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File Number(s):	Report No. 11/96; Case 11.230
Session:	Ninty-Second Special Session (29 April – 3 May 1996)
Title/Style of Cause:	Francisco Martorell v. Chile
Doc. Type:	Report
Decided by:	First Vice Chairman: Ambassador John S. Donaldson; Second Vice Chairman: Professor Carlos Ayala Corao; Members: Dr. Oscar Lujan Fappiano, Professor Robert Kogod Goldman, Dr. Jean Joseph Exume, Ambassador Alvaro Tirado Mejia. Commissioner Claudio Grossman, national of Chile, did not participate in the discussion and voting on this case, in accordance to Article 19 of the Regulations of the Commission.
Dated:	3 May 1996
Citation:	Martorell v. Chile, Case 11.230, Inter-Am. C.H.R., Report No. 11/96, OEA/Ser.L/V/II.95, doc. 7 rev. (1996)
Represented by:	APPLICANTS: Jose Miguel Vivanco, Juan Mendez and Viviana Krsticevic
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I. FACTS

1. On April 21, 1993, Mr. Francisco Martorell and the publishing house Editorial Planeta, published a book in Argentina titled "Impunidad diplomática" [Diplomatic Impunity] concerning the circumstances leading up to the departure of the former ambassador of Argentina in Chile, Oscar Spinosa Melo. The book was scheduled to go on sale in Chile the following day.

2. On April 21, 1993, however, Mr. Andrónico Luksic Craig, a Chilean businessman, petitioned the Seventh Chamber of the Santiago Court of Appeals seeking an injunction on the grounds that the book violated his right to privacy and requesting that it be banned. The Santiago Appeals Court issued an interlocutory injunction ["orden de no innovar"] that put a temporary stop to the book's entry, distribution and circulation in Chile pending a final ruling on the case.

3. Subsequently, a number of criminal actions were brought against Mr. Martorell in the Chilean courts by persons alleging that the contents of the book "Impunidad diplomática" were slanderous and defamatory. Those cases are still before Chile's domestic courts.

Litigation in the Chilean courts

4. On May 31, 1993, the Santiago Court of Appeals, in a two-to-one decision, granted the petition and issued an injunction (orden de no innovar) which prohibited the entry and sale of the book in Chile.

5. Through a "recurso extraordinario" [extraordinary remedy], an appeal was filed with the Supreme Court of Chile invoking the constitutional guarantees of freedom of the press. In a unanimous decision handed down on June 15, 1993, the Supreme Court denied the appeal and banned circulation of the book.

6. On June 28, 1993, the Court of Appeals officially notified Mr. Martorell of its final decision granting the injunction.

II. PROCEEDINGS IN THE COMMISSION

7. On December 23, 1993, the Commission received a petition filed by Human Rights Watch/Americas and the Center for Justice and International Law (CEJIL) in connection with this case. The petition alleged that the ban on the entry, distribution, and circulation of the book "Impunidad diplomática" in Chile was in violation of Article 13(2) of the American Convention on Human Rights which protects freedom of thought and expression and specifically provides that: "The exercise of the right.... shall not be subject to prior censorship but shall be subject to subsequent imposition of liability..."

8. On February 16, 1994, the Commission forwarded the relevant parts of the petition to the Government, requesting information on the facts or other pertinent information within 90 days.

9. On March 30, 1994, the Commission received additional information from the petitioners which was transmitted to the Government on April 15, 1994.

10. On June, 8, 1994, the Commission received a note from the Government requesting a 60-day extension for its response to the complaint. The requested extension was granted.

11. On September 7, 1994, the Government requested another extension, this time for 30 days. Again, its request was granted.

12. The Commission received the Government's response on October 13, 1994, and forwarded it to the petitioners on October 28, 1994.

13. On November 16, 1994, the Commission received a communication from CEJIL and from Human Rights Watch/Americas wherein they explained the terms of their participation in the case.

14. On December 5, 1994, the Commission received the petitioners' observations to the Government's rejoinder, the relevant parts of which were transmitted to the Government on December 19, 1994.

15. On February 1, 1995, a hearing was held on this case, with the petitioners and representatives of the Chilean State present.

16. On February 6, 1995, the Commission sent letters to the parties putting itself at their disposal for a friendly settlement of the matter. The petitioners replied that they would accept the Commission's proposal provided Chile first lifted the ban on Mr. Martorell's book "Impunidad diplomática", thus allowing the book to enter Chile and circulate freely therein.

17. On March 6, 1995, the Government sent the Commission a note containing its reply to the petitioners' proposal, which was that a friendly settlement would be out of the question as long as Mr. Martorell refused to answer to the Chilean courts. This note was forwarded to the petitioners on March 9, 1995.

18. On July 5, 1995, the Government of Chile presented its comments on the petitioners' observations. It ratified, in all their parts, the petitions that the Government filed in its original rejoinder to the complaint. The petitioners were sent a copy of the Government's comments on July 18, 1995.

19. On September 8, 1995, a hearing was held on this case, with the petitioners and representatives of the Chilean State present.

20. On September 14, 1995, pursuant to Article 50 of the American Convention, the Commission approved Report 20/95 on the instant case and forwarded it to the Chilean Government on October 6, 1995. The Government, for its part, responded to the report on February 8, 1996.

21. On March 19, 1996, the Commission forwarded Report 11/96 to the Government of Chile. In its letter of transmittal the Commission informed the Government that it had given final approval to the report and ordered its publication.

22. On April 2, 1996, the Commission wrote to the Chilean Government to advise that the Commission had decided to postpone publication of Report 11/96, in view of information that the petitioners had sent to the Commission on March 27 and 29, 1996, reporting new facts.

23. On April 22, 1996, the Permanent Representative of Chile to the Organization sent a letter to the Commission to convey his Government's views on the Commission's decision to postpone publication of Report 11/96.

24. On May 2, 1996, a hearing requested by the petitioners was held in which they and the representatives of the Chilean Government participated.

III. ADMISSIBILITY

25. The Commission is competent to entertain the instant case, inasmuch as it alleges acts that constitute violations of the rights enshrined in Article 13 of the Convention.

26. The petition is not pending before any other international procedure for settlement and does not substantially duplicate a petition already examined by the Commission.

27. The friendly settlement procedure established under Article 48.1(f) of the Convention and Article 45 of the Commission's Regulations was proposed by the Commission but no agreement could be reached.

28. As the record shows, the petitioners have exhausted the remedies established under Chilean law. The Government, however, contends that the petition was presented after the six-month time limit established by Article 46.1(b) of the Convention and Article 38 of the Commission's Regulations.

A. POSITION OF THE PARTIES ON THE ADMISSIBILITY OF THE CASE

1. GOVERNMENT

29. The Government asserts that the final decision on the instant case was the Chilean Supreme Court ruling of June 15, 1993. According to the Government, the petitioners confused the date of the Appeals Court's notification of the Supreme Court's ruling with the actual date of the Court's final decision. Before issuing a notification, which is just one part of the execution of a judgment, the Court must first establish that no appeals are pending.

30. The Government maintains that the complaint was presented to the Commission based on the date of the Appeal Court's notification, and was thus outside of the six-month time limit established in Article 46.1.b of the Convention and Articles 35.b and 38.1 of the Commission's Regulations. Based on this argument, the Government requested that the Commission declare the petition inadmissible.

2. PETITIONERS

31. The petitioners allege that the Commission should consider June 28, 1993 as the date from which the six-month period established in Article 46.1(b) of the Convention should be calculated. The date of June 28, 1993 corresponds to the date of the personal notification by the Court of Appeals, informing the petitioner that the Supreme Court had confirmed the decision prohibiting the entry and distribution of the book "Impunidad diplomática" in Chile.

32. The petitioners further argued that because the complete ban on the entry, distribution, and circulation of the book in Chile constituted a continuous violation, the six-month time limit did not apply in the instant case.

B. THE COMMISSION'S ANALYSIS ON ADMISSIBILITY

33. The six-month time limit established by Article 46.1 (b) of the Convention has a twofold purpose: to ensure legal certainty and to provide the person concerned with sufficient time to consider his position.

34. Contrary to what the Chilean Government argues in the instant case, the six-month time limit should not begin as of the date on which the Supreme Court handed down the final ruling;

rather, it should begin as of "the date on which the party alleging violation of his rights was notified of the final judgment", as the American Convention stipulates.

35. The Commission, therefore, considers that the complaint filed by the petitioners in the instant case was presented within the time period stipulated in Article 46.1(b) of the American Convention and Article 38 of the Commission's Regulations and so finds that said petition is admissible.

36. The Commission further considers that the interpretation of the provision cited in the preceding paragraph should not be overly formalistic and thus compromise the interests of justice. On this point, the Inter-American Court has held that:

It is generally accepted that the procedural system is a means of attaining justice and that the latter cannot be sacrificed for the sake of mere formalities. Keeping within certain timely and reasonable limits, some omission or delays in complying with procedure may be excused, provided that a suitable balance between justice and legal certainty is preserved.[FN1]

[FN1] Inter-American Court of Human Rights, Cayara Case, Preliminary Objections, Judgment of February 3, 1993, para. 42.

IV. POSITION OF THE PARTIES ON THE MERITS

A. PETITIONERS

37. The petitioners assert that the Convention, when it guarantees liberty of thought and expression, seeks to preserve individual autonomy by recognizing and protecting the rights to express, create and receive information. The protection of this right ensures democratic government by guaranteeing a free exchange of ideas in public affairs.

38. Article 13 guarantees the freedom to "seek, receive, and impart information and ideas of all kinds" through the medium of one's choice. The Convention's purpose is to afford every opportunity for one to engage in public debate not merely by guaranteeing freedom of thought but also by recognizing the collective right to be informed and the right of reply. The Convention guarantees freedom of expression in such manner as to also protect the right to a diversity of sources of information. The right of reply is guaranteed in order to ensure that anyone injured by inaccurate or libelous information has access to the communication outlet.

39. As a consequence of this liberal interpretation of the concept of freedom of thought and expression, any restrictions on those rights are subject to strict limitations. The Convention contains general norms that provide for possible restrictions to the rights it guarantees. However, in the case of freedom of thought and expression those provisions must be interpreted in accordance with the specific restrictions stipulated in Article 13 of the Convention.

40. The petitioners further asserted that prior censorship of Mr. Martorell's book violated an explicit prohibition present in Article 13(2) of the Convention, which draws a clear and intentional distinction between prior censorship and subsequent imposition of liability. The petitioners argued that the former was expressly prohibited while the latter was permissible only when necessary to ensure respect for the rights and reputation of others.

41. Because freedom of expression is a basic right, the Convention strictly prohibits any prior censorship as a means to protect the right to honor, and provides that the subsequent imposition of liability constitutes the only adequate and acceptable means of avoiding abuses in the exercise of freedom of expression.

B. GOVERNMENT

42. The Government of Chile argued that the conflict between freedom of expression and the right to honor and dignity was a difficult issue. The United Nations Covenant on Civil and Political Rights, to which Chile is also party, provides that freedom of expression (though not of opinion) may be subject to limitations, which are to be prescribed by law when necessary to ensure respect for the rights and reputation of others.

43. Article V of the American Declaration of the Rights and Duties of Man recognizes that:

Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.

44. In Article 11, the Convention also recognizes the right to have one's honor and personal dignity protected, paragraph 3 of which states that:

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

45. The Government further argued that it was subject to different and conflicting obligations under the United Nations Covenant on Civil and Political Rights on the one hand and the American Convention on the other. The Government's contention was that the obligations established by the Covenant were fundamentally different from those established by the American Convention, but that the Chilean State was duty-bound to respect both instruments. By stipulating that this right is subject only to the subsequent imposition of liability, the Convention is not as liberal as the Covenant, which permits restrictions provided by law to protect the rights and reputation of others. The Covenant makes a distinction between freedom of expression and the right to freedom of opinion. The first may be subject to a number of restrictions while the second is an absolute right.

46. The Government argued that the action taken against the publication and circulation of the book titled "Impunidad diplomática" did not infringe upon the author's freedom of opinion, as its contents did not express the author's opinions or thoughts but only slanderous and offensive material about the private lives of a number of individuals.

47. The Government also cited Article 25, which establishes the right to a simple and prompt recourse for the protection of the rights guaranteed by the Convention. According to the Government, this provision requires that the recourse be adequate to guarantee the rights protected under the Convention even before a violation actually takes place, whenever a right is in imminent danger of being violated. Such was the petition for protection exercised in the instant case.

48. According to the Government, Chilean law strikes the proper balance between the right to honor and privacy and freedom of expression. Although prior censorship is unacceptable and contrary to democratic government, this is not to say that it cannot be used in certain exceptional cases for which the law provides.

49. In Chile the executive and judicial branches of government are completely separate. In the instant case, it was not the Government that brought suit against the book and the decision in question was an independent ruling of the courts based on Chilean law. In the Government's opinion, an independent decision by the Judiciary granting a remedy allowed under the Constitution can hardly be said to constitute a violation of a human right.

50. Moreover, despite numerous complaints filed with the Chilean courts, the subsequent imposition of liability has thus far been impossible because of the defendant's refusal to answer to the Chilean courts. In the opinion of the Chilean Government the petitioner cannot demand his right to freedom of expression as long as he remains unwilling to accept the rulings of the Chilean courts in the cases brought against him for the facts alleged in the book in question.

V. ANALYSIS

1. The provisions of Article 13

51. The Government of Chile does not dispute the facts alleged in the complaint. It does, however, question the following:

- first, whether the decisions of the Chilean courts to ban the entry, circulation, and distribution of the book "Impunidad diplomática" in Chile are in violation of the right protected by Article 13 of the Convention;
- second, whether the violation of this right can be justified, as the Government contends, by virtue of the violation of another right such as the right to have one's honor and dignity protected, recognized in Article 11 of the Convention;
- finally, whether Mr. Martorell, by his conduct, would be prevented from petitioning the Commission to guarantee the enjoyment of the right he claims.

52. Each of these arguments by the Chilean Government will be examined.

1. The right to publish, circulate and distribute a book without prior censorship

Article 13 of the Convention states that:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - a. respect for the rights or reputation of others; or
 - b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color or religion, language, or national origin shall be considered as offenses punishable by law.

53. Article 13 establishes a dual right: the right to express thoughts and ideas, and the right to receive them. Therefore, arbitrary interference that infringes this right affects not just the individual right to express information and ideas but also the right of the community as a whole to receive information and ideas of all kinds. The Inter-American Court has held the following in this regard:

...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. The right protected by Article 13 consequently has a special scope and character, which are evidenced by the dual aspect of freedom of expression. It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.[FN2]

[FN2] Inter-American Court of Human Rights, Advisory Opinion OC-5/85 of November 13, 1985, Series A, N° 5, para. 30; American Convention on Human Rights, Articles 13 and 29.

54. In the same advisory opinion, the Court stated that the two dimensions of freedom of expression must be guaranteed simultaneously.[FN3]

[FN3] Ibid., para. 33.

55. The Convention allows restrictions to be imposed on the right to freedom of expression in order to protect the community from certain offensive manifestations and prevent the abusive exercise of that right. Article 13 authorizes certain restrictions to the exercise of this right and sets out the permissible limits and the requirements necessary to put these restrictions into practice. The principle set forth in that article is clear in that prior censorship is incompatible with the full enjoyment of the rights protected therein. The exception is the one contained in paragraph 4, which allows censorship of "public entertainments" for the moral protection of children. The only restriction authorized by Article 13 is the subsequent imposition of liability. Moreover, any subsequent imposition of liability must have been previously established by law and may only be to the extent necessary to ensure: a) respect for the rights or reputations of others; or b) the protection of national security, public order, or public health or morals.

56. The prohibition of prior censorship, with the exception present in paragraph 4 of Article 13, is absolute and is unique to the American Convention, as neither the European Convention nor the Covenant on Civil and Political Rights contains similar provisions. The fact that no other exception to this provision is provided is indicative of the importance that the authors of the Convention attached to the need to express and receive any kind of information, thoughts, opinions and ideas.

57. The Court underscored the fact that freedom of expression is a basic right when it held that:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not truly free.[FN4]

[FN4] Ibid., para. 70.

58. Under Article 13, any restriction of the rights and guarantees contained therein must take the form of a subsequent imposition of liability. Abusive exercise of freedom of expression may not be subject to any other kind of limitation. As that article indicates, anyone who has exercised this freedom shall be answerable for the consequences for which he is responsible.

59. Based on this reasoning, the Commission considers that the decision to ban the entry, circulation, and distribution of the book "Impunidad diplomática" in Chile violates the right to impart "information and ideas of all kinds", a right that Chile is bound to respect as a State Party to the American Convention. In other words, the decision is an unlawful restriction of the right to

freedom of expression, in the form of an act of prior censorship disallowed by Article 13 of the Convention.

2. The rights to privacy, honor and dignity

60. The Commission will now analyze the second issue raised by the Government of Chile in the instant case: the obligation to protect the right to honor and dignity and its possible conflict with the right to freedom of expression.

61. The Government of Chile has pointed out that the rights to honor and dignity often conflict with freedom of expression, that the State must endeavor to balance these rights with the guarantees inherent in freedom of expression, and that a right may be sacrificed for the sake of what is considered to be a higher right.

62. The American Convention recognizes that restrictions may exist when the different rights protected therein are in conflict. Furthermore, the text of Article 13 recognizes that the right to freedom of expression is subject to restrictions in order to ensure "respect for the rights and reputations of others".

63. In the opinion of the Government of Chile and of the Chilean courts that ruled on this matter, when the provisions of Article 11 that protect one's right to have one's honor and dignity respected and those of Article 13 that recognize freedom of expression are in conflict, the former should prevail.

64. The petitioners, on the other hand, argued that they did not offer any evidence in connection with the alleged violation of honor and dignity because that issue was being litigated in the Chilean courts, not in the Commission proceedings; consequently, it was not up to the Commission to make any pronouncement on that issue.

65. The American Convention recognizes and protects the right to privacy, honor and dignity in Article 11. This article acknowledges the importance of individual honor and dignity by stipulating the obligation to respect those rights, that these rights should be free from arbitrary or abusive interference or abusive attacks, and that everyone has the right to the protection of the law against such interference or attacks.

66. Moreover, Articles 1 and 2 of the Convention establish an obligation to ensure the rights protected by the Convention, and require that the States Parties adopt "such legislative or other measures as may be necessary to give effect to those rights (recognized in the Convention) or freedoms." Accordingly, all the States Parties to the Convention have an obligation to ensure that these rights are adequately and effectively protected by their domestic legal systems.

67. Under the Convention the State of Chile has a positive obligation to protect persons within its jurisdiction from violations of the right to privacy and, whenever that right is breached, to provide remedies that are prompt, effective and adequate to redress any injury caused by a violation of that right.

68. In the instant case it is alleged that the content of the book "Impunidad diplomática" impugned the honor of some persons and that, under the pretext of describing the circumstances which led to the Argentine ambassador's departure from Chile, a number of unrelated attacks were made on private individuals. According to the Government, these attacks were described as so severe that only a complete ban of the book could be deemed an adequate and effective solution to protect the victims' right to privacy and their honor.

69. The Commission considers that it is not for the Commission to examine the content of the book in question or the conduct of Mr. Martorell, because it does not have competence in the matter and because the right to honor is duly protected under Chilean law. Moreover, as the proceedings in the instant case show, those persons who believe that their honor and dignity have been impugned have, in the Chilean courts, adequate remedies to settle that question.

70. For that reason, the Commission cannot accept the Chilean Government's argument that the right to honor would be higher than the right to freedom of expression.

Article 29, paragraph a) provides the following:

No provision of this Convention shall be interpreted as:

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

For its part, Article 32(2) stipulates that:

2. 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.

71. It is the Commission's view that the rights upheld in these articles do not, contrary to what the Government argued, create conflicting principles necessitating a choice of one over the other.[FN5]

[FN5] In its decision in the Sunday Times case, the European Court of Human Rights stated that it was "faced not with a choice between conflicting principles, one of which is freedom of expression, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted." European Court of Human Rights, Sunday Times Case, Judgment of 26 April 1979, Series A, N° 30 para. 65.

72. Likewise, the organs of the State cannot interpret the provisions of Article 11 in a manner that violates Article 13, which prohibits prior censorship. In its rejoinder to the petitioners' complaint, the Government of Chile argued that:

The instant case is not one in which publication of an opinion, thought or idea has been thwarted; instead, it is an attempt to protect the honor of persons, as authorized -or better said, as required- under the Convention, the Covenant and the Chilean Constitution, all of which are in complete unison on this subject.

73. The Commission cannot accept the Government's argument, because the means that the Chilean State used to protect honor in the instant case were unlawful. To accept Chile's position in the case of Mr. Martorell would be tantamount to giving the organs of the State the authority to limit, through prior censorship, the right to freedom of expression upheld in Article 13 of the American Convention.

74. When legislating the protection of honor and dignity referred to in Article 11 of the American Convention -and when applying the relevant provisions of domestic law on this subject- States Parties have an obligation to respect the right of freedom of expression. Prior censorship, regardless of its form, is contrary to the system that Article 13 of the Convention guarantees.

75. In the Commission's judgment, any potential conflict in the application of articles 11 and 13 of the Convention can be resolved by resorting to the language of Article 13 itself, which brings up the third point of contention.

3. Subsequent responsibilities of one who violates the right to honor

76. As the case file shows, in his arguments before the Chilean courts, Mr. Martorell's attorney stated that:

... if a proper legal judgement in which all legal guarantees are present ultimately finds that some abuse or crime has been committed in the exercise of this constitutional guarantee, he will have to answer for it when the time comes. Under our legal system, the proper means is to bring a complaint in court.

77. In the final paragraph of chapter VII of its rejoinder, the Chilean Government states the following:

If the Commission believes that the Chilean State, by a ruling of its courts, has violated the Convention, it should at least demand that the petitioner present himself to accept the responsibilities that the Convention itself requires of him and that he so conspicuously announced in his petition.

78. Furthermore, at the hearing held on May 2, 1996, it was established that Mr. Martorell has been convicted both in a criminal court and a civil court and has agreed to return to Chile to be notified of the court ruling. That being the case, the question raised by the Chilean Government is moot and therefore need not be entertained by the Commission.[FN6]

[FN6] It should be noted that the Commission's view in this matter is that it should be interpreted in light of the statement made by the Commission in its report on the situation of Human Rights in Argentina:

On the other hand, it is not the Commission's role to substitute for the State in investigating and punishing violations committed by individuals. However, it falls to the Commission to protect persons whose rights have been injured by agents or organs of the State. The ultimate reason for international bodies to protect human rights, as in the case of the IACHR, lies in the need to have means of recourse when human rights have been violated by state agents or organs. [See the Report on the Situation of Human Rights in Argentina (OEA/Ser.L/VII.49), doc. 19, April 11, 1980, page 26.]

Much the same opinion was pronounced by the Commission at the public hearing on preliminary exceptions held on June 16, 1987 in the Fairen Garbi and Solis Corrales hearing at the Inter-American Court of Human Rights. Ad hoc Judge Rigoberto Espinal Irias asked the Commission, with reference to that case, if there could be "any possible relationship or tie between the violation of human rights and the so-called Clean Hands Theory, well known in international law." The Commission's response to the ad hoc judge's question was the following:

The answer is obviously no. The Commission protects human beings, irrespective of their ideology or their behavior. Certain rights are inherent to every person, the right to life being the most important of all. Regardless of ideology, behavior or nature, if a person does not have "clean hands" it is of course the state's duty to conduct a regular proceeding against that person. But under no circumstances does that mean that a country can execute the person, and certainly not by such a perverse method as forced disappearance. That is entirely unacceptable. There are no first and second-class citizens in diplomatic protection, Your Honor. The Commission has never asked about a person's ideology or "why?" Never. And it never will. [Response of Dr. Edmundo Vargas Carreño, Executive Secretary of the Inter-American Commission on human Rights, in Series D: Pleadings, Oral Arguments and Documents, page 182.]

VI. PROCESSING OF REPORT 20/95

79. In the course of its 90th session, held in September 1995, the Commission adopted Report 20/95 in connection with this case. The Report found that in the instant case, the State had violated Article 13 of the American Convention on Human Rights.

80. On October 6, 1995, the Commission forwarded the Report to the Government of Chile with the request that within three months of that date, "it kindly inform the Commission of the measures taken to correct the situation denounced."

81. Through Note No. 003/96, dated January 6, 1996, the Government of Chile requested a 30-day extension for its response to the report.

82. In its reply of February 1, 1996, concerning the measures adopted in relation to Report 20/95 on Case N° 11,230, the Government of Chile states, inter alia, that:

It will take all measures available to it to comply with that Report; that it will officially transmit the resolution to the President of the Supreme Court so that the Chilean Judiciary may adopt its

decisions in this regard in keeping with the jurisprudence of the Inter-American Commission on Human Rights established by the American Convention on Human Rights, to which Chile is a State Party; that Article 25 of the Convention establishes the right to effective recourse to the courts when fundamental rights are violated, and the obligation of the State to ensure enforcement of the decisions of those courts; that a study having been made of the country's laws and of the correspondence between them and the American Convention, the conclusion reached was that Article 29.12 of the Chilean Constitution and Article 13 of the American Convention are in complete agreement.

Concerning public entertainments that may be subject to prior censorship for the moral protection of children, the Chilean Constitution provides the following in the final paragraph of Article 19.12: "The law shall establish a censorship system for showing and advertising motion pictures."

VII. CONCLUSIONS AND RECOMMENDATIONS

WHEREAS:

83. By a ruling of the Supreme Court of Justice of June 15, 1993, barring the entry, distribution and circulation in Chile of the book "Impunidad diplomática", written by Mr. Francisco Martorell, the Chilean State has violated Article 13 of the American Convention on Human Rights;

84. The note received from the Government of Chile in reply to Report 20/95 contains no new information to refute the facts charged or to show that adequate measures have been taken to correct the situation denounced, and

85. In processing this case, all legal and regulatory procedures stipulated in the American Convention on Human Rights and in the Regulations of the Commission have been observed, fulfilled and exhausted,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

CONCLUDES:

86. To recommend to the State of Chile that it lift the ban placed on the book "Impunidad diplomática" in violation of Article 13 of the American Convention.

87. To recommend that the State of Chile take the necessary measures so that Mr. Francisco Martorell can bring the book mentioned in the preceding paragraph into Chile, and circulate and market it there.

88. To publish this report, pursuant to Article 48 of the Regulations of the Commission and Article 51.3 of the Convention in view of the fact that the Government of Chile has failed to adopt the requisite measures to remedy the situation denounced within the period granted.

SEPARATED OPINION

COMMISSIONER ALVARO TIRADO MEJÍA

I should like to explain the reasons for my dissenting vote in regard to the decision adopted at its May 3, 1996 meeting by the Inter-American Commission of Human Rights with respect to Case 11.230 (Chile).

It is my belief that, at the time that decision was reached, the Commission was not in a position to do so, for the following reasons:

- a. On September 14, 1995, during the 90th Regular Session, the Commission approved the Report, pursuant to Article 50 of the American Convention, as well as the transmittal thereof to the Government of Chile.
- b. On March 1, 1996, at its 91st Regular Session, held in Washington, the Commission approved the text of the final report and its publication in the 1995 Annual Report. The Secretariat complied with this decision, and Report 11.230 was printed on pages 79-95 (in the Spanish text) of the Annual Report.
- c. On March 19, 1996, the Commission--by means of a note from the Secretariat--informed Chile's Minister of Foreign Relations, José Manuel Insulsa, that "The Commission has given final approval to that Report and has ordered its publication." A copy of the decision to that effect was also sent.
- d. On March 28, 1996, the IACHR Secretariat notified the petitioner's representatives--José Miguel Vivanco, Juan Méndez and Viviana Krsticevic, of Human Rights Watch/Americas and CEJIL--that the Commission had "approved final report No. 11/96 on the aforementioned case, concerning Francisco Martorell," and enclosed a copy of the report.
- e. On March 29, 1996, the persons holding the petitioner's power of attorney sent a communication to the IACHR Secretariat, acknowledging receipt of the report and requesting that the publication thereof be suspended because they found that it contained "grave errors in the presentation of the facts," which had to do with a document sent to the Commission on March 27 as "recent information."
- f. On April 1, 1996, the Commission held a meeting by telephone, during which it was decided to postpone publication of the report. In the course of our discussion, I expressed my reservations concerning the Commission's competence to change something which had already been decided and announced; and also concerning the advisability of such action.
- g. At its May 3, 1996 meeting, the Commission approved a report on the case that contained a new text, different from the one that had been approved on March 1 of that year.

As I said to the Commission at the time--and now repeat in this explanatory document, my dissenting vote was due to my belief that the Commission was not competent to amend a decision which had been discussed and unanimously approved, the publication of which had already been ordered and notice sent to the parties. That action has no basis in the American Convention: it is contrary to the juridical security essential to the system, on which the parties rely as a guarantee. It could also establish a bad precedent.

Since I consider the new decision to be invalid, I shall not enter into conjectures regarding the changes to which it was subject, or the facts and considerations which were left unsaid, or whether or not the facts that were introduced as new had been substantiated.

At the same time, as I said during our deliberations and when I cast the dissenting vote, this does not mean that I withdraw from the position which I espoused along with the other members of the Commission when we approved the Report on March 1, 1996: i.e., that the State of Chile had, through a decision of its Judiciary, violated article 13 of the American Convention when it prohibited the entry, distribution and circulation of a book.

COMMUNICATION OF THE GOVERNMENT OF CHILE

On March 24, 1997, the Chairman of the Commission, received a letter from the Vice-Minister of Foreign Affairs of Chile, Mr. Mariano Fernández Amunátegui, that reads as follow:

I refer to the Reports dated March 1, 1996 (OEA/SER/L/V/II.91 Doc. 24) and May 3, 1996 (OEA/SER/L/V/II.91 Doc. 24 Rev. 1), both numbered 11/96, which were adopted by the Inter-American Commission on Human Rights, at its 91st Regular Session and 92nd Special Session, respectively, in respect of case 11.230, whose petitioner is Mr. Francisco Martorell, both of which were reported to the Government of Chile as the Commission's final and definitive decision in this case.

In the first of the above-noted reports the Commission unanimously, with the exception of Commissioner Claudio Grossman, who under the regulations was required to refrain from participating and voting, reached the conclusion that the Chilean State, by the decision of the Supreme Court of Justice to prohibit the entry, distribution, and circulation of the book "Impunidad Diplomática," by Mr. Francisco Martorell, had violated Article 13 of the American Convention.

Nonetheless, in that first report, the same Commission affirmed that the petitioner, Mr. Martorell, had eluded the responsibilities that derived from the publication of his book, indicating that it was not in a position to adopt measures aimed at protecting him from the violation of the right, as it could not "endorse the conduct of Mr. Martorell." The Commission later added:

... The whole structure and even the ideology underlying the Convention, whose oversight has been entrusted to the Commission, lies in the assumption that all the rights it establishes may be exercised without causing detriment to the others. In the situation under analysis, as has already been expressed, the counterpart of Mr. Martorell's rights to publish, circulate, and distribute his book in Chile without prior censorship is that he be held liable, before the Chilean courts, for the abuses he committed against the other persons' rights to their reputation. If one who is claiming to exercise a right can evade the responsibility indicated in Article 13 of the Convention, the whole balance struck in the Convention would be altered....

Until Report 11/96 was issued on March 1, 1996, the procedural rules provided for in the Convention, particularly Articles 50 and 51, had been abided by rigorously; consequently, the

Government of Chile still considers it to be the only valid report, and the only one by which it is legally bound.

Nonetheless, the Commission, in a special session on May 3, 1996, adopted a new report, not unanimously, but with a dissenting vote by Commissioner Alvaro Tirado Mejía, whose contents differed from the report adopted on March 1. In that report all references are to the subsequent liability of Mr. Martorell, which, it should also be noted, is a requirement of Article 13 of the American Convention.

In summary, though no provision of the Convention justifies the preparation of a new report, the IACHR adopted a text that is substantially different from that which it reported to the Government of Chile as the definitive report. It is clear in light of the applicable rules of the American Convention on Human Rights that the Commission lacks jurisdiction to proceed in this fashion.

The decision noted above introduced an element of uncertainty and a worrisome factor of juridical insecurity into the individual communications before the IACHR.

In his dissenting vote, Commissioner Tirado expressed his disagreement with the action of the Commission, as it "... did not have jurisdiction to modify a procedural decision debated and approved unanimously..." and in addition because in so proceeding "... it finds no basis in the American Convention, it is contrary to the juridical security that the system requires and that the parties need as a guarantee, and it could set a bad precedent...." His views aptly summarize the apprehensions of the Government of Chile.

In view of the need to clarify and define the validity of the procedure applied by the IACHR in the case in consideration, the Government of Chile decided to seek the legal opinion of the Inter-American Court of Human Rights, requesting an advisory opinion as to whether the Commission has the power to modify substantially the Article 50 and 51 reports, and issue a third report, once it has adopted the two reports contemplated in Articles 50 and 51 of the Convention, and where with respect to the Article 51 report it has notified the respective state that it was a final report.

While the request for an advisory opinion touches on a legal point of the utmost practical importance, it has not kept some commentators from tending to misrepresent the scope and purpose of the initiative adopted by my Government. And so it has been noted that the advisory opinion in question had the purpose of countering the resolution in the "Martorell case," or that it was aimed at challenging a recommendation of the Commission indirectly, by seeking an advisory opinion aimed at calling into question procedural or jurisdictional functions of the Commission.

Comments such as these have failed to perceive the real will that motivates the Government to turn to the Inter-American Court, i.e. to bring to light a possible difference between the Government of Chile and the Commission as to which of the two reports referred to prevails.

Nonetheless, a more careful analysis of the matter has led my Government to the conviction that such a difference probably does not exist. In effect, as to the merits, the Government of Chile has

had no difference with the Commission, for as we have said repeatedly, in Chile there is broad freedom of expression and opinion, which is set forth in our Constitution in the same terms as in the American Convention on Human Rights.

These views on the extent of the freedom of expression and opinion have also been endorsed by the General Assembly of the OAS, which in AG/RES. 1331 (XXV-O/95), voted for by Chile along with the other member states of the Organization, provides in its operative paragraph 15:

To reiterate that freedom of speech prevails in any democratic society; it should not be subject to prior censorship but should entail subsequent liability for any abuse thereof, in accordance with such internal laws as the member states have legitimately established to guarantee respect for the rights or reputations of others or to protect national security, law and order, or public health or morals.

In terms of the procedural aspects involved in the case, as noted above, for the Government of Chile only the report of March 1, 1996, can have effect; consequently, it shall continue to ensure that its conduct conforms to the terms of that report. As I noted in my letter of February 1, 1996, to the Commission in respect of this case, the Government of Chile, along with reiterating the importance it places on the inter-American human rights system, will adopt all measures within its reach to comply with the above-mentioned report.

In light of the foregoing, it is neither advisable or necessary for the Government of Chile to persist in a debate with the Commission regarding this matter, which has given rise to mistaken or ill-advised positions, especially when it is a decided purpose of my Government to continue to have the most fruitful relations of cooperation with the Commission, so as to make it possible, through a dialogue both bilateral and multilateral to strengthen the inter-American human rights system, to overcome situations such as have arisen in this case, and to prevent them from recurring in the future.

Based on the foregoing considerations, the Government of Chile communicates to the Commission presided over by Your Excellency its decision to withdraw the request for an advisory opinion filed with the Inter-American Court of Human Rights, and consequently kindly requests that this Note be published together with the report issued on case 11.230.