THE COURT

renders the following Advisory Opinion:

I. Background

1. The Republic of Chile (hereinafter "the State" or "Chile"), in a brief of November 11, 1996, received at the Secretariat of the Inter-American Court of Human Rights (hereinafter "the Court" or "the Tribunal") on November 13, 1996, in accordance with Article 64(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), submitted a request for an advisory opinion in the following terms:

a) May the Inter-American Commission, once it has adopted the two reports referred to in Articles 50 and 51 of the Convention in respect of a State and, concerning the latter of those reports, has notified the State that it is a final report, alter the substance of those reports and issue a third report?, and
b) In the case that the Inter-American Commission on Human Rights is not authorized to alter its final report, which of the reports should be deemed to be binding on the State?

2. In its petition the State declared that the request for an interpretation was based on the events summarized below by the Court:

a. On September 14, 1995 the Commission approved, in accordance with Article 50 of the Convention, Report 20/95 on the Martorell case and submitted it to the Illustrious State of Chile, which replied on February 8, 1996. On March 19 of that year the Commission apprised the State

of Chile of Report 11/96 and informed it that the Commission had given its final approval to the report and ordered it to be published.
b. On April 2, 1996 the Commission informed the State of Chile that it had decided to postpone publication of Report 11/96 on the basis of information concerning new facts supplied to it by the petitioners on March 27 and 29, 1996.
c. On May 2, 1996 a hearing was held at the request of the petitioners and attended by the petitioners and the representatives of the Chilean State and on May 3, 1996 the Commission adopted a new report on the case, which it transmitted to the State, declaring that it was "... a copy of the Report with the amendments approved by the Commission at the session held on May 3 of this year."

3. The State added that its request was based on the following considerations:

that in the opinion of the Government of Chile, Articles 50 and 51 of the Convention make no provision for revision or amendment of a final report that has been previously adopted, nor could this be inferred from the text. On the contrary, such an action constitutes a serious infringement of the legal certainty required by the system.

In view of the differing opinions within the Commission itself on the decision adopted, which concerns an exceedingly important practical procedural aspect of the Convention, and considering the need for the parties involved in a proceeding before the ICHR to know what they must abide by, it is essential for the Government of Chile to be informed of the opinion of the Inter-American Court of Human Rights on this matter.

4. The State appointed Ambassador Edmundo Vargas-Carreño, Permanent Representative of Chile to the Organization of American States (hereinafter "the OAS"), and attorney Carmen Hertz-Cádiz, Human Rights Adviser in the Ministry of Foreign Affairs of Chile, to serve as its agents.

5. Between November 14 and November 22, 1996 the Secretariat of the Court (hereinafter "the Secretariat"), in accordance with Article 54(1) of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), requested the Member States of the OAS, the Inter-American Commission on Human Rights (hereinafter "the Commission"), the Permanent Council of the OAS and, through the OAS Secretary General, all the organs listed in Chapter VIII of the OAS Charter, to submit written observations and relevant documentation on the subject of the Advisory Opinion.

6. The President of the Court (hereinafter "the President") ordered that the written observations and the relevant documents be submitted by January 31, 1997.

7. On January 10, 1997 the Commission informed the Court that it had appointed Mr. Carlos Ayala-Corao and Mr. Robert Goldman to serve as its delegates in this advisory proceeding. The Commission also requested the President of the Court to grant an extension of sixty days for presentation of its written observations on the request for an advisory opinion.

8. By Order of January 17, 1997, the President of the Court decided to:

[e]xtend by forty-five days the term for presentation of written observations or other documents concerning the request for Advisory Opinion OC-15 and set March 17, 1997 as the new deadline.

9. Between January 17 and January 22, 1997, the Secretariat notified the Member States of the OAS, the Commission, the Permanent Council of the OAS and, through the OAS Secretary General, all the organs referred to in Article 64 of the Convention, of the January 17 Order of the President of the Court.

10. On January 31, 1997 the State of Guatemala submitted its comments to the Court, which are summarized below:

[t]he reports issued by the Commission ... the existence of which is not provided for by the Convention and which, moreover, contain points different to those expressed in the original report, infringe the established rules and, therefore, contravene the Convention...

Accordingly, it is proper to indicate that the Inter-American Commission on Human Rights, once it has adopted the two reports referred to in Articles 50 and 51 of the Convention, has no legal power to issue a third report amending the report described in Article 51 of the Convention, especially when the second of those reports has been issued to the State as a final report.

On the question as to which report should be considered binding on the State, Guatemala deemed that "it is appropriate to state that the first final report notified is the one that is legally binding, inasmuch as any procedure that infringes the law is null and void."

11. On March 13, 1997 the Inter-American Commission forwarded to the Court a copy of a letter from the agent to the President of the Commission declaring that the State had decided to withdraw the request for an advisory opinion in the instant case. The following day, the delegates of the Commission requested the President of the Court to "halt the [advisory] proceeding and suspend the deadlines" until such time as the withdrawal of the request for an advisory opinion was formalised. On the instructions of the President of the Court, the Secretariat informed the delegates that no decision could be taken on the matter inasmuch as the requesting State had made no petition to the Tribunal.

12. The State of Costa Rica submitted its written comments on March 17, 1997 to the sole effect that "the Court has no competence to issue a legal opinion on specific cases that, when they could have been, were not submitted to its jurisdiction, which would imply pre-judgment of the matter."

13. By communication of March 25, 1997, the State of Chile informed the Court of its decision to "withdraw the request for an advisory opinion." It attached a copy of a note from the Minister of Foreign Affairs to the President of the Court, stating that:

[a]lthough the request for an advisory opinion rests on a legal point of the greatest practical importance, it has nevertheless given rise to certain comments that tend to misrepresent the scope and aim of [its] initiative [.] Thus,it has been said that the aim of the advisory opinion was to

undermine the resolution in the "Martorell case", or that it was an attempt to impugn a recommendation of the Commission indirectly by means of a request for an advisory opinion designed to challenge procedural or jurisdictional powers enjoyed by the Commission.

14. Chile further stated that, having conducted a "more detailed examination" of the events that led it to seek an advisory opinion from the Court, it had reached the conclusion that its view did not differ from that of the Commission and deemed it neither "appropriate nor necessary" to continue discussion of the matter; it had therefore informed the Commission of its decision to withdraw the request for an advisory opinion initiated before the Court.

15. On March 31, 1997 the Commission reiterated to the Court the contents of its communication of March 13 (supra 11); it further informed the Court that it was in agreement with the withdrawal of the request for an advisory opinion, and requested that the Court "end the proceedings under way on the matter and strike the matter from its files."

16. On April 14, 1997, the Court decided:

1. To continue, in exercise of its advisory function, to process this matter.
2. To entrust the President of the Court with the task of setting a new deadline for the Member States of the OAS and the organs indicated in Article 64 of the Convention to submit their comments and relevant documents.
3. To entrust the President of the Court with the task of convening a hearing on admissibility and merits in due course.

17. In its comments of July 31, 1997, on the request for an advisory opinion, the Inter-American Commission advanced arguments contesting the Court's competence to issue the instant Advisory Opinion after the State of Chile had withdrawn the request that had given rise to it, and requested that the Court "end the proceedings under way on the matter and strike the matter from its files." With regard to admissibility and merits of the request for an advisory opinion it commented as follows:

a. with the withdrawal of the request by the State, the Court was incompetent to issue the advisory opinion, in the absence of a specific request for one and incompetent to issue such an opinion motu proprio;
b. the request for an advisory opinion submitted by the Chilean State is not admissible since it constitutes a contentious case in disguise, and
c. in accordance with the provisions of Article 51(2) and 51(3) of the American Convention on Human Rights and with the case law applied by the Court in Advisory Opinion OC-13/93, it is permissible, in limited and justified circumstances, to make amendments to a report approved under Article 51 before it is published;

For the above reasons, the Inter-American Commission requested that the Court reconsider its Order of April 14, 1997.

18. On August 28, 1997 Human Rights Watch/Americas and the Center for Justice and International Law (CEJIL) presented a communication as amici curiae.

19. On September 12, 1997 the Court decided:

1. To reject the request of the Inter-American Commission on Human Rights that the Court reconsider its decision to continue with thie processing of this matter, in exercise of its advisory function.
2. To reject the request of the Inter-American Commission on Human Rights that the objective of the public hearing on the matter be changed and that testimonial and documentary evidence be permitted.
3. To reserve for subsequent consideration the other requests from the Inter-American Commission on Human Rights concerning the competence of the Court and the admissibility of the current process.
4. To confirm the Order of April 14, 1997 which entrusted the President of this Court with the task of convening in due course a hearing on admissibility and merits in the instant advisory proceeding.

20. On September 18, 1997, the President of the Court convened all those States, agencies, institutions and individuals that submitted their views on the request for an advisory opinion to a public hearing to be held at the seat of the Court on November 10, 1997, at 10:00 a.m.

21. Present were:

for the State of Chile:

Alejandro Salinas, Legal Adviser on Human Rights in the Ministry of Foreign Affairs of the Republic of Chile;

for the State of Costa Rica:

Gioconda Ubeda-Rivera, Director of Legal Affairs in the Ministry of Foreign Affairs of the Republic of Costa Rica, and
Ilse Mary Díaz-Díaz, Adviser in the Office of the Director of Legal Affairs;

for the State of Guatemala:

Dennis Alonzo-Mazariegos, Director, Presidential Commission for Coordination of the Human Rights Policy of the Executive Branch;

for the Inter-American Commission on Human Rights;

Carlos Ayala-Corao, First Vice President, and
Robert Goldman, Second Vice President;

for CEJIL and Human Rights Watch, Americas

Viviana Krsticevic, Executive Director, and

Marcela Matamoros, Director of CEJIL/Mesoamérica.

22. The following is the Court's summary of the arguments adduced by the States that participated in the hearing and those of the Inter-American Commission:

a. on the subject of the admissibility of the instant Advisory Opinion, the representative of the Chilean State declared that Chile, as a State Party to the Convention, had the right to request and withdraw an advisory opinion from the Court; that the Chilean State and the Inter-American Commission had expressed their intention and agreement, respectively, to withdraw the request for an advisory opinion, thereby putting an end to the proceeding; that the Court was not empowered to issue advisory opinions motu proprio; that Chile would, however, abide by the Order of the Inter-American Court of April 14, 1997, in which it decided to proceed with consideration of the matter, accepting the competence of the Court to take cognisance of this request for an advisory opinion. He said that what was sought was for the Court to determine whether the Inter-American Commission may or may not amend the substance of a report once a State had been notified of it as a final report; that the existence of new facts did not authorize or justify the Commission's revision of the aforementioned report; that the legal principles involved in this request for an advisory opinion -good faith and legal certainty- were of such importance as to merit the Court's greatest attention and concern, inasmuch as these were essential principles in International Law and, more particularly, International Human Rights Law; that the jurisprudence of the Court relating to the interpretation of the procedure established in Articles 50 and 51 of the Convention was in keeping with Chile’s views on the merits of the request, given that the report notified to Chile was a definitive or final report as defined by the Court in Advisory Opinion OC-13, that is, conclusive, terminal or binding. In conclusion, he stated that the Commission had taken the decision to publish the final report before notifying the State;

b. the representative of the State of Guatemala reasserted the contents of that Government’s brief of January 31, 1997 (supra, para. 10). He said that notification led to the consummation of a juridical act, which gave rise to obligations and rights for the party so notified; that in the instant case the power to issue a second report is exhausted when notification takes place; that, furthermore, Article 46 of the Convention itself determines that time starts to run from the date of notification of the final judgment; that there could be no legal certainty unless the time at which an act becomes final is established. He said that, as indicated in the request submitted by the State of Chile, it should be pointed out that once the Inter-American Commission has adopted the two reports referred to in Articles 50 and 51 of the Convention and notified the State that the latter of these reports is final, it has no legal power to issue a third report substantially amending the report described in Article 51 of the Convention; that, consequently, the State of Guatemala considers it pertinent to observe that the first final report notified is the one that is binding, since the second final report has no legal validity;

c. the Inter-American Commission reiterated its position submitted on July 31, 1997 in its written comments (supra, para. 17) to the effect that the Court is not competent to issue the Advisory Opinion, inasmuch as the request that gave rise to the procedure has been withdrawn. In regard to the admissibility of the request by Chile, it was the view of the Commission that the aim was to bring a disguised contentious case before the Court and so distort both the advisory and contentious systems. Regarding the substantive aspect of the Advisory Opinion, in respect of the first question (supra, para. 1), the Commission has the power to amend the report prepared pursuant to Article 51, paragraphs 1 and 2, for the purpose of adopting the final report and

deciding to publish it. The Commission's reports on cases, pursuant to Articles 50 and 51, evolve according to the specific circumstances of each situation, some of which allow them to be amended. If the State partially adopts recommendations once the second report has been transmitted to it, a third amended report will be prepared and published. Other situations that could justify amendment of a report would be: legal or factual situations that do not alter the Commission's conclusions and recommendations; supervening events which, while not affecting the conclusions or recommendations, do affect analysis of the grounds of the report, as well as new facts that could have repercussions on the conclusions of the report and which, in extraordinary situations, must be included, thereby amending the report. The Commission is empowered to reflect such amendments in a final report prior to its publication. The precedent in the American domain would be the review procedure, which must be based on pertinent facts or situations unknown at the time the judgment was issued. As to the second question, it is inadmissible on the ground that it assumes an interpretation and presumes that it would not be possible, in any circumstances, to amend the second report prepared pursuant to Article 51(1); and

d. the representative of the State of Costa Rica did not speak at the public hearing.

II. Jurisdiction of the Court

23. Chile, a Member State of the OAS, has submitted this request for an advisory opinion pursuant to the provisions of Article 64(1) of the Convention. The request meets the requirements of Article 59 of the Rules of Procedure.

24. The communication from the State on the withdrawal of its request for an advisory opinion raised a substantive question concerning the scope and nature of the Court's advisory jurisdiction, which derives from Article 64 of the American Convention and is governed by the Rules of Procedure. That jurisdiction "is closely related to the purposes of the Convention" and is intended to assist the American States in fulfilling their international human rights obligations and to assist the different organs of the Inter-American system to carry out the functions assigned to them in this field. ("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. 25).

25. The advisory jurisdiction of the Court differs from its contentious jurisdiction in that there are no "parties" involved in the advisory procedure nor is there any dispute to be settled. The sole purpose of the advisory function is "the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states." The fact that the Court's advisory jurisdiction may be invoked by all the Member States of the OAS and its main organs defines the distinction between its advisory and contentious jurisdictions.

26. The Court therefore observes that the exercise of the advisory function assigned to it by the American Convention is multilateral rather than litigious in nature, a fact faithfully reflected in the Rules of Procedure of the Court, Article 62(1) of which establishes that a request for an advisory opinion shall be transmitted to all the "Member States", which may submit their comments on the request and participate in the public hearing on the matter. Furthermore, while an advisory opinion of the Court does not have the binding character of a judgment in a

contentious case, it does have undeniable legal effects. Hence, it is evident that the State or organ requesting an advisory opinion of the Court is not the only one with a legitimate interest in the outcome of the procedure.

27. Lastly, it should be said that even in contentious cases submitted to the Court in which the respondent State may be the object of binding decisions, the discretionary power to continue to hear a case lies with the Court, even if the party bringing the case notifies the Court of its intention to discontinue it, the guiding principle for the Tribunal being its responsibility to protect human rights (cf. Articles 27(1), 52(1) and 54 of the Rules of Procedure). By analogy, it also has the power to continue to process an advisory opinion (Art. 63(1) of the Rules of Procedure).

28. In the light of the foregoing, in its Order of April 14, 1997 the Court, referring to the questions raised by Chile in its brief withdrawing the request for an advisory opinion decided that "the State requesting an advisory opinion is not the only interested party and that even if it withdraws the request, the withdrawal is not binding on the Court, [... which] may continue to process the matter", a decision that does "not prejudge the question of admissibility of the request nor, if applicable, of the merits of the advisory opinion."

III. Admissibility

29. In ruling on the admissibility of the Advisory Opinion, the Court bears in mind the rules of interpretation which it has applied in other cases, in conformity with the relevant provisions of the Vienna Convention of the Law of Treaties. Article 31 of that Convention states that treaties must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The object and purpose of the American Convention is the protection of human rights, so that whenever the Court is called upon to interpret it, it must do so in such a manner as to give full effect to the system of human rights protection (cf. "Other treaties" subject to the advisory opinion of the Court), supra 24, paras. 43 et seq.; 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, paras. 19 et seq.; Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights), Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, paras. 47 et seq.; 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, paras. 20 et seq.; Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, paras. 29 et seq.; 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, paras. 13 et seq.; Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 1, para. 30; Fairén Garbi and Solís Corrales Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 2, para. 35; Godínez Cruz Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 3, para. 33; Paniagua Morales et al. Case, Preliminary Objections, Judgment of January 25, 1996. Series C No. 23, para. 40.)

30. Equally pertinent in this matter are the criteria to be derived from Article 29 of the American Convention which states:

[n]o provision of this Convention shall be interpreted as:

a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; and
d) wexcluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

31. In deciding whether to accept or reject a request for an advisory opinion, the Court must base its decision on considerations that transcend merely formal aspects. In particular, the Court referred in its first Advisory Opinion to the inadmissibility of any request for an advisory opinion which is likely to undermine the Court's contentious jurisdiction or, in general, weaken or alter the system established by the Convention, in a manner that would impair the rights of potential victims of human rights violations ("Other Treaties" subject to the advisory opinion of the Court, supra 24, para. 31).

32. In this regard, the fact that the request for an advisory opinion cites as antecedent a specific case in which the Commission has specifically applied the criteria on which the State seeks a response, is an argument in favor of the Court's exercising its advisory jurisdiction, inasmuch as it is not being used for purely academic speculation, without a foreseeable application to concrete situations justifying the need for an advisory opinion (Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 16).

33. The Court is not empowered to examine a case which is being dealt with by the Commission; it is even clearer in the instant request that the matter under consideration could not be brought before this Court inasmuch as it concerns a concluded case, the Article 51 report of which has been published (Annual Report of the Inter-American Commission on Human Rights, 1996, General Secretariat, Organization of American States, Washington, D.C. 1997, OEA/Ser. L/VII.95, Doc. 7 rev.; March 14, 1997, Original: Spanish.)

34. As a ground for its request for an advisory opinion, the State claims that "the possibility of reviewing and amending a final report that has already been adopted by the Commission is not envisaged in Articles 50 and 51 of the Convention, nor could it be inferred from the text."

35. The Court points out that Article 50 of the Convention essentially provides that if a friendly settlement is not reached in a case before the Commission, the latter shall draw up a

report setting forth the facts and its conclusions. That report shall be submitted to "the states concerned", and may include such proposals and recommendations as the Commission sees fit.

36. The relevant parts of Article 51 of the Convention provide that if, within a period of three months from the date of the transmittal of the report referred to in Article 50, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.

It also provides that the Commission shall make "pertinent recommendations" and shall "prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined." When the prescribed period has expired, the Commission must decide by the vote of an absolute majority of its members whether the state has taken adequate measures and whether to publish its report.

37. In exercising its advisory jurisdiction on matters that have a specific case as a precedent, the Court shall be particularly careful to avoid a situation in which a reply to the questions ... could produce, under the guise of an advisory opinion, a determination of contentious matters not yet referred to the Court, without providing the victims with the opportunity to participate in the proceedings, [which] would distort the Convention system. (Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights, Advisory Opinion OC-12/91 of December 6, 1991. Series A No. 12, para. 28.)

38. The Court observes that, as the case that could have been at the root of this request for an advisory opinion has been settled (supra 33), any determination that it makes on the merits of the questions asked will not affect the rights of the parties involved.

39. In the instant matter, the Court must take account of a number of equally important considerations when deciding whether to accept or reject the State's request that it render an advisory opinion, bearing in mind the need to preserve a fair balance between the protection of human rights, which is the ultimate purpose of the system, and the legal certainty and procedural equity that will ensure the stability and reliability of the international protection mechanism (Cayara Case, Preliminary Objections, Judgment of February 3, 1993. Series C No. 14, para. 63.)

40. This finding of the Court is in full conformity with the international jurisprudence on the subject, which has repeatedly rejected any request that it refrain from exercising its advisory jurisdiction in situations in which it is claimed that, because the matter is in dispute, the Court is being asked to rule on a disguised contentious case (cf. [International Court of Justice] Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Face, Advisory Opinion, I.C.J. Reports 1950, p. 65; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 65; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16; Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12; Applicability of Article VI, Section 22, of the Convention on Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989, p. 177.)

41. In accordance with these criteria, the Court finds no reason to reject this request for an advisory opinion, convinced as it is that its pronouncement on the matter will provide guidance, both to the Commission and to the parties that appear before it, on important procedural aspects of the Convention, without jeopardizing the balance that must exist between legal certainty and the protection of human rights.

IV. Merits

42. The Court now examines the merits of the instant request for an advisory opinion.

43. The first matter referred to the Court concerns the question as to whether the Commission is or is not authorized, under the terms of Articles 50 and 51 of the Convention, to amend the substance of the report referred to in Article 51 and issue a third report. These articles, as the Court has affirmed, "raise certain problems of interpretation" (Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights), Advisory Opinion OC-13/93 of July 16, 1993. Series A No. 13, para. 45.)

44. The Court must, in the first place, analyze the terms in which the State couches its request for an advisory opinion. In effect, the State, in referring to the two reports mentioned in Articles 50 and 51, has used the terms "final" to describe the second report, referred to in Article 51. This term was also used by this Tribunal in the text of its Advisory Opinion OC-13/93 (Certain Attributes of the Inter-American Commission on Human Rights, supra 43, para. 53), in which it maintained, on the subject of the reports mentioned in Articles 50 and 51, that

[t]here are, then, two documents which, depending on the interim conduct of the State to which they are addressed, may or may not coincide in their conclusions and recommendations and to which the Convention has given the name of "report" and which have the character of being preliminary and final, respectively.

45. As can be seen from a comprehensive reading of the context of the aforementioned opinion, the words "preliminary" and "final" are purely descriptive and do not establish juridical categories of reports, which are not envisaged in the Convention.

46. As stated, the Convention establishes two separate stages in the process whereby the Commission may take a decision on the publication of the report referred to in Article 51. These two stages may be briefly defined in the following terms:

Stage one: if the matter has not been settled or submitted for a ruling by the Court, the Convention grants the Commission discretionary power to "set forth its opinion and conclusions" and "pertinent recommendations" and prescribe a period within which they must be implemented.
Stage two: if the Commission decides to exercise this discretionary power, the Convention requires that, when the prescribed period has expired, the Commission shall decide

a. whether the state has taken adequate measures; and
b. whether to publish its report, that is, its "opinion and conclusions" and its "recommendations".

47. This Court has made mention of the fair balance that must exist in the proceedings of the inter-American system for the protection of human rights (Cayara Case, supra 39, para. 63.) Although in that judgment it refers to the period prescribed in Article 51(1) for the Commission or the State to submit a case to the Court, the same or similar considerations would be applicable to the later period when it is no longer possible for the Commission or the State concerned to submit the case for a ruling by the Court. At that stage, the Commission, as the only conventional organ entitled to do so, continues to deal with the matter. In these circumstances, the Commission's acts must obey the following basic legal criteria:

a. the general principle that its acts must be fair and impartial in regard to the parties concerned;
b. the provision that "the main function of the Commission shall be to promote respect for and defense of human rights" as set forth in Article 41 of the Convention;
c. its powers to "make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights," as set forth in Article 41.b of the Convention.

48. In consequence, the Court must refer to the question as to whether the Convention either implicitly or explicitly provides for or permits or, on the contrary, categorically forbids that any modifications be made to that report. In discharging that function the Court must consider the purpose and scope of the report and the effects of the amendments the Commission may make to it, in terms of legal certainty, procedural equity and conformity with the aims and purposes of the Convention.

49. The purpose and scope of Article 51 are set forth in the text of the article. As stated, at the time it is transmitted to the State the report must include the Commission's opinion, conclusions and recommendations in regard to the matters submitted for its consideration. Likewise, it may include a deadline, a "prescribed period" within which the State must take the measures needed to "remedy the situation examined" (Art. 51(2)

50. All these stages constitute the conclusion of the proceeding before the Commission, whereby it takes a decision after examining the evidence as to whether the State has or has not fulfilled its conventional obligations and the measures deemed necessary for remedying the situation examined.

51. While the Convention does not envisage for the possibility of the Commission's amending the second report referred to in Article 51, neither does it forbid it. Moreover, the Court has already adverted to the nature and limitations of the inherent discretion enjoyed by the Commission during the period of three months following the transmittal of the report referred to in Article 51(1) of the Convention when it stated that

[a]rticle 51(1) provides that the Commission must decide within the three months following the transmittal of its report whether to submit the case to the Court or to subsequently set forth its own opinion and conclusions, in either case when the matter has not been settled. While the period is running, however, a number of circumstances could develop that would interrupt it or even require the drafting of a new report ... (Cayara Case, Preliminary Objections, supra 39, para. 39) (Emphasis added.)

52. In justification of its request for an advisory opinion, the State adduces as an additional argument the need for legal certainty for the persons participating in the proceedings before the Commission.

53. This Court considers that an interpretation that grants the Commission the right to amend its report for any reason and at any time whatsoever would leave the State concerned in a situation of uncertainty in regard to the recommendations and conclusions contained in the report issued by the Commission pursuant to Article 51 of the Convention.

54. At the same time, the Court cannot ignore the possibility of exceptional circumstances that would make it permissible for the Commission to amend the aforementioned report. One such circumstance would be partial or full compliance with the recommendations and conclusions contained in the report. Another would be the existence in the report of errors of substance regarding the facts of the case. Lastly, another situation would be if facts unknown at the time the report was issued and which could have a decisive effect on its content were to come to light. This implies that there can be no re-opening of the debate over the original facts or legal considerations.

55. In any of the above cases, amendment may be requested only by the petitioners or the State. Such a request for amendment may be made only prior to publication of the report, within a reasonable period from the date of its notification. The parties should be provided with an opportunity to discuss the facts or errors that have given rise to the petition, in accordance with the principle of procedural equity.

56. In the exercise of its contentious jurisdiction, this Court has, exceptionally, agreed to hear applications for review of its final judgments, for the purpose of preventing the final judgment from perpetuating an obviously unjust situation owing to the discovery of a fact that, had it been known at the time the judgment was rendered, would have altered the result, or which would demonstrate the existence of a substantial flaw in the judgment. (Genie Lacayo Case, Request for Review of the Judgment of January 29, 1997, Order of September 13, 1997, para. 10.)

57. Such applications are admissible only in regard to judgments issued by tribunals. A fortiori, revision of the decisions of organs such as the Inter-American Commission is permissible, on the understanding that this is limited to exceptional circumstances such as those concerned with documents the existence of which was unknown at the time the judgment was rendered, documentary evidence, testimony or deposition which has been declared to be false in a sentence that brings a judicial process to a close; the existence of prevarication, bribery,

violence or fraud, and events the falsity of which is subsequently proven, such as the discovery that a person declared disappeared is alive (Genie Lacayo Case, supra 56, para. 12.)

58. None of the above-mentioned situations in which the second report may be amended implies that the Commission is empowered to issue a third report, which is not provided for in the Convention.

59. Having responded to the first question contained in the present request for an advisory opinion, the Court considers it unnecessary to respond to the second question.

For the foregoing reasons,

THE COURT,

DECIDES

unanimously

That it is competent to render the present Advisory Opinion and that the request of the State of Chile is admissible.

AND IS OF THE OPINION,

by six votes to one,

1. That the Inter-American Commission on Human Rights, in exercise of the powers conferred on it by Article 51 of the American Convention on Human Rights, is not authorized to amend its opinions, conclusions or recommendations transmitted to a Member State, save in the exceptional circumstances set out in paragraphs 54 to 59. The request for amendment may be made only by the parties concerned, that is, the petitioners and the State, prior to the publication of the report itself, within a reasonable period starting from the date of its notification. In that case, the parties concerned shall be given the opportunity to discuss the facts or errors of substance that gave rise to its request, in accordance with the principle of procedural equity. In no circumstances shall the Commission be empowered by the Convention to issue a third report.

2. That, having responded to the first question in the manner indicated in the preceding paragraph, it is unnecessary to respond to the second question.

Judge Máximo Pacheco-Gómez dissenting.

Judge Máximo Pacheco-Gómez informed the Court of his Dissenting Opinion and Judge Cançado Trindade of his Concurring Opinion on the decision on competence and admissibility, both of which are attached to this Advisory Opinion.

Done in Spanish and English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, on this fourteenth day of November, 1997.

Hernán Salgado-Pesantes

President

Antônio A. Cançado Trindade
Héctor Fix-Zamudio
Alejandro Montiel-Argüello
Máximo Pacheco-Gómez
Oliver Jackman
Alirio Abreu-Burelli

Manuel E. Ventura-Robles
Secretary

Read at a public session at the seat of the Court in San José, Costa Rica, on this fifteenth day of November, 1997.

DISSENTING OPINION OF JUDGE MÁXIMO PACHECO-GÓMEZ

1. I regret that I am unable to join the decision adopted by the majority of the judges of the Court on the instant Advisory Opinion requested by the State of Chile. I therefore set out herein the legal reasoning behind my Dissenting Opinion on the merits.

2. Before stating my reasons for dissenting from the majority of my colleagues, I would first like to point out that when Chile withdrew its request for an advisory opinion and the Court nonetheless decided to maintain its jurisdiction, I stated in my dissenting opinion that the Court should have accepted the withdrawal requested without continuing to exercise its advisory function de jure, as it does not have the right to issue advisory opinions on its own initiative. That right is enjoyed only by the Member States of the Organization of American States or by the organs listed in Chapter X of the Charter of the Organization of American States, pursuant to Article 64(1) of the Convention.

3. Although I maintain the opinion I held on that occasion on the scope of Chile's withdrawal of the advisory opinion, the Court having decided that it is competent to continue to deal with the request, I have acquiesced in the Court's decision on its competence and cooperated with my colleagues in order to resolve the issues raised by Chile with regard to the correct interpretation of the American Convention on Human Rights.

4. Since the majority of the judges of the Court have determined the merits of the issue as they did, I have no choice but to render a Dissenting Opinion. In my view, the Court has not responded to the request for an advisory opinion in the terms formulated by the State of Chile.

5. In my opinion, the Court does not respond to Chile's request for an advisory opinion. Indeed, the what Chile actually sought, as shown in its brief and the previous written and oral proceedings before the Court, was a ruling on whether the Commission may or may not subsequently amend a report that has been notified to the State as a final report.

6. This aspect has not been given due consideration by the Court in its ruling, although in its summary of Chile's position and arguments it does make an apposite reference to that issue.

7. Nor does it in its ruling analyze the basis on which the State sought the Advisory Opinion, especially the role that such fundamental principles of international human rights law as legal certainty, stability, and good faith play in the matter. Even the term "Final Report" contained in the request for an advisory opinion, which, as shall be seen later, has been employed repeatedly in the jurisprudence of this very Court, is described incidentally as a purely descriptive term that establishes no juridical category.

8. In my view, according to Article 64 of the American Convention on Human Rights, the competence ratione materiæ of the Court in the matter of an advisory opinion is determined by the terms employed in the request, it being obligatory for the Court to refer to the matter submitted for its consideration.

9. As I see it, the Court should have considered whether Articles 50 and 51 of the Convention authorize the amendment of a report that has been notified to a State as final. In this regard, the American Convention should be interpreted by applying, as the Court has done on previous occasions, the rules of interpretation established in the 1969 Vienna Convention on the Law of Treaties, particularly Articles 31 and 32.

10. The following rules established in the aforesaid provisions of the Vienna Convention are particularly applicable to the advisory opinion under consideration by the Court: that the treaty must be interpreted according to the normal meaning that should be attributed to the terms in their context; that it is necessary to bear the object and purpose of the treaty in mind; that the practice subsequently followed in the treaty must be taken into account; that in enforcing a treaty consideration must be given to any applicable norms of international law; and that, as an additional measure, recourse may be had to the preparatory work for the treaty and the circumstances surrounding its signing.

11. Article 31 of the Vienna Convention on the Law of Treaties establishes, as a general rule, that a treaty must be interpreted in good faith, according to the normal meaning that should be given to the terms of the treaty in their context. Although Articles 50 and 51 do not expressly state that a final report may not be amended once it has been notified, it may be inferred from the text and context of those provisions that once the procedure referred to in those articles has been concluded and the State in question has been notified that it is a final report, the Commission may not amend that report. There is nothing in the text of those articles -let alone their context- that, in the normal meaning to be attributed to Articles 50 and 51, suggests that a final report may be amended after it has been notified to the State as final.

12. The Court has established that the object and purpose of the American Convection on Human Rights is to protect the human rights and fundamental freedoms enshrined in that instrument. However, the Court, in the Cayara Case, declared that it must preserve a fair balance between the protection of human rights, which is the ultimate purpose of the system, and the legal certainty and procedural equity that will ensure the stability and reliability of the international protection mechanism". It also established that [i]n the instant case, to continue

with a proceeding aimed at ensuring the protection of the interest of the alleged victims in the face of manifest violations of the procedural norms established by the Convention itself would result in a loss of the authority and credibility that are indispensable to organs charged with administering the system of the protection of human rights (Cayara Case, Preliminary Objections, para. 63.)

13. It is obvious that, whatever the reasons invoked to amend a final report notified by the Commission as such to the State, any such amendment, far from contributing to the object and purpose of the treaty, may seriously undermine "the necessary credibility of the organs entrusted with administering the human rights protection system."

14. The Vienna Convention on the Law of Treaties also provides, as a rule for interpretation of a treaty, that account must be taken of the practice subsequently followed in its enforcement. Since the procedure governing petitions established in the various instruments that have governed, and still govern, the Inter-American Commission on Human Rights was first established, only in one case has the Commission substantially amended a report notified to a State as final.

15. The aforesaid Vienna Convention also provides, as one of its rules of interpretation, that due consideration must be given to the pertinent norms of international law applicable in relations between the parties. Let it be said in this connection that well-established standards or principles of international law -such as good faith or legal certainty- would be gravely jeopardized if the Commission were permitted to amend a report after it had been notified as final.

16. Lastly, Article 32 of the Vienna Convention on the Law of Treaties establishes that additional means of interpretation may be employed -in particular the preparatory work on a treaty and the circumstances surrounding its signing- to reinforce to the meaning inferred from application of the other rules of interpretation.

17. As the Court has stated on previous occasions, Articles 50 and 51 of the American Convention on Human Rights have their basis in Articles 31 and 32 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European system provides that the European Commission adopt a single report, which shall be transmitted to the Council of Ministers and communicated to the States concerned (Article 31, paragraph 2). The European system makes no provision for the Commission to amend that report. Nor has this occurred in practice; amendment of a report transmitted and communicated to the Council of Ministers and the States concerned would seriously affect the normal functioning of the petition procedure organized by the European Convention for the Protection of Human Rights and Fundamental Freedoms, which, in this particular, has served as the basis for the provisions of the American Convention on Human Rights.

18. The Court has had occasion to refer to the interpretation of Articles 50 and 51 of the American Convention on Human Rights concerning the nature of the report mentioned in those articles. In Advisory Opinion N1⁄4 13, the Court established that

46. These norms [Articles 50 and 51 of the American Convention] were based upon Articles 31 and 32 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, according to which, when the European Commission considers there are violations of the rights protected in that Convention, it may send the report, which is the only one, to the Committee of Ministers which will dictate the measures the State concerned should adopt or submit it in the form of a case to the European Court of Human Rights for the Court to rule, in an imperative manner, on the alleged violations.

47. Because an organ similar to the Committee of Ministers was not established in the inter-American system, the American Convention empowered the Commission to decide whether to submit the case to the Court or to continue to examine the case and prepare a final report which it may publish.

The Court goes on to say that, should the matter not have been submitted to the consideration of the Court, "the Commission has the authority to prepare a final report containing the opinions and conclusions it considers advisable" (para. 52).

And in the following paragraph:
53. There are, then, two documents which, depending upon the interim conduct of the State to which they are addressed, may or not coincide in their conclusions and recommendations and to which the Convention had given the name of "report" and which have the character of preliminary and final, respectively.

19. As seen in that Advisory Opinion, the Court has drawn a clear distinction between a preliminary report and a final report. Let it be said that the term "informe definitivo" has been employed by the Court repeatedly in the aforementioned OC-13 (paragraphs 47, 53, 54 and 56) and that it was translated as "final report" in the English versions. The Diccionario de la Real Academia Española describes "definitivo" (or "final" in English) as "lo que decide, resuelve or concluye" [that which decides, resolves or concludes]; in other words, a final report is one that is no longer subject to amendment.

20. It may be argued, however, that the existence of new facts which were not or could not be known to the Commission at the time it adopted its final report justifies the drafting of a new report, although there is no provision for in the Convention for such an eventuality.

21. Although the Court has admitted that in "a number of circumstances" -which could include the emergence of new facts- the Commission may prepare a new report, it imposes on this potential new report the condition that "the number of circumstances" referred to must occur within the three months following the transmittal of the first report, in accordance with the provisions of Article 51(1) of the Convention. In the preliminary objections in the aforementioned Cayara case, the Court maintained that:

While the period is running [the three months following the transmittal of the first report], however, a number of circumstances could develop that would interrupt it or even require the drafting of a new report.

Consequently, should new facts emerge, the period within which they may be incorporated into the report is three months from the review of the first report.

22. It is obvious that new facts may emerge in situations that affect human rights, which are always prone to change; but legal certainty requires that there come a time when those facts are brought to light and transmitted to the parties. That time can only be the date on which the Commission adopts as final the report referred to in Article 51(3) of the Convention.

23. A reading of the Court's opinion suggests that it has advanced two arguments to maintain that the Commission may amend a final report notified as such to a State: a) a recent judgment of the Court in which it admitted that it was possible, in special circumstances, for the Court to review a judgment it had delivered, a criterion that may be applied to a Resolution of the ICHR (request for review of the Genie Lacayo Case of September 13, 1997); and b) the general spheres of competence of the IACHR, which differ from those governing the examination of individual petitions or denunciations.

24. None of the considerations contained in the Court's September 13, 1997 Order concerning the request for a review of the Genie Lacayo Case -in which I voted in favor- may be applied to a juridical relationship such as that resulting from the procedure instituted before the Inter-American Commission on Human Rights.

25. Had this been so, the considerations and reasons adduced by the Court in that review of judgment would also have to be applied even after the ICHR report had been published in the Annual Report.

26. So patent is the difference between the two organs that the regulations of the European Court of Human Rights contemplates the possibility of reviewing a judgment of the Court, whereas, as shown, there is no instrument in the European system that authorizes the European Commission to amend a report after it has been transmitted to the States or to the Committee of Ministers.

27. The nature and object of a judgment of the Court differ from those of a resolution or report of the Commission. It goes without saying that the decision of the Court, although final and not subject to appeal is, pursuant to the American Convention, subject to interpretation (Article 67). The judgment of the Court is also binding and may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state (Article 68(2) of the Convention).

28. At the same time, the report or resolution of the Commission does not have those binding effects. Its intervention is intended to enable it, on the basis of good faith, to obtain the State's cooperation and, by all possible means, submit the matter for the consideration of the Court, so that, in that event, the procedure to be used is that set forth in Article 51 of the Convention. Accordingly, that article, like the one that precedes it, refers to "a report setting forth the facts and stating its conclusions." It also refers to "pertinent recommendations" and whether "the State has taken the measures that are incumbent upon it to remedy the situation examined" and finally to decide, as the ultimate sanction, whether or not to publish its report.

29. It is important, in this regard, to remember that when an alleged violation of a human right or fundamental freedom does not stem from the action of an organ or agent of the Executive Branch, but from actions or omissions of other branches of the State -which equally involve its international responsibility- the only possible form of reparation is the delivery of a new judgment by the competent judicial organ or the promulgation of a new law by the Legislature.

30. In democratic States, characterized by the separation of the branches of government, that situation is increasingly frequent, thus requiring the activity of the Executive Branch -repository of the State's link with the organs of the system- with the other branches of government should be coherent and not subject to any amendments that the Commission may subsequently make. These considerations, in which the grounds for review of a judgment are automatically transferred to a report of the ICHR, execution of which depends on the State's good faith, confirm that the Court's criterion for review of a judgment is not applicable to an IACHR report.

31. Nor do I concur in another of the reasons adduced by the majority of the Court, whereby the Commission's final report, which has been notified as such to a State, may be amended in accordance with "legal criteria" such as:

a. the general principle that its acts must be equitable and impartial in regard to the two parties in the matter under consideration.
b. the mandate whereby "the Commission's main function is to promote the observance and defense of human rights" established in Article 41 of the Convention.
c. its powers "to make recommendations to the governments of the member States, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic laws and constitutional provisions as well as appropriate measures to further the observance of those rights", as stated in Article 41(b) of the Convention.

32. The Court itself, in the oft-cited Advisory Opinion OC-13, ruled out the possibility that the competence of the Commission to make recommendations to the governments of the member States of the OAS for the adoption of progressive measures in favor of human rights could be invoked in matters relating to the procedure governing the examination of individual petitions or denunciations based upon Articles 44 and 51 of the Convention (paragraph 44).

33. For that reason I cannot support the legal arguments put forward by the Court to authorize the Commission to amend a final report notified as such to a State.

34. Moreover, there could be no certainty as to when the procedure before that organ came to an end, inasmuch as exceptional circumstances could always be claimed.

35. Indeed, it would be extremely difficult in future for a State or a petitioner whose allegations have not been fully or partially examined by the Commission -aware as they will be that the final report may be altered in strict and exceptional circumstances- not to seek its amendment, adducing, for example, real or fictitious events that permit amendment of the final

report. Likewise, once a report has been successfully amended, there is nothing to prevent the new report from being amended as well if the grounds sustained by the Court are invoked.

36. None of the foregoing means that I am not persuaded that Articles 50 and 51 of the Convention need to be amended by the appropriate organs with a view to rectifying the serious problems of interpretation that these provisions have raised.

37. Lastly, I must recognize the efforts made by all the judges to find solutions that would make it possible to adopt by consensus a text satisfactory to everyone, and I acknowledge that the final version of the Court's ruling coincides with some of my views.

However, the text adopted by the majority does not detract from the observations I have expressed.

38. I my view, therefore, the Court should have responded as follows to Chile's request for an advisory opinion:

Regarding the first question asked by Chile:

That once the Inter-American Commission on Human Rights has adopted the two reports referred to in Articles 50 and 51 of the American Convention on Human Rights and has notified the latter of those reports to the State as a final report, it may not amend the report notified as final to the parties.

With regard to the second question asked by the State of Chile:
That since the Inter-American Commission on Human Rights is not empowered to alter the final report, the State and the parties must deem to be binding the report notified to them as final.

Máximo Pacheco-Gómez
Judge

Manuel E. Ventura-Robles
Secretary

CONCURRING OPINION OF JUDGE A. A. CANÇADO TRINDADE

1. I vote in favour of the adoption of the present Advisory Opinion, as I understand that its interpretation of Article 51 of the American Convention on Human Rights faithfully abides by the complementary imperatives of the quest for truth, juridical security, procedural balance and equity, and the realization of justice under the Convention. As to the decision of the Inter-American Court of Human Rights concerning the question of its competence and of the admissibility of the request for an Advisory Opinion, besides voting in favour of such decision, I feel obliged to add the present Concurring Opinion.

2. In an advisory proceeding marked by the incident of the withdrawal by Chile of its consultation to the Court, I consider correct the firm position assumed and sustained by this

latter, since its Resolutions of 14 April and of 12 September 1997 until the adoption of the present Advisory Opinion. The decision of the Court to sustain the wide scope of its advisory jurisdiction, despite the withdrawal of the original request by Chile, represents, in my view, an advance on the matter, with positive consequences towards the strengthening of its advisory function under Article 64 of the American Convention on Human Rights.

3. The incident occurred in the present advisory proceedings generated a series of questions and uncertainties which transcend the circumstances of the present subject and touch on the very foundations of the advisory function of the Inter-American Court, with repercussions in the supervisory mechanism itself of the American Convention. Accordingly, I feel obliged, by way of clarification and as the foundation of the position I have assumed in this regard since the beginning of the consideration by the Court of the present subject, to place on record my reasoning in this respect, which reflects, ultimately, my conception of the very foundations of the international legal order itself.

4. In its brief submitted to the Court on 31 July 1997, the Inter-American Commission on Human Rights observed that, with the withdrawal by Chile of its original advisory request, the Court remained without an "explicit petition" of Advisory Opinion. In the understanding of the Commission, the aforementioned withdrawal deprived the Court of the competence to deliver the Advisory Opinion, as the American Convention does not confer upon it the power to render it ex officio or motu propio [FN1]. The line of reasoning of the Commission attributes, thus, a decisive importance to the behaviour of the requesting State subsequent to the presentation of its petition, to the point of conditioning the very competence of the Court to decide to render the Advisory Opinion to such behaviour and its effects.

[FN1] IACHR, Observations of the Inter-American Commission on Human Rights on the Conduction of the Advisory Proceedings Initiated on the Basis of a Request Submitted to the Inter-American Court of Human Rights by the Government of Chile on 13 November 1996 [original in Spanish], of 31 July 1997, pp. 2-4, paragraphs 7-12, and p. 19, paragraph 53(1); cf. also p. 2, paragraph 6. - Both in its aforesaid brief (cf. ibid., pp. 5-7, paragraphs 15-24, and p. 15, paragraph 38) and at the public hearing before the Court on 10 November 1997, the Commission made it clear that it would have preferred the Court to have declared the request for an Advisory Opinion inadmissible, for referring to a "contentious case in disguise".

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5. The reasoning of the Commission discloses a vision of the jurisdictional basis of the international advisory function proper of another epoch, and which could hardly be sustained in our days. Contrary to what the Commission assumes, it is my understanding that, by force of a principle of International Law crystallized in the international arbitral practice and endowed with judicial recognition [FN2], every international tribunal and every organ with jurisdictional competences has the inherent power to determine the scope or extent of its own competence (Kompetenz-Kompetenz / compétence de la compétence).

[FN2] International Court of Justice (ICJ), Nottebohm case (Liechtenstein versus Guatemala), ICJ Reports (1953) p. 119.

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6. Whenever the Court decides to respond or not to a request for an Advisory Opinion, it is exercising the power to determine its own competence, derived from a principle of general International Law, and not conditioned by the behaviour of the requesting State or organ. Such principle, in turn, rests, not on the "will of the parties" (that is, of the State or organ concerned), as conceived in the past and as the brief of the Commission still tries to make one believe, but rather on the intrinsic nature of the international judicial organ.

7. Once set in motion the advisory proceedings, and notified the consultation to all the member States and main organs of the Organization of American States (OAS), and being the Court already seized of the petition, there is no way to seek to deprive the Court of its competence, not even by the withdrawal of the original request. The Court has the competence of the competence, and decides, in its own discretion, whether or not to render the Advisory Opinion. The withdrawal of the request has no effect whatsoever over its competence already established. The Court is already seized of the subject-matter of the petition, and is master of its jurisdiction.

8. The fragility of the argument to the contrary, seeking to deny the competence of the Court in the circumstances of the present advisory proceedings, does not resist to a more rigorous examination of the matter. As I have always maintained my position on defense of the integrity of the faculties, as organs of protection of human rights under the American Convention, of both the Court and the Commission, I feel here obliged, with the same determination, to sustain the intangibility of the competence of the Court, which the Commission curiously sought to deny in the present matter.

9. It is my understanding that, even in the circumstance of the withdrawal of a request for an Advisory Opinion, as in the present proceedings, the prevalence of the advisory jurisdiction of the Court ought in my view to prevail. Such jurisdiction (jus dicere, jurisdictio, the power to declare the Law) cannot be at the mercy of the changing will of those concerned; its competence (power to consider a given matter), as a measure of such jurisdiction, cannot be conditioned by the vicissitudes of the manifestations of consent on the part of the State or organ requesting the Advisory Opinion.

10. The consideration of the matter cannot prescind from an examination of the available jurisprudential elements. As the European Court of Human Rights has not yet exercised its advisory function under Protocol n. 2 (of 1963) to the European Convention on Human Rights, owing to the extremely restrictive terms of that Protocol (especially its Article 1(2)) which almost deprive it of purpose, rendering it meaningless, - the analysis which I shall develop focuses on the case-law of the International Court of Justice (and its predecessor, the Permanent Court of International Justice), along with the case-law the Inter-American Court of Human Rights itself.

11. In the matter of Eastern Carelia (1923), the old Permanent Court of International Justice (PCIJ) declined to render an Advisory Opinion for considering that, if it had delivered it, that would have been tantamount to deciding a pending dispute between Russia and Finland. That decision became locus classicus for the thesis that the consent of the State concerned was always a prerequisite for the exercise of the advisory jurisdiction of the Court [FN3]. That thesis, aligned with the legal positivism prevailing at that time [FN4], was, however, promptly abandoned and systematically rejected by the new International Court of Justice (ICJ).

[FN3] Permanent Court of International Justice (PCIJ), Series B, n. 5, 1923, p. 27.

[FN4] Even at a time intensely marked by State voluntarism and legal positivism, that of the old Permanent Court of International Justice (PCIJ), this latter succeeded, however, to deliver 26 Advisory Opinions (in the period 1922-1935) out of 28 requests, declining to do so in one matter; only one request was withdrawn (matter of the Expulsion of the Ecumenical Patriarch), of 16.06.1925, before any measure in that respect had been taken. Cf. PCIJ, III Rapport Annuel (1926-1927), Series E, n. 3, p. 185.

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12. As early as 1950 this latter took a position against the so-called "Eastern Carelia principle": in the matter of the Interpretation of Peace Treaties, the ICJ discarded the opposition of Bulgaria, Hungary and Rumania to its rendering an Advisory Opinion as a result of their lack of consent. To the ICJ, there was a confusion between the principles governing the contentious and the advisory procedures, as the consent of the State concerned was a precondition only of the contentious jurisdiction, and not of the advisory jurisdiction. Accordingly, no State could prevent the ICJ from deciding to render the requested Advisory Opinion [FN5].

[FN5] As that request for an Advisory Opinion intended to clarify the General Assembly of the United Nations as to the opportunities which the procedure of the Peace Treaties concluded with Bulgaria, Hungary and Rumania provided for putting an end to the existing situation - essentially, a juridical question, - the ICJ decided to render the Advisory Opinion. International Court of Justice (ICJ), Advisory Opinion on Interpretation of Peace Treaties, ICJ Reports (1950) pp. 71-72.

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13. Thus, in both the Advisory Opinion on the Interpretation of Peace Treaties (1950) and the Advisory Opinion on Reservations to the Convention against Genocide (1951) [FN6], the ICJ took a position on defense of the jurisdictional basis proper of its advisory function, affirming that it should not, in principle, decline to respond to a request for an Advisory Opinion. The advisory function of an international tribunal such as the ICJ began to be asserted as being endowed with characteristics of its own, which clearly distinguished it from the jurisdiction in contentious matter.

[FN6] ICJ, Advisory Opinion on Reservations to the Genocide Convention, ICJ Reports (1951) p. 19.

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14. On successive occasions the ICJ did affirm the existence of a "juridical question", and added that, even if political aspects existed, the question object of requests for an Advisory Opinion remained a juridical one, thus establishing its competence to render the Advisory Opinion, in the performance of an essentially juridical task [FN7]. The alleged political motivation of a request for an Advisory Opinion and the eventual "political implications" which the Advisory Opinion might have, - warned the ICJ, - were irrelevant when it came to establishing its competence to render such Advisory Opinion [FN8].

[FN7] ICJ, Advisory Opinion on Conditions of Admission of a State to Membership in the United Nations, ICJ Reports (1947-1948) pp. 61-62; ICJ, Advisory Opinion on Competence of the General Assembly for the Admission of a State to the United Nations, ICJ Reports (1950) pp. 6-7; ICJ, Advisory Opinion on Certain Expenses of the United Nations, ICJ Reports (1962) p. 155; ICJ, Advisory Opinion on Application for Review of Judgement n. 158 of the U.N. Administrative Tribunal, ICJ Reports (1973) p. 172; ICJ, Advisory Opinion on Interpretation of the Agreement of 1951 between the WHO and Egypt, ICJ Reports (1980) p. 87.
[FN8] ICJ, Advisory Opinion on Legality of the Use by a State of Nuclear Weapons in Armed Conflict, ICJ Reports (1996) pp. 73-74. In the present matter, the ICJ responded to the request of the General Assembly of the United Nations, but not to that of the World Health Organization (WHO). Even so, the Advisory Opinion of the ICJ, on a theme of such transcendental importance for the future of humankind, regrettably limited itself to verify the existence of what it considered as a juridical uncertainty on the matter; its Advisory Opinion, inconclusive and nebulous, contrasts with the force and clarity of the pleadings, for example, of New Zealand; cf. these latter in ICJ, Audience publique du 09 novembre 1995 - Compte rendu (Année 1995), doc. CR-95/28, pp. 19-37 (mimeographed, restricted circulation).
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15. In the cause célèbre of Namibia (1971), for example, the ICJ dismissed the argument of South Africa - which was opposed to its rendering the Advisory Opinion - that it was a political question involving a dispute between South Africa and other States: the ICJ replied that such was not the case, pondering that it was before a request for an Advisory Opinion which it should, as the main judicial organ of the United Nations, respond to, in order to elucidate the consequences and implications of the decisions of the Security Council in that respect. Furthermore, the fact that there existed "factual" points to be examined in no way affected the character of "juridical question" submitted to it for an Advisory Opinion. In order to pronounce on "juridical questions", concluded the Court, it had also to examine factual aspects, there being no "compelling reason" whatsoever which could lead the ICJ to abstain from rendering the requested Advisory Opinion [FN9].

[FN9] ICJ, Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276(1970), ICJ Reports (1971) pp. 21-24 and 27.
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16. Had the ICJ taken another position, pursuant to a more restrictive vision of its advisory jurisdiction, it would have declined to render an Advisory Opinion of historical importance. I consider the Advisory Opinion on Namibia (1971), for intertemporal law, the Advisory Opinion on Reservations to the Convention against Genocide (1951), for the recognition of humanitarian principles binding on States even in the absence of any conventional obligation (heralding the advent of the concept of jus cogens [FN10]), and the Advisory Opinion on Reparations for Damages (1948), for the assertion of the international legal personality of the United Nations (and a fortiori of that of other international organizations), the three Advisory Opinions of the ICJ of greatest significance in historical perspective for the evolution of contemporary International Law.

[FN10] Enshrined, years later, in Articles 53 and 64 of the Vienna Convention on the Law of Treaties (1969), and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).

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17. None of them would have been possible [FN11] if the ICJ had started from an outmoded voluntarist conception of International Law, with an instinctive attachment to the consent of the individual State for the exercise of not only the contentious but also the advisory jurisdictions of international tribunals. The notable contribution of the Advisory Opinion of the ICJ on the Interpretation of Peace Treaties (1950) consisted precisely in making it quite clear that the principles governing the contentious and advisory proceedings are essentailly distinct. The consent by the State conditions the former, but not the latter.

[FN11] The advisory jurisdiction of the ICJ has been exercised, much more than that of its predecessor, the PCIJ, to clarify juridical questions of the Law of International Organizations (above all of the United Nations), pertaining both to the constitutive charters of international organizations and to the legal effects of resolutions of their main organs; nothing of this would have been possible either, if the ICJ, instead of adopting its teleological approach, would have started from a voluntarist conception of its advisory function subordinated to the consent of each State individually.

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18. Eventual oppositions to the exercise of the advisory function (alleging the existence of "factual elements", or of a "contentious case in disguise", or of a "dispute" involving one or more States, or of a simple "controversy") ought not, thus, to make any impression; they ought not to be endowed with a dimension which they do not have. Such oppositions have been a constant factor in the international judicial practice, and have been repeatedly dismissed by the ICJ. There is nothing new under the sun. For example, in the matter of the Western Sahara (1975), it was Spain that invoked in vain the requisite of consent as asserted by the old PCIJ in the matter of Eastern Carelia (supra), whereas Morocco and Mauritania opted to base their case on the subsequent jurisprudential developments (Advisory Opinions of the ICJ on Interpretation of Peace Treaties, and on Namibia, supra).

19. In the same line of these latter, the Hague Court sustained that a question did not cease to be juridical simply because it had political aspects, being, thus, susceptible of becoming the object of an Advisory Opinion. As the contentious jurisdiction (subject to consent) was distinct from the advisory jurisdiction, and as an Advisory Opinion - by force of its own definition - had only an advisory character, - the aforementioned Court added, - no member State of the United Nations could prevent the ICJ, as the main judicial organ which participates in the life of the United Nations Organization, from rendering such Advisory Opinion; that this is so is shown by the fact that in the advisory proceedings there are neither parties, nor rules on the handling of evidence (such as that of the burden of proof) [FN12].

[FN12] ICJ, Advisory Opinion on Western Sahara, ICJ Reports (1975) pp. 18-24 and 26-29.

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20. More recently, in the matter of the Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (1989), the ICJ again pondered that it had before itself a juridical question, as it related to an international convention and its application; distinctly from the contentious jurisdiction, the consent of the States is not a precondition of its advisory jurisdiction, and no State could prevent the ICJ from rendering an Advisory Opinion. In such proceedings, the Court added, the absence of consent on the part of Rumania had no effect whatsoever on the jurisdiction of the Court [FN13]. Accordingly, the Court, like on previous occasions, proceeded to render the Advisory Opinion.

[FN13] The Court reiterated its view that it ought to, in principle, respond to a request for an Advisory Opinion, unless there were "compelling reasons" to the contrary (a question of "judicial propriety"), which were not found to exist in the present matter. Cf. ICJ, Advisory Opinion on the Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, ICJ Reports (1989) pp. 187-192.

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21. Moving from the global to the regional inter-American level, the advisory jurisdiction of the Inter-American Court of Human Rights, as the Court itself has pointed out from the start of its case-law, is particularly wide, as can be seen from the terms of Article 64 of the American Convention on Human Rights, which are unprecedented and unparalleled [FN14] in the international judicial function. The travaux préparatoires of Article 64 of the American Convention confirm the original purpose of endowing the Inter-American Court with a particularly wide advisory jurisdiction, without antecedents in contemporary International Law [FN15].

[FN14] In so far as the advisory jurisdiction of the International Court of Justice and that of the European Court of Human Rights are concerned.

[FN15] Inter-American Court of Human Rights (IACtHR), Advisory Opinion (OC-1/82) on "Other Treaties" Subject to the Advisory Jurisdiction of the Court (1982), paragraphs 15-17 and 46.

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22. As the faculty to request Advisory Opinions is extended both to the States Parties to the American Convention, as well as to the member States and to the main organs of the OAS, the Court's response to eventual requests corrresponds to an imperative of ordre public, to help those States and organs in the correct application of the Convention and in the full compliance with the conventional obligations [FN16]. It becomes clear, thus, that the advisory function of the Court, so broadly conceived, is not subject to the restrictions derived from the prerequisite of the consent of States to submit to its jurisdiction, distinctly from its jurisdiction in contentious matter (Article 62(1) of the Convention). The limitations of this latter disclose the lack of automatism of the international jurisdiction for the examination of concrete cases.

[FN16] IACtHR, Advisory Opinion (OC-3/83) on Restrictions to the Death Penalty (1983), paragraph 43.

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23. The advisory procedure has characteristics and a logic of its own: in it there are no parties (complainant and respondent), nor is there any Judgment (only an Advisory Opinion), nor are there any sanctions and reparations. There is nothing that permits to extend to such a procedure the prerequisite of the consent of the State, proper to the exercise of the contentious jurisdiction of the Court. All that one seeks, in the advisory procedure under the American Convention (in the terms of its Article 64), is to obtain an interpretation on the part of the Inter-American Court of provisions of the Convention (or of other treaties concerning the protection of human rights in the American States) that would facilitate and improve the application of this latter [FN17].

[FN17] Ibid., paragraphs 22-23.

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24. The Court would only abstain from responding to a request for an Advisory Opinion if it found that the consultation exceeds the extent of its advisory jurisdiction, either because it seeks to weaken the mechanism of protection of the Convention so as to undermine the protected rights, or because it seeks to distort or prejudice the contentious jurisdiction of the Court [FN18]. In the experience of the Court to date, on only one occasion did it deem that to respond to the consultation formulated (by Costa Rica) could distort its contentious jurisdiction and undermine the protected human rights (of those who had lodged petitions with the Inter-American Commission) [FN19]; the Court thus decided not to respond to the consultation, making use of its discretionary faculty, in the full exercise of its advisory jurisdiction.

[FN18] IACtHR, Advisory Opinion (OC-1/82) on "Other Treaties" Subject to the Advisory Jurisdiction of the Court (1982), paragraphs 30-31.

[FN19] IACtHR, Advisory Opinion (OC-12/91) on the Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights (1991), paragraphs 28 and 30-31.
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25. Apart from this isolated episode, the case-law of the Court, as from its first Advisory Opinion (of 1982), has developed in the same lines of the international case-law on the matter (in particular that of the International Court of Justice), in the sense of, in principle, always responding to the consultations formulated (even in face of the opposition of a State), thus dismissing an unduly restrictive interpretation of its advisory function [FN20]. Likewise, in the matter of Restrictions to the Death Penalty (1983), the Court dismissed the opposition of Guatemala to its rendering the Advisory Opinion, considering that the sole fact that there existed a controversy between the Inter-American Commission and Guatemala about Article 4 (right to life) of the American Convention did not constitute sufficient reason for it to abstain from exercising its advisory jurisdiction in that procedure [FN21].

[FN20] IACtHR, Advisory Opinion (OC-1/82) on "Other Treaties" Subject to the Advisory Jurisdiction of the Court (1982), paragraphs 23 and 50.
[FN21] IACtHR, Advisory Opinion (OC-3/83) on Restrictions to the Death Penalty (1983), paragraph 39.
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26. There is always the possibility that the interest of a State may be affected, in a way or another, by the interpretation pursued in a given Advisory Opinion; precisely for that, States are entitled to safeguard their interests by means of the full participation, assured to them, in the advisory proceedings, so as to submit to the Court their points of view on the matter at issue [FN22] (Regulations of the Court, Article 62). The Court, in its turn, has no cause to concern itself with the motivations which might have inspired a request for an Advisory Opinion [FN23], or the subsequent withdrawal of such request, or the reconsideration of that withdrawal. Its sole concern ought to be with the faithful exercise of the important advisory function attributed to it by Article 64 of the American Convention.

[FN22] Ibid., paragraph 24.
[FN23] ICJ, Advisory Opinion on Conditions of Admission of a State to Membership in the United Nations, ICJ Reports (1947-1948) p. 61.
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27. Bearing in mind what the international case-law points out on the matter, a question submitted to the examination of the Inter-American Court in the form of a request for an Advisory Opinion ought not to entail the inhibition of the Tribunal by the simple fact that it is surrounded by some controversy. On the contrary, with all the more reason must the Inter-American Court exercise its advisory function to clarify the question and, thereby, to pave the way for a more effective application of the American Convention. The experience of the ICJ provides a clear illustration to this effect. In so far as the Inter-American Court is concerned, this

position applies with even more force, being an international jurisdiction of safeguard of human rights, in which the notion of collective guarantee is underlying its mechanisms of protection.

28. The aforesaid, in my view, entirely discards the thesis of the consent of the State or the individual organ concerned as basis of the advisory jurisdiction of an international tribunal like the Inter-American Court. Its sole manifestation, proper of another epoch, the so-called "Eastern Carelia principle", is today a piece of museum, of purely historical interest. The jurisprudence constante of the ICJ took upon itself to bury that manifestation of the voluntarist conception of International Law - a reflection or emanation of a degenerate legal positivism [FN24], - which, had it been maintained and taken to extremes, would have led to the denial itself of the whole international legal order.

[FN24] Having as variants the voluntarist theories of the Vereinbarung, of the accords normatifs, of the "self-limitation" of the State, - all of them criticized in my essay "The Voluntarist Conception of International Law: A Re-Assessment", 59 Revue de Droit international de sciences diplomatiques et politiques (Sottile) - Geneva (1981) pp. 201-240.

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29. The aforementioned positivist-voluntarist conception never succeeded to free itself from the contradiction between the consent of the State as alleged basis of the obligations derived from the international norms and its premise of the existence of a juridical rule foreseeing the binding force of all that to which it consented. Even in a domain of International Law visibly permeated with State voluntarism as the law of treaties, the premise of the objectively binding force of treaties (pacta sunt servanda) marked its presence. All too soon the more lucid doctrine realized that the international legal order was, more than voluntary, necessary. And this became so evident above all in the present domain of the international protection of the human person.

30. It would be meaningless to attempt to resurrect the Eastern Carelia principle in our days, on the eve of the new century, after 50 years of international case-law solidly constructed in a contrary sense. As the exercise of the advisory jurisdiction of an international tribunal such as the Inter-American Court is not conditioned by the individual consent of each State, it cannot be sustained that the exercise of such jurisdiction affects State sovereignty, - a notion that, moreover, is alien to the domain of the international protection of human rights, which has found inspiration, instead, in the notion of solidarity.

31. In the present proceedings, in its already mentioned brief submitted to the Court on 31 July 1997, the Inter-American Commission recognized the faculty of the Court to proceed with the examination of a contentious case even when the complainant party notifies its intention to discontinue it (Article 54 of the Regulations of the Court), but considered that this norm, in the light of Article 63 of the Regulations, "is not completely compatible" with the advisory procedure [FN25]. Such conclusion requires demonstration.

[FN25] IACHR, doc. cit. supra n. (1), p. 4, paragraph 13.

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32. Article 54 of the Regulations points out, as justification of the faculty that it confers upon the Court, "the responsibilities incumbent upon it to protect human rights". In this way, contrary to what the brief of the Commission assumes, if in the exercise of its contentious jurisdiction (conditioned by the prior consent of the States Parties) the Court can proceed with the examination of a concrete case even after the discontinuance (désistement) by the complainant party, a fortiori the Court can, with all the more reason, proceed with the examination of a matter in order to render an Advisory Opinion (whose proceedings are not conditioned by the prior consent of the State) even after the withdrawal of the original request.

33. In requesting an Advisory Opinion from an international tribunal (endowed with jurisdiction to that end), the requesting State or organ does not present or declare itself as "complainant party", but it only initiates an advisory proceeding which exists to the benefit of all the States Parties, and not only the requesting State or organ. This latter sets in motion a procedure designed to clarify juridical questions, to the benefit of all the States Parties, besides the organs of the system of protection.

34. That this is so is shown by the fact that, in the present proceedings, following the request by Chile (of 11 November 1996) of an Advisory Opinion, two other States Parties to the American Convention, Guatemala and Costa Rica, intervened, submitting to the Inter-American Court (on 31 January 1997 and on 17 March 1997, respectively) their observations on the matter. Those of Guatemala touched clearly and pertinently the substance of the issue, and were reiterated by the State of Guatemala before the Court in the public hearing of 10 November 1997.

35. The request by Chile of an Advisory Opinion dealt in fact with a juridical question, pertaining to the interpretation and application of Article 51 of the American Convention, of importance to all the States Parties to the Convention as well as to its two supervisory organs. With the subsequent withdrawal of the request by Chile, after such request had been notified to all the member States and the main organs of the OAS, the question raised in the consultation did not lose, as if by a touch of magic, its juridical character, nor its practical importance.

36. On the contrary, the State of Chile itself, in its letter of withdrawal of the petition, of 24 March 1997, saw it fit to indicate that "the request of an Advisory Opinion concerns a juridical point of the utmost practical importance" (page 3). And, in the public hearing before the Court of 10 November 1997, at the same time that it asserted its right not only to request an Advisory Opinion of the Court but also to withdraw or discontinue it, it pointed out that it would abide by the Resolution of the Court of 14 April 1997, to the effect of continuing the consideration of the matter, and it declared that - despite the previous withdrawal - "it promptly accepts the jurisdiction of the Court to examine this request of an Opinion" [FN26].

[FN26] In its pleadings, the State of Chile added that it "considers that the Court has competence ratione materiae to respond to the consultation formulated", and it singled out the "importance" of the juridical question raised relating to the interpretation of the American Convention. [Government of Chile,] Draft Pleadings OC-15 [before the] Inter-American Court of Human Rights [original in Spanish], pp. 4 and 6 (mimeographed, restricted circulation).

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37. It is certain that an international tribunal cannot ex officio render an Advisory Opinion, sponte sua, as that would be tantamount to transforming itself, ultra vires, into an international legislator. No one would dare to confer upon it that faculty, which it does not have. Nevertheless, a tribunal like this Court, once consulted, by a State or an international organ, assumes jurisdiction over the mattter, and can and ought to determine ex officio whether or not it will render the requested Advisory Opinion, even if the request has been withdrawn. The international tribunal has the Kompetenz-Kompetenz (compétence de la compétence), the exercise of which corresponds to a discretionary faculty (known as "judicial propriety"), entirely distinct from the question of the original competence to render the Advisory Opinion.

38. In the present proceedings, the Court correctly retained its jurisdiction and determined the extent of its competence, despite the withdrawal of the request; likewise, the question at issue maintained its juridical character and practical importance to all the States Parties to the Convention and its two supervisory organs, despite the withdrawal of the request. Accordingly, the withdrawal of the request remained deprived of juridical effects, and the Court, quite properly, bearing in mind the provision of Article 63 of its Regulations, determined that it had the faculty and the duty to pronounce on the matter submitted to its consideration, in the exercise of the advisory function that Article 64 of the American Convention confers upon it.

39. The incident occurred in the present proceedings leaves a good lesson, for avoiding in the future incidents of the kind [FN27]. But, even so, should the withdrawal of a request of an Advisory Opinion again occur, it is to be hoped that one will no longer seek to endow it with effects which it does not have. The Inter-American Commission, which has always been guided by the ideal of the realization of the international protection of human rights, in the present matter advanced an argument which clearly does not serve that purpose, and which, it is to be hoped, will be abandoned by it to the already distant past to which it belongs. The misunderstandings of this incident have served, like the gold extracted from the crude stone, at least to leave clarified the jurisdictional basis of the advisory function of an international tribunal such as the Inter-American Court of Human Rights.

[FN27] As to the exercise of the contentious jurisdiction of the Court, for example, it is distressing to recall the procedural incident generated by the withdrawal of the complaint (demanda) in the Cayara case, pertaining to Peru (Preliminary Objections, 1993), with such negative consequences for the safeguard of human rights in the framework of the inter-American system of protection. One ought not to forget Cayara...

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40. Such advisory function, in sum, subsists, irrespective of the subsequent behaviour of the requesting State or organ. This latter, in formulating the consultation, sets in motion an advisory procedure which exists to the benefit of all the States Parties, and which is not conditioned by the individual consent of the requesting State or organ. As from the start of the examination of the juridical question on which the Advisory Opinion is requested, the Court, in its turn, as I have

already pointed out, is master of its jurisdiction and sovereign of the procedure. Moreover, as the international case-law warns, it has the duty to safeguard its own judicial function [FN28].

[FN28] ICJ, Northern Cameroons case (Cameroun versus United Kingdom), ICJ Reports (1963) p. 38; and cf. ICJ, Advisory Opinion on Interpretation of Peace Treaties, ICJ Reports (1950) pp. 71-72.

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41. This being so, it would be inadmissible to abide by any attempt to subordinate the advisory jurisdiction of an international tribunal such as the Inter-American Court to the changing behaviour and the vicissitudes of the manifestations of the consent of each one of those concerned in the consultation. Such as conceived the advisory function of the Inter-American Court, its operation is a matter of international ordre public. The thesis which I here firmly sustain, in support of the decision as to competence and admissibility taken by the Court in the present Advisory Opinion, applies, in my view, with even more force, in the present domain of the international protection of human rights, which finds inspiration in common superior values.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary