

INTER-AMERICAN COURT OF HUMAN RIGHTS

**ADVISORY OPINION OC-7/85
OF AUGUST 29, 1986**

**ENFORCEABILITY OF THE RIGHT TO REPLY
OR CORRECTION (ARTS. 14(1), 1(1) AND 2
AMERICAN CONVENTION ON HUMAN RIGHTS)**

REQUEST BY THE GOVERNMENT OF COSTA RICA

Present:

Thomas Buergenthal, President
Rafael Nieto-Navia, Vice President
Rodolfo E. Piza E., Judge
Pedro Nikken, Judge
Héctor Fix-Zamudio, Judge
Héctor Gros Espiell, Judge
Jorge R. Hernández Alcerro, Judge

Also present:

Charles Moyer, Secretary, and
Manuel Ventura, Deputy Secretary

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. By note of October 1, 1985, the Government of Costa Rica (hereinafter "the Government" or "Costa Rica") submitted to the Inter-American Court of Human Rights (hereinafter "the Court") an advisory opinion request regarding the interpretation and scope of Article 14(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") in relation to Articles 1(1) and 2 of that instrument.

2. In a note of October 31, 1985, the Secretariat of the Court, acting pursuant to Article 52 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), requested written observations on the issues 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 listed in Chapter X of the Charter of the OAS.

3. The President of the Court directed that the written observations and other relevant documents be presented in the Secretariat before January 10, 1986 in order to be considered by the Court during its Fourteenth Regular Session, which was held January 13-21, 1986.

4. Responses to the Secretariat's communication were received from the Government of Costa Rica.

5. Furthermore, the following non-governmental organizations submitted an **amici curiae** brief: the Inter-American Press Association, World Press Freedom Committee, American Newspaper Publishers Association, Federation International des Editeurs de Journaux, The Copley Press, Inc., The Miami Herald, Newsweek, USA Today, The Wall Street Journal and The International Herald Tribune.

6. A public hearing was held on Thursday, January 16, 1986 to enable the Court to receive the oral arguments of the Member States and the OAS organs on the issues raised in the request.

7. At this public hearing the Court heard the following representatives:

For the Government of Costa Rica:

Carlos José Gutiérrez, Agent and Minister of Foreign Affairs,

Manuel Freer Jiménez, Agent and Legal Adviser of the Ministry of Foreign Affairs

For the Inter - American Commission on Human Rights:

Edmundo Vargas Carreño, Executive Secretary, by virtue of the representation conferred on him by the President of the Commission.

8. The Court continued its study of the instant request at its Fifteenth Regular Session, held April 26-May 9, 1986, and at its Fifth Special Session, held August 25-29, 1986.

I ADMISSIBILITY

9. This request for an advisory opinion has been submitted to the Court by the Government of Costa Rica, which is a State Party to the Convention and a Member State of the OAS. Under Article 64 of the Convention any Member State of the OAS may seek an "interpretation of this Convention or of any other treaties concerning the protection of human rights in the American states." The Costa Rican request deals with the interpretation of Article 14(1) of the Convention in relation to Articles 1(1) and 2 of that instrument and, as such, falls within the purview of Article 64.

10. The request of the Government seeks an advisory opinion under Article 64(1) of the Convention rather than under Article 64(2). This conclusion may be deduced from the fact that the request of the Government

refers expressly to Article 49 of the Rules of Procedure, which deals with proceedings filed under Article 64(1), and not to Article 51 of the Rules which is applicable to advisory opinion requests filed under Article 64(2) of the Convention. Moreover, the Government does not seek an opinion of the Court regarding the compatibility of any of its laws with the Convention; instead, the object of the request is the interpretation of Article 14(1) in relation to Articles 1(1) and 2 of the Convention.

11. The mere fact that a request for an advisory opinion is filed by a Member State of the OAS and that it invokes, expressly or by implication, the provisions of Article 64(1) does not mean that the Court has jurisdiction, **ipso facto**, to deal with the questions submitted to it. If the Court were asked to respond to questions concerned exclusively with the application or interpretation of the domestic law of a Member State or which involved issues unrelated to the Convention or the other treaties referred to in Article 64, the Court would lack jurisdiction to render the opinion.

12. The manner in which a request is drafted may require the Court, in exercising its functions under Article 64 of the Convention, to define or clarify and, in certain cases, to reformulate the questions submitted to it in order to ascertain what, precisely, is being asked. This is particularly true when, as in the instant case, the request, notwithstanding the form in which the questions are articulated, seeks the Court's opinion with regard to issues that the Court believes fall within its jurisdiction. In this connection, the Court should emphasize that, in general, when an advisory opinion request contains questions whose analysis and interpretation fall within its jurisdiction, the Court is called upon to give its answer even though the request might contain issues outside the scope of its jurisdiction, unless these extraneous issues are completely inseparable from the former or unless there are other reasons which would justify a decision by the Court to abstain from rendering its opinion.

13. The first question reads as follows:

Can it be assumed that the full and free exercise of the right protected by Article 14 of the American Convention on Human Rights is already guaranteed to all persons under the jurisdiction of the State of Costa Rica by virtue of the obligations assumed by our country under Article 1 of that Convention?

14. The Court is of the opinion that the question, as formulated, contains two different issues which are clearly distinguishable. The first concerns the interpretation of Article 14(1) of the Convention in relation to Article 1(1), while the second deals with the application of Article 14(1) in the internal legal system of Costa Rica. The Court shall address only the first issue with reference to Article 64(1) of the Convention which, as has been stated, is the relevant provision. The second issue, as it has been set out, falls outside the advisory jurisdiction of the Court.

15. The Court consequently concludes that this question, understood in the sense indicated above, is admissible since it concerns the interpretation of the Convention, and the Court so holds.

16. The second question reads as follows:

If the preceding question is answered in the negative, does the State of Costa Rica have an international obligation under Article 2 of the American Convention on Human Rights to adopt, in accordance with its constitutional processes, the legislative or other measures that may be necessary to give effect to the right of reply or correction set out in Article 14 of the Convention?

The interpretation given to the first question eliminates the causal tie that links the second question to the first. The above question, therefore, seeks to determine what obligations, if any, Article 2 of the Convention imposes on Costa Rica to give effect to the right which Article 14(1) guarantees. It furthermore calls on the Court to interpret the Convention and, consequently, is admissible.

17. The third question reads as follows:

If it is decided that the State of Costa Rica is under the obligation to adopt the legislative or other measures that may be necessary to give effect to the right of reply or correction set out in Article 14 of the Convention, would it be proper to conclude that the term "law," which appears at the end of the first paragraph of said Article 14, is used in its broadest sense so as to encompass provisions of a regulatory type promulgated by executive decree, keeping in mind the instrumental character of such legal provisions?

To the extent that this question seeks an interpretation of the meaning of the word "law," as that concept is used in Article 14(1) of the Convention, it is admissible for the reasons indicated above.

18. Having ruled that the three questions presented in the Costa Rican application are admissible insofar as they concern the interpretation of the Convention, and considering that no other reasons justify a decision to abstain from rendering the advisory opinion requested pursuant to what the Court has expressed in its jurisprudence ("**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. 2, para. 3; **Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)**), Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 21; **The Word "Laws" in Article 30 of the American Convention on Human Rights**, Advisory Opinion OC-6/86 of May 9, 1986.

Series A No. 6, para. 11), the Court will now proceed to an examination of the merits of the application.

II MERITS

19. The first question seeks a determination concerning the legal effect of Article 14(1), given the obligations assumed by a State Party under Article 1(1) of the Convention.

20. Article 14 reads as follows:

1. Anyone injured by inaccurate or offensive statements or ideas* disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.

2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.

3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges.

Article 1(1) declares:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition.

21. The foregoing provisions must be interpreted using

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 (**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. 48)."

These rules are spelled out in Article 31(1) of the Vienna Convention on the Law of Treaties, which reads as follows:

A treaty shall 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.

Under Article 32 of the Vienna Convention, recourse may be had to other sources of interpretation only when the interpretation resulting from the

*-The word "ideas" does not appear in the Spanish, Portuguese or French texts of this provision, which refer to "informaciones inexactas o agraviantes," "informações inexactas ou ofensivas" and to "données inexactes ou des imputations diffamatoires"

application of Article 31 "a) leaves the meaning ambiguous or obscure; or b) leads to a result which is manifestly absurd or unreasonable."

22. In the instant case, the expression "Anyone... has the right," found in Article 14(1), must be interpreted in good faith in accordance with its ordinary meaning. The Convention guarantees a "right" to reply or correction, which explains why paragraphs (2) and (3) of Article 14 are so categorical when they speak of "the legal liabilities" of those who make inaccurate or offensive statements and of the requirement that someone be responsible for such statements. This interpretation is not ambiguous or obscure nor does it lead to a manifestly absurd or unreasonable result.

23. The argument that the phrase "under such conditions as the law may establish," used in Article 14(1), merely empowers the States Parties to adopt a law creating the right of reply or correction without requiring them to guarantee it if their internal legal system does not provide for it, is not consistent with the "ordinary meaning" of the terms used nor with the "context" of the Convention. It is worth noting, in this connection, that the right of reply or correction for inaccurate or offensive statements disseminated to the public in general is closely related to Article 13(2) on freedom of thought and expression, which subjects that freedom to the "respect of the rights and reputations of others" (See **Compulsory Membership of Journalists**, *supra* 18, paras. 59 and 63); to Article 11(1) and 11(3), according to which

1. Everyone has the right to have his honor respected and his dignity recognized.

3. Everyone has the right to the protection of the law against such interference or attacks.

and to Article 32(2) which states that

The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

24. The obligations of the States Parties set out in Articles 1(1) and 2 of the Convention are applicable to the right of reply or correction. It could not be otherwise, since the purpose of the Convention is to recognize individual rights and freedoms and not simply to empower the States to do so (American Convention, Preamble; **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. 33).

25. The fact that the right of reply or correction (Art. 14) follows immediately after the right to freedom of thought and expression (Art. 13) confirms this interpretation. The inescapable relationship between these articles can be deduced from the nature of the rights recognized therein since, in regulating the application of the right of reply or correction, the States Parties must respect the right of freedom of expression guaranteed by Article 13. They may not, however, interpret the right of freedom of

expression so broadly as to negate the right of reply proclaimed by Article 14(1) (**Compulsory Membership of Journalists, supra** 18, para. 18). It is appropriate to recall that Resolution (74) 26 of the Committee of Ministers of the Council of Europe based the right of reply on Article 10 of the European Convention, which deals with freedom of expression.

26. Having concluded that the Convention guarantees a right of reply or correction, the Court will now turn its attention to the consequences of the above.

27. Article 14(1) does not indicate whether the beneficiaries of the right are entitled to an equal or greater amount of space, when the reply once received must be published, within what time frame the right can be exercised, what language is admissible, etc. Under Article 14(1), these conditions are such "as the law may establish," a phrase that employs a wording that, unlike that used in other articles of the Convention ("shall be protected by law," in accordance with the law, "expressly established by law," etc.), requires the establishment of the conditions for exercising the right of reply or correction by "law." The contents of the law may vary from one State to another, within certain reasonable limits and within the framework of the concepts stated by the Court. This is not yet the moment to address the question of what is meant by the word "law" (**infra** 33).

28. The fact that the States Parties may fix the manner in which the right of reply or correction is to be exercised does not impair the enforceability, on the international plane, of the obligations they have assumed under Article 1(1). That Article contains an undertaking by the States Parties "to respect the rights and freedoms " the Convention recognizes and " to ensure to all persons subject to their jurisdiction the free and full exercise of these rights and freedoms...." If for any reason, therefore, the right of reply or correction could not be exercised by "anyone" who is subject to the jurisdiction of a State Party, a violation of the Convention would result which could be denounced to the organs of protection provided by the Convention.

29. The soundness of this conclusion gains added support from the language of Article 2 of the Convention, which reads:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights and freedoms.

30. This Article, which is referred to in the second question, codifies a basic rule of international law that a State Party to a treaty has a legal duty to take whatever legislative or other steps as may be necessary to enable it to comply with its treaty obligations. In the context of the Convention, this conclusion is in line with Article 43, which reads:

The States Parties undertake to provide the Commission with such information as it may request of them as to the manner in

which their domestic law ensures the effective application of any provisions of this Convention.

31. The Court is now in a position to address the third question contained in the Costa Rican request. It seeks the Court's opinion on the meaning of "law" as that concept is used in Article 14(1).

32. In its Advisory Opinion **The Word "Laws"** (*supra* 18), the Court has provided an extensive analysis of the meaning of " law " as that concept is used in Article 30 of the Convention. In that opinion the Court notes that the word "laws" is not necessarily used throughout the Convention to express one and the same concept and that, consequently, its meaning has to be ascertained on a case- by -case basis, drawing on the relevant international law standards for the interpretation of treaties. In that Opinion, the Court stated the following:

The question before us does not go beyond inquiring as to the meaning that the word "laws" has in Article 30 of the Convention. It is, therefore, not a question of giving an answer that can be applied to each case where the Convention uses such terms as "laws", "law", "legislative provisions", " provisions of the law", "legislative measures", "legal restrictions", or "domestic laws." On each occasion that such expressions are used, their meaning must be specifically determined.

In another of its advisory opinions, the Court declared that:

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. (**Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica**, Advisory Opinion OC-4/ 84 of January 19, 1984. Series A No. 4, para. 14).

33. The Court has already determined that Article 14(1) establishes a right of reply or correction and that the phrase "under such conditions as the law may establish" refers to the various conditions related to the exercise of that right. That phrase has reference, consequently, to the effectiveness of that right on the domestic plane and not to its creation, existence or enforceability on the international plane. This being so, it is relevant to look to Article 2 because it deals with the obligations of the States Parties "to adopt... such legislative or other measures as may be necessary to give effect to those rights or freedoms." If Article 14(1) is read together with Articles 1 and 2 of the Convention, any State Party that does not already ensure the free and full exercise of the right of reply or correction is under an obligation to bring about that result, be it by legislation or whatever other measures may be necessary under its domestic legal system. This justifies the conclusion that the concept "law," as used in Article 14(1), includes all those measures designed to regulate the exercise of the right of reply or correction. If,

however, those measures restrict the right of reply or correction or any other right recognized by the Convention, they would have to be adopted in the form of a law, complying with all of the conditions contained in Article 30 of the Convention (**The Word "Laws", supra 18**).

34. In any case, in regulating those conditions the States Parties have an obligation to ensure the enjoyment of the guarantees necessary for the exercise of the rights and freedoms, including the rights to a fair trial and to judicial protection (Arts. 8 and 25 of the Convention).

35. **Therefore**

THE COURT

1. With respect to the admissibility of the advisory opinion request presented by the Government of Costa Rica,

DECIDES

By four votes to three, to **admit the request.**

Dissenting:

Judges Buergenthal, Nieto - Navia and Nikken.

2. With respect to the questions contained in the request submitted by the Government of Costa Rica regarding the interpretation of Article 14(1) of the American Convention on Human Rights in relation to Articles 1(1) and 2 of that instrument,

IS OF THE OPINION

Unanimously

A. That Article 14(1) of the Convention recognizes an internationally enforceable right to reply or to make a correction which, under Article 1(1), the States Parties have the obligation to respect and to ensure the free and full exercise thereof to all persons subject to their jurisdiction.

Unanimously

B. That when the right guaranteed by Article 14(1) is not enforceable under the domestic law of a State Party, that State has the obligation, under Article 2 of the Convention, to adopt, in accordance with its constitutional processes and the provisions of the Convention, the legislative or other measures that may be necessary to give effect to this right.

By six votes to one

C. That the word "law," as it is used in Article 14(1), is related to the obligations assumed by the States Parties in Article 2 and that, therefore, the measures that the State Party must adopt include all such domestic measures as may be necessary, according to the legal system of the State Party

concerned, to ensure the free and full exercise of the right recognized in Article 14(1). However, if any such measures impose restrictions on a right recognized by the Convention, they would have to be adopted in the form of a law.

Dissenting:

Judge Piza Escalante.

Done in Spanish and English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this twenty - ninth day of August, 1986.

Thomas Buergenthal
President

Rafael Nieto-Navia

Rodolfo E. Piza E.

Pedro Nikken

Héctor Fix-Zamudio

Héctor Gros Espiell

Jorge R. Hernández Alcerro

Charles Moyer
Secretary

(Translation)

SEPARATE OPINION OF JUDGE HECTOR GROS ESPIELL

1. I concur completely in the advisory opinion rendered by the Court. I, therefore, neither disagree with the manner in which the Court answered the questions formulated by the Government of Costa Rica nor with the arguments on which the Court based its decision.

2. However, I think that the Court should consider in the development of the reasoning of its opinion, criteria not analyzed in this advisory opinion. I regard these criteria, to which I will refer later, to be essential to the understanding of the character and the scope of the right of reply or correction recognized in Article 14(1) of the American Convention. It is necessary to have a clear understanding of the questions formulated by the Government of Costa Rica to be able to answer them completely, since the answers could vary according to the different criteria that one uses with regard to the essential elements of the meaning of the right of reply or correction. For that reason, I believe that the Court should rule on these criteria, the consideration of which is absolutely necessary to completely answer the questions posed by the Government of Costa Rica.

3. The right of reply or correction is recognized to "anyone" --a concept specified in Article 1(2) of the Convention - "injured by inaccurate or offensive statements." The exercise of the right of reply or correction is inevitably related to the right of all persons to "seek, receive, and impart information" (Art. 13(1)). However, this right to "seek, receive, and impart information" may result in the subsequent imposition of liability established by law for failure to "respect the rights or reputations of others" (Art. 13(2)(a)), and "the right of everyone to have his honor respected" (Art.11). A judicial proceeding may be necessary to ensure the existence of each of these rights, in those cases where there is a dispute, and to resolve whether the statements are inaccurate or offensive. Since "the rights of each person are limited by the rights of others" (Art. 32(2)), a judicial proceeding should guarantee a just balance and harmony, in each case, between freedom of information, the right of reply or correction and the right to protection of honor. In a concrete case or situation in which the right of reply or correction is claimed but disputed, the judicial proceeding will serve to guarantee all of the rights at stake and will determine the nature of the inaccurate or offensive statements. The foregoing is fundamental because if there were no judicial proceeding capable of determining, with full guarantees, whether the right of reply or correction were applicable in a particular disputed case, there would be a violation of Article 8 of the Convention. This Article recognizes the right to a hearing "with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law,... for the determination of (the) rights and obligations of a civil, labor, fiscal, or other nature." A right of reply or correction that for practical effectiveness would only allow recourse to an automatic proceeding, without a judicial determination as to the truth of the statements and without the guarantees of due process in the case of a dispute, would not constitute an

expression of the protection of honor and dignity (Art. 11) or an integral element of freedom of information (Art. 13), but rather, to the contrary, would constitute an abridgment of freedom of thought and expression (Art. 13(1)).

4. The inaccurate or offensive statements must be "disseminated to the public in general by a legally regulated medium of communication." The expression "legally regulated medium of communication," which appears in what now is Article 14(1) of the Convention, was incorporated in the last stage of the drafting of the text, during the 1969 Specialized Conference. The wording was proposed by the Working Group that drafted the final version of this article. However, there is no explanation as to why this expression was included (**Conferencia Especializada Interamericana sobre Derechos Humanos, San José, Costa Rica, 7-22 de noviembre de 1969, Actas y Documentos**, OEA/Ser.K/XVI/ 1.2, Washington, D.C. 1973 (hereinafter "Actas and Documentos") repr. 1978, pp. 280-82). Examining first the text of Article 14 in accordance with the principles of the Vienna Convention (Art. 31), one must conclude that this expression specifies all of the media of communication that are in one form or another regulated by the domestic law of the States Parties. It does not refer to a specific or concrete form of regulation, nor can it be interpreted to include only those media of communication which are required by law to have a prior authorization, concession or license. The Convention does not make this distinction and, therefore, there is no basis whatsoever to interpret it in that manner. Moreover, if a distinction were made between the different media of communication, to include, for example, radio and television but to exclude the written press, it would be discriminatory and, consequently, forbidden as a violation of the principle of non - discrimination and the right to equality which are guaranteed by the Convention (Arts. 1(1) and 24).

5. The right of reply or correction can only be understood and explained in conjunction with freedom of thought, expression and information. These rights form an inseparable and yet independent whole. As the Court has stated:

Article 13 indicates that freedom of thought and expression "includes freedom to seek, receive and impart information and ideas of all kinds...." This language establishes that those to whom the Convention applies not only have the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds. Hence, when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to "receive" information and ideas... (**Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)**, Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 30).

In the individual dimension, the right of reply or correction guarantees that a party injured by inaccurate or offensive statements has the opportunity to express his views and thoughts about the injurious statements. In the social dimension, the right of reply or correction gives every person in the

community the benefit of new information that contradicts or disagrees with the previous inaccurate or offensive statements. In this manner, the right of reply or correction permits the re-establishment of a balance of information, an element which is necessary to the formation of a true and correct public opinion. The formation of public opinion based on true information is indispensable to the existence of a vital democratic society. This understanding is fundamental to the interpretation of the American Convention on Human Rights, whose purpose is to consolidate the democratic institutions in this hemisphere (Preamble, para. 1). The democracy to which the Convention refers is representative and pluralistic and presumes "a system of personal liberty and social justice based on respect for the essential rights of man" (**Ibid**).

Freedom of thought and expression (Art. 13) is one of the essential functions of a democratic society and one of the basic conditions for its progress and for each individual's self - fulfillment. It is a right which must be recognized even when its exercise provokes conflicts or disturbances. As the European Court of Human Rights has stated, it is a requirement of "pluralism, tolerance and broadmindedness without which there is no 'democratic society'" (Eur. Court H.R., **Lingens case**, judgment of 8 July 1986, Series A no. 103, para. 41). However, within the limits permitted in a democratic society, the right to freedom of thought and expression must be balanced with the responsibility to respect the reputation and the rights of others (Art. 13). This balance is brought about through the recognition, in the Convention, of the right of reply or correction (Art. 14), which comes into play in the case of "inaccurate or offensive statements." The existence of the right of reply or correction provides a means to impose liability (Art. 13(2)) in those cases in which the freedom of thought, expression or information is used to violate " the rights or reputation of others."

6. Article 2 of the Convention provides that:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

It is evident that this article of the Convention imposes a duty on the States Parties to adopt the measures necessary to make the rights and freedoms recognized by the Convention effective. These rights are not conditioned on the existence of pertinent norms in the domestic law of the States Parties. Rather, the States Parties are obligated to adopt legislative or other means, if they do not already exist, to make these rights and freedoms effective. This obligation is in addition to that imposed by Article 1 of the Convention. It is intended to make respect for the rights and freedoms recognized by the Convention more definite and certain. The obligation that results from Article 2 thus complements, but in no way substitutes or replaces, the general unconditional obligation imposed by Article 1. The Government of Chile, which proposed the inclusion of Article 2, stated in its Observations to the Draft Inter - American Convention on Human Rights:

The argument that inclusion of this clause in the Inter - American Convention might warrant the allegation by a State that it was not obligated to respect one or more rights not contemplated in its domestic legislation, is not supported by the terms of the Preliminary Draft; it is even less likely to find support if the scope of the Convention is expressly established at the Conference (**Actas y Documentos, supra** 4, p. 38).

Article 2 of the Convention appeared in the last stage of the drafting of the Convention. It is not found in the initial drafts nor in the final draft prepared by the Inter-American Commission on Human Rights. The article had not initially been included because it was originally thought, understandably, that a commitment of the type referred to in the current Article 2 exists naturally under International Law, as a logical consequence of international treaty obligations. For that reason, when Article 2 was proposed, it was explained that its only purpose was to emphasize and clarify that the requirement to comply with that obligation was immediate, direct and obligatory, and not to signify a change or ignore the special obligation that results from Article 1. Without this logical interpretation of why Article 2 is included in the Convention, it would not make sense. Further, it would lead to the irrational and absurd result that Article 1 would be inapplicable if the measures referred to in Article 2 had not been promulgated. This conclusion is inadmissible, because it would paralyze the functioning of the system established by the Convention and it would practically eliminate the essential obligations to protect human beings imposed on the States Parties by Article 1 of the Convention. In this respect, it must be remembered that the source of Article 2 of the Convention is Article 2(2) of the United Nations International Covenant on Civil and Political Rights, which, as much by its location in the instrument as by its text, constitutes an obvious complement to the essential obligation imposed by the first paragraph of said Article 2. On the other hand, the European Convention for the Protection of Human Rights and Fundamental Freedoms does not contain a reference analogous to that of Article 2 of the American Convention or to Article 2(2) of the International Covenant. In Article 1 of the European Convention, the States Parties merely recognize that every person subject to the jurisdiction of the States Parties has the rights and freedoms defined in its Section I. Moreover, this recognition implies that the States Parties have a duty to respect and guarantee these rights and, should it be necessary, to adopt measures in its internal law to better and more effectively comply with the obligations that result from the recognition of these rights and freedoms.

7. I believe that it is in the light of the above reasoning that the opinion rendered by the Court, regarding the questions formulated by the Government of Costa Rica, acquires its true significance. And I further believe that the right of reply or correction is best defined and understood in relation to the other rights recognized by the Convention, taking into account the obligations that the States Parties have acquired as a consequence of the requirements of Articles 1(1) and 2.

HECTOR GROS ESPIELL

CHARLES MOYER
Secretary

(Translation)

**JOINT DISSENTING OPINION OF JUDGES
RAFAEL NIETO - NAVIA AND PEDRO NIKKEN**

We regret that we must dissent from the majority opinion of the Court on the matter of the admissibility of this Advisory Opinion, notwithstanding the fact that we have no doubt whatsoever regarding the nature of the international obligations assumed by the States Parties under Article 14 of the American Convention on Human Rights. Nor do we have any doubt that, in a case in which the right of reply or correction could not be exercised by "anyone" in Costa Rica, there would be a violation of the Convention which could be the subject of a complaint on the international plane.

Our dissent is strictly limited to the question of admissibility and is based on the following reasons:

1. The function of the Court is not to interpret domestic law but rather international law, which in the case of its contentious jurisdiction would include only the provisions of the Convention itself and in the case of its advisory jurisdiction would include both the Convention and other treaties concerning the protection of human rights in the American States (**"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. 42).

2. Notwithstanding the above, it must be recognized that the domestic law of the American States is not completely outside the consideration of the Court. In the area of its contentious jurisdiction, the Court may consider the domestic law of a State Party when it is called upon to decide whether that State has specifically violated the obligations it has assumed under the Convention. It is a matter, after all, of assuming that the fundamental question that the Court would have to decide is whether there was a violation of the Convention. In that case, it would be the norms of the Convention that would have to be interpreted in order to define their scope and to determine whether they have been violated.

3. In the area of its advisory jurisdiction, under Article 64(2) of the Convention, the Court is also called upon, if so requested by any Member State of the OAS, to decide on the compatibility of a particular law of that State with the Convention or with other treaties concerning the protection of human rights in the American States. The object of this function is to aid the Member States of the OAS to fulfill, as completely as possible, their international obligations in the field of human rights by bringing their domestic legal system in line with the Convention.

4. Even in this case, the Court must essentially focus on international law, that is, it must interpret the Convention or other treaties concerning the protection of human rights. It is once again a question of establishing the scope of the guarantee offered by the Member State requesting the advisory

opinion with respect to the treaty that is being interpreted. Having settled this point, it is necessary to compare the interpretation of the domestic law with the international law to determine to what extent there is a contradiction between it and the international commitment of the requesting State in the area of human rights.

5. In the instant case, it is especially important to determine whether, as has been stated, the request for the advisory opinion refers to the interpretation of the Convention or whether, on the other hand, what is being asked is the possibility of an interpretation of Costa Rican law. In the first case, the Court would have jurisdiction to answer and the request would be admissible; in the second, the interpretation requested would be outside the scope of Article 64 of the Convention and, therefore, outside the jurisdiction of the Court which would make the request inadmissible.

6. In order to resolve the problem thus presented, the Court must examine the issues which might be contained in the questions formulated by the Government to determine whether the questions refer to matters under its jurisdiction. To that end, it must be pointed out that the questions have been posed in such a way that they are conditioned one upon another, since the third question depends on the answer given to the second and the second on the answer to the first. In that way, according to the Government of Costa Rica, the first question is determinative and if it is not admissible, it would not make sense, given the manner in which the Government has presented the request, to respond to the others.

7. The Government posed the following questions:

First: Can it be assumed that the full and free exercise of the right protected by Article 14 of the American Convention on Human Rights is already guaranteed to all persons under the jurisdiction of the State of Costa Rica by virtue of the obligations assumed by our country under Article 1 of the Convention ?

Second: If the preceding question is answered in the negative, does the State of Costa Rica have an international legal obligation under Article 2 of the American Convention on Human Rights to adopt, in accordance with its constitutional processes, the legislative **or other measures** that may be necessary to give effect to the right of reply or correction set out in Article 14 of the Convention ?

Third: If it is decided that the State of Costa Rica is under the obligation to adopt the legislative **or other measures** that may be necessary to give effect to the right of reply or correction set out in Article 14 of the Convention, would it be proper to conclude that the term "law," which appears at the end of the first paragraph of said Article 14, is used in its broadest sense so as to encompass provisions of a regulatory type promulgated by executive decree, keeping in mind the instrumental character of such legal provisions?

8. In addition, in the considerations that gave rise to the opinion, the Government pointed out:

The Government of Costa Rica requests the advisory opinion of the Inter - American Court of Human Rights inasmuch as there exists a doubt that should be resolved as to whether in Costa Rica anyone who is injured by inaccurate or offensive statements or ideas disseminated to the public by a medium of communication can exercise the right of reply established by Article 14 of the American Convention on Human Rights, or if that right can only be exercised once a formal law has been issued establishing the conditions for the specific exercise of such right.

9. The Government, likewise, cited the first paragraph of Article 7 of its Constitution, which provides:

Article 7. Public treaties, international agreements and concordats duly approved by the Legislative Assembly shall have a higher authority than the laws from their promulgation or from the day that they designate.

10. From the questions themselves as well as from the considerations which give rise to the request, as manifested by the Government, it is obvious that the legal problems posed in the request are related to the fact that in Costa Rica there is no law that **establishes the conditions** in which the right of reply or correction recognized by Article 14 of the Convention can be exercised. A doubt exists as to whether such a law is necessary in Costa Rica, given the aforementioned provision of its Constitution.

11. The central question is whether the right set out in Article 14 can be assumed as already guaranteed in its free and full exercise to all persons under the jurisdiction of the State of Costa Rica. Although it might be added that the question is posed in light of Article 1 of the Convention, it is not possible to answer it without express reference to the domestic law of Costa Rica since it concerns the system by which the international commitments of the State can be guaranteed in the domestic legal system. This requires a determination of whether in light of the domestic legal system of Costa Rica it is possible to give effect, on the domestic plane, to a right already recognized in a treaty.

12. The question is not formulated in terms of the compatibility or incompatibility of a specific domestic law with the Convention, nor is it formulated in terms of the scope of the rights and duties established in the Convention, particularly in Article 14, in which case the response would be generally valid with respect to any State Party. In this sense, it is not expressly asked what, in our opinion, is beyond any doubt: for instance, whether the impossibility of exercising the right contained in Article 14 in any State Party is a violation of the Convention which could eventually be brought before the organs of protection established by the Convention. What is being sought rather is a determination of whether such rights are or are not guaranteed within the jurisdiction of Costa Rica.

13. The reference to Article 1(1) of the Convention does not change this conclusion since, in order to understand that the question refers to the nature of this Article and not to the domestic Costa Rican law, it is necessary to

reformulate it by removing the respective references. We believe that reformulation is possible in certain cases, always taking into account the mission that the Convention confers on the Court, which is "as extensive as may be required to safeguard such rights, limited only by the restrictions that the Convention itself imposes" (**Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica**, Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 25). In this case, however, such a reformulation does not appear necessary since the immediate international enforcement of the rights recognized by Article 14 is beyond doubt and has not been questioned by Costa Rica.

14. Nor does it have anything to do with the self-executing nature of the Convention or with the role which the Convention plays in the legal system of the States Parties. Notwithstanding the reference to this problem made in the considerations which give rise to the request, this question has not been raised. Furthermore, the self-executing nature of a treaty is, in general and unless there is a special provision on the matter, a problem of domestic and not international law, since it is a matter of whether such treaty acquires, given the specific domestic mechanics of its approval, the nature of a domestic norm.

15. We believe, therefore, that the first question cannot be answered by means of an interpretation of the Convention but rather only with regard to the domestic law of Costa Rica. The Court must especially take into consideration its Constitution and the power of the Constitution or the approval of the Legislative Assembly to give effect to treaties in which Costa Rica is a party, as well as the competence of its courts to apply them. That is a function of the domestic organs of Costa Rica and is outside the scope of the jurisdiction of the Court.

16. If the first question is inadmissible for the reason given, and can not be answered, the other two, intimately tied and dependent on a response to the first, are also inadmissible. We, therefore, believe that the reformulation by the Court which allowed it to avoid any pronouncement on the domestic law of Costa Rica was not necessary in this case and the proper course would have been to declare the request inadmissible and to refrain from answering.

17. The normal consequence of our disagreement on the question of admissibility would be to abstain on the substantive part of the opinion rendered by the Court. However, within the context of this opinion, we believe we cannot avoid voting in favor of the conclusions of the opinion for the following reasons:

A. Article 15(1) of the Rules of Procedure of the Court expressly states that the vote of each judge shall be "either in the affirmative or the negative; abstentions shall not be permitted." That rule entirely eliminates the possibility of abstaining on the substantive part of the opinion.

B. As has been stated, we have no doubt whatsoever regarding the international enforceability of the obligations assumed under Article 14, as they have been analyzed by the Court in its opinion and with which we are in agreement.

C. Even though we have disagreed, for the reasons expressed, with the Court's exercise of its power to reformulate advisory opinion requests that are submitted to it, we recognize that in the present case reformulation did not lead the Court to consider matters, such as the interpretation of domestic law, which are outside its jurisdiction and we also recognize that the opinion is limited to the analysis of the Convention for which the Court has full competence

RAFAEL NIETO NAVIA

PEDRO NIKKEN

CHARLES MOYER
Secretary

DISSENTING AND CONCURRING OPINION OF JUDGE THOMAS BUERGENTHAL

1. I agree with my colleagues Nieto-Navia and Nikken that the instant advisory opinion request is inadmissible and associate myself with the arguments advanced in their opinion to support that conclusion. Accordingly, I dissent from that part of the Court's opinion which holds that the request is admissible.

2. Having concluded that the Costa Rican request is inadmissible because it asks the Court to render an opinion on a subject that is outside its jurisdiction, I regard it as inappropriate that I should have to address the merits of the request and would have preferred to abstain in the vote thereon. However, Article 15(1) of the Court's Rules of Procedure does not allow me to do so. That provision reads as follows:

The President shall present, point by point, matters for discussion and for a vote. Each judge shall vote either in the affirmative or the negative; abstentions shall not be permitted.

As I read this Rule, it requires me to vote either with or against the majority and does not permit me to abstain.

3. Since I am compelled to vote, I have decided to vote with the majority because I consider its holding to be sound as a matter of law. Here I should note that the majority substantially reformulated the first question presented by Costa Rica. This approach of the majority also implicitly changed the significance of the remaining two questions and enabled it to answer all three questions by doing little more than restating the provisions of Articles 14(1), 1(1) and 2 of the Convention. The resulting answers are therefore unobjectionable.

4. Given the language of Article 14(1), it can not be doubted that the provision establishes "a right to reply or to make a correction." It has been argued that the phrase "under such conditions as the law may establish" indicates that Article 14(1) was designed merely to authorize, but not to require, the States Parties to establish the right. The reasons given by the majority for rejecting this contention are sound, in my opinion, if one reads the applicable language consistent with the rules of interpretation prescribed by international law. It is unnecessary for me, therefore, to repeat that reasoning except to say that a contrary conclusion would distort the meaning of Article 14(1). Whether I, as an individual, believe that it is a good or a bad idea to provide for a right to reply is not a question that is proper for me to address when called upon to interpret Article 14(1). That Article is in the Convention and, as a judge of this Court, I have to interpret it in accordance with the relevant international law on the subject, which imposes the obligation on me, **inter alia**, to do so in "good faith" (Vienna Convention on the Law of Treaties, Art. 31(1)). Here it is worth noting that the Court makes quite clear that Article 14(1) may not be interpreted or applied in a manner which would impair the exercise of the rights which Article 13 (Freedom of

Thought and Expression) guarantees, and I strongly associate myself with that view.

5. It is also clear to me that to the extent that Article 14(1) recognizes the "right to reply," every State Party is required, under Articles 1 and 2 of the Convention, "to ensure to all persons subject to (its) jurisdiction the free and full exercise" of that right. A state which fails to comply with this requirement violates the international obligations it has assumed by ratifying the Convention. As a general proposition, whether Costa Rica complies with the aforementioned obligations by legislative, judicial or administrative measures is, in my opinion, a matter for its domestic law. I do not believe that we are called upon to say more on this subject at this time.

THOMAS BUERGENTHAL

CHARLES MOYER
Secretary

(Translation)

**SEPARATE OPINION OF
JUDGE RODOLFO E. PIZA E.**

I concur with the majority opinion of the Court on the request of the Government of Costa Rica as well as on the answers to the first and second questions, but not with the answer to the third question. Nevertheless, I consider it necessary to deliver a separate opinion on the entire advisory request for the following reasons:

- a) Because I disagree with the manner in which the majority of the Court has defined the very meaning of the questions posed, which affects not only the admissibility of the request, but also the answers to the questions. The Court considers them to be only questions of a general request, falling under Article 64(1) of the Convention, concerning the interpretation of Article 14(1) in relation to Articles 1(1) and 2 of that treaty without reference to the domestic law of Costa Rica or the States Parties in general. This interpretation, in my judgment, evades the specific dimension which ought to be given the questions in line with their context and the manifest intention of the Government in making the request that they are primarily part of a particular request falling under Article 64(2);
- b) Because I judge that the request, thus understood, was admissible in both the general and particular sense, since in both it was aimed at obtaining an interpretation of the Convention. In the first sense, it was seeking an interpretation of the meaning of the Convention itself, and in the second, it was relying on the particular advisory jurisdiction of the Court to determine the compatibility of Costa Rican law with the Convention. It is true that in this latter sense it could not have been answered in detail, not because it was inadmissible, but rather because the Government of Costa Rica did not offer sufficient information to allow the Court to analyze fully the right of reply or correction as it exists under the domestic law of Costa Rica;
- c) Because I feel that the answers given to the first and second questions, although correct, are expressed in such a general manner that they are merely a repetition, almost word for word, of the norms of the Convention, and that they do not completely answer the concrete, although confusing, request of the Government of Costa Rica even when it is understood only with reference to its general advisory jurisdiction under Article 64(1) of the Convention;
- d) Because I do not share the implicit thesis of the majority that this subject matter is reserved to the jurisdiction of the States Parties and is irrelevant to international law. Nor do I agree with the specific manner in which the Court would render effective the rights recognized by the Convention, particularly in respect to the question of whether the fulfillment of the right of reply or correction corresponds

to the duty to respect and ensure its exercise pursuant to Article 1(1), or instead requires the State Party to adopt measures to make the right fully effective in its domestic legal system pursuant to Article 2, as two sides of the same international obligation;

e) Finally, because I disagree with the answer to the third question to the extent that it assumes that the regulation of the right of reply or correction under Article 14(1) of the Convention can be guaranteed by measures other than a statutory law.

I

STATEMENT OF THE ISSUES INVOLVED IN THE REQUEST

2. Certainly, the phrasing of the questions and, above all, the reasoning which gave rise to them is somewhat confusing and made it necessary for the Court to interpret their meaning by exercising its implicit authority to clarify, reformulate or restate requests in more precise terms. However, that preciseness can not allow the contents of the request or the purpose of the questions to be understood in a sense contrary to the terms in which they were posed.

3. Above all, it is evident that the request does not ask the Court to determine the existence of the right of reply or correction set out in Article 14(1) of the Convention, because that is obvious. Nor does it ask the Court to define the obligation assumed by the States Parties, including the Republic of Costa Rica, to respect, ensure and, when necessary, to adopt measures under its domestic law, pursuant to Articles 1(1) and 2 of the Convention, because this derives automatically from ratification of the Convention.

Neither does the request pose the question of the effect of these provisions on the domestic law of Costa Rica, a question which the Government itself answered by indicating that the Convention, an international treaty, has a higher authority than domestic law, according to the provisions of Article 7 of the Constitution of Costa Rica.

4. To the contrary, the Government manifested an interest in clarifying an ambiguous situation, which exists in the context of its domestic legal system, but which is also directly related to the fulfillment of its obligations as a State Party to the Convention and the responsibility that it might incur if it did not comply on the international plane. It would seem that the Government is interested in knowing, for instance, in the questions posed, whether the right of reply or correction is an autonomous right, **enforceable per se as a right of the Convention, even though its exercise is not regulated under domestic law**. Consequently, if the right is considered to be autonomous and no regulations exist under domestic law, could the failure to enforce the right be protested as a violation of a State's immediate international duty to respect and ensure its effective enjoyment, pursuant to Article 1(1) of the Convention, irrespective of its lack of regulation. On the other hand, does the right of reply or correction **require state regulation to be effective and in the absence of such regulation, it would not be an internationally enforceable right of the Convention as such?** Under these circumstances, such violation could be imputed to the State due to its failure to establish the legal conditions referred to in Article 14(1), read in

conjunction with the obligation of Article 2 to adopt the measures that are necessary to make the right fully effective.

5. The effect of either answer would be, in my judgment, clearly different under the Convention. If the right of reply or correction is judged to be an autonomous right, enforceable **per se** even in the absence of domestic regulation, the absence of this regulation alone, which is not indispensable, would not constitute a violation of the Convention. A violation would exist only if a person, in a specific instance, were denied the opportunity to exercise the right or were refused the assistance of the administrative or judicial authorities to exercise the right, but only when this denial springs from a concrete case. On the other hand, if the right must exist under domestic law, the lack of such domestic regulation would result in the violation of the right even though no one was denied its protection in a concrete situation. In so far as these differences specifically concern a right of the Convention or the other treaties referred to in Article 64, it is absolutely necessary to explain them: to resolve first the matter of the admissibility of the request and then to answer the request if it is deemed admissible.

6. In light of the above, the first issue concerning Questions 1 and 2, which appear to be stated in the alternative, can not be answered by a mere formal definition of Article 14(1) or the mere statement of the obligation to respect, ensure and to make the right effective by the States Parties. That can be determined by simply reading the Convention. Rather, the questions should be phrased in this manner:

a) Should it be understood that this article sets out an autonomous right of reply or correction, that is, enforceable *per se* as a right recognized by the Convention, and that Costa Rica as a State Party is obligated to immediately respect and ensure this right under Article 1(1) of the Convention regardless of whether the requisite legal conditions have been established under domestic law ?

b) Or, to the contrary, does this right require regulation under domestic law, without which the right is unenforceable **per se** as a right of the Convention, at the same time recognizing the duty of Costa Rica, as a State Party to the Convention, to adopt such legislative or other measures as may be necessary to give effect, or full effect, to those rights pursuant to Article 2?

A third possible hypothesis would incorporate both alternatives:

c) Or is it both possibilities simultaneously: a right enforceable **per se**, that a State is obliged both to respect and ensure immediately, but which the State must also incorporate into its domestic law by legally establishing the conditions referred to in Article 14(1) ?

7. A second question, Question 3, could be stated in this way:

a) In the event that, in the opinion of the Court, Costa Rica is obligated to establish the legal conditions referred to in Article 14(1) of the Convention, could they be of a merely instrumental character and

thus be adopted, for instance, by decrees or administrative regulations?

b) Or to the contrary, would they be understood to fall within the requirement of law (**reserva de ley**), which would consequently require that they be instituted by the enactment of a statutory law?

8. The questions formulated in this manner could fall under Article 64(1) of the Convention, which authorizes the Court to interpret the Convention or other treaties concerned with the protection of human rights in the American States. If this is the case, then the reference to the Republic of Costa Rica in the request would be merely an example, as would be a reference to any other State Party. However, the questions also could and in deed appear to fall under Article 64(2), which authorizes the Court to provide a State with opinions regarding the compatibility of the domestic laws of the State with certain other international human rights instruments, providing only that this concept is understood as also applicable to the domestic legal system as a whole. Furthermore, there is no reason that the questions could not fall under and be considered under both Articles 64(1) and 64 (2). Precedent for this position exists in **Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism** (Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5). Or, as the Court itself has also stated,

The only major difference between opinions dealt with under Article 64(1) and those falling under Article 64(2) is one of procedure (**Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica**, Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 17).

9. It is true that the lack of reference to a concrete norm of the domestic law of Costa Rica whose compatibility with the Convention is in question, as well as the express invocation of Article 49 of the Rules of Procedure of the Court, which deals with general advisory requests under Article 64(1) of the Convention, and not Article 51 of the Rules which corresponds to particular requests under Article 64(2), could be understood to lead to the conclusion that this is a general advisory opinion request concerning the abstract interpretation of the Convention under the provisions of Article 64(1). However, these same explicit references to the domestic legal system of Costa Rica and the obligations it has undertaken as a State Party to the Convention, could also oblige the Court to consider it as a particular advisory opinion request pursuant to Article 64(2) of the Convention, which concerns the compatibility of the domestic legal system of Costa Rica with its international obligations.

II ADMISSIBILITY

10. I agree that to the extent that the request concerns an interpretation of Article 14(1) of the Convention in relation to Articles 1(1) and 2 and because it has been requested by the Government of Costa Rica, a State Party to the Convention and a Member State of the OAS, it falls, in general, within the parameters of Article 64 of the Convention. However, I believe that

the admissibility of the request should be considered in the two dimensions already pointed out, namely:

a) As a General Request:

11. In this first sense, I concur with the principal opinion of the Court in that the request does not pose any special doubt in respect to its admissibility. Its main purpose is to obtain an interpretation of the meaning of the very norms of the Convention. This conforms to the specific purpose of the advisory jurisdiction of the Court, in accordance with Article 64(1).

12. Nor does the fact that the request appears to involve, at first glance, considerations of the domestic law of the State cause me difficulty as to its admissibility. In this sense, I do not share the reasoning of my colleagues that, as the advisory jurisdiction of the Court is limited to the interpretation of the International Law of Human Rights (that of the Convention or of other treaties concerning human rights), the issue as to what degree and by what means the States must respect and effectively guarantee that right, as long as they do so, lies outside the jurisdiction of the Court. Stated in other terms, the Court would only be concerned with determining the meaning and scope of internationally recognized rights, or of the norms which guarantee them, and the general obligation of the States to effectively respect and ensure them. However, the Court would not be concerned with how the States actually accomplish these objectives or how they should accomplish them in their domestic legal system. Under international law, it is only important that they comply with this duty. The form or the means which they use is exclusively a matter of the jurisdiction and responsibility of the State.

13. I believe that this view is only partially true: certainly, from the point of view of international law, the State is a sovereign entity and its acts have traditionally been considered, although certainly less so today, as acts, legal or illegal as the case may be, in whatever form they are adopted, whether they be normative or subjective acts or whether they be legislative, governmental, administrative or judicial acts.

14. However, this thesis can no longer be sustained under contemporary international law, and much less under Human Rights Law, if any because it is no longer possible to differentiate the content of international law and even less Human Rights Law from that of domestic law, at least not with the clarity that was possible when international law was limited to the regulation of the external acts and relations of States. There was no apparent conflict with domestic law which retained exclusive domination over everything else, especially that which concerned a State's relations or actions within its own territory or in respect to its own subjects. On the contrary, at the present time, the same situations, in the same territory, and with respect to the same persons can be the subject of both the jurisdiction of a particular State and the jurisdiction of the international community. As a result, the legitimacy and even the need to consider questions from the point of view of international law, although they apparently fall under domestic law, is today indisputable. The Permanent Court of International Justice has already established this principle on various occasions even rebutting the classical but out-dated principle that domestic law must have precedence over international law.

b) As a Particular Request:

15. Nor do I have difficulty admitting the request as a particular request, falling under Article 64(2) of the Convention, in the sense that it can be understood to pose a question of the compatibility of the norms of Costa Rican domestic law with the norms of the Convention as they relate to the right of reply or correction, because this falls precisely under the definition of the Court's advisory jurisdiction in this particular dimension.

16. Nevertheless, I recognize that a doubt is raised by the fact that the Government of Costa Rica was not requesting an opinion with respect to a concrete norm of its domestic legal system that could possibly directly countermand the provisions of the Convention. In effect, from the point of view of a particular request, what was being asked was rather whether the obligation assumed by Costa Rica pursuant to Article 1(1) to respect and ensure the effective exercise of the rights recognized by Article 14(1) is satisfied by the sole fact that the Convention has a higher authority than Costa Rican domestic law under the Costa Rican Constitution (Art. 7), even in the absence of norms that regulate the conditions of its exercise under the terms of Article 14(1). Or to the contrary, does the nature of this right and its recognition by the Convention require an adoption of complementary measures under domestic law, in which case Costa Rica, if it lacked such regulations, would be in violation of the Convention and its obligations under Article 2. In addition, if domestic regulations are deemed necessary, what class of legislative or other measures must Costa Rica adopt to comply with its obligations ?

17. It is obvious that these questions would be completely admissible in a contentious case submitted to the Court, in which a complaint alleged a concrete violation of the right of reply or correction resulting from an action or omission of the State of Costa Rica. Naturally, this violation would require that the State had, in fact, denied to the injured person the administrative or judicial protection of the State, when the right of reply or correction was denied by a legally regulated medium of communication, as required under Article 14(1). However, violations do not only result from a denial of justice or from the non-application of the Convention or the related norms of domestic legislation. Violations may also result from the inability to protect the right because of the absence of domestic norms. However, as was stated, any one of these possibilities would constitute different forms of violation which would result in different consequences: if the violation were due to the absence of complementary domestic norms, it would be produced by the sole fact of this normative omission. In such a case, as has been repeatedly established under international law, the prior exhaustion of domestic remedies would not be necessary as the violation would be produced by the sole fact of this normative omission. This same jurisprudence declares that international law can be invoked when there is a violation of international law by a norm of domestic law, even without involving a concrete case. On the other hand, if it is only necessary that the right of the Convention be incorporated into the domestic law of Costa Rica, a violation would only result in the concrete case of a refusal to administer justice, regardless of whether intermediate legislation existed. It should also be kept in mind that the media of communication are normally private, and for that reason their simple refusal

to recognize the right of reply or correction could not constitute a violation of international law because such refusal would not be imputable to the State as long as the State, through its organs, did not acquire that responsibility by not protecting the victim from the publication of inaccurate or offensive statements.

18. If the questions posed in this request would be admissible in a contentious case in these terms, it is absurd to suppose that they would not be admissible in an advisory opinion, which has a wider scope and is more informal. The Court has repeatedly stated that its advisory jurisdiction was established by Article 64 as 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 ("**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 has indicated on another opportunity, the advisory process 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. (**Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)**), Advisory Opinión OC-3/83 of September 8, 1983, Series A No 3, para. 43). (See also **Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, supra** 8, especially paras. 19 and 25).

Paragraph 25 further states:

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.

19. The wording of Article 64(2) of the Convention which expressly refers to requests by a State for an opinion of the Court regarding the "compatibility of any of its domestic laws with (certain) international instruments" creates a problem in cases such as the one before us, which appears rather to refer to the absence of specific norms concerning the right of reply or correction in the domestic legal system of Costa Rica. It is also apparent that it can not be said **a priori** that these norms do not exist at all in view of the fact that, according to the Government of Costa Rica, all the norms of the Convention

are fully incorporated as law in its domestic system with a higher authority than even domestic laws. Furthermore, according to the principle of "plenitudo del orden jurídico" (the all-inclusiveness of law), a total absence of a norm in a concrete case or situation is equated with the existence of a contrary norm in the same way that every concrete norm always implies another that conforms to it, which may or may not be applicable to other suppositions not contemplated therein, by virtue of the general principles and technical criteria of interpretation, integrated in the law, in a way that the so-called gaps of the legal system are only apparent. This generally valid principle is particularly applicable in the case of standards of "guarantees" since these are aimed at working through the whole institutional and economic apparatus that, in the measure that it does not simply allow access of persons to its mechanisms of protection and eventual indemnization, it denies it to them with the same consequences and in the same way as if it had been expressly prohibited. In the case where, irrespective of the recognition of the right of reply or correction, its normative development in the domestic legal system were juridically necessary, the mere lack of this normative development would imply the existence of a concrete norm of that system which would block the exercise of the right in question, leaving it without the respect and guarantee provided by Articles 1(1) and 2 of the Convention. That is, moreover, in tune with the established principle that rights are violated, especially in international law, as much by action as by omission. As the European Court of Human Rights has stated:

In any event, the Government may not, in relation to the fulfillment of the engagements undertaken by them by virtue of Article 6, seek refuge behind the possible failings of their own domestic law. (Eur. Court H.R., **Eckle case**, judgment of 15 July 1982 Series A No. 51, para. 84; see also **Marckx case**, judgment of 13 June 1979, Series A No. 31, para. 3)

20. For these reasons, I believe that the request of the Government of Costa Rica is admissible and should be admitted as I have defined it, as much as a general request in the terms of Article 64(1), as a particular request in those of Article 64(2) of the Convention.

III WITH RESPECT TO THE GENERAL REQUEST OF COSTA RICA

21. I am in general agreement with the reasoning of the principal opinion concerning Questions 1 and 2, as they have been generally understood. It is not necessary for me to discuss here some exceptions that I have to that reasoning because they do not seriously affect the conclusion, which I share, that, under Article 14(1) of the Convention, the right of reply or correction is a right per se. Each State Party is obligated both to respect and to ensure this right to all persons subject to its jurisdiction, without discrimination, under the terms of Article 1(1), and to adopt the legislative or other measures as may be necessary to give it effect, or full effect, in its domestic legal system, in accordance with Article 2 of the Convention.

22. I must, however, expand on some matters not covered by the majority opinion, that appear to me to be important in order to answer the request more precisely, as well as comment on others on which I am in

general agreement with my colleagues but with respect to which I have some differences. The former concern the very interpretation of the right of reply or correction as it is guaranteed by Article 14(1) of the Convention. The latter concern both the nature and scope of the obligations assumed by the States Parties under Articles 1(1) and 2 of the Convention and the subject matter of Question 3, which concerns the kind of measures provided by Article 14(1) to regulate the conditions of the exercise of the right of reply or correction.

a) Articles 1(1) and 2 of the Convention:

23. The general duties assumed by the States Parties to the Convention for each one of the rights therein are, on the one hand,

... to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination... (Art. 1(1))

and on the other hand,

... to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights and freedoms (Art. 2).

I believe that the request requires the Court to analyze the content and scope of both such duties, starting with the logical presumption that both refer to different hypotheses-- otherwise it would not make sense to have separate provisions.

24. The draft that served as the basis for the American Convention only provided for the generic duties of Article 1(1) (see **Conferencia Especializada Interamericana sobre Derechos Humanos, San José, Costa Rica, 7 - 22 de noviembre de 1969**, Actas y Documentos, OEA/Ser.K/XVI/1.2, Washington, D.C. 1978, Doc. 5, pp. 12 ss.); that of Article 2, an almost exact copy of Article 2(2) of the International Covenant on Civil and Political Rights, was the result of the Observations of the Government of Chile (**Ibid.**, doc. 7, p. 38), supported by those of the Governments of the Dominican Republic (**Ibid.**, doc. 9, p. 55) and Guatemala (**Ibid.**, doc. 4, corr. 1, p. 107) and finally of a motion of Ecuador during the Conference (**Ibid.**, p. 145). It was subsequently accepted by the Working Group of Commission I as Article 2(2) (**Ibid.**, p. 152). This Article also had the support of the United States of America in a Declaration, (**Ibid.**, Appendix A, p. 146) although for reasons which differ from those of the other countries, as will be explained.

25. The foregoing, combined with the very requirements of the International Law of Human Rights, requires that the obligation to respect and ensure those rights, as established in Article 1(1), is truly essential to the system of the Convention, and that it be precisely understood as an immediate and unconditional duty of the States, resulting directly from the Convention. The very notion of protection on the international plane, although only as complementary or subsidiary to that of domestic law, requires that

the States immediately commit themselves to respect and ensure those rights as an international obligation over and above the vicissitudes of their domestic legal system.

26. On the other hand, the duty to take the necessary measures to ensure fully the effectiveness of such rights on the domestic plane, as referred to in Article 2, can not be understood, in the system of the Convention, as a mere repetition of that which is already established in Article 1(1) because that would be the equivalent of rendering Article 2 meaningless. Nor can it be understood to be the equivalent of the simple generic duty to give such rights effect on the domestic plane, as part of any international obligation, because then it would have been unnecessary to ensure them under Article 1(1), and perhaps it would have been unnecessary to ensure them at all. The European Convention for the Protection of Human Rights and Fundamental Freedoms does not have a provision similar to Article 2 of the American Convention and yet it can not be supposed that due to the absence of this provision the same obligation does not exist for its States Parties.

27. On the other hand, the fact that this norm has been included in the Convention shows, very clearly in my opinion, that it has a marginal role in the Convention, which is to provide protection in the eventuality that Article 1(1) would be inoperable or at least insufficient. It was included not because of the limitations inherent under domestic law that would result in violations of Article 1(1) but rather by virtue of the fact that some rights --not all-- need in and of themselves complementary standards or measures on the domestic plane in order to be immediately and unconditionally enforceable. In other words, in questions of those rights recognized by the Convention as immediate and unconditional, the duty of the States Parties to respect and to ensure them, in accordance with Article 1(1), is sufficient to make them immediate, unconditional and fully enforceable as rights of the Convention, which is the only area in which the Court exercises its jurisdiction. Some rights, however, due to their nature or to the wording of the Convention, lack this immediate and full enforceability unless domestic norms or other complementary measures grant it, as is the case for example with political rights (Art. 23) or those of judicial protection (Art. 25). These rights can not be effective solely by virtue of the norms that recognize them, because they are by their very nature inoperable without a very detailed normative regulation or, even, a complex institutional, economic and human machinery which gives them the effectiveness that they command as rights of the Convention on the international plane and not only as a question of the domestic legal system of each State. If there are no electoral codes or laws, voter rolls, political parties, means of publicity and transportation, voting centers, electoral boards, dates and time periods for the exercise of the right to vote, this right, by its very nature, simply can not be exercised; nor can the right to judicial protection be exercised unless there are courts to grant it and there are procedural standards that control and make it possible.

28. It is also for this reason that Article 2 wisely refers not only to normative provisions but also to "other measures" which clearly include the aforementioned institutional, economic and human machinery. Article 2 does not refer to the administrative or judicial measures as such, because they simply constitute the application of the former measures and, in that sense, are included within the duties of respect and guarantee recognized by Article

1(1) and not within the duties of Article 2. This is true even in States with systems of binding precedents, as are those under the common law system, because it is obvious that in these States general law is created not by jurisdictional act but rather by the normative power of the courts, as set by their precedents.

29. This interpretation is also, in my opinion, the only one that is in accord with the legislative history of Article 2 of the Convention. The drafts that preceded the present Convention did not include a similar provision, not through inadvertence but rather because of the concern that the provision might be interpreted as a kind of escape valve from the immediate and unconditional obligations of Article 1(1). Thus, in the report of the rapporteur of the Inter - American Commission, Dr. Dunshee de Abranches, it is expressly stated:

Under the constitutional system prevailing among the American States, the provisions of treaties are incorporated into municipal law through ratification, that is prior enactment of the competent legislative organ, without the need for a special law. Consequently, this paragraph is not needed in the Inter-American Convention. On the contrary, if it were placed in the Convention, it could justify the view that any State Party would not be obliged to respect one or more of the rights defined in the Convention but not covered by the domestic legislation; but would be so obliged only after passage of a special law on such right or rights. (**Estudio Comparativo de los Pactos de las Naciones Unidas.. y de los Proyectos de Convenciones Americanas sobre Derechos Humanos**, OEA/Ser.L/V/II.19/Doc. 18, p. 191, 1968).

This concern resulted in the concrete observations of the Government of Chile (**supra** 24), in which it proposed the inclusion of Article 2, in the sense that:

While it is true that generally speaking the statement made by the Rapporteur, Dr. Dunshee de Abranches, in the IACHR Document 18 to the effect that in the American states the provisions of treaties are incorporated into domestic law by virtue of ratifications may be borne out, it is not nonetheless certain that in various instances it will be necessary to adopt measures of a domestic nature to give effect to the rights, particularly in those cases in which the Preliminary Draft itself so indicates, in such terms as the following: "the law shall recognize equal rights for children born outside of wedlock and for those born in wedlock. (Art. 16); or "the law shall regulate the manner..." (Art. 17); and other similar passages. The argument that inclusion of this clause in the Inter-American Convention might warrant allegation by a State that it was not obligated to respect one or more rights not contemplated in its domestic legislation is not supported by the terms of the Preliminary Draft; and it is even less likely to find support if the scope of the Convention is expressly established at the Conference (**Actas y Documentos, supra** 24, doc. 7, p. 38).

30. I believe that the most basic duty is that of each State to immediately and unconditionally respect and ensure fundamental human rights, so that these rights are provided full protection on the international legal plane, even if domestic rules do not grant them immediate enforceability. By virtue of the duty to respect fundamental human rights, the State can not directly violate them even if it has not recognized those rights in its domestic law; and by virtue of the duty to guarantee them, the State can not indirectly violate them by denying the executive protection and judicial "amparo" necessary to enforce them both with respect to public authorities as well as with respect to individuals, not even under the pretext that such remedies have not been provided by its domestic legal system. In other words, the mere lack of respect of such rights and the mere denial of executive or judicial protection would constitute direct violations of those rights with regard to the duty to respect and ensure them as established by Article 1(1) of the Convention, without the necessity of recourse to that duty of Article 2 to adopt the legislative or other measures necessary to make them effective on the domestic plane.

31. Therefore, Article 2 only has meaning, as an independent norm within the system of the Convention, in respect to those rights which by their nature must be developed through supplementary laws on the domestic plane. I do not refer, of course, to the so --called programmatic rights because these establish a different category of mandates, certainly legal, but unenforceable as such even under the terms of Article 2 of the Convention.

32. In line with the above, Article 2 can not be understood as conditioning the application of Article 1(1) in the sense that, for example, it was interpreted unilaterally and without any support in the Conference of San José by the Declaration of the United States of America (**supra** 24), when it was stated:

The United States agrees that this article should be included in the draft Convention since it helps to clarify the legal effect of ratification on the domestic law of the respective parties. The article is sufficiently flexible so that each country can best implement the treaty consistent with its domestic practice. Some countries may choose to make the articles of the treaty directly effective as domestic law and this article would permit them to do so. The comments made by Chile suggest that its own practice may vary depending on the text of each article. Others may prefer to rely solely on domestic law to implement the articles of the treaty. In the U.S. we would interpret this article as authorizing us to follow the last course in the case of matters within Part I, the substantive portions, of the draft convention. That will permit us to refer, where appropriate, to our Constitution, to our domestic legislation already in existence, to our court decisions and to our administrative practice as carrying out the obligations of the Convention. It will also mean that we will be able to draft any new legislation that is needed in terms that can be readily and clearly assimilated into our domestic codes. In other words, it is not the intention of the U.S. to interpret the articles of the treaty in Part I as being self - executing (Buergenthal & Norris, **Human**

Rights: The Inter-American System, Chapter 1, Summary
Minutes of the Conference of San Jose, Doc. 35 Corr. 1,
November 16, 1969, p. 15).

33. Irrespective of the validity of this interpretation or of a reservation of this nature in the concrete case of the United States of America --a determination of which would exceed the scope of this advisory opinion-- it does not appear to be acceptable as a general thesis, nor was it, in fact, the reason that Article 2 was included in the Convention. On the contrary, I believe that, pursuant to the Convention, the States that do not automatically incorporate international law into their domestic legal system are obligated to incorporate all of the rights recognized by the Convention by virtue of the duty to respect and ensure them pursuant to Article 1(1) and not by virtue of the duty to develop these rights in their domestic law as established in Article 2.

b) Article 14 of the Convention:

34. As I have indicated, I agree, in general, with the reasoning of the majority opinion, especially with respect to the meaning and scope of Article 14(1) and the right of reply or correction which it guarantees. I limit myself to the following observations, which are complementary in nature.

35. First, given my interpretation of Articles 1(1) and 2 of the Convention, it is necessary to clarify the reasons, in addition to those expressed in the principal opinion, as to why I believe that Article 14(1) establishes a right of reply and correction enforceable **per se** without the need for "such conditions as the law may establish" as stated in Article 14(1). I believe that the essence of Questions 1 and 2 of the Government of Costa Rica is whether this reference subordinates the actual right or its exercise, so that without these legal conditions the right of reply or correction would not be imposed on the States as an immediate and unconditional duty that must be respected and ensured.

36. In this respect, it appears that the fundamental criterion which creates the very nature of human rights requires that the norms which guarantee or extend human rights be broadly interpreted and those that limit or restrict human rights be narrowly interpreted. This fundamental criterion, the **pro homine** principle of the Law of Human Rights, leads to the conclusion that immediate and unconditional enforceability is the rule and that conditional enforcement is the exception. Considered as such, under the terms of the Convention the right of reply and correction could be applied even if "such conditions as the law may establish" did not exist. The right is enforceable **per se**.

37. This is precisely the case: First, Article 14(1) defines this right as a corollary to the rights of everyone "to have his honor respected" and "to the protection of the law against interference or attacks" to his "honor or reputation" (Art. 11) and also in a certain way "to freedom of thought and expression" (Art. 13), both of which have a special if not preeminent place among the rights recognized by the Convention. Second, Article 14 itself establishes the basic criteria to determine its scope. The first line of Article 14 reads, "Anyone injured by inaccurate or offensive statements or ideas

disseminated to the public in general by a legally regulated medium of communication" and permits the injured party "the right to reply or to make a correction using the same communications outlet." From these criteria, it is evident that others can be deduced, such as the conditions that the reply or correction would be published free of charge, as soon as possible, in a location and with an emphasis comparable to that which caused the injury, and without a commentary which would impair its value. All of these conditions can be determined by only using reasonable criteria which should govern all interpretations of law, even when formal regulations do not exist.

38. In other words, the right of reply or correction is such that nothing may prevent that it be respected, ensured, applied and protected. The basic criteria of reasonability must be used to determine its boundaries even when no regulatory laws exist. All things considered, the same law that establishes the norms under which the right is to be exercised must also delineate its limitations, because in any other way the law itself would violate the essential subject matter of the right regulated and, therefore, Article 14(1) of the Convention.

39. In my judgment, two reasons exist in the present case which, in addition to and without detracting from the immediate and unconditional enforceability of the right of reply or correction, require that the conditions for its exercise be established with the exactitude and permanence of Law. The first is the principle of juridical security, which in this case plays a double role: security for the eventual victims of an inaccurate or offensive statement who hold the right, and also security for the mass media, normally private, to avoid abuse in the exercise of the right. Second, there must be a necessary balance between the rights of both parties, which can be provided for by access to an effective and expedient judicial remedy that is adequate to the character and urgency of the rights of both parties, and which also guarantees, in case of controversy, the opportune publication of the reply or correction when it is justified. Here we would see the operation of the principle to which I referred previously in this paragraph --that complementary legal and institutional measures are necessary if the very right recognized by Article 14(1) is to be fully and effectively guaranteed as a right of the Convention under domestic law, which is where we must look for human rights to be effective. Consequently, the States have a duty to adopt these measures pursuant to Article 2 of the Convention.

40. My affirmative vote on the answers in the principal opinion to Questions 1 and 2 of the request of the Government of Costa Rica should be understood to affirm the concurrent duties of the State Parties to the Convention to respect and ensure the rights in accordance with Article 1(1) and to develop these rights in their domestic legal system in accordance with Article 2.

c) The Meaning of the Word "Law" in Article 14(1):

41. Finally with reference to Question 3 of the Government of Costa Rica, I dissent from the majority's interpretation that the phrase "such legislative or other measures" (Art. 2) refers to regulations of any character that are sufficient in the domestic legal system of each State Party and not only the norms and institutional measures to which I believe it should be limited as I

have previously explained (see paras. 27-31, *supra*) but also that, by virtue of this general norm, the "law" to which Article 14(1) refers is not limited to a true "statutory law," in the terms already defined by the Court (**The Word "Laws" in Article 30 of the American Convention of Human Rights**, Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6), or even to a "norm" of another rank, in its specific meaning, but rather includes any other type of "act" that has the necessary force to make the right of reply or correction effective in the legal system of each State Party to the Convention.

42. It is true that the principal opinion itself recognizes that, in so far as the measures of the domestic legal system signify limitations or restrictions to the right of reply or correction itself or to other rights recognized by the Convention, they must be adopted by means of a statutory law, in the terms stated. Nevertheless, I believe that because, first, all regulations necessarily signify a limitation or restriction and, second, there exists a general principle of law that basic rights are a subject matter reserved to law, the Court should state that the expression "law" in Article 14(1) means the enactment of a "statutory law" in every case.

43. To reinforce this assertion, it should also be kept in mind that all regulation of the conditions of the exercise of the right of reply and correction necessarily involves limitations or restrictions of the general right of freedom of the mass media, which should be enough to require the existence of a statutory law. In this context, I believe that the possibility, affirmed in the request, that these measures be merely instrumental in character, is unacceptable considering that the right of reply or correction is established by the Convention itself, or in the domestic legal system that incorporates it. For this right to have effect, it is necessary to go beyond the terms of the simple definition of the right and to impose new limitations or restrictions on the holder of the right or the mass media or on both parties.

44. Of course, I warmly subscribe to the reservation established in paragraph 45 of the principal opinion that emphasizes how important it is that the States, in regulating the conditions of the exercise of the reply or correction, ensure to everyone involved the enjoyment of the necessary guarantees, specifically the rights to a fair trial and to judicial protection (Arts. 8 and 25 of the Convention).

IV AS TO THE PARTICULAR REQUEST OF COSTA RICA

45. I have little to add to my opinion concerning the admissibility of the request. I consider the request presented not a question which exclusively concerns the domestic law of Costa Rica, but rather a question about the compatibility of the domestic law of Costa Rica with the norms of the American Convention. The request expressly asked the Court to interpret Article 14(1) in relation to Articles 1(1) and 2 of this international treaty. As I have stated (***supra***, 1.b), however, the request did not provide the Court with sufficient facts to permit the Court to rule on the issue of incompatibility.

46. In effect, the Government of Costa Rica only affirmed that, under Article 7 of the Costa Rican Constitution, the Convention is incorporated as law in the domestic legal system of the country and has a higher authority

than domestic laws. This information is obviously insufficient to determine if the State of Costa Rica is fully complying with its obligations under the Convention. The Government did not even inform the Court as to whether a norm exists under Costa Rican law which regulates the conditions of the exercise of the right of reply or correction, although it can be assumed from the wording of the request that it does not exist. However, neither the Court nor its member from Costa Rica, as an international judge, is obligated to know or to investigate whether such a norm exists. Further, the Government did not offer concrete references explaining the status of this right in the legal practice of the country, nor did it explain whether appropriate judicial remedies, such as a writ of "amparo" which is prevalent in the Constitutions of the American States, are accessible.

47. For these reasons, I believe that the request of Costa Rica, inasmuch as it is a particular request falling under Article 64(2) of the Convention, although it is admissible and should be admitted, can not be answered.

V CONCLUSIONS

48. I believe that the request of Costa Rica:

a) Should be considered by the Court both as a general request under Article 64(1) and as a particular request under Article 64(2) of the Convention.

b) Is admissible and should be admitted in two contexts: as a request for an interpretation of Article 14(1) in relation to Articles 1 (1) and 2 of the Convention and as a request for a ruling on the compatibility of the Costa Rican legal system with these international norms.

c) As to the substance of the questions, they should be answered as follows:

I. AS A GENERAL REQUEST

First:

That Article 14(1) of the Convention recognizes a right of reply or correction enforceable **per se**, as a right of the Convention, regardless of the authority or effectiveness of this Article or of others found in the Convention in general in the domestic legal system of each State, and independent of whether the State has established the conditions for its exercise as provided by that Article.

Consequently, pursuant to Article 1(1) of the Convention, all States Parties are obligated immediately and unconditionally:

1. To ensure the right of reply or correction recognized in Article 14(1) to anyone subject to their jurisdiction who is injured by the mass media to which the Article refers, whether public or private, and to respect directly this right in the mass media even if the conditions for its exercise as stated in the Article have not been established in their domestic legal systems.

2. To ensure the right of reply and correction in any case, in accordance with criteria of reasonability, keeping in mind its character, object and purpose and the need to balance its legitimate exercise with the basic rights of others, particularly with freedom of the press;

3. To grant to anyone who considers himself to be injured, under the terms of Article 14(1), access to an expedient and efficient judicial remedy that peremptorily resolves any conflict regarding the existence of an injury and, in the case of an actual injury, guarantees the timely publication of a reply or correction.

Second:

That, in addition to and without detracting from the immediate and unconditional duty to respect and ensure the right of reply and correction, the States Parties are obligated, pursuant to Article 2 of the Convention and the general principle of judicial security, to establish in their domestic legal systems the conditions for its exercise referred to in Article 14(1), taking into consideration the peculiarities of the right itself and respecting its essential meaning and the other rights recognized under international law.

Third:

That, in virtue of the principle that the regulation of basic rights is a matter reserved to statutory law, and that the legitimate interests of both the injured parties and the mass media which is normally privately owned, are affected by the regulation of the right of reply or correction, conditions for the exercise of this right should be established by a statutory law, according to the terms defined by the Court in its Advisory Opinion **The Word "Laws"** (*supra* 41).

II. AS A PARTICULAR REQUEST:

First:

That the Republic of Costa Rica, by incorporating the international treaties duly approved by the Legislative Assembly into its legal system with a higher authority than domestic law, has granted the recognition and enforceability required by international law to the norms, including the right of reply and correction, which are recognized by the American Convention.

Second:

That, nevertheless, in order to determine if Costa Rica is complying fully with its commitment to respect and ensure the rights recognized in the Convention, including the right of reply and correction, and is taking the measures necessary to give effect to those rights in its domestic legal system pursuant to Articles 1(1) and 2 of the Convention, the request does not offer the information which is indispensable to clarify among other things:

1. Whether norms exist in the domestic legal system of Costa Rica to ensure this right by establishing the conditions of its exercise as provided by Article 14(1) of the Convention, and if such conditions do exist, to establish their scope and contents. The request contains nothing on this, although it may be inferred from it that these norms do not exist;
2. Whether there exists under Costa Rican law, expedient and effective remedies that ensure both the exercise of the right of reply or correction and a fair balance between it and the other rights recognized by the Convention. Although the request is also remiss in this respect, it is possible that remedies, such as "amparo" as it is set out in the laws of the Latin American States, would constitute an acceptable remedy, on the condition that it would be recognized in the case of an eventual refusal to allow the exercise of the right in question or the other rights recognized by the Convention in general and with respect to the injuries committed by private persons;
3. Whether there actually exists in Costa Rica expedient, equal and non - discriminatory access to these remedies, especially to appropriate judicial remedies, and whether these remedies undeniably provide a full and immediately effective resolution to the conflicts which the urgency of the character of the right of reply or correction requires. The request does not offer any information on these questions.

Consequently, the particular request of Costa Rica, although admissible, can not be answered.

RODOLFO E. PIZA E.

CHARLES MOYER
Secretary