had to be removed from the Peruvian legal system to formally ensure compliance with its Article 2 obligation to adapt its domestic laws, inasmuch as amnesty laws 26,479 and 26,492 have no legal effect as they are contrary to the Convention.<sup>104</sup> Thereafter, in the *Case of La Cantuta*, the Inter-American Court stated that although during the time in which the amnesty laws were applied in that case the State had violated its obligation to adapt its domestic law to the Convention pursuant to Article 2 thereof, it did not find sufficient evidence to show that the State had continued to violate its obligation, given that it had adopted appropriate measures to eliminate any effects that the amnesty laws might have had.<sup>105</sup> The IACHR observes that in the instant case, the Chilean State is not reporting that it has voided Decree Law No. 2191 of its effects; instead, it is reporting that a court did not apply it recently in a case, which does not imply that the amnesty law is no longer in force. This is different from the aforementioned Peruvian case, where measures were taken to eliminate the legal effects of an amnesty law.

91. Notwithstanding and in keeping with the above-mentioned precedent in the *Case of La Cantuta*, the Commission found that the effect of enacting the amnesty laws was that so long as they were in force “it was impossible to pursue any investigation against State agents owing to the amnesty provisions.” In this regard, the Commission held that

at the time that the aforesaid legislation was passed the investigations into the disappearance of Kenneth Anzualdo were closed without prejudice; however, the amnesty laws were a legal obstacle that prevented the continued pursuit of lines of investigation aimed at clarifying the circumstances of his disappearance. Thus, the IACHR considers that the aforesaid laws were a factor that contributed to the delay in the investigations, which, more than 13 years after

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<sup>101</sup> Annex 24. UN, Committee against Torture. Concluding Observations of the Committee against Torture, CAT/C/CHL/CO/5, May 14, 2009, 42<sup>nd</sup> session, para. 12. Emphasis in the original.

<sup>102</sup> IACHR, Application to the Inter-American Court of Human Rights in the case of Kenneth Ney Anzualdo Castro (Case N° 11.385) against the Republic of Peru, presented July 11, 2008, para. 179, citing I/A Court H.R., *Case of Barrios Altos*. Judgment of March 14, 2001, paragraphs 41 to 44 and operative paragraph four.

<sup>103</sup> IACHR, Application to the Inter-American Court of Human Rights in the case of Kenneth Ney Anzualdo Castro (Case N° 11.385) against the Republic of Peru, presented July 11, 2008, para. 179, citing I/A Court H.R., *Case of La Cantuta*. Judgment on the Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, para. 187. See also I/A Court H.R., *Case of Barrios Altos. Interpretation of the Judgment on the Merits* (Art. 67 American Convention on Human Rights) Judgment of September 3, 2001. Series C No. 83, para. 18 and operative paragraph two.

<sup>104</sup> IACHR, Application to the Inter-American Court of Human Rights in the case of Kenneth Ney Anzualdo Castro (Case N° 11.385) against the Republic of Peru, presented July 11, 2008, para. 181.

<sup>105</sup> I/A Court H.R., *Case of La Cantuta. Merits, Reparations and Costs*. Judgment of November 29, 2006. Series C No. 162. Series C No. 162, para. 189. Cited in IACHR, Application to the Inter-American Court of Human Rights in the case of Kenneth Ney Anzualdo Castro (Case N° 11.385) Against the Republic of Peru, presented on July 11, 2008, para. 181

the events, have failed to produce concrete results in the instant case and, consequently, the crimes surrounding young Kenneth's disappearance have gone unpunished. In sum, while they were in force the amnesty laws amounted to an obstacle to the prompt and effective investigation, prosecution, and punishment of those thought to be responsible for the violations, and to a breach by the State of its obligation to ensure rights, to the detriment of the victim's next of kin.<sup>106</sup>

92. In conclusion, the Commission considers that by not taking legislative measures to adjust its laws to the American Convention and instead leaving Decree Law 2191 in effect in the Chilean legal system, Chile has failed to comply with its obligation to ensure the human rights protected under the Convention, in violation of Article 2 thereof. The Commission also considers that the State's failure to conduct an effective and prompt investigation into the alleged torture of Mr. García Lucero, which occurred in the context of massive and serious human rights violations during the military dictatorship in Chile, constitutes violation of the rights recognized in Article XVIII of the American Declaration and Articles 5(1), 8(1) and 25(1) of the American Convention in relation to the general obligations established in Article 1(1) thereof, and of the obligation established in Article 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Mr. García Lucero and his next of kin.

## **2. Obligation to make reparations**

93. Preliminarily, the Commission wishes to acknowledge the important efforts carried out by the State of Chile in developing a reparations system to address the crimes and violations that took place during the military dictatorship. In this regard, it is worth noting the Commission's statement on the occasion of the inauguration of the Museum of Memory in Chile on January 11, 2010. At that time the IACHR congratulated the Chilean State and indicated that such an initiative constituted "an important symbol of the determination to combat impunity and create a democratic culture based on respect for human rights". The IACHR also highlighted the fundamental value of recovering the historical memory of great human rights violations "as a mechanism to prevent such acts from being repeated" and as "part of the process of comprehensive reparations for human rights violations".<sup>107</sup>

94. It must be made clear from the outset that the Commission will not examine whether the reparations program as a whole adopted by the Chilean State conforms to the American Convention or other international standards. However, the Commission does believe that certain observations must be made concerning the nature and scope of the Chilean State's obligation to redress the harm done specifically to Mr. García Lucero and his next of kin, in consideration of the fact that he is disabled and in exile.

95. Furthermore, the IACHR would like to point out preliminarily that in 2009 the United Nations Committee against Torture recommended to Chile that it should ensure that all persons who were victims of acts of torture have access to adequate reparation commensurate with the gravity of the crime committed against them, "including those not currently in the State party."<sup>108</sup>

96. The obligation to make reparation for damages caused by a violation of human rights is part of the duty to ensure established in Article 1(1) of the American Convention in relation to the right to personal integrity, protected under Article 5 thereof. As for the duty to ensure the free and

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<sup>106</sup> IACHR, Application to the Inter-American Court of Human Rights in the case of Kenneth Ney Anzualdo Castro (Case N° 11.385) against the Republic of Peru, presented July 11, 2008, para. 182.

<sup>107</sup> Annex 25. IACHR, Press Release No. 1/10, Opening of Chile's Museum of Memory, January 11, 2010.

<sup>108</sup> Annex 24. Committee against Torture, Concluding Observations of the Committee against Torture, CAT/C/CHL/CO/5, May 14, 2009, 42nd session, para. 25. (The original is highlighted in bold print).

full exercise of the rights recognized in the Convention to all persons subject to its jurisdiction, the Court has written that:

[t]his obligation implies the duty of States Parties to organize (...) 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.**<sup>109</sup>

97. The constant jurisprudence of the Inter-American Court is that any violation of an international obligation that results in harm creates a duty to make adequate reparation.<sup>110</sup> Thus, “[t]he occurrence of a wrongful act that is attributable to a State gives rise to the State’s international liability, and its resulting duty to make reparation for and remove the consequences of the violation.”<sup>111</sup> The Court has elaborated upon the obligation to make reparations pursuant to Article 63(1) of the American Convention, which embodies a customary law norm that is one of the basic principles of contemporary international law on States’ responsibility.<sup>112</sup>

98. In this regard, it is worth mentioning the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. These principles affirm the International obligation that States have to procure reparations for human rights violations, as an essential component of International Human Rights Law; and “do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law (...)”<sup>113</sup>. According to these principles:

Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law (...). Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions

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<sup>109</sup> I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4, para. 166 (emphasis added).

<sup>110</sup> I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*. Reparations and Costs. Judgment of July 21, 1989. Series C No. 7, para. 25; I/A Court H.R., *Case of Rosendo Cantú et al. v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 31, 2010. Series C No. 216, para. 203; and I/A Court H.R., *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*. Merits, Reparations and Costs. Judgment of September 1, 2010. Series C No. 217, para. 231.

<sup>111</sup> IACHR, Application with the I/A Court H.R. in the *Case of Teodoro Cabrera García and Rodolfo Montiel Flores (Case 12.449) v. Mexico*, June 24, 2009, para. 174, citing the case law of the Inter-American Court of Human Rights in the follow cases: I/A Court H.R., *Case of La Cantuta v. Peru*. Merits, Reparations and Costs. Judgment of November 29, 2006 Series C No. 162, para. 200; I/A Court H.R., *Case of the Miguel Castro Castro Prison v. Peru*. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160, para. 414; I/A Court H.R., *Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of 5 de julio de 2006. Series C No. 150, para. 116.

<sup>112</sup> See, for example, I/A Court H.R., *Case of Vélez Loor v. Panamá*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010. Series C No. 218, para. 255; I/A Court H.R., *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala*. Reparations and Costs. Judgment of May 26, 2001. Series C No. 77, para. 62; I/A Court H.R., *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*. Merits, Reparations and Costs. Judgment of September 1, 2010. Series C No. 217, para. 231, and I/A Court H.R., *Case of Rosendo Cantú et al. v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 31, 2010. Series C No. 216, para. 203.

<sup>113</sup> Annex 26. UN, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution 60/147, December 16, 2005, Preamble.

which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law.<sup>114</sup>

99. Reparations are crucial in ensuring that justice is done in a given case.<sup>115</sup> The interpretation and scope that the inter-American human rights system has attributed to this principle is that reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes “the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.”<sup>116</sup>

100. However, the injured party cannot always be afforded *in integrum* restitution of his or her violated right, in which case it is proper that “reparation be made for the consequences of the violation of the rights (...), including the payment of fair compensation.”<sup>117</sup> In a case involving forced disappearance, the Court held that:

The desired aim is full restitution for the injury suffered. This is something that is unfortunately often impossible to achieve, given the irreversible nature of the damages suffered, which is demonstrated in the instance case. Under such circumstances, it is appropriate to fix the payment of “fair compensation” in sufficiently broad terms in order to compensate, to the extent possible, for the loss suffered.<sup>118</sup>

101. In a case involving torture that the Commission recently submitted to the Court, it argued that where *restitution in integrum* is not possible, it is for the international court to determine a set of measures, “in addition to ensuring the rights abridged, to address the consequences of the infractions, as well as ordering payment of a compensation for the damage caused.”<sup>119</sup>

102. It is self-evident that in the instant case, *restitutio in integrum* is not possible as the physical and psychological effects that Mr. García Lucero and his family have suffered as a consequence of his torture and forced exile are irreversible. The question that needs to be answered, therefore, is the following: what are the adequate and effective measures to be taken in the instant case and, on that basis, measure Chile’s compliance with its obligation to make comprehensive reparations, as an essential element of its obligation to ensure.

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<sup>114</sup> Annex 26. UN, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution 60/147, December 16, 2005, para. 15.

<sup>115</sup> IACHR, Application with the I/A Court H.R. in the *Case of Teodoro Cabrera García and Rodolfo Montiel Flores (Case 12.449) v. Mexico*, June 24, 2009, para. 175.

<sup>116</sup> I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*. Reparations and Costs. Judgment of July 21, 1989. Series C No. 7, para. 26; I/A Court H.R., *Case of Godínez Cruz v. Honduras*. Reparations and Costs. Judgment of July 21, 1989. Series C No. 8, para. 24.

<sup>117</sup> I/A Court H.R., *Case of Castillo Páez v. Peru*. Merits. Judgment of November 3, 1997. Series C No. 34, para. 92.

<sup>118</sup> I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*. Interpretation of the Judgment of Reparations and Costs. Judgment of August 17, 1990. Series C No. 9, para. 27; I/A Court H.R., *Case of Godínez Cruz Vs. Honduras*. Interpretation of the Judgment of Reparations and Costs. Judgment of August 17, 1990. Series C No. 10, para. 27.

<sup>119</sup> IACHR, Application with the I/A Court H.R. in the *Case of Teodoro Cabrera García and Rodolfo Montiel Flores (Case 12.449) v. Mexico*, June 24, 2009, para. 176, citing the case law of the Inter-American Court of Human Rights in the follow cases: I/A Court H.R., *Case of La Cantuta Vs. Peru*. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, para. 201; I/A Court H.R., *Case of the Miguel Castro Castro Prison v. Peru*. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160, para. 415; I/A Court H.R., *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158, para. 143.

103. Bearing in mind the standards that the inter-American system has established on the matter of reparations, the parties' allegations –particularly the discrepancy in terms of whether the reparations have been comprehensive or not– the established facts –particularly the torture committed, the forced exile, the failure to investigate the acts of torture and Mr. García Lucero's permanent disability-, the IACHR is of the opinion that the analysis of the State's compliance with its obligation to provide comprehensive, adequate and effective reparations in the instant case involves two components: (a) the adoption of specific measures to make reparations for the consequences of the violation, and (b) the compensation for the harm caused.

**a. Adoption of specific measures to make reparations for the consequences of the violation**

104. The Commission is of the opinion that given that full restitution is not possible in the instant case, the proper course of action would be to adopt substitute restitution measures so as to eliminate, to the extent possible, the physical and psychological consequences of the torture and forced exile that Mr. García Lucero suffered.

105. In this regard, the petitioners allege that the health-related reparations program (those associated with the benefits granted through the PRAIS Health System) adopted by the Chilean State do not take Mr. García Lucero's particular situation into account; who, being in exile, has been unable to avail himself of these services. The petitioners contend that the State has not taken specific measures to provide the medical or psychological/psychiatric assistance to enable Mr. García Lucero to be rehabilitated in the United Kingdom, especially considering that his permanent disability has left him unable to work and unable to make a decent living for his family since he left Chile in 1975. Additionally, the IACHR takes note of the petitioners' allegation that Mr. García Lucero's next-of-kin, particularly his wife –who has had to devote herself entirely to his care since 1975 due to his disability- has not received any monetary compensation or health or education benefits.

106. In the instant case, the established facts make it clear that Mr. García Lucero needs psychological/psychiatric therapy sessions, both individual and family, as well as physical therapy sessions.

107. The United Nations Committee against Torture has affirmed that:

The Committee takes note of the fact that, in the State party, torture victims have access to the Programme of Compensation and Comprehensive Health Care (PRAIS) system and is pleased that this programme has been extended to cover the entire country. The Committee also welcomes the programme's cooperation with such organizations as the Centro de Salud Mental y Derechos Humanos (Centre for Mental Health and Human Rights) (CINTRAS), the Corporación de Defensa de los Derechos del Pueblo (Committee for the Defence of the People's Rights) (CODEPU), the Instituto Latinoamericano de Salud Mental y Derechos Humanos (Latin American Mental Health and Human Rights Institute) (ILAS) and the Fundación de Ayuda Social de las Iglesias Cristianas (Christian Churches Social Aid Foundation) (FASIC). It is, however, concerned that victims of torture living outside the country do not have the benefit of this programme (arts. 14 and 16).

**The Committee recommends that the State party take into consideration the obligation to ensure redress for all victims of torture and that it consider concluding cooperation agreements with countries where they reside so that they may have access to the kind of medical treatment required by victims of torture.**

**The Committee further urges the State party to take steps to ensure the necessary funding so that each team from PRAIS or another organization can give effective care to all those entitled to it. The Committee urges the State party to incorporate a gender policy encompassing**

training and awareness-raising for the officials responsible for dealing with the cases of victims of assault or sexual violence. The Committee recommends that the State party increase its efforts in regard to reparation, compensation and rehabilitation so as to ensure fair and appropriate reparation for all victims of torture.<sup>120</sup>

108. In application of the standards established regarding what constitutes full reparation in cases such as this, the Commission considers that when a person suffers a permanent disability as a consequence of an act of torture, the measures of reparation and rehabilitation must be individualized in order to effectively address the specific and particular needs of the disabled person.

109. The IACHR acknowledges the efforts made by the State in its Reparations program to include measures to treat the health of victims of human rights violations committed during the military regime. However, the Commission also observes that although a victim of torture, Mr. García Lucero has not had access to the PRAIS because he does not live in Chile; nor has he received the health care benefits (including psychological or psychiatric treatment) that the State provides to mitigate the consequences of the torture and exile endured, or treatment to relieve the physical consequences of the torture. Although the State has taken certain measures to grant benefits to persons in exile, those measures have not served to remedy the specific situation of Mr. García Lucero. The fact of the matter is that Mr. García Lucero has been unable to avail himself of the benefits granted under the Reparations program because he was sent into exile.

#### 1. Compensation for the harm done

110. First, the IACHR wishes to acknowledge, in general, the reparations program designed and implemented by the State of Chile, specifically with regards to the compensations given to victims of human rights violations during the military dictatorship, and in particular, with respect to the benefits given to Mr. García Lucero as an "*exonerado político*".

111. As for the compensation for the harm done, the Commission will not examine whether the amount of the compensation paid to Mr. García Lucero under the Chilean State's Reparations program was adequate or sufficient. Nevertheless, the established facts in this case show that Mr. García Lucero received a "bonus" and continues to receive a pension, but by virtue of having been fired due to his political ideology (the State's recognition that he is an "*exonerado político*"), and not as a victim of torture. The only monetary compensation paid for the harm done by the torture was a payment he received under Law 19,992 for having opted to continue to receive the pension as "*exonerado político*", over the benefits paid to victims of torture and political imprisonment. In the Commission's view, this does not constitute a comprehensive form of reparation in the specific case of Mr. García Lucero, especially when one considers that he suffers from a permanent disability resulting from the torture, which has left him unable to work since 1975. Here, the Commission must emphasize that "[a] respondent state may not invoke domestic legal provisions to modify or avoid complying with its obligations to redress, which are regulated in all their aspects (scope, nature, modes, and establishment of the beneficiaries) by international law."<sup>121</sup> Also, it is noteworthy that Mr. García Lucero's lost wages due to his permanent disability were not recognized.

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<sup>120</sup> Annex 24. Committee against Torture. Final conclusions of the Committee against Torture, CAT/C/CHL/CO/5, May 14, 2009, 42<sup>nd</sup> Session, para. 18. Emphasis in the original.

<sup>121</sup> IACHR, Application with the I/A Court H.R. in the *Case of Teodoro Cabrera García and Rodolfo Montiel Flores (Case 12.449) v. Mexico*, June 24, 2009, para. 177, citing the following cases: I/A Court H.R., *Case of Cantoral Huamaní and García Santa Cruz v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 190; I/A Court H.R., *Case of Zambrano Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 148; I/A Court H.R., *Case of La Cantuta v. Peru*. Merits, Reparations and Costs. Judgment of November 29, 2006 Series C No. 162, para. 200; I/A Court H.R., *Case of the Miguel Castro Castro Prison v. Peru*. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160, para. 415.



112. The parties also differ on the matter of the reimbursement of the taxes that were withheld from the special bonus paid to Mr. García Lucero as an “*exonerado político*”, under Law 20,134. As evidenced in the parties’ allegations and the established facts, the petitioners argue that the 140,943 Chilean pesos withheld were never reimbursed, whereas the State contends that they were. The Commission does not have any evidence to show that this money was in fact reimbursed, but it also cannot disprove the petitioners’ allegation. In any case, if the State has not reimbursed the 140,943 Chilean pesos owed in taxes (since as the State has pointed out this special bonus was not taxable), the State would not be complying with its obligation to make proper reparations to Mr. García Lucero.

113. As a corollary of the above, the Commission must make clear that full reparations in this case include conducting a serious, exhaustive and impartial investigation into the alleged acts of torture, which must be carried out by the Chilean State with the due diligence.<sup>122</sup> The Commission will not elaborate further on this point, as the obligation to investigate was examined at length in the earlier section on the analysis of law. So long as the State has failed in its obligation to investigate the acts of torture, it has also failed in its obligation to make reparations to Mr. García Lucero and his family, under the terms previously established by the Commission.

114. Additionally, the IACHR is of the opinion that the continuous suffering that Mr. García Lucero and his wife endured due to the lack of adequate rehabilitation and treatment, as well as the harm caused by the absence of an investigation and of full reparation for the acts of torture - all of which occurred due to the State’s lack of compliance with its obligation to ensure the right to personal integrity- tantamount to a violation of Article 5(1) of the American Convention.

115. Finally, the Commission recalls that the established case law of the organs of the inter-American system is that the next of kin of victims of human rights violations may also be regarded as victims.<sup>123</sup> In the instant case, the Commission observes that the impunity with respect to the acts alleged and the failure to provide full reparations compounded the emotional anxiety suffered by Mr. García Lucero’s wife, Elena, and his daughters (María Elena, Gloria and Francisca), which is why the Commission finds that their right to mental and moral integrity, protected under Article 5(1) of the American Convention, has been violated.

## VII. CONCLUSIONS

116. The Inter-American Commission concludes that the Chilean State is responsible for violation of:

1. The right to a fair trial, recognized in Article XVIII of the American Declaration, the right to a fair trial, to judicial protection and to personal integrity, in conjunction with the general obligation to ensure human rights and its duty to adapt its domestic laws (articles 8(1), 25(1), 5(1), 1(1) and 2 of the American Convention), and the duty to investigate established in Article 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Mr. García Lucero and his next of kin.

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<sup>122</sup> The Commission’s arguments and the Court’s conclusions on the matter of reparations in I/A Court H.R., *Case of Cabrera García and Montiel Flores Vs. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 26, 2010. Series C No. 220, paragraphs 213-215.

<sup>123</sup> I/A Court H.R., *Case of Bueno Alves v. Argentina*. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C. No. 164, para. 102; I/A Court H.R., *Case of the Miguel Castro Castro Prison v. Peru*. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160, para. 335; I/A Court H.R., *Case of Vargas Areco v. Paraguay*. Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 155, para. 83, and I/A Court H.R., *Case of Goiburú et al. v. Paraguay*. Merits, Reparations and Costs. Judgment of September 22, 2006. Series C No. 153, para. 96.

2. The right to full, adequate and effective reparations, under the general obligation to ensure, pursuant to Article 5(1) of the American Convention in conjunction with Article 1(1) thereof, to the detriment of Mr. García Lucero.
3. The right to personal integrity, recognized in Article 5(1) of the American Convention, in relation to the general obligation to ensure the free and full exercise of human rights, set forth in Article 1(1) thereof, to the detriment of Mr. García Lucero's wife (Mrs. Elena García) and his daughters (María Elena, Gloria and Francisca García).

#### **VIII. RECOMMENDATIONS**

117. Based on the above analysis and conclusions,

#### **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THE CHILEAN STATE TO:**

1. Fully and adequately compensate Leopoldo García Lucero and his next of kin for the human rights violations established in this report, in a manner that takes into account his specific condition, as he is in exile and permanently disabled.

2. Ensure that Leopoldo García Lucero and his next of kin have access to the medical and psychiatric/psychological treatment needed to assist in their physical and mental recovery at a specialized facility of his choosing, or the means to secure this recovery.

3. Adopt the measures needed to permanently void the effects of Decree Law No. 2191 –given its lack of effects due to its incompatibility with the American Convention, since it can prevent or hinder the investigation and punishment of persons responsible for serious human rights violations- so it does not pose an obstacle to the investigation, prosecution and punishment of other similar violations that occurred in Chile, and the rights of the victims to truth, justice and reparations.

4. To immediately proceed to investigate, impartially, effectively and within a reasonable time frame the facts in the terms established in the present report, with the objective of completely clarifying them, identifying those responsible and punish them accordingly. In the State's compliance with this obligation, it can not allege the fact that the Decree Law No. 2191 is in effect in Chile.

5. The Commission decides to forward this report to the State, which will have two months to comply with its recommendations. This time period shall commence as of the date on which this report is transmitted to the State. The Commission also decides to notify the petitioners that a report has been approved pursuant to Article 50 of the American Convention.