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Title/Style of Cause: Andres Aylwin Azocar, Jaime Castillo Velasco, Roberto Garretón Merino, Alejandro González Poblete, Alejandro Hales Jamarne, Jorge Mera Figueroa, Hernán Montealegre Klenner, Manuel Sanhueza Cruz, Eugenio Velasco Letelier, Adolfo Veloso Figueroa and Martita Woerner Tapia et al. v. Chile
Doc. Type: Decision
Decided by: Chairman: Carlos Ayala Corao;
First Vice Chairman: Robert K. Goldman;
Second Vice Chairman: Jean Joseph Exume.
Commissioners: Alvaro Tirado Mejía, Helio Bicudo, Henry Forde.
Commission member Claudio Grossman, a citizen of Chile, did not participate in the voting on this case, pursuant to Article 29(2)(a) of the Regulations of the Commission.
Dated: 9 December 1998
Citation: Aylwin Azocar v. Chile, Case 11.863, Inter-Am. C.H.R., Report No. 95/98, OEA/Ser.L/V/II.102, doc. 6 rev. (1998)
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I. SUMMARY

1. The Inter-American Commission of Human Rights, (hereinafter "the Commission") received a complaint against the State of Chile (hereinafter the "State", "the Chilean State" or "Chile") that charged violation of the human rights embodied in the American Convention on Human Rights (hereinafter "the Convention—Articles 23 (right to participate in government), 24 (right to equal protection), and others—to the detriment of the following persons who are victims and petitioners in this case: Andrés Aylwin Azócar, Jaime Castillo Velasco, Roberto Garretón Merino, Alejandro González Poblete, Alejandro Hales Jamarne, Jorge Mera Figueroa, Hernán Montealegre Klenner, Manuel Sanhueza Cruz, Eugenio Velasco Letelier, Adolfo Veloso Figueroa and Martita Woerner Tapia and others (hereinafter "the petitioners"). The events that have been alleged here are occurring at this time and are related to the situation left by the military government of General Augusto Pinochet, who ruled Chile between 1973 and 1990.

II. PROCESSING BY THE COMMISSION

2. On January 9, 1998, the petitioners contacted the Commission. According to their petition, the aforementioned government introduced arbitrary and anti-democratic institutions and new constitutional and legal norms which guaranteed that when the dictatorial regime gave way to a democratic system, the legal system it had constructed would remain in effect and

prevent the new democratic government from revoking those institutions and norms without violating the very laws of the democratic and constitutional system.

3. The petitioners draw the Commission's attention to the fact that it has not been possible to rescind of these legal and constitutional institutions and rules even though they were rejected by the majority of Chileans, by the democratic governments of Chile, and by the majority of the democratically elected members of congress. This situation makes it impossible to honor the commitment undertaken by Chile, through its ratification of the standards contained in the American Convention, to adopt whatever legislative measures are necessary to put into effect the rights and liberties enshrined in it.

4. The State's response to the petition was forwarded to the petitioners on June 19, 1998. Their observations, in turn, were sent to the Chilean Government in a note dated September 9, 1998. The Secretariat of the IACHR received the Government's reply to those observations on December 8, 1998 and reviewed at a meeting held the following day.

III. POSITION OF THE PARTIES

A. The petitioners

5. The petitioners request the Commission to declare: 1) that the existence of senators not elected by the people, whether appointed or serving for life, especially in such numbers that they amount to a significant alteration of the people's will, as provided by Article 45, clauses (a) through (f) of the Political Constitution of Chile of 1980, constitutes a violation of the right to equal suffrage enshrined in Article 23(1)(b) of the American Convention on Human Rights; 2) that the same provision of the Chilean Constitution which provides for privileged electoral bodies comprising an insignificant number of candidates running for the position of senator is contrary to and incompatible with the provisions of clause (1)(c) of the aforementioned Article 23 of the Convention, which states that it is the right of every citizen to have access [under general conditions of equality] to the public service of his country; 3) that the inequality in suffrage and access to public service transgresses Article 24 of the Convention which states that all persons are equal before the law; 4) that the nomination of senators representing 20% of this Chamber in Congress, who are not the expression of the free will of the voters, constitutes a usurpation of the people's will such that elections are no longer authentic, in flagrant violation of Article 23(1)(b) of the Convention, and challenges the very essence of democratic institutions; 5) that the privilege of a few to be designated as senators regardless of the people's will constitutes a manifestation of discrimination, which is prohibited by Article 1 of the Convention, which guarantees to all persons the [full and free] exercise of their human rights; 6) that the incorporation into the senate of Chile of one person in his capacity as former President of the Republic, a position to which that person was never elected by the people, constitutes a violation of the prohibition of discrimination embodied in the Convention; 7) that not only the persons appearing here but in fact all Chileans with the right to vote are the victims of these violations of human rights and these discriminations.

6. The petitioners further request the Commission to make the following recommendations: 1) that the State of Chile adapt its constitution and organic constitutional laws to the norms of the

American Convention on Human Rights, of which it is a State party, in all matters pertaining to the prohibition of discrimination; to political participation under equal conditions of access to public service; and, in general, to the restriction of the right to participate in a fully democratic manner; and especially, 2) that the third clause of Article 45 of the 1980 Constitution be repealed since it is contrary to the provisions of Article 1.1, Article 23(1)(a), (b) and (c) and Article 24 of the American Convention on Human Rights.

B. The State

7. In response to the positions set out by the petitioners, the State of Chile maintains that it cannot be blamed, nor does it have any responsibility for the alleged violation of human rights that has given rise to case 11.863.

8. The Government also states that the legislative initiatives presented by the democratic governments intended to amend the Constitution and eliminate the situation that is the subject of the present complaint should be taken into account. On three occasions, the senate rejected the bills aimed at eliminating the controversial institution of designated and life-time senators, and it is impossible for it to amend the present Constitution by other than legal means.

9. The State questions the contentious nature of the petition and says that it does not provide clear evidence but rather raises issues related to the political situation in Chile; that it does not refer to facts that "reveal or constitute a violation of the rights protected by the Convention," and that, "the circumstance that political and legal issues exist which are considered obstacles to the full development of democracy, or some ideal concept of democracy, cannot be equated with acts constituting violations," and that actually, "the petition revealed a situation of a strictly political nature," which is not within the competence of the Commission to hear.

10. The State maintains that the petition refers to a constitutional standard established in 1980, prior to the date of deposit of ratification of the American Convention and the State of Chile entered into the record, on the date of deposit of its instrument of ratification of that Convention, that the Convention would only apply to events subsequent to that date; and that, furthermore, the petition was entirely extemporaneous because the norm challenged was published in the Official Gazette of August 17, 1989, and the petition was lodged eight years later, long after the six month deadline to which Article 46 of the Convention refers; that the petitioners' claim that they represented the entire Chilean population or the citizens entitled to vote was excessive; and that for these reasons, it requests that the Commission declare itself to have no competence to hear this case *ratione materiae*, or else to declare the petition inadmissible.

11. The Commission reserves analysis of the merits of the petition and of the defense of the State for the corresponding stage of this proceeding.

IV. ANALYSIS

12. According to the information provided by the petitioner and corroborated or not objected to by the State, today Chile's juridical and political structure contains institutions, imposed by the

military government which ruled Chile between 1973 and 1990, which cannot be derogated. This makes it impossible for the democratic will of the people to prevail over arbitrariness, a situation that has not been satisfactorily resolved even though the government itself has attempted in vain to alter it by presenting, on three occasions, initiatives aimed at overturning the controversial institution of life-time senators.

13. The present constitutional government cannot be expected to transgress the institutional structure it inherited or to seek to amend it by the use of means alien to that same legality. Furthermore, the institutions to solve the problem are also shaped by the inherited set of institutions and constitute current law, and are not imputable to democratic governments.

14. The situation that is the subject of this complaint affects the exercise of the right of free determination. Such conditions are not ideal, and there are indeed political and juridical circumstances in Chile, such as those set out in the petition, that constitute obstacles to the full exercise of democracy.

A. Jurisdiction of the Commission *ratione materiae* and *ratione temporis*

15. The Chilean State raises primarily two objections to the admissibility of petition: the noncompetence of the Commission *ratione materiae*, and the inadmissibility of the complaint *ratione temporis*.

a. Considerations regarding the inapplicability of the *ratione materiae* argument

16. The Chilean State argues inadmissibility *ratione materiae* and maintains that the facts brought before the Commission are related to situations, circumstances or aspects of the internal politics of Chile that deal with Chile's transition to democracy; facts which are not within the competence of the Commission and which are not contentious in nature since they speak only to a situation of a strictly political nature pertaining to domestic institutional obstacles in the process of change, a situation in which there is no deliberate action by the State or its agents to prevent the enjoyment or use of the rights guaranteed in the Convention, which could be questioned.

17. The Chilean State repeats that the Commission does not have competence "to question a determined constitutional regime that is not in flagrant contradiction with the provisions of the Convention," and that the case under review will serve to determine whether the Commission "is willing to focus its attention on a complex subject that is not without aspects that have yet to be unequivocally resolved in comparative law, that is, the constitutional structure of the member states of the Organization."

18. With regard to the questions raised by the Chilean State, the Commission believes, pursuant to the provisions of articles 1, 2, 23, 24, 33(a), 44 and others of the American Convention, that it does have jurisdiction *prima facie* to examine the petition in question, that the petitioners have *locus standi* to appear, and that they have presented specific complaints about the non-fulfillment of determined standards established in the Convention by the agents of a state party to the Convention. Therefore the facts brought before the Commission, if they prove to be

true, could constitute possible violations of the human rights protected under the aforementioned articles of the American Convention. In addition, the petition does not refer, as the Chilean State claims, to political circumstances beyond the jurisdiction of judicial bodies in the inter-American system, as expressly provided in the American Convention.

b. Considerations on the inapplicability of *ratione temporis* arguments

19. The *ratione temporis* objection made by the State of Chile refers to two questions: 1) That the Commission does not have competence to hear and rule on a constitutional norm issued before the Republic of Chile ratified the Convention; and 2) that the petitioners waited ten years to present their complaint when the Convention sets a deadline of six months for "any person or group of persons who believe they have been hurt by the rules contained in the Constitution can have their rights enforced in accordance with the provisions of Article 44." [FN1]

[FN1] American Convention on Human Rights, Section 3. Competence, Article 44: Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

20. With respect to the first objection, the Chilean State expresses that the Commission's competence is circumscribed by the declaration formulated by Chile at the time it ratified the Convention, and that only those events that occurred after the deposit of that instrument can be considered violations. For that reason, it requests the Commission to take into account that the constitutional precept challenged originated long before March 11, 1990. [FN2]

[FN2] Chile ratified the Convention and accepted the competence of the Court on August 21, 1990, with the reservation that the competence applied only to events that occurred after March 11, 1990.

21. The Commission clarifies this point by stating that the violations alleged in the petition, while arising from norms issued prior to Chile's ratification of the American Convention, are ongoing, and have standing now, post-ratification of the American Convention, when the obligation to respect and guarantee the rights established in that Convention is now in effect for the Chilean State, a point that has not been nor could be called into question by the Chilean State.

22. With respect to the question of why the denunciation is being presented today and not earlier, the petitioners sufficiently clarified this point by stating that "time has shown the impossibility of repealing the aberrant norms"... and because "we are dealing with a transition to democracy that is being postponed indefinitely."

23. Furthermore, as the petitioners point out, and the representatives of the Chilean State do not question, Article 45 of the 1980 Political Constitution of the Republic of Chile on

composition of the Senate and its legal effects are part of an overall policy pursued by the military regime that governed Chile from September 1973 to March 1990.[FN3] Although that Constitution was enacted during the military government of General Augusto Pinochet, the norms contained in it regulating the composition of the legislative branch of government entered into force later when this Congress was instituted and still apply every time the composition of the Chilean Senate is renewed or changed.

The fact that the alleged violation continues and recurs after the date of ratification of the American Convention is confirmed by the following appointments of senators who were not directly elected by the people but designated according to the provisions of paragraphs (a) through (f) of Article 45 of the 1980 Constitution:

On March 11, 1998, former President of the Republic General Augusto Pinochet Ugarte took office as senator, in accordance with Article 45 (a), according to which the Senate shall also be composed of:

Former Presidents of the Republic who have served for six consecutive years in that capacity, except for the occurrence of the situations described in paragraph 3 of No.1 of Article 49 of this Constitution. These Senators shall hold their positions in their own right for life, without prejudice that incompatibilities, incapacities, and grounds for suspension described in Articles 55, 56, and 57 of this Constitution may be applied.

On March 11, 1998, Enrique Zurita Campos and Marco Aburto Ochoa, former ministers of the Supreme Court, chosen by that Court, took office as senators in accordance with Article 45 (b), which states that the Senate shall also be composed of Senate shall also be composed of:

Two former Ministers of the Supreme Court, elected by the latter in successive balloting and who have held their office for at least two consecutive years;

On March 11, 1998, former Comptroller General of the Republic Enrique Silva Cimma Ochoa took office as Senator, elected by the Supreme Court pursuant to Article 45 (c), which states that the Senate shall also be composed of:

A former Comptroller General of the Republic who have held the office for at least two consecutive years, also elected by the Supreme Court.

On March 11, 1998, the following persons took office as Senators: the former Commanders-in-Chief of the Army, General Julio Canesa Roberts; of the Navy, Admiral Jorge Martínez Busch; of the Air Force, General Ramón Vega; and, former Director General of the Police [Carabineros] Fernando Cordero Rusque; pursuant to Article 45 (d), according to which the Senate shall also be composed of:

A former Commander-in-Chief of the Army, one of the Navy, another of the Air Force, and a former [Director General] of the Police, who have held the office for at least two years, elected by the National Security Council;

On March 11, 1998, the former Rector of the Universidad de Concepción, Augusto Parra, took office as Senator, after having been designated by the President of the Republic, pursuant to Article 45 (e), which states that the Senate shall also be composed of:

A former Rector of a State University, or of a University acknowledged by the State, who have held office for a period not less than two consecutive years, appointed by the President of the Republic, and

On March 11, 1998, former Minister of State Edgardo Boeninger took office as Senator, after being designated by the President of the Republic pursuant to Article 45 (f), which states that the Senate shall also be composed of:

A former Minister of State who have held that position for more than two consecutive years in presidential periods prior to that in which the appointment is made, also designated by the President of the Republic.

[FN3] Article 45. The Senate shall be composed of members elected by direct ballot by each of the thirteen regions of the country. Each region shall elect two Senators, in the manner determined by the respective constitutional organic law.

The Senators elected by direct ballot shall remain in office for a period of eight years and they shall be replaced alternately every four years. Those representing odd-numbered regions shall be replaced in one period, and those representing even-numbered regions and the metropolitan area shall be replaced in the following period.

The Senate shall also be composed of

a. Former Presidents of the Republic who have served for six consecutive years in that capacity, except for the occurrence of the situations described in paragraph 3 of No.1 of Article 49 of this Constitution. These Senators shall hold their positions in their own right for life, without prejudice that incompatibilities, incapacities, and grounds for suspension described in Articles 55, 56, and 57 of this Constitution may be applied;

b. The Senate shall also be composed of: Two former Ministers of the Supreme Court, elected by the latter in successive balloting and who have held their office for at least two consecutive years;

c. A former Comptroller General of the Republic who have held the office for at least two consecutive years, also elected by the Supreme Court;

d. A former Commander-in-Chief of the Army, one of the Navy, another of the Air Force, and a former [Director General] of the Police, who have held the office for at least two years, elected by the National Security Council;

e. A former Rector of a State University, or of a University acknowledged by the State, who have held office for a period not less than two consecutive years, appointed by the President of the Republic, and

f. A former Minister of State who have held that position for more than two consecutive years in presidential periods prior to that in which the appointment is made, also designated by the President of the Republic.

The Senators referred to in letters (b), (c), (d), (e), and (f) of this Article shall serve for the term of eight years. Should there be only three, or fewer, persons qualifying as per requirements set

forth in letters (b) through (f) of this Article, citizens having held other relevant positions in bodies, institutions or services mentioned in each of the above letters, may be designated.

The appointment of these Senators shall be made every eight years within fifteen days following the corresponding senatorial election. The vacancies shall be filled within the same period of time, as from the date such vacancies should occur.

Not eligible for the nomination of Senator are those persons who have been discharged from office by pronouncement of the Senate, in accordance with Article 49 of this Constitution.

24. The consequences or juridical and practical effects of the above-mentioned constitutional norms and of their unchanging and continuing application during the democratic governments after 1990 extend to the date of the presentation of the petition and even afterward. Without question, this makes the rules of the American Convention as invoked by the petitioners applicable to this situation, and therefore makes the Inter-American Commission on Human Rights competent—*ratione temporis*—to hear and rule on this matter.

25. On this same point, it is pertinent to cite as well a precedent established by the European Commission of Human Rights. When that commission ruled on the *Agrotexim Hellas S.A. and others v. Greece Case*, it established the following jurisprudence:

As regards the Government's objection that part of the application has been introduced out of time, the Commission refers to its considerations under point i) above. It recalls that the applicants' complaints relate to a continuing situation and that in such circumstances the six months period runs from the termination of the situation concerned (No. 6852/74, Dec. 5.12.78 D.R. 15, p. 5). Having regard to the fact that the situation complained of is still continuing, the Commission finds that the Government's objection must be rejected.[FN4]

[FN4] Jurisprudence of the European Commission of Human Rights, Petition No. 1407/89, Case: *Agrotexim Hellas S.A., Biotex S.A., Hymofix Helias, S.A., Mepex S.A. and Texema S.A. v. Greece*. Decision on admissibility of the petition of February 12, 1992. 1992 Yearbook of the European Commission of Human Rights.

26. Moreover, in conformity with Article 28 of the Vienna Conference on the Law of Treaties, a situation that has not stopped existing at the moment of ratification is covered by the international obligations incorporated into the treaty that is being ratified.

27. In this case, the Commission confirms its practice of extending the scope of application of the American Convention to facts of a continuing nature that violate human rights prior to its ratification, but whose effects remain after its entry into force.[FN5] This practice is similar to and coincident with that of the European Commission of Human Rights,[FN6] of the European Court of Human Rights,[FN7] as well as the Committee of the Pact of Civil and Political Rights of the United Nations.[FN8]

[FN5] Report No. 24/98, Annual Report of the Inter-American Commission of Human Rights, paragraph 13/18. "...the doctrine according to which the European Commission and the Human Rights Committee of the Civil Rights Pact have jurisdiction to take cognizance of events occurring prior to the date of entry into force of the Convention for a specific State, provided and to the extent that those events are likely to result in a continuous violation of the Convention extending beyond that date, is applicable to the inter-American system."

[FN6] The European Commission of Human Rights, in its decision of February 12, 1992, in the Case of Agrotexim Hellas and others v. Greece, considered itself competent to hear the alleged violations resulting from a series of measures taken between 1979 and 1981 which led to a continuous situation that endured even though the Government of Greece had accepted the competition of the Commission on November 20, 1985. 1992 Yearbook of the European Convention, Request No. 14807/89, p.43.

[FN7] The European Court has accepted the notion of "continuing violation" of the Convention and its effects on the time limits of the competence of the organs of the Convention. See, among other decisions: Papamichalopoulos and others v. Greece, June 24, 1993, Series A No.260-B, pp. 69-70, 40 and 46; Agrotexim and others v. Greece, October 24, 1995, Series A No.330, pp. 22, 58; and Loizidow v. Turkey, December 18, 1996.

[FN8] United Nations Committee of the Pact, Cases Torres Ramírez v. Uruguay, Letter No. 4/1877, paragraph 18; and Millan Sequeira v. Uruguay, Letter No. 6/1977, paragraphs 16 and 17.

28. With respect to the second objection by the Chilean State that the time limit for the petition had lapsed because "the notification to the petitioners of the final decision, in this case the norm that is challenged, was made at the time that the amendment of the Constitution was published in the Official Gazette, that is, August 17, 1989," and that the petition came ten years later, the Commission believes it necessary to clarify that the six months to which the aforementioned Article 46 of the American Convention refers alludes not to the date of entry into effect of a law or some constitutional standard, but to the date from which "the party alleging violation of his rights was notified of the final judgment" on the outcome of his domestic, judicial or administrative complaint. For this reason, the promulgation of a constitutional norm is not [the same as] notification of the resolution regarding some domestic complaint, and therefore the objection made by the Chilean State does not apply in this case.

29. Nor is the objection that the deadlines have passed valid to the extent that the Chilean State has not adopted measures under domestic law to make the rights and liberties protected by the Convention effective. The representatives of the Chilean State underscored the relevance and timeliness of this question when they confirmed that "on three occasions the Senate has rejected bills presented by the democratic governments of Chile designed to eliminate the institution questioned." This praiseworthy effort by the government of Chile to amend the situation denounced, so far unsuccessfully, ratifies, along with other extraneous arguments, the competence of the Commission to hear and rule on a denunciation that questions the fulfillment, precisely at this time, of a commitment which, as the Chilean government makes clear in its letter of June 9, 1998 is "current law ... not imputable to democratic governments."

30. Following the ratification of the American Convention on Human Rights, a petition regarding alleged failure to adapt domestic laws to make the Convention effective in Chile and

regarding failure to repeal incompatible constitutional norms, as well as their attendant application to the specific case under review, deals with facts within the competence of the Inter-American Commission on Human Rights.

B. Admissibility of this specific case

a. Exhaustion of domestic remedies

31. The petitioners themselves have stated that the requirement of exhaustion of remedies under domestic law, as called for by Articles 46 of the American Convention and 37 of the Regulations of the Commission, has not been met in this case because Chilean domestic law contains no procedure to resolve the question raised in their petition. Thus, the exceptions set out in Article 46(2) of the American Convention, which free the petitioners of the need to comply with these requirements apply to this case.

b. Timeliness of the presentation

32. Given that the circumstances arising out of the law continue along with their effects, the Commission believes that the petition proceeds because it is covered by the provisions of Article 46(1)(b) of the American Convention since the exceptions contained in Article 46(2) of the American Convention which free the petitioners of the need to comply with this requirement are applicable to this case. In view of this, the Commission believes that the petition does not transgress the time limit for presentation since it is covered by the exceptions to that time limit contained in the aforementioned Article 46(2) of the Convention.

c. Concurrency of legal actions

33. The Commission understands that the subject of the petition is not pending in another international proceeding for settlement and that it is not substantially the same as one previously studied by this or any other international organization. Therefore, the requirements established in Articles 46(1)(c) and 47(d) are also satisfied.

d. Nature of the alleged facts

34. The Commission believes that, in principle, the petition refers to events that could constitute a violation of rights guaranteed in the American Convention. Since the petition is not manifestly groundless nor obviously out of order, the Commission believes that the requirements of Article 47(b) and (c) are satisfied.

V. Conclusions

35. The Commission believes that it has jurisdiction to hear the present case, and that it is admissible in accordance with the requirements established in Articles 46 and 47 of the American Convention. Based on the arguments of fact and law explained above,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this case admissible.
2. To notify the parties of this decision.
3. To continue analyzing the merits of the case.
4. To place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights protected in the American Convention and to invite the parties to go on record in that regard.
5. To publish this report and include it in its Annual Report to the OAS General Assembly.

Done and signed on December 9, 1998, at the headquarters of the Inter-American Commission on Human Rights in Washington, D.C., (Signed): Carlos Ayala Corao, Chairman; Robert K. Goldman, First Vice Chairman; Jean Joseph Exumé, Second Vice Chairman; Commissioners Alvaro Tirado Mejía, Hélio Bicudo, and Henry Forde.