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Dispute concerning responsibility for the deaths of Letelier and Moffitt (United States, Chile)

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PART I

Dispute concerning responsibility for the deaths of Letelier and Moffitt

Decision of 11 January 1992

Différend concernant la responsabilité des décès de Letelier et de Moffitt

Décision du 11 janvier 1992

DISPUTE CONCERNING RESPONSIBILITY FOR THE DEATHS OF LETELIER AND MOFFITT, DECISION OF 11 JANUARY 1992

DIFFÉREND CONCERNANT LA RESPONSABILITÉ DES DÉCÈS DE LETELIER ET DE MOFFITT, DÉCISION DU 11 JANVIER 1992

1914 Treaty for the Settlement of Disputes that May Occur Between the United States and Chile—the United States invoked the Treaty to investigate and report upon the facts surrounding the deaths of Letelier and Moffitt.

Ex gratia payment—Chile agreed, without admitting liability, to make an *ex gratia* payment equal to the amount due if liability were established in order to facilitate the normalization of relations with the United States. The United States and Chile agreed that the *ex gratia* payment would satisfy the claim espoused by the United States and any civil claim of the United States.

The Commission established by the 1914 Treaty was convened to consider the sole question of the amount of compensation to be paid, *ex gratia*, by Chile to the United States on behalf of the families of the victims and for personal injuries sustained by Michael Moffitt—the amount of payment was determined in accordance with applicable principles of international law as though liability were established—the Permanent Court of International Justice enunciated a general rule in the Chorzow Factory case—the same rules applied with no differentiation by reason of nationality—the general criteria included loss of financial support and services, material and moral damages suffered by each of the claimant family members, medical expenses for health problems directly caused by the attack—financial support included salary, fringe benefits and retirement pension but not income from other sources such as conferences, lectures or publications due to insufficient bases for establishing such income—moral damages: comparison of amounts granted by jurisdictional organs of the inter-American system, arbitration or judicial tribunals, bearing in mind factual differences between the cases; virtual impossibility of assigning a separate value to the damage caused by the loss of a spouse; consideration of significant steps undertaken by Chile and Congress to remedy human rights problems and efforts undertaken towards financial reparation at the domestic level for families of victims—compensation for medical and other direct costs as well as special expenses incurred as a consequence of the events giving rise to the case—payment of interest was not necessary because compensation for the above elements was expressed at present value—all outstanding claims against Chile are satisfied and no other claims may be brought against Chile before domestic courts or international proceedings.

Traité de 1914 relatif au règlement des différends qui pourraient surgir entre les États-Unis et le Chili – Les États-Unis ont invoqué ledit traité pour enquêter sur les circonstances des décès de Letelier et de Moffitt et publier les conclusions de cette enquête.

Paiement à titre gracieux – Le Chili a accepté, sans reconnaître une responsabilité, de verser à titre gracieux une somme égale au montant des indemnités qui auraient été dues si la responsabilité avait été établie, en vue de faciliter la normalisation de ses relations avec les États-Unis. Les États-Unis et le Chili sont convenus que ce paiement à titre gracieux éteindrait la plainte présentée par les États-Unis et toute plainte au civil émanant des États-Unis.

La Commission instituée par le Traité de 1914 s'est réunie à la seule fin d'examiner la question du montant de l'indemnité que le Chili devrait verser, à titre gracieux, aux États-Unis au bénéfice des familles des victimes et en réparation des dommages corporels subis par Michael Moffitt – le montant a été établi conformément aux principes applicables du droit international – la Cour permanente de justice internationale a énoncé une règle générale dans l'affaire de l'Usine

de Chorzów – cette même règle s'appliquait sans distinction à raison de la nationalité – les critères généraux comprenaient la perte de soutien et de services financiers, le préjudice matériel et moral subi par chacun des membres des familles plaignantes, les frais médicaux pour problèmes de santé directement causés par l'attentat – le soutien financier s'entendait du salaire et avantages sociaux et de la pension de retraite, mais non des autres sources de revenus, tels que honoraires perçus au titre de conférences, cours ou publications, à défaut de bases suffisantes permettant d'établir ces revenus – préjudice moral : comparaison des montants accordés par les organes judiciaires du système interaméricain, les tribunaux judiciaires ou arbitraux, compte tenu des différences dans les faits de la cause; impossibilité pratique d'évaluer séparément le préjudice résultant de la perte d'un époux; prise en considération des mesures significatives prises par le Chili et par le Congrès pour réparer les atteintes aux droits de l'homme et des efforts entrepris au niveau national pour dédommager les familles des victimes – indemnisation des frais directs, d'ordre médical ou autre, ainsi que des dépenses spéciales encourues par suite des événements à l'origine de l'affaire – il n'y avait pas lieu de verser des intérêts puisque les indemnités consenties au titre des dommages susmentionnés étaient exprimées en valeur actuelle – toutes les plaintes pendantes contre le Chili sont éteintes et aucune autre plainte ne peut être déposée contre le Chili devant les tribunaux nationaux ou des instances internationales.

* * * * *

1. On June 11, 1990, the United States of America and the Republic of Chile entered into the following agreement:

> 1. The Governments of the United States of America and the Republic of Chile agree that a dispute exists between their States concerning responsibility for the deaths of Orlando Letelier and Ronni Moffittt in Washington, D.C. on September 21, 1976.
>
> 2. On January 12, 1989 the United States invoked the Treaty for the Settlement of Disputes that May Occur Between the United States and Chile, which entered into force on January 19, 1916, to investigate and report upon the facts surrounding the deaths of Orlando Letelier and Ronni Moffitt in Washington, D.C. on September 21, 1976.
>
> 3. The United States has sought compensation from Chile on behalf of the families of Letelier and Moffitt, on the ground that the United States considers the State of Chile is legally responsible under international law for the deaths of Orlando Letelier and Ronni Moffitt and the personal injuries to Michael Moffitt. Without admitting liability, the Government of Chile, in order to facilitate the normalization of relations, is willing to make an *ex gratia* payment, subject to the provisions of Paragraph 5, to the Government of the United States of America, to be received on behalf of the families of the victims.
>
> 4. The Governments of the United States and Chile agree that the amount of the *ex gratia* payment should be equal to that which would be due if liability were established, and should be determined by the Commission established by the 1914 Treaty, in accordance with the Compromis which constitutes the annex to this Agreement. The Governments agree that, notwithstanding the invocation of the 1914 Treaty by the United States on January 12, 1989, in light of the understanding set forth herein, the amount of the compensation to be paid shall be the sole question to be determined by the Commission.

5. The Government of Chile agrees to pay to the Government of the United States, as its *ex gratia* payment in this matter, the amount of compensation as determined by the Commission. The Government of Chile undertakes to make the aforesaid payment as soon as possible and after the necessary legal requirements have been fulfilled following the determination by the Commission.

6. Upon receipt of the *ex gratia* payment referred to in Paragraph 5 above, the Government of the United States will regard as satisfied the claim espoused in its Diplomatic Note to the Government of Chile of April 18, 1988, and any other possible civil claim of the United States Government in regard to this matter.

7. This Agreement shall enter into force upon notification to the Government of the United States by the Government of Chile that it has completed the proceedings necessary under Chilean law to bring this Agreement into force.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

DONE at Santiago, this eleventh day of June, 1990, in duplicate, in the English and Spanish languages, both texts being equally authentic.

2. The Compromis appended to the Agreement transcribed above reads *verbatim* as follows:

1. The United States and Chile agree to convene the Commission established by the 1914 Treaty for the Settlement of Disputes that May Occur Between the United States and Chile, which entered force January 19, 1916.

2. The Commission shall be composed as follows:

Hon. William Mulligan
Sir John Freeland
Sr. Francisco Orrego Vicuña
Sr. Julio María Sanguinetti Coirolo
Sr. Andrés Aguilar Mawdsley, as President

Any vacancies on the Commission shall be filled in accordance with Article II of the Treaty.

3. The Commission is requested to determine the amount of compensation to be paid, *ex gratia*, by the Government of Chile to the Government of the United States, on behalf of the members of the families who were victims of the assassination and deaths of Orlando Letelier and Ronni Moffitt in Washington, D.C. on September 21, 1976, and for personal injuries sustained by Michael Moffitt.

4. The Commission shall determine the amount of the payment to be made by the Government of Chile in accordance with applicable principles of international law, as though liability were established.

5. The Commission shall determine its own procedures, except to the extent determined by the Parties in this Compromis.

6. Presentations by the Parties to the Commission, including all claims and supporting evidence, shall be in writing only, and shall remain confidential. Personal appearances are deemed unnecessary.

7. Following the Commission's organization, the Parties shall proceed as follows:

a. Within thirty days of the entry into force of the Agreement in accordance with Paragraph 7 thereof, the United States shall file its presentation with the Commission.

b. Within thirty days thereafter, the Government of Chile shall file with the Commission its observations on the presentation made by the United States, if any.

c. Within ten days thereafter, the United States shall have the opportunity to comment on the observations offered by the Government of Chile.

d. Within ten days thereafter, the Government of Chile shall have the opportunity to respond to the comments of the United States, if any.

e. Within thirty days of the last filing of either Party with the Commission, the Commission shall convey to the Parties its determination on the amounts due from Chile in the *ex gratia* payment it has agreed to make.

8. The Commission shall present its decision to the Parties at a meeting to be convened by the Commission in Washington, D.C. or Santiago.

9. The Parties shall seek the good offices of the Inter-American Commission on Human Rights to provide the facilities for the work of the Commission.

3. Mr. William Mulligan, originally designated by the Government of the United States as United States member of the Commission, resigned for reasons of health and, in accordance with the pertinent provisions of the Bryan-Suárez Mujica Treaty and of the Agreement entered into on June 11, 1990, was replaced by Mr. Malcolm Wilkey.

4. The Commission, with only this change in its composition, convened formally on October 4, 1991, at the headquarters building of the Organization of American States in Washington, D. C., in a ceremony attended by the Secretary General of the Organization of American States, Ambassador Joao Clemente Baena Soares and by the Assistant Secretary General, Ambassador Christopher Thomas.

5. In view of the fact that the Inter-American Commission on Human Rights was, at the request of the parties, making available its facilities for the Commission's work, it was unanimously decided to designate Ambassador Edith Márquez as Secretary of the Commission.

6. At the first working session, after hearing the representatives of the parties, and in the interest of facilitating and expediting the proceedings, it was agreed, among other things, that Sundays as well as December 25, 1991, and January 1, 1992, were not to be counted in computing the time periods set in the Compromis.

7. At the same session, the Agent for the United States of America, Mr. Edwin Williamson, formally delivered his country's presentation within the period prescribed in the Compromis.

8. On November 7, 1991, the Government of Chile, through the Secretariat, delivered the text of its observations on the United States Presentation, also within the period prescribed in the Compromis.

9. On November 19, 1991, the document containing the comments of the United States on the observations of the Government of Chile was received by the Secretariat.

10. Finally, on November 30, 1991, the Government of Chile delivered to the Secretariat the document containing its observations on the comments of the United States.

11. All of these documents, which were presented within the period prescribed in the Compromis, were sent by the Secretariat to all the members of the Commission.

12. As had been agreed by its members, the Commission reconvened in Washington, D.C., on the afternoon of January 6, 1992, at the offices of the Inter-American Commission on Human Rights.

13. The length of the documents submitted by the parties – 433 pages in all, without counting the annexes – together with the complexity of the matter and the fact that the time period of thirty (30) days set in paragraph 7(e) for announcement of the Commission's decision coincided with the period of the Christmas and New Year festivities, made it impossible for the Commission to present its decision within the period prescribed in the Compromis.

14. By letter of January 7, 1992, the Commission informed the States Parties of this situation and of its intention of discharging its mandate in full in the course of the week. It also expressed its hope that neither State would have objections.

15. By note dated January 9, 1992, the agent of the Government of Chile, Mr. Guillermo Piedrabuena, acknowledged receipt of the Commission's letter and communicated to the Commission that his Government had no objections to this extension.

16. For his part, by note of January 10, 1992, Mr. Edwin D. Williamson, agent of the Government of the United States, reported that his Government had no objections to this extension.

17. At its meeting on the afternoon of January 6, at morning and afternoon meetings held on January 7, 8, 9 and 10, and at a morning meeting held on January 11, 1992, the Commission carefully considered the documentation that had been submitted by the Parties.

18. As a result of those deliberations, the Commission reached the following unanimous agreement.

19. Before proceeding to a precise determination of the payments to be made to the members of the Letelier and Moffit families individually mentioned below, the Commission believes it advisable to indicate the general criteria that it has taken into consideration in setting the amount of those payments.

20. It is necessary to remember, first of all, that according to paragraph 4 of the Compromis, the Commission is to determine the amount of the *ex gratia* payment to be made by the Government of Chile in conformity with the applicable principles of international law, as though liability were established.

21. In this regard, the judgment handed down by the Permanent Court of International Justice in the Chorzow Factory case (*Chorzow Factory*, P.C.I.J. (ser. A) No. 17) cited by the United States and Chile in their respective written presentations, may be taken as enunciating a general rule. The pertinent portion of this judgment reads *verbatim* as follows: "(R)eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."

22. The Commission has also kept in mind the need to apply the same rules to the members of the families of Orlando Letelier and of Ronni Moffitt, with no differentiation whatever by reason of their nationality.

23. It should be pointed out that the Commission has followed the same criteria in examining the situation of each of the beneficiaries of these payments. In each of these cases, the Commission has examined the loss of financial support and services and the material and moral damages suffered by each of the claimant family members. The Commission has also examined the appropriateness of the expenses claimed in each case.

24. In respect of interest the Commission has considered that since compensation for the above elements has been expressed at present value it is unnecessary to provide for the payment of interest.

25. These general considerations having been presented, it is now appropriate to proceed to a precise determination of the amounts that in the judgment of the Commission should be paid by the Government of Chile to the various claimants.

26. We will start with the Letelier family by first of all examining the amount of the compensation to be paid for the loss of financial support suffered by Mr. Letelier's widow and children.

27. In order to calculate the amount due under this item, the Commission has taken into account what it considers to be the most likely assumption about the remainder of Mr. Letelier's working life had it not been cut short by the assassination to which he fell victim.

28. The Commission examined various hypotheses. These included the possibility that Mr. Letelier would have continued at the Institute for Policy Studies (hereinafter referred to as "the IPS") for the remainder of his working life; that he would at some point, in view of his previous experience, have switched to a career as an international banker; and that he would have returned to Chile in 1990, on the restoration of democratic government there,

and from then onwards have undertaken a career in Chilean public service in some such capacity as that of Minister of State, Ambassador or Senator.

29. In reaching conclusions on this aspect the Commission took into account the salary and fringe benefits which Mr. Letelier would have received from 1976 until at least 1990 from the IPS and the sums which he would have received in that period for continuing to teach courses at the American University. It also took into account the amounts which would have been paid to him as salary and retirement pension for the remainder of his expectation of life (until 2007) had he returned to Chile in 1990 and worked in public service in one of the capacities referred to above. It did not include income from other sources such as conferences, lectures or publications because it considered that there were insufficient bases on which to establish such income in this case. Nor did the Commission include an award for the provision by Mr. Letelier of household services, such as carpentry, because it considered such activities on his part to be more in the nature of an occasional pastime to which it was not in a position to attribute a pecuniary value.

30. Allowing for the uncertainties which must surround any attempt to predict the course which Mr. Letelier's life would have taken, the Commission decided in all the circumstances to award a sum of one million two hundred thousand dollars (US$1,200.000) as compensation for loss of financial support suffered by Mrs. Isabel Morel de Letelier and her sons as the result of the murder of Orlando Letelier.

31. The Commission agreed on the payment of one hundred and sixty thousand dollars (US$160.000) in moral damages to Mrs. Isabel Morel de Letelier and eighty thousand dollars (US$80.000) to each of the couple's four children: Christian, Francisco, Jose, and Juan Pablo. In setting this figure, the Commission took into account, by way of comparison, the amounts granted for moral damages by jurisdictional organs of the inter-American system and those ordered, also in recent years, by arbitration or judicial tribunals. Needless to say, in making these comparisons, the factual differences between the cases that served as a guide in setting these amounts were borne in mind.

32. Lastly, the Commission awarded Mrs. Isabel Morel de Letelier, as reimbursement of medical expenses for health problems resulting from the attack, the amount of sixteen thousand four hundred dollars (US$16.400).

33. The Commission next considered the amount of compensation payable to Mr. Michael Moffitt and to Mr. Murray and his wife Hilda Karpen, widower and parents of Mrs. Ronni Moffitt, respectively.

34. As compensation for loss of financial support resulting from the death of his wife, the Commission awarded Mr. Michael Moffitt the sum of two hundred and thirty-three thousand dollars (US$233.000). In arriving at this figure, the Commission considered that, given Mrs. Ronni's Moffitt's youth and brief working experience, it was difficult to make any fully reliable projections of her probable income. Obviously, in this case the speculative

factor is much greater than in the preceding case. The Commission also took into account the fact that Mr. Moffitt had remarried and, accordingly, from the date of his remarriage onwards, he could not reasonably presume to have suffered loss from the share in common household expenses derived from the income of his first wife. Nevertheless, it did take into account, albeit for a limited period of time, the contribution that Mrs. Ronni Moffitt would very likely have made in the form of services in the home.

35. In terms of moral damage, the Commission considered that, although a distinction may be drawn between the moral damage personally suffered by Mr. Michael Moffit as one of the victims of the attack in which he sustained personal injuries, and the damage caused by the loss of his wife, it was virtually impossible to assign a separate value to one or the other. Therefore, the Commission agreed on a total of two hundred and fifty thousand dollars (US$250.000) under this heading.

36. The Commission also agreed to reimburse to Mr. Michael Moffitt the sum of twelve thousand dollars (US$12.000) in direct costs.

37. Lastly, the Commission took up the claims for damage suffered by Mr. Murray Karpen and his wife Hilda Karpen, parents of Mrs. Ronni Moffitt.

38. The Commission finds that, in its judgement, it had not been sufficiently shown that the direct cause of the health problems suffered by Mr. Murray Karpen is the attack in which his daughter died. Therefore, the Commission considers that the damage suffered by both parents was moral in character and that there were no grounds for differences to be drawn between one and the other in this respect. The Commission estimates the amount of indemnity payable under this heading to Murray and Hilda Karpen together at three hundred thousand dollars (US$300.000).

39. The Commission also awards the amount of twenty thousand dollars (US$20.000) to Mr. and Mrs. Karpen for medical and other direct costs.

40. The Commission has deemed it appropriate to grant compensation for special expenses which the families have jointly incurred as a consequence of the tragic events giving rise to this case in the amount of one hundred thousand four hundred ninety two dollars (US$100.492).

41. In considering the compensation for moral damages the Commission has taken into account the significant steps undertaken by the Chilean Government and Congress to remedy human rights problems as well as the efforts undertaken towards financial reparation at the domestic level for families of victims.

42. In making this award the Commission wishes to record its understanding that all outstanding claims against the State of Chile are considered, both by the United States Government in accordance with paragraph 6 of the Agreement of 11th June 1990 and by the families, to be

satisfied and that therefore no other claims may be brought against Chile in this matter either before domestic courts or in international proceedings.

43. All the figures mentioned above amount to a total of two million six hundred and eleven thousand eight hundred and ninety two dollars (US$2,611.892), which is the final amount of compensation to be paid by the State of Chile.

44. At Washington, D.C., on January 11, 1992, eight identical copies of the present decision are hereby signed, one for each of the members of the Commission and the agents of the Governments of Chile and the United States of America and one which shall be placed on deposit with the Secretariat of the Commission. This document was signed in the respective English and Spanish versions, both of which shall be considered equally authentic.

45. It is hereby noted that Professor Francisco Orrego Vicuña has issued an opinion, attached hereto, concurring with the ruling of this Commission.

(*Signed*) Andrés Aguilar Mawdsley
President

(*Signed*) Julio María Sanguinetti

(*Signed*) John Freeland

(*Signed*) Francisco Orrego Vicuña

(*Signed*) Malcolm Wilkey

SEPARATE CONCURRENT OPINION OF PROFESSOR FRANCISCO ORREGO VICUÑA

The undersigned Commissioner concurs in the decision reached unanimously by the Commission established under the 1914 Treaty for the Settlement of Disputes that may occur between Chile and the United States, to which the present dispute was submitted by the Agreement and Compromis signed by both governments on 11th June 1990. There are, however, a number of points of law and opinion which should be explained by means of this Separate Opinion in the light of the present state of international law in the matter of compensation for damages arising from the loss of life and physical injury to individuals. I should not, of course, be taken to suggest that on every aspect the reasoning and conclusions of all my colleagues on the Commission

are the same as my own for as it is only natural different point of views were expressed on a number of points.

1. *The principles applicable to human rights distinguished*

It should be noted at the outset that there is perhaps nothing more delicate in adjudication under international law than to decide on damages relating to the loss of life or physical injury. After a long line of consistent decisions it has been been established that human life cannot be subject to valuation, but only the economic loss and moral suffering of the family as well as other related aspects can be the matter of compensation.[1] To this end international law has developed a separate and distinct set of principles which are different from those applicable to the compensation of property losses or economic interests which by their very nature can be valuated. While the former are closely related to the law of human rights the latter appertain generally to the law of international economic transactions.

Such a distinction has become recently more marked as a result of important decisions reached by international courts and tribunals.[2] The decision of this Commission in the present case is not an exception to this trend. Because of the different principles and criteria applicable in each such area of the law, the conclusions reached under one set of rules need not to be the same that could be reached under another set of rules in a different case. The standards and methods of valuation, the issue of payment of interests, and other such questions may be approached differently and lead to different results as to the level of compensation in the light of the different nature of the disputes and cases involved.

2. *Advancing the frontiers of international law*

The humanitarian nature of the present case is well reflected in a point which constitutes an important innovation as to the traditional requirements of international law in the matter of international claims and diplomatic protection.[3] The Chilean nationality or dual nationality of some of the persons protected by the United States Government was not raised as a bar to the disposition of the corresponding claims by the Agreement of 11th June 1990, what in actual fact means that the humanitarian concerns have prevailed over the traditional requirements mentioned. In the opinion of the Commissioner undersigned this is a most positive gesture on the part of the Chilean Government which opens new ground in international law. Neither the prior exhaustion of local remedies has been required in the Agreement mentioned above, but this aspect can always be waived more readily in agreements of this kind.

On the other hand it should be noted that the diplomatic protection extended by the United States Government has also a special nature, since that Government is not substituting its interest for that of the families protected under the traditional assumption of international law. It is simply acting on

behalf of such families and it has therefore been deprived of the discretionary element and surrogate capacity embodied in such traditional rules.

Important legal effects follow from such representational role. Upon receipt of the *ex-gratia* payment the United States will regard as satisfied the claim espoused, as well as any other possible civil claim of the United States Government in regard to this matter. This means, firstly, that the latter government together with putting an end to the present espoused claim is renouncing to any other civil claim that could arise from the matter. But it also means that the families concerned are precluded from any further claim or action against the Chilean State or any of its agencies since the espoused claim is declared to be satisfied by the mandated Government. The decision of this Commission has reached a clear conclusion in this regard. This does not prejudge the issue of civil claims or actions which those families could interpose in Chile or elsewhere in respect of individuals or entities which at some point could be indicted as a result of proceedings and investigations of the tragic events giving rise to this case. Neither does this conclusion prejudge in respect of any such actions that could be interposed by the Chilean State in that eventuality.

3. *The nature of an* ex-gratia *compensation*

The public debate that surrounded in Chile the parliamentary approval and ratification of the Agreement of 11th June 1990 raised some issues that need to be considered in order to rightly understand the nature of the commitments undertaken by both governments and their relationship to the work and decision of the Commission.

It has been firstly argued that the commitment to pay compensation on an *ex-gratia* basis not having responsibility been previously established by the courts prejudges the issue of such responsibility. Under international law the very concept of *ex-gratia* compensation has been distinctly accepted and practiced precisely in order to avoid the recognition of a legal obligation in the matter. Consequently there is no express or implied recognition of responsibility or liability by the party making the payment. The only source of legal obligation as to that payment is the decision rendered by this Commission. The claiming party may well have a different point of view, but this does not at all alter the mandate of the Commission to determine only the amount of *ex-gratia* compensation to be paid nor does it engage the other party in any way, as was clearly expressed by the Chilean Senate upon the granting of its approval to the Agreement.[4] In this same light it should be noted that the agreement to have an amount of *ex-gratia* payment "equal to that which would be due if liability were established", which has also been controverted in the debate mentioned above, refers only to the question of how to determine the "quantum" of compensation and in no way has an incidence on the legal basis of entitlement. In this understanding such a reference has oftenly been made in agreements dealing with *ex-gratia* payments under international law.

4. ***Sovereign immunity upheld***

A second issue which has been controverted in Chile refers to the argument that the Agreement of 11th June 1990 involves the indirect acceptance of the decision rendered by the District Court of the District of Columbia on 5th November 1980, and that consequently sovereign immunity has been ignored and violated. The same result, it is argued, emerges from the exercise of diplomatic protection in this case. This Commissioner must take exception from such arguments. Proceedings before an international commission have been instituted precisely because sovereign immunity was upheld and no jurisdiction could be validly exercised by a foreign court over the Chilean State. Such an international Commission is obviously unrelated to any such foreign court. Furthermore, it is precisely in the exercise of its sovereignty that Chile has entered into the Agreement of 11th June 1990. The exercise of diplomatic protection also comes to confirm this conclusion of the Commissioner undersigned, since an international claim has been presented in the impossibility of prosecuting the Chilean State in the courts of the United States. From this point of view Chilean sovereign immunity has been safeguarded and the proceedings before the international Commission were possible only on the basis of the voluntary agreement reached by both governments on the matter. The Senate understanding referred to above is also very clear on these points.[5]

5. ***A genuine contention***

This Commissioner regrets to have to make reference to a third line of argument, which no doubt is the result of the heat of passion but which cannot pass unchallenged. The argument has been made that the procedures before this Commission are a kind of simulation or mock trial since the Chilean State would have accepted the claim beforehand. Nothing could be farther from the truth and it is offensive to both governments and to the members of the Commission. This Commissioner can bear witness to the professional skill with which both parties have argued their case and to the fact that every relevant point of law and fact has been controverted by the parties with precision during the proceedings before this Commission, including the amount of compensation and the criteria as to its determination.

6. ***Punitive damages not acceptable***

The principles of international law applicable in the matter of compensation for damages arising from death or personal injury of individuals are fairly straightforward and have been greatly clarified as the result of important works of writers of international law, numerous decisions, and diplomatic practice.[6] This is not the occasion to explain such principles but to draw the attention to some salient issues of relevance for the adjudication of the present case.

It should firstly be reiterated that international law has not accepted as one of its principles the question of punitive damages.[7] While this type of

damages have not been claimed in the instance, the issue is whether a claim of an excessive or disproportionate amount of compensation can result in a similar effect, that is in the punishment or repression of the defendant State. The Commissioner undersigned is of the opinion that this would be very much the case irrespectively of the claim being labeled punitive or not. It follows that a claim involving this result would be entirely unwarranted and contrary to the principles of international law. This Commissioner is pleased to concur in the decision of the Commission determining an amount of compensation which is not excessive nor disproportionate.

7. ***Remoteness and causal consequences: a basic distinction***

It should be noted next that international law, like domestic law, draws a basic distinction between the remoteness of damage and the proximity which is associated with the natural and causal consequences of an act.[8] While the former type of damage is not usually granted compensation, unless very specific circumstances intervene, those including proximity are subject to compensation. In this regard international law does not rely so much in the distinction of being damages "direct" or "indirect" as in that they shall be "proximate" and not "remote".

There can be no doubt as to the fact that international law allows for compensation of reasonably foreseeable loss of income of the families of the victims, while requiring at the same time the test of proximity and excluding remote damages. This in fact means that the lost income to be compensated is to be determined in the light of the specific activities which the victims had at the time of their death and the conditions and expectations reasonably deriving therefrom. Remote or speculative loss of income which cannot be linked to such activities and conditions ought to be excluded from the determination of compensation.

This question is of particular relevance for the determination of the amount of compensation in the present case since it involves the need to exclude remote scenarios relating to the career of one of the victims and retain such other activities which meet the standard of proximity. In view of the political activities which the victim carried out at the time of his death and of the prominence which a public personality of his position would no doubt have attained in Chile as a member of parliament, a cabinet minister or some other high political office, it is only natural to consider that this type of work would have prevailed during his probable stay in the United States and later upon his return to Chilean political life. Different considerations apply of course to the prospective career of the other victim in the line of clerical services in the United States.

8. ***A non-discriminatory approach***

These considerations are also related to the issue of whether there would be a case of discrimination in the granting of compensation in the present

instance as compared to the amount of compensation which the Chilean Congress has considered for the victims of human rights situations in Chile, which is considerably lower. The problem here is not that the standards set by the principles of international law might be entirely different from those applied within domestic legal systems, for in fact international tribunals often apply general principles of law and municipal law experiences.[9] The problem is rather that under comparative legal approaches the resulting compensation will be usually higher than that which can be considered by a State individually in the context of massive human rights situations and the ensuing financial burden that will have to be born by a State which has limited resources.

The issue, therefore, cannot be approached from the point of view of an intended discrimination, but from the point of view that there are here different realities as to the manner and extent how the same State might satisfy in practice the various claims of compensation. Furthermore, the Chilean domestic compensation standards have not passed unnoticed to this Commission. The amount of compensation for the loss of financial support in the case of Mr. Orlando Letelier can be generally compared to the income that a high ranking government official would have obtained in Chile as from his likely return to Chilean politics. Other factors, including his stay in the United States, have of course been taken into account for this determination. Loss of income has also been established in the case of Mrs. Moffitt in the light of the proximity test appropriate to her own activities and conditions.

9. ***The compensation of moral damages***

Compensation for moral damages is clearly included among the important principles of international law in the matter. Being this damage non-material by its very nature the determination of the amount of compensation is a most difficult question requiring that both the standards of justice and reasonableness be met.

On this point it should be noted that the Chilean State has given important steps to satisfy the moral dimension of the human rights situations with which it has had to deal. The fact of having the Head of State apologized to the families of the victims, of having a non-judicial inquiry been ordered by means of the establishment of a National Commission on Truth and Reconciliation, of having requested Congress for the enactment of legislation on compensation, and of having prosecuted before the Chilean courts those individuals who have been charged criminally in the present case, are all indications that the Chilean State is not indifferent to the moral issues involved in the matter. This positive attitude has certainly a bearence on the determination of compensation for moral damages.

In a number of cases adjudicated under international law the decision itself has been considered a form of satisfaction. The situation here is somewhat different since the Commission is only empowered to determine the

amount of compensation and not to establish any form of responsibility, which is usually the basis of that satisfaction. The fact of being this compensation associated with an *ex-gratia* payment makes an important difference as to the effect of the decision on the question of satisfaction. Furthermore, the question of satisfaction arises not in relation to individuals but in relation to another State which could have been offended by a wrongful act. This is not the case in the instance since, as explained above, the United States Government is intervening on behalf of the families and not on behalf of its own interest. The fact that the Chilean Government has accepted to make an *ex-gratia* payment by the Agreement of 11th June 1990, however, is relevant for the relationship vis-a-vis those families and it can be considered as the equivalent of a satisfaction in such other relationship.

10. ***Applicability of other principles of international law***

The decision rendered by the Commission has established different levels of compensation for each category of family members, what is also very much in line with the decisions of international courts and tribunals and takes into account the facts of economic dependency and other factors which ought to be treated differently from case to case.

In addition to the loss of income and moral damages corresponding to the principles of international law the Commission has been called upon to determine the amount of compensation for the personal injuries suffered by Mr. Michael Moffit. On this point the fundamental distinction made by the principles of international law is whether such injuries result in a temporary inability or in a permanent disability of the victim. Fortunately only temporary consequences were suffered by the victim and the amount of compensation has been established accordingly.

Another problem that needs to be examined in the light of the principles of international law is whether other expenses ought to be compensated. Medical expenses, which in the instance are mostly represented by psychological treatment, are generally covered by the compensation of moral damage, which refers to this type of non-material suffering and treatment. Reasonable and moderate expenses have been granted compensation by this Commission. Lawyer's fees and other expenses related to the preparation of the case can only be considered to the extent that they are directly related to the proceedings before this Commission and not to prior proceedings which are entirely separate. In the view of the undersigned no such direct link can be clearly established in the present case.

11. ***The question of interests under international law***

A last fundamental point of relevance related to the principles of international law ought to be explained: the issue of interests. While international law will normally allow for the payment of interests in case of damages which can by their very nature be valuated, especially in cases of

property loss, different is the approach in cases of death or personal injury, since, as explained above, these cannot be subject to valuation in the same terms. The distinction was well established by Umpire Parker in 1923 with occasion of Administrative Decision No. III of the United States - Germany Mixed Claims Commission to the extent that interest would not be allowed as part of an award in the so-called tort claims, that is, "claims for losses based on personal injuries, death, maltreatment of prisoners of war, or acts injurious to health, capacity to work, or honor," since these involve a non liquid loss or the amounts thereof cannot be ascertained by mere computation.[10] In view of this distinction and bearing in mind that furthermore in the case of an *ex-gratia* payment there is no obligation to pay prior to the decision of the Commission, the allowance of interests would not be justified or warranted.

12. ***Justice upheld through the rule of law***

If contemporary decisions on the matter of compensation for death or personal injury are compared, it will be noted that quite naturally the amount of compensation will vary from case to case in the light of its specific circumstances, but it can also be noted that the legal reasoning leading to such determinations is generally coincident. The present decision of this Commission is also very much in line with the mainstream of legal opinion emerging from these precedents.[11]

In the light of all these considerations the Commissioner undersigned is pleased to concur in the decision of the Commission. At the same time this Commissioner wishes to express his belief in the fact of having justice been made in the matter submitted, while faithfully keeping with the principles and standards of international law as applicable to this case.

(*Signed*) Professor Francisco Orrego Vicuña
Commissioner

11th January 1992

NOTES

1. F.V. García Amador: *The Changing Law of International Claims*, 1984, Vol. II, Chapter VIII: "The Reparation of Injuries", 559-613. For an earlier Spanish version see *Principios de Derecho Internacional que rigen la responsabilidad*, 1963, 409-501.

2. Inter-American Court of Human Rights: *Caso Velásquez Rodríguez*, Decision on compensation of 21 July 1989; and *Case Godinez Cruz*, Decision

on compensation of 21 July 1989. For comments on these cases see Juan E. Méndez and José Miguel Vivanco: "Disappearances and the Inter-American Court: reflections on a litigation experience", *Hamline Law Review*, Vol. 13, 1990, 507-577.

3. On the traditional requirements of international law and the trends of evolution see C.F. Amerasinghe: *State responsibility for injuries to aliens*, 1967, particularly at 56-64; and Brigitte Bollecker-Stern: *Le prejudice dans la théorie de la responsabilité internationale*, 1973, particularly at 106-260.

4. Chilean Senate: Communication to the House of Representatives of 3 July 1991, in House of Representatives, Session 15, Thursday 4 July 1991, p. 1505.

5. *Ibid*.

6. See generally Marjorie M. Whiteman: *Damages in International Law*, 1937, pp. 637 *et seq*.; George T. Yates III: "State responsibility for non wealth injuries to aliens in the post war era", in Richard B. Lillich (ed.): *International Law of State responsibility for injuries to aliens*, 1983.

7. Clyde Eagleton: *The responsibility of States in international law*, 1928, 185-197, particularly at 190-91; Eduardo Jiménez de Aréchaga: *Derecho Internacional Público*, 1989, Vol. IV, capítulo III: "Responsabilidad internacional del Estado", 33-89, particularly at 64-65.

8. Ian Brownlie: *System of the Law of Nations, State Responsibility, Part I*, 1983, 224-225.

9. *Ibid*., at 222-227.

10. Ladislas Reitzer: *La reparation comme consequence de l'acte illicite en Droit International*, 1938, p. 195; Richard B. Lillich: "Interest in the law of international claims", *Essays in Honour of Voitto Saario*, 1983, 52-59.

11. For contemporary decisions and practice see generally Inter-American Court of Human Rights, decisions *cit., supra* note 2; *U.S.S. Vincennes* (1988), U.S. offer of compensation; *Rainbow Warrior* (1985), compensation to the families, 74 *International Law Reports* (1987), 241-277, at 267-268; Commission Européenne des Droits de l'Homme, Requête No. 5961/72, *Amekrane contre Royaume-Uni*, Repport de la Commission, 19 Juilett 1974; *U.S.S. Liberty* (1967); and see also generally Yates, *loc. cit., supra* note 6.