Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 137/99; Case 11.863
Title/Style of Cause:	Andres Aylwin Azocar, Jaime Castillo Velasco, Roberto Garreton Merino, Alejandro Gonzalez Poblete, Alejandro Hales Jamarne, Jorge Mera Figueroa, Hernan Montealegre Klenner, Manuel Sanhueza Cruz, Eugenio Velasco Letelier, Adolfo Veloso Figueroa, and Martita Woerner Tapia v. Chile
Doc. Type:	Report
Decided by:	Chairman: Professor Robert K. Goldman; Second Vice-Chairman: Dr. Helio Bicudo; Members: Prof. Carlos Ayala Corao, Dr. Alvaro Tirado Mejia. Commissioner Dean Claudio Grossman, of Chilean nationality, did not participate in the discussion or decision in this case, in keeping with Article 19(2)(a) of the Commission's Regulations.
Dated:	27 December 1999
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Editor's Note:	The original has footnote 18 but is missing the equavalent reference in the body of the text.
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I. SUMMARY

1. On January 9, 1998, the Inter-American Commission on Human Rights (hereinafter the "Commission") received a petition against the Republic of Chile (hereinafter "the State," "the Chilean State," or "Chile") alleging violations of human rights set forth in the American Convention on Human Rights (hereinafter "the American Convention"), in particular political rights (Article 23) and the right to equal protection (Article 24), to the detriment of Chilean society, and in particular of the following persons identified as 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 (hereinafter "the petitioners").

2. The petitioners allege that the provision on senator-for-life (General Augusto Pinochet) and designated senators, found at Article 45 of the Chilean Constitution, thwarts the expression of popular sovereignty, implying that elections are no longer "genuine" in the terms required by Article 23(1)(b) of the American Convention, and that for the same reasons it violates the essence of the institutional framework of representative democracy, which is the basis and foundation for the entire human rights system now in force. Petitioners also allege that the designation of senators in the manner provided for under the new constitutional order in Chile

constitutes an institution that violates the right to equality in voting, is inimical to popular sovereignty, and represents an obstacle making it practically impossible to change the non-democratic institutions established in the Chilean Constitution.

3. In addition, petitioners argue that the provision on designated senators violates Articles 23(1)(c) and 24 of the Convention, which set forth "the right and opportunity" "to have access, under general conditions of equality," to the public functions of the state. In this respect, the petitioners note that such equality of rights and opportunities is not to be found in a system in which some of the persons elected to occupy positions in the legislative branch are designated exclusively, and in an exclusionary manner, by a very small group of people.

4. The state has called into question the contentious nature of the petition, noting that it refers to Chile's internal political situation; that these are not facts that "describe or characterize a violation of the rights guaranteed by the Convention," and that "the fact that there are political and legal aspects that are deemed obstacles to the full development of democracy, or to an ideal concept of it, cannot be equated with violations"; and that instead "the petition describes a situation that is strictly political in nature," and that is not within the Commission's jurisdiction.

5. After analyzing the arguments put forth by the parties, the rights established in the Convention, and the rest of the evidence and documents that appear in the record, the Commission concludes that by establishing what are called designated senators and senator-for-life Augusto Pinochet, in Article 45 of the Chilean Constitution, and by its application by the authorities indicated, the human rights to political participation and to equality without discrimination as set forth in the American Convention (Articles 23 and 24) have been violated in respect of the victims in this case. Consequently, the Commission decides to recommend to the Chilean State that it adopt the necessary measures to bring its internal legal order into line with the provisions of the American Convention, so as to fully ensure all Chilean citizens, including the victims in this case, the exercise of the right to vote and to be elected in general conditions of equality in accordance with Articles 23 and 24 of the American Convention, in the determination of the composition of the Senate, as a bicameral legislative organ of popular representation in the Chilean Congress.

II. PROCESSING BY THE COMMISSION

6. The Commission opened the case on January 23, 1998; it forwarded the pertinent parts of the complaint to the Chilean State and asked that it provide information within 90 days. In that same communication, the Commission called on the Chilean State to participate in a hearing on admissibility issues, along with the petitioners' representatives, to be held February 27, 1998, during the 98th regular session of the Commission. The state answered the notice of hearing on February 19, 1998, indicating that it would not participate, and that instead it would provide its arguments in writing within the period set by the Commission's Regulations.

7. On March 16, 1998, the Chilean State requested a 60-day extension for submitting its observations on the complaint. This extension was granted on April 8, 1998. Said observations were submitted on June 16, 1998; the pertinent parts were transmitted to the petitioners three

days later. On August 14, 1998, the petitioners submitted a brief with observations, whose pertinent parts were forwarded to the state on September 9, 1998.

8. On October 5, 1998, the Chilean State requested a new extension for answering the observations submitted by petitioners, which was granted on October 14, 1998. On December 8, 1998, the Chilean State submitted its brief with observations on the latest brief submitted by petitioners.

9. On December 9, 1998, and once the requirements in Articles 46 and 47 of the American Convention were analyzed, the Commission, meeting in its 101st special session, approved Report 95/98, declaring the admissibility of the complaint submitted by the petitioners. On that occasion the Commission analyzed the arguments of the parties on admissibility of the petition; therefore, here the Commission will only analyze the arguments on the merits.

10. On December 11, 1998, the admissibility decision was communicated to the petitioners and to the Chilean State, and it was agreed to make it public and to include it in the Commission's Annual Report. On December 28, 1998, the Commission forwarded the pertinent parts of the last brief submitted by the Chilean State; likewise, the Secretariat of the Commission sent a letter to the parties, informing them that the Commission was putting itself at their disposal with a view to seeking a possible friendly settlement. On April 22, 1999, the Commission was notified by the petitioners of their decision not to pursue the friendly settlement process.

III. POSITION OF THE PARTIES

A. The petitioners

11. The petitioners indicate in their complaint that the designation of senators outside of the provisions on universal suffrage at Article 45(a) through (f) of the Chilean Constitution[FN1] violates the concept of "equal suffrage" set forth at Article 23(1)(b) of the American Convention. This is because the "designated" senators, in order to reach the Senate, are chosen by a very small number of persons (1 to 17), while the senators elected by popular vote require the endorsement of approximately 120,000 citizens.

[FN1] Article 45. The Senate shall be made up of members elected by direct vote by each of the country's thirteen regions. Each region shall elect two senators, in the manner determined by the respective constitutional organic law.
The senators elected by direct vote shall serve a term of eight years, with one-half up for election every four years, the representatives of the odd-numbered regions one period, and those from the even-numbered regions and the Metropolitan Region the next.
The Senate shall also be made up of:
(a) The former Presidents of the Republic who have held the post for six years continuously, unless the condition provided for at Article 49(1)(3) of this Constitution has occurred (referring to removal from office). These senators shall be senators of their own right, and for life, without

prejudice to the disqualifications, incapacities, and grounds for removal set forth at Articles 55, 56, 57 of this Constitution;
(b) Two former justices of the Supreme Court, elected by the Supreme Court in successive votes, who have held the position for at least two years continuously;
(c) One former comptroller-general of the Republic, who has held the post for at least two years continuously, also elected by the Supreme Court;
(d) One former commander-in-chief of the Army, one of the Navy, and one from the Air Force, in addition to one former director general of the Carabineros, who have held the respective posts for at least two years, elected by the National Security Council;
(e) One former president of a state university or a university recognized by the state who has held the post for a period not less than two years continuously, designated by the President of the Republic; and
(f) One former cabinet minister, who has held the post for more than two years continuously, during presidential terms prior to that in which the appointment is made, also designated by the President of the Republic.
The senators to whom reference is made in paragraphs (b), (c), (d), (e), and (f) of this article shall serve a term of eight years. If there are no more than three persons who meet the characteristics and requirements demanded by paragraphs (b) through (f) of this article, the corresponding designation shall may be of citizens who have held other relevant functions in the agencies, institutions, or services mentioned in each of the paragraphs cited.
The designation of these senators shall be made every eight years, within 15 days of the corresponding election of senators. Any vacancies shall be filled within 15 days of the time they occur.
Those who have been removed from the Senate pursuant to Article 49 of this Constitution may not be designated senators.
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12. They state that the provision on designated senators is a breach of Article 23(1)(c) of the American Convention, which enshrines "the right and opportunity" "to have access, under general conditions of equality" to the public service of his or her country. In this respect, the petitioners note that such equality of rights and opportunities is not to be found in an electoral system in which some of the persons elected to occupy posts in the legislative branch are selected by a very small group of persons (for example: three or four former commanders-in-chief of the Army, Navy, or Air Force; three or four former comptrollers-general of the Republic), while other candidates are selected by hundreds of thousands or millions of citizens.

13. In addition, the petitioners note that the inequality in the worth of the vote and in access to public service also constitutes an open violation of Article 24 of the American Convention, which establishes: "All persons are equal before the law."

14. The petitioners also consider that the designation of 20 percent of the Chilean Senate by corporatist procedures and without regard to universal suffrage works an evident usurpation of an equivalent quota of natural power from the sovereignty of the people, which means that elections cease to be "genuine" in the terms required by Article 23(1)(b) of the Convention, and therefore represent a rupture with the essential basis of a democratic institutional arrangement, which constitutes the basis and foundation of the entire human rights system now in place. They

argue that the seriously diminished sovereignty and the requirement of supermajorities for making decisions constitute an aberrant situation in which apparently democratic forms are overtaken by a reality in which the exercise of popular sovereignty is practically impossible in relation to the issues that are most important and crucial to society.

15. The petitioners point out that the privilege enjoyed by some, of acceding to the Chilean Senate apart from the popular vote; the excessive power of those who designate them (a small group of authorities), and the diminished value of the vote of the large majority constitute open discrimination, which is prohibited by Articles 1 and 24 of the American Convention. They further state that the inadvisability and illegitimacy of the designated senators were fully shown with the nine senators designated in 1990, who included one former interior minister under the government of Augusto Pinochet, three high-level military or police officials who acted under his orders, and one judge who stood out for his failure to protect human rights.

16. They are of the view that the designated senators are in themselves an undemocratic expression, and tend to help maintain an undemocratic political-juridical reality, or an undefined "transition to" democracy. The petitioners understand the institution of the designated senators as violative of the principle of equality of the vote and popular sovereignty, and also constitutes a lock that makes it practically impossible to modify the non-democratic institutions established in the Chilean Constitution.

17. The petitioners request that the Commission declare: (1) that the existence of senators not elected by the people, whether designated or senators-for-life, especially in numbers such that it works a significant alteration of the popular will, as provided by Article 45(a) through (f) of the 1980 Chilean Constitution, constitute a violation of the right to equal vote enshrined in Article 23(1)(b) of the American Convention; (2) that said provision of the Chilean Constitution, insofar as it provides for privileged electoral bodies made up of an insignificant number of candidates to the position of senator, is contrary to and incompatible with Article 23(1)(c) of the Convention, which enshrines the right of all citizens to have access (under general conditions of equality) to the public posts in their country; (3) that the inequality of the vote and access to public posts violates Article 24 of the Convention, which affirms that all persons are equal before the law; (4) that the appointment of senators who account for approximately 20 percent of the members of the Senate, without regard for the popular will, constitutes a usurpation of such magnitude that the elections cease to be genuine, constituting a flagrant violation of Article 23(1)(b) of the Convention, and an attack on the essence of democratic institutional arrangements; (5) that the privilege bestowed on some of being designated senators without regard for the popular will constitutes discrimination, which is prohibited by Article 1 of the Convention, which guarantees all persons the (free and full) exercise of their human rights; (6) that the incorporation in the Chilean Senate of a member as former President of the Republic, without him having been elected to that post by the people, constitutes a violation of the prohibition on discrimination enshrined in the Convention; (7) that not only the persons who come before the Commission as petitioners, but all Chileans who have the right to vote, are victims of these human rights violations and of these acts of discrimination.

18. In addition, they ask that the Commission formulate the following recommendations: (1) that the Chilean State bring its Constitution and organic laws into line with the standards of the

American Convention, to which it is a party, with respect to the prohibition on discrimination; political participation in equal conditions in access to public functions; and, in general, the restriction on the right to participation in an entirely democratic fashion; and, specifically, (2) that Article 45(3) of the 1980 Constitution be derogated, as it is contrary to the provisions of Articles 1(1), 23(1)(a),(b), and (c), and 24 of the American Convention.

B. The State

19. The Chilean State, in due course, raised in opposition a series of arguments alleging inadmissibility, which were considered and dismissed by the Commission when it issued its decision on the admissibility of the petition.[FN2] The State's arguments on the merits can be summarized as follows:

[FN2] See Report 95/98, published in the Annual Report of the IACHR for 1998 to the General Assembly of the Organization of American States.

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20. In response to the allegations formulated by the petitioners, the Chilean state argues that it has committed no violation nor does it have any responsibility whatsoever for the alleged violation of human rights that is at the origin of this case. It states that the present-day constitutional government cannot be required to violate the institutional order it inherited or to seek to modify it by means that are outside of that same legal order.

21. The representatives of the State affirm that the legislative initiatives submitted by the democratic governments to reform the Constitution should be taken into account in order to do away with the situation that is the subject matter of this complaint. On three occasions the Senate rejected the bills submitted by the Executive aimed at suppressing the institution of the designated senators and senator-for-life been called into question here. It is impossible to modify the Constitution currently in force by means other than what is established in the Constitution itself.

22. The State questions the contentious nature of the petition and says that it is not evident, and that instead it raises matters related to Chile's political situation; that they are not facts that "describe or characterize a violation of the rights guaranteed by the Convention" and that "the fact that political and juridical aspects are considered obstacles to the full development of democracy, or of an ideal concept thereof, cannot be equated to facts that constitute violations"; and that, instead, "the petition describes a situation strictly political in nature," over which the Commission has no jurisdiction.

23. The Chilean State argues that the ways in which the various states parties to the Convention enshrine political rights may differ, but that this is not grounds for considering a basis for calling into question those democratic traditions.

24. Based on the foregoing considerations, the representatives of the Chilean State asked the Commission to declare itself without jurisdiction to take cognizance of this dispute, or, should it

not do so, to declare that the presumed violations alleged by the petitioners cannot be attributed to it and that it has no responsibility.

IV. ADMISSIBILITY OF THIS CASE

25. As noted above, on December 9, 1998, the Commission approved Report 95/98[FN3], by which it declared the admissibility of the complaint submitted by the petitioners. In that Report, the Commission noted that it had prima facie jurisdiction to examine the petition, considering that the facts alleged, if true, could constitute a violation of the rights established in the American Convention.

[FN3] Published in the 1998 Annual Report of the IACHR to the General Assembly.

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26. In addition, the Commission rejected the argument on lack of jurisdiction ratione temporis presented by the Chilean State, noting that while the provisions called into question were issued prior to Chile's ratification of the American Convention, the violation alleged has continued and remained current after the date of ratification of the Convention, since it is occurring now, at a time when the obligation to respect and ensure the rights established in the Convention has come into effect, and consequently its obligation to bring its legal order into line with the terms of the Convention (Article 2), are binding on the Chilean State.

27. Finally, and in relation to the grounds of inadmissibility contained in Article 46(1)(b) of the Convention, which was alleged by the Chilean State and referred to the six-month period for submitting the complaint, the Commission indicated that the consequences or the legal and factual effects of the Constitutional provisions that have been called into question, as well as their invariable and continuing application during the democratic administrations since 1990, extend to the date of submission of the complaint and even afterwards, which definitely makes the provisions of the American Convention invoked by petitioners applicable to this situation.[FN4] The Commission decided the admissibility of this case based on the foregoing considerations.

[FN4] The Admissibility Report notes that the violation alleged is continuing and updated as of the date of ratification of the American Convention with the following acts of designation of senators not elected directly by popular vote: On March 11, 1998, the following assumed the office of senator: (1) Former President of the Republic Gen. Augusto Pinochet Ugarte; (2) former Supreme Court justices Enrique Zurita Campos and Marcos Aburto Ochoa; (3) former comptroller-general of the Republic Enrique Silva Cimma Ochoa; (4) former commanders-in-chief of the Army, Gen. Julio Canesa Roberts; of the Navy, Admiral Jorge Martínez Busch; of the Air Force, Gen. Ramón Vega; and former director general of the Carabineros, Fernando Cordero Boeninger, all pursuant to Article 45 of the Chilean Constitution.

V. ANALYSIS OF THE MERITS

28. As can be observed in the arguments of the parties, the dispute in this case revolves around the violation of human rights enshrined in the American Convention, by virtue of the establishment, in the 1980 Chilean Constitution, and their consequent application by the respective authorities, of what are called the designated senators and the senator-for-life, General Augusto Pinochet. Article 45 of the Constitution provides that in addition to the senators elected by direct vote by each of the 13 regions of the country, the following shall also be members of the Senate: (1) those former Presidents of the Republic who have held said post for six years continuously (senators for life); (2) two former justices of the Supreme Court, elected by the Supreme Court in successive votes, so long as they have held their posts for at least two years continuously; (3) one former comptroller-general of the Republic, also elected by the Supreme Court, so long as he or she has held the post for at least two years; (4) one former commander-in-chief of the Army, one commander-in-chief of the Navy, and another commander-in-chief of the Air Force, plus one former director general of the Carabineros, elected by the National Security Council, so long as they have held the respective posts for at least two years; (5) one former president of a state university or a university recognized by the state, designated by the President of the Republic, so long as he or she has held said post for a period not less than two years; and (6) one former cabinet minister who served under a previous presidential administration or administrations, also designated by the President of the Republic, who has held said post for more than two years continuously.

29. The petitioners allege that the effects and application of the provision called into question entail a diminishing of the system of representative democracy and involve a violation of their political rights as set forth in the American Convention. For its part, the Chilean State considers that the Commission does not have jurisdiction to review said provision, considering that there is no flagrant contradiction with the provisions of the American Convention, but that, instead, the provision debated represents one of many possible ways of complying with the international provisions enshrining political rights.

30. For this reason, as an introductory point, the Commission deems it necessary to establish the link between representative democracy and the protection of human rights, as well as its own jurisdiction to decide individual cases that involve political rights enshrined in the American Convention.

A. Representative democracy and human rights

31. On several occasions the Commission has noted the close relationship between representative democracy and the protection of human rights.[FN5] In effect, the Commission has said that representative democracy--one of whose key elements is the popular election of those who hold political power--is the form of organization of the state explicitly adopted by the member states of the Organization of American States.[FN6] In contrast to the United Nations, the inter-American system has incorporated an express provision in its Charter, Article 3(d), according to which the solidarity of the American states and the high aims of the Charter require a form of political organization based on the effective exercise of representative democracy (Commission's emphasis).

[FN5] See, for example, ""Areas in which steps need to be taken towards full observance of the human rights set forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights," in the 1990-1991 Annual Report of the Inter-American Commission on Human Rights, pp. 549 ff. In this regard, John Stuart Mill had already argued that representative democracy is the best form of government, because it is the appropriate way to meet social needs through participation. of the people. Consequently, the participation of the people is the foundation of democracy. An elected ruler has a duty to the voters to represent them in a responsible manner; and the citizens hold in their hands the power to award or punish their rulers through the suffrage. (John Stuart Mill, Consideration of the Representative Government 85, Gernika ed., 1991). This is why democracy implies adequate protection for human rights. In this regard, democracy has itself brought about this form of political participation as a distinct right. In this connection, a renowned professor and former member of the IACHR has argued that violations of the right to political participation are not of secondary importance, as they are very serious violations of human rights:

Popular government is an internationally prescribed human right.Article 21(3) of the Universal Declaration on Human Rights provides: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." [Therefore, when the right to democratic government is violated], all the other human rights that depend on the lawful institutions of government become matters for the discretion of the dictators.... Violations of the right to popular government are not secondary or less important. They are very, very serious human rights violations. (W. Michael Reisman. Humanitarian Intervention and Fledgling Democracies. 18 Fordham Int. L.J. 794, 795, 1995.)

[FN6] Id.

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32. This article complements the invocation, in the Preamble of the Charter of the Organization of American States, by the Representatives:

Confident that the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man...

33. This text is of special importance as it links democracy to individual liberties and human rights, an idea that had already been incorporated into the preambular part of the Inter-American Treaty of Reciprocal Assistance, of 1947, when it notes:

That the American regional community affirms as a manifest truth that juridical organization is a necessary prerequisite of security and peace, and that peace is founded on justice and moral order and, consequently, on the international recognition and protection of human rights and freedoms, on the indispensable well-being of the people, and on the effectiveness of democracy for the international realization of justice and security.

34. In the amendment to the Charter of the OAS introduced by the Protocol of Cartagena of 1985, the concept of representative democracy was incorporated into the Preamble in these

terms: "Convinced that representative democracy is an indispensable condition for the stability, peace and development of the region." And Article 2(b) established as essential purposes of the Organization "To promote and consolidate representative democracy, with due respect for the principle of non-intervention."

35. The relationship between representative democracy and the observance of human rights has been reaffirmed in various meetings of consultation, inter-American conferences, additional protocols, and resolutions of the General Assembly of the Organization of American States. In effect, the General Assembly of the Organization has reaffirmed on several occasions the relationship between representative democracy and human rights, emphasizing the need for the exercise of political rights so as to be able to elect the government authorities. In this vein, the General Assembly has recommended "to the member states that have not yet done so that they reestablish and perfect the democratic system of government, in which the exercise of power derives from the legitimate and free expression of the will of the people, in accordance with the particular characteristics and circumstances of each country."[FN7]

[FN7] Resolutions 510 (X-O/80); 543 (XI-O/81); 618 (XII-O/82); 666 (XIII-O/83); and 742 (XIV-O/84).

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36. More specifically, in Resolution 837 (XVI-O/86), the General Assembly noted:

The Inter-American Commission on Human Rights, in its annual report for the period 1985-86 presented to this regular session of the General Assembly for consideration, recommended "that it reaffirm the urgent need for the governments that have not yet reestablished representative democracy as their system of government to put in place the relevant institutional mechanisms for restoring that system in as short a period of time as possible by means of free, secret and informed elections, since democracy is the best guarantee for the observance of human rights and the basis of solidarity among the states of the hemisphere"....

37. In the operative part, the General Assembly resolved:

To reaffirm the inalienable right of all the peoples of the Americas freely to determine their political, economic and social system without outside interference, through a genuine democratic process and within a framework of social justice in which all sectors of the population will enjoy the guarantees necessary to participate freely and effectively through the exercise of universal suffrage.

38. The Commission has also noted that it is not unusual for the hemisphere's legal framework to insist on the existence of direct relationship between the exercise of political rights so defined and the concept of democracy as a form of organization of the state, which in turn implies the effective observance of other fundamental human rights. In effect, in the view of the Commission, the concept of representative democracy is grounded on the principle that political sovereignty vests in the people, who elect their representatives to exercise political power. These representatives, moreover, are elected by the citizens to apply certain political measures, which

in turn implies that there has been a wide-ranging debate on the nature of the policies to be adopted (freedom of expression) among organized political groups (freedom of association) that have had the opportunity to express themselves and meet publicly (right to assembly).[FN8]

[FN8] Id.

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39. The analysis of the human rights situation in the states to which the Commission has referred in prior years leads it to state that only through the effective exercise of representative democracy can human rights be fully guaranteed. It is not just a question of noting the organic relationship between representative democracy and human rights as arises from the Charter of the OAS and other instruments of the inter-American system. The Commission's experience, as borne out in the facts, is that grave human rights violations in some countries of the Americas originate in the need to improve the operation of the institutions, and the rule of law.

40. Thus, for example, in its Report on the Situation of Human Rights in Paraguay of 1987, the Commission conceived of

the exercise of political rights in the larger context of the system of representative democracy. The hemisphere's legal tradition and the Commission's experience lead to the belief that the exercise of such rights implies participation by the population in the conduct of public affairs, either directly or through representatives elected in periodic and genuine elections featuring universal suffrage and secret ballot, to ensure the free expression of the electors' will. The voters must be given access, on general conditions of equality, to public functions.

This hemispheric vision of the exercise of political rights within the context of a democratic system of government is completed by the requisite development and promotion of economic, social and cultural rights. Without them, the exercise of political rights is severely limited and the very permanence of the democratic regime is seriously threatened.

41. This explains the legitimate concern of the inter-American system, especially as of 1948, to ensure the full exercise of representative democracy as a legitimate and necessary means of attaining respect for human rights. In this regard, the Commission, as a principal organ of the OAS Charter, has been invested with the function of promoting the observance and defense of human rights in all member states.[FN9] Before the entry into force of the American Convention, and even afterwards in relation to those states that are not party to it, the human rights whose observance and defense have been entrusted to the Commission since its creation in 1959 are those set forth in the American Declaration on the Rights and Duties of Man ("American Declaration").[FN10] In this regard, as of 1948 the member states recognized as a human right "the right to vote and to participate in government," in Article XX of the American Declaration in the following terms:

Article XX. Every person having legal capacity is entitled to participate in the right to vote and to participate in government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.

[FN9] See Article 106 of the Charter of the Organization of American States.
[FN10] IACHR Statute, Article 1. See also Advisory Opinion OC-10/89 on the value of these rights.

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42. As a complement, in the second chapter of the Declaration, Article XXXII established the "duty to vote" in these terms: "It is the duty of every person to vote in the popular elections of the country of which he is a national, when he is legally capable of doing so."[FN11]

[FN11] The importance of universal suffrage and its relationship with democracy was reiterated in Resolution XXX, adopted at the Tenth International Conference of American States at Caracas, in 1954, by which it was resolved "to pay tribute to the countries that have incorporated in their legislation the right to vote for the illiterate, thereby seeking to expand and strengthen the institutions of representative democracy." (International Conferences of the American States. Second Supplement 1945-1954, Legal Department, Pan American Union, Washington, D.C., 1956, p. 312).

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43. This situation was reiterated and developed even further under the American Convention, which confirmed as its main function "to promote respect for and defense of human rights"[FN12]; taking into account "their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man."[FN13] It is precisely within those essential rights of man as human rights that the American Convention sets forth the political rights inherent to representative democracy in Article 23, which provides as follows:

Article 23. Right to Participate in Government

1. Every citizen shall enjoy the following rights and opportunities:

a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
c. to have access, under general conditions of equality, to the public service of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

[FN12] See Article 41 of the American Convention.

[FN13] See Preamble to the American Convention.

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44. The impact of this provision of the American Convention and its essential impact on the consolidation of representative democracy was expressed by the Inter-American Court in crystal-clear terms:

Representative democracy is determinant in the whole system of which the Convention is part.[FN14]

[FN14] See Advisory Opinion OC-13, para. 34.

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45. The concept of representative democracy and its protection is so important and such an essential part of the hemispheric system that it not only sets it forth in its texts, from the first documents, but an entire mechanism of hemispheric protection has been put in place to address a breakdown of democracy in any of the member states. This is the purpose and mandate of General Assembly Resolution 1080, adopted in 1991 in Santiago, Chile, and of the Protocol of Washington, of 1993, which merited an amendment to the Charter to enshrine this purpose of the Organization of American States, which entered into force in 1997.

46. Consequently, there is a conception in the inter-American system of the fundamental importance of representative democracy as a legitimate mechanism for achieving the realization of and respect for human rights; and as a human right itself, whose observance and defense was entrusted to the Commission.

47. Along these lines, the Commission has reiterated that it is "empowered to verify, with respect to these rights, whether the holding of periodic, genuine elections, with universal, equal, and secret suffrage takes place within the framework of the necessary guarantees so that the results represent the popular will, including the possibility that the voters could, if necessary, effectively take appeal of an electoral process that they consider fraudulent, defective, and irregular or that ignores the right to access, under general conditions of equality, to the public functions of their country."[FN15]

[FN15] Report on Cases 9768, 9780, and 9828 (Mexico), 1990 Annual Report of the Inter-American Commission on Human Rights, para. 95.

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48. Some domestic high courts have also had occasion to establish guiding interpretive principles in this regard. The U.S. Supreme Court, for example, has also noted the importance of representative democracy in protecting all other fundamental rights. In this regard, it has indicated that the right to vote is the fundamental guarantee of representative democracy, and all other rights, even the most basic, would be illusory or in jeopardy if the right to vote were

diminished. The right to vote and representative democracy constitute the guarantee of all other rights.[FN16]

[FN16] On these issues, see, among others, Yick Wo v. Hopkins, 118 U.S. 356, 370 (1986) and Wesberry v. Saunders, 376 U.S. 1, 17 (1964). In the latter judgment, the Supreme Court noted: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." See also, Erwin Chemerinsky, Constitutional Law, Principles and Policies, Aspen Law & Business, 1997, pp. 710 ff.

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49. This principle of participatory democracy, as an expression of the content of the human right to political participation and as a legitimate system for attaining the realization of all other human rights, has also been recognized by international human rights instruments. For example, the Universal Declaration of Human Rights,[FN17] at its Article 21, establishes:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

[FN17] Adopted by the United Nations General Assembly on December 10, 1948.

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50. Similarly, the International Covenant on Civil and Political Rights, in language very similar to the American Convention, sets forth the human right to political participation in the following terms at Article 25:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.

51. In addition, several international and intergovernmental agencies have adopted resolutions and decisions on the essential and indivisible linkage between the right to political participation and representative democracy as the only legitimate and suitable mechanism for attaining the observance of human rights. Thus, for example, the treaty-based human rights organs of the United Nations (Human Rights Committee, Committee on Economic, Social and

Economic Rights, Committee for the Elimination of Racial Discrimination, and the Committee for the Elimination of Discrimination against Women), in their recommendations and general comments on the right to political participation set forth in the international instruments cited, have considered the following interpretive guidelines:

10. The right to vote in elections and referenda should be established by law and may be subject only to reasonable restrictions, such as setting a minimum age to be able to exercise it. It is not reasonable to restrict the right to vote for reasons of physical disability nor to impose requirements or restrictions related to the ability to read and write, level of schooling, or economic situation. Affiliation to a party cannot be a condition or impediment for voting.

15. The effective realization of the right and the ability to run for elective office guarantees that all persons with the right to vote may choose among different candidates. All restrictions on the right to run for election, such as setting a minimum age, must be based on objective and reasonable criteria. The persons who otherwise meet the conditions required for running for elective office should not be excluded by the imposition of unreasonable or discriminatory requirements, such as level of schooling, place of residence, or descent, or because of political affiliation. No one should be subject to discrimination or suffer disadvantages of any type because of their candidacy. The States Parties should indicate and explain the legislative provisions by virtue of which a group or category of persons may be deprived of the possibility of holding elective office.

21. Although the Covenant does not impose any specific electoral system, any electoral system in place in a State Party must be compatible with the rights protected by Article 25 and guarantee and give effect to the free expression of the will of the voters. The principle of one person-one vote should be applied, and, in the context of the electoral system of each of the States, the vote of one voter should be equal in value to that of any other. The delimitation of electoral districts and the method of allocating votes should not distort the distribution of voters or entail any discrimination against any group, nor unreasonably exclude or restrict citizens' right to freely elect their representatives.

52. As regards the jurisdiction of the treaty-based organs to decide matters related to the rights of representation, as of 1956, in the first case on Cyprus, the European Commission on Human Rights held that it had jurisdiction to issue decisions on political matters, for otherwise the international protection of human rights would lose its effectiveness and true meaning.[FN19]

[FN18] As regards the nature and purpose of the general comments, see Official Documents of the General Assembly, thirty-sixth regular session, Supplement No. 40 (A/36/40), Annex VII, Introduction. As regards the history of the issue, the method of preparation, and the practical utility of the general comments, see id., Thirty-ninth regular session, Supplement No. 40 (A/39/40 and Corr. 1 and 2), paras. 541 to 557. To consult the text of the general comments already approved by the Committee, see id., thirty-sixth regular session, Supplement No. 40 (A/36/40), Annex VII; id., thirty-seventh regular session, Supplement No. 40 (A/37/40), Annex V; id., thirty-eighty regular session, Supplement No. 40 (A/38/40), Annex VI; id., thirty-ninth

regular session, Supplement No. 40 (A/39/40 and Corr. 1 and 2), Annex VI; id., fortieth regular session, Supplement No. 40 (A/40/40), Annex VI; id., forty-first regular session, Supplement No. 40 (A/41/40), Annex VI; id., forty-third regular session, Supplement No. 40 (A/43/40), Annex VI; id., forty-fifth regular session, Supplement No. 40 (A/45/40), Annex VI; id., forty-seventh regular session, Supplement No. 40 (A/47/40), Annex VI; id., forty-ninth regular session, Supplement No. 40 (A/49/40), Annex V; id., fiftieth regular session, Supplement No. 40 (A/50/50), Annex V. They have also been published in the documents CCPR/C/21/Rev.1/Add. 1 to 7.

[FN19] See, Yearbook of the European Convention on Human Rights, 1958-59, petition 176/56, p. 176.

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53. In relation to the right to political participation set forth at Article 21 of the Universal Declaration of Human Rights, the Inter-Parliamentary Union made the following pronouncement on this issue:

The key element in the exercise of democracy is the holding of free and fair elections at regular intervals enabling the people's will to be expressed. These elections must be held on the basis of universal, equal and secret suffrage so that all voters can choose their representatives in conditions of equality, openness and transparency that stimulate political competition. To that end, civil and political rights are essential, and more particularly among them the rights to vote and be elected....[FN20]

[FN20] Universal Declaration on Democracy, para. 12, Inter-Parliamentary Union. Cairo, September 1997, in Positions Regarding Human Rights Issues. I-PU. Geneva, 1998, p. 42.

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54. The Inter-Parliamentary Union has also stated:

[The Conference] stresses the right of all persons to participate in the conduct of public affairs in their country, either directly or indirectly through freely chosen representatives, to vote and to be elected in elections held by secret ballot, to submit, on an equal footing, their candidature for elections and to express their political views, on their own or with others.[FN21]

[FN21] Id., p. 43.

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55. Recently, the Inter-Parliamentary Union stated categorically:

A freely and democratically elected Parliament is a prerequisite for the consolidation of peace and the prevention of new conflicts[FN22]

[FN22] Id., p. 43.

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56. In summary, the Commission reiterates that the exercise of political rights is an essential element of the regime of representative democracy, which also presupposes the observance of other human rights. In addition, it implies protecting those civil and political rights in the framework of representative democracy, as well as the existence of institutional control over the acts of the branches of government, and the rule of the law.

B. The position of senator-for-life General Augusto Pinochet, the designated senators, and representative democracy

57. Based on the arguments contained in the complaint, the Commission must determine whether the effects of the position of designated and lifetime senators, set forth in Article 45 of the Chilean Constitution, and applied by the authorities named therein, constitutes an unreasonable and unacceptable limitation that alters the very essence of representative democracy, and that therefore violates the political rights guaranteed by the American Convention.

58. In this regard, the complaint submitted alleges that the constitutional provision whose application has been questioned, which was included in the Constitution of 1980, and presently accounts for 20 percent of the Chilean Senate, is made up of senators who have not been elected by popular, universal, and equal suffrage, but who instead are designated based on the guidelines of the Constitution, the effect of which is to deprive the citizenry of the ability to elect a considerable number of representatives.[FN23]

[FN23] It should be noted that pursuant to Article 42 of the Chilean Constitution, the Senate is one of the two chambers that constitute the National Congress; both participate in shaping the laws, pursuant to the provisions of that same Constitution. In addition, the Senate has other important attributes assigned exclusively to it (Article 49). Thus, the Senate has jurisdiction to hear accusations against high-level officials of the Chilean government; judicial actions that any person may initiate against any cabinet minister for damages suffered by such an official in the performance of his or her duties; the jurisdictional conflicts that may arise between the political or administrative authorities and the superior courts of justice; to grant the restoration of one's citizenship; to give or withhold its consent to the acts of the President of the Republic in those cases where required by the Constitution; to agree for the President of the Republic to leave the country for more than 30 days or in the last 90 days of his term; to declare the disqualification of the President of the Republic or of the President-elect when a physical or mental impediment disqualifies him; and to give opinions to the President of the Republic when he so requests. As can be noted, the Senate has jurisdiction over matters of vital importance to the democratic development of the country. In addition, all the laws must be approved by both chambers, so that its role is fundamental, a sine qua non for passage of the laws.

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59. It should be noted that the lesson of the American and French revolutions was to consolidate popular sovereignty, the principle of legality, and the principle of separation of powers. To these ends, an appeal was made to the fiction of representation, the idea being that

the legislature is no more than a representative of the people, and that the people cannot express their will other than through the legislature. Thus, the Constitution of 1791, produced by the French Revolution, affirmed that "no part of the people" can attribute to itself the exercise of sovereignty, which vests solely in the nation (Article 1 of Title III).

60. In this way, political representation transmits the supreme power or sovereignty vested in the nation, and this power must express itself in general laws. The whole government structure is conceived of, in the wake of two major revolutions of the 18th century, as enforcement of the law, which is the only instrument that can demand obedience, the only source of any possible restriction on the original liberty, the only instrument for building and sustaining equality among all the citizens, as the only means of ensuring rights and enforcing them.[FN24]

[FN24] See, Eduardo García de Enterría, Democracia, jueces y control de la Administración, Civitas, Madrid, 1996, p. 52.

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61. And precisely in view of the importance of the rule of law, representation is essential in democracy, for in order for the people to feel that they truly hold power, they must necessarily believe that their interests are the true objective of the rulers, who they have elected directly as trustees. The lack of confidence that can be brought on by a situation in which some representatives act who are imposed or foreign to the popular will results in a people alienated by an alien power, which the people are not capable of internalizing or feeling as their own, and whose action is not considered to be for their own benefit, but rather to further the interests of those who hold legislative posts, who have thereby appropriated the legislative power and its purposes.[FN25]

[FN25] Id.

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62. The idea of representative democracy means that weighty decisions involving value judgments are carried out by democratically elected representatives, with the check that if these decisions are not approved or endorsed by the people, the people may sanction the officer-holders by not re-electing them. The very idea of the drafters of the modern constitutions has been to find solutions to the abuses of representation so as to prevent the legislators from being confused with the laws. Hence democratic elections are held, so that the people, by their own will, may elect the representatives with whom they identify, and to prevent any betrayal of their trust by the punishment of non-reelection.[FN26]

[FN26] On this point, see The Federalist No. 57 (James Madison), pp. 383-385, B. Wright ed. 1961.

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63. Therefore, a true system of representative democracy is one that undertakes to be guided by the people's trust in designating their rulers, and to keep it alive all the time, as required by the real structure of the trust, such that the people always recognize themselves as holding power, and as the sole beneficiary of their actions. This trust extends, in presidential systems, to the direct designation of the members of the legislature and of the President of the Republic.

64. It is alleged in this case that the establishment of a group of senators--who participate in the drafting of laws--who are not elected by the sovereign people, but are, rather, designated from corporatist slates by certain organs of public power, some of them with no popular election whatsoever, is a violation of the right to universal and equal political participation. Thus, for example, pursuant to Article 95 of the Chilean Constitution, the National Security Council is made up of the President of the Republic, the presidents of the Senate and Supreme Court, the commanders-in-chief of the Armed Forces, and the director general of the Carabineros. That Security Council elected four senators from among the foreign commanders-in-chief of the Armed Forces.

65. Further, in the case of the senators with life tenure, while this institution has been incorporated in some member states (see, for example, Article 148 of the Venezuelan Constitution and Article 189 of the Paraguayan Constitution), in Chile, the institution of having senate posts with life tenure was imposed by a de facto regime, which was tantamount to self-designation of the head-of-state of Chile at the time, General Augusto Pinochet.[FN27] In effect, while all the other countries of the Americas that have this institution provide that the position can only be occupied by former presidents who have been democratically elected --with which one could accept that there is an indirect sort of popular legitimation-- in Chile it has been applied to give a Senate seat to a former head-of-state not elected by fair, free, secret and universal suffrage, in accordance with universally accepted standards. In this sense, it is contradictory that the first democratically elected president in Chile under the 1980 Constitution, Patricio Aylwin, was not able to join the Senate as a senator-for-life, since he did not fall within the Constitutional requirement of having exercised power for six continuous years, while General Augusto Pinochet, who was head-of-state during a de facto regime without any popular election, was made a senator-for-life under this provision.

[FN27] Even though the 1980 Chilean Constitution was approved by a plebiscite, the vote itself did not meet the electoral guidelines necessary for guaranteeing its transparency. In this respect, the Commission stated in its Report on the Situation of Human Rights in Chile (1985) that in that plebiscite "the lack of electoral rolls, the existence of the state of emergency, the inactivity of political parties, the practical disadvantages of opposition sectors in access to the information media, and the absence of viable options to the rejection of the proposal of the Government, are all elements that seriously affect the credibility of that procedure." In addition, in the conclusions of the chapter on the exercise of political rights in that same Report on Chile, the Commission, referring to the electoral consultation of 1978 and the plebiscite of 1980 stated that on both occasions there were "restrictions arising from the existence of states of constitutional emergency, which have had a negative impact on the exercise of other human rights associated with the exercise of political rights such as the right to freedom of expression and opinion, the right of association, the right of assembly, and the right to personal freedom. The Commission

has also been able to observe that, when those polls were held, political parties were proscribed or dissolved and that a significant group of Chileans was impeded from returning to the country. The Commission has also been able to observe that when those polls were held, the Government used all the resources at its disposal and put the opposition in a clearly disadvantageous position. In the opinion of the Commission, these serious restrictions violate the principle of pluralism, which is characteristic of a regime of representative democracy; they also affect the freedom and authenticity that are fundamental characteristics of any poll in which the right to vote is exercised. All these elements cast well-founded doubts on the credibility of the two procedures."

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66. This situation, which, moreover, is foreign to Chile's democratic constitutional tradition, cannot be legitimated by the argument that the institution of designated senators or senators-for-life was approved by the majority of the Chilean people in the plebiscite approving the 1980 Constitution, for, apart from what was noted above on the lack of guarantees in that election--the majority cannot diminish or eliminate a right as fundamental as the opportunity to effectively elect their representatives to the legislative branch. There is a limit on the limitations that majorities can place on those rights of minorities that are protected by human rights. Otherwise, the majorities would seriously endanger the rights of the minorities, in open defiance of the democratic rule of law. In this respect, the decision of the U.S. Supreme Court in which it declared the unconstitutionality of a referendum in the state of Colorado, in which the voters had approved a federal plan, instead of the rule of "one person one vote" is very enlightening. That court ratified the principle according to which: "An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate...."[FN28]

[FN28] Lucas v. Colorado General Assembly, 377 U.S. 713 (1964).

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67. In the instant case, as petitioners have argued, the institution of designated senators compromises the very legitimacy of the rule of law, on taking from the sovereign people the ability to elect a significant number (20.83% to date) of its representatives. This situation notably diminishes the likelihood of the necessary representativity between the people and their representatives. This Commission considers that in practice the effects of this institution constitute an authoritarian enclave that has prevented culmination of the transition to full representative democracy.

68. In this regard, the Commission should note that the petitioners have alleged that in the wake of the establishment of what are known as the designated senators, several reforms aimed at eliminating institutions that arose and operated under the military dictatorship have been blocked. The Chilean State made no reply to this assertion, which is evidence that the system of imposing representatives has kept the majority from being able to suppress the authoritarian enclaves imposed by the de facto regime on Chilean democracy. The proof that human rights have been detrimentally affected by the system of designation imposed by the Chilean Constitution can be clearly observed, among other examples, in the impediment these senators

have constituted to the derogation of the amnesty laws and to the reform of the film censorship system.

69. In effect, in the cases processed before this Commission, and which culminated in Report Nº 25/98 on Chile, of April 7, 1998, the Chilean State defended itself by noting that the "Executive has sought to derogate the Decree Law on amnesty, but the constitutional provision provides that initiatives on the amnesty laws may only originate in the Senate (Article 62(2) of the Constitution), where it lacks a majority due to the number of persons not designated by popular vote in that legislative body." (Commission's emphasis.)

70. This puts into evidence the negative effect of the system of authoritarian enclaves stipulated by the Constitution on the everyday development of Chilean democracy, whose ability to respond is diminished vis-à-vis the autocratic vestiges imposed in opposition to the true will of the people.

71. Therefore, the Commission considers that the system of designating senators established in Article 45 of the Chilean Constitution in the case under analysis affects the essential core of representative democracy, on depriving the sovereign people and the victims of the ability to elect a large number of their representatives to the Chilean Senate.

72. The Chilean State has alleged that the Commission lacks jurisdiction to decide this dispute, since the way in which political rights are enshrined by the different states parties to the Convention may differ, yet this does not mean they are tantamount to a per se challenge to those democratic traditions.

73. In this respect, it should be noted, first, that this Commission has the fundamental power to examine whether the effects of a certain measure adopted by a state violates the fundamental rights recognized in the American Convention. This includes all legal norms, whatever their nature, including constitutional provisions.[FN29] The Inter-American Court of Human Rights (hereinafter "the Inter-American Court") has noted that the attributes of the Commission are in no way diminished by the way in which the Convention is or is not violated.[FN30]

[FN29] See in this respect Advisory Opinion OC-4/84 of January 19, 1984, and Advisory Opinion OC-14/94 of December 9, 1994.
[FN30] Advisory Opinion OC-13/93 of July 16, 1993.

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74. The Inter-American Court has gone beyond the international liability of the state for all state acts contrary to human rights enshrined in the Convention, whatever their legal nature, in stating that the fact that "the action complies with domestic law is no justification from the point of view of international law."[FN31]

[FN31] Advisory Opinion OC-14/94 of December 9, 1994.

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75. Second, it should be noted that while it is true that it is not up to this Commission to design model constitutional clauses for the purposes of effectively guaranteeing each of the rights established in the American Convention, it is also true that it has the unquestionable jurisdiction to investigate and determine whether the acts or legal rules of a state violate the victims' rights protected by the Convention.

76. No effort is made, therefore, to unify the constitutional models of the states parties to the Convention to consolidate a system of representative democracy that is identical in each of them. Rather, the idea is to avoid having a state's laws, including its constitutional provisions, from becoming an insuperable obstacle to the system for the protection of human rights.

77. Even though the Americas have consolidated the system of representative democracy with near unanimity, the work of the Commission, as a principal organ of the Organization of American States, is still relevant for improving upon and correcting those effects that derive from state acts that may be violative of the obligations assumed by the member states under the Declaration or by the states parties to the American Convention. Such is the case of the Chilean Constitution, which to this day includes provisions which, in the specific case and under the circumstances analyzed, have the effect of forestalling the consolidation of democratic change. The designated senators usurp a very significant share of the popular sovereignty, and endanger the full observance of the political rights of the Chilean citizens, including those identified as victims in this case.

78. Therefore, the Commission concludes that it has jurisdiction to examine the effects of the designated senators on the general system for the protection of human rights, and to determine whether these effects violate the political rights set forth in the American Convention.

C. Violation of political rights

79. Petitioners have alleged that the institution of designated senators violates Article 23(1)(c) of the Convention, which provides for "the right and opportunity" to "have access, under general conditions of equality," to the public functions of the state. In this respect, the petitioners note that such equality of rights and opportunities enshrined in the American Convention is not to be found in an electoral system in which some of those elected to occupy seats in the legislative branch are selected from among a small group of persons belonging to certain corps or groups so as to be exclusive and exclusionary (e.g., three or four former commanders-in-chief of the Army, Navy, and Air Force; three or four former comptroller-generals of the Republic), while the others are elected by universal, direct, secret, and free suffrage by hundreds of thousands if not millions of citizens. In addition, they note that inequality in the worth of one's vote and in access to public office also constitute a clear violation of Article 24 of the American Convention, which establishes that "all persons are equal before the law."

80. More concretely, the petitioners have indicated that the Chilean Senate is made up of a total of 48 senators, only 38 of whom are elected by popular vote, while nine are designated by entities made up of one person or a small number of people, and one is a member for life (former president), without ever having been popularly elected. Hence popular sovereignty has been

diminished, in real terms, by 20.83%. In addition, they state that there are 8,044,163 voters in Chile, which implies that each of the 38 senators popularly elected is elected, on average, from a pool of 211,689 voters. In contrast, in the case of the designated senators, three are elected by only 17 voters (the justices of the Supreme Court), which implies that each senator may be elected by approximately 5.7 voters; another four senators are chosen by 8 voters (the members of the National Security Council), which implies that each of these senators may be elected by 1.8 voters. In summary, while a senator elected by the people needs the popular vote of more than 200,000 citizens, a designated senator requires the backing of one to 17 persons from different entities or bodies.

81. The Commission observes, first, that Article 23 of the Convention provides as follows

1. Every citizen shall enjoy the following rights and opportunities:

a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
c. to have access, under general conditions of equality, to the public service of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil or mental capacity, or sentencing by a competent court in criminal proceedings.

82. Article 24 of the same Convention provides:

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

83. Article 45 of the Political Constitution of the Republic of Chile of 1980, on the composition of the Senate and its legal effects, as petitioners indicate and the representatives of the Chilean State do not controvert, is part of a general policy implemented by the military regime that governed the country from September 1973 until March 1990:

Article 45. The Senate shall be made up of members elected by direct vote by each of the country's thirteen regions. Each region shall elect two senators, in the manner determined by the respective constitutional organic law.

The senators elected by direct vote shall serve a term of eight years, with one-half up for election every four years, the representatives of the odd-numbered regions one period, and those from the even-numbered regions and the Metropolitan Region the next.

The Senate shall also be made up of:

(a) The former Presidents of the Republic who have held the post for six years continuously, unless the condition provided for at Article 49(1)(3) of this Constitution has occurred (referring to removal from office). These senators shall be senators of their own right, and for life, without prejudice to the disqualifications, incapacities, and grounds for removal set forth at Articles 55, 56, 57 of this Constitution;
(b) Two former justices of the Supreme Court, elected by the Supreme Court in successive votes, who have held the position for at least two years continuously;
(c) One former comptroller-general of the Republic, who has held the post for at least two years continuously, also elected by the Supreme Court;
(d) One former commander-in-chief of the Army, one of the Navy, and one from the Air Force, in addition to one former director general of the Carabineros, who have held the respective posts for at least two years, elected by the National Security Council;
(e) One former president of a state university or a university recognized by the State who has held the post for a period not less than two years continuously, designated by the President of the Republic; and
(f) One former cabinet minister, who has held the post for more than two years continuously, during presidential terms prior to that in which the appointment is made, also designated by the President of the Republic.

The senators to whom reference is made in paragraphs (b), (c), (d), (e), and (f) of this article shall serve a term of eight years. If there are no more than three persons who meet the characteristics and requirements demanded by paragraphs (b) through (f) of this article, the corresponding designation shall may be of citizens who have held other relevant functions in the agencies, institutions, or services mentioned in each of the paragraphs cited.

The designation of these senators shall be made every eight years, within 15 days of the corresponding election of senators. Any vacancies shall be filled within 15 days of the time they occur.

Those who have been removed from the Senate pursuant to Article 49 of this Constitution may not be designated senators.

84. Although that Constitution was adopted during the military government of General Augusto Pinochet, the provisions contained therein, regulating the composition of the legislature, came into force afterwards, when that Congress was constituted, and are still being applied every time the composition of the Chilean Senate is renewed or changed.

85. The alleged violation continues and is updated after the date of ratification of the American Convention, as confirmed by the following acts of designating senators not by popular vote, but by the system established at Article 45(a) to (f) of the 1980 Chilean Constitution.

86. On March 11, 1998, former President of the Republic General Augusto Pinochet Ugarte took office as senator, pursuant to Article 45(a), according to which the Senate is also made up of:

The former Presidents of the Republic who have held the post for six years continuously, unless the condition provided for in Article 49(1)(3) of this Constitution has occurred (referring to removal from office). These senators shall be senators of their own right, and for life, without prejudice to the disqualifications, incapacities, and grounds for removal set forth at Articles 55, 56, 57 of this Constitution.

87. On March 11, 1998, former justices of the Supreme Court Enrique Zurita Campos and Marcos Aburto Ochoa took office as senators, elected by the Supreme Court, pursuant to Article 45(b), according to which the Senate is also made up of:

Two former justices of the Supreme Court, elected by the Supreme Court in successive votes, who have held the position for at least two years continuously.

88. 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 the provision of Article 45(c), according to which the Senate is also made up of:

One former comptroller-general of the Republic, who has held the post for at least two years continuously, also elected by the Supreme Court.

89. On March 11, 1998, 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 the former director general of the Carabineros, Fernando Cordero Rusque, took office as senators pursuant to Article 45(d), according to which the Senate is also made up of:

One former commander-in-chief of the Army, one of the Navy, and one from the Air Force, in addition to one former director general of the Carabineros, who have held the respective posts for at least two years, elected by the National Security Council.

90. On March 11, 1998, the former president of the Universidad de Concepción, Augusto Parra, designated by the President of the Republic, took office as senator, pursuant to Article 45(e), according to which the Senate is also made up of:

One former president of a state university or a university recognized by the state who has held the post for a period not less than two years continuously, designated by the President of the Republic.

91. On March 11, 1998, former cabinet minister Edgardo Boeninger, designated by the President of the Republic, took office as senator, pursuant to Article 45(f), according to which the Senate is also made up of:

One former cabinet minister, who has held the post for more than two years continuously, during presidential terms prior to that in which the appointment is made, also designated by the President of the Republic.

92. The legal and factual consequences or effects of the above-cited constitutional provisions, as well as their invariable and continuing application during the democratic administrations after 1990, extend to the date of submission of the complaint, and even afterwards, which clearly makes the provisions of the American Convention invoked by petitioners applicable to this situation, and therefore determines the jurisdiction ratione temporis of the Commission to hear and decide on them.

93. On declaring the admissibility of this case[FN32], the Commission stated that it was ratifying its practice of extending the scope of application of the American Convention to facts violative of human rights that first arose prior to its ratification, but which are continuing in nature and whose effects persist after its entry into force.[FN33]This practice is similar to and in agreement with that of the European Commission on Human Rights[FN34], the European Court of Human Rights[FN35], and the Human Rights Committee established under the International Covenant on Civil and Political Rights.[FN36]

[FN32] Report 95/98 of October 25, 1998.
[FN33] Report Nº 24/98, Annual Report of the Inter-American Commission on Human Rights, para. 13/18. ".... The doctrine established by the European Commission and by the Human Rights Committee established under the International Covenant on Civil and Political Rights, according to which these organs have declared their jurisdiction to hear facts pre-dating the entry into force of the Convention for a given state, so long as such acts may result in a continuing violation of the Convention that continues past that date, is applicable to the inter-American system." (Andrés Aguilar, Derechos Humanos en las Américas, note 8, p. 202).
[FN34] The European Commission on Human Rights, in its decision of February 12, 1992, in the case of Agrotexim Hellas et al. v. Greece, considered that it had jurisdiction over the violations alleged to have arisen from a series of measures adopted from 1979 to 1981, which gave rise to a continuing situation that endured, even though the Government of Greece accepted the jurisdiction of the Commission on November 20, 1985. Yearbook of the European Convention for 1992, Application Nº 14807/89, p. 43.
[FN35] The European Court has accepted the notion of a "continuing violation" of the Convention and its effects on the reach in time of the jurisdiction of the Convention organs. See, among other decisions: Papamichalopoulos et al. v. Greece, June 24, 1993, Series A, No. 260-B, pp. 69-70, 40, and 46; Agrotexim et al. v. Greece, October 24, 1995, Series A, No. 330, pp. 22, 58; and Loizidow v. Turkey, December 18, 1996.
[FN36] Human Rights Committee, Torres Ramírez v. Uruguay, communication Nº 4/1977, para. 18; and Millan Sequeira v. Uruguay, communication Nº 6/1977, paras. 16 and 17.
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94. On previous occasions the Commission has analyzed issues relating to political rights and has established that:

The participation of citizens in government, which is protected by Article XX of the Declaration [whose content is similar to that of Article 23 of the Convention], forms the basis and support of democracy, which cannot exist without it; for title to government rests with the people, the only

body empowered to decide its own immediate and future destiny and to designate its legitimate representatives.

Neither the form of political life, nor institutional change, nor development planning or the control of those who exercise public power can be made effective without representative government.

The right to political participation leaves room for a wide variety of forms of government; there are many constitutional alternatives as regards the degree of centralization of the powers of the state or the election and attributes of the organs responsible for the exercise of those powers. However, a democratic framework is an essential element for establishment of a political society where human values can be fully realized.[FN37] [Emphasis added.]

[FN37] IACHR, Doctrine of the Inter-American Commission on Human Rights (1971-1981), in Ten Years of Activities 1971-1981, Washington, D.C., 1982, p. 334.

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95. The right to vote and to be elected in open elections, held with universal and equal suffrage, which guarantee the free expression of the will of the voters (Article 23(1)(b) of the American Convention), fills an essential function of legitimation of the political authority in representative democracy. Therefore, the link between voters and the persons elected, and genuine representation, can only be attained through mechanisms that assure the most free and ample participation of the citizens.[FN38] This explains the consensus reached, after a lengthy process of democratization and expansion of citizenship in modern democracies, regarding the imposition of universal suffrage without no exclusions or restrictions based on sex, social or economic status, or privileges.[FN39]

[FN38] See Ferreira Rubio, Delia, "Los sistemas electorales: el vínculo entre electores y elegidos," in SEMINARIO SOBRE ELECCIONES Y DERECHOS HUMANOS. Inter-American Institute of Human Rights. San José, 1998.

[FN39] See, among others, Nohlen, Dieter. SISTEMAS ELECTORALES Y PARTIDOS POLÍTICOS. Fondo de Cultura Económica. Mexico City. 1994.

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96. In this case, the Commission must determine to what extent the institution of the designated senators is detrimental to political equality and to what extent it entails unjustified discrimination in the election of the people's representatives by the citizens of Chile. In this regard, the Chilean Constitution defines as "citizens" "those Chileans who are at least 18 years of age and who have not been convicted of a felony" (Article 13, introductory paragraph). In this vein, under the Chilean Constitution, "citizenship bestows the rights of suffrage, to run for elective office and all others conferred by the Constitution or by statute" (Article 13, subsection). (Emphasis added.)

97. The Commission understands that the above-cited rights to political equality prohibit the states parties to the American Convention from giving unreasonable distinct or unequal treatment to their citizens in the election of their representatives. Therefore, these rights imply that the states parties cannot reduce or water down the effective opportunity for the citizens to elect their representatives, giving greater weight to the votes cast by certain members of society, even if they are representatives of the people.

98. This is precisely the situation in this case, as the Constitution has established in Article 45 the institution of the senators, whereby the Chilean Senate is made up not only of persons who are popularly elected, but also by one senator-for-life not popularly elected to the presidency (General Augusto Pinochet) and by members of corporatist or institutional origin designated by certain authorities.[FN40] This has the effect of watering down the power of the popular vote cast by the sovereign people, and places the citizens on an unequal footing as regards the authorities designated, with a consensus of but a few, as members of the legislatures. These are bodies or institutions made up mostly by citizens (such as the President of the Republic, justices of the Supreme Court of Justice, and members of the National Security Council) who in addition to being voters as Chilean citizens, also have been assigned the constitutional function of serving as the privileged voters who elect almost one-fifth of the Chilean Senate.

[FN40] Moreover, it is clear that the explicit reference to representative democracy expresses the opposition to other forms of government and representation, such as corporatism. The supposed theoreticians of this type of government, as well as its practice in other societies such as Portugal under Oliveira Salazar, Italy under Mussolini, or Spain under Franco, had a corporatist content. In those systems representation stems not from the equal vote of the citizens, but from institutions based on profession or occupational group, including the military institution. Designation by an interest group or social sector does not fit in representative democracy, and deprives the citizenry of the right "to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free," as provided for in the American Declaration.

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99. Nonetheless, this does not mean that the states cannot establish differences in the treatment of certain situations, as not all differences are prohibited or are contrary to the Convention. In this regard, the Commission recognizes and respects the degree of autonomy of the states in how they organize their political institutions, so long as they respect the rights set forth in the Convention.[FN41] Therefore, only when the difference in treatment lacks any objective and reasonable justification will we find ourselves before a violation of Articles 23 and 24 of the Convention.

[FN41] Id.

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100. This has been recognized by the Inter-American Court in pointing out the possible grounds for a complaint of discrimination under the American Convention. It has held:

It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review.[FN42]

[FN42] Advisory Opinion OC-4/84, of January 19, 1984, para. 57.

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101. Consequently, the states may draw distinctions among different situations and establish categories for certain groups of individuals, so long as it pursues a legitimate end, and so long as the classification is reasonably and fairly related to the end pursued by the legal order. To cite just one example, it cannot be said that the state discriminates among its citizens when it establishes a minimum age for exercising the right to vote, for it pursues a legitimate end (capacity for discernment in the electorate), and the distinction is related to the end pursued (conscientious political participation). It should be noted that the Convention recognizes the limits that the state can reasonably place on the exercise of political rights by regulating specifically by age, nationality, residence, language, education, civil or mental capacity, or conviction by a judge with jurisdiction in a criminal proceeding. This is, therefore, the entire list of limitations, thus any other cause that limits the exercise of the rights to equal participation set forth in the Convention would be in violation of this rule, and would therefore constitute a breach of the international obligations of the state under the Convention.

102. The instant case involves fundamental human rights, which constitute the basic guarantee of representative democracy and of all other rights, including the most essential ones. Therefore, any distinction or restriction requires sufficient justification that it is a necessary, reasonable, and proportional means of attaining the end sought by the state. Therefore, on mentioning the possibility of watering down or reducing the effective capacity of the people to elect their representatives by the designation of members of the legislative chambers without popular legitimacy, the state must pursue a legitimate end (rational test) and the means adopted must be reasonable and proportional. In other words, the restrictions or limitations on the human rights set forth in the Convention must be justified by the "need" for them in the framework of a democratic society. This demarcation is clearly determined by the justification of the means, their motives, reasonability, and proportionality.[FN43]

[FN43] See "Dudgeon" case, European Court of Human Rights, October 22, 1981; see discussion in Theory and Practice of the European Convention on Human Rights, P. van Dijk and G.I.H. van Hoof, The Hague, 1998.

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103. In this regard, the European Court of Human Rights has approved the interpretation by the European Commission, in that the right guaranteed at Article 3 of Protocol 1 of the European Convention contains a subjective right to participation, which implies certain limitations on the right to vote and to be elected. But in each case the organs of the European system have to evaluate and satisfy itself that these conditions do not restrict the rights in question to the

extreme of emptying them of their essential content and impeding their effectiveness; that they are imposed to pursue a legitimate end; and that the means employed are not disproportionate.[FN44] These conditions, concretely, cannot impede "the free expression of the opinion of the people in the choice of the legislature."[FN45] Moreover, the European Court has emphasized that the phrase "under conditions which will ensure the free expression of the opinion of the people" in the election of the legislature essentially implies--in addition to freedom of expression, already protected by Article 10 of the Convention--the principle of equality in the treatment accorded all citizens in the exercise of their right to vote and to be elected in elections.[FN46]

[FN44] See P. van Dijk and G.J.H. van Hoof et al. Theory and Practice of the European Convention on Human Rights. The Hague. 1998, pp. 659 and 660.
[FN45] Judgment of March 2, 1987, Mathieu-Mohin and Clerfayt, A. 113, p. 23.
[FN46] Id.

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104. Therefore, in the European system the key to the acceptance of limitations on the right to vote and to be elected, in addition to the prohibition on arbitrariness, turns on the issue of whether this right has been set forth in sufficiently broad and representative terms, so as to make free expression and citizen participation possible. Moreover, the restrictions must be reviewed, pursuant to Article 5 of Protocol 1, for conformity with the rest of the Convention, and in particular with the prohibition on discrimination.[FN47]

[FN47] See, P. van Dijk and G.J.H. van Hoof et al. Theory ..., op. cit., p. 660.

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105. In the case under analysis, the Chilean State did not allege any justification or purpose for the establishment of the designated senators. It merely noted that this constitutional clause is part of the process of transition from the military dictatorship to democracy, that it has not yet been possible to amend it, but at not time did it argue that it was pursuing a genuine state purpose at the service of human rights. The Commission considers that the burden of proving the legitimate aim pursued has been on the Chilean State, which did not even enunciate any type of argument aimed at justifying the institution of designated senators.

106. The Commission, for its part, finds no justification whatsoever for drawing a distinction in the way in which the Chilean Senate is constituted, especially when they have chosen--among others--institutions entrusted with designating senators who, in principle, should have nothing to do with popular representation (such as, e.g., the National Security Council).

107. The designated senators constitute a corporatist enclave that does not reflect the senator's status as a citizen, but rather the post or function he performs or performed. In effect, Article 45 itself provides that when there are no persons who bring together the qualities and requirements provided for in sections (b) through (f), the designation may be of officials who have performed important functions in the organs referred to in such sections. Consequently, it is a corporatist

form of representation--but not of just any corporate body--whose purpose is to diminish the value of the equal popular vote.

108. Therefore, there is an odious and illegitimate discrimination that finds its origins in the Chilean Constitution and that works a real diminution of the equal right of citizens to elect their representatives. In this regard, the Constitution itself sets forth the right to equality of the vote, providing that "in popular elections, suffrage shall be personal, equal, and secret" (Article 15). The distinction drawn in Article 45 and applied by the authorities has the effect of watering down the real value of the popular vote, as it accords priority to military institutions and officers who have nothing to do with the performance of the legislative functions of the representative body.

109. In effect, many of the institutions that have been assigned the power to designate senators are made up of Chilean citizens who have the right to elect senators by universal suffrage with the rest of the voters of each electoral region and district (President of the Republic, justices of the Supreme Court of Justice); and, in addition, they may exercise the privilege of designating senators by themselves or with the participation of the small number of citizens who constitute the institutions to which they belong. This is, therefore, an unreasonable inequality that becomes discriminatory by having the effect of creating dual and privileged elections as compared to the common election Chilean citizens participate in, thereby distorting the right to political participation by casting a "universal and equal" vote.

110. In addition, the effects of this situation make out a case of political discrimination, as some citizens have the privilege of being elected not like all other Chileans, by the electorate, but by a one-person electorate (President of the Republic, Supreme Court justices), or by small groups of members of certain institutions (National Security Council or Supreme Court). Such discrimination is reinforced with the finding that not any Chilean citizen can also be designated by this privileged means of election, as it excludes those who do not hold nor have performed certain posts or functions as former commander-in-chief of the Army, Navy, or Air Force; former director general of Carabineros; former justices of the Supreme Court; former comptroller-general of the Republic; former president of the state university; or former cabinet minister.

111. It should be noted that this corporatist representation also requires that one have held the post for two years; and it allows for exceptions for Supreme Court justices and cabinet ministers, when there are no more than three people who meet these characteristics and requirements. Nonetheless, in that case the integrity of corporatist representation is preserved, as the designation can only be of citizens who have performed other important functions in the organs, institutions, and services mentioned. Consequently, the effects of this situation, in practice, constitute a clear and flagrant violation of the right of the victims in this case (and the rest of Chilean citizens) to "be elected ... by universal and equal suffrage..." (Article 23(1)(b)) and "to have access, in general conditions of equality, to the public service of [their] country." (Article 23(1)(c)).

112. In this case, the Commission concludes that the regulation and continuing application of the provision contained in Article 45 of the Chilean Constitution has the effect of violating the

active and passive rights to political participation of the victims identified in this case, in their capacity as Chilean citizens. In effect, the right to vote by universal and equal suffrage enshrined in Article 23(1)(b) of the American Convention is violated in the circumstances of this case, since not all citizens can exercise the right of sitting in the Chilean Senate, as there are "designated" senators who sit in the Senate, but in respect of whom only a small number of voters make the determination, as provided for in the Constitution in exclusive and exclusionary terms: President of the Republic, Supreme Court, National Security Council. In addition, the rights to cast an equal vote (Article 23(1)(b)) and to equality before the law (Article 24), provided for in the Convention, have been violated with respect to the victims identified in this case as Chilean citizens, considering that there are other citizens who have the privilege of the preferential double vote when it comes to electing the Chilean Senate: certain Chilean citizens, in addition to participating in regional elections to elect, by universal suffrage, those senators who are so elected, are also empowered to elect, unipersonally (President of the Republic) or as members of a very small group of persons (Supreme Court, some members of the National Security Council), senators who together account for approximately 20 percent of the total number of members of the Senate.

113. Furthermore, the Commission concludes that the right to passive suffrage, i.e., the right to participate in the direction of public affairs, to be elected by universal and equal suffrage, and to have access under conditions of equality to the public service of his or her country, enshrined in the American Convention (Article 23(1)(a), (b) and (c)), has been violated in this case, to the detriment of the victims, as Chilean citizens, in view of the effect of the provisions contained in Article 45 of the Chilean Constitution, and its continuing application by the acts indicated, since the only persons who can be "designated" senator are those who make up an exclusive group of Chileans (numerus clausus) who have held posts or functions expressly provided for in Article 45 (former commander-in-chief of the Armed Forces, former director general of Carabineros, former justice of the Supreme Court, former comptroller-general of the Republic, former president of the state university, or former cabinet minister).

114. In addition, preference is given to certain former officials and other individuals, facilitating their election to the Senate with the support of an insignificant minority. And all of this has occurred without that group offering any reasonable justification for arrogating to itself that important representation of the sovereign people.

115. In accordance with the foregoing, and considering that the institution of designated senators constitutes an unjustified inequality that alters the essential core of representative democracy, this Commission concludes that the political rights set forth at Articles 23 and 24 of the American Convention have also been violated.

116. In effect, this Commission understands that when Article 23 of the Convention makes reference to "universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters," it requires at least that popular sovereignty be capable of being exercised without any unjustified discrimination that works a real loss of value in the power of the vote. A Senate composed in the terms provided for by the Chilean Constitution does not guarantee the free expression of the will of the voters, for the institution of designated senators

contained in Article 45 of the Constitution of Chile detracts a significant quota of power from the citizen will.

117. It should also be noted that as the Chilean Senate is a co-legislative body of the Congress of Chile, along with the Chamber of Deputies, the law-making function has been assigned to it, in the form of drafting and adopting legislation.[FN48] These laws, as provided for at Article 30 of the American Convention, may establish authorized limitations on the rights enshrined therein. As regards Article 30 of the Convention, the Inter-American Court has established limits especially with respect to civil and political rights:

The protection of human rights, particularly the civil and political rights set forth in the Convention, is in effect based on the affirmation of the existence of certain inviolable attributes of the individual that cannot be legitimately restricted through the exercise of governmental power. These are individual domains that are beyond the reach of the State or to which the State has but limited access. Thus, the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power.... In order to guarantee human rights, it is therefore essential that state actions affecting basic rights not be left to the discretion of the government but, rather, that they be surrounded by a set of guarantees designed to ensure that the inviolable attributes of the individual not be impaired. Perhaps the most important of these guarantees is that restrictions to basic rights only be established by a law passed by the Legislature in accordance with the Constitution.[FN49] (Emphasis added.)

[FN48] See Articles 62 ff. of the Constitution of Chile.
[FN49] See Advisory Opinion OC-6/86, of May 9, 1986, paras. 21 and 22.

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118. Hence the importance that the laws be acts emanating from democratically-elected legislative organs, as the Inter-American Court has said:

... the word "laws" ... can have no other meaning than that of formal law, that is, a legal norm passed by the legislature and promulgated by the Executive Branch, pursuant to the procedure set out in the domestic law of each State.[FN50] (Emphasis added.)

[FN50] See OC-6/86, para. 38.

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119. This has been precisely the leading argument in the European human rights system, which, though the European Convention for the Protection of Human Rights did not originally set forth the right to vote and to be elected as a universal right--as the inter-American system did--incorporated at Article 3 of Protocol 1 the obligation of the states to organize free elections in conditions that guarantee the free expression of the opinion of the people "in the choice of the legislature." In this connection, the European Commission adopted the interpretation that what is involved, in any case, is the election of the body vested with the power to legislate, thus the constitutional law of the state party in question is decisive for these purposes. For this reason, a

body that can only propose legislation but not approve it--whether unicameral or bicameral--would not be embraced in the Convention's conception of the right to vote and to be elected for the "legislature."[FN51]

[FN51] See, P. van Dijk and G.J.H. van Hoof et al. Theory and Practice of the European Convention on Human Rights. The Hague. 1998, pp. 664 ff. Decisions cited: Appls 6745 and 6746/74, W, X, Y and Z v. Belgium, in Yearbook xviii, p. 236 (240-244).

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120. Consequently, as the Inter-American Court has stated, "there exists an inseparable bond between the principles of legality, democratic institutions and the rule of law."[FN52] From there, as the Court has stated with such clarity:

Representative democracy is determinant throughout the system of which the Convention is a part.[FN53]

[FN52] Advisory Opinion OC-8/87, para. 24.
[FN53] Advisory Opinion OC-13/93, para. 34.

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121. The "determinant" character of representative democracy in the system of the American Convention is also confirmed by two important principles. First, on determining in its "Restrictions Regarding Interpretation" (Article 29) that no provision of the Convention can be interpreted as:

precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government. (Emphasis added.)

122. In this connection, the Inter-American Court has ruled that any act aimed at suppressing any of the rights set forth in the American Convention is illegal.

Article 30 refers to the restrictions that the Convention itself authorizes with respect to the different rights and freedoms recognized therein. It must be emphasized that, under the Convention (Article 29(a)), all acts directed toward the suppression of any one of the rights set forth therein are illicit.[FN54] (Emphasis added.)

[FN54] Advisory Opinion OC-6/86 of May 9, 1986, para. 14.

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123. Second, the "determinant" character of representative democracy in the system of the American Convention is confirmed by the fundamental value placed on the rights of political participation in the Convention. In effect, they are treated as being of the highest possible level of the rights enshrined in the Convention, as the suspension of these political rights and the

guarantees essential for their protection is suspended, even in time of war, public danger, or other emergency that threatens the independence or security of the state party (Article 27).

124. In this regard, the Inter-American Court has interpreted that the just demands of democracy should guide the interpretation of the Convention, in particular of those provisions that are critically geared to the preservation and functioning of democratic institutions:

... the European Convention contains no clause comparable to Article 29 of the American Convention, which lays down guidelines for the interpretation of the Convention and prohibits the interpretation of any provision of the treaty "precluding other rights and guarantees ... derived from representative democracy as a form of government."... The just demands of democracy must consequently guide the interpretation of the Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions.[FN55]

[FN55] Advisory Opinion OC-5/85 of November 13, 1985, para. 44.

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125. These are superior and fundamental values of the legal order established by the American Convention, which inspire and permeate its text, as a source of the international obligations assumed by the states parties to it; and in respect of which they must organize the state so as to ensure they are fully respected and guaranteed (Article 1). Should this not be the case, the states parties undertake to adopt measures to make such rights effective (Article 2).

126. Therefore, pursuant to the arguments of fact and of law, and the evidence analyzed above, the Commission concludes that the institutions of designated senators and senator-for-life, as established in the Constitution of Chile and as applied by the authorities indicated[FN56], constitute a violation of the political rights of political representation without discrimination, enshrined in Articles 23 and 24 of the Convention, to the detriment of the Chilean citizens identified as victims in this case, and the rest of Chilean society.

[FN56] The Commission is of the view that this does not preclude a new constitutional amendment, under institutional and democratic parameters, to restore the institution of senators-for-life; such an this institution, as noted supra, may be perfectly legitimate, for if the people know of this privilege beforehand, it is understood that upon democratically electing the President of the Republic, they would also be electing a senator-for-life once his presidential term is completed, so long as the constitutional requirements established for this purpose are met.

D. The international responsibility of the State

127. The Inter-American Court has noted: "Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority

constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention."[FN57]

[FN57] Inter-American Court of Human Rights, Case of Velásquez Rodríguez, Judgment of July 29, 1988, para. 164.

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128. In this case, at stake is not the responsibility of the Government of Chile, but the international responsibility of the Chilean State for violations of human rights and breach of the obligations assumed by Chile upon ratifying the American Convention. The Chilean State has alleged that the legal facts in this case are attributed to a branch of government other than the Executive; that the efforts and initiatives of the democratic government to have the constitutional provisions in question amended should be taken into account; and that those provisions of the Constitution were not approved by the current democratic government.

129. Thus, for example, as of 1986 the National Agreement on the Proposal for a Minimal Reform of the 1980 Constitution had proposed, in a Report of April 6, 1986, to modify the composition and means of election to the Senate, stating:

All of the members of the legislature should base their seat on popular sovereignty, so as to avoid there being legislators of different categories and representation. With this criterion in mind, it is proposed that those provisions that establish the inclusion of unelected members of the Senate be derogated.[FN58]

[FN58] Reforma de la Constitución Política de Chile de 1980, Carlos Andrade Geywitz, p. 317, para. 1.

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130. The democratic governments of Chile that have come in the wake of the authoritarian regime have submitted proposed constitutional amendments with this same objective in 1992, 1994, 1995, 1996, and 1997. In addition, there have been various legislative initiatives for constitutional reform aimed at eliminating the institution of designated senators, including those supported in 1990 and 1991 by the legislators of the Socialist Party of Chile, considering that "all the members of the legislature should base their seat on popular sovereignty, and so the provisions allowing for the Senate to be constituted by unelected members should be eliminated...."

131. In 1992, the proposed constitutional amendment presented by President Aylwin, which was passed by the Chamber of Deputies by a vote of 72 in favor to 37 opposed, met with the resistance of the same designated senators and a minority of opposition senators.

132. The proposals put forth by President Frei on August 18 and October 14, 1994, included, among other fundamental issues, altering the composition of the Senate, so as to eliminate the designated senators and senators-for-life. The justification of the constitutional amendment

proposed by President Frei included the following consideration: "the effective and complete recovery of democracy, as well as its enhancement, have been an ethical imperative for my government, which the Concertación de Partidos por la Democracia took on from its inception ... for the purpose of allowing for the complete re-establishment of popular sovereignty"; the need for "a modern legislature to be transparently democratic, in terms of how its members are determined ... that is why ... all of the members of both Chambers should be democratically elected"; "my government believes firmly that the origin of parliamentary representation lies in the will of the people, and that all who wish to form part of the National Congress should have the support of the citizenry...." He also affirmed emphatically his axiological belief in the proposal, stating that "this is not a question of convenience, but of principles, expressed in a programmatic commitment that won the vote of the immense majority of the citizenry." Both proposals finally had to be withdrawn at the request of the Executive. President Frei's draft constitutional amendment of October 26, 1995, also proposed suppressing the institution of non-elected senators, on equivalent grounds, so that all the senators might be elected by universal and direct suffrage. This proposal was rejected by the Senate for lack of quorum.

133. In 1996, the proposed constitutional amendment presented by President Eduardo Frei for the purpose of eliminating the institution of designated senators was rejected in the Senate, as it failed to win the three-fifths (3/5) of all members of the Senate, as required by the Constitution. The record reflects 25 senators voting in favor, and 21 against, seven of whom were designated senators.

134. In July 1997, a second proposed constitutional amendment with the same objective, also presented by President Frei, was approved in the Chamber of Deputies with 92 votes in favor and 15 against. In the Senate, 25 senators voted in favor and 20 against; these 20 included eight designated senators who had assumed office, and consequently the amendment was defeated again, as the quorum of 3/5 of the senators who had assumed office was not attained.[FN59]

[FN59] Although this amendment was focused on eliminating the designated senators (and in respect of the senators-for-life it was proposed to reduce the years required for former Presidents to become senators-for-life, with which former President Aylwin, a democratically elected president, would have qualified as a senator-for-life), the bases of the constitutional amendment proposed by President Frei included a new argument on the "politicization" of the institutions entrusted with designating such senators:

Our objection to the institution of the designated senators is also rooted in the certain risk of politicization of the institutions called on by the Constitution to designate senators. None of this seems positive to us for the future of the rule of law in Chile. It is essential, for the proper functioning of permanent institutions of the Republic, such as the Armed Forces, the forces of order, and the Supreme Court, to prevent all risk of potential politicization. Such risk--it would be in vain to refute this--is necessarily present in the designation of senators who, especially in the current political electoral scenario, shall be entrusted with swaying the Senate majority one way or the other.

In addition, in the motion made by deputies Valenzuela, Acuña, Rocha, Aníbal Pérez, Luksic, and Morales, introduced in the session of Tuesday, October 7, 1997, they proposed, again

unsuccessfully, to suppress the institution of designated senators-for-life (boletín Nº 2098-07), with the following explanation:

Considering:

1. The need to enhance our institutional order for the purpose of contributing to the full democratization of the country.

2. That several steps have been taken, with that objective in mind, beginning with the constitutional amendments of 1989, and including those aimed at securing the popular election of mayors and municipal council members.

3. That this process of democratization has been supported repeatedly by the citizenry at the polls, giving the Concertación de Partidos por la Democracia broad popular support, which has won it the absolute majority of votes in all the elections held in the country since the 1988 plebiscite.

4. Public opinion is aware of the firm will to achieve democratization of the Governments of the Concertación Democrática, ratified by several efforts to amend the Constitution for the purpose of eliminating the various authoritarian enclaves of our institutional arrangement that impede the normal expression of popular sovereignty which, however, have not won sufficient support in the Senate of the Republic.

5. The existence of these authoritarian enclaves, which thwart the will of the citizenry, have a serious detrimental effect on democracy, undermining its legitimacy in the face of public opinion by making it difficult to meet the goals and objectives proposed by the authorities to the country, and embraced by the citizens at the polls, thereby contributing to discredit the system, as attaining these purposes is made difficult, if not impossible, by the action of bodies that do not reflect the sense of the majority of the population and which, therefore, need not be held accountable to the electorate for their acts.

6. These entities include, among others, the Constitutional Court, the binominal electoral system, and, in particular, the composition of the Senate of the Republic, which, according to the 1980 Constitution, has members who are not popularly elected, but instead are designated by various public organs or accede to the post for life for having served as President of the Nation.

7. The legitimacy of the designated senators and senators-for-life is clearly questionable, from the most basic democratic analysis.

In effect, except for the obvious and unquestioned principle of popular sovereignty, there are those who bestow legitimacy on this institution based on comparative law, arguing that it is an institution that exists in other nations in which, nonetheless, it should be noted that they have never achieved the influence they have in our country, where, with 20% of the upper chamber of the legislature, the unelected senators become arbiters of political decisions without regard to the will of the citizens.

Moreover, another grave criticism of the existence of the designated senators can be found in their origin, i.e., in the organs entrusted with making these designations. In effect, this procedure leads to the politicization of fundamental institutions of the Republic, forcing their members to take sides, when making the designations, and transforming their representative into an unofficial unconstitutional agent of the political positions of the institutions in each of the legislative decisions with which they are faced. This is especially grave when some of the institutions represented through the designated senators are, by constitutional mandate, subordinated to the President of the Republic and disqualified from expressing political opinions.

The Armed Forces and the Judiciary have a fundamental role to play for the country, the first safeguarding external security, and the second ensuring the rights of all inhabitants of the

Republic. In view of the foregoing, their politicization is alien to their objectives and clearly ill-advised.

8. As regards the institution whereby former presidents become senators-for-life, it is clearly arbitrary to extend the will of the citizens who elected them to the presidency, supposing that the electorate had the intention of also conferring a legislative mandate on them. It is excessive.

This institution could only find some justification when this consequence is widely known by the electorate when electing the President of the Republic; when it is applied uniformly to all those who have held the presidency, whatever the duration of their term; and, especially, when the president has been chosen as the result of the citizens' will, expressed in free, open, and competitive elections.

9. It is, therefore, essential that the Constitution be amended so that the Legislature may be elected in its entirety by the people, fully in line with the democratic principle, and thereby giving the authorities the means they need to carry out the programmatic guidelines offered to the country with no limitation other than the will of the citizenry expressed in apportionment of the legislature.

10. Approval of the Constitutional amendment that we propose would constitute a new, albeit partial, advance in the democratization of the country, as well as an unparalleled opportunity for political actors to state to the citizens that they fully support democracy, expressed in respect for popular sovereignty, eliminating the obstacles or limits to its effective exercise.

In view of the foregoing, the undersigned deputies submit the following:

PROPOSED CONSTITUTIONAL AMENDMENT

Single Article: The following modifications are hereby made to the Constitution of Chile:

1. Article 45 is amended as follows:

(a) The expression "elected by direct vote" is deleted from the second paragraph;

(b) The third, fourth, fifth, and sixth paragraphs are deleted.

2. The following modifications are hereby made to Article 47:

(a) The clause "who are to be elected by direct vote" is hereby deleted from the second paragraph;

(b) The clause "elected by direct vote" is hereby deleted from the third paragraph.

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135. In international human rights law, not only the Executive, as representative of the state in international relations, is capable of compromising the international responsibility of the state, but so may any other organ of the state, including, as in this case, the legislative branch, by impeding all constitutional reforms proposed by the Executive, and even by groups within the legislature.[FN60] This entails a breach of the duty to adopt the legislative measures needed to make effective the rights and liberties contained in the American Convention.

[FN60] Both petitioners and the representatives of the Chilean State have agreed in noting that on three occasions the Senate has rejected proposed constitutional reforms that include deleting the provision on designated senators.

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136. States, as parties to the American Convention, assume the responsibility of respecting and guaranteeing all the rights and liberties recognized in it with respect to the persons under their jurisdiction, with no discrimination whatsoever (Article 1). In addition, the states have assumed the obligation of changing or adapting their legislative order or other laws (including Constitutional provisions) if the exercise of the rights and guarantees set forth in the American Convention is not ensured (Article 2). In these cases, the states assume the obligation of adopting, pursuant to their constitutional provisions and the provisions of the Convention, the legislative or other measures as needed to make give effect to such rights and freedoms (Article 2). Consequently, the responsibility of the state may be compromised by act or omission of the Executive, Legislative, or Judicial branch, or by the act or omission of any public official.[FN61]

[FN61] Medina Quiroga, Cecilia, "Constitución, Tratados y Derechos Esenciales". Corporación Nacional de Reparación y Reconciliación, Santiago, Chile, 1994, p. 15.

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137. According to the case-law of the Inter-American Commission, while domestically the organs that exercise the executive, legislative, and judicial powers are separate and independent, the three constitute a single indivisible unity of the Chilean State which, internationally, does not allow for separate treatment. Therefore, Chile assumes the international responsibility for the acts of its branches of government that are at odds with the international commitments that derive from the international treaties.[FN62]

[FN62] Report 36/96 against Chile, paragraph 84, and Report 34/96, paragraph 83, also against Chile, in the 1996 Annual Report of the Inter-American Commission on Human Rights. OEA/Ser.L/V/II.95 Doc.7 rev. of March 14, 1997.

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138. Therefore, the Chilean State cannot, in this case, justify its breach of the Convention by the argument that the Executive branch has presented several proposals to amend the Constitution aimed at doing away with the institution of designated senators. The failure to derogate a provision that is incompatible with the Convention, after its ratification, and the failure to adapt domestic constitutional provisions so as to give it effect in Chile, make the state responsible for a breach of the Convention[FN63] and for the continuous application of those provisions by the various constitutional organs (President of the Republic, National Security Council, and Supreme Court of Justice).

[FN63] See Report 36/96, cited in the previous note.

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139. In this regard, in addition to the case-law cited, one should note the resolution recently adopted by the Conference of the Inter-Parliamentary Union held in September 1998 in Moscow, entitled "Strong Action by National Parliaments in the Year of the 50th Anniversary of the Universal Declaration of Human Rights to Ensure the Promotion and Protection of All Human

Rights in the 21st Century," which decided to make an appeal to the national legislatures to take appropriate measures to assure[FN64]:

(ii) that these [human] rights are written into legally binding and judicially enforceable texts, such as national constitutions and international conventions;
(iii) that national law is reviewed and if necessary amended to conform with the norms and standards embodied in the Universal Declaration of Human Rights and other human rights instruments derived from it.

[FN64] Positions. I-PU, op. cit., p. 18.

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140. Therefore, in this case, the violation of the victims' human rights set forth at Articles 23 and 24 of the American Convention arises, first of all, from the failure of the competent organs of the Chilean State (Congress) in its duty to adopt the measures needed to guarantee the rights set forth in the Convention in its domestic legal order (Article 2). Second, the violation has been concretized and updated, most recently, with the application of the Constitutional provision on designated senators (Article 45) by the designations made in 1998 by the various authorities (President of the Republic, National Security Council, and Supreme Court), which determined that those senators would assume their posts on March 11, 1998.

141. The Commission considers, based on the foregoing considerations, that the Chilean State has not met the obligations contained in Articles 23 and 24, in conjunction with Article 2 of the American Convention, as it failed to guarantee the effective exercise of political rights or to consolidate representative democracy, or to adapt its constitutional provisions noted to the requirements of the Convention (Article 2).

VI. PROCEEDINGS AFTER REPORT 78/99

142. On May 5, 1999, in the course of its 103rd session, held April 29 to May 9, 1999, the Commission adopted Report 78/99 in this case, pursuant to Article 50 of the American Convention, and forwarded it to the Chilean State with the pertinent recommendations, giving it two months from the date it was forwarded to report on compliance with them. The Government of Chile did not respond to the Commission's note with regard to Report 78/99 of May 5, 1999, nor did it seek a delay for that purpose. The Chilean State did not answer the Commission within the time indicated in Report 78/99 of May 9, 1999, nor did it request any extension for doing so. Once the time period the Commission gave the State to forward its answer had lapsed, the Chilean State finally answered on September 29, 1999. The Commission laments the failure to submit an answer to the report within the time period indicated, which could have led it to reiterate its conclusions and recommendations without having the information requested at hand. Nonetheless, the Commission shall now refer to the information provided by the State.

143. In its answer the Chilean State argues as follows:

That it values the Commission's efforts to reach a friendly settlement, but given the nature of the complaints and the issues involved, it is not yet been possible to reach a satisfactory result that would put an end to this controversy; that it has had difficulties complying with the recommendations of the Commission's report, but that the recommendations indicated have been carried out in part; that it has expressed its will to amend the constitutional provision that establishes designated and life-tenure senators, but that this has not been possible, even though it is the will of the Government; that the communication of the petitioners is on the borderline of what is understood to be the violation of a right contained in the Convention; that the communication from the petitioners is a legal consultation on a point of constitutional law; that citizens participated in the 1988 elections in equal conditions and that the State has mobilized all the means available to it to guarantee free access to the polls for all of the country's citizens;

That the fact that the Senate includes senators who are not elected does not evidence, in itself, a denial of citizens' right to vote, but reflects, rather, a clearly political issue linked to the representation or over-representation of a certain group of senators; that it is a matter related to the domestic constitutional legislation of the State, that falls outside the sphere of individual communications established by the American Convention;

That the IACHR's recommendation to guarantee fully to all Chilean citizens, including the victims in this case, the exercise of their right to vote and to be elected in general conditions of equality appears to be a redundancy, bearing in mind that the State has guaranteed access to the polls for all citizens in conditions of equality since the period of democratic normality resumed; that the right to vote and to be elected in equal conditions is fully guaranteed; that all Chilean citizens are able to vote and to elect their representatives, and that no vote is privileged; that the acceptance or rejection of this procedure for designating senators and the composition of the Senate has to do with a political decision, more than a legal or human rights-related decision; and, that the right to vote is not violated by this composition of the Senate;

That the existence of unelected senators alters the political balance within the Senate, but it is far from being a human rights violation, in particular the right to vote set forth in the American Convention; that the same situation could arise if some political force were predominant in the Senate. Nor could one argue in that case that such an imbalance affects the political rights of minorities; that the right to vote and to be elected is not only fully guaranteed under Chilean law, but that since 1988 its practice has been widespread and reiterated; that in these last 10 years seven elections have been held;

That the mixed nature of the upper chamber in the Chilean legislature, made up of 38 elected senators and nine designated senators, is fully in line with the Constitutional power; that according to the Human Development Report prepared by the United Nations Development Program (UNDP) for this year, almost 50% of the countries included in the index on political life have designated senators in their respective Chambers (30 of 61); that of these 30 democracies, 17 have only designated senators, including democracies as solid as Canada, the United Kingdom, Germany, and the English-speaking Caribbean countries. A table is attached that details this information;

That there is no indication that the European human rights system could consider admissible a complaint for the violation of the rights of a group of persons who felt their rights to be affected by the existence of designated senators in the legislatures of: Belgium, the United Kingdom, Germany, Italy, or Ireland, and which is found is 20 of the countries with the highest level of human development in the world; that the Government of Chile has the aim and the will to carry out the constitutional reforms needed so that the composition of the Senate and the representation of the people before the National Congress faithfully reflect the citizen will and are more in line with Chile's democratic traditions; that it also wishes to note that the existence of Constitutional provisions that establish a certain mechanism for determining the composition of the Senate, should not be understood as a violation of one or more human rights, as it is a matter that pertains to the realm of the political, and in no way casts a pale over the exercise of the human right to vote, as established in the Convention.

144. As is apparent, in its answer brief, the Chilean State admits that--despite past efforts--it has not been able to implement fully the Commission's recommendations, nor arrive at a satisfactory result aimed at reaching an understanding with the petitioners to reach a friendly settlement in this case. Considering this, the IACHR reiterates that this stage of the procedure is not for debate regarding the admissibility of the case, which was determined in due course, and no material mistakes have been raised in opposition to this decision in this connection to justify such a consideration. Consequently, it is clear that the Chilean State has not adopted the measures necessary to carry out the recommendations set forth in Report No. 78/99. The Commission reminds the State of what the Inter-American Court has established in relation to the obligation of the States to carry out its recommendations:

In accordance with the principle of good faith, embodied in the aforesaid Article 31(1) of the Vienna Convention, if a State signs and ratifies an international treaty, especially one concerning human rights, such as the American Convention, it has the obligation to make every effort to apply the recommendations of a protection organ such as the Inter-American Commission, which is, indeed, one of the principal organs of the Organization of American States, whose function is "to promote the observance and defense of human rights" in the hemisphere.[FN65]

[FN65] Inter-American Court of Human Rights, Case of Loayza Tamayo, Judgment of September 17, 1997, para. 80.

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145. The Commission shall now undertake an analysis of the arguments made by the State in its communication dated September 29, 1999.

146. In relation to the argument made by the Chilean state at this stage of the proceedings to the effect that the communication submitted by the petitioners is "borderline" with respect to what is understood to constitute an individual communication to report a specific violation of a human right contained in the Convention, the Commission observes as follows:

First, the expression "borderline" used by the State should lead to the following result: In case of doubt, the ambiguity should be interpreted in favor of the victims' rights. This principle of pro-

homine, as the Inter-American Court has stated, is a controlling guideline for interpreting the Convention, and in human rights law in general.

Second, the State would appear to raise anew, at this stage, an issue already decided by the Commission in Report No. 95/98, on the admissibility of this case, with respect to personal jurisdiction. In this regard, the Commission reiterates that the system provided for in the American Convention is aimed at protecting the human person (Article 1(2)) from violations of their rights set forth in the Convention (Articles 1 and 44) by acts, deeds, or omissions imputable to a State party.

147. With respect to the question of personal jurisdiction, the Commission has previously provided[FN66] that, in general, its jurisdiction to process individual cases refers to facts that involve the rights of a specific person or specific persons.[FN67] The Commission has broader jurisdiction pursuant to Article 41(b) of the Convention to make recommendations to the member States to adopt progressive measures in favor of the protection of human rights, which it may exercise outside of the individual petition system.

[FN66] Report No. 28/98, Case of María Eugenia Morales v. Guatemala. Annual Report of the IACHR 1998.
[FN67] See, in general, IACHR, Case of Emérita Montoya González, Report 48/96, Case 11,553 (Costa Rica), in the Annual Report of the IACHR 1996, OEA/Ser.L/V/II.95, Doc. 7 rev., March 14, 1997, paras. 28, 31.

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148. In this case, the petitioners, in their petition, designated 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 as specific victims. As the Inter-American Court has explained, to initiate the proceedings provided for in Articles 48 and 50 of the American Convention, the Commission requires that a petition contain a complaint of a specific violation with respect to one or more specific persons.[FN68]

[FN68] Inter-American Court of Human Rights, Advisory Opinion OC-14/94, "International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Articles 1 and 2 of the American Convention on Human Rights," of December 9, 1994, para. 45, see also paras. 46-47. With respect to the other contentious mechanisms of the system, Article 61(2) of the Convention provides, in addition: "In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 shall have been completed." "The contentious jurisdiction of the Court is intended to protect the rights and freedoms of specific individuals, not to resolve abstract questions." Id., para. 49.

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149. The Commission has found that in this case, the victims have experienced and continue to experience violations of their rights to political participation and equality, enshrined in

Articles 23 and 24 of the American Convention, in light of the rule on designated senators contained in Article 45 of the Constitution and its continued and present-day application.

150. With respect to the characterization of the petition as a "borderline" case of an individual petition, the Commission must reiterate, first, that in view of the nature of human rights as a public policy matter, including the possible consent of the victim in the violation, the violative state act neither validates nor detracts from the jurisdiction of the international organ in which the States have entrusted the protection of such rights.

151. In relation to the claims overall, the Commission observes that a legal provision could affect different persons differently. A law that does not apply directly or is not self-executing requires that the authorities take measures pursuant to it in order for it to be applied to a specific case.[FN69] For its part, a law that does not require additional measures to be applied (a law that applies directly, or is self-executing) could violate a protected right by coming into force, if all the other requirements (for example, personal jurisdiction) are satisfied. Therefore, and taking into account the foregoing, "a norm that deprives a portion of the population of some of its rights--for example, because of race--automatically injures all the members of that race."[FN70]

[FN69] OC-14/94, supra, para. 41.
[FN70] Id., para. 43.

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152. In this respect, the international case-law has established that a law may violate the right of an individual, even in the absence of a specific measure applied later, ordered by the authorities, in those cases in which the persons are directly affected or run an imminent risk of being directly affected by a legislative provision.[FN71] Thus, for example, as the Commission has established in an earlier case, "María Eugenia Morales de Sierra," challenged a legal situation--that of a married woman covered by a certain part of the Civil Code--"which affects them personally."[FN72] The Commission considered that the direct effect of the legislative provisions challenged on the rights and daily life of the victim had been adequately alleged and shown for the purposes of admissibility.[FN73]

[FN71] See, in general, European Court of Human Rights, Case of Klass et al., judgment of June 6, 1979, Ser. A, Vol. 28, para. 33-38; European Court of Human Rights, Case of Marckx, judgment of June 13, 1979, para. 27; see also, Human Rights Committee of the United Nations, Case of Ballantyne, Davidson, and McIntyre v. Canada, 1993 Report, Vol. II, p. 102.
[FN72] See Case of Marckx, supra, para. 27.
[FN73] See Report 28/98, supra.

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153. In the instant case, the constitutional provisions contrary to the Convention (Article 45) required acts of application to be current, which denoted a continuing violation (see paragraphs 85 to 92) of the rights of petitioners as Chilean citizens, and therefore of the rights of all other Chilean citizens similarly situated, specifically of their political rights. And in the instant case,

the Commission has determined that the constitutional provisions regarding senator-for-life General Augusto Pinochet and the designated senators are not only contrary per se to the rights to political participation (rights to vote and to be elected) in conditions of equality enshrined in Articles 23 and 24 of the American Convention; but that, in addition, their continuing application in respect of the victims identified in this case, through acts adopted by the Chilean State in 1998 (see paragraphs 85 to 91 supra), has updated and concretized this violation. In this regard, the Inter-American Court has established that laws contrary to the Convention may constitute a per se violation of the Convention, with all the members of said category, and a simultaneous violation in the specific case that arises from its application to the victims.[FN74]

[FN74] "As the Court has maintained, the States Parties to the Convention may not order measures that violate the rights and freedoms recognized therein (International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 36). Whereas the first two provisions of Article 114 bis of the Ecuadorian Criminal Code accord detained persons the right to be released when the conditions indicated exist, the last paragraph of the same article contains an exception to that law.

"The Court considers that this exception deprives a part of the prison population of a fundamental right, on the basis of the crime of which it is accused and, hence, intrinsically injures everyone in that category. This rule has been applied in the specific case of Mr. Suárez-Rosero and has caused him undue harm. The Court further observes that, in its opinion, this law violates per se Article 2 of the American Convention, whether or not it was enforced in the instant case.

"In conclusion, the Court points out that the exception contained in the aforementioned Article 114 bis violates Article 2 of the Convention in that Ecuador has not taken adequate measures under its domestic law to give effect to the right enshrined in Article 7(5) of the Convention." (Commission's emphasis.) (Inter-American Court of Human Rights, Series C: Decisions and Judgments No. 35, Case of Suárez Rosero, Judgment of November 12, 1997).

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154. More recently, the Court has reiterated this case-law in the following terms:[FN75]

As the Court has held, States Parties to the Convention may not issue measures that violate the rights and freedoms recognized in it. (International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Articles 1 and 2 of the American Convention on Human Rights)), Advisory Opinion OC-14/94 of December 16, 1994. Series A No. 14, para. 36, Case of Suárez Rosero, supra, note 80, para. 97.) The Court has established that a norm may violate Article 2 of the Convention per se, independent of whether it has been applied in a concrete case (Case of Suárez Rosero, supra, note 80, para. 98).

The Court holds that the State, on submitting the victims in this case to procedures in which several provisions of the American Convention were violated, has failed in its duty "to respect the rights and freedoms recognized herein and to ensure ... the free and full exercise of those rights and freedoms," as provided by Article 1(1) of the Convention.

Furthermore, the Court declares that the provisions contained in the emergency legislation adopted by the State to address the phenomenon of terrorism, and in particular Decree-Laws Nos. 25,475 and 25,659, applied to the victims in this case, infringe Article 2 of the Convention, as the State has not taken adequate measures of domestic law to make it possible to implement the rights enshrined in it, and the Court so declares. The general duty of Article 2 of the American Convention on Human Rights implies adopting measures along two lines. First, suppressing the norms and practices, whatever their nature, that entail a violation of the guarantees provided for in the Convention. And second, issuing norms and developing practices conducive to the effective observance of those guarantees. Evidently, the State has not done, in respect of the provisions applicable to the trial of the accused, what it should do in light of Article 2 of the Convention.

In view of the foregoing, the Court declares that the State violated Articles 1(1) and 2 of the Convention.

[FN75] Inter-American Court of Human Rights, Case of Castillo Petruzzi et al. Judgment of May 30, 1999, paras. 205 to 208.

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155. The rest of the State's arguments are time-barred at this stage of the proceedings, as they make reference to the violation of the petitioners' rights to political participation on equal terms set forth in the American Convention (Articles 23 and 24) not having occurred, as all Chilean citizens have exercised their right to vote and to be elected, in conditions of equality, since 1988. The Commission reiterates in this respect its doctrine and case-law contained in this report. In effect, the right to vote and to be elected in equal conditions provided for in the American Convention is violated with respect to the victims in their capacity as Chilean citizens when they are not allowed to elect all the members of the Chilean Senate, nor to be nominated for election to all the posts in the Chilean Senate on an equal footing, and, to the contrary, under the current system, only certain Chilean citizens have exclusive, preponderant, and exclusionary access to that right, to the detriment of all other Chilean citizens. In any event, it can be shown by estoppel that the arguments of the Chilean State in its communication to the Commission openly contradict and are rejected by the very arguments used by Chilean Presidents Patricio Aylwin and Eduardo Frei, when they sent their proposals to amend the constitutional article in question (Article 45) to the Chilean Congress; these proposals included grounds based precisely on "principles" (not on reasons of "convenience"), such as "the effective and complete recovery of democracy," "the complete re-establishment of popular sovereignty," "the entirety of members of both Chambers be democratically elected."[FN76] It is precisely these principles of representative democracy and popular sovereignty that constitute the human right to vote and to be elected in equal conditions, i.e., without discrimination or exclusions that are unreasonable because they are illegitimate, enshrined in Articles 23 and 24 of the American Convention, as the Commission has determined in this report.

[FN76] See supra, para. 13.

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156. Furthermore, in its communication to the Commission, the Chilean State claims to present a generic justification for the institution of designated senators, making non-specific references--as they are imprecise--to other jurisdictions. The Commission observes that, apart from introducing elements alien to the case under analysis, regarding the mentions of countries most of which are not even members of the OAS, that argument of the Chilean State, in any event, has no basis whatsoever. In effect, the Commission has not made a generic and universal determination as to whether having designated senators is per se violative of the rights set forth in the Convention. The analysis and the conclusion reached by the Commission in the instant case are based on the elements and specific circumstances of fact and law contained in it. For example, one of the essential elements in reaching this determination, in the reasoning of the Commission, has been the fully bicameral nature of the Chilean Congress, and therefore of its Senate, which, as has been seen in the European system, has also been conclusive for making determinations as to the right to vote and to be elected in the legislative organs.

157. The Commission once again rejects the State's argument that the matter of designated senators is "political" and does not affect the human right to vote, based on all the case law developed prior to and in this case, according to which the Convention, in Article 23, enshrines the right to vote and to be elected in conditions of equality, which constitutes a justiciable human right essential for democracy and the rule of law. Democracy has evolved as a human right in itself that contains a form of political participation. In this sense, a renowned scholar and former chairman of the IACHR, Professor Michael Reisman, has argued that violations of the right to political participation are not secondary, as they are very serious human rights violations:

Popular government is an internationally prescribed human right.Article 21(3) of the Universal Declaration on Human Rights provides: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." [Therefore, when the right to democratic government is violated], all the other human rights that depend on the lawful institutions of government become matters for the discretion of the dictators.... Violations of the right to popular government are not secondary or less important. They are very, very serious human rights violations. (W. Michael Reisman. Humanitarian Intervention and Fledgling Democracies. 18 Fordham Int. L.J. 794, 795, 1995.)

158. Finally, the Commission takes note of what was expressed by the Chilean State in its communication regarding its purpose and its interest in bringing about the constitutional reform necessary for the composition of the Senate to reflect faithfully the citizen will and to be more in keeping with Chile's democratic traditions. This expression, by the State, coincides precisely with the recommendation made in this report by the Commission to the Chilean State. Consequently, the Commission values this expression of will and recognition, and hopes that it may be concretized in the State's timely compliance with its recommendation, so as to make reparation for the violations found.

VII. CONCLUSIONS

159. For the foregoing reasons, the Commission reiterates its conclusions, adopted in Report 78/99, that the Chilean State, by establishing what have been called designated senators and the senator-for-life, General Augusto Pinochet, at Article 45 of the Chilean Constitution, and its application by the authorities indicated, has violated the rights of 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, the victims in this case, to political participation and to equality without discrimination (Articles 23 and 24), enshrined in the American Convention; as well as their obligation to adapt the legal order to carry out its international commitments, so as to ensure the rights established by the Convention, pursuant to Article 2.

160. The Commission also reiterates its conclusions, contained in Report No. 78/99, that the Chilean State has failed to implement the provisions of Article 2 of the American Convention on Human Rights, as it has not adapted its legislation on amnesty to the provisions of said Convention.

VIII. RECOMMENDATIONS

Based on the foregoing analysis and conclusions

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES
THE FOLLOWING RECOMMENDATIONS TO THE CHILEAN STATE

161. That it adopt the measures necessary to bring its domestic legal order into line with the provisions of the American Convention, so as to guarantee fully, for all Chilean citizens, including the victims in this case, the exercise of the right to vote and to be elected in general conditions of equality, as set forth in Articles 23 and 24 of the American Convention, in respect of the composition of the Chilean Senate, as a bicameral legislative organ of popular representation of the Chilean Congress.

IX. PUBLICATION

162. On December 13, 1999, the IACHR forwarded Report No. 111/99 -- whose text is the foregoing -- to the Chilean State, in keeping with Article 51(2) of the American Convention, and gave it an additional 10 days to carry out the foregoing recommendations. On December 23, the State submitted to the IACHR a communication in which it reiterated several considerations that it had expressed during the processing of the case: it states its will to carry out the reforms needed for the composition of the Senate to reflect faithfully the citizen will and to be more in keeping with Chile's democratic traditions. Nonetheless, it states that neither the Executive nor the other organs of government can carry out the Commission's recommendations; and it states its opposition to the additional 10-day period granted by the IACHR at this new stage.

163. On referring to the recommendations formulated by the IACHR in Report No. 111/99, the State, among other things, indicated:

As has been explained in a previous response by the State to the IACHR, one finds that the Executive branch has repeatedly stated its will to amend the constitutional provision that establishes the so-called designated and life-tenure senators, and to this end it has submitted the corresponding proposed amendments. Nonetheless, it has not yet been possible to achieve this objective.... The State has repeatedly indicated that the communication of the petitioners is on the borderline of what should be understood to be an individual communication. In this regard, it is aware of the Commission's decision in its Report on Admissibility 95/96, but it highlights one fact which in itself calls for a more in-depth analysis. In effect, as indicated earlier, for the State the communication from the petitioners is a legal consultation on a point of constitutional law....

That the fact that the Senate includes senators who are not elected does not evidence, in itself, a denial of citizens' right to vote, as petitioners argue, but reflects, rather, a clearly political issue linked to the representation or over-representation of a certain group of senators in the Senate. Accordingly, it is a matter related to the domestic constitutional legislation of the State, that falls outside the sphere of individual communications established by the American Convention....

The IACHR's recommendation to "fully guarantee, for all Chilean citizens, including the victims in this case, the exercise of the right to vote and to be elected, in general conditions of equality, as set forth in Articles 23 and 24 of the American Convention," appears to be a redundancy, bearing in mind that the State has guaranteed access to the polls for all citizens in conditions of equality in every popular election that has taken place since 1988, i.e. since the period of democratic normality resumed. All Chilean citizens are able to vote and to elect their representatives, and no vote is privileged. It is another matter, as indicated previously, that in addition to the senators and deputies elected by suffrage, the Senate also includes senators not elected, through a procedure that is regulated in the Constitution. Accordingly, the acceptance or rejection of this procedure for designating senators and the composition of the Senate has to do with a political decision, more than a legal or human rights-related decision; and, that the right to vote is not violated by this composition of the Senate. It is, thus, a different situation....

No doubt the existence of unelected senators alters the political balance within the Senate, but it is far from being a human rights violation, in particular the right to vote set forth at Article 23 of the American Convention on Human Rights. The same situation could arise if some political force were predominant in the Senate. Nor could one argue in that case that such an imbalance affects the political rights of minorities....

That the mixed nature of the upper chamber in the Chilean legislature, made up of 38 elected senators and nine designated senators, is fully in line with the Constitutional power. In this respect, it should be noted that according to the Human Development Report prepared by the United Nations Development Program (UNDP) for this year, almost 50% of the countries included in the index on political life have designated senators in their respective Chambers (30 of 61); that of these 30 democracies, 17 have only designated senators, including democracies as solid as Canada, the United Kingdom, Germany, and the English-speaking Caribbean countries....

In this regard, as the Government as well as Commissioner Goldman have stated, it cannot reasonably be considered that the assignment of 20 percent of the seats in the upper chamber

constitutes a manifestly arbitrary situation that entails emptying of content or undermining the effectiveness of the principle of effective representation....

164. In keeping with Article 51(3) of the American Convention, in this procedural stage the Commission must evaluate whether the State has taken adequate measures to carry out the recommendations so as to remedy the situation examined, with respect to the violations established in its report presented for the second time to the State, pursuant to Article 51(2) of the Convention. In this regard, the IACHR finds that the State has not adopted the actions needed for carrying our the recommendations of this report. Furthermore, the information provided by the State does not reveal new facts or provide elements which--had they been provided in timely fashion and proper form--could have modified the analysis and conclusions of this report. In any event, the arguments of fact and of law provided by the parties during the processing of the case have already been sufficiently analyzed by the IACHR in Chapters V and VI of this report.

165. As for the 10-day term that the Chilean State cites as too brief for being able to carry out the Commission's recommendations, it should be noted that pursuant to Article 50 of the American Convention, the Commission forwarded to the State, on May 13, 1999, Report No. 78/99 regarding this case, and that since then more than six months have elapsed, without the State having carrying out the Commission's recommendations.

166. Finally, the Commission takes note once again of what the Chilean State expressed in its communication with respect to its purpose and interest in carrying out the constitutional reforms needed for the composition of the Senate to reflect faithfully the will of the citizens, and to be more in accordance with Chile's democratic traditions. This expression by the State coincides precisely with the recommendation made in this report by the Commission to the Chilean State. Consequently, the Commission reiterates that it values this expression of will and this acknowledgement, and hopes that it may be concretized in timely compliance with its recommendation, so as to make reparation for the violations established.

167. In view of the foregoing considerations, and of the provisions of Article 51(3) of the American Convention and Article 48 of the Commission's Regulations, the Commission decides to reiterate the conclusions and recommendations contained, respectively, in Chapters VII and VIII supra; to make public this report; and to include it in its Annual Report to the OAS General Assembly. The IACHR, pursuant to the provisions contained in the instruments that govern its mandate, will continue to evaluate the measures adopted by the Chilean State with respect to the recommendations, until they have been fully carried out by the State.

Done and signed by the Inter-American Commission on Human Rights, December 27, 1999. (Signed): Robert K. Goldman, Chairman; Hélio Bicudo, Second Vice-Chairman; Commissioners: Alvaro Tirado Mejía and Carlos Ayala Corao. Commissioner Robert K. Goldman reiterated his dissenting opinion, which is included immediately after this report.

DISSENTING OPINION BY COMMISSIONER ROBERT KOGOD GOLDMAN

1. I wish to begin the presentation of my grounds for dissenting by emphasizing that I subscribe to those aspects of the majority's decision that refer to the notion of representative

democracy as an essential core and fundamental basis for the protection and promotion of human rights in the inter-American system. There is no doubt that the domestic laws and practices of member states that uphold representative democracy are subject to the scrutiny of the Commission under the principle of the primacy of international law over domestic law. This scrutiny extends to both those laws and practices adopted under a democratic regime and those adopted by a de facto regime and which continue in force under democratic rule.[FN77]

[FN77] The Commission has jurisdiction to determine whether any provision or practice is incompatible with the Convention. In addition, it is called on to analyze, in light of the American Convention, the effects that any provision might have, independent of its genesis or origins, in determining whether its contents violate the Convention. See I/A Court H.R., Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights), Advisory Opinion OC-13/93, Annual Report 1993, para. 27.

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2. At the same time, it should be recalled that the protection provided by the standards of the inter-American system has been designed as a subsidiary mechanism, under which the primary responsibility for protecting human rights is vested in the member States. The supervisory organs of the system have the mandate to monitor and determine whether the way in which these states carry out this task in their respective jurisdictions is compatible with their international obligations.

3. This case has been examined by the majority in light of the scope of the obligation to respect and guarantee the political rights provided for in Article 23 of the American Convention, in conjunction with the right to equality before the law under Article 24 of the Convention. Article 23 sets forth the right to vote and be elected, and mandates that election laws provide for genuine and periodic elections, with universal suffrage and secret ballot, to guarantee free expression of the voters' will.[FN78] This provision does not, however, prescribe the specific type or modalities of elections through which the members of the legislative organs are chosen, such as proportional representation or a majority in one or two ballots.[FN79]

[FN78] See, in this regard, IACHR, Report Nº 1/90, Annual Report of the IACHR 1989-90, para. 45.

[FN79] The European Convention likewise does not provide for a specific form of election. See Van Dijk and Van Hoof, Theory and Practice of the European Convention on Human Rights, 1998, 657.

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4. Even though Article 23 assumes the existence of a government structure that is democratic and representative in nature, it does not stipulate a definitive model concerning how the state should be organized to institutionalize representative democracy in an ideal fashion, much less how the seats in the legislative branch should be distributed. Therefore, claims alleging the incompatibility of a particular institutional model with the principles underlying

Article 23 should be analyzed with special deference to the states parties, and the Commission must carefully consider whether it is appropriate to take a position regarding the advisability of a particular model. I believe that unless the institutional structure established by the state impedes the effective expression of the will of the citizens in a manifestly arbitrary manner, the Commission should in principle refrain from passing judgment on that structure's proximity to an ideal model, at least in the context of examining an individual case. In this regard, issues concerning the advisability of particular models of political participation more appropriately fall within the mandate of the Commission to promote human rights. Accordingly, the Commission can recommend specific measures to improve and strengthen such models in its country or special reports.

5. The Commission has previously demonstrated a certain degree of deference to state parties in interpreting Article 23. In Report 30/93, for example, the Commission found that Articles 23 and 32 of the Convention authorized Guatemala to establish certain limitations on the right to be elected, in light of the historical context which led to their adoption.[FN80] The European Court of Human Rights has likewise been amply deferential in its interpretation of the obligations arising from the right to vote and be elected under Article 3 of Protocol No. 1 to the European Convention on Human Rights, indicating that it will not interfere so long as the state measures in question do not restrict those rights to "such an extent as to impair [their] very essence and deprive [them] of [their] effectiveness."[FN81] Moreover, the European Court has acknowledged that electoral legislation differs from place to place and over time[FN82], and that all electoral systems should be evaluated in light of the political development of the country in question. Accordingly, the European Court has recognized that certain characteristics that are unacceptable in the context of a given system can be justified in another so long as the free expression of the voters' opinion is safeguarded in the election of the legislature.[FN83] In its view, states enjoy considerable latitude to adopt provisions regulating the status of legislators, including constitutional criteria for their disqualification.[FN84] These decisions reflect the fact that the absence of positive standards renders it difficult to determine at what point the operation of particular institutional structures violate certain expressly protected rights.[FN85] In this connection, the Human Rights Committee of the United Nations has also encountered serious difficulties evaluating respect for certain political rights which require determinations concerning the "reasonability" of certain structures of power that can only be analyzed in light of the context in which they were designed and in which the political system in question operates.[FN86]

[FN80] Report 30/93, Case of Ríos Montt, Annual Report of the IACHR 1993.

[FN81] Eur. Court HR, Case of Mathieu-Mohin and Clerfayt, Judgment of March 2, 1987, Series A Nº 113, para. 54; Eur. Court HR, Case of Gitonas et al. v. Greece, Judgment of July 1, 1997, para. 39. See also P. Van Dijk and G.J.H. Van Hoof, Theory and Practice of the European Convention on Human Rights (1998), p. 659- 660.

[FN82] Eur. Court HR, Case of Mathieu-Mohin and Clerfayt, id., para. 54.

[FN83] Id.

[FN84] Eur. Court HR, Case of Gitonas et al., id., para. 39.

[FN85] Nowak, Manfred, UN Covenant on Civil and Political Rights, CCPR Commentary (1993), p. 453-454.

[FN86] Id.

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6. In the instant case the majority has concluded that the State is responsible for violating the right to universal and equal suffrage set forth in Article 23(1)(c) in conjunction with Article 24 of the Convention because Chilean citizens have been impeded from voting for the "designated senators" and "senators for life",[FN87] which it characterizes as "unwarranted discrimination."[FN88] However, it does not appear from the petitioners' arguments in this case that they were impeded from voting or being elected, or forced to participate in the elections on an unequal footing with all other voters or candidates, in respect of 80 percent of the vacancies in the upper chamber of Chile's bicameral Congress. Rather, the petitioners allege that they were impeded from voting for and being elected to the remaining 20 percent of vacancies, and raise concerns regarding the possible effect of assigning Senate seats to the senators with life tenure (such as General Pinochet) and the so-called "designated" senators, as provided for in Article 45 of the Constitution.

[FN87] Decision of the majority, para. 112.
[FN88] Id., para. 116.

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7. Therefore, the petitioners' allegations do not fundamentally relate to the right to vote and to be elected, but rather to the advisability of automatically assigning 20 percent of the seats in the upper chamber of the legislature on the basis of certain criteria, mainly prior participation in public office. It should be noted that, apart from its origins and the processes undertaken to legitimize or de-legitimize it, the arrangement provided for in the Chilean Constitution is comparable to that found in several democratic systems in this hemisphere and elsewhere, and, like these, is the result of historical, social, and political factors.

8. Throughout history, states have developed different models for social comity and political participation that have provided particular accommodations for certain groups based on, for example, ethnic criteria or prior experience in governmental affairs. The political arrangements by which States have progressively structured their respective electoral systems and forms of political representation reflect highly complex historical, political, and social realities. I believe that judging the need, advisability, and purposes of these arrangements in a given historical context generally lies outside the purview of an international supervisory organ as they involve considerations that are eminently political in nature. It is the role of states, and not of this Commission, to make these kinds of delicate and complex determinations. Indeed, in a sense the principle according to which the international protection and promotion of human rights is subsidiary to the domestic protection and promotion mechanisms is an expression of these limitations.

9. Just as the Commission must avoid sitting as a fourth instance, or court of last resort, with respect to domestic judicial decisions, it should also avoid, insofar as is possible, assuming the role of a supraconstituent assembly of the states with a view to "perfecting" their political structures. Acting otherwise compromises the very integrity of the system for the protection of

human rights, an aim which, as the Inter-American Court has stated since its first cases, should guide the interpretation of the Convention.[FN89]

[FN89] I/A Court HR, In the Matter of Viviana Gallardo et al., Decision of November 13, 1981, Nº 101/81, Series A, para. 16.

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10. As has already been noted, the deference which in principle should be conceded in this area must not be absolute. The Commission has the authority to determine whether the mechanism of political representation adopted by a state party is manifestly arbitrary. The various factors that come into play with respect to an issue as complex as designing the legislative organs and ensuring their compatibility with the American Convention require a careful analysis of each particular case. I am of the view that in this case assigning 20 percent of the seats in the upper chamber, pursuant to the criteria set forth in Article 45 of the Chilean Constitution, cannot be considered to be manifestly arbitrary, since it does not appear to divest the principle of effective representation of any content, or deprive it of its effectiveness.

11. Finally, I am aware that the prominent role of a former dictator has a highly-charged symbolic value that has provoked and continues to provoke negative reactions, both in the Republic of Chile and abroad. It is a view that I personally share, as well as the hope that the Chilean people, themselves, will modify their constitutional structure, so that a former dictator – now senator for life— will not continue by his mere presence to discredit the legislative function and to offend numerous Chilean men and women whose rights were systematically violated by a brutal government. Nonetheless, moral reproach cannot, in and of itself, justify that an organ, such as the Commission, interfere with the prerogative reserved, in principle, to each state to design its own system of political representation, unless the arrangement adopted is manifestly arbitrary.

Done and signed by the Inter-American Commission on Human Rights, in the city of Washington, D.C. October 6, 1999.