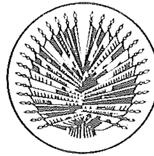
ORGANIZATION OF AMERICAN STATES
INTER-AMERICAN COURT ON HUMAN RIGHTS



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ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1984

GENERAL SECRETARIAT
ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C. 20006
1984

court

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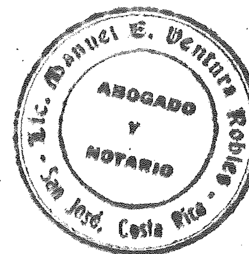


I. ORIGIN, STRUCTURE AND COMPETENCE OF THE COURT

A. Creation of the Court

The Inter-American Court of Human Rights was brought into being by the entry into force of the American Convention on Human Rights (Pact of San José, Costa Rica), which occurred on July 18, 1978 upon the deposit of the eleventh instrument of ratification by a member state of the Organization. The Convention had been drafted at the Specialized Inter-American Conference on Human Rights, which took place November 7-22, 1969 in San José, Costa Rica.

The two organs provided for under Article 33 of the Pact are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. They have competence on matters relating to the fulfillment of the commitments made by the States Parties to the Convention.

B. Organization of the Court

In accordance with the terms of its Statute, the Inter-American Court of Human Rights is an autonomous judicial institution which has its seat in San José, Costa Rica and whose purpose is the application and interpretation of the American Convention on Human Rights.

The Court consists of seven judges, nationals of the member states of the Organization of American States, who act in an individual capacity and are elected from among "jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the states of which they are nationals or the state that proposes them as candidates." (Article 52 of the Convention).

The judges serve for a term of six years. They are elected by an absolute majority vote of the States Parties to the Convention. The election is by secret ballot in a General Assembly of the Organization.

Upon entry into force of the Convention and pursuant to its Article 81, the Secretary General of the Organization requested the States Parties to the Convention to nominate candidates for the position of judge of the Court. In accordance with Article 53 of the Convention, each State Party may propose up to three candidates.

The judicial term runs from January 1 of the year in which a judge assumes office until December 31 of the year in which he completes his term. However, judges continue in office until the installation of their successors or to hear cases that are still pending. (Article 5 of the Statute).

Election of judges takes place, insofar as possible, at the OAS General Assembly immediately prior to the expiration of the term of the judges. In the case of vacancies on the Court caused by death, permanent disability, resignation or dismissal, an election is held at the next General Assembly. (Article 6).

In order to preserve a quorum of the Court, interim judges may be appointed by the States Parties. (Article 6.3).

In the event that one of the judges called upon to hear a case is the national of one of the States Parties to the case, the other States Parties to the case may appoint an *ad hoc* judge. If none of the States Parties to a case is represented on the Court, each may appoint an *ad hoc* judge. (Article 10).

The judges are at the disposal of the Court and, pursuant to the Rules of Procedure, meet in two regular sessions a year and in special sessions when convoked by the President or at the request of a majority of the judges. Although the judges are not required to reside at the seat of the Court, the President renders his services on a permanent basis. (Article 16 of the Statute and Articles 11 and 12 of the Rules of Procedure).

The President and Vice President are elected by the judges for a period of two years and they may be reelected. (Article 12 of the Statute).

There is a permanent commission composed of the President, Vice President and a judge named by the President. The Court may appoint other commissions for special matters. (Article 6 of the Rules of Procedure).

The Secretariat of the Court functions under the direction of the Secretary, who is elected by the Court.

C. Composition of the Court

The Court is composed of the following judges, in order of precedence:

Pedro A. Nikken (Venezuela), President
Thomas Buergenthal (United States), Vice President
Huntley Eugene Munroe (Jamaica)
Máximo Cisneros Sánchez (Peru)
Carlos Roberto Reina (Honduras)
Rodolfo Piza Escalante (Costa Rica)
Rafael Nieto Navia (Colombia)

The Secretary of the Court is Mr. Charles Moyer and the Deputy Secretary is Lic. Manuel E. Ventura.

D. Competence of the Court

The American Convention confers two distinct functions on the Inter-American Court of Human Rights. One involves the power to adjudicate disputes relating to charges that a State Party has violated the Convention. In performing this function, the Court exercises its so-called contentious jurisdiction. In addition, the Court also has power to interpret the Convention and certain other human rights treaties in proceedings in which it is not called upon to adjudicate a specific dispute. This is the Court's advisory jurisdiction.

1. The Court's contentious jurisdiction

The contentious jurisdiction of the Court is spelled out in Article 62 of the Convention, which reads as follows:

> 1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.
>
> 2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.
>
> 3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the states parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by special agreement.

As these provisions indicate, a State Party does not subject itself to the contentious jurisdiction of the Court by ratifying the Convention. Instead, the Court acquires that jurisdiction with regard to the state only when it has filed the special declaration referred to in paragraphs 1 and 2 of Article 62 or concluded the special agreement mentioned in paragraph 3. The special declaration may be made when a state ratifies the Convention or at any time thereafter; it may also be made for a specific case or a series

of cases. But since the states parties are free to accept the Court's jurisdiction at any time in a specific case or in general, a case need not be rejected _ipso facto_ when acceptance has not previously been granted, as it is possible to invite the state concerned to do so for that case.

A case may also be referred to the Court by special agreement. In speaking of the special agreement, Article 62.3 does not indicate who may conclude such an agreement. This is an issue that will have to be resolved by the Court.

In providing that "only the States Parties and the Commission shall have the right to submit a case to the Court," Article 61.1 does not give private parties standing to institute proceedings. Thus, an individual who has filed a complaint with the Commission cannot bring that case to the Court. This is not to say that a case arising out of an individual complaint cannot get to the Court; it may be referred to it by the Commission or a State Party, but not by the individual complainant.

The Convention, in Article 63.1, contains the following stipulation relating to the judgments that the Court may render:

> 1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

This provision indicates that the Court must decide whether there has been a breach of the Convention and, if so, what rights the injured party should be accorded. Moreover, the Court may also determine the steps that should be taken to remedy the breach and the amount of damages to which the injured party is entitled.

Paragraph 2 of Article 68 of the Convention exclusively concerns compensatory damages. It provides that the "part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state."

In addition to regular judgments, the Court also has the power to grant what might be described as temporary injunctions. The power is spelled out in Article 63.2 of the Convention, which reads as follows:

> In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such

> provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

This extraordinary remedy is available in two distinct circumstances: the first consists of cases pending before the Court and the second involves complaints being dealt with by the Commission that have not yet been referred to the Court for adjudication.

In the first category of cases, the request for the temporary injunction can be made at any time during the proceedings before the Court, including simultaneously with the filing of the case. Of course, before the requested relief may be granted, the Court must determine if it has the necessary jurisdiction.

The judgment rendered by the Court in any dispute submitted to it is "final and not subject to appeal." Moreover, the "States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties." (Articles 67 and 68 of the Convention).

Enforcements of judgments of the Court are ultimately for the General Assembly of the Organization. The Court submits a report on its work to each regular session of the Assembly, specifying the cases in which a state has not complied with the judgments and making any pertinent recommendations. (Article 65 of the Convention).

2. <u>The Court's Advisory Jurisdiction</u>

The jurisdiction of the Inter-American Court of Human Rights to render advisory opinions is set forth in Article 64 of the Convention, which reads as follows:

> 1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.
>
> 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instrument.

Standing to request an advisory opinion from the Court is not limited to the States Parties to the Convention; instead, any OAS Member State may ask for it as well as all OAS organs, including the Inter-American Commis-

sion on Human Rights, specialized bodies such as the Inter-American Commission of Women and the Inter-American Institute of Children, within their fields of competence. Secondly, the advisory opinion need not deal only with the interpretation of the Convention; it may also be founded on a request for an interpretation of any other treaty "concerning the protection of human rights in the American states."

As to the meaning and scope of this phrase, the Court, in response to a request of the Government of Peru, was of the opinion:

"Firstly: By unanimous vote, that the advisory jurisdiction of the Court can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have a right to become parties thereto.

Secondly: By unanimous vote, that, for specific reasons explained in a duly motivated decision, the Court may decline to comply with a request for an advisory opinion if it concludes that, due to the special circumstances of a particular case, to grant the request would exceed the limits of the Court's advisory jurisdiction for the following reasons, _inter alia_: because the issues raised deal mainly with international obligations assumed by a non-American State or with the structure or operation of international organs or bodies outside the inter-American system; or because granting the request might have the effect of altering or weakening the system established by the Convention in a manner detrimental to the individual human being."

(I/A Court H.R., "Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art.64 American Convention on Human Rights), Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1).

The Court's advisory jurisdiction power enhances the Organization's capacity to deal with complex legal issues arising under the Convention. Its advisory jurisdiction therefore extends to the political organs of the OAS in dealing with disputes involving human rights issues.

Finally, Article 64.2 permits OAS Member States to seek an opinion from the Court on the extent to which their domestic laws are compatible with the Convention or with any other "American" human rights treaty.

Under the provision, this jurisdiction also extends to pending legislation. Resort to this provision could contribute very significantly to the uniform application of the Convention by national tribunals.

3. Acceptance of the jurisdiction of the Court

In the period covered by this report, two States Parties, Ecuador and Argentina, recognized as binding the jurisdiction of the Court on all matters relating to the interpretation and application of the Convention. (Article 62.1 of the Convention). A total of six States Parties have now recognized the jurisdiction of the Court. They are Costa Rica, Perú, Venezuela, Honduras, Ecuador and Argentina.

It should be pointed out that, according to the provisions of Article 62, any State Party to the Convention may accept the jurisdiction of the Court in a specific case without recognizing it for all cases. Cases may also be submitted to the Court by special agreement between States Parties to the Convention.

A table showing the status of ratifications of the American Convention may be found at the end of this report. (Appendix IV).

E. Budget

The presentation of the budget of the Court is regulated by Article 72 of the American Convention which states that "the Court shall draw up its own budget and submit it for approval to the General Assembly through the General Secretariat. The latter may not introduce any changes in it." Pursuant to Article 26 of its Statute, the Court administers its own budget.

The General Assembly of the Organization, at its Thirteenth Regular Session, approved a budget for the Court of $305,800 for each of the years of the biennium 1984-85, thus maintaining the Court at its 1983 funding level.

F. Relations with other organs of the system and with regional and world-wide agencies of the same kind

The Court has close institutional ties with its sister organ of the American Convention, the Inter-American Commission on Human Rights. These ties have been solidified by a series of meetings between members of the two bodies. The Court also maintains cooperative relations with other OAS bodies working in the area of human rights, such as the Inter-American Commission

of Women and the Inter-American Juridical Committee. It has established especially strong ties with the European Court of Human Rights, which was established by the Council of Europe and exercises functions within the framework of that Organization comparable to those of the Inter-American Court. The Court also maintains relations with the pertinent bodies of the United Nations such as the Commission and Committee on Human Rights and the Office of the High Commissioner for Refugees.

II. ACTIVITIES OF THE COURT

A. Ninth Regular Session of the Court

The Court held its Ninth Regular Session September 1-9, 1983 at its seat in San José. All of the judges attended this meeting.

During this session the Court drafted an advisory opinion on the interpretation of the last sentence of Article 4(2) of the American Convention on Human Rights that deals with the application of the death penalty, which had been submitted by the Inter-American Commission on Human Rights.

The Court was of the opinion that "the Convention imposes an absolute prohibition on the extension of the death penalty, and that, consequently, the Government of a State Party cannot apply the death penalty to crimes for which such a penalty was not previously provided for under its domestic law." It was also of the opinion that "a reservation restricted by its own wording to Article 4(4) of the Convention does not allow the Government of a State Party to extend by subsequent legislation the application of the death penalty to crimes for which this penalty was not previously provided for."

The Court delivered this opinion, the text of which can be found in Appendix I, at a public reading that took place on September 9, 1983.

With respect to the request for an advisory opinion presented by the Government of Costa Rica regarding the compatibility of proposed amendments to the naturalization provisions of its Constitution with the American Convention, the Court held a public hearing on September 7, 1983 at which it heard the views of the following Costa Ricans: Francisco Sáenz Meza, President of the Supreme Electoral Tribunal; Carlos José Gutiérrez, Minister of Justice; Guillermo Malavassi, Deputy of the Legislative Assembly; Rafael Villegas, Director of the Civil Registry; and Luis Varela, representing the University of Costa Rica Law School.

On September 9, 1983, in a ceremony that took place in the Ministry of Foreign Affairs, the President of Costa Rica, Luis Alberto Monge, signed into law the Headquarters Agreement that sets forth, *inter alia*, the privileges and immunities of the Court and its judges.

During this session the Court adopted a final resolution on the case **In the Matter of Viviana Gallardo** *et al*. This case had been presented to the Court by the Government of Costa Rica in 1981 and had been subsequently forwarded to the Inter-American Commission by the Court in a decision taken on November 13, 1982. The resolution can be found in Appendix II of this report.

The Court also heard a report by the Executive Director of the Inter-American Institute of Human Rights on the activities of the Institute.

B. Thirteenth Regular Session of the OAS General Assembly

The Court was represented at the Thirteenth Regular Session of the General Assembly of the Organization, held November 14-18, 1983 in Washington, by its Permanent Commission.

President Nikken, in his report on the activities of the Court for the year 1983 to the Commission on Juridical and Political Matters of the Assembly, placed particular emphasis on the advisory opinion **Restrictions on the Death Penalty**, which had been rendered in September of that year. The text of this Advisory Opinion can be found in Appendix I of this report.

In its Resolution on the Annual Report of the Court (AG/RES.656 XIII-0/83), the Assembly resolved:

> 1. To express the appreciation of the Organization of American States for the work accomplished by the Inter-American Court of Human Rights as reflected in its Annual Report.
>
> 2. To urge all the member states of the OAS to ratify or accede to the American Convention on Human Rights.
>
> 3. To express its hope that all of the states that are parties to the American Convention on Human Rights will recognize the binding jurisdiction of the Court.
>
> 4. To express its trust that the measures required in order for the Court to comply fully with the functions attributed to it by the Convention will continue to be adopted.

The Assembly approved the budget of the Court for a biennium 1984-85. It was decided to maintain the Court at its 1983 level of funding, that is $305,800 per year.

The General Assembly also requested that the Court present its observations and recommendations on the Preliminary Draft Additional Protocol to the American Convention on Human Rights. The Draft Protocol deals with economic, social and cultural rights.

C. Tenth Regular Session of the Court

This session of the Court was held January 9-20, 1984 at its seat in San José. All of the judges attended except Judge Munroe, who was excused due to prior commitments.

This meeting was dedicated to the drafting of the advisory opinion requested by the Government of Costa Rica, under Article 64 (2) of the American Convention, on the compatibility of proposed amendments to the naturalization provisions of its Constitution with the American Convention.

On this matter, the Court was of the opinion:

As regards Article 20 of the Convention,

> By five votes to one
>
> That the proposed amendment to the Constitution, which is the subject of this request for an advisory opinion, does not affect the right to nationality guaranteed by Article 20 of the Convention.

As regards Articles 24 and 17(4) of the Convention,

> By unanimous vote
>
> That the provision stipulating preferential treatment in the acquisition of Costa Rican nationality through naturalization, which favors Central Americans, Ibero-Americans and Spaniards over other aliens, does not constitute discrimination contrary to the Convention.
>
> By five votes to one
>
> That it does not constitute discrimination contrary to the Convention to grant such preferential treatment only to those who are Central Americans, Ibero-Americans and Spaniards by birth.

By five votes to one

That the further requirements added by Article 15 of the proposed amendment for the acquisition of Costa Rican nationality through naturalization do not as such constitute discrimination contrary to the Convention.

By unanimous vote

That the provision stipulating preferential treatment in cases of naturalization applicable to marriage contained in Article 14(4) of the proposed amendment, which favors only one of the spouses, does constitute discrimination incompatible with Articles 17(4) and 24 of the Convention.

Dissenting:

Judge Buergenthal with regard to point 3.
Judge Piza Escalante with regard to points 1 and 4.

This opinion, the full text of which can be found in Appendix III of this report, was delivered at a public reading on January 19, 1984. After the reading, the public was invited to the unveiling of a portrait of Simón Bolívar, a gift of the Government of Venezuela in commemoration of the 200th anniversary of the birth of the Liberator. On this occasion, Ambassador Aquiles Certad, representing the Government of Venezuela, and Judge Nieto spoke.

The judges of the Court attended a meeting of the Council of the Inter-American Institute of Human Rights at which time Héctor Gros Espiell (Uruguay) was named the new Executive Director. Inasmuch as he will not be able to assume office until March of 1985, Sonia Picado, former Dean of the University of Costa Rica Law School, was named interim Director.

APPENDIX I

INTER-AMERICAN COURT OF HUMAN RIGHTS

ADVISORY OPINION OC-3/83
OF SEPTEMBER 8, 1983

RESTRICTIONS TO THE DEATH PENALTY
(ARTS. 4(2) AND 4(4) AMERICAN CONVENTION
ON HUMAN RIGHTS)

REQUESTED BY THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Present:

Pedro Nikken, President
Thomas Buergenthal, Vice President
Huntley Eugene Munroe, Judge
Máximo Cisneros, Judge
Carlos Roberto Reina, Judge
Rodolfo E. Piza E., Judge
Rafael Nieto Navia, Judge

Also present:

Charles Moyer, Secretary
Manuel Ventura, Deputy Secretary

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The Inter-American Commission on Human Rights (hereinafter "the Commission"), by telex dated April 15, 1983, communicated its decision to submit to the Inter-American Court of Human Rights (hereinafter "the Court") a request for an advisory opinion on the interpretation of the last sentence of Article 4(2) of the American Convention on Human Rights (hereinafter "the Convention"). The text of the request was received in the Secretariat of the Court on April 25, 1983.

2. By notes dated April 27 and May 12, 1983 the Secretariat, acting pursuant to Article 52 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), requested written observations on the different matters involved in the instant proceeding from the Member States of the Organization of American States (hereinafter "the OAS") as well as, through the Secretary General, from the organs referred to in Chapter X of the Charter of the OAS that might have an interest in the matter.

3. The President of the Court fixed July 1, 1983 as the deadline for the submission of written observations or other relevant documents.

4. Responses to the Secretariat's communications were received from the following States: Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, and Guatemala. In addition, the following OAS organs responded: the Permanent Council, the General Secretariat and the Inter-American Juridical Committee. A majority of the responses included substantive observations on the issues raised in the request. Even though the observations submitted by the Governments of Costa Rica, Ecuador and El Salvador were received in the Secretariat after the deadline fixed by the President, the Court decided to consider them and to include them in the file of the case, given the purpose that these observations have in advisory proceedings.

5. Furthermore, the following organizations submitted their points of view on the request as *amici curiae*: the International Human Rights Law Group & the Washington Office on Latin America; the Lawyers Committee for International Human Rights & the Americas Watch Committee; and the Institute

for Human Rights of the International Legal Studies Program at the University of Denver College of Law & the Urban Morgan Institute for Human Rights of the University of Cincinnati College of Law.

6. A public hearing was set for Tuesday, July 26, 1983, to enable the Court to hear, during its Third Special Session, the oral arguments of the Member States and the organs of the OAS bearing on the advisory opinion request and on the objections to the Court's jurisdiction filed by the Government of Guatemala.

7. At the public hearing, the Court heard from the following representatives:

For the Inter-American Commission on Human Rights:
Luis Demetrio Tinoco Castro, Delegate and First Vice President
Marco Gerardo Monroy Cabra, Delegate and Ex-President,

For Guatemala:
Edgar Sarceño Morgan, Agent and Vice-Minister of Foreign Affairs
Mario Marroquín Nájera, Adviser and Director General of the Ministry of Foreign Affairs,

For Costa Rica:
Carlos José Gutiérrez, Agent and Minister of Justice
Manuel Freer Jiménez, Adviser and Procurator of the Republic

I

STATEMENT OF THE ISSUES

8. Invoking Article 64(1) of the Convention, the Commission requested the Court, in communications of April 15 and 25, 1983, to render an advisory opinion on the following questions relating to the interpretation of Article 4 of the Convention:

1) May a government apply the death penalty for crimes for which the domestic legislation did not provide such punishment at the time the American Convention on Human Rights entered into force for said state?

2) May a government, on the basis of a reservation to Article 4(4) of the Convention made at the time of ratification, adopt subsequent to the entry into force of the Convention a law imposing the death penalty for crimes not subject to this sanction at the moment of ratification?

9. Article 4 of the Convention reads as follows:

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be reestablished in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

10. In its explanation of the considerations giving rise to the request, the Commission informed the Court of the existence of certain differences of opinion between it and the Government of Guatemala concerning the interpretation of the last sentence of Article 4(2) of the Convention as well as on the effect and scope of Guatemala's reservation to the fourth paragraph of that article. That reservation reads as follows:

> The Government of the Republic of Guatemala, ratifies the American Convention on Human Rights, signed in San José, Costa Rica, on the 22nd of November of 1969, making a reservation with regard to Article 4, paragraph 4 of the same, inasmuch as the Constitution of the Republic of Guatemala, in its Article 54, only excludes from the application of the death penalty, political crimes, but not common crimes related to political crimes.

The specific legal problem presented by the Comission is whether a reservation drafted in the aforementioned terms can be invoked by a State Party to permit it to impose the death penalty for crimes to which such penalty did not apply at the time of its ratification of the Convention. That is, in particular, whether this allegation can be invoked, as the Government of Guatemala did before the Commission, in order to justify the application of the death penalty to common crimes connected with political crimes to which that penalty did not previously apply. During the public hearing, the Delegates of the Commission stated that the problem that had arisen with respect to Guatemala's reservation had been referred to the Court as an example in order to highlight the underlying legal problem.

11. In a telex addressed to the President of the Court by the Minister of Foreign Affairs of Guatemala, which was received on April 19, 1983, the Government of Guatemala requested the Court to decline to render the requested opinion. The specific grounds upon which the Government based its plea are stated as follows:

> The Government of Guatemala respectfully requests the Honorable Inter-American Court of Human Rights to decline to render the advisory opinion requested by the Commission, since even if Article 64 of the Convention empowers the Commission, in general terms, to consult the Court on the interpretation of the Convention, the fact is that Article 62(3) of the Convention itself clearly states that:
>
>> The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

Since Guatemala has not declared, either upon depositing its instrument of ratification of the Convention or at any subsequent time, that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation of the Convention, as provided in Article 62(1), it is obvious that the Court must decline to render the advisory opinion requested by the Commission for lack of jurisdiction.

12. Following the receipt of this telex, the President of the Court, after consulting the Permanent Commission and acting in accordance with the Rules of Procedure, directed that the request of the Commission as well as the submissions of the Government of Guatemala regarding the jurisdiction of the Court be forwarded to the OAS Member States and OAS organs, inviting them to submit to the Court their views on the relevant issues.

13. By telex dated May 18, 1983, the Government of Guatemala challenged the legality of this decision, claiming that the Permanent Commission should have ruled the Commission's request inadmissible or, at the very least, that it should have separated the proceedings for dealing with the jurisdictional objections filed by Guatemala from the consideration of the merits, and that it should have decided the former as a preliminary question.

14. The President of the Court responded to the aforementioned communication by informing the Government of Guatemala that both he and the Permanent Commission lacked the power to dismiss requests for advisory opinions and that only the Plenary Court was competent to rule on the issues raised by Guatemala. The President further pointed out that the decision relating to the manner in which Guatemala's objection to the Court's jurisdiction should be dealt with was also reviewable by the latter.

II

PROCEDURAL MATTERS

15. The instant request raises a number of procedural issues that should be disposed of at the outset. Given the claim of the Government of Guatemala that the Permanent Commission did not accept Guatemala's views regarding various procedural points, the Court needs to consider the role that the Permanent Commission performs.

16. Article 6 of the Court's Rules of Procedure provides that "the Permanent Commission is composed of the President, Vice President and a third Judge named by the President. The Permanent Commission assists and advises the President in the exercise of his functions." This provision indicates that the Permanent Commission is an advisory body. As such, it lacks the power to rule on the jurisdiction of the Court and, in general, on the admissibility of contentious cases or requests for advisory opinion submitted to the Court by the States or organs referred to in Articles 62 and 64 of the Convention.

17. Furthermore, Article 44(1) of the Rules of Procedure declares that "the judgments, advisory opinions, and the interlocutory decisions that put an end to a case or proceedings, shall be decided by the Court." Decisions of this type must be adopted by the Court in plenary, that is to say, by the Court duly convoked and sitting in conformity with the quorum requirements laid down in Article 56 of the Convention, which provides that "five judges shall constitute a quorum for the transaction of business by the Court." It follows from these stipulations that the Permanent Commission lacked the power to act on Guatemala's plea that it dismiss the Comissions's advisory opinion request.

18. The Court concludes that both the President and the Permanent Commission acted within the scope of their authority when they transmitted Guatemala's objections to the Member States and OAS organs entitled to participate in advisory proceedings before the Court. In doing so, they acted in conformity with the general guidelines established by the Court for the handling of advisory opinions and the provisions of Articles 6(1) and 44(2) of the Rules of Procedure.

19. This conclusion does not suffice, however, to dismiss Guatemala's contention that its jurisdictional objections should not have been joined to the merits of the Commission's request. In addressing the latter issue, the Court notes that Article 25(2) of its Statute, adopted by the OAS General Assembly, reads as follows:

> The Rules of Procedure may delegate to the President or to Committees of the Court authority to carry out certain parts of the legal proceedings with the exception of issuing final rulings or advisory opinions. Rulings or decisions issued by the President or the Committees of the Court that are not purely procedural in nature may be appealed before the full Court.

This provision permits a challenge to any decisions, be they those of the President or of the Permanent Commission, "that are not purely procedural in nature." Regardless of its applicability to the instant proceedings, the Court will examine the matter *motu propio*, because the issue it raises is one that has not been previously ruled upon by this Court and because it is likely to arise in the future.

20. The question whether an objection to the exercise of the jurisdiction of the Court should be joined to the proceedings on the merits or should be considered separately as a preliminary question can come up in the context of contentious cases or of advisory opinions.

21. In contentious cases the exercise of the Court's jurisdiction ordinarily depends upon a preliminary and basic question, involving the State's acceptance of or consent to such jurisdiction. If the consent has been given, the States which participate in the proceedings become, technically speaking, parties to the proceedings and are bound to comply with the resulting decision of the Court. [Convention, Article 68(1).] By the same token, the Court cannot exercise its jurisdiction where such consent has not been given. It would make no sense, therefore, to examine the merits of the case without first establishing whether the parties involved have accepted the Court's jurisdiction.

22. None of these considerations is present in advisory proceedings. There are no parties in the sense that there are no complainants and respondents; no State is required to defend itself against formal charges, for the proceeding does not contemplate formal charges; no judicial sanctions are envisaged and none can be decreed. All the proceeding is designed to do is to enable OAS Member States and OAS organs to obtain a judicial interpretation of a provision embodied in the Convention or other human rights treaties in the American states.

23. As the Court will demonstrate in this opinion, [see paragraphs 31 *et seq.*, *infra*.] there is nothing in the Convention that would justify the extension of the jurisdictional preconditions applicable to the Court's contentious jurisdiction to the exercise of its advisory functions. On the contrary, it is quite clear that the exercise of the Court's advisory jurisdiction is subject to its own prerequisites which relate to the identity and legal capacity of the entities having standing to seek the opinion, that is, OAS Member States and OAS organs acting "within their spheres of competence." It follows that none of the considerations, which would require the Court in contentious cases to hear the jurisdictional objections in separate proceedings, is present as a general rule when the Court is asked to render an advisory opinion.

24. The Court recognizes, of course, that a State's interest might be affected in one way or another by an interpretation rendered in an advisory opinion. For example, an advisory opinion might either weaken or strengthen a State's legal position in a current or future controversy. The legitimate interests of a State in the outcome of an advisory opinion proceeding are adequately protected, however, by the opportunity accorded it under the Rules of Procedure of the Court to participate fully in those proceedings and to make known to the Court its views regarding the legal norms to be interpreted and any jurisdictional objections it might have. [Rules of Procedure, Article 52.]

25. The delay that would result, moreover, from the preliminary examination of jurisdictional objections in advisory proceedings would seriously impair the purpose and utility of the advisory power that Article 64 confers on the Court. In fact, it is not unreasonable to assume that when an OAS organ requests an opinion, it does so in order to obtain the Court's assistance and guidance to enable it to fulfill its mission within the inter-American system. As one eminent Latin American jurist has noted, "a request for an advisory opinion normally implies a postponement of a decision on the merits by the requesting organ until the answer has been received." [Eduardo Jiménez de Arêchaga, "The Amendments to the Rules of Procedure of the International Court of Justice," 67 Am.J.Int'l L. 1, at 9 (1973).] The need to avoid such delays has prompted the International Court of Justice, for example, to adopt an amendment to its Rules of Court, which is designed to permit that tribunal to accelerate the consideration of requests for advisory opinions. [See I.C.J., Rules of Court, Article 103.] Another amendment of the Rules of Court, in force since 1972, which requires the Hague Court in contentious cases to consider objections to its jurisdiction prior to dealing with the merits has not been applied to advisory opinions. [I.C.J., Rules of Court, Article 79. See, e.g., Western Sahara, 1975 I.C.J. 12.]

26. The promptness with which a request for an advisory opinion is complied with is linked closely to the purpose which this function of the Court performs within the system established by the Convention. It would make little sense for the Member States and organs of the OAS to make such a request and, pending the reply, to suspend consideration of the matter referred to the Court if the Court's response were unnecessarily delayed. This would be true, in particular, in situations such as the one now before the Court, which involves an advisory opinion request that refers to Article 4 of the Convention and concerns the right to life.

27. The Court notes, furthermore, that in the instant matter it has before it a request by an OAS organ expressly identified as such in Chapter X of

the OAS Charter, whose competence to deal with the issues raised in its request admit of no reasonable doubt, and which organ seeks an answer to a purely legal question involving the interpretation of the Convention. The Court is not being asked to resolve any disputed factual issue. The objection of Guatemala to the Court's jurisdiction to deal with the request also involves an interpretation of the Convention and raises no question of fact. The only consequence flowing from the decision to join the jurisdictional objections with the merits is that the interested States or organs have to present their legal arguments on both issues at the same time. Guatemala had the opportunity and was invited to address both issues, but in its written submission and at the public hearing, it dealt only with the questions bearing on the jurisdiction of the Court. In doing so, and remembering that the Court is here dealing with an advisory opinion and not a contentious case, Guatemala was in no different position than any other OAS Member State which was invited but failed to avail itself of the opportunity to address the merits of the Commission's request.

28. These conclusions are based on the premise that the Court is here dealing with a request for an advisory opinion. Doubts might arise therefore with regard to the soundness of these conclusions if it appeared that these proceedings were instituted to disguise a contentious case or, more generally, if there were circumstances present here that would alter the advisory functions of the Court. But even if this were so, these issues could not be analyzed fully as a rule without examining the merits of the questions submitted to the Court, which would once again require the Court to look at all of the elements of the request as a whole. Although it is true that in some such situation the Court might ultimately have to decline to respond to the advisory opinion request, that fact does not weaken or invalidate the foregoing conclusions about the manner in which the proceedings should be conducted.

29. The Court finds, accordingly, that there is no valid basis for overruling the decision to merge the proceedings and to consider the jurisdictional objection and merits of the request in one and the same hearing.

III

OBJECTIONS TO THE JURISDICTION OF THE COURT

30. The Court can now turn to the jurisdictional objections advanced by the Government of Guatemala. It contends that, although Article 64(1) of

the Convention and Article 19(d) of the Statute of the Commission authorize the latter to seek an advisory opinion from the Court regarding the interpretation of any article of the Convention, if that opinion were to concern a given State directly as it does Guatemala in the present case, the Court could not render the opinion unless the State in question has accepted the tribunal's jurisdiction pursuant to Article 62(1) of the Convention. The Government of Guatemala argues accordingly that because of the form in which the Commission submitted the present advisory opinion request, linking it to an existing dispute between Guatemala and the Commission regarding the meaning of certain provisions of Article 4 of the Convention, the Court should decline to exercise its jurisdiction.

31. The Convention distinguishes very clearly between two types of proceedings: so-called adjudicatory or contentious cases and advisory opinions. The former are governed by the provisions of Articles 61, 62 and 63 of the Convention; the latter by Article 64. This distinction is also reflected in the provisions of Article 2 of the Statute of the Court, which reads as follows:

Article 2. Jurisdiction

The Court shall exercise adjudicatory and advisory jurisdiction:

1. Its adjudicatory jurisdiction shall be governed by the provisions of Articles 61, 62 and 63 of the Convention, and

2. Its advisory jurisdiction shall be governed by the provisions of Article 64 of the Convention.

32. In contentious proceedings, the Court must not only interpret the applicable norms, determine the truth of the acts denounced and decide whether they are a violation of the Convention imputable to a State Party; it may also rule "that the injured party be ensured the enjoyment of his right or freedom that was violated." [Convention, Article 63(1).] The States Parties to such proceeding are, moreover, legally bound to comply with the decisions of the Court in contentious cases. [Convention, Article 68(1).] On the other hand, in advisory opinion proceedings the Court does not exercise any fact-finding functions; instead, it is called upon to render opinions interpreting legal norms. Here the Court fulfills a consultative function through opinions that "lack the same binding force that attaches to decisions in contentious cases." [I/A Court H.R., "Other treaties" Subject to the Advisory Jurisdiction of the Court (Art.64 American Convention on Human Rights), Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 51; cf. Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950, p.65.]

33. The provisions applicable to contentious cases differ very significantly from those of Article 64, which govern advisory opinions. Thus, for example, Article 61(2) speaks of "case" and declares that "in order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 to 50 shall have been completed." (Emphasis added.) These procedures apply exclusively to "a petition or communication alleging violation of any of the rights protected by this Convention." [Convention, Article 48(1).] Here the word "case" is used in its technical sense to describe a contentious case within the meaning of the Convention, that is, a dispute arising as a result of a claim initiated by an individual (Article 44) or State Party (Article 45), charging that a State Party has violated the human rights guaranteed by the Convention.

34. One encounters the same technical use of the word "case" in connection with the question as to who may initiate a contentious case before the Court, which contrasts with those provisions of the Convention that deal with the same issue in the consultative area. Article 61(1) provides that "only States Parties and the Commission shall have a right to submit a case to the Court." On the other hand, not only "States Parties and the Commission," but also all of the "Member States of the Organization" and the "organs listed in Chapter X of the Organization of American States" may request advisory opinions from the Court. [Convention, Article 64(1).] There is yet another difference with respect to the subject matter that the Court might consider. While Article 62(1) refers to "all matters relating to the interpretation and application of this Convention," Article 64 authorizes advisory opinions relating not only to the interpretation of the Convention but also to "other treaties concerning the protection of human rights in the American states." It is obvious, therefore, that what is involved here are very different matters, and that there is no reason in principle to apply the requirements contained in Articles 61, 62 and 63 to the consultative function of the Court, which is spelled out in Article 64.

35. Article 62(3) of the Convention -the provision Guatemala claims governs the application of Article 64- reads as follows:

> The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement. (Emphasis added.)

It is impossible to read this provision without concluding that it, as does Article 61, uses the words "case" and "cases" in their technical sense.

36. The Court has already indicated that situations might arise when it would deem itself compelled to decline to comply with a request for an advisory opinion. In Other Treaties, [supra 32] the Court acknowledged that resort to the advisory opinion route might in certain situations inter- fere with the proper functioning of the system of protection spelled out in the Convention or that it might adversely affect the interests of the victim of human rights violations. The Court addressed this problem in the following terms:

> The advisory jurisdiction of the Court is closely related to the purposes of the Convention. This jurisdiction is intended to assist the American States in fulfilling their international human rights obligations and to assist the different organs of the inter-American system to carry out the functions assigned to them in this field. It is obvious that any request for an advisory opinion which has another purpose would weaken the system established by the Convention and would distort the advisory jurisdiction of the Court. [Ibid., para. 25.]

37. The instant request of the Commission does not fall within the category of advisory opinion requests that need to be rejected on those grounds because nothing in it can be deemed to interfere with the proper functioning of the system or might be deemed to have an adverse effect on the interests of a victim. The Court has merely been asked to interpret a provision of the Convention in order to assist the Commission in the discharge of the obligations it has as an OAS Charter organ "to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters." [OAS Charter, Article 112.]

38. The powers conferred on the Commission require it to apply the Convention or other human rights treaties. In order to discharge fully its obligations, the Commission may find it necessary or appropriate to consult the Court regarding the meaning of certain provisions whether or not at the given moment in time there exists a difference between a Government and the Commission concerning an interpretation, which might justify the request for an advisory opinion. If the Commission were to be barred from seeking an advisory opinion merely because one or more governments are involved in a controversy with the Commission over the interpretation of a disputed provision, the Commission would seldom, if ever, be able to avail itself of the

Court's advisory jurisdiction. Not only would this be true of the Commission, but the OAS General Assembly, for example, would be in a similar position were it to seek an advisory opinion from the Court in the course of the Assembly's consideration of a draft resolution calling on a Member State to comply with its international human rights obligations.

39. The right to seek advisory opinions under Article 64 was conferred on OAS organs for requests falling "within their spheres of competence." This suggests that the right was also conferred to assist with the resolution of disputed legal issues arising in the context of the activities of an organ, be it the Assembly, the Commission, or any of the others referred to in Chapter X of the OAS Charter. It is clear, therefore, that the mere fact that there exists a dispute between the Commission and the Government of Guatemala regarding the meaning of Article 4 of the Convention does not justify the Court to decline to exercise its advisory jurisdiction in the instant proceeding.

40. This conclusion of the Court finds ample support in the jurisprudence of the International Court of Justice. That tribunal has consistently rejected requests that it decline to exercise its advisory jurisdiction in situations in which it was alleged that because the issue involved was in dispute the Court was being asked to decide a disguised contentious case. [See, e.g., Interpretation of Peace Treaties, supra 32; Reservations to the Convention on Genocide, Advisory Opinion I.C.J. Reports 1951, p. 15; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion I.C.J. Reports 1971, p. 16; Western Sahara, supra 25.] In doing so, the Hague Court has acknowledged that the advisory opinion might affect the interests of States which have not consented to its contentious jurisdiction and which are not willing to litigate the matter. The critical question has always been whether the requesting organ has a legitimate interest to obtain the opinion for the purpose of guiding its future actions. [Western Sahara, supra 25, p. 27.]

41. The Commission, as an organ charged with the responsability of recommending measures designed to promote the observance and protection of human rights, [OAS Charter, Article 112; Convention, Article 41; Statute of the Commission, Articles 1 and 18] has a legitimate institutional interest in the interpretation of Article 4 of the Convention. The mere fact that this provision may also have been invoked before the Commission in petitions and communications filed under Articles 44 and 45 of the Convention does not affect this conclusion. Given the nature of advisory opinions, the opinion of the Court in interpreting Article 4 cannot be deemed to be an adjudication of those petitions and communications.

42. In The Effect of Reservations on the Entry into Force of the American Convention (Arts.74 and 75), [I/A Court H.R., Advisory Opinion OC-2/82 of September 24, 1982 Series A. No. 2] this Court examined in considerable detail the requirements applicable to OAS organs requesting advisory opinions under Article 64. The Court there explained that Article 64, in limiting the right of OAS organs to advisory opinions falling "within their spheres of competence," meant to restrict the opinions "to issues in which such entities have a legitimate institutional interest." [Ibid., para. 14.] After examining Article 112 and Chapter X of the OAS Charter, as well as the relevant provisions of the Statute of the Commission and the Convention itself, the Court concluded that the Commission enjoys, in general, a pervasive legitimate institutional interest in questions bearing on the promotion and protection of human rights in the inter-American system, which could be deemed to confer on it, as a practical matter, "an absolute right to request advisory opinions within the framework of Article 64(1) of the Convention." [Ibid., para. 16.] Viewed in this light, the instant request certainly concerns an issue in which the Commission has a legitimate institutional interest.

43. The advisory jurisdiction conferred on the Court by Article 64 of the Convention is unique in contemporary international law. As this Court already had occasion to explain, neither the International Court of Justice nor the European Court of Human Rights has been granted the extensive advisory jurisdiction which the Convention confers on the Inter-American Court. [Other Treaties, supra 32, paras. 15 and 16.] Here it is relevant merely to emphasize that the Convention, by permitting Member States and OAS organs to seek advisory opinions, creates a parallel system to that provided for under Article 62 and offers an alternate judicial method of a consultative nature, which is designed to assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process. It would therefore be inconsistent with the object and purpose of the Convention and the relevant individual provisions, to adopt an interpretation of Article 64 that would apply to it the jurisdictional requirements of Article 62 and thus rob it of its intended utility merely because of the possible existence of a dispute regarding the meaning of the provision at issue in the request.

44. Article 49(2)(b) of the Rules of Procedure requires that each request for an advisory opinion by an OAS organ "shall indicate the provisions to be interpreted, how the consultation relates to its sphere of competence, the considerations giving rise to the consultation, and the name and address of its delegates." The requirement of a description of "the considerations

giving rise to the consultation" is designed to provide the Court with an understanding of the factual and legal context which prompted the presentation of the question. Compliance with this requirement is of vital importance as a rule in enabling the Court to respond in a meaningful manner to the request. Courts called upon to render advisory opinions impose this requirement for reasons that have been explained as follows by the International Court of Justice:

> [A] rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part. Accordingly, if a question put in the hypothetical way in which it is posed in the request is to receive a pertinent and effectual reply, the Court must first ascertain the meaning and full implications of the question in the light of the actual framework of fact and law in which it falls for consideration. Otherwise its reply to the question may be incomplete and, in consequence, ineffectual and even misleading as to the pertinent legal rules actually governing the matter under consideration by the requesting organization. The Court will therefore begin by setting out the pertinent elements of fact and of law which, in its view, constitute the context in which the meaning and implications of the ... question posed in the request have to be ascertained. [Interpretation of the Agreement of 25 March 1951 between WHO and Egypt, 1980 I.C.J. 73 at 76.]

Thus, merely because the Commission, under the heading of "Considerations giving rise to the consultation," has described for the Court a set of circumstances indicating that there exist differences concerning the interpretation of some provisions of Article 4 of the Convention, it certainly does not follow that the Commission has violated the Rules of Procedure or that it has abused the powers conferred on it as an organ authorized to request advisory opinions. The same conclusion is even more valid when the issue presented calls for the interpretation of a reservation, considering how difficult it is to respond with precision to a question that relates to a reservation and which is formulated in the abstract.

45. The fact that this legal dispute bears on the scope of a reservation made by a State Party in no way detracts from the preceding conclusions. Under the Vienna Convention on the Law of Treaties (hereinafter cited as "the Vienna Convention"), incorporated by reference into the Convention by its Article 75, a reservation is defined as any "unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting,

approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." [Article 2(d).] The effect of a reservation, according to the Vienna Convention, is to modify with regard to the State making it the provisions of the treaty to which the reservation refers to the extent of the reservation. [Article 21(1).] Although the provisions concerning reciprocity with respect to reservations are not fully applicable to a human rights treaty such as the Convention, it is clear that reservations become a part of the treaty itself. It is consequently impossible to interpret the treaty correctly, with respect to the reserving State, without interpreting the reservation itself. The Court concludes, therefore, that the power granted it under Article 64 of the Convention to render advisory opinions interpreting the Convention or other treaties concerning the protection of human rights in the American states of necessity also encompasses jurisdiction to interpret the reservations attached to those instruments.

46. Having addressed and disposed of the relevant preliminary issues, the Court is now in a position to deal with the questions submitted to it by the Commission.

IV

MEANING AND INTERPRETATION OF THE TEXTS

47. The questions formulated by the Commission present a number of more general issues which need to be explored. In the first place, in order to interpret Article 4(2) of the Convention, it is necessary to determine within what context that treaty envisages the application of the death penalty, which in turn calls for the interpretation of Article 4 as a whole. In the second place, it is also necessary to determine what general principles apply to the interpretation of a reservation which, although authorized by the Convention, nevertheless restricts or weakens the system of protection established by that instrument. Finally, it is necessary to resolve the specific hypothetical question that has been submitted to the Court.

48. The manner in which the request for the advisory opinion has been framed reveals the need to ascertain the meaning and scope of Article 4 of the Convention, especially paragraphs 2 and 4, and to determine whether these provisions might be interrelated. To this end, the Court will apply

the rules of interpretation set out in the Vienna Convention, which may be deemed to state the relevant international law principles applicable to this subject.

49. These rules specify that treaties must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." [Article 31(1), Vienna Convention.] Supplementary means of interpretation, especially the preparatory work of the treaty, may be used to confirm the meaning resulting from the application of the foregoing provisions, or when it leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. [Ibid., Article 32.]

50. This method of interpretation respects the principle of the primacy of the text, that is, the application of objective criteria of interpretation. In the case of human rights treaties, moreover, objective criteria of interpretation that look to the texts themselves are more appropriate than subjective criteria that seek to ascertain only the intent of the Parties. This is so because human rights treaties, as the Court has already noted, "are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States"; rather "their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States." [The Effect of Reservations, supra 42, para. 29.]

51. An analysis of the system of death penalties permitted within certain limits by Article 4, raises questions about the extent to which the enjoyment and the exercise of the rights and liberties guaranteed by the Convention may be restricted. It also raises questions about the scope and meaning of the application of such restrictions. Here the principles derived from Articles 29(a) and 30 of the Convention are of particular relevance. Those articles read as follows:

Article 29. Restrictions Regarding Interpretation

No provision of this Convention shall be interpreted as:

a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;

b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;

c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or

d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

Article 30. Scope of Restrictions

The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general inter- est and in accordance with the purpose for which such restrictions have been established.

52. The purpose of Article 4 of the Convention is to protect the right to life. But this article, after proclaiming the objective in general terms in its first paragraph, devotes the next five paragraphs to the application of the death penalty. The text of the article as a whole reveals a clear tendency to restrict the scope of this penalty both as far as its imposition and its application are concerned.

53. The subject is governed by a substantive principle laid down in the first paragraph, which proclaims that "every person has the right to have his life respected," and by the procedural principle that "no one shall be arbitrarily deprived of his life." Moreover, in countries which have not abolished the death penalty, it may not be imposed except "pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime." [Article 4(2).] The fact that these guarantees are envisaged in addition to those stipulated in Articles 8 and 9 clearly indicates that the Convention sought to define narrowly the conditions under which the application of the death penalty would not violate the Convention in those countries that had not abolished it.

54. The Convention imposes another set of restrictions that apply to the different types of crimes punishable by the death penalty. Thus, while the death penalty may be imposed only for the most serious crimes [Article 4(2)], its application to political offenses or related common crimes is prohibited in absolute terms. [Article 4(4).] The fact that the Convention limits the imposition of the death penalty to the most serious of common crimes not related to political offenses indicates that it was designed to

be applied in truly exceptional circumstances only. Moreover, viewed in relation to the condemned individual, the Convention prohibits the imposition of the death penalty on those who, at the time the crime was committed, were under 18 or over 70 years of age; it may also not be applied to pregnant women. [Article 4(5).]

55. Thus, three types of limitations can be seen to be applicable to States Parties which have not abolished the death penalty. First, the imposition or application of this sanction is subject to certain procedural requirements whose compliance must be strictly observed and reviewed. Second, the application of the death penalty must be limited to the most serious common crimes not related to political offenses. Finally, certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account.

56. The tendency to restrict the application of the death penalty, which is reflected in Article 4 of the Convention, is even clearer and more apparent when viewed in yet another light. Thus, under Article 4(2), _in fine_, "the application of such punishment shall not be extended to crimes to which it does not presently apply." Article 4(3) declares, moreover, that "the death penalty shall not be reestablished in states that have abolished it." Here it is no longer a question of imposing strict conditions on the exceptional application or execution of the death penalty, but rather of establishing a cut off as far as the penalty is concerned and doing so by means of a progressive and irreversible process applicable to countries which have not decided to abolish the death penalty altogether as well as to those countries which have done so. Although in the one case the Convention does not abolish the death penalty, it does forbid extending its application and imposition to crimes for which it did not previously apply. In this manner any expansion of the list of offenses subject to the death penalty has been prevented. In the second case, the reestablishment of the death penalty for any type of offense whatsoever is absolutely prohibited, with the result that a decision by a State Party to the Convention to abolish the death penalty, whenever made, becomes, _ipso jure_, a final and irrevocable decision.

57. On this entire subject, the Convention adopts an approach that is clearly incremental in character. That is, without going so far as to abolish the death penalty, the Convention imposes restrictions designed to delimit strictly its application and scope, in order to reduce the application of the penalty to bring about its gradual disappearance.

58. The preparatory work of the Convention confirms the meaning to be derived from the literal interpretation of Article 4. Thus, although the proposal of various delegations that the death penalty be totally abolished

did not carry because it failed to receive the requisite number of votes in its favor, not one vote was cast against the motion. [See generally, Conferencia Especializada Interamericana sobre Derechos Humanos, San José, Costa Rica, 7-22 Noviembre de 1969, Actas y Documentos, OEA/Ser.K/XVI/1.2, Washington, D.C. 1973 (hereinafter cited as Actas y Documentos), repr. 1978, esp. pp. 161, 295-296 and 440-441.] The prevailing attitude, and clearly the majority view in the Conference, is reflected in the following declaration, submitted to the Final Plenary Session by fourteen of the nineteen delegations present at the Conference (Costa Rica, Uruguay, Colombia, Ecuador, El Salvador, Panama, Honduras, the Dominican Republic, Guatemala, Mexico, Venezuela, Nicaragua, Argentina, and Paraguay):

> The undersigned Delegations, participants in the Specialized Inter-American Conference on Human Rights, in response to the majority sentiment expressed in the course of the debates on the prohibition of the death penalty, in agreement with the most pure humanistic traditions of our peoples, solemnly declare our firm hope of seeing the application of the death penalty eradicated from the American environment as of the present and our unwavering goal of making all possible efforts so that, in a short time, an additional protocol to the American Convention on Human Rights -Pact of San José, Costa Rica- may consecrate the final abolition of the death penalty and place America once again in the vanguard of the defense of the fundamental rights of man. [Actas y Documentos, supra, p.467.]

This view is borne out by the observations of the Rapporteur of Committee I who noted that in this article "the Committee registered its firm belief in the suppression of the death penalty." [Actas y Documentos, supra, p.296.]

59. It follows that, in interpreting the last sentence of Article 4(2) "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose," [Vienna Convention, Art. 31(1)] there cannot be the slightest doubt that Article 4(2) contains an absolute prohibition that no State Party may apply the death penalty to crimes for which it was not provided previously under the domestic law of that State. No provision of the Convention can be relied upon to give a different meaning to the very clear text of Article 4(2), in fine. The only way to achieve a different result would be by means of a timely reservation designed to exclude in some fashion the application of the aforementioned provision in relation to the State making the reservation. Such a reservation, of course, would have to be compatible with the object and purpose of the treaty.

V

RESERVATIONS TO THE AMERICAN CONVENTION ON HUMAN RIGHTS

60. Article 75 of the Convention declares that it is subject to reservations only in conformity with the provisions of the Vienna Convention. As this Court has already stated, the reference to Article 75

> ...makes sense only if it is understood as an express authorization designed to enable States to make whatever reservations they deem appropriate, provided the reservations are not incompatible with the object and purpose of the treaty. As such, they can be said to be governed by Article 20(1) of the Vienna Convention and, consequently, do not require acceptance by any other State Party. [The Effect of Reservations, supra 42, par. 35.]

61. Consequently, the first question which arises when interpreting a reservation is whether it is compatible with the object and purpose of the treaty. Article 27 of the Convention allows the States Parties to suspend, in time of war, public danger, or other emergency that threatens their independence or security, the obligations they assumed by ratifying the Convention, provided that in doing so they do not suspend or derogate from certain basic or essential rights, among them the right to life guaranteed by Article 4. It would follow therefrom that a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it. The situation would be different if the reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose. Since the reservation referred to by the Commission in its submission does not appear to be of a type that is designed to deny the right to life as such, the Court concludes that to that extent it can be considered, in principle, as not being incompatible with the object and purpose of the Convention.

62. Reservations have the effect of excluding or modifying the provisions of a treaty and they become an integral part thereof as between the reserving State and any other States for whom they are in force. Therefore, without dealing anew with the question of reciprocity as it relates to reservations which, moreover, is not fully applicable as far as human rights treaties are concerned, it must be concluded that any meaningful interpretation of a treaty also calls for an interpretation of any reservation

made thereto. Reservations must of necessity therefore also be interpreted by reference to relevant principles of general international law and the special rules set out in the Convention itself.

63. It follows that a reservation must be interpreted by examining its text in accordance with the ordinary meaning which must be attributed to the terms in which it has been formulated within the general context of the treaty of which the reservation forms an integral part. This approach must be followed except when the resultant interpretation would leave the meaning ambiguous or obscure or would lead to a result which is manifestly absurd or unreasonable. A contrary approach might ultimately lead to the conclusion that the State is the sole arbiter of the extent of its international obligations on all matters to which its reservation relates, including even all such matters which the State might subsequently declare that it intended the reservation to cover.

64. The latter result cannot be squared with the Vienna Convention, which provides that a reservation can be made only when signing, ratifying, accepting, approving or acceding to a treaty. [Vienna Convention, Article 19.] Thus, without excluding the possibility that supplementary means of interpretation might, in exceptional circumstances, be resorted to, the interpretation of reservations must be guided by the primacy of the text. A different approach would make it extremely difficult for other States Parties to understand the precise meaning of the reservation.

65. In interpreting reservations, account must be taken of the object and purpose of the relevant treaty which, in the case of the Convention involves the "protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States." [<u>The Effect of Reservations</u>, <u>supra</u> 42, para. 29.] The purpose of the Convention imposes real limits on the effect that reservations attached to it can have. If reservations to the Convention, to be permissible, must be compatible with the object and purpose of the treaty, it follows that these reservations will have to be interpreted in a manner that is most consistent with that object and purpose.

66. The Court concludes, furthermore, that since a reservation becomes an integral part of the treaty, the reservation must also be interpreted by reference to the principles set out in Article 29 of the Convention. Thus, consistent with the considerations that have been noted above, the Court is of the view that the application of paragraph a) of Article 29 compels the conclusion that a reservation may not be interpreted so as to limit the enjoyment and exercise of the rights and liberties recognized in the Convention to a greater extent than is provided for in the reservation itself.

VI

INTERPRETATION OF A RESERVATION TO ARTICLE 4(4)

67. Keeping the preceding considerations in mind and in view of the fact that a clear answer to the first question submitted by the Commission is provided by the text of Article 4(2) of the Convention, the Court can now proceed to an examination of the second question. It reads as follows: "2) May a government, on the basis of a reservation to Article 4(4) of the Convention made at the time of ratification, adopt subsequent to the entry into force of the Convention a law imposing the death penalty for crimes not subject to this sanction at the moment of ratification?" In other words, may a State that has made a reservation to Article 4(4) of the Convention, which article prohibits the application of the death penalty to common crimes related to political offenses, validly assert that the reservation extends by implication to Article 4(2) and invoke the reservation for the purpose of applying the death penalty to crimes to which that penalty did not previously apply notwithstanding the prohibition contained in Article 4(2)? The difficulties that might have arisen if one sought to answer this question in the abstract disappeared once the Commission called the Court's attention to the text of Guatemala's reservation. The Court will therefore analyze the question by reference to that reservation, which it will have to examine in some detail.

68. In relating Article 4(4) to Article 4(2), the Court finds that each provision, in its context, is perfectly clear and that each has a different meaning. Thus, while Article 4(2) imposes a definite prohibition on the death penalty for all categories of offenses as far as the future is concerned, Article 4(4) bans it for political offenses and related common crimes. The latter provision obviously refers to those offenses which prior thereto were subject to capital punishment, since for the future the prohibition set forth in paragraph 2 would have been sufficient. The Court is here therefore dealing with two rules having clearly different purposes: while Article 4(4) is designed to abolish the penalty for certain offenses, Article 4(2) seeks to bar any extension of its use in the future. In other words, above and beyond the prohibition contained in Article 4(2), which deals with the extension of the application of capital punishment, Article 4(4) adds a further prohibition that bars the application of the death penalty to political offenses related to common crimes even if such offenses were previously punished by that penalty.

69. Accordingly, given the context of the Commission's request, what is the effect of a reservation to Article 4(4) of the Convention? In answering

this question, it must be remembered above all, that a State reserves no more than what is contained in the text of the reservation itself. Since the reservation may go no further than to exempt the reserving State from the prohibition of applying the death penalty to political offenses or related crimes, it is apparent that all other provisions of the article remain applicable and in full force for the reserving State.

70. Furthermore, if Article 4, whose second paragraph clearly establishes an absolute prohibition on the extension of the death penalty in the future, is examined as a whole, it becomes clear that the only subject reserved is the right to continue the application of the death penalty to political offenses or related common crimes to which that penalty applied previously. It follows that a State which has not made a reservation to paragraph 2 is bound by the prohibition not to apply the death penalty to new offenses, be they political offenses, related common crimes or mere common crimes. On the other hand, a reservation made to paragraph 2, but not to paragraph 4, would permit the reserving State to punish new offenses with the death penalty in the future provided, however, that the offenses in question are mere common crimes not related to political offenses. This is so because the prohibition contained in paragraph 4, with regard to which no reservation was made, would continue to apply to political offenses and related common crimes.

71. The Court does not believe, moreover, that it can be reasonably argued that a reservation to Article 4(4) can be extended to encompass Article 4(2) on the grounds that the reservation relating to the prohibition of the death penalty for political offenses and related common crimes would make no sense if it were inapplicable to new offenses not previously punished with that penalty. Such a reservation does in fact have a purpose and meaning standing alone; it permits the reserving State to avoid violating the Convention if it desires to continue to apply the death penalty to common crimes related to political offenses, which penalty existed at the time the Convention entered into force for that State. The Court having established, moreover, that the aforementioned provisions of Article 4 apply to different issues, [see paragraph 68, *supra*] there is no reason for assuming either as a matter of logic or law that a State which, when ratifying the Convention, made a reservation to one provision, was in reality attaching a reservation to both provisions.

72. The foregoing conclusions apply, in general, to the reservation made by Guatemala when it ratified the Convention. The reservation is based solely on the fact that "the Constitution of the Republic of Guatemala, in its Article 54, only excludes from the application of the death penalty, political crimes, but not common crimes related to political crimes." This

explanation merely refers to a reality of domestic law. The reservation does not suggest that the Constitution of Guatemala requires the application of the death penalty to common crimes related to political offenses, but rather that it does not prohibit the application of the death penalty to such crimes. Guatemala was, therefore, not debarred from making a more extensive commitment on the international plane.

73. Since the reservation modifies or excludes the legal effects of the provision to which it is made, the best way to demonstrate the effect of the modification is to read the provision as it has been modified. The substantive part of the reservation "only excludes political crimes from the application of the death penalty, but not common crimes related to political crimes." It is clear and neither ambiguous nor obscure, and it does not lead to a result that is absurd or unreasonable applying the ordinary meaning to the terms to read the article as modified by the reservation as follows: "4(4) In no case shall capital punishment be inflicted for political offenses," thus excluding the related common crimes from the political offenses that were reserved. No other modification of the Convention can be derived from this reservation, nor can a State claim that the reservation permits it to extend the death penalty to new crimes or that it is a reservation also to Article 4(2).

74. It follows that if the Guatemalan reservation is interpreted in accordance with the ordinary meaning to be given to its terms, within the general context of the Convention and taking into account its object and purpose, one has to conclude that in making the reservation, what Guatemala did was to indicate that it was unwilling to assume any commitment other than the one already provided for by its Constitution. The Court finds that in its reservation Guatemala failed to manifest its unequivocal rejection of the provision to which it attached a reservation. Although this fact does not transform the reservation into one that is unique in character, it does at the very least reinforce the view that the reservation should be narrowly interpreted.

75. The instant opinion of the Court refers of course not only to the reservation of Guatemala but also to any other reservation of a like nature.

76. Now, therefore,

THE COURT

1. Unanimously, rejects the request of the Government of Guatemala that it abstain from rendering the advisory opinion requested by the Commission;

2. unanimously, finds that it has the jurisdiction to render this advisory opinion; and

3. as regards the questions contained in the request for an advisory opinion presented by the Commission on the interpretation of Articles 4(2) and 4(4) of the Convention,

IS OF THE OPINION:

a) In reply to the question

1) May a government apply the death penalty for crimes for which the domestic legislation did not provide such punishment at the time the American Convention on Human Rights entered into force for said state?

By a unanimous vote

that the Convention imposes an absolute prohibition on the extension of the death penalty and that, consequently, the Government of a State Party cannot apply the death penalty to crimes for which such a penalty was not previously provided for under its domestic law, and

b) In reply to the question

2) May a government, on the basis of a reservation to Article 4(4) of the Convention made at the time of ratification, adopt subsequent to the entry into force of the Convention a law imposing the death penalty for crimes not subject to this sanction at the moment of ratification?

By a unanimous vote

that a reservation restricted by its own wording to Article 4(4) of the Convention does not allow the Government of a State Party to extend by subsequent legislation the application of the death penalty to crimes for which this penalty was not previously provided for.

Done in Spanish and English, the Spanish text being authentic, at the seat of the Court in San Jose, Costa Rica, this eighth day of September, 1983.

PEDRO NIKKEN
PRESIDENT

THOMAS BUERGENTHAL

HUNTLEY EUGENE MUNROE

MAXIMO CISNEROS

CARLOS ROBERTO REINA

RODOLFO E. PIZA E.

RAFAEL NIETO NAVIA

CHARLES MOYER
SECRETARY

Judges Reina and Piza presented separate votes.

APPENDIX II

GOVERNMENT OF COSTA RICA (IN THE MATTER OF VIVIANA GALLARDO *ET AL.*)

No. G 101/81

ORDER OF SEPTEMBER 8, 1983

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

WHEREAS:

1. On November 13, 1981 this Court adopted a Resolution, which read as follows:

> 1. *Decides*, unanimously, not to admit the application of the Government of Costa Rica, requesting the Court to examine the case of Viviana Gallardo *et al.*;
>
> 2. *Decides*, unanimously, to grant the subsidiary plea of the Government of Costa Rica and to refer the matter to the Inter-American Commission on Human Rights;
>
> 3. *Decides*, unanimously, to retain the application of the Government of Costa Rica on its docket pending the proceedings of the Commission.

2. On June 30, 1983 the Inter-American Commission on Human Rights adopted a resolution, the relevant parts of which are set out below:

> 1. Article 48, paragraph 1, clause c) of the American Convention on Human Rights relating to the procedure established for the processing of individual communications notes that the Commission may declare the petition or communication inadmissible or out of order on the basis of information or evidence subsequently received.
>
> 2. Article 32, clauses b) and c) of the Regulations of the Commission states that it is necessary in advance to decide on other questions related to the admissibility of the petition or its manifest inadmissibility based on the record or submission of the parties and whether grounds for the petition exist or subsist and, if not, to order the file closed.

3. From the evidence subsequently received by the Commission, in particular, the replies submitted to it for consideration by the Government of Costa Rica; the study of letter No. 034-81 from the Office of the Procurator General of the Nation; the formal inquiry request presented by the fiscal agent of San Jose; the sentences handed down in the case against José Manuel Bolaños for the crimes of qualified homicide, aggravated assault and simple assault of Viviana Gallardo, Alejandra Bonilla Leiva and Magaly Salazar Nassar; and the investigation conducted by the Director of Judicial Investigations, it is clear that the Government of Costa Rica acted in conformity with current legal provisions and punished with full force of the law the person responsible for the acts charged.

4. In view of the foregoing, the petition advanced is manifestly out of order since the grounds that led to its introduction no longer subsist, as required by Article 48, paragraph 1, clause c) of the Pact of San Jose and Articles 32 b) and c) of the Regulations of the Inter-American Commission on Human Rights.

5. The institutional system for the protection of human rights established in the Convention for the processing of petitions or communications, within the limits set for it, and to which the States Parties have voluntarily agreed to abide, operates, except in cases specifically provided for in the Convention itself, in lieu of the domestic legal system, in accordance with generally recognized principles of international law.

RESOLVES:

1. To declare inadmissible the petition made in the present matter, under the terms of Article 48, paragraph 1, clause c) of the American Convention on Human Rights.

2. To communicate this Resolution to the Government of Costa Rica and to the Inter-American Court of Human Rights.

3. To close the file on this matter, as provided for in Article 32(c) of the Regulations of the Inter-American Commission on Human Rights.

4. To include this Resolution in its Annual Report to the General Assembly in accordance with the terms of Article 52(g) of the Regulations of the Commission.

AND WHEREAS:

The reasons given on which the Resolution of the Inter-American Commission on Human Rights is based lead to the conclusion that, the Commission having rendered its decision in the manner set forth, there is no reason, under Articles 61(2) and 48-50 of the Convention for the case to remain on the docket of the Court.

NOW, THEREFORE, RESOLVES BY A DECISION OF SIX VOTES TO ONE:

1. To strike from its docket the case "In the Matter of Viviana Gallardo *et al*." (No. G 101/81.)

2. To close the file on this matter.

3. To communicate this Resolution to the Government of Costa Rica and to the Inter-American Commission on Human Rights.

Nothing in this order is to be understood as being intended to affect the right of any interested individual from resorting to any and all remedies that the laws of Costa Rica may provide.

Done in English and Spanish, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this eighth day of September, 1983.

PEDRO NIKKEN
PRESIDENT

THOMAS BUERGENTHAL — HUNTLEY EUGENE MUNROE

MAXIMO CISNEROS — CARLOS ROBERTO REINA

R. E. PIZA E. — RAFAEL NIETO NAVIA

CHARLES MOYER
SECRETARY

Judge Rodolfo E. Piza E. presented a dissenting opinion.

APPENDIX III

(Translation)

INTER-AMERICAN COURT OF HUMAN RIGHTS

ADVISORY OPINION OC-4/84
OF JANUARY 19, 1984

PROPOSED AMENDMENTS TO THE NATURALIZATION PROVISIONS OF THE CONSTITUTION OF COSTA RICA

REQUESTED BY THE GOVERNMENT OF COSTA RICA

Present:

Pedro Nikken, President
Thomas Buergenthal, Vice President
Máximo Cisneros, Judge
Carlos Roberto Reina, Judge
Rodolfo E. Piza E., Judge
Rafael Nieto Navia, Judge

Also present: Charles Moyer, Secretary
Manuel Ventura, Deputy Secretary

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. In a telegram dated June 28, 1983, received that same day at the Inter-American Court of Human Rights (hereinafter "the Court"), the Executive Secretariat of the Permanent Committee on Legal Affairs of the Legislative Assembly of the Republic of Costa Rica reported that the Special Committee set up to study certain proposed amendments to Articles 14 and 15 of the Constitution (hereinafter "the Constitution") of that country had decided to seek an advisory opinion from the Court on the proposed constitutional amendments.

2. By document No. 1588-84 SGOI-PE, dated July 21, 1983 and received at the Court one day later, the Vice-Minister of Foreign Affairs of Costa Rica expressed his Government's desire to obtain the opinion of the Court relating to the above-mentioned proposed amendments. With his communication to the Court, the Vice-Minister enclosed the present text of Articles 14 and 15 of the Constitution, the text of the proposed amendments, and the opinion of the Special Legislative Committee that had reviewed these amendments.

3. By a communication dated August 8, 1983, signed by the Minister of Justice and received at the Court on August 9, the Government of Costa Rica (hereinafter "the Government") made a formal request for the aforementioned advisory opinion, conforming it to the rules governing the advisory proceedings of the Court and, in particular, to the provisions of Article 51 of the Rules of Procedure.

4. In accordance with the decision made by the Court at its Third Special Session, held from July 25 to August 5, 1983, the Secretary of the Court invited certain Costa Rican juridical institutions to present their views on the instant request and any other information or relevant documents by September 1, 1983. The designated institutions were selected by the Court in consultation with the Government of Costa Rica.

5. During the Ninth Regular Session, the President of the Court fixed the date of the public hearing for September 7, 1983, in order to hear the views of the Government's Agent as well as those of the institutions that had indicated their desire to participate in the hearing.

226. At the public hearing, the following representatives presented oral arguments to the Court:

Carlos José Gutiérrez, Agent and Minister of Justice,

Francisco Sáenz Meza, President of the Supreme Electoral Tribunal,

Guillermo Malavassi, Member of the Legislative Assembly,

Rafael Villegas, Director of the Civil Registry, and

Luis Varela, Representative of the Faculty of Law of the University of Costa Rica.

I

STATEMENT OF THE ISSUES

7. The relevant parts of the Government's request for an advisory opinion read as follows:

II. PROVISIONS TO BE ANALIZED IN THE DETERMINATION OF COMPATIBILITY

...

a) Domestic legislation:

1) Present text of Articles 14 and 15 of the Constitution of Costa Rica:

ARTICLE 14. By Naturalization

The following are Costa Ricans by naturalization:

1) Those who have acquired this status by virtue of former laws;

2) Nationals of the other countries of Central America, who are of good conduct, who have resided at least one year in the republic, and who declare before the civil registrar their intention to be Costa Ricans;

3) Native-born Spaniards and Ibero-Americans who obtain the appropriate certificate from the civil registrar, provided they have been domiciled in the country during the two years prior to application;

4) Central Americans, Spaniards and Ibero-Americans who are not native-born, and other foreigners who have been domiciled in Costa Rica for a minimum period of five years immediately preceding their application for naturalization, in accordance with the requirements of the law;

5) A foreign woman who by marriage to a Costa Rican loses her nationality or who indicates her desire to become a Costa Rican;

6) Anyone who receives honorary nationality from the Legislative Assembly.

ARTICLE 15. Requirements for Naturalization; the Concept of Domicile

Anyone who applies for naturalization must give evidence in advance of good conduct, must show that he has a known occupation or means of livelihood, and must promise to reside in the republic regularly.

For purposes of naturalization, domicile implies residence and stable and effective connection with the national community, in accordance with regulations established by law.

2) AMENDMENTS PROPOSED by the Special Committee of the Legislative Assembly in its Opinion of June 22, 1983.

ARTICLE 14. The following are Costa Ricans by naturalization:

1) Those who have acquired this status by virtue of previous laws;

2) Native-born nationals of the other countries of Central America, Spaniards and Ibero-Americans with five years official residence in the country and who fulfill the other requirements of the law;

3) Central Americans, Spaniards and Ibero-Americans, who are not native-born, and other foreigners who have held official residence for a minimum period of seven years and who fulfill the other requirements of the law;

4) A foreign woman who by marriage to a Costa Rican loses her nationality or who, after two years of marriage and the same period of residency in the country, indicates her desire to take on our nationality; and

5) Anyone who receives honorary nationality from the Legislative Assembly.

ARTICLE 15.- Anyone who applies for naturalization must give evidence in advance of good conduct, must show that he has a known occupation or means of livelihood, and must know how to speak, write and read the Spanish language. The applicant shall submit to a comprehensive examination on the history of the country and its values and shall, at the same time, promise to reside within the national territory regularly and swear to respect the constitutional order of the Republic.

The requirements and procedures for applications of naturalization shall be established by law.

3) MOTION OF AMENDMENT to Article 14(4) of the Constitution presented by the Deputies of the Special Committee:

A foreigner who by marriage to a Costa Rican loses his or her nationality and who, after two years of marriage and the same period of residence in the country, indicates his or her desire to take on the nationality of the spouse.

b) <u>Articles of the Convention</u>

The abovementioned legal texts should be compared to the following articles of the American Convention on Human Rights in order to determine their compatibility:

Article 17. Rights of the Family

Paragraph 4. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.

Article 20. Right to Nationality.

1. Every person has the right to a nationality.

2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.

3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

Article 24. Right to Equal Protection

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

III. SPECIFIC QUESTIONS ON WHICH THE OPINION OF THE COURT IS SOUGHT

In accordance with the request originally made by the Special Committee to study amendments to Articles 14 and 15 of the Constitution, the Government of Costa Rica requests that the Court determine:

a) Whether the proposed amendments are compatible with the aforementioned provisions of the American Convention on Human Rights.

Specifically, within the context of the preceding question, the following questions should be answered:

b) Is the right of every person to a nationality, stipulated in Article 20(1) of the Convention, affected in any way by the Proposed amendments to Articles 14 and 15 of the Constitution?

c) Is the proposed amendment to Article 14(4), according to the text proposed in the Opinion of the Special Committee, compatible with Article 17(4) of the Convention with respect to equality between spouses?

d) Is the text of the motion of the Deputies found in their opinion to amend this same paragraph compatible with Article 20(1) of the Convention?

II

ADMISSIBILITY

8. This advisory opinion has been requested by the Government pursuant to Article 64(2) of the American Convention on Human Rights (hereinafter "the Convention"). The Court's opinion is sought concerning the compatibility of certain proposed amendments to the Constitution with various provisions of the Convention.

9. Article 64 of the Convention reads as follows:

(1) The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties

concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in a like manner consult the Court.

(2) The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

10. Costa Rica, being a Member State of the Organization of American States (hereinafter "the OAS"), has standing to request an advisory opinion under Article 64(2) of the Convention.

11. It should be noted that the instant request was initially referred to the Court by a Committee of the Legislative Assembly, which is not one of the governmental entities empowered to speak for Costa Rica on the international plane. Only when the Minister of Foreign Affairs formally filed the request, followed by the communication of the Minister of Justice supplying relevant information bearing on it, did the Court become seized of the matter now before it.

12. The instant request, being the first to be referred to the Court under Article 64(2), raises a number of issues bearing on its admissibility that have not been previously considered by the Court.

13. Since the instant request does not relate as such to laws in force but deals instead with proposed amendments to the Constitution, it should be asked whether the reference in Article 64(2) to "domestic laws" includes constitutional provisions and whether the proposed legislation comes within the scope of the Courts advisory jurisdiction under that article of the Convention.

14. The answer to the first question admits of no doubt: whenever an international agreement speaks of "domestic laws" without in any way qualifying that phrase, either expressly or by virtue of its context, the reference must be deemed to be to all national legislation and legal norms of whatsoever nature, including provisions of the national constitution.

15. The answer to the second question is more difficult. The request does not seek an advisory opinion referring to a domestic law in force; it involves a legislative proposal for a constitutional amendment which has not as yet been adopted by the Legislative Assembly, although it has been admitted for debate by the latter and was approved by the appropriate Committee.

16. It should be borne in mind that under Article 64(1) the Court would have jurisdiction to render an advisory opinion requested by a Member State of the OAS on the question of whether a proposed law is compatible with the

Convention. Although it is true that in this context the request would be formulated in a different manner, it could nevertheless involve an issue identical in character to the one that is envisaged under Article 64(2).

17. The only major difference between opinions dealt with under Article 64(1) and those falling under Article 64(2) is one of procedure. Under Article 52 of the Rules of Procedure, advisory opinions filed under Article 64(2) of the Convention are not _ipso facto_ subject to the system of notices that applies to Article 64(1) opinions. Instead, in dealing with requests under Article 64(2), the Court enjoys broad discretion to fix, on a case by case basis, the procedures to be followed, it being quite likely that the requested opinion, by its very nature, can properly be resolved without seeking views other than those of the applicant state.

18. Any attempt to interpret Article 64(2) as referring exclusively to laws in force, that is, to laws that have passed through all the required stages resulting in their enactment, would have the effect of preventing states from seeking advisory opinions from the Court relating to draft legislation. This would mean that states would be compelled to complete all steps prescribed by domestic law for the enactment of a law before being able to seek the opinion of the Court regarding the compatibility of that law with the Convention or with other treaties concerning the protection of human rights in the American states.

19. It should also be kept in mind that the advisory jurisdiction of the Court was established by Article 64 to enable it "to perform a service for all of the members of the inter-American system and is designed to assist them in fulfilling their international human rights obligations" [I/A Court H.R., _"Other treaties" Subject to the Advisory Jurisdiction of the Court (Art.64 American Convention on Human Rights)_, Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 39.] Moreover, as the Court noted elsewhere, its advisory jurisdiction "is designed to assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process." [I/A Court H.R., _Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)_, Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 43.]

20. Article 29 of the Convention contains the following specific rules applicable to questions of interpretation:

Article 29. Restrictions Regarding Interpretation

No provision of this Convention shall be interpreted as:

a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;

b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;

c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or

d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

This provision was designed specifically to ensure that it would in no case be interpreted to permit the denial or restriction of fundamental human rights and liberties, particularly those rights that have already been recognized by the State.

21. This Court has determined, moreover, that "the rules of interpretation set out in the Vienna Convention [on the Law of Treaties]...may be deemed to state the relevant international law principles applicable to this subject." [Restrictions to the Death Penalty, supra 19, para. 48.]

22. In determining whether the proposed legislation to which the request relates may form the basis of an advisory opinion under Article 64(2), the Court must therefore interpret the Convention "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." [Vienna Convention on the Law of Treaties, Article 31(1); Restrictions to the Death Penalty, supra 19, para. 49.]

23. It follows that the "ordinary meaning" of terms cannot of itself become the sole rule, for it must always be considered within its context and, in particular, in the light of the object and purpose of the treaty. In its Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations, the International Court of Justice declared that "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur" [Competence of the General Assembly for the Admission of a State to the United Nations. Advisory Opinion, I.C.J. Reports 1950, page 8], which of necessity includes the object and purpose as expressed in some way in the context.

24. The Court has held [Restrictions to the Death Penalty, supra 19, para. 47] in dealing with reservations, but this argument is equally valid when applied to the articles of the Convention, that the interpretation to be adopted may not lead to a result that "weakens the system of protection

established by [the Convention]," bearing in mind the fact that the purpose and aim of that instrument is "the protection of the basic rights of individual human beings" [I/A Court H.R., The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts.74 and 75), Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 29].

25. In this context, the Court concludes that its advisory function, as embodied in the system for the protection of basic rights, is as extensive as may be required to safeguard such rights, limited only by the restrictions that the Convention itself imposes. That is to say, just as Article 2 of the Convention requires the States Parties to "adopt...such legislative or other measures as may be necessary to give effect to [the] rights and freedoms" of the individual, the Court's advisory function must also be viewed as being broad enough in scope to give effect to these rights and freedoms.

26. Thus, if the Court were to decline to hear a government's request for an advisory opinion because it concerned "proposed laws" and not laws duly promulgated and in force, this might in some cases have the consequence of forcing a government desiring the Court's opinion to violate the Convention by the formal adoption and possibly even application of the legislative measure, which steps would then be deemed to permit the appeal to the Court. Such a requirement would not "give effect" to the objectives of the Convention, for it does not advance the protection of the individual's basic human rights and freedoms.

27. Experience indicates, moreover, that once a law has been promulgated, a very substantial amount of time is likely to elapse before it can be repealed or annulled, even when it has been determined to violate the state's international obligations.

28. Keeping the above considerations in mind, the Court concludes that a restrictive reading of Article 64(2), which would permit states to request advisory opinions under that provision only in relation to laws already in force, would unduly limit the advisory function of the Court.

29. The foregoing conclusion is not to be understood to mean that the Court has to assume jurisdiction to deal with any and all draft laws or proposals for legislative action. It only means that the mere fact that a legislative proposal is not as yet in force does not *ipso facto* deprive the Court of jurisdiction to deal with a request for an advisory opinion relating to it. As the Court has already had occasion to note, "its advisory jurisdiction is permissive in character [and]...empowers the Court to decide whether the circumstances of a request for an advisory opinion justify a decision rejecting the request" ["Other Treaties," *supra* 19, para. 28. See also "Restrictions to the Death Penalty," *supra* 19, para. 36].

30. In deciding whether to admit or reject advisory opinion requests relating to legislative proposals as distinguished from laws in force, the Court must carefully scrutinize the request to determine, inter alia, whether its purpose is to assist the requesting state to better comply with its international human rights obligations. To this end, the Court will have to exercise great care to ensure that its advisory jurisdiction in such instances is not resorted to in order to affect the outcome of the domestic legislative process for narrow partisan political ends. The Court, in other words, must avoid becoming embroiled in domestic political squabbles, which could affect the role which the Convention assigns to it. In the instant case which, moreover, is without precedent in that it involves a government's request for the review by an international court of a proposed constitutional amendment, the Court finds no reason whatsoever to decline complying with the advisory opinion request.

III

ISSUES RELATING TO THE RIGHT TO NATIONALITY

31. The questions posed by the Government involve two sets of general legal problems which the Court will examine separately. There is, first, an issue related to the right to nationality established by Article 20 of the Convention. A second set of questions involves issues of possible discrimination prohibited by the Convention.

32. It is generally accepted today that nationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual's legal capacity. Thus, despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manners in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights.

33. The classic doctrinal position, which viewed nationality as an attribute granted by the state to its subjects, has gradually evolved to the point that nationality is today perceived as involving the jurisdiction of the state as well as human rights issues. This has been recognized in a regional instrument, the American Declaration of the Rights and Duties of Man of May 2, 1948 (hereinafter "the American Declaration"), whose Article 19 reads as follows:

> Every person has the right to the nationality which he is entitled by law and to change it, if he so wishes, for the nationality of any other country that is willing to grant it to him.

Another instrument, the Universal Declaration of Human Rights (hereinafter "the Universal Declaration"), approved by the United Nations on December 10, 1948, provides the following in its Article 15:

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

34. The right of every human being to a nationality has been recognized as such by international law. Two aspects of this right are reflected in Article 20 of the Convention: first, the right to a nationality established therein provides the individual with a minimal measure of legal protection in international relations through the link his nationality establishes between him and the state in question; and, second, the protection therein accorded the individual against the arbitrary deprivation of his nationality, without which he would be deprived for all practical purposes of all of his political rights as well as of those civil rights that are tied to the nationality of the individual.

35. Nationality can be deemed to be the political and legal bond that links a person to a given state and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that state. In different ways, most states have offered individuals who did not originally possess their nationality the opportunity to acquire it at a later date, usually through a declaration of intention made after complying with certain conditions. In these cases, nationality no longer depends on the fortuity of birth in a given territory or on parents having that nationality; it is based rather on a voluntary act aimed at establishing a relationship with a given political society, its culture, its way of life and its values.

36. Since it is the state that offers the possibility of acquiring its nationality to persons who were originally aliens, it is natural that the conditions and procedures for its acquisition should be governed primarily by the domestic law of that state. As long as such rules do not conflict with superior norms, it is the state conferring nationality which is best able to judge what conditions to impose to ensure that an effective link exists between the applicant for naturalization and the systems of values and interests of the society with which he seeks to fully associate himself. That state is also best able to decide whether these conditions have been complied with. Within these same limits, it is equally logical that the perceived need of each state should determine the decision whether to facilitate naturalization to a greater or lesser degree; and since a state's perceived needs do not remain static, it is quite natural that the conditions for naturalization might be liberalized or restricted with the changed circumstances. It is therefore not surprising that at a given moment new conditions might be imposed to ensure that a change of nationality not be effected to solve some temporary problems encountered by the applicants when these have not established real and lasting ties with

the country, which would justify an act as serious and far-reaching as the change of nationality.

37. In the Nottebohm Case, the International Court of Justice voiced certain ideas which are consistent with the views of this Court, expressed in the foregoing paragraph. The International Court declared:

> Naturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being. It involves his breaking of a bond of allegiance and his establishment of a new bond of allegiance. It may have far-reaching consequences and involve profound changes in the destiny of the individual who obtains it. It concerns him personally, and to consider it only from the point of view of its repercussions with regard to his property would be to misunderstand its profound significance [Nottebohm Case (second phase), Judgment of April 6th, 1955, I.C.J. Reports 1955, p. 24].

38. It follows from what has been said above that in order to arrive at a satisfactory interpretation of the right to nationality, as embodied in Article 20 of the Convention, it will be necessary to reconcile the principle that the conferral and regulation of nationality fall within the jurisdiction of the state, that is, they are matters to be determined by the domestic law of the state, with the further principle that international law imposes certain limits on the state's power, which limits are linked to the demands imposed by the international system for the protection of human rights.

39. An examination of the provisions of the proposed amendment submitted to this Court by the Government makes clear that the amendment as a whole seeks to restrict the conditions under which an alien may acquire Costa Rican nationality. Some of the problems dealt with by the proposed amendment are not of a legal nature; others, although legal in character, are not for this Court to consider, either because they are of little consequence from the point of view of human rights or because, although tangentially important thereto, they fall within the category of issues within the exclusive domain of Costa Rica's domestic laws.

40. The Court will consequently not address certain issues that were raised during the public hearing, despite the fact that many of these issues reveal the overall purpose sought to be achieved by the amendment and expose differences of opinion on that subject. Here one might note, among other things, the doubts that were expressed at the hearing regarding the following questions: whether the spirit underlying the proposed amendments as a whole reflects, in a general way, a negative nationalistic reaction prompted by specific circumstances relating to the problem of refugees, particularly Central American refugees, who seek the protection of Costa Rica in their flight from the convulsion engulfing other countries in the region; whether that spirit reveals a tendency of retrogression from the traditional humanitarianism of Costa Rica; whether the proposed amendment,

in eliminating the privileged naturalization status enjoyed by Central Americans under the current Constitution of Costa Rica, is indicative of a position rejecting the unity and solidarity that has historically characterized the peoples of Central America who achieved independence as a single nation.

41. Mindful of the foregoing considerations, the Court is now in a position to examine the question whether the proposed amendments affect the right to nationality guaranteed in Article 20 of the Convention, which reads as follows:

Article 20. Right to Nationality

1. Every person has the right to a nationality.

2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.

3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

42. Since the proposed amendments are designed, in general, to impose stricter requirements for the acquisition of Costa Rican nationality by naturalization, but since they do not purport to withdraw that nationality from any citizen currently holding it, nor to deny the right to change that nationality, the Court concludes that the proposals do not in any formal sense contravene Article 20 of the Convention. Although Article 20 remains to be more fully analyzed and is capable of development, it is clear in this case that since no Costa Ricans would lose their nationality if the proposed amendments entered into force, no violation of paragraph 1 can be deemed to take place. Neither is there a violation of paragraph 2 of that same Article, for the right of any person born in Costa Rica to the nationality of that country is in no way affected. Finally, considering that the proposed amendments are not intended to deprive any Costa Rican nationals of their nationality nor to prohibit or restrict their right to acquire a new nationality, the Court concludes that no contradiction exists between the proposed amendments and paragraph 3 of Article 20.

43. Among the proposed amendments there is one that, although it does not violate Article 20 as such, does raise some issues bearing on the right to nationality. It involves the amendment motion to Article 14, paragraph 4, of the proposal presented by the Members of the Special Legislative Committee. Under that provision, Costa Rican nationality would be acquired by

> A foreigner who by marriage to a Costa Rica loses his or her nationality and who, after two years of marriage and the same period of residence in the country, indicates his or her desire to take on the nationality of the spouse.

44. Without entering into an examination of all aspects of the present text that touch on the subject of discrimination --a topic which will be considered later on this opinion [cf. infra Chapter IV]-- some related problems raised by the wording of the proposal need to be addressed. As a matter of fact, the above wording differs in more than one respect from the text of Article 14, paragraph 5, of the present Constitution and from the text of Article 4, paragraph 4, of the proposed amendment as originally presented. The two latter texts read as follows:

Article 14. By Naturalization

The following are Costa Ricans by naturalization:

5. A foreign woman who by marriage to a Costa Rican loses her nationality or who indicates her desire to become a Costa Rican.

Article 14.

The following are Costa Ricans by naturalization:

4. A foreign woman who by marriage to a Costa Rican loses her nationality or who, after two years of marriage and the same period of residency in the country, indicates her desire to take on our nationality.

The above provisions indicate that a foreign woman who loses her nationality upon marrying a Costa Rican would automatically acquire Costa Rican nationality. They prescribe additional specific requirements only for cases where no automatic loss of the previous nationality occurs.

45. It is clear, on the other hand, that the text proposed by the Members of the Special Legislative Committee effects a substantial change in the here relevant provision, for it imposes additional conditions which must all be complied with in order for a person to become eligible for naturalization.

46. One consequence of the amendment as drafted is that foreigners who lose their nationality upon marrying a Costa Rican would have to remain stateless for at least two years because they cannot comply with one of the obligatory requirements for naturalization unless they have been married for that period of time. It should also be noted that it is by no means certain that statelessness would be limited to a period of two years only. This uncertainty results from the fact that the other concurrent requirement mandates a two-year period of residence in the country. Foreigners forced to leave the country temporarily due to unforeseen circumstances would continue to be stateless for an indefinite length of time until they will have completed all the concurrent requirements established under this proposed amendment.

47. Furthermore, whereas in the text here under consideration the automatic loss of nationality is one of the concurrent conditions for naturalization by reason of marriage, no special provisions are made to regulate the status of foreigners who do not lose their nationality upon marriage to Costa Ricans.

48. The amendment proposed by the Members of the Special Legislative Committee would not as such create statelessness. This status would in fact be brought about by the laws of the country whose nationals, upon marrying a Costa Rican, lose their nationality. It follows that this amendment cannot therefore be deemed to be directly violative of Article 20 of the Convention.

49. The Court nevertheless considers it relevant, for the sole purpose of providing some guidance to the Costa Rican authorities in charge of this subject and without doing so _in extenso_ and with lengthy citations, to call attention to the stipulations contained in two other treaties bearing on the subject. The Court refers to these treaties, without enquiring whether they have been ratified by Costa Rica, to the extent that they may reflect current trends in international law.

50. Thus, the Convention on the Nationality of Married Women provides in its Article 3:

> 1. Each Contracting State agrees that the alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged naturalization procedures; the grant of such nationality may be subject to such limitations as may be imposed in the interests of national security or public policy.
>
> 2. Each Contracting State agrees that the present Convention shall not be construed as affecting any legislation or judicial practice by which the alien wife of one of its nationals may, at her request, acquire her husband's nationality as a matter of right.

51. The Convention on the Elimination of all Forms of Discrimination against Women provides in its Article 9:

> States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during the marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

IV

ISSUES RELATING TO DISCRIMINATION

52. The provisions of the proposed amendments that have been brought before the Court for interpretation as well as the text of the Constitution that is now in force establish different classifications as far as the conditions for the acquisition of Costa Rican nationality through naturalization are concerned. Thus, under paragraphs 2 and 3 of Article 14 of the proposed amendment, the periods of official residence in the country required as a condition for the acquisition of nationality differ, depending on whether the applicants qualify as native-born nationals of "other countries of Central America, Spaniards and Ibero-Americans" or whether they acquired the nationality of those countries by naturalization. Paragraph 4 of that same Article in turn lays down special conditions applicable to the naturalization of "a foreign woman" who marries a Costa Rican. Article 14 of the Constitution now in force makes similar distinctions which, even though they may not have the same purpose and meaning, suggest the question whether they do not constitute discriminatory classifications incompatible with the relevant texts of the Convention.

53. Article 1(1) of the Convention, a rule general in scope which applies to all the provisions of the treaty, imposes on the States Parties the obligation to respect and guarantee the free and full exercise of the rights and freedoms recognized therein "without any discrimination." In other words, regardless of its origin or the form it may assume, any treatment that can be considered to be discriminatory with regard to the exercise of any of the rights guaranteed under the Convention is *per se* incompatible with that instrument.

54. Article 24 of the Convention, in turn, reads as follows:

> Article 24. Right to Equal Protection
>
> All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Although Articles 24 and 1(1) are conceptually not identical --the Court may perhaps have occasion at some future date to articulate the differences-- Article 24 restates to a certain degree the principle established in Article 1(1). In recognizing equality before the law, it prohibits all discriminatory treatment originating in a legal prescription. The prohibition against discrimination so broadly proclaimed in Article 1(1) with regard to the rights and guarantees enumerated in the Convention thus extends to the domestic law of the States Parties, permitting the conclusion that in these provisions the States Parties, by acceding to the Convention, have undertaken to maintain their laws free of discriminatory regulations.

55. The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That prin- ciple cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character.

56. Precisely because equality and non-discrimination are inherent in the idea of the oneness in dignity and worth of all human beings, it follows that not all differences in legal treatment are discriminatory as such, for not all differences in treatment are in themselves offensive to human dignity. The European Court of Human Rights, "following the principles which may be extracted from the legal practice of a large number of democratic States," has held that a difference in treatment is only discriminatory when it "has no objective and reasonable justification." [Eur. Court H.R., case relating to "Certain Aspects of the Laws on the Use of Languages in Education in Belgium" (Merits), Judgment of 23rd July, 1968, p.34.] There may well exist certain factual inequalities that might legitimately give rise to inequalities in legal treatment that do not violate principles of justice. They may in fact be instrumental in achieving justice or in protecting those who find themselves in a weak legal position. For example, it cannot be deemed discrimination on the grounds of age or social status for the law to impose limits on the legal capacity of minors or mentally incompetent persons who lack the capacity to protect their interests.

57. Accordingly, no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. 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. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.

58. Although it cannot be denied that a given factual context may make it more or less difficult to determine whether or not one has encountered the situation described in the foregoing paragraph, it is equally true that, starting with the notion of the essential oneness and dignity of the human family, it is possible to identify circumstances in which considerations of public welfare may justify departures to a greater or lesser degree from the standards articulated above. One is here dealing with values which take on concrete dimensions in the face of those real situations in which they have to be applied and which permit in each case a certain margin of appreciation in giving expression to them.

59. With this approach in mind, the Court repeats its prior observation that as far as the granting of naturalization is concerned, it is for the granting state to determine whether and to what extent applicants for naturalization have complied with the conditions deemed to ensure an effective link between them and the value system and interests of the society to which they wish to belong. To this extent there exists no doubt that it is within the sovereign power of Costa Rica to decide what standards should determine the granting or denial of nationality to aliens who seek it, and to establish certain reasonable differentiations based on factual differences which, viewed objectively, recognize that some applicants have a closer affinity than others to Costa Rica's value system and interests.

60. Given the above considerations, one example of a non-discriminatory differentiation would be the establishment of less stringent residency requirements for Central Americans, Ibero-Americans and Spaniards than for other foreigners seeking to acquire Costa Rican nationality. It would not appear to be inconsistent with the nature and purpose of the grant of nationality to expedite the naturalization procedures for those who, viewed objectively, share much closer historical, cultural and spiritual bonds with the people of Costa Rica. The existence of these bonds permits the assumption that these individuals will be more easily and more rapidly assimilated within the national community and identify more readily with the traditional beliefs, values and institutions of Costa Rica, which the state has the right and duty to preserve.

61. Less obvious is the basis for the distinction, made in paragraphs 2 and 3 of Article 14 of the proposed amendment, between those Central Americans, Ibero-Americans and Spaniards who acquired their nationality by birth and those who obtained it by naturalization. Since nationality is a bond that exists equally for the one group as for the other, the proposed classification appears to be based on the place of birth and not on the culture of the applicant for naturalization. The provisions in question may, however, have been prompted by certain doubts about the strictness of the conditions that were applied by those states which conferred their nationality on the individuals now seeking to obtain that of Costa Rica, the assumption being that the previously acquired nationality--be it Spanish, Ibero-American or that of some other Central American country-- does not constitute an adequate guarantee of affinity with the value system and interests of the Costa Rican society. Although the distinctions being made are debatable on various grounds, the Court will not consider those issues now. Notwithstanding the fact that the classification resorted to is more difficult to understand given the additional requirements that an applicant would have to meet under Article 15 of the proposed amendment, the Court cannot conclude that the proposed amendment is clearly discriminatory in character.

62. In reaching this conclusion, the Court is fully mindful of the margin of appreciation which is reserved to states when it comes to the

establishment of requirements for the acquisition of nationality and the determination whether they have been complied with. But the Court's conclusion should not be viewed as approval of the practice which prevails in some areas to limit to an exaggerated and unjustified degree the political rights of naturalized individuals. Most of these situations involve cases not now before the Court that do, however, constitute clear instances of discrimination on the basis of origin or place of birth, unjustly creating two distinct hierarchies of nationals in one single country.

63. Consistent with its clearly restrictive approach, the proposed amendment also provides for new conditions which must be complied with by those applying for naturalization. Draft Article 15 requires, among other things, proof of the ability to "speak, write and read" the Spanish language; it also prescribes a "comprehensive examination on the history of the country and its values." These conditions can be deemed, prima facie, to fall within the margin of appreciation reserved to the state as far as concerns the enactment and assessment of the requirements designed to ensure the existence of real and effective links upon which to base the acquisition of the new nationality. So viewed, it cannot be said to be unreasonable and unjustified to require proof of the ability to communicate in the language of the country or, although this is less clear, to require the applicant to "speak, write and read" the language. The same can be said of the requirement of a "comprehensive examination on the history of the country and its values." The Court feels compelled to emphasize, however, that in practice, and given the broad discretion with which tests such as those mandated by the draft amendment tend to be administered, there exists the risk that these requirements will become the vehicle for subjective and arbitrary judgments as well as instruments for the effectuation of discriminatory policies which, although not directly apparent on the face of the law, could well be the consequence of its application.

64. The fourth paragraph of draft Article 14 accords "a foreign woman who [marries] a Costa Rican" special consideration for obtaining Costa Rican nationality. In doing so, it follows the formula adopted in the current Constitution, which gives women but not men who marry Costa Ricans a special status for purposes of naturalization. This approach or system was based on the so-called principle of family unity and is traceable to two assumptions. One has to do with the proposition that all members of a family should have the same nationality. The other derives from notions about paternal authority and the fact that authority over minor children was as a rule vested in the father and that it was the husband on whom the law conferred a privileged status of power, giving him authority, for example, to fix the marital domicile and to administer the marital property. Viewed in this light, the right accorded to women to acquire the nationality of their husbands was an outgrowth of conjugal inequality.

65. In the early 1930's, there developed a movement opposing these traditional notions. It had its roots in the acquisition of legal capacity

by women and the more widespread acceptance of equality among the sexes based on the principle of non-discrimination. These developments, which can be documented by means of a comparative law analysis, received a decisive impulse on the international plane. In the Americas, the Contracting Parties to the Montevideo Convention on the Nationality of Women of December 26, 1933 declared in Article 1 of that treaty that "There shall be no distinction based on sex as regards nationality, in their legislation or in their practice." [Adopted at the Seventh International Conference of American States, Montevideo, December 3-26, 1933. The Convention is reproduced in International Conferences of American States - Supplement 1933- 1940. Washington, Carnegie Endowment for International Peace, 1940, p. 106.] And the Convention on Nationality, signed also in Montevideo on that same date, provided in Article 6 that "Neither matrimony nor its dissolution affects the nationality of the husband or wife or of their children." [Ibid., at 108.] The American Declaration, in turn, declares in Article II that "All persons are equal before the law and have the rights and duties established in this declaration, without distinction as to race, sex, language, creed or any other factor." These same principles have been embodied in Article 1(3) of the United Nations Charter and in Article 3(j) of the OAS Charter.

66. The same idea is reflected in Article 17(4) of the Convention, which reads as follows:

> The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.

Since this provision is consistent with the general rule enunciated in Article 24, which provides for equality before the law, and with the prohibition of discrimination based on sex contained in Article 1(1), Article 17(4) can be said to constitute the concrete application of these general principles to marriage.

67. The Court consequently concludes that the different treatment envisaged for spouses by paragraph 4 of Article 14 of the proposed amendment, which applies to the acquisition of Costa Rican nationality in cases involving special circumstances brought about by marriage, cannot be justified and must be considered to be discriminatory. The Court notes in this connection and without prejudice to its other observations applicable to the amendment proposed by the members of the Special Legislative Committee [cf. supra, paras. 45 et seq.] that their proposal is based on the principle of equality between the spouses, and, therefore, is more consistent with the Convention. The requirements spelled out in that amendment would be applicable not only to "a foreign woman" but to any "foreigner" who marries a Costa Rican national.

68. For the foregoing reasons, responding to the questions submitted by the Government of Costa Rica regarding the compatibility of the proposed amendments to Articles 14 and 15 of its Constitution with Article 17(4), 20 and 24 of the Convention,

THE COURT IS OF THE OPINION,

As regards Article 20 of the Convention,

By five votes to one

1. That the proposed amendment to the Constitution, which is the subject of this request for an advisory opinion, does not affect the right to nationality guaranteed by Article 20 of the Convention.

As regards Articles 24 and 17(4) of the Convention,

By unanimous vote

2. That the provision stipulating preferential treatment in the acquisition of Costa Rican nationality through naturalization, which favors Central Americans, Ibero-Americans and Spaniards over other aliens, does not constitute discrimination contrary to the Convention.

By five votes to one

3. That it does not constitute discrimination contrary to the Convention to grant such preferential treatment only to those who are Central Americans, Ibero-Americans and Spaniards by birth.

By five votes to one

4. That the further requirements added by Article 15 of the proposed amendment for the acquisition of Costa Rican nationality through naturalization do not as such constitute discrimination contrary to the Convention.

By unanimous vote

5. That the provision stipulating preferential treatment in cases of naturalization applicable to marriage contained in Article 14(4) of the proposed amendment, which favors only one of the spouses, does constitute discrimination incompatible with Articles 17(4) and 24 of the Convention.

Dissenting:

Judge Buergenthal with regard to point 3.
Judge Piza Escalante with regard to points 1 and 4.

Done in English and Spanish, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this nineteenth day of January, 1984.

PEDRO NIKKEN
PRESIDENT

THOMAS BUERGENTAL

MAXIMO CISNEROS

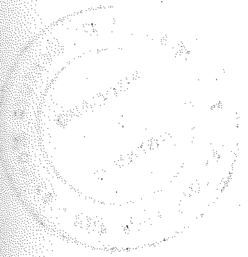
CARLOS ROBERTO REINA

RODOLFO E. PIZA E.

RAFAEL NIETO NAVIA

CHARLES MOYER
SECRETARY

Judges Buergenthal and Piza presented dissenting opinions.



APPENDIX IV

AMERICAN CONVENTION ON HUMAN RIGHTS "PACT OF SAN JOSE, COSTA RICA"

SIGNATORY COUNTRIES	DATE OF SIGNATURE	DATE OF DEPOSIT OF THE INSTRUMENT OF RATIFICATION OR ADHERENCE
Argentina*	2/II/84	05/IX/84
Barbados	20/VI/78	05/XI/81
Bolivia[1]		19/VII/79
Chile[2]	22/XI/69	
Colombia	22/XI/69	31/VII/73
Costa Rica[4]	22/XI/69	08/IV/70
Dominican Republic[2]	07/IX/79	19/IV/78
Ecuador[2]*	22/XI/69	28/XII/77
El Salvador[2,3]	22/XI/79	23/VI/78
Grenada	14/VII/78	18/VII/78
Guatemala[3]	22/XI/69	25/V/78
Haiti[1]		27/IX/77
Honduras[6]	22/XI/69	08/IX/77
Jamaica[2]	16/IX/77	07/VIII/78
Mexico [1]		24/III/81
Nicaragua	22/XI/69	25/IX/79
Panama	22/XI/69	22/VI/78
Paraguay	22/XI/69	
Peru[5]	27/VII/77	28/VII/78
United States	01/VI/77	
Uruguay[3]	22/XI/69	
Venezuela[2,3,7]	22/XI/69	09/VIII/77

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1. Adhered.
2. With a declaration.
3. With a reservation.
4. Recognized the competence of the Inter-American Commission on Human Rights and of the Inter-American Court on Human Rights on July 2, 1980. (Convention, Arts. 45 and 62.)
5. Recognized the competence of the Commission and of the Court on January 21, 1981. (Convention, Arts. 45 and 62.)
6. Recognized the competence of the Court on September 9, 1981. (Convention, Art. 62.)
7. Recognized the competence of the Comission on August 9, 1977 and of the Court on June 24, 1981. (Convention, Arts. 45 and 62.)

* Recognized the competence of the Court.