

**REPORT No. 136/11**  
CASE 12.474  
MERITS  
MEMBERS OF THE PACHECO TINEO FAMILY  
BOLIVIA  
October 31, 2011

**I. SUMMARY**

1. On April 25, 2002, the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission", "Commission," or "IACHR") received a petition, lodged by Mr. Rumaldo Juan Pacheco Osco, on his own behalf, that of his wife, Fredesvinda Tineo Godos, and that their children, Frida Edith, Juana Guadalupe, and Juan Ricardo Pacheco Tineo, all of them minors, (hereinafter "the petitioners"), which alleged violation of the American Convention on Human Rights (hereinafter the "American Convention" or "Convention") by the Republic of Bolivia (hereinafter the "Bolivian state," "the state," or "Bolivia") as a consequence of the events that surrounded their entry to and expulsion from Bolivia, between February 19 and 24, 2001.

2. According to the petitioners, all of whom are Peruvian nationals, except for the youngest child, Juan Ricardo Pacheco Tineo, who has Chilean nationality, after they entered Bolivia and went to the National Immigration Service (hereinafter "SENAMIG"), the Bolivian immigration authorities withheld their documents, arbitrarily detained Mrs. Fredesvinda Tineo Godos, failed adequately to review their new application for recognition of refugee status,<sup>1</sup> and then proceeded to expel them to Peru on February 24, 2001, using violence and putting them at risk in said country. The petitioners also say that some years earlier the state of Bolivia recognized their status as refugees, after which they requested their repatriation to Peru owing to their precarious situation in Bolivia, and that subsequently they were granted refugee status in Chile.

3. For its part, the state contested several of the facts narrated by the petitioners and argued that it was not in violation of the American Convention since the Pacheco Tineo family was returned to Peru because they had illegally entered Bolivia, where they were no longer recognized as refugees because they had sought voluntary repatriation three years previously. Furthermore, the state says that the Pacheco Tineo family did not demonstrate to the Bolivian authorities that they had refugee status in Chile, and that neither did they present sufficient evidence to support their new application for recognition of refugee status in Bolivia. As for the detention of Mrs. Tineo Godos, the state mentioned that this situation was remedied through the *habeas corpus* petition that was decided in her favor.

4. Having examined the positions of the parties, the Inter-American Commission has concluded that the State of Bolivia is responsible for the violation of the right to a fair trial, the right to seek and be granted asylum, the principle of *non refoulement*, and the right to humane treatment (respect for mental and moral integrity) recognized in Articles 8, 22(7), 22(8) and 5(1) of the American Convention, taken in conjunction with Article 1(1) of that instrument, to the detriment of Rumaldo Juan Pacheco Osco; Fredesvinda Tineo Godos; and the minors Frida Edith, Juana Guadalupe, and Juan Ricardo Pacheco Tineo. By virtue of the principle *iura novit curia*, the Commission also concluded that the State of Bolivia is responsible for the violation of the right to

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<sup>1</sup> In the course of the proceedings the parties have indistinctly used the terms "application for refuge," "request for asylum," and "request for protection," among others. The Commission has also noted that the domestic legislation distinguishes between asylum and the acknowledgment of the refugee status. Under the applicable international law the case concerns an application for asylum or for recognition of refugee status and therefore, throughout this report the Commission will use these expressions indistinctly.

judicial protection established in Article 25 of the American Convention, in conjunction with article 1.1 of the said instrument<sup>2</sup>, to the detriment of Rumaldo Juan Pacheco Osco, Fredesvinda Tineo Godos; and the minors Frida Edith, Juana Guadalupe and Juan Ricardo Pacheco Tineo. The Commission also finds that the State of Bolivia is responsible for the violation of Article 19 of the American Convention regarding the obligation to provide special protection to children, taken in conjunction with Article 1(1) of that instrument. The Commission also concludes that it is unnecessary to rule on the alleged violation of the rights of the family enshrined in Article 17 of the American Convention. Finally, by virtue of the principle of subsidiarity, the Commission did not make any finding regarding the right to personal liberty enshrined in Article 7 of the American Convention with respect to Fredesvinda Tineo Godos. The Commission finally concludes that the State of Bolivia did not violate the right to respect for physical integrity recognized in Article 5 of the American Convention, to the detriment of the Pacheco Tineo family.

## **II. PROCESSING BY THE IACHR**

5. The IACHR took receipt of the initial petition on April 25, 2002. The proceedings from the lodging of the petition until the decision on admissibility are explained in detail in the report on admissibility issued on October 13, 2004.<sup>3</sup>

6. On November 3, 2004, the Commission notified the parties of the above report, informed them that the petition had been registered as case number 12.474 and, under article 38.1 of the Rules of Procedure then in force, set a deadline of two months for the petitioners to submit additional observations on merits. Furthermore, pursuant to article 48(1)(f) of the American Convention, the Commission placed itself at the disposal of the parties with a view to reaching a friendly settlement of the matter.

7. The Commission received the response of the state to the petition on December 23, 2004.<sup>4</sup> The IACHR forwarded this response to the petitioners on April 13, 2005 and gave them one month in which to submit comments. A communication was received from the petitioners on June 27, 2005. This brief was relayed to the state on July 5, 2005, together with a request that it comment within one month.

8. In a communication dated December 18, 2006, the Commission requested additional information from the state, as well as from the petitioners, in order to have access to all the necessary elements to offer an opinion on the merits of the case.

9. The petitioners responded to the request for information from the IACHR on January 5, 2009. This brief was forwarded to the state in a communication dated February 20, 2007, with the request that it submit comments within one month.

10. The Commission reiterated the request for information to the state on May 21, 2007. The Commission requested the petitioners for additional information on November 26, 2007. On April 30 and June 12, 2008, the Commission asked the state to furnish the information requested as soon as possible.

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<sup>2</sup> The Commission includes this Article base don the understanding that the State has knowledge of the facts in which the analysis is based and had the procedural opportunity to present arguments regarding those facts. This inclusion is also relevant to ensure consistency with respect to other cases.

<sup>3</sup> IACHR, Report No. 53/04 (Admissibility), Petition 301-02, Rumaldo Juan Pacheco Osco, Frida Pacheco Tineo, Juana Guadalupe Pacheco Tineo, and Juan Ricardo Pacheco Tineo, Bolivia, October 13, 2004, pars. 5 and 6.

<sup>4</sup> As noted in the section on processing in the report on admissibility, the state did not respond to the petition in that stage.

11. The IACHR received a communication from the state on July 9, 2008, and forwarded it to the petitioners on August 20, 2008, giving them one month to comment.

12. Additional information was received from the petitioners on September 22, 2008 and June 2, 2009. The IACHR received additional information from the state on March 25, 2009. These communications were duly relayed to the parties.

### **III. POSITIONS OF THE PARTIES**

#### **A. The Petitioners**

13. By way of background information, the petitioners said that the family entered Bolivia in October 1995 after receiving information that the acquittal of the charge of terrorism for which they were on trial in Peru had been set aside by the Supreme Court of Justice and, consequently, there was a warrant out for their arrest. They said that on that occasion the Center for Studies and Specialized Services on Involuntary Migration (hereinafter "CESEM") and the Office of the United Nations High Commissioner for Refugees (hereinafter "the UNHCR") in Bolivia handled their claim for refugee status with the Bolivian authorities, which resulted in recognition of their status as refugees in 1996.

14. They mentioned that between 1995 and 1998, when they signed, under pressure, a "statement of voluntary repatriation" to Peru, and they were "mistreated and denied" their human rights "as asylum-seekers." They added that they did not have identity documents that accredited recognition of their status and, therefore, had no rights in Bolivia, were unable to work or study, and depended on CESEM for economic aid. In the words of the petitioners, "We were kept without any documents whatsoever until March 1998, when a courtesy visa was stamped in our passports (...) which did not enable us to exercise any of our rights other than to stay legally in Bolivia." They said that as a result of this situation they decided in that month in 1998 to leave Bolivia because of the limited nature of the assistance received and their lack of identity documents. With regard to the "statement of voluntary repatriation," the petitioners said, "We were forced to sign a statement in which we wrote down the compelling reasons that obliged us to do so, and we told them verbally that we were holding them responsible for anything that happened to our family. They mocked us."

15. The petitioners said that, in fact, after signing that statement, they did not return to Peru but attempted a "new and risky exodus to find decent asylum (...) in Chile," in order to contact the Australian embassy, since they were also in the process of applying there for a "visa on humanitarian grounds." Finally, the petitioners said that in view of their circumstances the Chilean state granted them refugee status.

16. As regards the specific facts that prompted the petition to the Commission; that is, the events that occurred between February 19 and 24, 2001, the petitioners said that on February 19, 2001, they traveled to La Paz, Bolivia, accompanied by their three children, Juana Guadalupe, Frida Edith, and Juan Ricardo Pacheco Tineo (the last, a Chilean national) with the following documents: passports, Chilean and Peruvian identity documents, birth certificates, and professional credentials. They said that by then they had been granted refugee status in Chile and were residents in the country.

17. According to the petitioners they reached La Paz at 11:00 p.m. the same day and that the following morning at approximately 10:00 a.m. they went to "immigration," while their three children remained in the care of some Bolivian friends. By the petitioners' account, Mr. Pacheco Osco and Mrs. Tineo Godos were seen by Mr. Juan Carlos Molina, Chief of Immigration

and General Advisor, who made offensive remarks about their situation and proffered threats against their physical, moral, and psychological integrity.

18. They said that, in spite of the fact that said official confirmed through the Chilean consul in La Paz that the alleged victims were resident in Chile, "he violently ordered" the doors of his office closed, "abducted" Fredesvinda Tineo Godos, and forcibly relieved the alleged victims of the family's personal documents. They specified that some minutes before this turn of events, Rinaldo Juan Pacheco Osco had "managed" to leave the office to make a telephone call, a fact which, according to the above official, prevented his arrest and immediate expulsion.

19. The petitioners went on to say that Mrs. Fredesvinda Tineo Godos was taken at 6:00 p.m. to the holding cells of La Paz police headquarters without either food or warm clothing, without being told the reason for her arrest, and without being informed of her rights. They added that she was not permitted to contact anyone who could act in her defense and that at 8:00 p.m. Mr. Pacheco Osco located her and attempted to secure her release through the intervention of a lawyer from the La Paz Permanent Human Rights Assembly (hereinafter "the APDH").

20. The petitioners say that on February 21, 2001, various efforts were made at the office of the representative of the UNHCR; the Chilean consulate; the Office of the Undersecretary for Human Rights of the Ministry of Justice; and the APDH – La Paz, to confirm that the Pacheco Tineo were staying in La Paz lawfully. They said that thanks to these efforts the release of Mrs. Fredesvinda Tineo Godos was finally secured.

21. They also said that, in an "act of self-defense" because of what was happening, Mr. Pacheco Osco went to the offices of the Episcopal Conference of La Paz, which was in charge of UNHCR Bolivia at the time, and filled out an application for recognition of refugee status, which was submitted to the proper authorities. Accordingly, this document was left in the hands of the Bolivian government. With respect to this new application, they said that the "procedures, deadlines, and instances were not complied with." The petitioners said, "The Bolivian authorities never provided us with any information about it, still less did they give us the chance to present our case to the authorities in charge of processing our application."

22. At around the same time, the Chilean consulate interceded so that the alleged victims might be allowed to leave the country for Arica, Chile. They said that the Bolivian authorities accepted, provided that the Pacheco Tineo family were taken in a police vehicle, a condition to which Rinaldo Juan Pacheco Osco and Fredesvinda Tineo Godos did not agree. They said that as a result their documents were not returned to them.

23. They added that on February 23, 2001, at 3 p.m., officials from the Chilean consulate "went" to the immigration offices and reached a verbal agreement with the official Juan Carlos Molina whereby the alleged victims would be permitted to leave the country for Arica, Chile, on February 24, 2001, at 7 a.m. They said that they were again pressed to agree to be taken in a police vehicle but that finally it was agreed that they would travel by bus for which they already had tickets. According to the petitioners, their documents were not returned to them then either.

24. They said that on February 24, 2001, at 6:30 a.m., six individuals dressed as civilians and two policemen led by an inebriated Mr. Juan Carlos Molina, traveling in two 4x4 jeeps with tinted windows, and armed with pistols, intercepted the Pacheco Tineo family on the road leading to the bus station. They said that both Mr. Pacheco Osco and Mrs. Tineo Godos had guns pointed at them; were struck, insulted, and humiliated in front of their young children; and, without any explanation offered, their hands were "cuffed" behind their backs, their faces were covered with their coats, and they were brutally forced into one of the vehicles. They added that their children were snatched from their arms and violently pushed into the other vehicle.

25. According to them, in response to their questions about what was happening to them they received blows, insults, and threats that they would be shot. They said that the vehicle set off without the alleged victims knowing the direction they were taking or being allowed to raise their heads, their arms twisted and manacled, causing them bruises and intense pain. They said that this situation lasted more than two hours until their assailants stopped the vehicle, and one hour later made them get out.

26. They said that it was then that they realized that they had been taken to El Desaguadero, on the border between Peru and Bolivia. According to them, they were locked in a room, stripped of their belongings, and approximately one hour later taken out and led to the border with some of the suitcases that they had brought for their journey to Arica, Chile. They said that upon crossing the border they were handed over to the Peruvian police, who were told that they were terrorists and that subversive material had been found in their possession.

27. The petitioners say that because of the terrorism charges against them, the prosecutor informed them that she had to take the matter up with Lima. They said that they were detained in the border city of Puno until March 3, 2001, together with their children, who showed signs of serious psychological harm, including nightmares and nighttime sobbing fits, loss of speech, crying for no reason, and fear of being murdered. They said that they were taken to Lima and that their children were handed over to relatives of theirs.

28. They said that in Lima they were in the custody of the investigations police and that they were held incommunicado in uncomfortable cells until March 6, 2001, in the case of Fredesvinda Tineo Godos, and until March 8, 2001, in the case of Rumaldo Juan Pacheco Osco. They said that they were then moved to Santa Mónica Prison, in Chorrillos, and Miguel Castro Castro Prison, respectively. They said that both prisons are maximum-security facilities and, therefore, the inmates are subjected to severe restrictions on their human rights, which led to a decline in the physical and mental health of the alleged victims.

29. They added that they remained in detention until July 3, 2001, after it was demonstrated that the charges brought by the police in June 1991 were unfounded.

30. In general terms, with respect to the events that transpired between their entry to Bolivia on February 19, 2001, and their expulsion on February 24, 2001, the petitioners claimed that they were not given "the slightest opportunity to mount a defense." They also said that they did not report the attacks sustained because their attention was focused on their children and, therefore, they considered that filing lawsuits was beyond them. Finally, they said that they had not abused the refugee status application procedure and that any formalities they had pursued did not warrant their "abduction and forcible delivery to the authorities of a country where their lives, security, and integrity were at risk."

31. At different times in these proceedings, the petitioners have mentioned the difficulty of providing many documents supporting their petition. Specifically in this regard, they stated that several documents were taken from them at the time of their expulsion from Bolivia. Furthermore, they mentioned that they were unable to pursue many formalities in Bolivia precisely because they had been expelled from the country.

## ***B. The State***

32. In its first communication, received on December 23, 2004, the Bolivian state presented a report that was addressed, not to the Commission, but to the Legal Director of the National Immigration Service, and formulated by Mr. Juan Carlos Molina, former General Advisor on

Immigration, in his defense. Nevertheless, for the purposes of this proceeding before the Commission this communication is regarded as the state's response.

33. In its initial communication the state contested several of the facts described by the petitioners. Regarding the entry on February 19, 2001, the state said that although the Pacheco Tineo family had identity documents, none of the passports had entry or departure stamps from the immigration authorities of Chile, Peru, and Bolivia, for which reason he believed it "obvious" that they had entered Bolivia "illegally," evading and making a mockery of the mandatory border controls in both Peru and Bolivia. According to the state, Rinaldo Juan Pacheco Osco and Fredesvinda Tineo Godos had gone to the offices of the National Immigration Service on February 20, 2001, in order to request that "they be allowed to cross Bolivian territory into Chile" or that the National Immigration Service of Bolivia take them to that country.

34. The state claimed that at no time did the petitioners demonstrate that they were refugees and that the immigration office had evidence that they had requested their voluntary repatriation in March 1998. The state said that when it was found that Mrs. Fredesvinda Tineo Godos had broken the Bolivian immigration laws she was taken under arrest by the Department of Inspections to the offices of the national police with a view to her expulsion from Bolivia the next day; that is, February 21, 2001. As to the family's documents, the state said that the possession of the passports was the responsibility of the Department of Inspections and Immigration Bonds in view of the fact that those documents "were not in order."

35. The state added that the Chilean consul was contacted by telephone but that no official response was forthcoming regarding the possibility of their entry to Chile. Subsequently, the state said that officials from the Chilean consulate in La Paz went to the immigration offices "simply to obtain information" but that the supposed negotiation mentioned by the petitioners on the arrangements for their travel to Arica, Chile, did not take place. On this point, the state said that the National Immigration Service is not empowered to transfer citizens across the country, much less to a third country, in national police vehicles. The state said that in the absence of an official response from Chile, the petitioners were treated like any other foreigners who had entered the country in an irregular manner.

36. It said that on February 21, 2001, when the expulsion of Mrs. Tineo was about to be put into effect under Article 48 b) of Executive Decree 24423 of 1996, a fax was received from the CEB-UNHCR requesting Mrs. Tineo's release. According to the state, the Department of inspections immediately ordered her release, even before a *habeas corpus* petition, in which she was a party "as if she were a refugee," was decided in her favor. The state mentioned that following the decision on the *habeas corpus* petition, the purpose of which was limited to determining the lawfulness of the deprivation of liberty, the administrative procedure continued in accordance with the Legal Regime on Migration.

37. Regarding the expulsion, the state offered an account that differs substantially from that of the petitioners. According to the state, on February 24, 2001, Personnel from the National Immigration Service carried out the expulsion order for the Pacheco Tineo family, in keeping with the prosecutor's request and the legal regime on migration. It said that the individuals in charge of the expulsion were inspectors with the Department of Inspections and Bonds, with police support. It says that this was carried out in the presence of Mr. Juan Carlos Molina—though not at his direction—and that none of the people who executed the order were licensed to carry firearms.

38. The state added that the family was taken from the city of La Paz to El Desaguadero on the border. It said that, once there, the officials had to wait until the relevant immigration offices in Bolivia and Peru opened and that during that wait the Pacheco Tineo family was given food.

According to the state, upon crossing the border the Pacheco Tineo were handed over to the Peruvian immigration authorities, not the Peruvian police.

39. The state said that the claims as to how the transfer and expulsion were carried out are untrue and that if they had been in any way attacked the alleged victims should have reported that circumstance to the Peruvian immigration and/or prosecutorial authorities, so that a medical examination could be performed on them.

40. Citing Article 1.1 c) of the Convention Relating to the Status of Refugees, 1951 (hereinafter the "1951 Convention"), the state underscored that the recognition of the refugee status cannot be manipulated or used arbitrarily, since the Pacheco Tineo family did not enter Bolivia in 2001 as refugees, but did so "illegally," bearing in mind that, while in 1996 they had been granted refugee status, in March 1998 they requested their voluntary repatriation, which was without defect and, therefore, valid. The states added that upon entering Bolivia the Pacheco Tineo family did not produce the documents recognized in the 1951 Convention that enable persons who have been granted refugee status to travel. According to Bolivia, it was up to Chile to provide them with documents. According to the state, Bolivia cannot guarantee the refugee status that the alleged victims had in Chile.

41. Following a request from the Commission to the state for information as to whether or not the Pacheco Tineo family had presented a new application for asylum in Bolivia, the state informed the Commission that the communication from CEB-UNHCR, received on February 21, 2001, when the release of Mrs. Tineo Godos was requested, indicated that the Pacheco Tineo family were again applying for refugee status in Bolivia. In that regard, the state said that the fax was received in the morning and that that same afternoon the appropriate procedure was instituted before the competent local bodies. The state said that in the evening of February 21, 2001, the National Committee on Refugees (hereinafter "CONARE") evaluated the application and found it inadmissible. Therefore, the presence of the family in Bolivian jurisdiction was "regularized and considered within the sphere of competence of the immigration authorities."

42. According to the state, upon submitting the new application for refugee status, the applicants failed to present elements that could have been considered in the evaluation. It added that bearing in mind the time elapsed between the voluntary repatriation and the new application, "the case suggested a cessation of refugee status through a personal decision."

43. The state pointed out that people have the opportunity to claim protection as refugees based on convincing motives, providing such evidence as they are able, even though they might have previously decided to return to their country of origin but not with that status, in order to avoid being returned to immigration authorities in the country of origin. In this regard, the state cited the UNHCR Note on Fair and Efficient Asylum Procedures, based on which it is acceptable for abusive or fraudulent claims to be processed under accelerated procedures as they give rise to a presumption of unfoundedness.

44. The State said that there is a contradiction between the alleged "fear of persecution," on which, according to the CEB-UNHCR, the request for protection in Bolivia was based, and the account provided by the petitioners to the IACHR where they said that they went to the National Immigration Service to conduct "foreign status procedures" and, in light of the outrage suffered, presented a new application for refugee status "as an act of self-defense." The state argued that the petitioners had misinterpreted the institution of asylum since they are not covered by any of the definitions, either in the 1951 Convention or in the Cartagena Declaration on Refugees, 1984 (hereinafter "the Cartagena Declaration").

45. In conclusion, the state indicated that the family did not have refugee status in Bolivia, nor did it have a justified fear of being returned to the Republic of Peru, and that that it merely used the institution of refuge to avoid being expelled from Bolivia for having evaded the immigration controls in Peru, Chile, and Bolivia.

46. The following is a summary of the legal arguments put forward by the state. As to the alleged violation of the right to freedom of movement and residence, the state claimed that that right applies to persons who enter the territory of a country legally. Therefore, it argued, in light of the fact that the Pacheco Tineo family did not make clear their intention to apply again for recognition of their refugee status upon entering Bolivia in February 2001, nor provide documents attesting to their status as refugees in Chile, nor have passports that had been stamped at the respective immigration controls in Peru, Chile, and Bolivia, competence to deal with the situation belonged to the immigration authorities.

47. As to the alleged violation of the right to humane treatment, the state held that the the handover of the family to the immigration authorities was carried out in keeping in with institutional procedures and by the appropriate officials in the area of immigration.

48. As for the alleged violation of the right to personal liberty, the state argued that the detention of Fredesvinda Tineo Godos was remedied at the domestic level since the *habeas corpus* petition was admitted even before Mrs. Tineo Godos was released. In the opinion of the state, it met its international obligation to cause to cease a situation that violated rights and order appropriate reparation, as established by the judgment on the *habeas corpus* petition.

49. Regarding the alleged violation of the right to a fair trial, the state said that the habeas corpus proceeding was instituted and processed in a timely fashion. The state added that Mrs. Tineo Godos was given a "hearing within a reasonable time and with due guarantees, under equal conditions," and that she was assisted by expert counsel from the Permanent Human Rights Assembly.

50. With regard to the alleged violation of the obligation to provide special protection to children, the state said the Pacheco Tineo children were transferred to immigration authorities "together with their parents and in accordance with the logistical means available to said authorities." With respect to the alleged violation of the right to protection of the family, Bolivia said that as the "receiving state" it recognized refugee status to the family in keeping with the principle of family unity. It also said that during the return the family group was not separated.

#### **IV. ESTABLISHED FACTS**

##### **A. Relevant legal framework**

51. At the time of the facts alleged in the petition, the applicable legal standards with respect to migration and recognition of refugee status, respectfully, consisted of Executive Decree 24423 (Legal Regime on Migration) of November 29, 1996, and Executive Decrees 19639 and 19640 regarding the establishment of the CONARE. The following is a transcription of the relevant provisions.

##### **1. On migration**

52. The Legal Regime on Migration was governed by Executive Decree 24423, the pertinent portions of which are as follows:

Article 41

Those foreigners who have been granted political asylum by the supreme government and those who have been recognized refugee status through the appropriate national organizations, which are required to apply for their registration in the Register of Foreigners, shall be granted a stay of one year, renewable indefinitely on an annual basis until the causes that prompted the application for asylum or refuge have disappeared.

Political asylees and refugees are required to obey the laws, standards of the Republic, and provisions of the departmental administrations in the areas of residence that they have been assigned, as appropriate, or which they have established as their domicile, and which must be registered.

Foreigners who enjoy either asylee or refugee status shall lose that status if they leave the country of their own will, without express authority from the supreme government, granted through the office of the Undersecretary for Migration, and without the travel document issued to them for that purpose. Anyone who returns voluntarily to their country shall also lose said status.

#### Article 48

Foreigners shall be expelled from the country and prohibited to reenter Bolivian territory in the future on the following grounds:

- a) Possession or presentation at any time of a false or adulterated passport, identity card, or other documents;
- b) Illegal entry to the country in violation of provisions set forth in this Executive Decree, or presentation of false statements or fraudulent documents or contracts to the immigration or labor authorities;
- c) Staying in the country for longer than authorized by their visa or permission to stay, without due cause;
- d) When their permission to stay or residence has been canceled or annulled;
- e) When they have engaged in illicit trade, acts contrary to public morality or health, or vagrancy;
- f) When they have been involved, either directly or indirectly, in activities connected with trafficking in persons, drug trafficking, terrorism, trafficking or possession of firearms, or counterfeiting of currency, or have concealed or protected those who engage therein, even though the judgments convicting them might not order their expulsion;
- g) When they have in any way defrauded the treasury of the nation or institutions of the state;
- h) When they have committed crimes punishable by more than six months' imprisonment or been convicted of false bankruptcy, even though the judgments convicting them might not order their expulsion;
- i) When they interfere in any way in domestic politics or the leadership of trade unions, or incite, by any means, a disruption of the social or political order or of trade union organizations. When they join associations that have direct or indirect political ends. When they interfere in the organization or direction of marches, assemblies, or any kind of public demonstration that is political in nature or contrary to the decisions of the supreme government, or issue statements or publications that are in the same vein or that are offensive to national institutions and/or authorities. When they in any way incite disobedience of the laws of the Republic or the legally constituted authorities;
- j) When they in any way undermine the good international relations of Bolivia or engage in

agitation or propaganda activities against the governments of countries with which we have relations;

k) When they violate the rules of residence that apply to them.<sup>5</sup>

## **2. On recognition of refugee status**

53. Bolivia acceded to the United Nations 1951 Convention relating to the Status of Refugees and its 1967 Protocol on February 9, 1982.<sup>6</sup> Bolivia adopted the 1951 Convention as a law of the Republic by Law 2071 of April 14, 2000.<sup>7</sup> The pertinent portions of the decrees that governed recognition of refugee status at the time of the facts are as follows:

### Executive Decree 19639 de July 4, 1983

#### Article 1

Let the National Commission on Refugees be created and let it be composed of the following:

- 1 Delegate from the Ministry of Foreign Affairs and Worship;
- 1 Delegate from the Ministry of the Interior, Migration and Justice;
- 1 Delegate from the Ministry of Labor and Social Development;
- 1 Delegate from the Church;
- 1 Delegate from the Permanent Human Rights Assembly;
- 1 Delegate from Universidad Mayor de San Andrés Law School; and
- 1 Delegate from the UNHCR

This national commission, which shall be transitory in nature, shall advise both the Ministry of Foreign Affairs and Worship and the Ministry of the Interior, Migration, and Justice in determining refugee status.

#### Article 2

The basic task of the National Commission will be to study the creation of a National Office for Refugees, which shall be composed of the above-mentioned national institutions, be administrative and supervisory in nature, and work in coordination with the UNHCR through the Ministry of Foreign Affairs and Worship.

The National Commission may, as appropriate and until the inception of the National Office for Refugees, perform a comparative study of country's laws in relation to the problems posed by the current reality and the enforcement of international instruments in this area.

The Minister of Foreign Affairs and Worship shall be in charge of the execution and implementation of this executive decree.<sup>8</sup>

### Executive Decree 19640 of July 4, 1983

#### Article 1

Under the terms of this decree a refugee is defined as any person who, due to a justified fear of persecution by reason of race, religion, nationality, membership of a particular social

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<sup>5</sup> Appendix 36. Relevant domestic standards.

<sup>6</sup> <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=biblioteca/pdf/0506>.

<sup>7</sup> Appendix 36. Relevant domestic standards.

<sup>8</sup> Appendix 36. Relevant domestic standards.

group, or political views, is outside of their country of nationality and unable or, because of those fears, unwilling to seek the protection of that country; or who, lacking nationality and finding themselves, as a result of such occurrences, outside of the country where they previously had their habitual residence is unable or, because of those fears, unwilling to return to it.

#### Article 2

Also considered refugees on humanitarian grounds shall be all those persons who have been forced to flee their country because of internal armed conflicts; foreign aggression, occupation, or domination; massive violation of human rights; or events of a political nature that seriously disrupt public order in the country of origin or provenance.

#### Article 4

For the purposes of assessing a foreigner as a refugee, applications shall be received at the Ministry of Foreign Affairs and Worship, which, through the appropriate department, shall receive a confidential written statement from the applicant and such evidence as they may provide, and shall proceed to deal with applications, following their assessment, in accordance with the provisions contained in the international instruments on these matters and the recommendations and documents issued by the Office of the United Nations High Commissioner for Refugees.

Denials shall be communicated to the applicant and the United Nations High Commissioner for Refugees and may be reconsidered within a maximum of 30 days.

#### Article 5

The declaration of refugee status grants the foreigner the protection dispensed by the state, which consists of the guarantee of non-return to the country, whether or not it is the country origin, where their right to life or to personal liberty is at risk of violation for the reasons mentioned in articles 1 and 2, in keeping with the principle set forth in article 33 of the 1951 Convention Relating to the Status of Refugees and in article 22(8) of the American Convention on Human Rights, and with the Constitution, under Titles One (Fundamental rights and duties of the person) and Two (Guarantees of the person).

As a result of that declaration, the refugee will be granted authorization for indefinite or temporary residence in Bolivia; travel and identity documents, should they need them; the right to work, and all the other powers and rights to which they are entitled under the terms of the above 1951 United Nations Convention.<sup>9</sup>

### **3. *Legislative reforms after the events***

54. Executive Decree 28329 was issued on September 1, 2005.<sup>10</sup> The preambles of these decrees indicate that their purpose was the implementation of a "coordinated action" on the part of the state through a "permanent mechanism for the assessment and consideration of those cases." It was also stated that this permanent mechanism for the assessment and consideration of applications for recognition of the refugee status should be empowered to determine the propriety of the admission and/or rejection of applications as well as the consequences arising therefrom, in accordance with the provisions contained in the 1951 Convention relating to the Status of Refugees.<sup>11</sup>

<sup>9</sup> Appendix 36. Relevant domestic standards.

<sup>10</sup> Appendix 24. Executive Decree 28329 of September 1, 2005. National Commission on Refugees in Bolivia. Rules and Procedures.

<sup>11</sup> Appendix 24. Executive Decree 28329 of September 1, 2005. National Commission on Refugees in Bolivia. Rules and Procedures.

55. Indeed, Article 1 of this law provides,

The object of the present Executive Decree is to establish the National Commission on Refugees in Bolivia as a permanent mechanism for assessment and consideration of applications for refuge. It also sets out the rules and procedures to be followed by the National Commission on Refugees in Bolivia based on legal and international provisions in force.<sup>12</sup>

**B. The Pacheco Tineo family**

56. The Pacheco Tineo family is made up of:

- Rinaldo Juan Pacheco Osco; Peruvian nationality; born on September 7, 1962; occupation: psychologist.<sup>13</sup>
- Fredesvinda Tineo Godos; Peruvian nationality; born on September 6, 1959; occupation: nurse.<sup>14</sup>
- Frida Edith Pacheco Tineo, Peruvian nationality,<sup>15</sup> and approximately 8 years old in 2001.<sup>16</sup>
- Juana Guadalupe Pacheco Tineo, Peruvian nationality,<sup>17</sup> and approximately 4 years old in 2001.<sup>18</sup>
- Juan Ricardo Pacheco Tineo, Chilean nationality,<sup>19</sup> and approximately 2 years old in 2001.<sup>20</sup>

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<sup>12</sup> Appendix 24. Executive Decree 28329 of September 1, 2005. National Commission on Refugees in Bolivia. Rules and Procedures.

<sup>13</sup> Appendix 1. Copies of pages of the passport of Rinaldo Juan Pacheco Osco (appended to the petitioners' briefs received on December 27, 2002, and January 30, 2007).

<sup>14</sup> Appendix 4. Copies of pages of the passport of Fredesvinda Tineo Godos (appended to the petitioners' briefs received on December 27, 2002, and January 30, 2007).

<sup>15</sup> Petitioners' brief received on October 21, 2004. Appendix 13. Report of the General Advisor of the SENAMIG to the Director of the SENAMIG of February 22, 2001 (appended to the state's brief received on December 23, 2004).

<sup>16</sup> The ages of the children of the family are determined based on the petitioners' various briefs, which were not disputed by the state in that respect.

<sup>17</sup> Petitioners' brief received on October 21, 2004. Appendix 13. Report of the General Advisor of the SENAMIG to the Director of the SENAMIG of February 22, 2001 (appended to the state's brief received on December 23, 2004).

<sup>18</sup> The ages of the children of the family are determined based on the petitioners' various briefs, which were not disputed by the state in that respect.

<sup>19</sup> Petitioners' brief received on October 21, 2004; Appendix 13. Report of the General Advisor of the SENAMIG to the Director of the SENAMIG of February 22, 2001 (appended to the state's brief received on December 23, 2004).

<sup>20</sup> The ages of the children of the family are determined based on the petitioners' various briefs, which were not disputed by the state in that respect.

**C. Background on the recognition of their refugee status in Bolivia and Chile prior to February 2001**

57. In the early 1990's Rumaldo Juan Pacheco Osco and Fredesvinda Tineo Godos were prosecuted on terrorism charges in Peru but acquitted. Both were held in detention in Peru and were victims of the events examined by the Inter-American Court of Human Rights in the Castro-Castro Prison case.<sup>21</sup> Upon their release as a result of the acquittal, the family sought asylum in Bolivia as refugees. The Commission does not have the exact date, but it knows that the acquittal was set aside in Peru.<sup>22</sup>

**1. Entry to Bolivia in 1995, recognition of refugee status in 1996, and statement of voluntary repatriation in 1998**

58. Rumaldo Juan Pacheco Osco and Fredesvinda Tineo Godos entered Bolivia on October 13, 1995.<sup>23</sup> On October 16, 1995, Rumaldo Juan Pacheco Osco submitted his application for recognition of the refugee status to the Government of Bolivia through CESEM and the Office of the United Nations High Commissioner for Refugees in La Paz.<sup>24</sup> The passports of Rumaldo Juan Pacheco Osco and Fredesvinda Tineo Godos were issued by the Peruvian Consulate in Bolivia on October 20, 1995.<sup>25</sup>

59. While the decision of the Bolivian authorities was pending, on August 22, 1996, Rumaldo Juan Pacheco Osco sent a letter to the Regional Office for Southern Latin America of the UNHCR, in which he mentioned the following:

For almost five years we have been suffering unjust physical and psychological repression, which today we are making sacrifices in order to put behind us, particularly for the sake of our two young daughters I am sending a document that will allow you clearly to grasp that our situation is one of extreme emergency, which warrants invoking our right to political refugee status with sufficient guarantees and security for our family. Our case concerns the decision of the Supreme Court of Justice of Lima, Peru, which annulled the unanimous acquittal that we were granted after almost three years' imprisonment, with much suffering for us and our relatives at the hands of the implacable faceless special tribunals (...).<sup>26</sup>

60. Furthermore, on October 2, 1996, Mr. Pacheco Osco, who was in Argentina, went to the Argentine Catholic Commission for Immigration in order to request assistance and inquire about the possibility of applying for recognition of refugee status in Argentina, in view of the fact

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<sup>21</sup> I/A Court H.R., *Case of the Miguel Castro-Castro Prison*. Judgment of November 25, 2006. Series C, No. 160. See List of appendices. [http://www.corteidh.or.cr/docs/casos/articulos/anexo\\_penal2.pdf](http://www.corteidh.or.cr/docs/casos/articulos/anexo_penal2.pdf). Both were considered victims of a violation of the right to humane treatment.

<sup>22</sup> Appendix 3. Urgent action (dates not specified) issued by the Committee of Peruvian Refugees in Chile. (Appended to the petitioners' brief received on December 27, 2002).

<sup>23</sup> Appendix 1. Copies of pages of the passport of Rumaldo Juan Pacheco Osco (appended to the petitioners' briefs received on December 27, 2002, and January 30, 2007); and Appendix 4. Copies of pages of the passport of Fredesvinda Tineo Godos (appended to the petitioners' briefs received on December 27, 2002, and January 30, 2007). It is unclear why the dates of these stamps predate the passport issue date.

<sup>24</sup> Appendix 29. Confirmation issued by the Regional Office for Southern Latin America of the UNHCR on June 14, 1996 (appended to the petitioners' brief received on January 30, 2007).

<sup>25</sup> Appendix 1. Copies of pages of the passport of Rumaldo Juan Pacheco Osco (appended to the petitioners' briefs received on December 27, 2002, and January 30, 2007); and Appendix 4. Copies of pages of the passport of Fredesvinda Tineo Godos (appended to the petitioners' briefs received on December 27, 2002, and January 30, 2007).

<sup>26</sup> Appendix 30. Letter from Mr. Pacheco Osco to the Regional Office for Southern Latin America of the UNHCR, dated August 22, 1996 (appended to the petitioners' brief received on January 30, 2007).

that his application in Bolivia was still pending a decision by CONARE. He also mentioned that his economic situation was precarious as the assistance received in Bolivia had not been sufficient to live on.<sup>27</sup>

61. By Undersecretariat resolution No. 360 of November 22, 1996, and pursuant to Executive Decree 19640 of July 4, 1983, CONARE granted refugee status to the Pacheco Tineo family as it was then comprised.<sup>28</sup> Following analysis of the relevant documents, this resolution decided:

To grant "refugee status" to Mr. RUMALDO JUAN PACHECO OSCO, his wife FREDESVINDA TINEO GODOS, and their daughters FRIDA EDITH and JUANA GUADALUPE PACHECO TINEO, all of Peruvian nationality, who shall assume in the territory of the Republic of Bolivia the rights and obligations inherent to their new condition, in strict accordance with refugee status and the domestic laws in force in this area.<sup>29</sup>

62. On March 4, 1998, Rumaldo Juan Pacheco Osco went to the CESEM and signed a sworn statement requesting his voluntary repatriation to Peru, stating that the repatriation would be done in the company of his wife Fredesvinda Tineo Godos and his daughter Juana Guadalupe Pacheco Tineo.<sup>30</sup> Written by hand beneath the signature of Rumaldo Juan Pacheco Osco are the words "for not having received any assistance whatsoever since January 1998."<sup>31</sup>

63. There is nothing in the record to suggest that the State of Bolivia issued any document attesting to recognition of refugee status to the Pacheco Tineo family in Bolivia since November 22, 1996. Accordingly, the IACHR has no information as to how the Pacheco Tineo family was legitimated to exercise their rights as refugees. The only document in the record is a visa issued on March 10, 1998,<sup>32</sup> one year and four months after the resolution that granted refugee status and days after Mr. Pacheco Osco offered his statement of voluntary repatriation owing to the difficulties that he had allegedly been contending with in Bolivia. This visa makes no reference to any recognition of their refugee status; it is a "courtesy" visa to stay for one year.<sup>33</sup>

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<sup>27</sup> Appendix 32. Certificate of representation from Mr. Pacheco Osco to the Argentine Catholic Commission for Immigration, October 2, 1996 (appended to the petitioners' brief received on January 30, 2007).

<sup>28</sup> Appendix 6. CONARE resolution of November 22, 1996 (appended to the state's brief received on December 23, 2004); Appendix 5 Report of the former General Advisor of the SENAMIG to the Legal Director of the National Immigration Service (appended to the state's brief received on December 23, 2004); and Appendix 11 Certificate of the Office of the President of CONARE of February 22, 2001 (appended to the state's brief of December 23, 2004).

<sup>29</sup> Appendix 6. CONARE resolution of November 22, 1996 (appended to the state's brief received on December 23, 2004).

<sup>30</sup> Appendix 7. Sworn statement of voluntary repatriation (appended to the state's brief received on December 23, 2004); Appendix 5. Report of the former General Advisor of the SENAMIG to the Legal Director of the National Immigration Service (appended to the state's brief received on December 23, 2004); and Appendix 11 Certificate of the Office of the President of CONARE of February 22, 2001 (appended to the state's brief of December 23, 2004).

<sup>31</sup> Appendix 7. Sworn statement of voluntary repatriation (appended to the state's brief received on December 23, 2004).

<sup>32</sup> Appendix 1. Copies of pages of the passport of Rumaldo Juan Pacheco Osco (appended to the petitioners' briefs received on December 27, 2002, and January 30, 2007); and Appendix 4. Copies of pages of the passport of Fredesvinda Tineo Godos (appended to the petitioners' briefs received on December 27, 2002, and January 30, 2007).

<sup>33</sup> Appendix 1. Copies of pages of the passport of Rumaldo Juan Pacheco Osco (appended to the petitioners' briefs received on December 27, 2002, and January 30, 2007); and Appendix 4. Copies of pages of the passport of Fredesvinda Tineo Godos (appended to the petitioners' briefs received on December 27, 2002, and January 30, 2007).

64. On March 19, 1998, the CESEM sent a communication to the Department of Immigration of the Ministry of the Interior informing it of the voluntary repatriation of the Pacheco Tineo family to Peru, mentioning that the repatriation would take place on March 21, 1998.<sup>34</sup>

**2. Entry to Chile on March 21, 1998, and recognition of refugee status in that country**

65. The Pacheco Tineo family did not return to Peru. On the contrary, the family left Bolivian territory on March 21, 1998, via Tambo Quemado, in the Department of Oruro,<sup>35</sup> on the border with Chile.

66. On August 24, 1998, UNHCR Office in Chile issued certificates stating that Rinaldo Juan Pacheco Osco, Fredesvinda Tineo Godos, and their daughters Frida Edith and Juana Guadalupe Pacheco Tineo, requested recognition as refugees by the Government of Chile. The same certificates state that the Pacheco Tineo family were recognized as refugees by the Regional Office for Southern Latin America of the UNHCR.<sup>36</sup>

67. The State of Chile recognized refugee status to the Pacheco Tineo family, as it was then comprised, by resolutions 3748 and 3749 of December 28, 1998.<sup>37</sup>

68. It was in this period that Juan Ricardo Pacheco Tineo, who has Chilean nationality, was born.<sup>38</sup>

69. On February 3, 2001, Rinaldo Juan Pacheco Osco and Fredesvinda Tineo Godos left the Republic of Chile through the immigration control on the Chacalluta road.<sup>39</sup> There is nothing in the record to suggest that the Pacheco Tineo family had renounced their refugee status or that any resolution had been issued in Chile to that effect.<sup>40</sup>

70. The Commission does not have clear information about what happened between February 3 and 19 2001.

**D. Entry to Bolivia on February 19, 2001, and expulsion to Peru on February 24, 2001**

**1. Visit to the offices of the National Immigration Service (SENAMIG)**

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<sup>34</sup> Appendix 8. Communication from CESEM to the Department of Immigration, March 19, 1998 (appended to the state's brief received on December 23, 2004).

<sup>35</sup> Appendix 1. Copies of pages of the passport of Rinaldo Juan Pacheco Osco (appended to the petitioners' briefs received on December 27, 2002, and January 30, 2007); and Appendix 4. Copies of pages of the passport of Fredesvinda Tineo Godos (appended to the petitioners' briefs received on December 27, 2002, and January 30, 2007).

<sup>36</sup> Appendix 31. Certificates issued by the UNHCR office in Chile on August 24, 1998 (appended to the petitioners' brief received on January 30, 2007).

<sup>37</sup> Appendix 28. Certificate issued by the *Vicaría de Pastoral Social*, the Chilean Implementing Agency for the UNHCR, on July 13, 2001 (appended to the petitioners' brief received on January 9, 2008).

<sup>38</sup> Petitioners' brief received on October 21, 2004; Appendix 13. Report of the General Advisor of the SENAMIG to the Director of the SENAMIG of February 22, 2001 (appended to the state's brief received on December 23, 2004).

<sup>39</sup> Appendix 1. Copies of pages of the passport of Rinaldo Juan Pacheco Osco (appended to the petitioners' briefs received on December 27, 2002, and January 30, 2007); and Appendix 4. Copies of pages of the passport of Fredesvinda Tineo Godos (appended to the petitioners' briefs received on December 27, 2002, and January 30, 2007).

<sup>40</sup> On the contrary, the available information suggests that in December 2000, the Pacheco Tineo family began legal steps to obtain indefinite residence in Chile which, as of July 13, 2001, were ongoing. On this last date it was noted that "the above persons should have no impediment whatever to enter Chilean territory, or require any visa or special authorization." See Appendix 28. Certificate issued by the *Vicaría de Pastoral Social*, the Chilean Implementing Agency for the UNHCR, on July 13, 2001 (appended to the petitioners' brief received on January 9, 2008).

71. The Pacheco Tineo family entered Bolivia on February 19, 2001. The following day Rinaldo Juan Pacheco Osco and Fredesvinda Tineo Godos went to the offices of the National Immigration Service. According to the version of events offered by the SENAMIG, the reason for the visit was "to request that they be allowed to cross Bolivian territory into Chile or that the immigration authorities of Bolivia take them to that country."<sup>41</sup>

72. The SENAMIG version of events indicates that when they presented themselves at those offices, "it became clear that the whole family had entered Bolivia illegally," that "they evaded and made a mockery of the mandatory border and immigration controls in Peru and Bolivia,"<sup>42</sup> that "at no time did they demonstrate that they were refugees" and that there was "evidence that they had renounced their status as refugees and requested their voluntary repatriation in March 1998."<sup>43</sup>

73. The information available suggests that, as the petitioners claimed, their documents were withheld at the SENAMIG. According to the state, "the possession of the passports was the responsibility of the Department of Inspections and Immigration Bonds, taking into account that these documents were not in order"<sup>44</sup> and their return was denied.<sup>45</sup>

## **2. The detention of Fredesvinda Tineo Godos and the habeas corpus petition**

74. That same day, February 20, 2001, "when it was found that their entry was illegal" and given that Mr. Pacheco Osco left the office, Mrs. Tineo Godos "was turned over to the Department of Inspections and Immigration Bonds of the National Immigration Service."<sup>46</sup> The SENAMIG justified the arrest of Mrs. Tineo Godos in the following terms: "She has broken the Bolivian (as well as the Peruvian and Chilean) immigration laws, and therefore was taken under arrest by the Department of Inspections to the offices of the national police with a view to her expulsion from Bolivia the next day."<sup>47</sup>

75. The communication of February 20, 2001, from the SENAMIG to the police states:

I am writing in order to send you the citizens FREDESVIDA TINEO GODOS (Peruvian), so that you might place her in custody, given that there are no cells at our offices.<sup>48</sup>

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<sup>41</sup> Appendix 5. Report of the former General Advisor on Immigration to the Legal Director of the National Immigration Service (appended to the state's brief received on December 23, 2004); Appendix 13. Report of the General Advisor of the SENAMIG to the Director of the SENAMIG of February 22, 2001 (appended to the state's brief received on December 23, 2004); and Appendix 23 Report to the Ministry of the Interior of April 9, 2001 (appended to the state's brief received on December 23, 2004).

<sup>42</sup> Appendix 5. Report of the former General Advisor on Immigration to the Legal Director of the National Immigration Service (appended to the state's brief received on December 23, 2004).

<sup>43</sup> Appendix 5. Report of the former General Advisor on Immigration to the Legal Director of the National Immigration Service (appended to the state's brief received on December 23, 2004).

<sup>44</sup> Appendix 5. Report of the former General Advisor on Immigration to the Legal Director of the National Immigration Service (appended to the state's brief received on December 23, 2004).

<sup>45</sup> Appendix 13. Report of the General Advisor of the SENAMIG to the Director of the SENAMIG of February 22, 2001 (appended to the state's brief received on December 23, 2004).

<sup>46</sup> Appendix 5. Report of the former General Advisor on Immigration to the Legal Director of the National Immigration Service (appended to the state's brief received on December 23, 2004).

<sup>47</sup> Appendix 5. Report of the former General Advisor on Immigration to the Legal Director of the National Immigration Service (appended to the state's brief received on December 23, 2004).

<sup>48</sup> Appendix 9. Communication from the SENAMIG to the National Police, February 20, 2001 (appended to the state's brief received on December 23, 2004).

76. Fredesvinda Tineo Godos was taken late at night to the police cells on Sucre` Street.<sup>49</sup>

77. The following day, February 21, 2001, Mrs. Tineo Godos and a lawyer filed for a writ of *habeas corpus*.<sup>50</sup> That same day, February 21, 2001, the SENAMIG received a fax from the CEB-UNHCR Program requesting the release of Mrs. Tineo Godos and indicating that the family would again be applying for refugee status in Bolivia. The facts in connection with this new application are described *below 82-87*.

78. Mrs. Tineo Godos was released on February 21, 2001. It is not clear if the release came before or after the *habeas corpus* petition was filed. According to the SENAMIG, the *habeas corpus* petition was lodged that day in the afternoon, by which time Mrs. Tineo Godos was already at liberty.<sup>51</sup> However, the information available would appear to suggest that Mrs. Tineo Godos was in detention when the *habeas corpus* petition was filed and that she was at liberty by the time the *habeas corpus* hearing came to order.<sup>52</sup> before the Ninth Criminal Court in and for La Paz.<sup>53</sup>

79. In spite of the fact that Mrs. Tineo Godos was at liberty, the petition against the Director of the Department of Inspections and Immigration Bonds and the Director of the Judicial Investigation Police was admitted in the hearing.<sup>54</sup> On February 22, 2001, the Ninth Criminal Court issued the ruling in question, admitting the petition under article 10 of the Constitution, inasmuch as neither the legal nor the constitutional conditions for detention had been met. Specifically, the ruling found that articles 9 and 11 of the Constitution and articles 225 to 228 of the Code of Criminal Procedure had been violated.<sup>55</sup> Furthermore, the decision ordered the officials against whom the petition was brought to pay a fine of 200 bolivianos each.<sup>56</sup> The Commission has no information as to whether or not this part of the ruling was carried out.

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<sup>49</sup> Appendix 18. Judgment of the Constitutional Court on the *habeas corpus* petition of March 23, 2001 (appended to the state's brief received on December 23, 2004). This was mentioned by the police official against whom the *habeas corpus* petition was brought. His account was referenced in the judgment of the Constitutional Court.

<sup>50</sup> Appendix 10. Presentation of a petition of *habeas corpus* to the Duty Court for Criminal Matters on February 21, 2001 (appended to the state's brief received on December 23, 2004). In that petition, Mrs. Tineo Godos said, "On February 20 of this month [*sic*] I arrived via Casani, on the Peru-Bolivia border, not in a legal manner because I am a refugee. Once in this city I made my way to immigration in order to to regularize my documents. However, Mr. OSWALDO REA GALLOSO, had me illegally arrested without an order from a prosecutor and put me in a cold, dark cell on Calle Sucre, disregarding my constitutional and human rights. I, therefore, submit to your authority this special petition of *habeas corpus* against this official and officials of the Judicial Investigations Police (...) and, consequently, request my freedom of movement in order to regularize my legal situation and go to the Republic of Chile."

<sup>51</sup> Appendix 5. Report of the former General Advisor on Immigration to the Legal Director of the National Immigration Service (appended to the state's brief received on December 23, 2004).

<sup>52</sup> Appendix 18. Judgment of the Constitutional Court on the *habeas corpus* petition of March 23, 2001 (appended to the state's brief received on December 23, 2004). The Constitutional Court judgment of March 23, 2001 indicates that in the *habeas corpus* hearing Mrs. Tineo Godos' lawyer said that, although she had already been released, he was requesting the continued liberty of his client and a cessation of the persecution against her.

<sup>53</sup> Appendix 5. Report of the former General Advisor on Immigration to the Legal Director of the National Immigration Service (appended to the state's brief received on December 23, 2004).

<sup>54</sup> Appendix 5. Report of the former General Advisor on Immigration to the Legal Director of the National Immigration Service (appended to the state's brief received on December 23, 2004).

<sup>55</sup> Appendix 18. Judgment of the Constitutional Court on the *habeas corpus* petition of March 23, 2001 (appended to the state's brief received on December 23, 2004).

<sup>56</sup> Appendix 12. Decision of the Ninth Criminal Court in and for La Paz of February 22, 2001 (appended to the state's brief received on December 23, 2004).

80. On March 23, 2001, by which time the Pacheco Tineo family had been expelled to Peru. See *below pars. 88 – 93*, the Constitutional Court issued its judgment reviewing the *habeas corpus* petition.<sup>57</sup> The legal grounds put forward for this decision include the following:

That the petitioner has systematically violated the immigration standards in Bolivia and failed to abide by the system of laws of three countries, in addition to making a complete mockery of the standards in force for refugees by repeatedly covertly coming and going between Bolivia, Peru, and Chile, which is inadmissible for persons who claim to be persecuted on political grounds, particularly when, based on the Sworn Statement of Voluntary Repatriation of March 5, 1998 (...) the petitioner lost her refugee status in Bolivia from that date forward.

That the immigration authorities have the power, *inter alia*, to keep track of foreigners who are in transit in Bolivia and those who are in the country under a temporary stay or domicile, and they are expressly recognized the authority to expel them when the conditions set out in article 48 of Executive Decree No. 24423 are met (...) however, they do not have the authority to order the arrest of anyone.

(...)

That in instant case, in ordering that the petitioner be detained and placed in “custody” in the police cells at 5:00 p.m. on February 21 of this year, without authority to do so, the respondent Director of the Department of Inspections and Immigration did violate the provisions of article 9-I of the Constitution, without his having ordered the release of the petitioner the day after learning that she and her family had again applied for refuge lessening the illegality with which the respondent acted.<sup>58</sup>

81. Based on the foregoing, the Constitutional Court approved the *habeas corpus* decision of February 22, 2001, except with respect to the claim against the Judicial Investigation Police, given that Mrs. Tineo Godos was detained in the cells of the Police Command and not those of the Judicial Investigation Police.<sup>59</sup>

### **3. The new application for recognition of refugee status on February 21, 2001**

82. On February 21, 2001, Rinaldo Juan Pacheco Osco, claims refuge on behalf of his family at the offices of the *Pastoral de Movilidad Humana*, CEB-UNHCR Program.<sup>60</sup> That same day, the CEB-UNHCR Program sent a communication to the CONARE, the Ministry of Justice and Human Rights, and the immigration authorities in order to inform them of the following:

That Mr. PACHECO OSCO, RUMALDO JUAN, and his wife, Mrs. FREDESVINDA TINEO GODOS, have just applied for refuge at our offices.

We have a statement from the gentleman to the effect that his wife has been arrested. Therefore, at the request of the interested party, we would kindly ask you not to return them to Peru because they have expressed a fear of persecution. In the final analysis, should

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<sup>57</sup> Appendix 18. Judgment of the Constitutional Court reviewing the *habeas corpus* petition, March 23, 2001 (appended to the state’s brief received on December 23, 2004); and Appendix 5. Report of the former General Advisor on Immigration to the Legal Director of the National Immigration Service (appended to the state’s brief received on December 23, 2004).

<sup>58</sup> Appendix 18. Judgment of the Constitutional Court on the *habeas corpus* petition of March 23, 2001 (appended to the state’s brief received on December 23, 2004).

<sup>59</sup> Appendix 18. Judgment of the Constitutional Court on the *habeas corpus* petition of March 23, 2001 (appended to the state’s brief received on December 23, 2004).

<sup>60</sup> Appendix 27. Certificate issued by the *Pastoral de Movilidad Humana* National Coordinator (appended to the petitioners’ brief received on January 9, 2008).

Bolivia be unable to provide them with refuge, the interested party has indicated in our offices his preference to enter Chile, where he already has refugee status.<sup>61</sup>

83. It is an established fact that SENAMIG took cognizance of this application. Indeed, the fact that a fax from the CEB-UNHCR was received on February 21, 2001, indicating that the family was again applying for refugee status in Bolivia, was accepted by the General Advisor on Immigration, who, prior to the expulsion, said in his report of February 22, 2001,<sup>62</sup> that in the afternoon of February 21, 2001, a meeting was convened of the CONARE, composed of representatives from the Ministry of Foreign Affairs, the Ministry of the Interior, and the Ministry of Justice, which decided to reject the application.<sup>63</sup>

84. In light of these references, the Commission requested precise information from the state as to specifically how the new application for recognition of refugee status was processed.

85. The state furnished documentation in the form of minutes of the Second Meeting of the CONARE in the 2001 session, held on February 21, 2001. In the minute is mentioned the participation of 5 persons from different state entities as follows: The Director General of Bilateral Affairs and Chair of the CONARE, the Person Responsible from the Department of Legal Affairs of the Ministry of Foreign Affairs and Worship, the Advisor to the Immigration Department, the Representative of the Department of Human Rights of the Ministry of Justice and Human Rights, and the Assistant to the Director General of Bilateral Affairs.<sup>64</sup> The minute is not signed by these persons and therefore it is not possible to establish the actual participation of the entities.

86. According to the minutes provided by the state:

The meeting having come to order (...) it proceeded with the examination of the cases of asylum seekers, as well as other items, the details of which are transcribed as follows:

RUMALDO JUAN PACHECO OSCO

The CEB-UNHCR Program forwarded by fax the application for refuge of the Peruvian citizens Rumualdo [*sic*] Juan Pacheco Osco and his wife Fredesvinda Tineo Godos.

Upon analysis of the background information, it was found that on March 5, 1998, the above Peruvian citizens gave a sworn statement of voluntary repatriation to their country and, therefore, implicitly renounced their refugee status; therefore, it was decided to dismiss the application because, in the opinion of the Commission, as the applicants had returned to Peru, the conditions that gave rise to their refuge in Bolivia had clearly ceased.

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<sup>61</sup> Appendix 34. Communication from the CEB-UNHCR Program of February 21, 2001 (Appendix to the state's brief of July 9, 2008).

<sup>62</sup> Appendix 13. Report of the General Advisor of the SENAMIG to the Director of the SENAMIG of February 22, 2001 (appended to the state's brief received on December 23, 2004).

<sup>63</sup> Appendix 13. Report of the General Advisor of the SENAMIG to the Director of the SENAMIG of February 22, 2001 (appended to the state's brief received on December 23, 2004). Furthermore, the judgment of the Constitutional Court of March 23, 2001, describes the position held by the respondent immigration authorities in the *habeas corpus* petition and expressly says that "it was learned from an official communication that the aforementioned and her family were applying for refuge in Bolivia." See Appendix 18. Judgment of the Constitutional Court on the *habeas corpus* petition of March 23, 2001 (appended to the state's brief received on December 23, 2004).

<sup>64</sup> Appendix 35. Minutes of the meeting of the CONARE of February 21, 2001 (Appendix to the state's brief of July 9, 2008).

Given that it was the exclusive competence of the Immigration Department of the Ministry of the Interior, the CONARE did not consider the immigration status in the country of the said Peruvian citizens.<sup>65</sup>

87. The information available indicates that this meeting was held without the Pacheco Tineo family or their representatives in attendance. Nor is there information by which to determine the nature of the proceedings; for example, if the decision was an administrative one open to appeal. The information available suggests that the Pacheco Tineo family was expelled from Bolivia without knowing that their new application had been rejected.

#### **4. *The expulsion of the Tineo Godos family to Peru on February 24, 2001***

88. In the wake of this rejection and of the release of Fredesvinda Tineo Godos, the case was brought to the attention of the Office of the Attorney General.<sup>66</sup> On February 23, 2001, a prosecutor from La Paz District Prosecutor's Office issued a request to the SENAMIG soliciting the expulsion of the Pacheco Tineo family. This request states:

(...) Inasmuch as they have not shown that they entered the country legally, the individuals who answer to the names of RUMALDO JUAN PACHECO OSCO, FREDESVINDA TINEO GODOS, FRIDA EDITH PACHECO TINEO, JUANA GUADALUPE PACHECO PINEDO [*sic*] AND JUAN RICARDO PACHECO TINEO, the first being Peruvians, and the last, Chilean; who, having no type of documentation at this time and having lost their status as refugees, it is incumbent upon your authority to order that they be expelled from the country, in accordance with the country's immigration laws.<sup>67</sup>

89. That same day, February 23, 2001, the SENAMIG issued resolution No. 136/2001 by which, "pursuant to the prosecutor's request and insofar as they are illegal aliens in violation of the immigration laws in force" and, under article 48 of Executive Decree 24423, it resolved "to expel [the Pacheco Tineo family] from the national territory." The above task was assigned to the Department of Inspections of the Department of Inspections and Immigration Bonds of the SENAMIG.<sup>68</sup>

90. The Pacheco Tineo family had bus tickets issued by the company *Trasporte Internacional y Turismo* to travel from La Paz to Arica, Chile.<sup>69</sup>

91. On February 24, 2001, Rumaldo Juan Pacheco Osco and Fredesvinda Tineo Godos, together with their three children, all of them minors, were expelled from Bolivia by the SENAMIG,<sup>70</sup>

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<sup>65</sup> Appendix 35. Minutes of the meeting of the CONARE of February 21, 2001 (Appendix to the state's brief of July 9, 2008).

<sup>66</sup> Appendix 5. Report of the former General Advisor on Immigration to the Legal Director of the National Immigration Service (appended to the state's brief received on December 23, 2004).

<sup>67</sup> Appendix 14. Prosecutor's Request from La Paz District Prosecutor's Office of February 23, 2000 [*sic*] (appended to the state's brief received on December 23, 2004).

<sup>68</sup> Appendix 15. SENAMIG resolution No. 136/2001, February 23, 2001 (appended to the state's brief received on December 23, 2004). There is another copy of this resolution with a number of differences in form on which there appears the signature of an official of the "Desaguadero Immigration Office." This copy of the resolution bears an exit stamp dated February 24, 2001, that says "Desaguadero". See Appendix 16. Copy of SENAMIG resolution No. 136/2001, February 23, 2001, with a number of differences in form and stamped "Desaguadero" (appended to the state's brief received on December 23, 2004).

<sup>69</sup> Appendix 33. Bus tickets from the company *Trasporte Internacional y Turismo* (appended to the petitioners' brief received on January 30, 2007).

“in accordance with the prosecutor's request and the Legal Regime on Migration.”<sup>71</sup> Rumaldo Juan Pacheco Osco and Fredesvinda Tineo Godos were turned over to the Peruvian authorities by means of a communication from the Chief of Immigration – Desaguadero Bolivia to the Chief of Immigration – Desaguadero Peru.<sup>72</sup> The individuals in charge of the expulsion were inspectors with the Department of Inspections and Bonds, with police support.<sup>73</sup> The Pacheco Tineo family was taken from the city of La Paz to El Desaguadero on the border, where they were handed over to Peruvian officials.<sup>74</sup>

92. Beyond the authorities involved, the Commission has no official information regarding the circumstances as to the time, manner, and starting point of this transfer to the border zone of El Desaguadero.

93. As to the participation of the Chilean government in this process, the Commission notes that there is discrepancy between the submissions of either party. On one hand, the petitioners hold that the Chilean and Bolivian authorities came to an agreement on the transfer of the family to Arica in Chile and even that the Chilean authorities arranged their bus tickets for the journey. The state, on the other hand, holds that no such agreement existed and that the SENAMIG contacted the Chilean consul,<sup>75</sup> who reputedly gave no official response as to whether or not the Pacheco Tineo family could enter that country.<sup>76</sup> In a later communication, the state mentioned that “officials from the Chilean consulate went to the immigration offices simply to obtain information.”<sup>77</sup> The Commission does not have further information.

#### ***E Information on events following the expulsion***

94. The Commission does not have detailed information about what happened immediately after the Pacheco Osco family were turned over to the Peruvian authorities. However, information furnished by the Bolivian state indicates that Rumaldo Juan Pacheco Osco and Fredesvinda Tineo Godos had outstanding warrants for their arrest issued by the “Special Correctional Tribunal in and for Lima for the crime of terrorism.”<sup>78</sup> Indeed, the available information

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<sup>70</sup> Appendix 1. Copies of pages of the passport of Rumaldo Juan Pacheco Osco (appended to the petitioners' briefs received on December 27, 2002, and January 30, 2007); and Appendix 4. Copies of pages of the passport of Fredesvinda Tineo Godos (appended to the petitioners' briefs received on December 27, 2002, and January 30, 2007).

<sup>71</sup> Appendix 5. Report of the former General Advisor on Immigration to the Legal Director of the National Immigration Service (appended to the state's brief received on December 23, 2004). Although this report indicates that the phrase “expelled from Bolivia” in the passports is not the handwriting of the former General Advisor on Immigration, the fact that they were expelled from Bolivia on February 24, 2001, is not contested.

<sup>72</sup> Appendix 17. Communication from the Chief of Immigration – Desaguadero Bolivia to the Chief of Immigration – Desaguadero Peru, stamped February 24, 2001 (appended to the state's brief of December 23, 2004).

<sup>73</sup> Appendix 5. Report of the former General Advisor on Immigration to the Legal Director of the National Immigration Service (appended to the state's brief received on December 23, 2004).

<sup>74</sup> Appendix 5. Report of the former General Advisor on Immigration to the Legal Director of the National Immigration Service (appended to the state's brief received on December 23, 2004).

<sup>75</sup> Appendix 5. Report of the former General Advisor on Immigration to the Legal Director of the National Immigration Service (appended to the state's brief received on December 23, 2004).

<sup>76</sup> Appendix 5. Report of the former General Advisor on Immigration to the Legal Director of the National Immigration Service (appended to the state's brief received on December 23, 2004).

<sup>77</sup> Appendix 5. Report of the former General Advisor on Immigration to the Legal Director of the National Immigration Service (appended to the state's brief received on December 23, 2004).

<sup>78</sup> Appendix 23. Report to the Ministry of the Interior of April 9, 2001 (appended to the state's brief received on December 23, 2004).

indicates that Rumaldo Juan Pacheco Osco and Fredesvinda Tineo Godos were detained in Castro Castro Prison and Santa Mónica Prison, respectively, following their expulsion from Bolivia.<sup>79</sup>

95. After the expulsion, international organizations and Bolivian authorities followed events.

96. Thus, for example, Amnesty International requested the Government of Bolivia for "an explanation for handing over a family of Peruvian refugees to the Lima authorities in an alleged violation" of international refugee law.<sup>80</sup>

97. On March 5, 2001, the *Secretariado para Migrantes y Refugiados* filed a complaint with the Ombudsman of Bolivia, alleging that the Pacheco Tineo family had been arbitrarily expelled from Bolivia.<sup>81</sup> In response to that complaint, the Ombudsman sent a communication on March 19, 2001, stating that "since the petitioners had obtained refugee status in Chile, it was up to their defense counsel to uphold the status of his clients before the legal authorities."<sup>82</sup>

98. On March 30, 2001, the Human Rights Committee of the House of Deputies requested a report on these events from the Vice Ministry of the Interior and Police, in reaction to a complaint filed by the Permanent Human Rights Assembly.<sup>83</sup> That same day, the Chief of the Human Rights Unit sent a report to the Vice Minister for Human Rights in which he provides an account of the facts and specifies that the Vice Minister had said at the time that if the Pacheco Tineo family was to be expelled, then they should be expelled to Chile, which concern was brought to the attention of the CONARE.<sup>84</sup>

99. On April 9, 2001, the Office of the Director of the SENAMIG submitted a report to the Ministry of the Interior, recounting the events, from the visit of the Pacheco Tineo family to the immigration offices, to their expulsion.<sup>85</sup>

100. That same day, April 9, 2001, at the behest of the Human Rights Committee of the House of Deputies, the Office of the Attorney General requested a report from the Director of the National Immigration Service.<sup>86</sup> That request mentions that the Special Operations Division of the Departmental Directorate of the Judicial Investigation Police "is conducting an *ex officio* inquiry" in

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<sup>79</sup> Appendix 2. *Cadena Peruana de Noticias*, press release of March 13, 2001 (appended to the petitioners' brief received on December 27, 2002); and Appendix 20. Report to the Vice Minister for Human Rights of March 30, 2001 (appended to the state's brief received on December 23, 2004). In reference to information thought to have been supplied by the Peruvian human rights organization "APRODEH".

<sup>80</sup> Appendix 2. *Cadena Peruana de Noticias*, press release of March 13, 2001 (appended to the petitioners' brief received on December 27, 2002).

<sup>81</sup> Appendix 25. Complaint of the *Secretariado para Migrantes y Refugiados* to the Ombudsman of Bolivia of March 5, 2001.

<sup>82</sup> Appendix 26. Response of the Ombudsman to the *Secretariado para Migrantes y Refugiados* of March 19, 2001.

<sup>83</sup> Appendix 19. Request for a report from the Human Rights Committee of the House of Deputies of March 30, 2001 (appended to the state's brief received on December 23, 2004. This document is partially illegible); and Appendix 5. Report of the former General Advisor on Immigration to the Legal Director of the National Immigration Service (appended to the state's brief received on December 23, 2004).

<sup>84</sup> Appendix 20. Report to the Vice Minister for Human Rights of March 30, 2001 (appended to the state's brief received on December 23, 2004).

<sup>85</sup> Appendix 23. Report to the Ministry of the Interior of April 9, 2001 (appended to the state's brief received on December 23, 2004).

<sup>86</sup> Appendix 5. Report of the former General Advisor on Immigration to the Legal Director of the National Immigration Service (appended to the state's brief received on December 23, 2004).

connection with the arbitrary and improper detention of the Pacheco Tineo family.<sup>87</sup> This request was responded to with a report dated April 11, 2001, which provides an account of the events and mentions the existence of a Constitutional Court judgment in this connection.<sup>88</sup>

101. The Commission has no information about the outcome of this *ex officio* inquiry.

102. After again being acquitted in Peru, on August 7, 2001, Rumaldo Juan Pacheco Osco and Fredesvinda Tineo Godos entered the Republic of Chile through the immigration control at Arturo Merino Benítez Airport.<sup>89</sup> The available information indicates that the family currently resides in Chile, where their refugee status is recognized.

## V. LEGAL ANALYSIS

103. Based on the established facts, the Commission's legal analysis in the instant case takes the following order: i) the right to personal liberty of Fredesvinda Tineo Godos; ii) the right to a fair trial, the right to seek and be granted asylum, the principle of non-return, and the right to judicial protection of the Pacheco Tineo family; iii) the right to humane treatment; and, iv) the duty to provide special protection to children and the rights of the family.

### A. *The right to personal liberty of Fredesvinda Tineo Godos (Article 7 of the American Convention)*

104. Where it pertains to the instant case, Article 7 of the American Convention provides:

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

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<sup>87</sup> Appendix 21. Request for a report from La Paz Criminal Prosecutor's Office of April 9, 2001 (appended to the state's brief received on December 23, 2004).

<sup>88</sup> Appendix 22. Report from the Office of the Director of the SENAMIG to the Office of the Prosecutor for Criminal Matters dated April 11, 2001 (appended to the state's brief received on December 23, 2004).

<sup>89</sup> Appendix 1. Copies of pages of the passport of Rumaldo Juan Pacheco Osco (appended to the petitioners' briefs received on December 27, 2002, and January 30, 2007); and Appendix 4. Copies of pages of the passport of Fredesvinda Tineo Godos (appended to the petitioners' briefs received on December 27, 2002, and January 30, 2007).

105. Article 1(1) of the American Convention provides:

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.

106. The Commission considers proven that Fredesvinda Tineo Godos was deprived of liberty on February 20, 2001, upon orders from the National Immigration Service, as a result of her irregular entry to Bolivia, and with a view to her expulsion from the country. As is mentioned in the established facts, Mrs. Tineo Godos was taken late at night to a police station where she remained until the following day. The detention of Fredesvinda Tineo Godos was determined by a migration authority. Domestic judicial authorities concluded that the detention did not comply with legal and constitutional guarantees, and also concluded that according to the Legal Migration Regime migration authorities had no faculty to detain any person. In sum, Mrs. Fredesvinda Tineo Godos was freed the next day of her detention and there was a domestic decision determining the illegality of the detention. The Commission considers that the State overcame the situation and, therefore, by virtue of the principle of subsidiarity, the Commission will not make a finding on the alleged violations to personal liberty.

***B. Right to a fair trial, right to seek asylum, guarantee of non-return and judicial protection (articles 8, 22(7), 22(8) y 25 of the American Convention)***

107. The pertinent parts of Article 8 of the American Convention recognize the following:

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

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

(...)

c. adequate time and means for the preparation of his defense;

d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

(...)

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

(...)

108. For its part, Article 22(7) of the Convention provides:

7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.

109. Regarding the principle of non-return, article 22(8) of the American Convention provides:

In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

110. On its part, Article 25 of the American Convention states that:

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

111. The Commission has taken as established a number of facts that occurred between February 19 and 24, 2001. The Commission observes that the Pacheco Tineo family entered Bolivia irregularly on February 19, 2001. When they visited the offices of the SENAMIG the following day, the immigration authorities became aware of their situation and, consequently, ordered steps to be taken with a view to their summary expulsion to Peru. During that same interval, Rumaldo Juan Pacheco Osco applied to the State of Bolivia for recognition of refugee status for himself and his family. Consequently, from February 21, 2001, until their expulsion on February 24, 2001, their status was both that of undocumented migrants and of applicants for refugee status. Therefore, on one hand, the immigration authorities moved forward with the arrangements for the expulsion of the Pacheco Tineo family, and on the other, meanwhile, in a matter of hours the CONARE made decisions on the propriety of the new asylum claim. Bearing in mind the different purpose and scope of these procedures—one having to do with irregular entry and resulting expulsion, the other concerning recognition of refugee status—the Commission finds it appropriate to refer separately to the standards applicable to each; that is, on one hand, the guarantees in the framework of an immigration proceeding, which may result in the expulsion or deportation of an individual, and, on the other, the guarantees necessary for effective exercise of the right to seek and be granted asylum and the principle of non-return under the terms of articles 22(7) and 22(8) of the American Convention.

112. In order for this analysis to incorporate both aspects, the Commission considers it appropriate to set out its considerations in the following order: i) General considerations on the right to a fair trial in immigration matters; ii) The right to seek and be granted asylum and the principle of non-return; iii) The relationship between the right to seek and be granted asylum, the principle of non-return, the right to a fair trial, and the right to judicial protection; iv) Analysis of the events that occurred between February 20 and 24, 2001.

### **1. General considerations on the rights to a fair trial in immigration matters**

113. The consistent jurisprudence of the organs of the inter-American system indicates that fair trial guarantees are not limited to judicial remedies but apply to all procedural instances,<sup>90</sup>

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<sup>90</sup> I/A Court H.R. *Constitutional Court Case*. Judgment of January 31, 2001. Series C, No. 71, par. 69; and Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-Continues...

including, of course, any proceeding that could culminate in a person's expulsion or deportation.<sup>91</sup> In this last case, the Inter-American Commission and the Court have underscored that in addition to the guarantees envisaged in article 8(1), also applicable are the guarantees set forth in article 8(2) of the American Convention, where pertinent. This has to do with the punitive nature of proceedings of this type.<sup>92</sup> The Commission has also found that proceedings that can result in a person's expulsion or deportation involve determinations on fundamental rights, which demands as broad an interpretation as possible of the right to a fair trial.<sup>93</sup>

114. The Commission underscores what the Inter-American Court stated in its Advisory Opinion 18 on the "Juridical Condition and Rights of the Undocumented Migrants" with respect to the relationship between the right to equality and nondiscrimination and due process for undocumented migrants:

[...] for "the due process of law" a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants. To accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages.<sup>94</sup>

115. More recently, in its *Report on Immigration in the United States Detention and Due Process*, the Commission observed that the due process rights set forth in article 8 of the American Convention establish a baseline of due process to which all immigrants, whatever their situation, have a right.<sup>95</sup> In the same report, the Commission noted the following:

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9/87 of October 6, 1987. Series A, No. 9. par. 27. Through its case-law, the inter-American court has been developing the scope of fair trial guarantees and their extent of application. The Court has interpreted that these guarantees are not limited to judicial remedies in the strict sense "but [to] all the requirement that must be observed in the procedural stages in order for an individual to be able to defend his rights adequately vis-à-vis any [...] act of the State that could affect them." This is because, as the Court has noted, the State also empowers administrative, collegiate, and uni-personal authorities to adopt decisions that determine rights. On the last point, see I/A Court H.R., *Case of Claude-Reyes et al.* Judgment of September 19, 2006. Series C, No. 151, par. 118.

<sup>91</sup> IACHR, Report No. 64/08. Case 11.691. Admissibility. *Raghda Habbal and son*. Argentina. July 25, 2008. par. 54; IACHR, Report No. 49/99. Case 11.610. *Loren Laroye Riebe Star, Jorge Barón Guttlein, and Rodolfo Izal Elorz*. Mexico. April 13, 1999. pars. 56, 58; IACHR, Report No. 81/10. Case 12.562. Publication. *Wayne Smith, Hugo Armendariz et al.* July 12, 2010. pars. 5 and 63; IACHR, Report No. 84/09. Case 12.525. Merits. *Nelson Iván Serrano Sáenz*. Ecuador. August 6, 2009. par. 61; IACHR, Report No. 63/08. Case 12.534. Admissibility and merits. *Andrea Mortlock*. United States. July 25, 2008. pars. 78 and 83; IACHR, *Report on Terrorism y Human Rights*, OEA/Ser.L/V/II.116 Doc 5 rev. 1 corr. (2002). par. 401. See also I/A Court H.R., *Case of Vélez Loor v. Panama. Preliminary Objections, Merits, Reparations and Costs* Judgment of November 23, 2010. Series C, No. 218. par. 141 and 142.

<sup>92</sup> IACHR, Application to the Inter-American Court of Human Rights. Case of Jesús Tranquilino Vélez Loor. 12.581. Panama. October 8, 2009. par. 73; and I/A Court H.R., *Ivcher Bronstein Case v. Peru*. Judgment of February 6, 2001. Series C, No. 74, par. 103.

<sup>93</sup> IACHR, Report No. 49/99. Case 11.610. *Loren Laroye Riebe Star, Jorge Barón Guttlein, and Rodolfo Izal Elorz*. Mexico. April 13, 1999. par. 70.

<sup>94</sup> I/A Court H.R. Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003, Series A, No. 18. par. 121.

<sup>95</sup> IACHR, Report on Immigration in the United States: Detention and Due Process. OEA/Ser.L/V/II. Doc. 78/10. December 30, 2010, par. 58. Cf. IACHR, Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere, Annual Report 2000, par. 90 (April 16, 2001); see IACHR, Wayne Smith, Continues...

The right to a hearing, with due guarantees and within a reasonable time by a competent, independent, and impartial tribunal; prior notification in detail to the accused of the charges against him; the right not to be compelled to be a witness against oneself or to plead guilty; the right of the accused to be assisted without charge by a translator or interpreter; the right of the accused to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; the right of the defense to examine witnesses present in the court and to obtain their appearance as witnesses, experts or other persons who may throw light on the facts; and the right to appeal the judgment to a higher court. While many of these guarantees are articulated in a language that is more germane to criminal proceedings, they must be strictly enforced in immigration proceedings as well, given the circumstances of such proceedings and their consequences.<sup>96</sup>

116. Within the framework of the right to a hearing “with due guarantees” the organs of the system have been emphasizing the obligation to provide grounds. In this regard, the Court has held that the grounds are “the reasoned justification that allows a conclusion to be reached.”<sup>97</sup> As the Court found:

The duty to state grounds is a guarantee linked to the proper administration of justice, protecting the right of citizens to be tried for the reasons provided by law, and giving credibility to the legal decisions adopted in the framework of a democratic society.<sup>98</sup> Decisions adopted by domestic bodies that could affect human rights should be duly grounded; otherwise, they would be arbitrary decisions.<sup>99</sup> In this regard, the reasoning for a ruling and for certain administrative acts should provide information regarding the facts, reasons and norms on which the authority based its decision, in order to rule out any suggestion of arbitrariness.<sup>100</sup> It must also show that the arguments of the parties have been duly weighed and that the body of evidence has been analyzed. Based on all the foregoing, the duty to state grounds is one of the “due guarantees” included in Article 8(1) to safeguard the right to a fair trial.<sup>101</sup>

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United States, Report No. 56/06 (Admissibility), Case No. 12.562, par. 51 (July 20, 2006); IACHR, Loren Laroye Riebe Star, Jorge Alberto Barón Guttlein and Randolph Izal Elorz, Mexico, Report No. 49/99 (Merits), Case No. 11.610, par. 46 (April 13, 1999)

<sup>96</sup> IACHR, Report on Immigration in the United States: Detention and Due Process. OEA/Ser.L/V/II. Doc. 78/10. December 30, 2010, par. 57.

<sup>97</sup> I/A Court H.R. *Case of López Mendoza v. Venezuela. Merits, Reparations and Costs*. Judgment of September 1, 2011, Series C No. 233. par. 141; *Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 6, 2009. Series C, No. 200. par. 208; and I/A Court H.R., *Case of Chocrón Chocrón v. Venezuela, Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 1, 2011. Series C, No. 227. par. 118.

<sup>98</sup> I/A Court H.R. *Case of López Mendoza v. Venezuela. Merits, Reparations and Costs*. Judgment of September 1, 2011, Series C No. 233. par. 141. Cf. *Case of Apitz-Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 5, 2008. Series C, No. 182, par. 77. The European Court has so ruled in the Case of Suominen: “The Court then reiterates that, according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based.” Cf. *Suominen v. Finland*, no. 37801/97, para. 34, 1 July 2003.

<sup>99</sup> I/A Court H.R. *Case of López Mendoza v. Venezuela. Merits, Reparations and Costs*. Judgment of September 1, 2011, Series C No. 233. par. 141. Cf. I/A Court H.R., *Case of Yatama v. Nicaragua*. Judgment of June 23, 2005. Series C, No. 127. pars. 152 and 153. Likewise, the European Court has pointed out that the judges must indicate with sufficient clarity the reasons for which they adopt their decisions. Cf. ECHR, *Hadjianastassiou v. Greece*, Judgment of 16 December, 1992, Series A No. 252, para. 23.

<sup>100</sup> I/A Court H.R. *Case of López Mendoza v. Venezuela. Merits, Reparations and Costs*. Judgment of September 1, 2011, Series C No. 233. par. 141. Cf. *Case of Claude Reyes et al v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C, No. 151, par. 122.

<sup>101</sup> I/A Court H.R. *Case of López Mendoza v. Venezuela. Merits, Reparations and Costs*. Judgment of September 1, 2011, Series C No. 233. par. 141

117. For its part and regarding the specific guarantees recognized in article 8(2) of the American Convention, the Court has held that the administration may not dictate punitive administrative actions without granting the individuals sanctioned the above minimum guarantees, which are applied *mutatis mutandis* to punitive proceedings.<sup>102</sup>

118. In applying a number of these guarantees to a specific case concerning immigration, the Commission referred to the need to ensure that persons can “prepare their defense, formulate their claims and submit evidence,” which guarantees are impossible to exercise when the government’s decision is carried out in an “unreasonably short time.”<sup>103</sup>

119. For its part, in referring to the scope of the right of defense in the context of an immigration proceeding, the Court has held that it

binds the State to treat the person, at all times, as a true party to the proceeding, in the broadest sense of this concept and not simply as an object thereof.<sup>104</sup> Article 8(2)(d) and (e) establish the right of the accused to defend himself or herself personally or to be assisted by legal counsel of his or her own choosing, and, if the accused does not so chose, the accused has the inalienable right to be assisted by a counsel provided by the State, paid or not as the domestic law provides. In this respect and for cases concerning non-criminal procedures, the Tribunal has previously established that “the circumstances of a particular case or proceeding—its significance, its legal character, and its context in a particular legal system—are among the factors that bear on the determination of whether legal representation is or is not necessary for due process.”<sup>105</sup>

120. With respect to the right of appeal, the Court has held that it applies to “punitive” decisions.<sup>106</sup> It has also referred to the importance of the notification of the decision for exercising this right. In the case of *Vélez Loo v. Panama*, the Inter-American Court found that “the lack of notification constitutes, per se, a violation of Article 8 of the Convention, given that it placed Mr. Vélez Loo in a situation of uncertainty regarding his legal situation and made the exercise of the right to appeal a judgment unfeasible.”<sup>107</sup>

## **2. General considerations on the right to seek and be granted asylum and the principle of non-return**

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<sup>102</sup> I/A Court H.R., *Baena Ricardo et al. Case v. Panama*. Judgment of February 2, 2001. Series C, No. 72. par. 128. See also Second Progress Report of the Rapporteurship on Migrants Workers and their Families in the Hemisphere, OEA/Ser./L/V/II.111 doc. 20 rev., 16 April 2001, pars. 98 a 100.

<sup>103</sup> IACHR, Report No. 49/99. Case 11.610. *Loren Laroye Riebe Star, Jorge Barón Guttlein, and Rodolfo Izal Elorz. Mexico*. April 13, 1999. par. 60; IACHR. Report No. 84/09. Case 12.525. *Nelson Iván Serrano Sáenz*. Publication. Ecuador. August 6, 2009. pars. 61 and 62.

<sup>104</sup> I/A Court H.R., *Case of Vélez Loo v. Panama. Preliminary Objections, Merits, Reparations and Costs* Judgment of November 23, 2010. Series C, No. 218. par. 145. Cf. I/A Court H.R., *Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs*. Judgment of November 17, 2009. Series C, No. 206. par. 29.

<sup>105</sup> I/A Court H.R., *Case of Vélez Loo v. Panama. Preliminary Objections, Merits, Reparations and Costs* Judgment of November 23, 2010. Series C, No. 218. par. 145. Cf. *Exceptions to the Exhaustion of Domestic Remedies* (Arts. 46(1), 46(2)(a) and 46(2)(b), American Convention on Human Rights). Advisory Opinion OC-11/90 of August 10, 1990. Series A, No. 11, par. 28.

<sup>106</sup> I/A Court H.R., *Case of Vélez Loo v. Panama. Preliminary Objections, Merits, Reparations and Costs* Judgment of November 23, 2010. Series C, No. 218. par. 179.

<sup>107</sup> I/A Court H.R., *Case of Vélez Loo v. Panama. Preliminary Objections, Merits, Reparations and Costs* Judgment of November 23, 2010. Series C, No. 218. par. 180.

121. As noted above, in the instant case, in view of the fact that while the Bolivian immigration authorities were proceeding with the administrative steps for their expulsion the Pacheco Tineo family submitted a claim for recognition of refugee status, the Commission finds it necessary to include the rights enshrined in articles 22(7) and 22(8) of the Convention in its analysis.

### **2.1 The right to seek and be granted asylum (Article 22(7) of the American Convention)**

122. With respect to the right to seek and be granted asylum, recognized at article 22(7) of the American Convention, the Commission has found that this provision “outlines two criteria which are cumulative and both of which must be satisfied in order for the right to exist. The first criterion is that the right to seek and receive asylum on foreign territory must be in ‘accordance with the laws of each country,’ that is the country in which asylum is sought. The second criterion is that the right to seek asylum in foreign territory must be ‘in accordance with international agreements.’”<sup>108</sup> Recently, in the Case of *John Doe v. Canada*, the Inter-American Commission explained the scope of these two criteria, saying, “Article XXVII [of the American Declaration] would be meaningless under such an interpretation because Member States could exclude broad classes of refugee claimants through domestic law without implementing their obligations under Article XXVII and international refugee law.”<sup>109</sup>

123. It is article 22(7) of the Convention that brought forth the international conventions. As the Inter-American Commission has stated on a number of occasions, the primary instruments governing the status and protection of asylum seekers and others who have crossed borders and are unable or unwilling to return to their countries of origin for fear of persecution are the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.<sup>110</sup> In this regard, it is important to recall that, as was confirmed in the section “Established Facts,” Bolivia is a party to these instruments, both of which have been included in its domestic law on protection of refugees.

124. In its *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, the Commission provided the following description of the evolution and content of these instruments:

The 1951 Convention was adopted to address refugee situations resulting from World War II, and thus places a heavy emphasis on the rights of non-return and assimilation. The 1967 Protocol expanded the applicability of the 1951 Convention by removing the geographic and temporal restrictions which had limited the application of the latter to persons displaced pursuant to World War II. The 1951 Convention and its Protocol define: who is and is not a refugee, or has ceased to be a refugee; the legal status of a refugee, and his or her rights and

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<sup>108</sup> IACHR, Report No. 51/96. Decision of the Commission As to the Merits of Case 10.675. *Interdiction of Haitian Boat People*. United States. March 13, 1997. par. 151.

Although the Commission reached a decision in this case on the scope of the right to receive and be granted asylum under the American Declaration, this interpretation is applicable to article 22(7) of the Convention since the relevant language is substantially similar. On this similarity, see paragraph 154 of the same report.

In paragraph 152 of this report, the Commission offers the following analysis of the *travaux préparatoires* on the provision: “The *travaux préparatoires* show that the first draft in the Article did not have the phrase ‘in accordance with the laws of each country.’ That phrase was added in the Sixth Session of the Sixth Commission’s of the Inter-American Juridical Committee at the Ninth International Conference of American States in Bogota in 1948, and discussed in the Seventh session of the Sixth Commission, to preserve the states sovereignty in questions of asylum.”

<sup>109</sup> IACHR, Report No. 24.11. Case 12.586. Merits. *John Doe et al. Canada*. par. 92.

<sup>110</sup> IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System. OEA/Ser.L/V/II.106. Doc. 40. Rev. 1. February 28, 2000. par. 21; and IACHR, Report No. 51/96. Decision of the Commission As to the Merits of Case 10.675. *Interdiction of Haitian Boat People*. United States. March 13, 1997. par. 155.

duties in the country of refuge; and matters relative to the implementation of the respective instruments.<sup>111</sup> Under the regime of the 1951 Convention modified by the 1967 Protocol, a refugee is a person who:

- owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion;
- is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country;
- or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.<sup>112</sup>

The 1951 Convention defines three basic groups that, while otherwise meeting the foregoing criteria, are excluded from refugee status: persons already subject to UN protection or assistance; persons not considered in need of international protection due to having been accorded treatment equivalent to that of nationals by the country of residence; and persons deemed undeserving of international protection. The latter group includes persons with respect to whom there are "serious reasons for considering" that they have committed "a crime against peace, a war crime, or a crime against humanity," "a serious non-political crime outside the country of refuge prior to admission," or "acts contrary to the purposes and principles of the United Nations."<sup>113</sup>

With respect to persons accorded refugee status, the corresponding protections must be maintained unless or until they come within the terms of one of the "cessation clauses."<sup>114</sup>

125. In this connection, in accordance with international and national law,<sup>115</sup> the right to seek and be granted asylum is subject to certain limitations, most pertinently, the exclusionary clauses set out in article 1(f) of the 1951 Convention,<sup>116</sup> which may be applied where it is established that there are "serious reasons for considering" that the person concerned committed one of the acts described. The Commission has noted that, given the potential consequences the

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<sup>111</sup> IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System. OEA/Ser.L/V/II.106. Doc. 40. Rev. 1. February 28, 2000. par. 22. Cf. Office of the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (reedited, Geneva, 1992), pp. 4-5.

<sup>112</sup> IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System. OEA/Ser.L/V/II.106. Doc. 40. Rev. 1. February 28, 2000. par. 22.

<sup>113</sup> IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System. OEA/Ser.L/V/II.106. Doc. 40. Rev. 1. February 28, 2000. par. 23.

<sup>114</sup> IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System. OEA/Ser.L/V/II.106. Doc. 40. Rev. 1. February 28, 2000. par. 24.

At the inter-American level and taking into account the peculiarities of the region, the Cartagena Declaration broadens the definition of refugees. This instrument provides that, "(...) in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order." Cartagena Declaration on Refugees, Cartagena de Indias, November 22, 1984, p. 3.

<sup>115</sup> Bolivia adopted the 1951 Convention and its 1967 Protocol into its legal system as a Law of the Republic by Law 2071 of April 14, 2000.

<sup>116</sup> IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System. OEA/Ser.L/V/II.106. Doc. 40. Rev. 1. February 28, 2000. par. 58.

denial of protection may have for the person concerned, "the interpretation of these exclusion clauses must be restrictive."<sup>117</sup>

126. Finally, the Commission has underscored that while the right to asylum contained in Article 22(7) of the Convention implies no guarantee that refugee status will be granted, it necessarily requires that the claimant be heard with due guarantees during the respective proceeding.<sup>118</sup> In the following section, the Commission refers in greater detail to the link between this right and the right to a fair trial and judicial protection, as well as their specific implications.

## **2.2 The principle of non-return (non-refoulement) (Article 22(8) of the American Convention)**

127. The principle of non-return (*non-refoulement*) is the keystone of the international protection of refugees and persons in similar circumstances. Article 33(1) of the 1951 Convention provides:

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

128. Article 33(2) of the 1951 Convention stipulates that this benefit may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

129. At the inter-American level the principle of non-return (*non-refoulement*) encloses an absolute protection, without exception, in articles 22(8) of the American Convention and 7(3) of the Inter-American Convention to Prevent and Punish Torture, in the following terms:

### Article 22(8) of the American Convention

In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

### Article 13 of the Inter-American Convention to Prevent and Punish Torture

Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.

130. Insofar as the instant case is concerned, the Commission has said that the obligation of non-return means that any person recognized or seeking recognition as a refugee can invoke this protection to prevent their removal. This necessarily requires that such persons cannot be rejected at the border or expelled without an adequate, individualized examination of their

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<sup>117</sup> IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System. OEA/Ser.L/V/II.106. Doc. 40. Rev. 1. February 28, 2000. par. 59. Cf. Office of the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (reedited, Geneva, 1992)

<sup>118</sup> IACHR - Canada. par. 60. Cf. in general, IACHR, Report No. 51/96. Decision of the Commission As to the Merits of Case 10.675. *Interdiction of Haitian Boat People*. United States. March 13, 1997. par. 163.

claim.<sup>119</sup> In addition to being expressly recognized in article 22(8) of the American Convention, the principle of non-return has been understood by the Commission as a means to ensure the most basic human rights, such as the rights to life, liberty, and personal integrity.<sup>120</sup>

131. The specific terms of instruments on the protection of refugees are supplemented and, in certain respects, broadened by international human rights law. Thus, in the inter-American framework, the American Convention has served to strengthen the protection offered by international refugee law. As the IACHR has held, "Pursuant to this network of protections, States are obliged to refrain from taking measures contrary to the principle of asylum, such as returning or expelling asylum seekers or refugees contrary to international human rights, humanitarian and refugee law."<sup>121</sup>

### **3. General considerations on the right to seek and be granted asylum, the principle of non-return, the right to a fair trial, and the right to judicial protection**

132. In cases concerning the determination of refugee status and the expulsion or deportation of a refugee or someone seeking the recognition of refugee status, the analysis of compliance of the state's obligations under the American Convention entails a combined assessment of the rights recognized by articles 8, 22(7), 22(8), and 25 of that instrument. In circumstances such as in the instant case, these three articles of the American Convention are interrelated from two perspectives.

133. On one hand, as is explained in the section on fair trial guarantees in the area of immigration, according to the consistent case-law of the organs of the inter-American system, fair trial guarantees are not limited to judicial remedies, but apply to all procedural instances, including immigration proceedings, which can end in the expulsion or deportation of a person, as well as proceedings for the determination of refugee status and any proceeding that might culminate with an individual's expulsion or deportation.<sup>122</sup> From this perspective, the object and purpose of the protections recognized in articles 22(7) and 22(8) of the American Convention, introduce certain specific aspects in satisfying the right to fair trial guarantees in the framework of proceedings to do with the scope of these provisions.

134. On the other hand, it is up to states to make determinations regarding the rights recognized in articles 22(7) and 22(8) of the American Convention through the procedures and authorities established internally for those ends. And in that sense, these provisions include not only substantive, but also procedural, obligations, in order to ensure the effectiveness of such procedures and authorities in satisfying the ultimate purpose of these provisions; that is, the

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<sup>119</sup> IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System. OEA/Ser.L/V/II.106. Doc. 40. Rev. 1. February 28, 2000. par. 25.

<sup>120</sup> IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System. OEA/Ser.L/V/II.106. Doc. 40. Rev. 1. February 28, 2000. par. 32.

<sup>121</sup> IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System. OEA/Ser.L/V/II.106. Doc. 40. Rev. 1. February 28, 2000. par. 26. See generally, UN General Assembly Resolution 52/103, 12 December 1997, "Office of the UN High Commissioner for Refugees," para. 5.

<sup>122</sup> Further to what is mentioned above in the sphere of the inter-American system, the African Commission on Human and People's Rights has also consistently held that fair trial guarantees must be applied in the framework of proceedings on expulsion of immigrants and refugees. For more information see, *inter alia*, African Commission on Human and Peoples' Rights: Communication 313/05 – *Kenneth Good v. Republic of Botswana*, 47th ordinary session, 12-26 May 2010, paras. 160-180; and Communications 27/89, 46/91, 49/91, 99/93 - *Organisation Mondiale Contre La Torture and Association Internationale des juristes Democrates, Commission Internationale des Juristes (C.I.J), Union Interfricaine des Droits de l'Homme v. Rwanda*, 20th ordinary session, October 1996, p. 4.

protection of these individuals from dangers to their life, integrity, or liberty in other countries. Consequently, determinations on asylum claims and on the admissibility of grounds for invoking the principle of non-return must meet the applicable basic guarantees contained in article 8 of the Convention in the below-described terms.

135. Indeed, based on these interconnections, following, the Commission summarizes the specific due process standards for upholding the right to seek and be granted asylum, as well as the principle of non-return.

136. To begin with, the Commission notes that “the status of refugee is one which derives from the circumstances of the person; it is recognized by the State rather than conferred by it. The purpose of the applicable procedures is to ensure that it is recognized in every case where that is justified.”<sup>123</sup> The Commission also notes that that an applicant for refugee status is normally in a particularly vulnerable situation.<sup>124</sup> In that regard, any refugee determination process implies an assessment and a decision on the possible risk of impairment of the most basic rights, such as the rights to life, personal integrity, and personal liberty. Therefore, the design and implementation of these proceedings should start from this fundamental premise so that they can effectively achieve the essential purpose of protection that they pursue.

137. On this point, in its *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, the Commission held that:

The process of determining who is or is not a refugee involves making case by case determinations that may affect the liberty, personal integrity, and even the life of the person concerned. As is evident, the factors which lead individuals to flee persecution are often highly specific to their particular situation. At the same time, the basic principles of equal protection and due process reflected in the American Declaration require predictable procedures and consistency in decision-making at each stage of the process.<sup>125</sup>

(...)

In many cases concerning eligibility, for example, determinations are not administrative but substantive in nature, requiring appropriate procedural guarantees. The effective observance of the rights of asylum seekers and the obligation of non-return necessarily presuppose the existence of a procedure to effectively determine who is entitled to be accorded these protections. It is axiomatic that the effective protection of rights requires a procedural framework which offers the necessary minimum guarantees.<sup>126</sup>

138. As is noted above, the right to seek and be granted asylum implies no guarantee that it will be granted. However, this right contained in article 22(7) of the American Convention necessarily requires that the claimant be heard in presenting the application.<sup>127</sup> That is, while the applicable international law on refugees leaves it to states to determine the procedures and

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<sup>123</sup> IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System. OEA/Ser.L/V/II.106. Doc. 40. Rev. 1. February 28, 2000. par. 70.

<sup>124</sup> Office of the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (reedited, Geneva, 1992) par. 190.

<sup>125</sup> IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System. OEA/Ser.L/V/II.106. Doc. 40. Rev. 1. February 28, 2000. par. 52.

<sup>126</sup> IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System. OEA/Ser.L/V/II.106. Doc. 40. Rev. 1. February 28, 2000. par. 62.

<sup>127</sup> IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System. OEA/Ser.L/V/II.106. Doc. 40. Rev. 1. February 28, 2000. par. 60.

authorities for giving effect to the right to seek and be granted asylum, this determination cannot lose sight of the fact that “the nature of the rights potentially at issue – for example, to life and to be free from torture – requires the strictest adherence to all applicable safeguards.”<sup>128</sup>

139. Similar to what was mentioned above with respect to fair trial guarantees in immigration proceedings that can end in a person's deportation or expulsion, in the case of asylum determination procedures the guarantees contained in articles 8(1) and 8(2) of the American Convention are, *mutatis mutandis*, applicable. In the case of refugee determination processes, these guarantees do not arise from the punitive nature of the procedure but from the nature of the rights that could be impaired by a mistaken determination of the risk or an unfavorable response in the context of a proceeding that does not satisfy the minimum guarantees of due process. As the IACHR has found, it “require[s] that the person concerned be accorded the minimum guarantees necessary to effectively state his or her claim.”<sup>129</sup>

140. Specifically, the Commission has determined that the right to seek asylum necessarily requires that asylum seekers have the opportunity to effectively state their claim before a fully competent decision-maker.<sup>130</sup> This authority should, furthermore, be independent, impartial, suitable, and sufficiently trained in “establishing the relevant facts, and interpreting and applying the relevant norms.” This point is particularly relevant where the effectiveness of refugee determination processes is concerned, in that “ascertaining the specific facts of an individual's circumstances within the context of a country situation which may well be complicated, unclear and unstable poses particular challenges, involving crucial content-based assessments concerning the credibility, reliability and relevance of documentary and testimonial evidence presented.”<sup>131</sup> Furthermore, in the terms described above regarding the obligation to provide grounds, any determination in this respect should be duly reasoned as part of the right to a hearing with due guarantees.

141. With respect to other guarantees envisaged in article 8(2) of the American Convention, the Commission considers that, in similar fashion to the provisions that govern the right of defense [e.g. articles 8(2)(b), (c), (d), (e), and (f)], in a refugee determination procedure it is essential that the applicant receive the necessary information on the procedure to be followed, be provided with the necessary means to state their case to the appropriate authorities, and be directly notified of any decisions issued in the proceeding.<sup>132</sup> The proceeding should also include a real opportunity to present evidence on the situation of risk invoked by the petitioner. Summary determinations on the refugee status of a person are inadmissible under the American Convention. Where immigration officials constitute a kind of “counterpart” to the applicant in the framework of the proceeding, the latter should have the possibility to rebut the arguments and evidence offered by such officials. The scope of the “necessary means to present their case to the appropriate authorities”—for instance if the state is required to furnish free counsel—constitutes an element to be assessed on a case-by-case basis, taking into account the particular characteristics of the specific proceeding and its requirements.

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<sup>128</sup> IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System. OEA/Ser.L/V/II.106. Doc. 40. Rev. 1. February 28, 2000. par. 70.

<sup>129</sup> IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System. OEA/Ser.L/V/II.106. Doc. 40. Rev. 1. February 28, 2000. par. 60.

<sup>130</sup> IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System. OEA/Ser.L/V/II.106. Doc. 40. Rev. 1. February 28, 2000. par. 68.

<sup>131</sup> IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System. OEA/Ser.L/V/II.106. Doc. 40. Rev. 1. February 28, 2000. par. 104.

<sup>132</sup> See Office of the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (reedited, Geneva, 1992)

142. As to the possibility of appealing the decision, precisely because of the nature of the factual determinations and, as noted above, the possible effects of such determinations, unfavorable decisions on a claim for recognition of refugee status should be subject to review with automatic suspensive effect.<sup>133</sup> In this connection, the UNHCR has strongly urged all States to ensure that refused refugee claimants have access to a merits-based review.<sup>134</sup>

143. The Commission believes that these standards are applicable even in those cases where “exclusion clauses” might be relevant, the considerations for which “may well be interconnected to the basis of the individual’s claim for asylum.”<sup>135</sup> Moreover, the Commission has referred to the “much lower threshold of screening out claims which are ‘manifestly unfounded’ – i.e. clearly fraudulent or not related to the criteria of the 1951 Convention,” and recalled that the UNHCR has indicated that “in all cases, a potential applicant should: be given a complete interview, preferably by an official of the authority competent to determine refugee status; the manifestly unfounded or abusive character of an application should be established by the authority normally competent to determine refugee status; an unsuccessful applicant should be entitled to some form of review before rejection at the frontier or removal.”<sup>136</sup> This point is especially relevant as the inadequate application of exclusion clauses or the concept of “manifestly unfounded” applications can lead to grave situations as a result of a lack of protection.

144. Having said that, on a separate point and with a different scope as regards the possibility of review (which has more to do with article 8(2)(h) of the Convention), concerning the right to judicial protection enshrined in article 25 of the American Convention, the Commission recalls that the purpose of that right is to ensure the existence and effectiveness of remedies by which to question before judicial authorities possible violations of rights recognized in that instrument, the Constitution, and the law of each state. Consequently, the protection envisaged in article 25 of the American Convention also encompasses the rights recognized in articles 22(7) and 22(8) of that instrument.<sup>137</sup> The effect of this right is to require that a domestic remedy be afforded that allows the relevant judicial authority to weigh the substance of the claim and remedy the situation through appropriate reparation. Although applicants do not necessarily have an unlimited

<sup>133</sup> European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011. para. 293.

<sup>134</sup> UNHCR. Rec. No. 8 (XXVIII) “Determination of Refugee Status,” (1977), at secs. (e)(vi) and (vii). As the UNHCR has said: If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system. The applicant should .... also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending

<sup>135</sup> IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System. OEA/Ser.L/V/II.106. Doc. 40. Rev. 1. February 28, 2000. par. 68.

<sup>136</sup> IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System. OEA/Ser.L/V/II.106. Doc. 40. Rev. 1. February 28, 2000. par. 69. Cf. UNHCR Executive Committee, Conclusion N° 30 (XXXIV) – 1983, “The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum,” Report of the 34th Session, UN Doc. A/AC.96/631, at para. 97(2)(e).

<sup>137</sup> See generally, IACHR, Resolutions N° 3/84, 4/84 and 5/85, Cases N° 4563, 7848 and 8027, Paraguay, published in *Annual Report of the IACHR 1983-84*, OEA/Ser.L/V/II.63, doc. 10, 24 Sept. 1984, at pp. 57, 62, 67 (addressing lack of access to judicial protection in proceedings involving expulsion of nationals; linking right to freely enter and remain in one’s own country under Article VIII of the Declaration to the rights to a fair trial and due process under Articles XVIII and XXVI). See also, Report N° 47/96, Case 11.436, Cuba, in *Annual Report of the IACHR 1996*, OEA/Ser.L/V/ II.95, Doc. 7 rev., 14 March 1997, at para. 91, (citing *Annual Report of the IACHR 1994*, “Cuba,” at p. 162, and addressing failure of State to observe freedom of movement of nationals under Article II via denial of exit permits from which no appeal is allowed). In the context of the American Convention, see generally, IACHR, Resolution N° 30/81, Case 7378, Guatemala, in *Annual Report of the IACHR 1980-81*, OEA/Ser.L/V/II.54, doc. 9 rev. 1, 16 Oct. 1981, p. 60, at 62 (addressing denial of right to judicial protection in expulsion of foreigner absent any form of due process), Report N° 49/99, Case 11.610, Mexico, *Annual Report of the IACHR 1998*, OEA/Ser.L/V/II.102, Doc. 6 rev., 16 April 1999, Vol. II.

right of access to judicial remedies, the limitations on the exercise of this right cannot be unreasonable or of such a nature as to render the right void.

145. In sum, under the American Convention, those persons who are under the jurisdiction of a state and find themselves in the framework of a proceeding for determination of refugee status should be afforded some level of judicial protection against possible violations of the right to seek and be granted asylum, as well as of the principle of non-return, both of which are protected by the Convention.

#### **4. *Analysis of the events that occurred between February 20 and 24, 2001***

146. It has been established in the instant case that Rumaldo Juan Pacheco Osco, Fredesvinda Tineo Godos, and their three children entered Bolivia on February 19, 2001, without passing through that country's immigration controls. The following day, Mr. Pacheco Osco and Mrs. Tineo Godos visited the offices of the National Immigration Service, where they advised officials of their intention and request for assistance to travel to the State of Chile. It was at that point that the Bolivian immigration authorities became aware of their irregular entry to Bolivia and initiated steps to deport the Pacheco Tineo family to Peru. On February 21, 2001, Mr. Pacheco Osco applied for recognition of refugee status in Bolivia for himself and his family, according to him, as a defense mechanism against the response of the immigration authorities, which was to arbitrarily arrest his wife and initiate procedures for their expulsion to Peru as a result of their irregular entry. That same day, the CONARE convened and summarily determined that the new claim for asylum was inadmissible on the basis that three years earlier the family had requested voluntary repatriation to Peru. Two days later, on February 23, 2001, the SENAMIG issued resolution No. 136/2001, by which it decided to expel the family from Bolivian territory. On February 24, 2001, the expulsion was carried out by means of the transfer and handover of the Pacheco Tineo family on the border with the State of Peru, specifically in the locality known as El Desaguadero.

147. Bearing in mind the peculiarities of the case and the applicable standards on due process in immigration matters (see above, pars. 113 – 120) and on due process in refugee determination proceedings (see above, pars. 132 – 145), the Commission will address, first, the conduct of the SENAMIG and, second, the conduct of the CONARE.

##### **4.1 *Conduct of the National Immigration Service (SENAMIG)***

148. The Commission notes that almost as soon as the Pacheco Tineo family set foot in the offices of the SENAMIG on February 20, 2001, that agency set in motion proceedings for the family's deportation, which culminated with resolution 136/2001 and the expulsion on February 24, 2001. The petitioners say that they were afforded neither a hearing nor the possibility to defend themselves. There is no documentary evidence whatsoever to suggest that the Pacheco family were notified of the opening of an administrative proceeding against them; that they were formally apprised of the administrative offenses with which they were charged under the Legal Regime on Migration; that they were given any opportunity to defend themselves against those charges, or that the state provided them with the assistance of counsel.

149. On the contrary, the circumstances in which the events occurred and the evidence in the record suggest that the determination to expel them under article 48 of the Legal Regime on Migration was a summary decision made in an unreasonably short time, which precluded satisfaction of the minimum fair trial guarantees to which the Pacheco Tineo were entitled. Furthermore, there are no documents to suggest that the Pacheco Tineo family were notified of resolution 136/2001 once it was issued so that they might know the grounds for their expulsion and invoke the applicable administrative and/or judicial remedies.

150. In light of these facts, the Commission finds that the conduct of the SENAMIG in the proceeding that culminated in the expulsion of the Pacheco Tineo family engaged the international responsibility of the State of Bolivia, specifically for violation of the rights to a hearing with due guarantees, to be informed of the administrative charges against them, to defend themselves, to the possibility of review, and to judicial protection recognized in articles 8(1), 8(2), and 25 of the American Convention, taken in conjunction with article 1(1) of that instrument, to the detriment of Rumaldo Juan Pacheco Osco; Fredesvinda Tineo Godos; and Frida Edith, Juana Guadalupe, and Juan Ricardo Pacheco Tineo.

151. Finally, the Commission also notes that resolution 136/2001 makes no assessment as to which country it was appropriate to transfer them to, in spite of evidence that the immigration authorities were aware that the child Juan Ricardo Pacheco Tineo was a Chilean national and that there was at least the suggestion that all the other members of the Pacheco Tineo family had refugee status in Chile. The Commission considers that, regardless of the unfavorable decision on the asylum application in Bolivia—which matter is examined in the next section—the immigration authority that ordered the expulsion of the family had the obligation to take into consideration all the information available and make a reasoned determination not only with respect to the propriety of the grounds for expulsion, but also as regards the country to which the family should be taken given the particular circumstances of the case.

152. The Commission considers that it is not appropriate to comment on whether or not the life or freedom of the Pacheco family would be threatened in the Peruvian States on account of their race, religion, nationality, membership of a particular social group or political opinion. For the purposes of the instant case, the expulsion of a family to their country of origin in violation of minimum fair trial guarantees and in the knowledge that said family might enjoy protection as refugees in a third country is incompatible with the principle of non-return (*non-refoulement*) recognized in article 22(8) of the American Convention in conjunction with article 1(1) of that instrument.

#### **4.2 Conduct of the National Committee on Refugees (CONARE)**

153. The Commission has taken it is proven that on February 20, 2001, Rumaldo Juan Pacheco Osco and Fredesvinda Tineo Godos visited the SENAMIG, that Mr. Pacheco Osco withdrew from the offices, and that Mrs. Tineo Godos was deprived of liberty in the circumstances examined in the preceding sections. In this regard, on February 21, 2001, the CEB-UNHCR program sent a communication to the Bolivian immigration authorities stating that the Pacheco Tineo family had again applied for recognition of refugee status in Bolivia. According to information provided by the state, this application was settled in the afternoon of that same day, February 21, 2001, by the CONARE, which rejected the claim.

154. In first place, the Commission notes that the CONARE made a summary determination without listening to the applicants by means of a hearing, interview, or any other mechanism. In that regard, the Pacheco Tineo family did not have an opportunity to state the reasons why they were requesting asylum, including, for example, the reasons that led them to present their statement of "voluntary repatriation," whether or not there were new factors that threatened their lives or personal liberty in Peru, among other aspects that have been gradually clarified in the proceeding before the IACHR for the first time, since the petitioners did not have an opportunity to present them to the CONARE before that entity turned down their application. In addition the Pacheco Tineo family were not given the opportunity to present documentary or other evidence on each of these aspects, or to contest the possible arguments against their application that could have been made by the immigration official which, as the minutes furnished by the state show, formed part of the unfavorable decision on the application for recognition refugee status.

155. Furthermore, the Commission notes a lack of clarity with respect to the nature of the state act whereby the CONARE made determinations regarding the inadmissibility of the new asylum claim. The document furnished by the state consists of meeting minutes that have not been signed by any of the persons named therein. Whatever the case, the Commission observes that if the act is a resolution or some other administrative decision, it does not include the minimum grounds by which to understand, in a proceeding of this nature, how the Bolivian state weighed the circumstances in which the Pacheco Tineo family found themselves in February 2001. On the contrary, the above act merely states that the family requested voluntary repatriation and, therefore, renounced the refugee status recognized some years previously by Bolivia. However, the CONARE neither considered nor weighed the possibility that the circumstances might have changed or that supervening events might have occurred in the three-year interval between the statement of voluntary repatriation and their new application.

156. Although the Commission lacks elements from which to determine with certainty the reasons that led Rinaldo Juan Pacheco Osco to request voluntary repatriation, it is important to establish that article 22(7) of the American Convention cannot be interpreted restrictively in the sense that a voluntary repatriation in the past might prevent someone from subsequently seeking asylum. Both article 22(7) and article 22(8) of the American Convention impose the obligation to make a serious assessment of circumstances of potential risk to asylum seekers, without it being acceptable to presume that no such risk exists because of a voluntary repatriation that occurred in the past.

157. Therefore, the Commission considers that the determination made by the CONARE was not sufficiently well grounded. This omission also shows that the CONARE did not seriously assess all the circumstances of the Pacheco Tineo family at the time of the application and, therefore, the appraisal of the potential risk was not adequate in light of the nature of the rights involved and the consequences that could ensue from proceedings of this type.

158. In addition to the foregoing, the Commission notes that the Pacheco Tineo family were not notified of the CONARE decision so that they might attempt the available remedies against decisions of this type and, therefore, have their situation reviewed. This failure to notify them also undermined their possibility of interposing a judicial appeal to challenge any possible violations of due process, of the rights to seek and be granted asylum, or of the principle of non-return.

159. Finally, the Commission would like to address the argument of the state regarding the permissibility of summary determinations on manifestly unfounded applications, as well as the state's observations to the effect that the Pacheco Tineo family abused the institution of asylum.

160. Regarding the first point, the Commission finds that, under the American Convention, any proceeding for the determination of rights must include the guarantees of due process. Although states have the authority to order different proceedings to evaluate applications that are "manifestly unfounded," that authority cannot render void the minimum guarantees of due process. In the instant case, the Commission considers that this argument is not admissible since, to begin with, it is a defense advanced to the IACHR and not a determination that the CONARE actually made in making its decision. The CONARE did not provide grounds to the effect that application was "manifestly unfounded" or state the reasons for reaching such a conclusion. In second place, the summary manner in which the CONARE acted by adopting a decision in an unreasonably short time and without offering the possibility of submitting any arguments, evidence, or defense, renders the most basic due process guarantees void. In third place, as the Commission has already mentioned, a voluntary repatriation in the past cannot constitute an impediment to exercise the right enshrined in article 22(7) of the American Convention. Finally, although the recognition of protection in a third country could justify the denial of an asylum claim, petitioners in

this case did not have an opportunity to explain their situation in Chile. The situation was not considered either by the CONARE in its summary determination.

161. Consequently, by summarily rejecting this application, without affording any due process guarantee in the terms described above, the state, through the CONARE, not only acted in violation of the guarantees of due process and the right to seek and be granted asylum, it also infringed the procedural obligations imposed by the principle of non-return by denying protection—resulting in the expulsion—without making a serious and adequate determination of the potential risk faced by the family in their country of origin.

162. Based on the foregoing, the Commission concludes that the state violated the rights to a fair trial, to seek and be granted asylum, the principle of non-return and the right to judicial protection recognized in articles 8(1), 8(2), 22(7), 22(8), and 25 of the American Convention, taken in conjunction with article 1(1) of that instrument, to the detriment of Rinaldo Juan Pacheco Osco; Fredesvinda Tineo Godos; and Frida Edith, Juana Guadalupe, and Juan Ricardo Pacheco Tineo.

**1. *The right to humane treatment of the Pacheco Tineo family (article 5 of the American Convention)***

163. Where it pertains to the instant case, Article 5 of the American Convention provides:

1. Every person has the right to have his physical, mental, and moral integrity respected.

164. Since the initial petition was lodged, the petitioners have claimed a series of violations to their personal integrity, including acts of verbal violence by a SENAMIG official as well as physical and verbal abuse during the journey from La Paz to the border zone of El Desaguadero on February 24, 2001. These facts were refuted by the state, which said that the Pacheco Tineo family were humanely treated by its authorities.

165. As mentioned in the Established Facts section, the Commission has no official information that would allow it to make factual determinations regarding the circumstances as to the time, manner, and location of the transfer of the Pacheco Tineo family with a view to their expulsion. There is no official document whatever that records the details of how the family's transfer and expulsion proceeded. For their part, the petitioners provided no additional information to support the allegations of mistreatment, such as, for instance, the filing of a complaint.

166. In these circumstances, the Commission considers that it does not have sufficient information to conclude that the state violated the right to humane treatment of the members of the Pacheco Tineo family during the journey on February 24, 2001, from La Paz to the border zone of El Desaguadero.

167. Having said that, the Commission notes from the established facts that it would be fair to say that the members of the Pacheco Tineo family were expelled in a situation of complete uncertainty regarding the outcome of the new application for recognition of refugee status and regarding the possibilities of invoking any remedy in that respect. It is also reasonable to surmise that Rinaldo Juan Pacheco Osco and Fredesvinda Tineo Godos, on being taken to the border with Peru just hours before they were due to get on a bus that would take them to Chile, a country where they had already been granted protection as refugees, were in a state of distress and fear at the prospect of the deprivation of liberty that in all likelihood awaited them in their country of origin, as well as the resulting separation from their young children. By the same token, in these circumstances, and given the young age of the children Frida Edith, Juana Guadalupe, and Juan Ricardo, it is reasonable to infer that they felt afraid and defenseless during the transfer and expulsion. It is also reasonable to infer that the children were suffering because of what might happen to their parents as a result of these events.

168. Although, in the context of a country's immigration policy the transfer and subsequent delivery of a person to another country may be consistent with the international obligations of that state and, therefore, any feelings of frustration or fear that might arise would not be attributable to the state in question, in the instant case the transfer and expulsion occurred as a result of proceedings which, as has been determined above, were arbitrary and in violation of various provisions contained in the American Convention. Accordingly, the distress and fear which, as noted in the foregoing paragraph, it is reasonable to infer were suffered by every member of the family during the transfer and expulsion, are attributable to the state of Bolivia.

169. Consequently, the Commission finds that it does not have sufficient information to conclude that the state violated the right of the members of the Pacheco Tineo family to have their physical integrity respected. However, the Commission finds that there is sufficient evidence to conclude that the Bolivian state violated the right to mental and moral integrity enshrined in article

5(1) of the American Convention, taken in conjunction with article 1(1) of that instrument, to the detriment of Rinaldo Juan Pacheco Osco; Fredesvinda Tineo Godos; and Frida Edith, Juana Guadalupe, and Juan Ricardo Pacheco Tineo.

**D. The obligation to provide special protection to children and the right to protection of the family (articles 19 and 17 of the American Convention)**

170. Article 19 of the American Convention states that:

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

171. Article 17(1) of the American Convention provides:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

172. Pursuant to article 19 of the American Convention, states have a duty to observe a particularly high standard in all matters related to the guarantee and protection of the human rights of children. Respect for the rights of the child is a fundamental value in a society that claims to practice social justice and observe human rights.<sup>138</sup>

173. By the Court's case law, Article 19 of the American Convention should be understood as a complementary right that the Convention establishes for individuals who need special measures of protection, owing to their stage of physical and emotional development.<sup>139</sup> Children, therefore, possess not only the same human rights that correspond to all persons, but also special rights accruing to their child status, in regard to which the family, society and the State have specific duties. In other words, children are entitled to special measures of protection.<sup>140</sup>

174. In sum, the rights of children must be safeguarded both in view of their status as human beings and by reason of their special condition, to which end special protective measures must be adopted. This added obligation to provide protection<sup>141</sup> and these special duties should be regarded as determinable based on the needs of the child as a person with rights.<sup>142</sup> As a corollary to the foregoing, any proceeding that might lead to the expulsion of a child to their country of origin or to a third country should be oriented toward safeguarding the child's best interests.<sup>143</sup>

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<sup>138</sup> IACHR, Report No. 33/04, Case 11.634, Merits, Jailton Neri Fonseca (Brazil), March 11, 2004, par. 80.

<sup>139</sup> I/A Court H.R., *Case of the Ituango Massacres*. Judgment of July 1, 2006. Series C, No. 148, par. 106; *Case of Baldeón García*, Judgment of April 6, 2005. Series C, No. 147, par. 244; *Case of the "Mapiripán Massacre"*, Judgment of September 15, 2005. Series C, No. 134, par. 152; and, in particular, *Case of the "Juvenile Reeducation Institute"*, Judgment of September 2, 2004. Series C, No. 112, par. 147, and *Case of Servellón-García et al.* Judgment of September 21, 2006, par. 113

<sup>140</sup> I/A Court H.R. Advisory Opinion OC-17/2002, par. 62:

Adoption of special measures to protect children is a responsibility both of the State and of the family, community, and society to which they belong.

<sup>141</sup> I/A Court H.R., *Case of the "Juvenile Reeducation Institute"*, par. 160; *Case of the Gómez Paquiyauri Brothers*, pars. 124, 163-164, and 171; *Case of Bulacio*, pars. 126 and 134; *The "Street Children" Case (Villagrán Morales et al.)*, pars. 146 and 191; and *Case of the Indigenous Community Yakye Axa*. Judgment of June 17, 2005, par. 172. In the same connection: Advisory Opinion OC-17/02, pars. 56 and 60.

<sup>142</sup> I/A Court H.R., *Case of the Indigenous Community Sawhoyamaxa*. Judgment of March 29, 2006, par. 154

<sup>143</sup> For further information on determining the best interests of the child where child refugees are concerned, see UNHCR: *Guidelines on Determining the Best Interests of the Child*. 2008.

175. In the instant case, Frida Edith, Juana Guadalupe, and Juan Ricardo Pacheco Tineo, the three children of Rumaldo Juan Pacheco Osco and Fredesvinda Tineo Godos, were of a young age at the time of the events. Given the characteristics of both the proceeding that culminated in the expulsion and the proceeding on the application for refugee status, it is plain that the special condition of the two girls and the boy were not considered in these decisions. In that regard, the conduct of the SENAMIG and the CONARE, which, as was concluded in the preceding section, violated several rights contained in the American Convention, also constituted a breach of the special duty of protection to the three children under article 19 of the American Convention.

176. Finally, the Commission finds that, in view of its analysis in the foregoing section on the right of the family to have their mental and moral integrity respected, that it is unnecessary to offer a separate finding on a possible violation of the right enshrined in article 17 of the American Convention.

## **VI. CONCLUSIONS**

177. Based on the foregoing considerations of fact and law, the Inter-American Commission concludes that:

1. By virtue of the principle of subsidiarity, the Commission will not rule on the alleged violation of the right to personal liberty contained in Article 7 of the American Convention with respect to Fredesvinda Tineo Godos.

2. The State of Bolivia is responsible for the violation of the right to a fair trial, the right to seek asylum and the principle of non-return, enshrined in articles 8, 22(7), and 22(8) of the American Convention, taken in conjunction with Article 1(1) of that instrument, to the detriment of Rumaldo Juan Pacheco Osco; Fredesvinda Tineo Godos; and the minors Frida Edith, Juana Guadalupe, and Juan Ricardo Pacheco Tineo.

3. Based on the principle of *iura novit curia*, the State of Bolivia is responsible for the violation of the right to judicial protection enshrined in article 25 of the American Convention, taken in conjunction with Article 1(1) of that instrument, to the detriment of Rumaldo Juan Pacheco Osco; Fredesvinda Tineo Godos; and the minors Frida Edith, Juana Guadalupe, and Juan Ricardo Pacheco Tineo.

4. The State of Bolivia did not violate the right to respect for physical integrity recognized in Article 5 of the American Convention, to the detriment of the Pacheco Tineo family.

5. The State of Bolivia violated the right to mental and moral integrity enshrined in article 5(1) of the American Convention, taken in conjunction with article 1(1) of that instrument, to the detriment of Rumaldo Juan Pacheco Osco; Fredesvinda Tineo Godos; and Frida Edith, Juana Guadalupe, and Juan Ricardo Pacheco Tineo.

6. The State of Bolivia is responsible for the violation of the obligation to provide special protection to children recognized in article 19 of the American Convention, taken in conjunction with Article 1(1) of that instrument.

7. It is not necessary to offer an opinion on the alleged violation of the rights of the family enshrined in article 17 of the American Convention.

**VII. RECOMMENDATIONS**

178. Based on the foregoing conclusions,

***THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THAT THE BOLIVIAN STATE,***

1. Order comprehensive reparation in favor of the members of the Pacheco Tineo family for the human rights violations found in this report. This reparation should include compensation for the material and non-pecuniary damages suffered. The presence of the Pacheco Tineo family in another country should not be considered an obstacle in carrying out this recommendation. It is incumbent on the Bolivian State to order the necessary efforts through diplomatic and consular channels to ensure this reparation.

2. Order administrative, disciplinary, and other measures to address the acts or omissions of the government officials who took part in the human rights violations found in this report.

3. Adopt measures to ensure non-repetition, including training for officials in charge of immigration proceedings that could result in the deportation or expulsion of immigrants and of proceedings for the determination of refugee status. This training should include the standards described in the instant merits report. The State should also adopt other measures to ensure non-repetition in order to make certain that the practices of domestic authorities in these two spheres are compatible with the American Convention in the terms described in this report.