THE COURT

renders the following Advisory Opinion:

I. SUBMISSION OF THE REQUEST

1. By submission of December 9, 1997, the United Mexican States (hereinafter "Mexico" or "the requesting State") sought an advisory opinion of the Inter-American Court of Human Rights (hereinafter "the Inter-American Court," "the Court," or "the Tribunal") on "several treaties concerning the protection of human rights in the American States" (hereinafter "the request"). According to the requesting State, the application concerned the issue of minimum judicial guarantees and the requirement of the due process when a court sentences to death foreign nationals whom the host State has not informed of their right to communicate with and seek assistance from the consular authorities of the State of which they are nationals.

2. Mexico added that the request, made pursuant to Article 64(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "Pact of San José), came about as a result of the bilateral representations that the Government of Mexico had made on behalf of some of its nationals, whom the host State had allegedly not informed of their right to communicate with Mexican consular authorities and who had been sentenced to death in ten states in the United States.

3. The requesting State asserted that the considerations giving rise to the request were the following: the sending State and the host State were both parties to the Vienna Convention on Consular Relations; both were members of the Organization of American States (hereinafter "the OAS") and had signed the American Declaration of the Rights and Duties of Man (hereinafter

"the American Declaration"); and although the host State had not ratified the American Convention, it had ratified the International Covenant on Civil and Political Rights of the United Nations (hereinafter "the UN").

4. Given these considerations, Mexico requested the Court's opinion as to the following points:

In relation to the Vienna Convention on Consular Relations:

1. Under Article 64(1) of the American Convention, should Article 36 of the Vienna Convention [on Consular Relations] be interpreted as containing provisions concerning the protection of human rights in the American States?
2. From the point of view of international law, is the enforceability of individual rights conferred on foreigners by the above-mentioned Article 36 on behalf of the interested parties in regard to the host State subject to the protests of the State of which they are nationals?
3. Mindful of the object and purpose of Article 36(1)(b) of the Vienna Convention, should the expression "without delay" contained in that provision be interpreted as requiring the authorities of the host State to inform any foreigner detained for crimes punishable by the death penalty of the rights conferred on him by Article 36(1)(b), at the time of the arrest, and in any case before the accused makes any statement or confession to the police or judicial authorities?
4. From the point of view of international law and with regard to aliens, what should be the juridical consequences of the imposition and application of the death penalty in the light of failure to give the notification referred to in Article 36(1)(b) of the Vienna Convention?

Concerning the International Covenant on Civil and Political Rights:

5. In connection with Article 64(1) of the American Convention, are Articles 2, 6, 14 and 50 of the Covenant to be interpreted as containing provisions concerning the protection of human rights in the American States?
6. In connection with Article 14 of the Covenant, should it be applied and interpreted in the light of the expression "all possible safeguards to ensure a fair trial" contained in paragraph 5 of the United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty, and that concerning foreign defendants or persons convicted of crimes subject to capital punishment that expression includes immediate notification of the detainee or defendant, on the part of the host State, of rights conferred on him by Article 36(1)(b) of the Vienna Convention?
7. As regards aliens accused of or charged with crimes subject to the death penalty, is the host State's failure to notify the person involved as required by Article 36(1)(b) of the Vienna Convention in keeping with their rights to "adequate time and facilities for the preparation of his defense", pursuant to Article 14(3)(b) of the Covenant?
8. As regards aliens accused of or charged with crimes subject to the death penalty, should the term "minimum guarantees" contained in Article 14(3) of the Covenant, and the term "at least equal" contained in paragraph 5 of the corresponding United Nations Safeguards be interpreted as exempting the host State from immediate compliance with the provisions of Article 36(1)(b) of the Vienna Convention on behalf of the detained person or defendant?
9. With regard to [A]merican countries constituted as federal States which are Parties to the Covenant on Civil and Political Rights, and within the framework of Articles 2, 6, 14 and 50 of

the Covenant, are those States obliged to ensure the timely notification referred to in Article 36(1)(b) to every individual of foreign nationality who is arrested, detained or indicted in its territory for crimes subject to the death penalty; and to adopt provisions in keeping with their domestic law to give effect in such cases to the timely notification referred to in this article in all its component parts, if this was not guaranteed by legislative or other provisions, in order to give full effect to the corresponding rights and guarantees enshrined in the Covenant?

10. In connection with the Covenant and with regard to persons of foreign nationality, what should be the juridical consequences of the imposition and application of the death penalty in the light of failure to give the notification referred to in Article 36(1)(b) of the Vienna Convention?

Concerning the OAS Charter and the American Declaration

11. With regard to the arrest and detention of aliens for crimes punishable by death and in the framework of Article 3(1) [FN1] of the Charter and Article II of the Declaration, is failure to notify the detainee or defendant immediately of the rights conferred on him in Article 36(1)(b) of the Vienna Convention compatible with the Charter of Human Rights, which contains the term without distinction of nationality, and with the right to equality before the law without distinction as to any factor, as enshrined in the Declaration?

12. With regard to aliens in the framework of Article 3(1) [FN2] of the OAS Charter and Articles I, II and XXVI of the Declaration, what should be the juridical consequences of the imposition and execution of the death penalty when there has been a failure to make the notification referred to in Article 36(1)(b) of the Vienna Convention?

[FN1] The original reference that the requesting State made was to Article 3(1) of the Charter as amended by the Protocol of Buenos Aires in 1967, by the Protocol of Cartagena de Indias in 1985, by the Protocol of Washington in 1992, and by the Protocol of Managua in 1993.

[FN2] Supra note 1.

II. DEFINITIONS

5. For purposes of the present Advisory Opinion, the following expressions will have the meaning hereunder assigned to them:

a) “the right to information on consular assistance” or “right to information”

The right of a national of the sending State who is arrested or committed to prison or to custody pending trial or is detained in any other manner, to be informed “without delay” that he has the following rights:

i) the right to have the consular post informed, and

ii) the right to have any communication addressed to the consular post forwarded without delay.

(Article 36(1)(b) of the Vienna Convention on Consular Relations)

b) “the right to consular notification” or “right of notification”

The right of the national of the sending State to request that the competent authorities of the host State notify the consular post of the sending State, without delay, of his arrest, imprisonment, custody or detention.

c) "right of consular assistance" or "right of assistance"

The right of the consular authorities of the sending State to provide assistance to their nationals (articles 5 and 36(1)(c) of the Vienna Convention on Consular Relations)

d) "right of consular communication" or "right of communication" [FN3]

The right of the consular authorities and nationals of the sending State to communicate with each other (articles 5, 36(1)(a) and 36(1)(c) of the Vienna Convention on Consular Relations)

e) "sending State"

The State of which the person who is arrested or committed to prison or to custody pending trial or detained in any other manner is a national (Article 36(1)(b) of the Vienna Convention on Consular Relations)

f) "host State"

The State in which the national of the sending State is arrested or committed to prison or to custody pending trial or is detained in any other manner (Article 36(1)(b) of the Vienna Convention on Consular Relations)

[FN3] Cognizant of the fact that the rights conferred under Article 36 of the Vienna Convention on Consular Relations are listed under the heading "Communication and Contact with Nationals of the Sending State," the Court has opted instead to use the phrase "right of consular communication" for the right described under sub-paragraph d) above, as it considered that to be the proper language for purposes of the present Advisory Opinion.

III. PROCEEDINGS WITH THE COURT

6. In accordance with Article 62(1) of the Court's Rules of Procedure (hereinafter "the Rules of Procedure") and on instructions from the President of the Court (hereinafter "the President") to that effect, by note of December 11, 1997, the Secretariat of the Court (hereinafter "the Secretariat") forwarded the text of the request to the member States of the OAS, to the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission"), to the Permanent Council and, through the OAS Secretariat General, to all the organs named in Chapter VIII of the OAS Charter. On that same date, the Secretariat notified all of the above that the President would set the deadline for submitting written comments or documents relevant to this matter during the Court's thirty-ninth regular session.

7. After conferring with the other judges on the Court, on February 4, 1998, the President directed that written comments and documents relevant to the request be submitted by no later than April 30, 1998.

8. By order of March 9, 1998, the President convened a public hearing on the request, to be held at the seat of the Court on June 12, 1998, at 10:00 a.m., and instructed the Secretariat to summon to those oral proceedings any and all parties that had submitted written comments to the Court.

9. The Republic of El Salvador (hereinafter "El Salvador") submitted its written comments to the Court on April 29, 1998.

10. The following States filed their written comments with the Court by April 30, 1998: the Dominican Republic, the Republic of Honduras (hereinafter "Honduras") and the Republic of Guatemala (hereinafter "Guatemala").

11. On May 1, 1998, Mexico filed a brief containing "additional considerations, new information and documents relevant to the request."

12. In keeping with the extension that the President granted to the Republic of Paraguay (hereinafter "Paraguay") and the Republic of Costa Rica (hereinafter "Costa Rica"), these two countries submitted their comments on May 4 and 8, 1998, respectively. The United States submitted its comments on June 1 of that year.

13. The Inter-American Commission submitted its comments on April 30, 1998.

14. The following jurists, nongovernmental organizations and individuals submitted briefs containing the points of view of amici curiae between April 27 and May 22, 1998:

- Amnesty International;
- la Comisión Mexicana para la Defensa y Promoción de Derechos Humanos (hereinafter "CMDPDH"), Human Rights Watch/Americas, and the Center for Justice and International Law (hereinafter "CEJIL");
- Death Penalty Focus of California
- Delgado Law Firm and Jimmy V. Delgado;
- International Human Rights Law Institute of DePaul University College of Law and MacArthur Justice Center of the University of Chicago Law School;
- Minnesota Advocates for Human Rights and Sandra L. Babcock;
- Bonnie Lee Goldstein and William H. Wright, Jr.;
- Mark Kadish;
- José Trinidad Loza;
- John Quigley and S. Adele Shank;
- Robert L. Steele;
- Jean Terranova, and
- Héctor Gros Espiell.

15. On June 12, 1998, before the public hearing convened by the President commenced, the Secretariat provided those present for the public hearing with a set of the comments and relevant documents submitted to date in the advisory proceedings.

16. The following were present at the public hearing:

for the United Mexican States:

Sergio González Gálvez, Special Advisor to the Secretary of Foreign Affairs of the United Mexican States, Agent;

Enrique Berruga Filloy, Ambassador of the United Mexican States to the Government of Costa Rica;

Rubén Beltrán Guerrero, Director General for Consular Affairs and Protection, with the Secretariat of Foreign Affairs of the United Mexican States, Alternate Agent;

Jorge Cícero Fernández, Director of Litigation, Office of Legal Affairs, Secretariat of Foreign Affairs of the United Mexican States, Alternate Agent;

Juan Manuel Gómez Robledo, Alternate Representative of the United Mexican States to the Organization of American States;

for Costa Rica:

Carlos Vargas Pizarro, Agent;

for El Salvador:

Roberto Arturo Castrillo Hidalgo, Coordinator of the Advisory Commission of the Ministry of Foreign Affairs of the Republic of El Salvador, Head of delegation;

Gabriel Mauricio Gutiérrez Castro, Member of the Advisory Commission of the Ministry of Foreign Affairs of El Salvador;

Ana Elizabeth Villalta Vizcarra, Director of the Advisory Services Unit of the Ministry of Foreign Affairs of El Salvador, and

Roberto Mejía Trabanino, Human rights advisor to the Minister of Foreign Affairs of El Salvador;

for Guatemala:

Marta Altolaguirre, Chair of the Presidential Steering Commission for Executive Policy in Human Rights, Agent;

Dennis Alonzo Mazariegos, Executive Director of the Presidential Steering Commission for Executive Policy in Human Rights, Alternate Agent, and

Alejandro Sánchez Garrido, Advisor;

for Honduras:

Mario Fortín Midence, Ambassador of the Republic of Honduras to the Government of the Republic of Costa Rica, Agent, and

Carla Raquel, Chargé d'affaires of the Embassy of the Republic of Honduras to the Government of the Republic of Costa Rica;

for Paraguay:

Carlos Víctor Montanaro, Permanent Representative of the Republic of Paraguay to the Organization of American States, Agent;

Marcial Valiente, Ambassador of the Republic of Paraguay to the Government of the Republic of Costa Rica, Alternate Agent, and

Julio Duarte Van Humbeck, Alternate Representative of the Republic of Paraguay to the Organization of American States, Alternate Agent;

for the Dominican Republic:

Claudio Marmolejos, Counselor with the Embassy of the Dominican Republic to the Republic of Costa Rica, Representative;

for the United States:

Catherine Brown, Assistant Legal Advisor for Consular Affairs, United States Department of State,

John Crook, Assistant Legal Advisor for United Nations Affairs, United States Department of State;

John Foarde, Attorney Adviser, Office of the Assistant Legal Adviser for Consular Affairs, United States Department of State;

Robert J. Erickson, Principal Deputy Chief of the Criminal Appellate Section of the United States Department of Justice;

for the Inter-American Commission:

Carlos Ayala Corao, Chairman of the Inter-American Commission on Human Rights, Delegate;

Alvaro Tirado Mejía, Member of the Inter-American Commission on Human Rights, Delegate, and

Elizabeth Abi-Mershed, Principal Specialist with the Executive Secretariat of the Inter-American Commission on Human Rights.

for Amnesty International

Richard Wilson, and
Hugo Adrián Relva;

for CMDPDH, Human Rights Watch/Americas And CEJIL:

Mariclaire Acosta;
José Miguel Vivanco;
Viviana Krsticevic;
Marcela Matamoros, and
Ariel Dulitzky;

for the International Human Rights Law Institute of DePaul University College of Law:

Douglas Cassel;

for Death Penalty Focus of California:
Mike Farrell and
Stephen Rohde;

for Minnesota Advocates for Human Rights

Sandra Babcock and
Margaret Pfeiffer;

representing Mr. José Trinidad Loza

Laurence E. Komp;
Luz Lopez-Ortiz, and
Gregory W. Meyers;

in an individual capacity:

John Quigley;
Mark J. Kadish, and
Héctor Gros Espiell.

Also present as an observer was:

for Canada:

Dan Goodleaf, Ambassador of Canada to the Government of Costa Rica.

17. At the public hearing, El Salvador and the Inter-American Commission delivered to the Secretariat the written texts of their oral arguments before the Court. In keeping with the President's instructions in this regard, the Secretariat made a record of receipt of the submissions and provided copies of the documents to all those appearing before the Court.

18. Also during the public hearing, the United States presented a copy of a handbook titled "Consular Notification and Access: Instruction for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them," published by the United States Department of State. The requesting State presented a brief titled "Explicación de las preguntas planteadas in la solicitud consultiva OC-16" ["Explanation of the questions raised in the request for Advisory Opinion OC-16"], three documents titled "Memorandum of Understanding on Consultation Mechanism of the Immigration and Naturalization Service Functions and Consular Protection," "The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides," and "Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent," and a copy of a letter dated June 10, 1998, signed by Mr. Richard C. Dieter and addressed to the Court on 'Death Penalty Information Center' letterhead paper. As instructed by the President, the Secretariat made a record of receipt of these documents and made them available to all members of the Court.

19. At the conclusion of the public hearing, the President told those who had appeared before the Court that they could submit briefs of final comments on the advisory process underway, and set three months from the time the Secretariat transmitted the verbatim record of the public hearing to all the participants as the deadline for submission of those final comments.

20. On October 14, 1998, the requesting State submitted to the Court a copy of two documents, titled "Comisión General de Reclamaciones México–Estados Unidos. Caso Faulkner, Opinión y Decisión de fecha 2 de noviembre de 1926" [Mexican-United States General Claims Commission. Faulkner Claim, Opinion and Decision of 2 November 1926] and "Información adicional sobre los servicios de protección consular a nacionales mexicanos en el extrajero" [Additional information on consular protection services for Mexican nationals abroad].

21. By notes dated February 11, 1999, the Secretariat forwarded the verbatim record of the public hearing to all participants.

22. The following institutions and individuals who had appeared as amici curiae submitted briefs of final points of view: CMPDDH, Human Rights Watch/Americas and CEJIL, August 20, 1998; International Human Rights Law Institute of DePaul University College of Law, October 21, 1998; Mr. José Trinidad Loza, May 10, 1999, and Amnesty International, May 11, 1999.

23. The Inter-American Commission submitted its brief of final comments on May 17, 1999.

24. The United States presented its brief of final comments on May 18, 1999.

25. As directed by the President, on July 6, 1999, the Secretariat forwarded the briefs of additional comments submitted to this Tribunal, to all those who had participated in the proceedings and there informed them that the Court would scheduled its deliberations on the request for its ninety-fifth session, September 16 to October 2, 1999.

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26. The following is the Court's summary of the substance of the original briefs of comments submitted by the States participating in these advisory proceedings and those of the Inter-American Commission: [FN4]

[FN4] The full text of the briefs of comments submitted by the States, organs, institutions and individuals participating in the proceedings will be published in due course as part of the Court's official publications Series "B".

United Mexican States:

In its request, Mexico stated the following concerning the merits of the request:

The American States recognize that in the specific case the death penalty, the fundamental rights of a person must be scrupulously observed and respected, because that punishment causes irreparable loss of that "most fundamental of human rights that is the right to life";
The jurisprudence of this Court, the doctrine of the Inter-American Commission and a number of UN resolutions have recognized that application of the death penalty must be conditional upon and subject to the restrictions imposed by strict observance of the judicial guarantees that the universal and regional human rights instruments uphold with regard to the due process in general and cases in which the death penalty is applicable;
When the detained persons are foreign nationals, it is evident that the minimum guarantees of criminal justice must be applied and interpreted in accordance with the Vienna Convention on Consular Relations, since otherwise they would be deprived of a "suitable means" to exercise those rights;
Prompt consular assistance may be decisive in the outcome of a criminal proceeding, because it guarantees, inter alia, that the foreign detainee is advised of his constitutional and legal rights in his own language and in a manner accessible to him, receives proper legal counsel, and understands the legal consequences of the crime of which he is accused, and
Consular agents may assist in the preparation, coordination and supervision of the defense, play a decisive role in obtaining, in the State of which the accused is a national, evidence that attests to mitigating circumstances and help make the circumstances of the accused and his relatives "more humane," thereby helping to compensate for the real disadvantage at which they find themselves.

El Salvador

In its brief of April 29, 1998, the Salvadoran State wrote the following:

The minimum necessary guarantees in criminal justice matters must be applied and interpreted in the light of the rights conferred upon individuals in Article 36 of the Vienna Convention on Consular Relations. Thus, failure to inform a detained person of those rights is a violation "of every rule of the due process because the judicial guarantees under international law are not being observed";
Failure to comply with Article 36 of the Vienna Convention on Consular Relations can "in practice lead to wrongful executions […] that violate a person's most fundamental right […], the right to life", and
Application of the rules and principles embodied in international human rights instruments must be assured, strengthened and promoted, and observance of the minimum guarantees necessary for the due process must be assured.

Guatemala

In its brief of April 30, 1998, the Guatemalan State wrote the following:

Given the rights and guarantees protected under Article 36 of the Vienna Convention on Consular Relations, that article can be said to contain provisions concerning the protection of human rights;

The language of Article 36(1)(b) of the Vienna Convention on Consular Relations establishes the fact that the enforceability of the rights it confers is not conditional upon protests filed by the State of nationality of the detained foreign national;
The expression "without delay" in Article 36(1)(b) of the Vienna Convention on Consular Relations implies that a foreign national detainee must be advised of his rights "as soon as […] possible upon being arrested, detained or taken into preventive custody" and that his communications are to be forwarded without delay to his country's consular office;
In a case in which the death penalty has been imposed, the juridical consequences of the failure to give the notification required under Article 36(1)(b) of the Vienna Convention on Consular Relations should be decided by the domestic court that tried that particular case;
The provision contained in Article 14 of the International Covenant on Civil and Political Rights is the basis for application of the Safeguards guaranteeing protection of the rights of those facing the death penalty;
Failure to comply with the obligation contained in Article 36(1)(b) of the Vienna Convention on Consular Relations "could be a violation" of Article 14(3)(b) of the International Covenant on Civil and Political Rights;
The "minimum guarantees" referred to in Article 14(3) of the International Covenant on Civil and Political Rights encompasses the provisions of Article 35(1)(b) of the Vienna Convention on Consular Relations, and
The guarantee of nondiscrimination, upheld in Article 3(1) of the OAS Charter and Article II of the American Declaration, includes the matter of nationality.

Dominican Republic

The Dominican Republic divided its written comments of April 30, 1998 into two parts. The first, titled "Observations […] with respect to the [request]", states that

The purpose of Article 36 of the Vienna Convention on Consular Relations is to protect the human rights of the accused and their enforceability is not subject to protests from the State of nationality, because "the Convention is national law inasmuch as it was approved by the National Congress";
The detainee must be informed of his rights under Article 36 of the Vienna Convention on Consular Relations at the time of his arrest and before he makes any statement or confession;
Article 14 of the International Covenant on Civil and Political Rights must be interpreted in the light of the phrase "all possible safeguards to ensure a fair trial", the language of paragraph 5 of the Safeguards guaranteeing protection of the rights of those facing the death penalty; therefore, observance of Article 36(1)(b) of the Vienna Convention on Consular Relations is essential if the accused is to be afforded those guarantees, and
Failure to inform a detained foreign national of his rights under the Vienna Convention on Consular Relations is a violation of the OAS Charter and the American Declaration.

In the second half of its brief of April 30, 1998, titled "Report […] on the Advisory Opinion," the Dominican Republic repeated some of the comments expressed previously and added that:

Consular assistance derives from the right to nationality recognized in the Universal Declaration of Human Rights (hereinafter "the Universal Declaration"); the provisions of the Vienna Convention on Consular Relations must be observed if that consular assistance is to be effective;
The purpose of the provisions relating to observance of the due process is to assert a number of individual rights, such as equality before the courts and the right to be heard, without distinction; consular intervention sees to it that the correlative obligations that attend those rights are performed, and
Observance "without delay" of the provisions of Article 36 of the Vienna Convention on Consular Relations ensures the due process of law and protects the individual's fundamental rights, "especially the most basic right of all, the right to life."

Honduras

In its brief of April 30, 1998, the Honduran State wrote the following with respect to the jurisdiction of the Court:

The source of "consular notification" is Article 36 of the Vienna Convention on Consular Relations, which is the domestic law of the American States and, as such, enhances "the measures provided by the Hemisphere's system for the protection of human rights," and
Under Article 29(b) of the American Convention, no provision of that Convention can be interpreted as restricting the Court's advisory jurisdiction to interpret the request concerning "consular notification," even when the right to consular notification derives from a universal instrument.

Paraguay

In its brief of May 4, 1998, the Paraguayan State wrote the following in regard to the merits of the request:

States have an obligation to respect the minimum judicial guarantees upheld by international law in the case of a person "accused of a capital offense in a State of which he is not a national. The host State incurs international responsibility if it fails to honor that obligation";
International norms for the protection of fundamental rights must be interpreted and applied in a manner consistent with the international juridical system of protection;
Failure to comply with Article 36 of the Vienna Convention on Consular Relations concerning "communication with nationals of the sending State," is a violation of the human rights of the accused foreign national because it affects the due process and, in cases involving the death penalty, can violate the human right par excellence: the right to life";
Paraguay has a case against the United States before the International Court of Justice, concerning a failure to observe Article 36 of the Vienna Convention on Consular Relations (infra 28) [FN5], and
Because the States' systems differ, the consular function is essential to providing the affected national with immediate and timely assistance in the criminal proceedings and can affect the outcome of the case.

[FN5] The United States later informed the Court of Paraguay's discontinuance of the case it had brought against the United States with the International Court of Justice. See, in that regard, infra, paragraph 28.

Costa Rica

In its brief of May 8, 1998, the Costa Rican State wrote the following regarding the competence of the Court:

The considerations that gave rise to the request do not interfere with the proper functioning of the inter-American system and do not adversely affect the interests of any victim, and
In the present matter, the purpose of the Court's advisory function is to further compliance with Article 36 of the Vienna Convention on Consular Relations, which concerns observance of the individual's fundamental rights;

and on the merits of the request:

Domestic laws cannot stand in the way of proper performance of international human rights obligations;
The obligations that attend protection of the minimum guarantees and the requirements of the due process in respect of human rights are binding, and
all the entities of a federal State are bound by the international treaties that State signs.

United States

In its brief of June 1, 1998, the United States stated the following with respect to the jurisdiction of the Court in this matter:

As the Vienna Convention on Consular Relations is a global treaty, there can be no differing interpretations of the States' obligations on a regional basis;
The International Court of Justice had, at the time, a contentious case on its docket that involved the same issue that the requesting State had raised in these proceedings; [FN6] hence, "prudence, if not considerations of comity, should lead [the] Court to defer its consideration of the pending request until the International Court had rendered its decision interpreting the obligations of States party to the Vienna Convention on Consular Relations";
The Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes, ratified by 53 States Party to that Convention, provides for conciliation or arbitration by agreement or referral of disputes to the International Court of Justice;
The request is patently an attempt to subject the United States to the contentious jurisdiction of this Court, even though the United States is not a party to the American Convention and has not accepted the Court's contentious jurisdiction;
Mexico has presented a contentious case in the guise of a request for an advisory opinion. It cannot be settled without reference to specific facts that cannot be decided in an advisory proceeding;

The judicial records of the cases described in the request are not before the Court and the United States has not had the opportunity to refute the generalized allegations that the requesting State has made in connection with these cases;
Any decision by the Court, even of an advisory nature, would gravely affect the cases still pending before the respective judicial systems and seriously compromise the rights of the individuals and governments involved, including the victims of the crimes committed, who have not had the opportunity to participate in these proceedings, and
Were the Court to follow Mexico's suggestion, it would call into question the basic fairness and sufficiency of any criminal proceeding conducted in the criminal justice systems of the States Parties to the Vienna Convention on Consular Relations that might result in a severe penalty and in which consular notification did not occur. "There is [n]o basis in international law, logic, or morality for such a judgment and for the resulting disruption and dishonor to the many States parties to the Vienna Convention on Consular Relations";

[FN6] The United States later informed the Court of Paraguay's discontinuance of the case it had brought against the United States with the International Court of Justice. See, in that regard, infra, paragraph 28.

Concerning the Vienna Convention on Consular Relations and consular assistance:

The Vienna Convention on Consular Relations is neither a human rights treaty nor a treaty "concerning" the protection of human rights. Instead, it is a multilateral treaty "of the traditional type concluded to accomplish reciprocal exchange of rights for the mutual benefit of the contracting States," in the sense interpreted by the Court in its second Advisory Opinion. In support of its argument, the United States asserts that the intent of the Vienna Convention on Consular Relations is to establish legal rules governing relations between States, not to create rules that operate between States and individuals; its Preamble states that the purpose of such privileges and immunities "is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States";
Not every obligation of States regarding individuals is perforce a human rights obligation. Nor does the fact that one provision in the Vienna Convention on Consular Relations may authorize beneficial assistance to certain individuals in certain circumstances transform the Vienna Convention into a human rights instrument or a source of the human rights of individuals;
Article 36 of the Vienna Convention on Consular Relations is in the section titled "[F]acilities, privileges and immunities relating to a consular post", and
Neither the Vienna Convention on Consular Relations nor any international human rights instrument creates the right to consular assistance.The former merely stipulates that a host State must inform a detainee that, if he requests, sending State consular authorities may be notified of his detention. "[W]hether, when and to what extent consular assistance is ultimately provided to the detainee is in the discretion of the sending State's consular authorities." The United States describes the activities that its consular officers abroad perform when notified of the arrest of a United States citizen and from there concluded that no State provides the type of services that Mexico described in its request;

Concerning the nature of consular notification and its effects on the proceedings:

There is no evidence to support the premise that there exists a human right to consular notification or that it is a universal prerequisite to the observance of human rights.
If a defendant is treated fairly and with equality before the court, if he receives competent legal representation, and by such representation adequate time and facilities for the preparation of a defense, the failure to provide consular notification does not affect the integrity of the defendant's human rights. By contrast, when the facts of a case demonstrate that a defendant did not receive the benefit of a fair trial and the due process protections, an inquiry properly results and remedies may be appropriate, regardless of consular notification.
Furthermore, consular notification is not a prerequisite for the observance of human rights and nonobservance does not invalidate criminal proceedings that otherwise "satisfy relevant human rights norms as reflected in national law";
The guarantees of the due process are to be given effect regardless of the nationality of the defendant and regardless "of whether consular relations exist between the host country and a foreign national defendant's country." The United States reasons that if consular notification is to be considered a fundamental right, then the inference is that individuals who are nationals of States that have consular relations "have greater human rights than others" who are nationals of States that do not have relations of that type or States that are not party to the Vienna Convention on Consular Relations;
Neither the Vienna Convention on Consular Relations nor international human rights instruments require that proceedings in criminal cases be held in abeyance pending notification, and
Nothing in the texts of the respective human rights instruments and their negotiating histories makes reference, either implicitly or explicitly, to the right to consular notification.

Concerning the relationship of consular notification to the principle of equality before the law:

There is no basis for assuming that a foreign national will not effectively enjoy his rights without special measures being taken, because the needs and circumstances of each foreign national vary dramatically, from one who is completely unfamiliar with the host State's language and customs (as in the case of an individual making a brief visit to a country) to complete language fluency and total assimilation (as with individuals who have lived in a country for long periods and even, in some cases, most of their lives);
The mere suggestion that foreign nationals may require special rights is, in itself, at odds with the principles of nondiscrimination and equality before the law;
Consular notification by its nature comes into play only in relation to persons who are citizens of States that have consular relations with the host State and, therefore, is based on a principle of distinction by reason of nationality;
As the United States understands it, the Government of Mexico is raising the question of possible discrimination or inequality as between citizens of the State responsible for the detention and citizens of other States. In this context, it is not the presence or absence of consular notification that is relevant (since consular notification is never given to nationals of the detaining State). Instead, the pertinent issue is whether there is discrimination or unequal treatment with respect to the enjoyment of recognized rights to the due process and other relevant rights;

Concerning the role of consular notification in capital cases:

Consular notification is relevant in all cases and not just in those involving the death penalty or where the person detained does not know the language or justice system of the host State; there is nothing in Article 36 of the Vienna Convention on Consular Relations that would allow these distinctions;
Although the death penalty is the most serious and irreversible sanction, and may be handed down only in strict accordance with the protections for criminal defendants recognized under law, there is nothing to suggest that consular notification is one of those protections;
"It is difficult to see how standards for the protection of human rights can properly be set at a much higher level in death penalty cases than in other equally or more serious cases that, because of the specific differences among national criminal justice systems, may lead to penalties other than death, such as life or other lengthy imprisonment", and
It cannot be said that cases involving the possible imposition of the death penalty are the only cases in which the arrest and imprisonment of a foreign national can have potentially the most serious consequences for the accused; even "leaving aside cases of potential torture or abuse by detaining authorities, persons may die or suffer permanent impairment in prisons for a variety of reasons, such as lack of effective or even minimally adequate medical care";

Concerning the expression "without delay" contained in Article 36(1)(b) of the Vienna Convention on Consular Relations:

There is no basis for the suggestion that the expression "without delay" means that notification must occur precisely at the time of the arrest; rather, a defendant should be informed about consular notification following his detention or arrest, "within a limited, reasonable period of time that allows authorities to determine whether the defendant is a foreign national and to complete the necessary formalities", and
When States have wished to agree to specify a precise time by which the consular notification procedure must be completed, they have done so by concluding agreements separate from the Vienna Convention on Consular Relations;

Concerning remedies for failure to fulfill the consular notification obligation:

Neither the Vienna Convention on Consular Relations nor its Optional Protocol Concerning the Compulsory Settlement of Disputes makes provision for a remedy for a host State's failure to perform its consular notification obligation;
The priority given to consular notification depends, in large part, on the type of assistance that the sending State is able to provide to its nationals; that State "has some responsibility to call the host State's attention" to situations in which the sending State is dissatisfied with compliance with Article 36 of the Vienna Convention on Consular Relations;
There is nothing to suggest that failure to give consular notification invalidates the convictions of a state criminal justice system; any such interpretation would be completely at odds with the Vienna Convention on Consular Relations and the practice of States;
If there is any question about the fundamental fairness of a judicial proceeding, the resulting inquiry properly focuses on whether such rights explicitly guaranteed by international instruments and municipal law have been violated, but not, as the requesting State suggests,

deem failure to advise the detainee of his right to consular notification to be a violation of fair trial rights and the due process protections per se, and
"When a consular officer learns of and is concerned about a failure of notification, a diplomatic communication may be sent to the host government protesting this failure. While such correspondence sometimes goes unanswered, more often it is investigated either by the foreign ministry or the relevant law enforcement officials of the host government. If it is learned that notification in fact was not given, it is common practice for the host government to apologize and to undertake to ensure improved future compliance";

Lastly, the United States suggested that the Court conclude as follows:

Compliance with the consular notification requirements of Article 36 of the Vienna Convention is important and all States party to that Convention should endeavor to improve their compliance;
Consular notification is not a human right, as such, but rather a duty of States that have entered into consular relations with other States, and is intended to benefit individuals as well as States;
Consular notification does not imply a right to or require any particular level of consular assistance;
Where consular relations exist between States, consular notification nevertheless may result in consular assistance that could assist a foreign national who is subject to criminal proceedings in the host State;
The essence of the individual rights and protections applicable in criminal proceedings is expressed in the American Declaration, the OAS Charter, and the International Covenant on Civil and Political Rights;
All persons are entitled to fair criminal proceedings, regardless of the penalty that may be imposed, and foreign nationals must be accorded fair criminal proceedings regardless of whether they receive consular notification, and
The failure of a host State to inform a foreign national that consular authorities may be notified of his detention may properly result in diplomatic measures that seek to address such a failure and improve future compliance; in any event, the appropriate remedy for a failure of notification can only be evaluated on a case-by-case basis in light of the actual practice of States and the consular relations between the States concerned.

Inter-American Commission

In its brief of April 30, 1998, the Inter-American Commission stated Commission the following with regard to the admissibility of therequest and the competence of the Court

There are two cases pending before the inter-American system that involve an alleged violation of Article 36 of the Vienna Convention on Consular Relations: the Santana case, which is with the Inter-American Commission, and the Castillo Petruzzi et al. case. However, according to the Court's findings in its Advisory Opinion OC-14, this circumstance should not prevent the Court from hearing the request;

And the following with respect to the merits:

The individual right that foreign national detainees have to contact and communicate with the consular officers of their State of nationality is distinct from the privilege that States have traditionally had to protect their nationals and is a rule of customary international law or, at the least, of international practice, regardless of whether a treaty on the subject exists;

The Vienna Convention on Consular Relations is a treaty in the meaning given to this term in Article 64 of the American Convention. Its Article 36 concerns protection of human rights in the American States because it establishes individual rights –not just the duties of States- and because consular access can afford additional protection to a foreign national who may be encountering difficulties in receiving equal treatment during the criminal proceedings;

In application of the principle pacta sunt servanda, upheld in the Vienna Convention on the Law of Treaties, the States Parties to the Vienna Convention on Consular Relations have a duty to perform their obligations under the Treaty throughout their territory, without geographic exception;

In cases where capital punishment is used, the State has an obligation to rigorously enforce the procedural guarantees established in Article XXVI of the American Declaration, Article 8 of the American Convention, and Article 14 of the International Covenant on Civil and Political Rights; the obligations contained in Article 36(1)(b) of the Vienna Convention on Consular Relations can have an effect on the due process rights of a defendant accused of a capital offense;

The duties that Article 36(1)(b) of the Vienna Convention on Consular Relations impose go beyond the contact between a specific prisoner and his country's consular post, and to the issue of the security and freedom of foreign nationals who live, travel and work within the territory of a State;

The protection of the rights of detainees and prisoners is one of the building blocks of a stronger democracy; Article 36 of the Vienna Convention on Consular Relations creates obligations with respect to the treatment of foreign nationals detained within the territory of its States Party;

A State that fails to apply within its territory the international rules with regard to foreign nationals incurs international responsibility and, therefore, must provide proper means of remedy;

A comparative study of legislation reveals that domestic laws have given varying interpretations of the effects of a violation of Article 36(1)(b) of the Vienna Convention on Consular Relations; it also finds that it is possible to invalidate a proceeding if it is established that the violation of that article was prejudicial to the defendant, and

The State that fails to perform its obligations under Article 36 of the Vienna Convention on Consular Relations bears thc burden of proving that, despite the lack of consular notification, all procedural guarantees required to ensure a fair trial were respected; that State must show that it created the conditions necessary to ensure respect for the due process (affirmative duties) and that the detainee was not arbitrarily denied a protected right (negative duties).

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27. The following is the Court's summary of the pertinent parts of the oral arguments of the States participating in this proceeding and those of the Inter-American Commission [FN7] as regards Mexico's request:

[FN7] The full text of the arguments made by the States, organs, institutions and individuals participating in the public hearing has been published in the volume titled “Verbatim Record of the Public Hearing held at the seat of the Inter-American Court of Human Rights, June 12 and 13, 1998, on the request for advisory opinion OC-16. Official text” (limited circulation; hereinafter “Verbatim Record of the Public Hearing”). This, too, will shortly be published in Series “B” of the Court’s publications. The arguments were made in Spanish, unless otherwise indicated in the summaries prepared by the Court.

United Mexican States

In its initial presentation, of June 12, 1998, the requesting State addressed the issue of the admissibility of the request as follows follows:

In making this request for an advisory opinion, the State’s purpose is “to help States and agencies comply with and enforce human rights treaties, without subjecting them to the formalities of a contentious proceeding” and to defend the due process of law, whose violation in cases involving the death penalty may mean violation of the right to life. The request is not about any specific case and is not an interstate contentious case in disguise;
Concerning the considerations giving rise to the request:
In a case involving the death penalty, the individual’s fundamental rights must be “scrupulously observed and respected;” execution of a death sentence forecloses any possibility of correcting judicial error. The Court has already given its opinion on the limitations that the American Convention imposes vis-à-vis application of the death penalty. Mexico has some 70 consulates worldwide, and over 1,000 officers protecting the consular affairs of its citizens abroad; in 1997 alone, those consulates handled some 60,000 protection cases;
From its experience it can assert that the first moments of an arrest are absolutely decisive in determining a detainee’s fate; nothing can substitute for swift consular intervention at these times, as this is when the detainee is most in need of assistance and guidance. It is often the case that the detainee does not speak the language of the host State, does not know what his constitutional rights in that State are or whether there is any possibility of his being afforded legal counsel gratis, and does not understand the due process of law, and
No domestic court has provided an effective remedy against violations of Article 36(1)(b) of the Vienna Convention on Consular Relations;

Concerning the merits of the request:

The transformation that international law has undergone in this century has implications for the effects and nature that instruments like the American Declaration must be recognized to have.In cases where the death penalty is imposed, the consequences of a violation of the right to be informed of the right to consular notification have to be remedied by restoring the status quo ante; if the death sentence has already been carried out, making it impossible to restore the status quo ante, then the State in question has incurred international responsibility for failure to observe the procedural guarantees and for a violation of the right to life. It would, consequently, have a duty to compensate the next of kin of the persons executed. The fact that the violation caused injury would not have to be proven.

In response to the questions of some judges on the Court, the requesting State added the following:

Plaintiff cannot be required to bear the burden of proving the injury caused by the violation of the right to information on consular assistance; in any event, the international responsibility exists irrespective of any damages or injury caused.

Costa Rica

In its arguments before the Court, Costa Rica stated the following with regard to the Court's competence in this matter:

The request satisfies the requirements stipulated in the American Convention and the Court's Rules of Procedure;

Concerning the merits aspects of the request:

Observance of the procedural guarantees established within the inter-American system and in the International Covenant on Civil and Political Rights is essential in capital cases; Article 36(1)(b) of the Vienna Convention on Consular Relations recognizes a detained foreign national's right to be advised of his right to consular communication; Article 14 of the International Covenant encompasses the rights given to detained foreign nationals under Article 36(1)(b);
There is no circumstance in which the host State is exempt from its obligation to inform the detainee of his rights; otherwise, the detainee would not have adequate means to prepare his defense. Often a foreign national sentenced to death understands neither the language nor the law of the host State, and is unaware of the judicial guarantees he enjoys under the laws of that State and under international law; he may even have entered the country illegally;
The expression "without delay" contained in Article 36(1)(b) of the Vienna Convention on Consular Relations should be understood to mean that the host State has an obligation to advise a foreign national arrested for a capital offense of his rights under that article, whether it be at the time of his arrest or before he makes a statement or confession to the police or court authorities of the host State;
The right of a detained foreign national to information on consular assistance is not subject to protests filed by the State of his nationality, and
When the obligations imposed in Article 36(1)(b) are not fulfilled, reparations must be made; a case involving imposition of the death penalty might also involve civil liability;

Responding to questions from some of the judges of the Court, Costa Rica added the following:

If the death sentence has not been carried out, nullification of the trial and "some type" of civil liability should be considered.

El Salvador In its argument before the Court, El Salvador stated the following with regard to the considerations giving rise to the request:

The present advisory opinion will have favorable repercussions for the States' legal systems and the inter-American system, and will hasten the enforcement and unqualified observance of the legal provisions contained in the various international human rights instruments, and
The Court's opinion in this matter will "serve to give the due process greater legitimacy in all criminal justice systems worldwide" and thereby strengthen the system for the protection of human rights;

Concerning the admissibility of the request:

The American Convention gives the Court the authority to interpret any treaty concerning the protection of human rights in the American States, which includes the International Covenant for Civil and Political Rights and the Vienna Convention on Consular Relations;

Concerning the merits of the request:

Article 36 of the Vienna Convention on Consular Relations concerns the protection of human rights in the American States because it regulates "the minimum guarantees necessary for foreign nationals to be able to enjoy the due process of law abroad"; a foreign national arrested or detained abroad is at a disadvantage because of language differences, unfamiliarity with the laws and the courts with jurisdiction to prosecute him, the lack of an adequate and permanent defense from the outset, and ignorance as to what his rights are; Article 36(1)(b) is intended to guarantee that the process is a fair one and that the minimum guarantees are observed;
It is the duty of the host State to inform a detained foreign national, without delay, of his rights under Article 36(1)(b) of the Vienna Convention on Consular Relations, a provision that is "closely related" to the International Covenant on Civil and Political Rights, the OAS Charter and the American Declaration; this obligation exists even if "there are no consular authorities of the accused' nationality accredited to the host State and even [… if] there are no diplomatic and/or consular relations between the sending and host States." In the latter event, the host State must advise the accused of his right to make contact with his State of nationality "via a friendly country or his country's diplomatic delegations to international organizations, or through organizations and institutions dedicated to human rights";
Article 14 of the International Covenant on Civil and Political Rights recognizes every person's right to a public hearing, with the proper guarantees, which implicitly include Article 36 of the Vienna Convention on Consular Relations, and
"If a competent court enters a [j]udgment in a proceeding in which the guarantees of the due process were not fully observed, the proper sanction is nullification of all proceedings";

In response to questions from some of the judges on the Court, El Salvador stated the following:

When the obligation to notify was not observed, neither were the principles of the due process. The proceedings are, therefore, invalidated since the foreign national defendant has been left without means of defense.

Guatemala

In its presentation before the Court, Guatemala read its brief of April 30, 1998 (supra 26)

In response to questions from members of the Court, Guatemala stated that:

If even one of the requirements of the due process is lacking, a proceeding is by law invalid;
It is up to the national and international courts to determine, on a case-by-case basis, what the consequences will be of a failure to observe the requirement stipulated in Article 36(1)(b) of the Vienna Convention on Consular Relations, which contains a minimum guarantee, in the meaning given to the term in Article 14(3) of the International Covenant on Civil and Political Rights, particularly inasmuch as the accused "must fully understand the charges against him."

Honduras

In its argument before the Court, the Honduran stated the following with regard to the issue of competence:

Although the right to information on consular assistance originated outside the inter-American system, the Court is nonetheless competent to render its opinion on this matter, as that right has become domestic law in the States Party to the Vienna Convention on Consular Relations.

Concerning the merits of the request:

If the host State does not duly advise the interested parties of their right to seek consular protection, the guarantees of the due process are illusory, particularly in the case of those sentenced to death, and
"Non-notification is at once a violation of the accrediting State's domestic law and of the defendant's human rights." For States Party to the Vienna Convention on Consular Relations, the obligation contained in its Article 36 "is domestic law" and has thus augmented the measures that protect human rights.

Paraguay

In its presentation to the Court, Paraguay stated the following regarding the merits of the request:

States must respect the minimum guarantees to which foreign nationals accused of capital offenses are entitled. Non-observance generates international responsibility. The Vienna Convention on Consular Relations contains obligations incumbent upon the host State and not the individual charged; failure to fulfill those obligations effectively denies the individual his rights;
A host State's failure to comply with Article 36(1)(b) of the Vienna Convention on Consular Relations renders a detained foreign national's right to the due process illusory; when the defendant is charged with a crime punishable with the death penalty, the host State's failure to comply with its obligations under Article 36(1)(b) is all the more serious, and constitutes a violation of the "human right par excellence", the right to life, and
The involvement of consular officers from the time a foreign national is arrested is essential, especially when one considers how the legal systems differ from State to State and the potential

language problems the arrested foreign national might have. Consular assistance can significantly influence the outcome of the process in the accused' favor.

Dominican Republic

In its presentation to the Court, the Dominican Republic reconfirmed the content of its brief of comments of April 30, 1998. Concerning the merits of the request, it added the following:

To comply, without delay, with the provisions of Article 36 of the Vienna Convention on Consular Relations would be "to follow […] the generalized trend of protecting the human person's fundamental rights, especially the most fundamental of all, the right to life"; compliance must be automatic, not conditional upon protests lodged by the sending State, and
The expression "without delay" used in Article 36(1)(b) of the Vienna Convention on Consular Relations, should be understood to mean that notification must be made "as of the time of the arrest and before the detained foreign national makes any statement or confession in the presence of police or judicial authorities;

United States [FN8]

[FN8] The United States delivered its presentation before the Court in English. The full text of the original presentation can be consulted in the Verbatim Record of the Public Hearing. It, too ,will be published shortly in the Court's publications Series "B".

In its presentation before the Court, the United States stated the following with regard to the request's admissibility:

The purpose of the request is to get a ruling on a dispute with the United States. Given the jurisprudence of the Court, the request confuses the Court's advisory function;
Analysis of the request would require that the Court decide factual allegations, which it cannot do in an advisory proceeding. The latter is a summary proceeding, wholly unsuited for deciding complex factual questions in disputes between States. Evidence can be neither introduced nor tested in an advisory proceeding. Hence, the United States is not required to defend itself against the charges that have been made;
The request seeks to call into question the conformity of United States domestic law and practice with human rights norms. However, as the United States is not party to the American Convention, this Court does not have jurisdiction to render its opinion on these matters;
The request is based upon misguided concepts of the consular function;
The Court is being asked to establish a new and presumably universal human right to consular notification, one not made explicit in the principal human rights instruments –the Universal Declaration, the International Covenants, or the American Convention. Instead, it must be implied from a 1962 treaty on a wholly different subject matter: consular relations;
The fact that a global treaty affords protection or advantages or enhances an individual's possibility of exercising his human rights does not mean that it concerns the protection of human rights and that the Court has therefore competence to interpret it;

The request presented by Mexico involves one sentence in the very long Vienna Convention on Consular Relations; it is unlikely that this one sentence alone could transforms the Vienna Convention on Consular Relations into a treaty "concerning" the protection of human rights in the American States;
If the Court found that it does have jurisdiction to render the present advisory opinion, there are compelling reasons why it should decline to do so, particularly in light of the contentious case that Paraguay brought against the United States before the International Court of Justice [FN9], whose subject matter and issues are similar to at least some of those involved in the request; an advisory opinion would create confusion, be detrimental to the legal positions of the parties and could create the risk of inconsistency between the findings of the Inter-American Court and those of the principal judicial organ of the United Nations. Moreover, the Inter-American Court's interpretation of a treaty to which a vast number of States outside the hemisphere are party could create problems elsewhere in the world.

[FN9] The United States later informed the Court of Paraguay's discontinuance of the case it had brought against the United States with the International Court of Justice. See, in that regard, infra, para. 28.

The United States also argued that should the Court conclude that an advisory opinion in this case was within the compass of its jurisdiction:

The Court could acknowledge the importance of consular notification and urge the States to improve their compliance in all cases in which foreign nationals are detained;
The Court could also find that the Vienna Convention on Consular Relations did not purport to create, and did not create, an individual human right essential to criminal due process, an argument amply supported by its text and its negotiating history, by the practice of States and by the fact that the State criminal justice systems must protect human rights irrespective of whether consular notification is made and regardless of the sentence imposed. It is not the purpose of Article 36 of the Vienna Convention to establish minimum standards for criminal proceedings. That Convention does not make the right to be advised of consular assistance essential to the host State's criminal justice system;
The legislative history of the Vienna Convention on Consular Relations shows a clear bias in favor of respecting the independence of domestic criminal justice systems;
No State participating in the negotiations suggested that national criminal justice systems should be changed to ensure that the criminal process was held in abeyance pending consular notification; it was understood that criminal proceedings could proceed but that notification should not be deliberately delayed while the criminal process was underway;
The right to be advised of consular assistance exists only when the sending State has the right to conduct consular functions within the host State; the logical inference is that the Vienna Convention does not construe it to be a human right;
The Convention does not establish a right to consular assistance, as the latter is within the discretion of the sending State;
Consuls are unlikely to be able to provide assistance to all their nationals detained abroad; hence, it would be illogical to consider such assistance to be one of the requirements of the due process;

There is no reason to suppose that even if the sending State provides consular assistance, that assistance will have any bearing on the outcome of the proceedings; in the request, Mexico painted an idealized but unrealistic picture of the level of consular service it is able to provide to its nationals;
The assumption that all foreign nationals are unfamiliar with the language, customs and legal system in the host State is wrong as a general rule. The United States cites itself as an example, noting that Mexican nationals often live within United States territory for long periods and that there are cases in which the foreign national is indistinguishable from the national in his command of the language, his family and economic ties, and familiarity with the host State's legal system;
The negotiating history of the Vienna Convention on Consular Relations and the practice of States show that there is no phase in the criminal justice process that can be used as a point of reference for distinguishing what constitutes "without delay";
It would be inappropriate to institute special rules for consular notification in death penalty cases, as such rules would apply only to those countries that use the death penalty and would therefore be inconsistent with the universal character of the Vienna Convention on Consular Relations;
It is significant to note that there was an explicit decision that Article 36 of the Vienna Convention on Consular Relations should not include the obligation of informing the consular officer of the nature of the charges brought against the detained foreign national;
It would be unfair to create a special rule for consular notification in death penalty cases, as those States that apply the death penalty would be held to a much higher standard in the matter of consular notification than those that do not use the death penalty, even though the latter may impose very stiff sentences, such as life imprisonment, or incarcerate prisoners in facilities where conditions are chronically life-threatening, and
The Vienna Convention on Consular Relations does not establish a rule of international law that stipulates that lack of consular notification invalidates any subsequent proceedings before the court or subsequent court rulings.

In response to questions from some of the judges on the Court, the United States answered that:

While the Vienna Convention on Consular Relations does establish the right to consular notification, there is no reason to suppose that consular notification is essential for the basic rights of the due process to be observed;
Consular notification should not be deliberately delayed and should be done as soon as reasonably possible, given the circumstances in each case; the United States cited some examples from its own domestic practice;
It was apparent from the travaux preparatoires of the Vienna Convention on Consular Relations that the right of a detained foreign national to speak to the consular officer was the corollary of the consular officer's right to speak with the detained foreign national;
Instances in which consulates were not notified should be analyzed on a case-by-case basis. Although it is possible to suppose a situation in which a national court might find that the failure to notify the consulate was inextricably bound with a failure of the due process, there is no known case in which any national court has reached this conclusion, and

Article 36 of the Vienna Convention on Consular Relations does not give the individual the right to have a subsequent legal proceeding and conviction set aside where the requirement of consular notification was not satisfied.

Inter-American Commission

In its presentation before the Court, the Inter-American Commission confirmed the arguments given in its April 30, 1998 brief of comments and added the following:

As it expressly stipulates that a person under arrest or detained is to be advised of his right to consular notification without delay and without exception, the text of Article 36(1)(b) of the Vienna Convention on Consular Relations recognizes that the pretrial phase in any criminal proceeding is critical and the accused must be in a position to protect his rights and prepare his defense;
The duty to notify a detained foreign national of his right to consular access ties in with a number of fundamental guarantees that are vital to ensuring humane treatment and a fair trial; consular officers have important verification and protection functions to discharge; these functions were the reason why Article 36 was included in the Vienna Convention on Consular Relations;
When an OAS member State that is party to the Vienna Convention on Consular Relations fails to comply with its obligations under Article 36 thereof, it effectively denies the detained foreign national a right whose object and purpose is to protect the basic guarantees of the due process; thus, the burden of proof falls upon that State, and it must show that the due process was respected and that the individual in question was not arbitrarily denied the protected right;
To place the burden of proof upon the individual would be to deny the protections recognized in Article 36 of the Vienna Convention on Consular Relations;
International law has recognized that detained foreign nationals may be at a disadvantage or have problems preparing their defense; the purpose of Article 36 of the Vienna Convention on Consular Relations is to ensure that those detainees have the benefit of conferring with their consul, which provides means to satisfy their right to a trial with the proper guarantees;
The protections that Article 36 affords are not substitutes for the requirements of the due process in criminal law and are not entirely the same as those requirements; instead, the purpose of the Article 36 protections is to allow the detained foreign national to make conscious and informed decisions to preserve and defend his rights, and
In the case of the death penalty, the States Parties' obligations to scrupulously observe the guarantees of a fair trial do not admit of exception and failure to fulfill that obligation is a flagrant and arbitrary violation of the right to life.

In response to questions from some of the judges on the Court, the Inter-American Commission stated the following:

If the guarantee contained in Article 36(1)(b) of the Vienna Convention on Consular Relations is not respected, there is a presumption iuris tantum that the arrested or convicted person has not had benefit of the necessary guarantees, thus reversing the burden of proof and leaving it upon the host State instead.

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28. The following is the Court's summary of the additional and final comments from the States participating in this proceeding and from the Inter-American Commission: [FN10]

[FN10] The full text of the final comments presented by the States, organs, institutions and individuals participating in the proceeding will be published in due course. The language of the briefs was Spanish, unless otherwise indicated in the Court-prepared summaries.

United Mexican States

In its "[e]xplanation of the questions raised in the [request]" Mexico stated the following:

Concerning the first question:

Mexico believed the first question was crucial, "as this was the first time the Court was being asked to exercise its advisory jurisdiction in respect of a treaty not adopted within the inter-American [s]ystem";
Although the protection of human rights may not be the principal object of the Vienna Convention on Consular Relations, it is clear that its Article 36 contains provisions applicable to the protection of those rights within the territory of the States Party, because it accords the interested individual his rights, and
Other multilateral treaties contain provisions on the freedom to communicate with consulates and on the duty to advise the interested parties of that freedom; a reading of Article 36 of the Vienna Convention on Consular Relations "in the light of those other instruments suggests that at the present time, the international community regards that freedom of consular notification and communication to be human rights";

Concerning the second question:

This question is of practical consequence because some national courts consider that the Vienna Convention on Consular Relations enshrines the rights and duties of States exclusively;

Concerning the third question:

There is no standard interpretation of the expression "without delay," used in Article 36(1)(b) of the Vienna Convention on Consular Relations, which is why this question was posed;

Concerning the fifth [FN11] question:

[FN11] The requesting State's brief containing the "[e]xplanation of the questions posed in advisory opinion request OC-16" also contained a section on the fourth question raised in the request. However, the agent for that State read the text of that section during the public hearing

that the Court held and its content is summarized in the corresponding section (supra paragraph 27).

The International Covenant on Civil and Political Rights is obviously a treaty with respect to which the Court can exercise its advisory jurisdiction; given the specific cases enumerated in the request, this interpretation could hardly be regarded as a "mere theoretical exercise";

Concerning the sixth question:

The purpose of this question is to determine whether the notification provided for in Article 36(1)(b) of the Vienna Convention on Consular Relations is one of the minimum guarantees of the due process recognized by international human rights law, and specifically to determine whether the Safeguards guaranteeing protection of the rights of those facing the death penalty "are an interpretative instrument that must be taken into account when interpreting Article 14 of the Covenant [on Civil and Political Rights]", and

Concerning the seventh question:

This inquiry raises the question of whether Article 14 of the International Covenant on Civil and Political Rights demands fulfillment of Article 36(1)(b) of the Vienna Convention on Consular Relations in order to guarantee a fair trial when the defendant is a foreign national;
Failure to give the notification required under Article 36(1)(b) of the Vienna Convention on Consular Relations deprives the accused foreign national of consular assistance, which is the "most accessible and suitable means for compiling the mitigating and other evidence located in the State of his nationality";

Concerning the eighth question:

When a foreign national is on trial, human rights standards cannot be dissassociated from strict compliance with Article 36(1)(b) of the Vienna Convention on Consular Relations;

Concerning the ninth question:

This is for confirmation of federal States' obligations to guarantee throughout their territory the minimum guarantees that the International Covenant on Civil and Political Rights upholds with respect to the due process and the importance of complying with the provisions of Article 36(1)(b) of the Vienna Convention on Consular Relations;

Concerning the eleventh [FN12] question:

[FN12] Mexico's brief containing the "[e]xplanation of the questions posed in advisory opinion request OC-16" also contained a section concerning the tenth question put to the Court in that request. However, in that section, the requesting State referred the Court to the text explaining the fourth question, which, as previously pointed out (supra footnote 11), the Agent read during

the public hearing the Court held and is summarized in the corresponding section (supra paragraph 27).

It is evident that when a host State fails to comply with its duty to immediately advise the detained foreign national of his rights under Article 36(1)(b) of the Vienna Convention on Consular Relations, the guarantees of equality upheld in the OAS Charter are violated;

Concerning the twelfth question:

The purpose of this question is to contribute to the protection of the human rights of prosecuted and convicted aliens and to help the Inter-American Commission fulfill its mandate.

United States In its brief of May 18, 1999, [FN13] the United States informed the Court of them following:

[FN13] The text of the United States' final comments was submitted in English. The original text will be published in due course in the Court's publications Series "B".

Paraguay withdrew the case it brought against the United States with the International Court of Justice and the latter, in turn, removed the case from the docket on November 10, 1998, and
A similar case, brought by Germany, is still pending with the International Court of Justice;

The United States confirmed the following:

From its standpoint, the Court should not render an interpretation of the Vienna Convention on Consular Relations, which is a convention of global import that addresses consular relations between States and does not create individual human rights, and
In any event, the Vienna Convention on Consular Relations provides no basis for the type of remedies advocated by other participants in these advisory proceedings.

Inter-American Commission

In its brief of final comments, dated May 17, 1999, the Inter-American stated the following:

By establishing rules to allow consular access to protect the detainee's rights during the phase when those rights are most at risk, Article 36 of the Vienna Convention on Consular Relations contains norms concerning the protection of human rights, in the meaning given to this expression in Article 64(1) of the American Convention, and provides a solid foundation for rendering an advisory opinion;
Even though the preamble of the Vienna Convention on Consular Relations states that its purpose is not to benefit individuals, it is also apparent that the protection of individual rights is the primary purpose of the consular function, as can be inferred from Article 5 of that Convention;

The right of access established in Article 36 of the Vienna Convention on Consular Relations is not subject to protests lodged by the sending States, and is closely linked to the right to the due process established in the international human rights instruments;
The expression "without delay" in Article 36(1)(b) of the Vienna Convention on Consular Relations implies that the detainee is to be advised of his right to consular notification "as soon as possible";
A State that violates its obligations under Article 36(1)(b) of the Vienna Convention on Consular Relations automatically incurs international responsibility;
If a balance is struck between the interests that come into play with the inter-American system for the protection of human rights, the criteria by which to measure the consequences of the violation of Article 36(1)(b) of the Vienna Convention on Consular Relations must begin with a presumption of prejudice; it is then up to the State concerned to show that, the failure to notify notwithstanding, all the guarantees of the due process were respected;
Violation of Article 36(1)(b) of the Vienna Convention on Consular Relations must not be considered, per se, a violation of the due process; instead, it creates the presumption of prejudice, which could be disproved if it is shown that all appropriate guarantees of the due process were observed;
The examples given by the participants in these proceedings make a convincing argument for the case that consular protection can be an important safeguard to ensure respect for the due process recognized in the principal international human rights instruments;
It is reasonable to surmise that a detained foreign national is at a disadvantage vis-à-vis the national, even though there may be exceptions to this rule;
When the violation of Article 36(1)(b) of the Vienna Convention on Consular Relations occurs in a case involving a capital offense, strict compliance with all judicial guarantees must be assured, and
At both the domestic and international levels, the purpose of reparations is to provide an effective remedy. Within the inter-American system, an effective remedy might include such measures as commutation of sentence, release, the grant of another appeal, indemnification or, if the victim has already been executed, compensation for next of kin.

IV. COMPETENCE

29. Mexico, a member State of the OAS, submitted a request to the Court seeking an advisory opinion pursuant to Article 64(1) of the Convention, which states that:

> [T]he member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.

This provision carries the following requirements: precise formulation of the specific questions on which the Court's opinion is sought; the norms to be interpreted; the considerations giving rise to the request, and the name and address of the Agent (Article 59 of the Rules of Procedure of the Court). Should the request seek an interpretation of "other treaties concerning the

protection of human rights in the American states," the application is to name the treaty and the parties thereto (Article 60(1)).

30. The application puts twelve specific questions to the Court for its opinion, indicates the provisions and treaties to be interpreted, the considerations giving rise to the request and the name and address of its agent, thereby satisfying the requirements stipulated in the Rules of Procedure.

31. Fulfillment of the stipulated requirements does not necessarily mean that the Court is obliged to respond to the request. The Court must base its decision to accept or reject a request for an advisory opinion on considerations that transcend merely formal aspects [FN14] and that fall within the generic limits that the Court has recognized with regard to the exercise of its advisory jurisdiction. [FN15] The Court will examine these considerations in the following paragraphs.

[FN14] Reports of the Inter-American Commission on Human Rights (Art. 51 of the American Convention on Human Rights). Advisory Opinion OC-15/97 of November 14, 1997. Series A No. 15; para.31.
[FN15] "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. 13.

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32. In regard to its competence ratione materiae to respond to this request for an advisory opinion, this Court must first determine whether it has the authority to interpret, in an advisory opinion, international treaties other than the American Convention. [FN16]

[FN16] "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. 19.

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33. Twelve questions have been put to the Court involving six different international instruments; Mexico has divided its question into three sections, described below:

a. questions one to four make up the first group. In the first question, the Court is asked to interpret whether, under Article 64(1) of the American Convention, Article 36 of the Vienna Convention on Consular Relations should be interpreted as containing provisions "concerning the protection of human rights in the American States;" the other three questions in this first group seek an interpretation of that Vienna Convention;
b. questions five to ten comprise the middle group, which begins with an inquiry as to whether, in connection with Article 64(1) of the American Convention, Articles 2, 6, 14 and 50 of the International Covenant on Civil and Political Rights are to be interpreted as containing provisions "concerning the protection of human rights in the American States." The other four

questions in this group seek an interpretation of those articles and their relationship to the Safeguards guaranteeing protection of the rights of those facing the death penalty and the Vienna Convention on Consular Relations, and

c. questions eleven and twelve comprise the last group and concern the interpretation of the American Declaration and the OAS Charter and their relationship to Article 36 of the Vienna Convention on Consular Relations.

34. With the lead-in questions to each of the first two groups described above, the requesting State is seeking an interpretation of the scope of Article 64(1) of the American Convention with respect to the other international instruments. "Given that Article 64(1) authorizes the Court to render advisory opinions 'regarding the interpretation of th[e] Convention'" [FN17] or other treaties concerning the protection of human rights in the American States, an advisory request made in this regard is within the competence of the Court ratione materiae.

[FN17] Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10; para. 24.

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35. In consequence, the Court has competence to render an opinion on the first and fifth questions raised by the requesting State and, once they have been answered, to respond to questions two to four and six to ten.

36. In Advisory Opinion OC-10, which concerned the Court's authority to interpret the American Declaration of the Rights and Duties of Man, it determined the following:

Article 64(1) of the American Convention authorizes [it], at the request of a member state of the OAS or any duly qualified OAS organ, to render advisory opinions interpreting the American Declaration of the Rights and Duties of Man, provided that in doing so the Court is acting within the scope and framework of its jurisdiction in relation to the Charter and Convention or other treaties concerning the protection of human rights in the American states. [FN18]

In that advisory opinion, the Court wrote that "the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the [American] Declaration." [FN19]

[FN18] Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, single operative paragraph and cf. para. 44.

[FN19] Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, para. 43.

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37. The Court therefore considers that it is equally competent to render an opinion on questions eleven and twelve, which are the third group of questions submitted by Mexico in its request.

38. The Court takes note of the following factual givens submitted by the requesting State:

a. the sending State and the host State are both Parties to the Vienna Convention on Consular Relations;
b. the sending State and the host State are both members of the OAS;
c. the sending State and the host State have both signed the American Declaration;
d. the host State has ratified the International Covenant on Civil and Political Rights, and
e. the host State has not ratified the American Convention.

39. The Court is of the view that the last given cited above is, for all intents and purposes, irrelevant since whether or not they have ratified the American Convention, the States Party to the Vienna Convention on Consular Relations are bound by it.

40. Were the Court to confine its opinion to those States that have not ratified the American Convention, it would be difficult to avoid making this Advisory Opinion a specific finding on the judicial system and laws of those States. This, in the Court's judgment, would go beyond the object of an advisory opinion:

All the proceeding is designed to do is to enable OAS Member States and OAS organs to obtain a judicial interpretation of a provision embodied in the Convention or other human rights treaties in the American states. [FN20]

[FN20] Restrictions on the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 22.

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41. Moreover, were the Court to limit the scope of its opinion to member States of the OAS that are not Party to the American Convention, it would be making its advisory services available to only a handful of America States, which would not be in the general interest that the request is intended to serve (infra 62).

42. Therefore, and in exercise of its inherent authority "to define or clarify and, in certain cases, to reformulate the questions submitted to it," [FN21] the Court finds that the present Advisory Opinion will be based on the following facts: that both the sending State and the host State are members of the OAS, have signed the American Declaration, have ratified the International Covenant on Civil and Political Rights and are Party to the Vienna Convention on Consular Relations, irrespective of whether or not they have ratified the American Convention on Human Rights.

[FN21] Enforceability of the right to reply or correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights). Advisory Opinion OC-7/86 of August 26, 1986. Series A No. 7; para. 12.

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43. In keeping with its practice, the Court must consider whether an opinion rendered in response to the "request might have the effect of altering or weakening the system established by the Convention in a manner detrimental to the individual human being." [FN22]

[FN22] "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; opinion two.

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44. The jurisprudence constante of the Court has been that:

The Court is, first and foremost, an autonomous judicial institution with jurisdiction both to decide any contentious cases concerning the interpretation and application of the Convention as well as to ensure to the victim of a violation of the rights or freedoms guaranteed by the Convention the protection of those rights. (Convention, Arts. 62 and 63 and Statute of the Court, Art. 1.) Because of the binding character of its decisions in contention cases (Convention, Art. 68), the Court also is the Convention organ having the broadest enforcement powers to ensure the effective application of the Convention. [FN23]

For this reason, when deciding whether or not to respond to a request for an advisory opinion, the Court must be particularly careful to weigh whether that opinion might "weaken its contentious jurisdiction or worse still, that it might undermine the purpose of the latter, thus changing the system of protection provided for in the Convention to the detriment of the victim." [FN24]

[FN23] "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. 22 (emphasis added); Cf. 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; Restrictions on the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3; 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;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; 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; Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights). Advisory Opinion OC-7/86 of August 26, 1986. Series A No. 7; Habeas Corpus in Emergency

Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8; 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; Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A NO. 10; Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights). Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11; 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; 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; International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14; Reports of the Inter-American Commission on Human Rights (Art. 51 of the American Convention on Human Rights). Advisory Opinion OC-15/97 of November 14, 1997. Series A No. 15.

[FN24] 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. 24.

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45. The Court can weigh a number of considerations when examining this issue. One, which is largely consistent with the relevant international case-law on this subject matter, [FN25] concerns the fact that by requesting an advisory opinion, a member State could obtain a determination on an issue that might eventually be put to the Court as part of a contentious case. [FN26] However, this Court has noted that the existence of a difference concerning the interpretation of a provision does not, per se, constitute an impediment for exercise of the advisory function. [FN27]

[FN25] Cf. I.C.J.: Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951; 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; Western Sahara, Advisory Opinion, I.C.J. Reports 1975; Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989.

[FN26] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention of Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5; para. 22; Cf. Reports of the Inter-American Commission on Human Rights (Art. 51 of the American Convention on Human Rights). Advisory Opinion OC-15/97 of November 14, 1997. Series A No. 15; para. 31.

[FN27] Restrictions on the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 38; Cf.

Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights). Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11; para. 3; 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.

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46. Under the heading of "[C]onsiderations that gave rise to the request," Mexico mentioned that it had made numerous representations on behalf of some of its nationals, whom the host State had "not informed, either immediately or subsequently, of their right to communicate with Mexican consular authorities" and who had been sentenced to death. [FN28]Also, by way of example the requesting State described the cases of six people and made specific reference to the practice and laws of the United States, a member State of the OAS. [FN29] This pattern was also in evidence in the written comments and oral arguments of other member States [FN30] and in the briefs filed by the amici curiae, [FN31] some of which also had appended documents to their comments to support the merits of the arguments concerning the cases described in those presentations. [FN32]For these reasons, one State that appeared before the Court [FN33] was of the view that the request could be regarded as a contentious case in disguise, since the questions it posed did not turn solely on legal issues or treaty interpretation; that State's position was that a response to the request required that facts in specific cases be determined.

[FN28] See also the Verbatim Record of the Public Hearing: Mexico's initial presentation, p. 18.
[FN29] Request, pp. 1 to 2, 6 to 7, and 9 to 11. See also the brief of additional comments submitted by Mexico, pp. 1 to 5 and attachments; Second brief of additional comments submitted by Mexico, (supra para. 28), the document titled "American-Mexican Claims Commission, Faulkner Case, Opinion and Decision, November 2, 1926" and the document titled "Additional information on consular protection services for Mexican nationals abroad"; Brief "[e]xplaining the questions posed in the advisory opinion request OC-16," presented by Mexico, pp. 3, 8, 10 and 11; and Verbatim Record of the Public Hearing: Mexico's initial presentation, p. 15.
[FN30] Report presented by the Dominican Republic, p. 4; Briefs of comments presented by Honduras, p. 2; Paraguay, pp.2-3; Costa Rica, p. 4, and the United States, p. 12 (text and note 7), pp. 29 to 38 and 41 to 46. See also: Verbatim Record of the Public Hearing, Honduras' argument, p. 54; Paraguay's argument, pp. 57 to 60; the Dominican Republic's argument, p. 63, and the United States' argument, p. 69.
[FN31] Cf. Briefs of comments presented by Jean Terranova, Esq., in extenso; S. Adele Shank and John Quigley, in extenso; Robert L. Steele, in extenso; Death Penalty Focus of California, pp. 2 to 12; José Trinidad Loza, in extenso; the International Human Rights Law Institute of DePaul University College of Law and MacArthur Justice Center of the University of Chicago Law School, pp. 28 to 46; Minnesota Advocates for Human Rights and Sandra Babcock, pp. 3, 6 to 8, and 21 to 23; Mark J. Kadish, pp. 4 to 6, 19 to 33, 52 to 56 and 69 to 70; Bonnie Lee Goldstein and William H. Wright, pp. 2 to 28; Jimmy V. Delgado, in extenso. See also, the Brief of Final Comments presented by the International Human Rights Law Institute of Depaul University College of Law and MacArthur Justice Center of the University of Chicago Law School, pp. 1 to 2 and appendices I, II and III, and Mr. José Trinidad Loza, pp. 1, 3, 5 and 6.
[FN32] Brief presented by Ms. Jean Terranova, attachments 1 to 12; brief presented by Mr. Robert L. Steele.

[FN33] Cf. The United States' written comments and its oral arguments before the Court.
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47. The Court observes that it may not rule on charges or evidence alleged against a State because to do so would be at variance with the nature of its advisory function and would deny the respective State the opportunities to defend itself that it would have in a contentious proceeding. [FN34] This is one of the distinctive differences between the Court's contentious and advisory functions. In exercise of its contentious jurisdiction:

… the Court must not only interpret the applicable norms, determine the truth of the acts denounced and decide whether they are a violation of the Convention imputable to a State Party; it may also rule "that the injured party be ensured the enjoyment of his right or freedom that was violated." [Convention, Article 63(1).] The States Parties to such proceeding are, moreover, legally bound to comply with the decisions of the Court in contentious cases. [Convention, Article 68(1).] [FN35]

To the contrary, in exercising its advisory jurisdiction, the Court is not called upon to settle questions of fact, but rather to throw light on the meaning, object and purpose of international human rights norms. [FN36] Here, the Court is performing an advisory function. [FN37]

[FN34] International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14; para. 28.
[FN35] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3; para. 32.
[FN36] International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14; para. 23.
[FN37] Cf. "Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1; para. 51; Cf. Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3; para. 32, and I.C.J., Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950, p. 65.
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48. As to the difference between its advisory and contentious jurisdictions, the Court has recently clarified that:

25. The advisory jurisdiction of the Court differs from its contentious jurisdiction in that there are no "parties" involved in the advisory proceedings 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. [FN38]

[FN38] Reports of the Inter-American Commission on Human Rights (Art. 51 of the American Convention on Human Rights). Advisory Opinion OC-15/97 of November 14, 1997. Series A No. 15; paras. 25 and 26.

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49. The Court observes that the use of examples places the request in a particular context [FN39] and illustrates the differences as to the interpretation that might be given of the legal issue raised in the present Advisory Opinion, [FN40] without the Court having to rule on those examples. [FN41] The use of practical situations allows the Court to show that its Advisory Opinion is not mere academic speculation, and is warranted by the benefit it might have for international protection of human rights. [FN42]

[FN39] Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-8/87 of October 6, 1987. Series A No. 9, para. 16.
[FN40] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3; paras. 44 in fine and 45.
[FN41] International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14; para. 27.
[FN42] Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-8/87 of October 6, 1987. Series A No. 9; para. 16.

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50. Hence, without ruling on any contentious case mentioned in the course of these advisory proceedings, [FN43] the Court is of the view that it should examine the subject matter of this advisory opinion request.

[FN43] Cf. footnotes 29 to 32.

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51. The Inter-American Commission informed the Court that it was formally processing a petition involving an alleged violation of Article 36 of the Vienna Convention on Consular Relations. [FN44]

[FN44] Brief of comments submitted by the Inter-American Commission, p. 5. While the Commission also mentioned the Castillo Petruzzi et al. case now before the Court as one involving Article 36 of the Vienna Convention on Consular Relations, the Court's Judgment on Preliminary Objections in that case already found that it did not have competence to rule on that point because the Commission's own findings on the matter were not included in its Report 17/97 (Cf. Castillo Petruzzi et al.Case, Preliminary Objections, Judgment of September 4, 1998. Series C No. 41; paragraphs 68 and 69, and operative paragraph two).

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52. However, this request and the Santana case are two entirely different proceedings. Any interpretation the Court makes of Article 36 of the Vienna Convention on Consular Relations cannot be taken as a ruling on the facts in the petition pending before the Inter-American Commission. The Court, therefore, finds no reason to suppose that the rendering of this Advisory Opinion could be in any way prejudicial to the interests of the petitioner in the Santana case.

53. Lastly, the Court has to consider the circumstances of the present proceedings and decide whether, in addition to the reasons already examined, there might be other analogous reasons that would cause it to decline the request for an advisory opinion. [FN45]

[FN45] "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; operative paragraph two.

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54. The Court is mindful of the contentious cases pending before the International Court of Justice concerning a(n) (OAS Member) State's alleged violation of Article 36 of the Vienna Convention on Consular Relations (the Breard and La Grand cases).

55. During the early stages of these advisory proceedings, the United States and Paraguay informed this Court that the latter had brought a case against the United States with the International Court of Justice, which was the Breard case. Because that case was pending, the United States argued that this Court should defer consideration on this request for reasons of "prudence, if not considerations of comity." [FN46]

[FN46] Written comments of the United States, p. 4 (English), p. 5 (Spanish).

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56. Paraguay later decided to desist from its case with the International Court of Justice. However, in its brief of final comments in these advisory proceedings, the United States reported

that Germany, too, had brought a case against the former with the International Court of Justice, on the same legal issue raised in the Breard case. This second case (the La Grand case) was initiated with the International Court on March 2, 1999, [FN47] more than a year after Mexico submitted its request for an advisory opinion from this Court and eight months after the Court concluded the oral phase of these proceedings.

[FN47] I.C.J.; La Grand Case (Germany v. United States of America), Application instituting proceedings, filed in the Registry of the International Court of Justice on 2 March 1999, p. 1.

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57. Even so, the Court is of the opinion that it should consider whether, under the rules of the American Convention, the fact that a contentious case is pending with another international court can be a factor in a decision to admit or decline a request for an advisory opinion.

58. Article 31 of the Vienna Convention on the Law of Treaties provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The object and purpose of the American Convention is effective protection of human rights. Hence, when interpreting that Convention the Court must do it in such a way that the system for the protection of human rights has all its appropriate effects (effet utile). [FN48]

[FN48] "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; paras. 43 et seq. ; Cf. 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 on the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3; 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.; and, inter alia, Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 1; para. 30; Fairen 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.

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59. This Court has held that the purpose of its advisory jurisdiction is:

… 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. [FN49]

[FN49] "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.

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60. The Court has clarified the meaning of its advisory jurisdiction in general terms so as not to weaken its contentious jurisdiction in a manner prejudicial to the rights of victims of possible human rights violations. [FN50]

[FN50] "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. 24.

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61. However, this Court cannot be restrained from exercising its advisory jurisdiction because of contentious cases filed with the International Court of Justice. It is important to recall that under its Statute, this Court is an "autonomous judicial institution." [FN51] The Court has already held that:

… the possibility of conflicting interpretations is a phenomenon common to all those legal systems that have certain courts which are not hierarchically integrated. Such courts have jurisdiction to apply and, consequently, interpret the same body of law. Here it is, therefore, not unusual to find that on certain occasions courts reach conflicting or at the very least different conclusions in interpreting the same rule of law. On the international law plane, for example, because the advisory jurisdiction of the International Court of Justice extends to any legal question, the UN Security Council or the General Assembly might ask the International Court to render an advisory opinion concerning a treaty which, without any doubt, could also be interpreted by this Court under Article 64 of the Convention. Even a restrictive interpretation of Article 64 would not avoid the possibility that this type of conflict might arise. [FN52]

[FN51] Statute of the Inter-American Court of Human Rights (hereinafter the "Statute"). Adopted through Resolution No. 448, approved by the General Assembly of the Organization of American States at its ninth regular session, held in La Paz, Bolivia, October 1979, Article 1.
[FN52] "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. 50.

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62. The request from Mexico is with regard to a situation that concerns the "protection of human rights in the American States," and with respect to which there is a general interest in the Court's finding, as evidenced by the unprecedented participation in these proceedings of eight member States, the Inter-American Commission and 22 individuals and institutions as amici curiae.

63. The legitimate interests that any member State has in the outcome of an advisory proceeding are protected by the opportunity it is given to participate fully in those proceedings and to make known to the Court its views on the legal norms to be interpreted, [FN53] as has happened in the case of these advisory proceedings.

[FN53] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3; para. 24.

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64. In exercising its jurisdiction over this matter, the Court is mindful of the permissive scope [FN54] of its advisory function, unique in contemporary international law, [FN55] which enables it "to perform a service for all of the members of the inter-American system and is designed to assist them in fulfilling their international human rights obligations" [FN56] and:

… to assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process. [FN57]

[FN54] "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. 37; and Proposed Amendment of the Naturalization Provisions of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 1; para. 28.
[FN55] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3; para. 43.
[FN56] "Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1; para. 39.
[FN57] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3; para. 43; Cf. Reports of the Inter-American Commission (Art. 51 of the American Convention on Human Rights). Advisory Opinion OC-15/97 of November 14, 1997. Series A No. 15; para. 22.

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65. The Court concludes that interpretation of the American Convention and any "other treaties concerning the protection of human rights in the American States" provides all the member States of the OAS and the principal organs of the inter-American system for the protection of human rights with guidance on relevant legal questions of the kind raised in this request, which the Court will now proceed to answer.

V. STRUCTURE OF THE OPINION

66. Exercising the prerogative that every court has to order its decisions according to the logical structure that it believes will best serve the interests of justice, the Court will take up the questions raised in the following order:

a. It will first study the issues bearing upon the relationship of Article 36 of the Vienna Convention on Consular Relations to the protection of human rights in the American States, and some characteristics of the right to information on consular assistance (first, second and third questions);
b. It will then state its findings as to the relationship that the provisions of the International Covenant on Civil and Political Rights have to the protection of human rights in the American States (fifth question);
c. It will then examine the questions that concern the relationship between the right to information on consular assistance and the guarantees of the due process and the principle of equal justice (sixth, seventh, eighth and eleventh questions);
d. Once it has completed the analysis described above, it will look at the legal consequences of a host State's failure to provide a detained foreign national with information on consular assistance (fourth, tenth and twelfth questions), and lastly
e. It will respond to the request concerning the obligations of federal States in the matter of the right to information on consular assistance (ninth question).

67. The Court will examine each set of questions according to its essential content and will offer the conceptual response that, in its view, goes toward establishing the Court's opinion as regards the set of questions as a whole, if possible, or the individual questions taken separately, if necessary.

VI. THE RIGHTS TO INFORMATION ON CONSULAR ASSISTANCE, NOTIFICATION AND COMMUNICATION, AND OF CONSULAR ASSISTANCE, AND THEIR RELATIONSHIP TO THE PROTECTION OF HUMAN RIGHTS IN THE AMERICAN STATES (First question)

68. In its request for an advisory opinion, Mexico asked the Court to interpret whether

> Under Article 64(1) of the American Convention, […] Article 36 of the Vienna Convention [on Consular Relations] [should] be interpreted as containing provisions concerning the protection of human rights in the American States.
>
> […]

69. As stated previously (supra 29), the Court has jurisdiction to interpret, in addition to the American Convention, "other treaties concerning the protection of human rights in the American States."

70. In Advisory Opinion OC-10, the Court interpreted the word "treaty," as the term is employed in Article 64.1 of the Convention, to be "at the very least, an international instrument of the type that is governed by the two Vienna Conventions": the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties among States and International Organizations or among International Organizations. [FN58] The Court has also held that the treaties of which Article 64.1 speaks are those to which one or more American States is party, with an American State understood to mean a Member State of the OAS. [FN59]Lastly, the Court once again notes that the language of the article in question indicates a very 'expansive' tendency, one that should also inform its interpretation. [FN60]

[FN58] Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10; para. 33.
[FN59] "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. 35.
[FN60] "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.17.

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71. The Vienna Convention on Consular Relations is an "international agreement concluded between States in written form and governed by international law," in the broad sense of the term as defined in the 1969 Vienna Convention on the Law of Treaties. All the Member States of the OAS but two –Belize and St. Kitts and Nevis- are Party to the Vienna Convention on Consular Relations.

72. For purposes of this Advisory Opinion, the Court must determine whether this Treaty concerns the protection of human rights in the 33 American States that are Party thereto; in other words, whether it has bearing upon, affects or is of interest to this subject matter. In analyzing this issue, the Court reiterates that the interpretation of any norm is to be done in good faith in accordance with the ordinary meaning to be given to the terms used in the treaty in their context and in the light of its object and purpose (Article 31 of the Vienna Convention on the Law of Treaties [FN61]) and that an interpretation may, if necessary, involve an examination of the treaty taken as a whole.

[FN61] Cf. "The Word 'Laws" in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6; para.13.

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73. Some briefs of comments submitted to the Court observed that the preamble to the Vienna Convention on Consular Relations notes that in the drafting process, the States Party realized that:

… the purpose of [consular] privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States... [FN62]

[FN62] Vienna Convention on Consular Relations. Document A/CONF.25/12; paragraph five of the preamble, in accord with paragraph four thereof.

Thus, the Vienna Convention on Consular Relations would not appear to be intended to confer rights to individuals; the rights of consular communication and notification are, "first and foremost", rights of States.

74. Having examined the travaux preparatoire for the preamble of the Vienna Convention on Consular Relations, the Court finds that the "individuals" to whom it refers are those who perform consular functions, and that the clarification cited above was intended to make it clear that the privileges and immunities granted to them were for the performance of their functions.

75. The Court observes, on the other hand, that in the Case Concerning United States Diplomatic and Consular Staff in Tehran, the United States linked Article 36 of the Vienna Convention on Consular Relations with the rights of the nationals of the sending State. [FN63]The International Court of Justice, for its part, cited the Universal Declaration in the respective judgment. [FN64]

[FN63] I.C.J. Pleadings, United States diplomatic and consular staff in Tehran; I.C.J. Pleadings, Oral Arguments, Documents, p. 173-174.

[FN64] United States diplomatic and consular staff in Tehran, judgment, I.C.J. Report 1980, pp. 3 and 42.

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76. Mexico, moreover, is not requesting the Court's interpretation as to whether the principal object of the Vienna Convention on Consular Relations is the protection of human rights; rather, it is asking whether one provision of that Convention concerns the protection of human rights. This is an important point, given the advisory jurisprudence of this Court, which has held that a treaty can concern the protection of human rights, regardless of what the principal purpose of that treaty might be. [FN65] Therefore, while some of the comments made to the Court concerning the principal object of the Vienna Convention on Consular Relations to the effect that the treaty is one intended to 'strike a balance among States' are accurate, this does require that the Treaty be dismissed outright as one that may indeed concern the protection of an individual's fundamental rights in the American hemisphere.

[FN65] "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; opinion, first paragraph.

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77. The discussions of the wording of Article 36 of the Vienna Convention on Consular Relations turned on the common practice of States in the matter of diplomatic protection. That article reads as follows:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication and access to consular officers of the sending State;

[…]

78. The sub-paragraph cited above recognizes the right to freedom of communication. The text in question makes it clear that both the consular officer and the national of the sending State have that right, and does not stipulate any qualifications as to the circumstances of the nationals in question. Further, the most recent international criminal law [FN66] recognizes the detained foreign national's right to communicate with consular officers of the sending State.

[FN66] Rules governing the detention of persons awaiting trial or appeal before the Tribunal or otherwise detained on the authority of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; as amended on 17 November 1997; IT/38/REV.7; Rule 65.
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79. Therefore, the consular officer and national of the sending State both have the right to communicate with each other, at any time, in order that the former may proper discharge his functions. Under Article 5 of the Vienna Convention on Consular Relations, consular functions consist, inter alia, in the following: [FN67]

a) protecting in the host State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;
[…]
e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;
[…]
i) subject to the practices and procedures obtaining in the host State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the host State, for the purpose of obtaining, in accordance with the laws and regulations of the host State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;

[…]

[FN67] Vienna Convention on Consular Relations, Art. 5.

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80. Taking the above-cited texts as a whole, it is evident that the Vienna Convention on Consular Relations recognizes assistance to a national of the sending State for the defense of his rights before the authorities of the host State to be one of the paramount functions of a consular officer. Hence, the provision recognizing consular communication serves a dual purpose: that of recognizing a State's right to assist its nationals through the consular officer's actions and, correspondingly, that of recognizing the correlative right of the national of the sending State to contact the consular officer to obtain that assistance.

81. Sub-paragraphs (b) and (c) of Article 36(1) of the Vienna Convention on Consular Relations concern consular assistance in one particular situation: deprivation of freedom. The Court is of the view that these sub-paragraphs need to be examined separately. Sub-paragraph (b) provides the following:

if he so requests, the competent authorities of the host State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

This text recognizes, inter alia, a detained foreign national's right to be advised, without delay, that he has:

a) the right to request and obtain from the competent authorities of the host State that they inform the appropriate consular post that he has been arrested, committed to prison, placed in preventive custody or otherwise detained, and
b) the right to address a communication to the appropriate consular post, which is to be forwarded "without delay".

82. The bearer of the rights mentioned in the preceding paragraph, which the international community has recognized in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, [FN68] is the individual. In effect, this article is unequivocal in stating that rights to consular information and notification are "accorded" to the interested person. In this respect, Article 36 is a notable exception to what are essentially States' rights and obligations accorded elsewhere in the Vienna Convention on Consular Relations. As interpreted by this Court in the present Advisory Opinion, Article 36 is a notable advance over international law's traditional conceptions of this subject.

[FN68] Cf. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the United Nations General Assembly, Resolution 43/173 of 9 December 1988, Principle 16.2; Cf. Rules governing the detention of persons awaiting trial or appeal before the Tribunal or otherwise detained on the authority of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; as amended on 17 November 1997; IT/38/REV.7, Rules 65; Declaration on the human rights of individuals who are not nationals of the country in which they live, adopted by the United Nations General Assembly, Resolution 40/144 of 13 December 1985, Art. 10.

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83. The rights accorded to the individual under sub-paragraph (b) of Article 36(1), cited earlier, tie in with the next sub-paragraph, which reads:

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

It can be inferred from the above text that exercise of this right is limited only by the individual's choice, who may "expressly" oppose any intervention by the consular officer on his behalf. This confirms the fact that the rights accorded under Article 36 of the Vienna Convention on Consular Relations are rights of individuals.

84. The Court therefore concludes that Article 36 of the Vienna Convention on Consular Relations endows a detained foreign national with individual rights that are the counterpart to the host State's correlative duties. This interpretation is supported by the article's legislative history. There, although in principle some States believed that it was inappropriate to include clauses regarding the rights of nationals of the sending State [FN69], in the end the view was that there was no reason why that instrument should not confer rights upon individuals.

[FN69] This was the objection raised by Venezuela (A/CONF.25/C.2/L.100 and A/CONF. 25/16 Vol. I, pp.331 and 332, Kuwait (A/CONF.25/16, Vol. I, p. 332), Nigeria (A/CONF.25/16, Vol. I, p. 333), and Ecuador (A/CONF.25/16, Vol. I, p. 333).

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85. The Court must now consider whether the obligations and rights recognized in Article 36 of the Vienna Convention on Consular Relations concern the protection of human rights. [FN70]

[FN70] Cf., in this regard, "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. 20.

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86. Should the sending State decide to provide its assistance and in so doing exercise its rights under Article 36 of the Vienna Convention on Consular Relations, it may assist the detainee with various defence measures, such as providing or retaining legal representation, obtaining evidence in the country of origin, verifying the conditions under which the legal assistance is provided and observing the conditions under which the accused is being held while in prison.

87. Therefore, the consular communication to which Article 36 of the Vienna Convention on Consular does indeed concern the protection of the rights of the national of the sending State and may be of benefit to him. This is the proper interpretation of the functions of 'protecting the interests' of that national and the possibility of his receiving "help and assistance," particularly with arranging appropriate "representation … before the tribunals". The relationship between the rights accorded under Article 36 and the concepts of "the due process of law" or "judicial guarantees" is examined in another section of this Advisory Opinion (infra 110).

VII. THE ENFORCEABILITY OF THE RIGHTS RECOGNIZED IN ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS (Second question)

88. In its second question, Mexico asked the Court for its interpretation as to the following:

From the point of view of international law, is the enforceability of individual rights conferred on foreigners by the above-mentioned Article 36 on behalf of the interested parties in regard to the host State subject to the protests of the State of which they are nationals?

89. In the opinion of this Court, compliance with the State's duty corresponding to the right of consular communication (Article 36(1), sub-paragraph (a)) is not subject to the requirement that the sending State first file a protest. This is obvious from the language of Article 36(1)(a), which states that:

Nationals of the sending State shall have the […] freedom with respect to communication with and access to consular officers of the sending State[.]

The same is true in the case of the right to information on consular assistance, which is also upheld as a right that attends the host State's duty. No requirement need be met for this obligation to have effect or currency.

90. Exercise of the right to consular notification is contingent only upon the will of the individual concerned. [FN71] It is interesting to note that in the original draft presented to the United Nations Conference on Consular Relations, compliance with the duty to notify the consular officer in the cases provided for in sub-paragraph (b) of Article 36(1) did not hinge on the acquiescence of the person being deprived of his freedom. However, some participants in the Conference objected to this formulation for practical reasons that would have made it impossible to discharge that duty [FN72] and because the individual in question should decide of his own free will whether he wanted the consular officer to be notified of his arrest and, if so, authorize

the latter's intervention on his behalf. The argument for these positions was, in essence, that the individual's freedom of choice had to be respected. [FN73] None of the participating States mentioned any requirements or conditions that the sending State would have to fulfill.

[FN71] This position is reflected clearly in the amendments proposed on the Second Committee by Switzerland (A/CONF.25.C.2/L.78), the United States (A/CONF.25.C.2/L.3), Japan (A/CONF.25.C.2/L.56), Australia (A/CONF.25/16, Vol. I, p. 331); Spain (A/CONF.25/16, Vol. I, p. 332). It is particularly interesting to note that express mention was made of the fact that "the freedom of the human person and the expression of the will of the individual were the fundamental principles which governed instruments concluded under the auspices of the United Nations. The text being drafted by the Conference should likewise reflect those principles." Cf. intervention by Switzerland (A/CONF.25/16, Vol. I, p. 335).

[FN72] Interventions of France (A/CONF.25/16, Vol. I, pp. 337 and 341); Italy (A/CONF.25/16, Vol. I, p. 338); the Republic of Korea (A/CONF.25/16, Vol. I, p. 338); the Republic of Viet-Nam (A/CONF.25/16, Vol. I, p. 339); Thailand (A/CONF.25/16, Vol. I, pp. 340 and 343); the Philippines (A/CONF.25/16, Vol. I, p. 36); New Zealand (A/CONF.25/16, Vol. I, p. 36); the United Arab Republic (A/CONF.25/16, Vol. I, p. 36; Venezuela (A/CONF.25/16, Vol. I, p. 37); Japan (A/CONF.25/16, Vol. I, p. 38); the United Arab Republic, introducing the joint amendment to the seventeen-power proposal (A/CONF.25/16, Vol. I, p. 82).

[FN73] Amendment proposed by the United States (A/CONF.25/C.2/L.3), which concurred with the presentations of Australia (A/CONF.25.C.2/L.78, p. 331), (A/CONF.25.C.2/L.78, p. 334), the Netherlands (A/CONF.25/16, Vol. I, p. 332), Argentina (A/CONF.25/16, Vol. I, p. 334); the United Kingdom (A/CONF. 25/16, Vol. I p. 334), Ceylon (A/CONF.25/16, Vol. I, p. 334), Thailand (A/CONF.25/16, Vol. I, pp. 334-335), Switzerland (A/CONF.25/16, Vol. I, p. 335), Spain (A/CONF. 26/16, Vol. I, pp. 335 and 343-344), Ecuador (A/CONF.25/16, Vol. I, p. 343), the Republic of Viet-Nam (A/CONF.25/16, Vol. I, p. 37), France (A/CONF.25/16, Vol. I, p. 38), and Tunisia, introducing the seventeen-power proposal (A/CONF.15/16, Vol. I, p. 82).

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91. Under sub-paragraph (c), any action by a consular officer to "arrange for [the individual's] legal representation" and visit him in his place of confinement requires the consent of the national who is in prison, custody or detention. This sub-paragraph, too, makes no mention of the need for the sending State to file protests.

92. Particularly in the case of sub-paragraphs (b) and (c) of Article 36(1), the object of consular notification is served when the host State discharges its duties immediately. Indeed, the purpose of consular notification is to alert the sending State to a situation of which it is, in principle, unaware. Hence, it would be illogical to make exercise of these rights or fulfillment of these obligations subject to protests from a State that is unaware of its national's predicament.

93. One brief submitted to this Court notes that in some cases it is difficult for the host State to obtain information about the detainee's nationality. [FN74] Without that information, the host State will not know that the individual in question has the right to information recognized in Article 36 of the Vienna Convention on Consular Relations.

[FN74] Written comments of the United States of America, p. 13.

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94. The Court considers that identification of the accused, which is essential for penal individualization programs, is a duty incumbent upon the State that has him in custody. For example, the individual in custody has to be identified in order to determine his age and to make certain that he is treated in a manner commensurate with his circumstances. In discharging this duty to identify a detainee, the State employs that mechanisms created under its domestic laws for this purpose, which necessarily include immigration records in the case of aliens.

95. This Court is aware that individuals in custody may make it difficult to ascertain that they are foreign nationals. Some might conceal the fact because of fear of deportation. In such cases, immigration records will not be useful –or sufficient- for a State to ascertain the subject's identity. Problems also arise when a detainee is in fear of the actions of his State of origin and thus endeavors to hinder any inquiry into his nationality. In both these hypothetical situations, the host State can deal with the problems –for which it is not to blame- in order to comply with its obligations under Article 36. The assessment of each case by the competent national or international authorities will determine whether a host State is or is not responsible for failure to comply with those duties.

96. The foregoing does not alter the principle that the arresting State has a duty to know the identity of the person whom it deprives of his freedom. This will enable it to discharge its own obligations and respect the detainee's rights promptly. Mindful that it may be difficult to ascertain a subject's identity immediately, the Court believes it is no less imperative that the State advise the detainee of his rights if he is an alien, just as it advises him of the other rights accorded to every person deprived of his freedom.

97. For these reasons, the Court considers that enforcement of the rights that Article 36 of the Vienna Convention on Consular Relations confers upon the individual is not subject to the protests of the sending State.

VIII. THE EXPRESSION "WITHOUT DELAY" IN ARTICLE 36(1)(b) OF THE VIENNA CONVENTION ON CONSULAR RELATIONS (Third question)

98. The third question that Mexico put to the Court in its request was as follows:

Mindful of the object and purpose of Article 36(1)(b) of the Vienna Convention [on Consular Relations], should the expression "without delay" contained in that provision be interpreted as requiring the authorities of the host State to inform any foreigner detained for crimes punishable by the death penalty of the rights conferred on him by Article 36(1)(b) itself, at the time of the arrest, and in any case before the accused makes any statement or confession to the police or judicial authorities?

99. This question is the first to raise one of the central issues of this Advisory Opinion. While the question mainly concerns whether the expression "without delay" is to be interpreted as

pertaining to a particular stage of the criminal justice process, the interpretation being requested is in the context of the cases where the arrest is part of the prosecution of a crime punishable with the death penalty.

100. The requesting State explained that while the request concerned cases punishable with the death penalty, this does not preclude enforcement of the rights conferred in Article 36 in any and all circumstances. The Court concurs with this assessment. Article 36(1)(b) of the Vienna Convention on Consular Relations makes no distinction based on the severity of the penalty for the crime for which the arrest was made. It is interesting to note that the article in question does not require that the consular officer be advised of the reasons for the arrest. Having examined the respective travaux preparatoire, the Court found that this was the express decision of the States Party, some of which reasoned that to disclose the reason for the arrest to the consular officer would be to violate the detained person's basic right to privacy. Article 36(1)(b) also makes no distinction for the applicable penalty. It is logical, then, to infer that every detained person has this right.

101. Therefore, the Court's answer to this part of the request applies with equal force to all cases in which a national of a sending State is deprived of his freedom, regardless of the reason, and not just for facts that, when the nature of the crime they constitute has been determined by the competent authority, could involve the death penalty.

102. Having dispatched this aspect of the question, the Court will now proceed to determine whether the expression "without delay" used in Article 36(1)(b) of the Vienna Convention on Consular Relations should be interpreted as requiring the authorities of the host State to inform any detained foreign national of the rights accorded to him in that article "at the time of the arrest, and in any case before the accused makes any statement or confession to the police or judicial authorities."

103. The legislative history of that article reveals that inclusion of the obligation to inform a detained foreign national of his rights under that article "without delay", was proposed by the United Kingdom and had the support of the vast majority [FN75] of the States participating in the Conference as a means to help ensure that the detained person was made duly aware of his right to request that the consular officer be advised of his arrest for purposes of consular assistance. It is clear that these are the appropriate effects (effet utile) of the rights recognized in Article 36.

[FN75] The record of the voting shows that 65 States voted in the affirmative, 13 abstained and 2 voted against (A/CONF.25/16, Vol. I, p. 87). Later, Czechoslovakia, which had abstained, stated that the amendment proposed by the United Kingdom, was a "perfectly reasonable proposal" (A/CONF.25/16, Vol. I, p. 87).

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104 Therefore, and in application of a general principle of interpretation that international jurisprudence has repeatedly affirmed, the Court will interpret Article 36 so that those appropriate effects (effet utile) are obtained. [FN76]

[FN76] Vienna Convention on the Law of Treaties, Art. 31.1. Cf. Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, PÁG. C.I.J., Series A, No. 22, p. 13, and Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 1; para. 30.

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105. The Court's finding as to the second question of the request (supra 97) is very relevant here. There the Court determined that the enforceability of the rights conferred upon the individual in Article 36 of the Vienna Convention on Consular Relations was not subject to protests from the State of the individual's nationality. It is, therefore, incumbent upon the host State to fulfill the obligation to inform the detainee of his rights, in accord with the finding in paragraph 96.

106. Consequently, in order to establish the meaning to be given to the expression "without delay," the purpose of the notification given to the accused has to be considered. It is self-evident that the purpose of notification is that the accused has an effective defense. Accordingly, notification must be prompt; in other words, its timing in the process must be appropriate to achieving that end. Therefore, because the text of the Vienna Convention on Consular Relations is not precise, the Court's interpretation is that notification must be made at the time the accused is deprived of his freedom, or at least before he makes his first statement before the authorities.

IX. PROVISIONS OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS [FN77] (Fifth question)

[FN77] International Covenant on Civil and Political Rights, G.A. resolution 2200A (XXI), 31 U.N. GAOR Supp. (No. 16), p. 52, UN Doc. A/6319 (1966), 999 U.N.T.S. 171, entry into force 23 March 1976.

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107. Mexico has requested the Court's opinion on the following question:

In connection with Article 64.1 of the American Convention, are Articles 2, 6, 14 and 50 of the Covenant to be interpreted as containing provisions concerning the protection of human rights in the American States?

108. The provisions of the International Covenant on Civil and Political Rights mentioned in the request read as follows:

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present

Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this Article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this Article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary

in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail and in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the grounds that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

109. With the exception of Antigua and Barbuda, the Bahamas, St. Kitts and Nevis and Saint Lucia, the Member States of the OAS are parties to the International Covenant on Civil and Political Rights. It is the opinion of this Court that all the above-cited provisions of the

International Covenant on Civil and Political Rights do concern the protection of human rights in the American States.

X. THE RIGHT TO INFORMATION ON CONSULAR ASSISTANCE AND ITS RELATIONSHIP TO THE MINIMUM GUARANTEES OF THE DUE PROCESS OF LAW (Sixth, seventh, eighth and eleventh questions)

110. In a number of the questions in its request, Mexico put specific issues to the Court concerning the nature of the nexus between the right to information on consular assistance and the inherent rights of the individual as recognized in the International Covenant on Civil and Political Rights and the American Declaration and, through the latter, in the Charter of the OAS. These questions are as follows:

With respect to the International Covenant on Civil and Political Rights

[…]
6. In connection with Article 14 of the Covenant, should it be applied and interpreted in the light of the expression “all possible safeguards to ensure a fair trial” contained in paragraph 5 of the United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty, and that concerning foreign defendants or persons convicted of crimes subject to capital punishment that expression includes immediate notification of the detainee or defendant, on the part of the host State, of rights conferred on him by Article 36(1)(b) of the Vienna Convention [on Consular Relations]?
7. As regards aliens accused of or charged with crimes subject to the death penalty, is the host State's failure to notify the person involved as required by Article 36(1)(b) of the Vienna Convention in keeping with their rights to “adequate time and facilities for the preparation of his defense”, pursuant to Article 14(3)(b) of the Covenant?
8. As regards aliens accused of or charged with crimes subject to the death penalty, should the term “minimum guarantees” contained in Article 14.3 of the Covenant, and the term “at least equal” contained in paragraph 5 of the corresponding United Nations Safeguards be interpreted as exempting the host State from immediate compliance with the provisions of Article 36(1)(b) of the Vienna Convention [on Consular Relations] on behalf of the detained person or defendant?
[…]

With respect to the Charter of the OAS and the American Declaration of the Rights and Duties of Man:

[…]
11. With regard to the arrest and detention of aliens for crimes punishable by death and in the framework of Article 3(1) of the Charter and Article II of the Declaration, is failure to notify the detainee or defendant immediately of the rights conferred on him in Article 36(1)(b) of the Vienna Convention [on Consular Relations] compatible with the Charter of Human Rights, which contains the term without distinction of nationality, and with the right to equality before the law without distinction as to any factor, as enshrined in the Declaration?

111. In these questions, the requesting State is seeking from the Court its opinion on whether nonobservance of the right to information constitutes a violation of the rights recognized in Article 14 of the International Covenant on Civil and Political Rights, Article 3 of the Charter of the OAS and Article II of the American Declaration, mindful of the nature of those rights.

112. Examination of these questions necessarily begins with consideration of the rules governing interpretation of the articles in question.The International Covenant on Civil and Political Rights and the OAS Charter, which are treaties in the meaning given to the term in the Vienna Convention on the Law of Treaties, must be interpreted in accordance with the latter's Article 31 (supra 58).

113. Under that article, the interpretation of a treaty must take into account not only the agreements and instruments related to the treaty (paragraph 2 of Article 31), but also the system of which it is part (paragraph 3 of Article 31). As the International Court of Justice has held:

[…] the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law […] Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years […] have brought important developments […]. In this domain, as elsewhere, the corpus iuris gentium has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore. [FN78]

[FN78] 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 ad 31).

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114. This guidance is particularly relevant in the case of international human rights law, which has made great headway thanks to an evolutive interpretation of international instruments of protection. That evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention. Both this Court, in the Advisory Opinion on the Interpretation of the American Declaration of the Rights and Duties of Man (1989) [FN79], and the European Court of Human Rights, in Tyrer v. United Kingdom (1978), [FN80] Marckx v. Belgium (1979), [FN81] Loizidou v. Turkey (1995), [FN82] among others, have held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions.

[FN79] In regard to the American Declaration, the Court held that
by means of an authoritative interpretation, the member states of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration. (Interpretation of the American

Declaration of the Rights and Duties of Man within the Framework of the Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10; para. 43).
The Court has thus recognized that the Declaration constitutes a source of international obligations for the States of our region, obligations that can also be interpreted in the context of the evolution of "American law" on this subject.
[FN80] European Court of Human Rights, Tyrer v. United Kingdom judgment of 25 April 1978, Series A no. 26; pp. 15-16, para. 31.
[FN81] European Court of Human Rights, Marckx case, judgment of 13 June 1979, Series A no. 31; p. 19, para. 41.
[FN82] European Court of Human Rights, Loizidou v. Turkey (Preliminary Ojbections) judgment of 23 March 1995, Series A no. 310; p. 26, para. 71.
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115. The corpus juris of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law.

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116. The International Covenant on Civil and Political Rights recognizes the right to the due process of law (Article 14) as a right that "derives[s] from the inherent dignity of the human person." [FN83] That article enumerates a number of guarantees that apply to "everyone charged with a criminal offence," and in that respect is consistent with the principal international human rights instruments.

[FN83] International Covenant on Civil and Political Rights (supra footnote 77), second paragraph of the Preamble.
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117. In the opinion of this Court, for "the due process of law" a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants. It is important to recall that the judicial process is a means to ensure, insofar as possible, an equitable resolution of a difference. The body of procedures, of diverse character and generally grouped under the heading of the due process, is all calculated to serve that end. To protect the individual and see justice done, the historical development of the judicial process has introduced new procedural rights. An example of the evolutive nature of judicial process are the rights not to incriminate oneself and to have an attorney present when one speaks. These two rights are already part of the laws and jurisprudence of the more advanced legal systems. And so, the body of judicial guarantees given in Article 14 of the International Covenant on Civil and

Political Rights has evolved gradually. It is a body of judicial guarantees to which others of the same character, conferred by various instruments of international law, can and should be added.

118. In this regard the Court has held that the procedural requirements that must be met to have effective and appropriate judicial guarantees [FN84] "are designed to protect, to ensure, or to assert the entitlement to a right or the exercise thereof" [FN85] and are "the prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination." [FN86]

[FN84] 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. 27.
[FN85] Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8; para. 25.
[FN86] 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. 28. Cf. Genie Lacayo Case. Judgment of January 29, 1997, Series C No. 30; para. 74; Loayza Tamayo Case, Judgment of September 17, 1997, Series C No. 33; para. 62.

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119. To accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts [FN87] and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages.

[FN87] Cf. the American Declaration, Arts. II and XVIII; the Universal Declaration, Arts. 7 and 10; the International Covenant on Civil and Political Rights (supra footnote 77), Arts. 2(1), 3 and 26; the Convention on the Elimination of All Forms of Discrimination against Women, Arts. 2 and 15; the International Convention on the Elimination of All Forms of Racial Discrimination, Arts 2(5) and 7; the African Charter on Human and Peoples' Rights, Arts. 2 and 3; the American Convention, Arts. 1, 8(2) and 24; the European Convention on Human Rights and Fundamental Freedoms, Art. 14.

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120. This is why an interpreter is provided when someone does not speak the language of the court, and why the foreign national is accorded the right to be promptly advised that he may have consular assistance. These measures enable the accused to fully exercise other rights that everyone enjoys under the law. Those rights and these, which are inextricably inter-linked, form the body of procedural guarantees that ensures the due process of law.

121. In the case to which this Advisory Opinion refers, the real situation of the foreign nationals facing criminal proceedings must be considered. Their most precious juridical rights, perhaps even their lives, hang in the balance. In such circumstances, it is obvious that notification of one's right to contact the consular agent of one's country will considerably enhance one's chances of defending oneself and the proceedings conducted in the respective cases, including the police investigations, are more likely to be carried out in accord with the law and with respect for the dignity of the human person.

122. The Court therefore believes that the individual right under analysis in this Advisory Opinion must be recognized and counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial.

123. The inclusion of this right in the Vienna Convention on Consular Relations –and the discussions that took place as it was being drafted- [FN88] are evidence of a shared understanding that the right to information on consular assistance is a means for the defense of the accused that has repercussions –sometimes decisive repercussions- on enforcement of the accused' other procedural rights.

[FN88] See, in this regard, the VII Ibero-American Summit of Heads of State and Presidents, November 6-9, 1997, Isla de Margarita, Venezuela: Declaration of Margarita, Part Three, Matters of Special Interest; Art. 31 in fine, as well as several inter-American statements and arguments made before this Court by a number of States, organizations, institutions and amici curiae.

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124. In other words, the individual's right to information, conferred in Article 36(1)(b) of the Vienna Convention on Consular Relations, makes it possible for the right to the due process of law upheld in Article 14 of the International Covenant on Civil and Political Rights, to have practical effects in tangible cases; the minimum guarantees established in Article 14 of the International Covenant can be amplified in the light of other international instruments like the Vienna Convention on Consular Relations, which broadens the scope of the protection afforded to those accused.

XI. CONSEQUENCES OF THE VIOLATION OF THE RIGHT TO INFORMATION ON CONSULAR ASSISTANCE (Fourth, tenth and twelfth questions)

125. In its fourth, tenth and twelfth questions, Mexico requested the Court's interpretation of the juridical consequences of the imposition and execution of the death penalty in cases in which the rights recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations were not respected:

In relation to the Vienna Convention on Consular Relations:

[…]

4. From the point of view of international law and with regard to aliens, what should be the juridical consequences of the imposition and application of the death penalty in the light of failure to give the notification referred to in Article 36(1)(b) of the Vienna Convention [on Consular Relations]?
[…]
With regard to the International Covenant on Civil and Political Rights:
[…]
10. In connection with the Covenant and with regard to persons of foreign nationality, what should be the juridical consequences of the imposition and application of the death penalty in the light of failure to give the notification referred to in Article 36(1)(b) of the Vienna Convention [on Consular Relations]?
[…]

With regard to the OAS Charter and the American Declaration of the Rights and Duties of States:

12. With regard to aliens in the framework of Article 3(1) of the OAS Charter and Articles I, II and XXVI of the Declaration, what should be the juridical consequences of the imposition and execution of the death penalty when there has been a failure to make the notification referred to in Article 36(1)(b) of the Vienna Convention [on Consular Relations]?

126. From the questions posed by the requesting State, it is unclear whether it is asking the Court to interpret the consequences of the host State's failure to inform the detained foreign national of his rights under Article 36(1)(b) of the Vienna Convention on Consular Relations, or whether the question concerns cases in which the detainee has expressed a desire to have the consular officer advised of his arrest and the host State has failed to comply.

127. However, from the general context of Mexico's request, [FN89] the Court's reading is that the request concerns the first of the two hypotheticals suggested above, which is to say the obligation to inform the detainee of his rights under Article 36(1)(b) of the Vienna Convention on Consular Relations. The Court will address that question below.

[FN89] See, in this regard, Request, pp. 1 (paragraph 4, lines 2 to 9) and 3 (paragraph 1, lines 2 and 3).
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128. It is a general principle of international law, recognized in the Vienna Convention on the Law of Treaties (Article 26), that States Party to a treaty have the obligation to perform the treaty in good faith (pacta sunt servanda).

129. Because the right to information is an element of Article 36(1)(b) of the Vienna Convention on Consular Relations, the detained foreign national must have the opportunity to avail himself of this right in his own defense. Non-observance or impairment of the detainee's right to information is prejudicial to the judicial guarantees.

130. In a number of cases involving application of the death penalty, the United Nations Human Rights Committee observed that if the guarantees of the due process established in Article 14 of the International Covenant on Civil and Political Rights were violated, then so, too, were those of Article 6.2 of the Covenant if sentence was carried out.

131. In Communication No. 16/1977, for example, which concerned the case of Mr. Daniel Monguya Mbenge (1983), that Committee determined that under Article 6.2 of the International Covenant on Civil and Political Rights:

… sentence of death may be imposed only "in accordance with the law [of the State party] in force at the time of the commission of the crime and not contrary to the provisions of the Covenant". This requires that both the substantive and the procedural law in the application of which the death penalty was imposed was not contrary to the provisions of the Covenant and also that the death penalty was imposed in accordance with that law and therefore in accordance with the provisions of the Covenant. Consequently, the failure of the State party to respect the relevant requirements of article 14 (3) leads to the conclusion that the death sentences pronounced against the author of the communication were imposed contrary to the provisions of the Covenant, and therefore in violation of article 6 (2). [FN90]

[FN90] Selección de Decisiones del Comité de Derechos Humanos adoptadas con arreglo al Protocolo Facultativo, Vol. 2 (October 1982 – April 1988), United Nations, New York, 1992; p. 86, para. 17.

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132. In the case of Reid vs. Jamaica (no. 250/1987), the Committee stated that:

[T]he imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes […] a violation of article 6 of the Covenant. As the Committee noted in its general comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that 'the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal'. [FN91]

It came to exactly the same conclusion in Wright vs. Jamaica [FN92] in 1992.

[FN91] Human Rights Law Journal, Vol. 11 (1990), No. 3-4; p. 321, para. 11.5.
[FN92] Human Rights Law Journal, Vol. 13 (1992), No. 9-10; p. 351, para. 8.7.

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133. The Court has observed that the requesting State directed its questions at those cases in which the death penalty is applicable. It must therefore be determined whether international human rights law gives the right to consular information in death penalty cases special effects.

134. It might be useful to recall that in a previous examination of Article 4 of the American Convention, [FN93] the Court observed that the application and imposition of capital punishment are governed by the principle that "[n]o one shall be arbitrarily deprived of his life." Both Article 6 of the International Covenant on Civil and Political Rights and Article 4 of the Convention require strict observance of legal procedure and limit application of this penalty to "the most serious crimes." In both instruments, therefore, there is a marked tendency toward restricting application of the death penalty and ultimately abolishing it. [FN94]

[FN93] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3; paras. 52-55.
[FN94] Cf., also, European Court of Human Rights, Soering case, decision of 26 January 1989, Series A no. 161; para. 102.

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135. This tendency, evident in other inter-American [FN95] and universal [FN96] instruments, translates into the internationally recognized principle whereby those States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases. It is obvious that the obligation to observe the right to information becomes all the more imperative here, given the exceptionally grave and irreparable nature of the penalty that one sentenced to death could receive. If the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty and declaration recognizes and protects is at stake: human life.

[FN95] Protocol to the American Convention on Human Rights to Abolish the Death Penalty, approved by the OAS General Assembly at its XX regular session, Asuncion, Paraguay, June 8, 1990.
[FN96] United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty, approved by the United Nations Economic and Social Council in its Resolution 1984/50 of May 25, 1984.

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136. Because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result.

137. For the foregoing reasons, the Court concludes that nonobservance of a detained foreign national's right to information, recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the guarantees of the due process of law; in such circumstances, imposition of the death penalty is a violation of the right not to be "arbitrarily" deprived of one's life, in the terms of the relevant provisions of the human rights treaties (eg the American Convention on Human Rights, Article 4; the International Covenant on Civil and Political Rights, Article 6) with the juridical consequences inherent in a violation of this nature,

i.e., those pertaining to the international responsibility of the State and the duty to make reparations.

XII. THE CASE OF FEDERAL STATES (Ninth question)

138. Mexico requested Court's interpretation of the following question:

With regard to American countries constituted as federal States which are Parties to the Covenant on Civil and Political Rights, and within the framework of Articles 2, 6, 14 and 50 of the Covenant, are those States obliged to ensure the timely notification referred to in Article 36(1)(b) to every individual of foreign nationality who is arrested, detained or indicted in its territory for crimes subject to the death penalty; and to adopt provisions in keeping with their domestic law to give effect in such cases to the timely notification referred to in this article in all its component parts, if this was not guaranteed by legislative or other provisions, in order to give full effect to the corresponding rights and guarantees enshrined in the Covenant?

139. While the Vienna Convention on Consular Relations does not contain any clause relative to federal States' fulfillment of obligations (such as those contained, for example, in the International Covenant on Civil and Political Rights and the American Convention), this Court has already held that "a State cannot plead its federal structure to avoid complying with an international obligation." [FN97]

[FN97] Garrido and Baigorria Case, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of August 27, 1998. Series C No. 39; para. 46. Cf.: Arbitral award of July 26, 1875 in the Montijo Case, LA PRADELLE-POLITIS, Recueil des arbitrages internationaux, Paris, 1954, t. III, p. 675; decision of the France-Mexico Mixed Claims Commission of 7.VI.1929 in the Hyacinthe Pellat case, U.N., Report of International Arbitral Awards, vol. V, p. 536).

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140. Moreover, the Vienna Convention on the Law of Treaties provides that

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory. [FN98]

The Court has established that no intention to establish an exception to this provision can be read from either the letter or the spirit of the Vienna Convention on Consular Relations. The Court, therefore, concludes that international provisions that concern the protection of human rights in the American States, including the one recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, must be respected by the American States Party to the respective conventions, regardless of whether theirs is a federal or unitary structure.

[FN98] Vienna Convention on the Law of Treaties, Art. 29.

XIII. OPINION

141. For the above reasons,

THE COURT

DECIDES

unanimously

That it is competent to render the present Advisory Opinion.

IT IS OF THE OPINION

Unanimously

1. That Article 36 of the Vienna Convention on Consular Relations confers rights upon detained foreign nationals, among them the right to information on consular assistance, and that said rights carry with them correlative obligations for the host State.

Unanimously,

2. That Article 36 of the Vienna Convention on Consular Relations concerns the protection of the rights of a national of the sending State and is part of the body of international human rights law.

Unanimously,

3. That the expression “without delay” in Article 36(1)(b) of the Vienna Convention on Consular Relations means that the State must comply with its duty to inform the detainee of the rights that article confers upon him, at the time of his arrest or at least before he makes his first statement before the authorities.

Unanimously,

4. That the enforceability of the rights that Article 36 of the Vienna Convention on Consular Relations confers upon the individual is not subject to the protests of the sending State.

Unanimously,

5. That articles 2, 6, 14 and 50 of the International Covenant on Civil and Political Rights concern the protection of human rights in the American States.

Unanimously,

6. That the individual's right to information established in Article 36(1)(b) of the Vienna Convention on Consular Relations allows the right to the due process of law recognized in Article 14 of the International Covenant on Civil and Political Rights to have practical effects in concrete cases; Article 14 establishes minimum guarantees that can be amplified in the light of other international instruments such as the Vienna Convention on Consular Relations, which expand the scope of the protection afforded to the accused.

By six votes to one,

7. That failure to observe a detained foreign national's right to information, recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the due process of law and, in such circumstances, imposition of the death penalty is a violation of the right not to be deprived of life "arbitrarily", as stipulated in the relevant provisions of the human rights treaties (v.g. American Convention on Human Rights, Article 4; International Covenant on Civil and Political Rights, Article 6), with the juridical consequences that a violation of this nature carries, in other words, those pertaining to the State's international responsibility and the duty to make reparation.

Judge Jackman dissenting.

Unanimously,

8. That the international provisions that concern the protection of human rights in the American States, including the right recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, must be respected by the American States Party to the respective conventions, regardless of whether theirs is a federal or unitary structure.

Judge Jackman informed the Court of his partially dissenting opinion, while Judges Cançado Trindade and García Ramírez informed of their concurring opinions. All three will accompany this Advisory Opinion.

Done in Spanish and English, the Spanish text being authentic, in San Jose, Costa Rica, on October 1, 1999.

Antônio A. Cançado Trindade
President

Máximo Pacheco-Gómez
Hernán Salgado-Pesantes
Oliver Jackman
Alirio Abreu-Burelli
Sergio García-Ramírez
Carlos Vicente de Roux-Rengifo

Manuel E. Ventura-Robles
Secretary

Read at a public session at the seat of the Court in San José, Costa Rica, on October 2, 1999.

So ordered,

Antônio A. Cançado Trindade
President

Manuel E. Ventura-Robles
Secretary

PARTIALLY DISSENTING OPINION OF JUDGE OLIVER JACKMAN

1. It is with considerable regret that I must register my inability to accompany the majority of the Court in all the conclusions to which it has come in this Advisory Opinion. Specifically, I must respectfully dissent from the conclusion which concerns the legal effects of failure by a receiving State to respect the right to consular information guaranteed by Article 36 of the Vienna Convention on Consular Relations ("the Convention").

The conclusion in question may be conveniently divided into two parts:

a) that failure to respect the right to consular information affects the guarantees of due process; and
b) that imposition of the death penalty in such circumstances constitutes a violation of the right not to be arbitrarily deprived of life, as that right is defined in various international treaties on human rights.

2. In regard to (a), there can be no doubt that situations can arise in which failure to advise a detained person of his rights under Article 36.1.(b) of the Convention may have an adverse – and even a determining – effect on the judicial process to which such a person may be subjected, with results that might amount to a violation of that person's right to a fair trial. Where I find myself obliged to differ from the majority is in the finding that such a violation is the inevitable, invariable consequence of the failure in question.

3. In regard to (b), it is clear that States which maintain the death penalty on their law books have a particularly heavy duty to ensure the most scrupulous observance of due process requirements in cases in which this penalty may be imposed. Nevertheless, I find it difficult to accept that, in international law, in every possible case where an accused person has not had the benefit of consular assistance, the judicial procedure leading to a capital conviction must, per se, be considered to be arbitrary, for the purposes and in the terms of, for example, Article 6 of the International Covenant on Civil and Political Rights ("the Covenant").

4. The approach taken by the Court in this Advisory Opinion appears to be based on what might be called an immaculate conception of due process, a conception which is not justified by the history of the precept in either municipal or international law. On the contrary, the evidence – from Magna Carta in 1215 to the 1993 Statute of the International Tribunal for the Former

Yugoslavia (as amended in May 1998) – suggests that there has been a steady, pragmatic evolution, aimed at increasing the practical effectiveness of the protective structure by attempting to meet the real needs of the individual when confronted with the monolithic power of the State.

5. Thus it is noteworthy that Article 11.1 of the Universal Declaration of Human Rights ("the Declaration") stipulates that a person charged with a penal offence has the right to be presumed innocent "until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence". (Emphasis added). Subsequent developments in international law and, in particular, in the international law of human rights, have progressively added flesh to this skeletal delineation of the basic elements of due process. Analysis of provisions such as those to be found in Articles 9 to 15 inclusive of the Covenant, or in Articles 7, 8, and 25 of the American Convention, makes it clear that the ruling principle in the devising of these guarantees has been the principle of necessity laid down in the Declaration.

6. In the case of Thomas and Hilaire vs the Attorney General of Trinidad and Tobago (Privy Council Appeal No. 60 of 1998) the Privy Council commented that

"Their Lordships are unwilling to adopt the approach of the Inter-American Commission on Human Rights, which they understand holds that any breach of a condemned man's constitutional rights makes it unlawful to carry out a sentence of death .. [T]his fails to give sufficient recognition to the public interest in having a lawful sentence of the court carried out. [Their Lordships] would also be slow to accept the proposition that a breach of a man's constitutional rights must attract some remedy, and that if the only remedy which is available is commutation of the sentence then it must be adopted even if it is inappropriate and disproportionate"(emphasis added).

7. Reference is made in the present Advisory Opinion to the case of Daniel Monguya Mbenge, which the United Nations Committee on Human Rights examined in 1983. There, in finding that the author of the communication had been sentenced to death in breach of Article 6.2 of the Covenant, the Committee held that it was "the failure of the State party to respect the relevant requirements of article 14(3)" that led to "the conclusion that the death sentences pronounced against the author of the communication were imposed contrary to the provisions of the Covenant and therefore in violation of article 6(2)." (Emphasis added)

8. In similar vein, this Court has noted, in its Advisory Opinion OC-9/87 on Judicial Guarantees in States of Emergency, that

"28. Article 8 [of the American Convention] recognises the concept of 'due process of law', which includes the prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination". (Emphasis added)

9. In my view, the concepts of relevance, proportionality, adequacy, and, above all, necessity, are indispensable tools in assessing the role which a given right plays in the totality of the structure of due process. On this analysis it is difficult to see how a provision such as that of Article 36.1.(b) of the Convention – which is essentially a right on the part of an alien accused in

a criminal matter to be informed of a right to take advantage of the possible availability of consular assistance - can be elevated to the status of a fundamental guarantee, universally exigible as a conditio sine qua non for meeting the internationally accepted standards of due process. This is not to gainsay its undoubted utility and importance in the relatively specialised context of the protection of the rights of aliens, nor to relieve States parties to the Convention from their duty to comply with their treaty obligation.

10. For these reasons, although I am in full support of the analysis and conclusions of the Court in relation to paragraphs 1-6 inclusive and paragraph 8 of this Advisory Opinion, I must respectfully and regretfully dissent from the conclusion at paragraph 7 as well as from the considerations put forward in support of it.

Oliver Jackman
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 of the Inter-American Court of Human Rights, which, in my understanding, represents an important contribution of the International Law of Human Rights to the evolution of a specific aspect of contemporary international law, namely, that pertaining to the right of foreigners under detention to information on consular assistance in the framework of the guarantees of the due process of law. The present Advisory Opinion faithfully reflects the impact of the International Law of Human Rights on the precept of Article 36(1)(b) of the Vienna Convention on Consular Relations of 1963. In fact, at this end of the century, one can no longer pretend to dissociate the above-mentioned right to information on consular assistance from the corpus juris of human rights. Given the transcendental importance of this matter, I feel obliged to present, as the juridical foundation of my position on the issue, the thoughts which I purport to develop in this Concurring Opinion, particularly in relation to the resolutory points ns. 1 and 2 of the present Advisory Opinion.

I. Time and Law Revisited: The Evolution of Law in Face of New Needs of Protection.

2. The central issue of the present Advisory Opinion leads to the consideration of a question which appears truly challenging to me, namely, that of the relation between time and law. The time factor is, in fact, inherent to the legal science itself, besides being a key element in the birth and exercise of rights (as exemplified by the individual right to information on consular assistance, as raised in the present advisory proceeding). Already in my Individual Opinion in the Blake versus Guatemala case (merits, judgment of 24.01.1998) before this Court, in tackling precisely this question, I allowed myself to indicate the incidence of the temporal dimension in Law in general, as well as in various chapters of Public International Law in particular (paragraph 4, and note 2), in addition to the International Law of Human Rights (ibid., note 5).

The theme reassumes capital importance in the present Advisory Opinion, in the framework of which I proceed, therefore, to retake its examination.

3. All the international case-law pertaining to human rights has developed, in a converging way, throughout the last decades, a dynamic or evolutive interpretation of the treaties of protection of the rights of the human being [FN99]. This would not have been possible if contemporary legal science had not liberated itself from the constraints of legal positivism. This latter, in its hermetical outlook, revealed itself indifferent to other areas of human knowledge, and, in a certain way, also to the existencial time, of human beings: to legal positivism, imprisonned in its own formalisms and indifferent to the search for the realization of the Law (Derecho), time reduced itself to an external factor (the dead-lines (plazos), with their juridical consequences) in the framework of which one had to apply the law (la ley), positive law.

[FN99] Such evolutive interpretation does not conflict in any way with the generally accepted methods of interpretation of treaties; cf., on this point, e.g., Max Sorensen, Do the Rights Set Forth in the European Convention on Human Rights in 1950 Have the Same Significance in 1975?, Strasbourg, Council of Europe (doc. H/Coll.(75)2), 1975, p. 4 (mimeographed, internal circulation).

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4. The positivist-voluntarist trend, with its obsession with the autonomy of the will of the States, in seeking to crystallize the norms emanating therefrom in a given historical moment, came to the extreme of conceiving (positive) law independently of time: hence its manifest incapacity to accompany the constant changes of the social structures (at domestic as well as international levels), for not having foreseen the new factual assumptions, being thereby unable to respond to them; hence its incapacity to explain the historical formation of customary rules of international law [FN100]. The very emergence and consolidation of the corpus juris of the International Law of Human Rights are due to the reaction of the universal juridical conscience to the recurrent abuses committed against human beings, often warranted by positive law: with that, the Law (el Derecho) came to the encounter of the human being, the ultimate addressee of its norms of protection.

[FN100] A. Verdross, Derecho Internacional Público, 5th. ed. (transl. from the 4th. German ed. of Völkerrecht), Madrid, Aguilar, 1969 (1st. reprint), p. 58; M. Chemillier-Gendreau, "Le rôle du temps dans la formation du droit international", Droit international - III (ed. P. Weil), Paris, Pédone, 1987, pp. 25-28; E. Jiménez de Aréchaga, El Derecho Internacional Contemporáneo, Madrid, Tecnos, 1980, pp. 15-16 and 37; A.A. Cançado Trindade, "The Voluntarist Conception of International Law: A Re-assessment", 59 Revue de droit international de sciences diplomatiques et politiques - Genève (1981) p. 225. And, for the criticism that the evolution of legal science itself, contrary to what legal positivism sustained, cannot be explained by means of an idea adopted in a "purely aprioristic" manner, cf. Roberto Ago, Scienza Giuridica e Diritto Internazionale, Milano, Giuffrè, 1950, pp. 29-30.

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5. In the framework of this new corpus juris, we cannot remain indifferent to the contribution of other areas of human knowledge, and nor to the existential time; the juridical solutions cannot fail to take into account the time of human beings [FN101]. The endeavours undertaken in this examination seem to recommend, in face of this fundamental element conditioning of human existence, a posture entirely distinct from the indifference and self-sufficiency, if not arrogance, of legal positivism. The right to information on consular assistance, to refer to one example, cannot nowadays be appreciated in the framework of exclusively inter-State relations. In fact, contemporary legal science came to admit, as it could not have been otherwise, that the contents and effectiveness of juridical norms accompany the evolution of time, not being independent of this latter.

[FN101] Time has been examined in different areas of knowledge (the sciences, philosophy, sociology and social sciences in general, besides law); cf. F. Greenaway (ed.), Time and the Sciences, Paris, UNESCO, 1979, 1-173; S.W. Hawking, A Brief History of Time, London, Bantam Press, 1988, pp. 1-182; H. Aguessy et alii, Time and the Philosophies, Paris, UNESCO, 1977, pp. 13-256; P. Ricoeur et alii, Las Culturas y el Tiempo, Salamanca/Paris, Ed. Sígueme/UNESCO, 1979, pp. 11-281.

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6. At the level of domestic law, one even spoke, already in the middle of this century, of a true revolt of Law against the codes [FN102] (positive law): - "À l'insurrection des faits contre le Code, au défaut d'harmonie entre le droit positif et les besoins économiques et sociaux, a succédé la révolte du Droit contre le Code, c'est-à-dire l'antinomie entre le droit actuel et l'esprit du Code civil. (...) Des concepts que l'on considère comme des formules hiératiques sont un grand obstacle à la liberté de l'esprit et finissent par devenir des sortes de prismes au travers desquels l'on ne voit plus qu'une réalité déformée" [FN103]. In fact, the impact of the dimension of human rights was felt in institutions of private law.

[FN102] In a lucid monograph published in 1945, Gaston Morin utilized this expression in relation to the French Civil Code, arguing that this latter could no longer keep on being applied mechanically, with an apparent mental laziness, ignoring the dynamics of social transformations, and in particular the emergence and assertion of the rights of the human person. G. Morin, La Révolte du Droit contre le Code - La révision nécessaire des concepts juridiques, Paris, Libr. Rec. Sirey, 1945, pp. 109-115; in sustaining the need for a constant revision of the legal concepts themselves (in the matter, e.g., of contracts, responsibility, and propriety), he added that there was no way to make abstraction of value judgments (ibid., p. 7).

[FN103] Ibid., pp. 2 and 6. [Translation: "To the insurrection of the facts against the Code, to the lack of harmony beween positive law and economic and social needs, the revolt of Law against the Code has succeeded, that is, the antinomy between current law and the spirit of the Civil Code. (...) The concepts that one considers as hieratic formulas are a great obstacle to the freedom of the spirit and end up by becoming a sort of prisms through which one does not see more than a deformed reality".]

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7. This is illustrated, e.g., by the well-known decision of the European Court of Human Rights in the Marckx versus Belgium case (1979), in which, in determining the incompatibility of the Belgian legislation pertaining to natural children with Article 8 of the European Convention on Human Rights, it pondered that, even if at the time of the drafting of the Convention the distinction between "natural" family and "legitimate" family was considered lawful and normal in many European countries, the Convention should, nevertheless, be interpreted in the light of present-day conditions, taking into account the evolution in the last decades of the domestic law of the great majority of the member States of the Council of Europe, towards the equality between "natural" and "legitimate" children [FN104].

[FN104] Other illustrations are found, for example, in the judgments of the European Court in the cases of Airey versus Ireland (1979) and Dudgeon versus United Kingdom (1981). The Airey case is always recalled for the projection of classic individual rights into the ambit of economic and social rights; the Court pondered that, in spite of the Convention having originally contemplated esentially civil and political rights, one could no longer fail to admit that some of those rights had projections into the economic and social domain. And, in the Dudgeon case, in determining the incompatibility of national legislation on homosexuality with Article 8 of the European Convention, the Court pondered that, with the evolution of the times, in the great majority of the member States of the Council of Europe one no longer believed that certain homosexual practices (between consenting adults) required per se penal repression. Cf. F. Ost, "Les directives d'interprétation adoptées par la Cour Européenne des Droits de l'Homme - L'esprit plutôt que la lettre?", in F. Ost and M. van de Kerchove, Entre la lettre et l'esprit - Les directives d'interprétation en Droit, Bruxelles, Bruylant, 1989, pp. 295-300; V. Berger, Jurisprudence de la Cour européenne des droits de l'homme, 2nd. ed., Paris, Sirey, 1989, pp. 105, 110 and 145.

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8. At the level of procedural law the same phenomenon occurred, as acknowledged by this Court in the present Advisory Opinion, in pointing out the evolution in time of the concept itself of due process of law (paragraph 117). The contribution of the International Law of Human Rights is here undeniable, as disclosed by the rich case-law of the European Court and Commission of Human Rights under Article 6(1) of the European Convention of Human Rights [FN105].

[FN105] Cf., e.g., Les nouveaux développements du procès équitable au sens de la Convention Européenne des Droits de l'Homme (Actes du Colloque de 1996 en la Grande Chambre de la Cour de Cassation), Bruxelles, Bruylant, 1996, pp. 5-197.

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9. At the level of international law - in which the distinct aspects of intertemporal law came to be studied [FN106] - likewise, the relationship between the contents and the effectiveness of its norms and the social transformations which took place in the new times became evident [FN107]. A locus classicus in this respect lies in the well-known obiter dictum of the International Court of Justice, in its Advisory Opinion on Namibia of 1971, in which it affirmed

that the system of mandates (territories under mandate), and in particular the concepts incorporated in Article 22 of the Covenant of the League of Nations, "were not static, but were by definition evolutionary". And it added that its interpretation of the matter could not fail to take into account the transformations occurred along the following fifty years, and the considerable evolution of the corpus juris gentium in time: "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" [FN108].

[FN106] To evoke the classic formulation of arbiter Max Huber in the Palmas Island case (United States versus The Netherlands, 1928), in: U.N., Reports of International Arbitral Awards, vol. 2, p. 845: "A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time such a dispute in regard to it arises or falls to be settled". For a study of the matter, cf.: Institut de Droit International, "[Résolution I:] Le problème intertemporel en Droit international public", 56 Annuaire de l'Institut de Droit International (Session de Wiesbaden, 1975) pp. 536-541. And cf., inter alia, P. Tavernier, Recherches sur l'application dans le temps des actes et des règles en Droit international public, Paris, LGDJ, 1970, pp. 9-311; S. Rosenne, The Time Factor in the Jurisdiction of the International Court of Justice, Leyden, Sijthoff, 1960, pp. 11-75; G.E. do Nascimento e Silva, "Le facteur temps et les traités", 154 Recueil des Cours de l'Académie de Droit International de La Haye (1977) pp. 221-297; M. Sorensen, "Le problème inter-temporel dans l'application de la Convention Européenne des Droits de l'Homme", in Mélanges offerts à Polys Modinos, Paris, Pédone, 1968, pp. 304-319.

[FN107] or example, the whole historical process of decolonization, brought about by the emergence and consolidation of the right of self-determination of peoples, was decisively fostered by the evolution itself to this effect of contemporary international law.

[FN108] International Court of Justice, Advisory Opinion on Namibia, ICJ Reports (1971) pp. 31-32, par. 53.

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10. In the same sense the case-law of the two international tribunals of human rights in operation to date has oriented itself, as it could not have been otherwise, since human rights treaties are, in fact, living instruments, which accompany the evolution of times and of the social milieu in which the protected rights are exercised. In its tenth Advisory Opinion (of 1989) on the Interpretation of the American Declaration of the Rights and Duties of Man, the Inter-American Court pointed out, however briefly, that the value and meaning of that American Declaration should be examined not in the light of what one used to think in 1948, when it was adopted, but rather nowadays, in face of what is today the inter-American system of protection, bearing in mind "the evolution it has undergone since the adoption of the Declaration" [FN109]. The same evolutive interpretation is pursued, in a more elaborate way, in the present Advisory Opinion of the Court, taking into consideration la crystallization of the right to information on consular assistance in time, and its link with human rights.

[FN109] Inter-American Court of Human Rights, Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man, of 14.07.1989, Series A, n. 10, p. 45, par. 37.

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11. The European Court of Human Rights, in its turn, in the Tyrer versus United Kingdom case (1978), in determining the unlawfulness of corporal punishments applied to adolescents in the Isle of Man, affirmed that the European Convention on Human Rights "is a living instrument" to be "interpreted in the light of present-day conditions" of living. In the concrete case, "the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field" [FN110]. More recently, the European Court has made it clear that its evolutive interpretation is not limited to the substantive norms of the Convention, but is extended likewise to operative provisions [FN111]: in the Loizidou versus Turkey case (1995), it again pointed out that "the Convention is a living instrument which must be interpreted in the light of present-day conditions", and that none of its clauses can be interpreted solely in the light of what could have been the intentions of its draftsmen "more than forty years ago", it being necessary to bear in mind the evolution of the application of the Convention along the years [FN112].

[FN110] European Court of Human Rights, Tyrer versus United Kingdom case, Judgment of 25.04.1978, Series A, n. 26, pp. 15-16, par. 31.

[FN111] Such as the optional clauses of Articles 25 and 46 of the Convention, prior to the entry into force, on 01.11.1998, of Protocol XI to the European Convention.

[FN112] European Court of Human Rights, Case of Loizidou versus Turkey (Preliminary Objections), Strasbourg, C.E., Judgment of 23.03.1995, p. 23, par. 71.

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12. The profound transformations undergone by international law, in the last five decades, under the impact of the recognition of universal human rights, are widely known and acknowledged. The old monopoly of the State of the condition of being subject of rights is no longer sustainable, nor are the excesses of a degenerated legal positivism, which excluded from the international legal order the final addressee of juridical norms: the human being. The need is acknowledged nowadays to restore to this latter the central position - as subject of domestic as well as international law - from where he was unduly displaced, with disastrous consequences, evidenced in the successive atrocities committed against him in the last decades. All this occurred with the indulgence of legal positivism, in its typical subservience to State authoritarianism.

13. The dynamics of contemporary international life has cared to disauthorize the traditional understanding that the international relations are governed by rules derived entirely from the free will of the States themselves. As this Court well indicates, Article 36 of the Vienna Convention on Consular Relations, as interpreted in the present Advisory Opinion, constitutes "a notable advance in respect of the traditional conceptions of International Law on the matter" (par. 82). In fact, the contemporary practice itself of States and international organizations has for years

withdrawn support to the idea, proper of an already distant past, that the formation of the norms of international law would emanate only from the free will of each State [FN113].

[FN113] Cf., e.g., C. Tomuschat, "Obligations Arising for States Without or Against Their Will", 241 Recueil des Cours de l'Académie de Droit International de La Haye (1993) pp. 209-369; S. Rosenne, Practice and Methods of International Law, London/N.Y., Oceana Publs., 1984, pp. 19-20; H. Mosler, "The International Society as a Legal Community", 140 Recueil des Cours de l'Académie de Droit International de La Haye (1974) pp. 35-36.

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14. With the dismystification of the postulates of voluntarist positivism, it became evident that one can only find an answer to the problem of the foundations and the validity of general international law in the universal juridical conscience, starting with the assertion of the idea of an objetive justice. As a manifestation of this latter, the rights of the human being have been affirmed, emanating directly from international law, and not subjected, thereby, to the vicissitudes of domestic law.

15. It is in the context of the evolution of the Law in time, in function of new needs of protection of the human being, that, in my understanding, ought to be appreciated the insertion of the right to information on consular notification (under Article 36(1)(b) of the above-mentioned 1963 Vienna Convention) into the conceptual universe of human rights. Such provision, despite having preceeded in time the general treaties of protection - as the two Covenants on Human Rights of the United Nations (of 1966) and the American Convention on Human Rights (of 1969), - nowadays can no longer be dissociated from the international norms on human rights concerning the guarantees of the due process of law. The evolution of the international norms of protection has been, in its turn, fostered by new and constant valuations which emerge and flourish from the basis of human society, and which are naturally reflected in the process of the evolutive interpretation of human rights treaties.

II. Venire Contra Factum Proprium Non Valet.

16. In spite of the fact that the Vienna Convention on Consular Relations of 1963 was celebrated three years before the adoption of the two Covenants on Human Rights (Civil and Political Rights, and Economic, Social and Cultural Rights) of the United Nations, its travaux préparatoires, as this Court recalls in the present Advisory Opinion, disclose the attention dispensed to the central position occupied by the individual in the exercise of his free discretion, in the elaboration and adoption of its Article 36 (pars. 90-91). In the present advisory proceeding, all the intervening States, with one sole exception (the United States), sustained effectively the relationship between the right to information on consular assistance and human rights.

17. In this sense, the Delegations of the seven Latin-American States which intervened in the memorable public hearing before the Inter-American Court on 12 and 13 June 1998 were in fact unanimous in relating the provision of the 1963 Vienna Convention on Consular Relations (Article 36(1)(b)) on consular notification directly to human rights, in particular to the judicial guarantees (arguments of Mexico, Costa Rica, El Salvador, Guatemala, Honduras, Paraguay)

[FN114] and including to the right to life itself (arguments of Mexico, Paraguay, Dominican Republic) [FN115]. The only Delegation in disagreement, that of the United States, emphasized the inter-State character of the above-mentioned Vienna Convention, arguing that this latter did not provide for human rights, and that consular notification, in its view, was not an individual human right and was not related to the due process of law [FN116].

[FN114] Cf. Inter-American Court of Human Rights (IACtHR), Transcripción de la Audiencia Pública Celebrada en la Sede de la Corte el 12 y 13 de Junio de 1998 sobre la Solicitud de Opinión Consultiva OC-16 (mimeographed), pp. 19-21 and 23 (Mexico); 34, 36 and 41 (Costa Rica); 44 and 46-47 (El Salvador); 51-53 and 57 (Guatemala); 58-59 (Honduras); and 62-63 and 65 (Paraguay).
[FN115] IACtHR, Transcripción de la Audiencia Pública..., op. cit. supra n. (16), pp. 15 (Mexico); 63 and 65 (Paraguay); and 68 (Dominican Republic).
[FN116] IACtHR, Transcripción de la Audiencia Pública..., op. cit. supra n. (16), pp. 72-73, 75-77 and 81-82 (United States).

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18. In arguing in this way, the United States assumed, however, a position with an orientation manifestly distinct from that which they sustained themselves in the case - filed against Iran - of the Hostages (United States Diplomatic and Consular Staff) in Tehran (1979-1980) before the International Court of Justice (ICJ). In fact, in their oral arguments before the Hague Court in that case, the United States invoked, at a given moment, the provision of the 1963 Vienna Convention on Consular Relations which requires of the receiving State the permission for the consular authorities of the sending State "to communicate with and have access to their nationals" [FN117].

[FN117] International Court of Justice (ICJ), Hostages (U.S. Diplomatic and Consular Staff) in Tehran case, ICJ Reports (1979); Pleadings, Oral Arguments, Documents; Argument of Mr. Civiletti (counsel for the United States), p. 23. Further on, the United States argued, significantly, that the treatment dispensed by the Iranian government to the North-American civil servants captured and kept as hostages in Tehran fell "far below the minimum standard of treatment which is due to all aliens, particularly as viewed in the light of fundamental standards of human rights. (...) The right to be free from arbitrary arrest and detention and interrogation, and the right to be treated in a humane and dignified fashion, are surely rights guaranteed to these individuals by fundamental concepts of international law. Indeed, nothing less is required by the Universal Declaration of Human Rights"; cit. in ibid., Argument of Mr. Owen (agent for the United States), pp. 302-303. - In the written phase of the proceedings the United States, in their memorial/mémoire, pointed out that "the right of consular officers in peacetime to communicate freely with co-nationals has been described as implicit in the consular office, even in the absence of treaties. (...) Such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations". Memorial/Mémoire of the Government of the U.S.A., cit. in ibid., p. 174.

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19. In the written phase of the proceedings, the United States, in their memorial/mémoire, after pointing out that, in the circumstances of the cas d'espèce, the North-American nationals had been held incommunicado "in the grossest violation of consular norms and accepted standards of human rights", added, with all emphasis, that Article 36 of the 1963 Vienna Convention on Consular Relations "establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others" [FN118].

[FN118] Ibid., p. 174 (emphasis added).

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20. This line of argument of the United States before the ICJ could not be clearer, adding itself to that of the Latin-American States intervening in the present advisory proceeding before the Inter-American Court (supra), contributing all of them, jointly, to insert Article 36 of the above-mentioned 1963 Vienna Convention ineluctably into the conceptual universe of human rights. Having sustained this thesis before the ICJ, in my understanding the United States cannot pretend to prevail themselves, in the present advisory proceeding before the Inter-American Court, of a position oriented in the opposite sense on the same point (as warned by the international case-law [FN119]): allegans contraria non audiendus est.

[FN119] Cf., e.g., Ch. de Visscher, De l'équité dans le règlement arbitral ou judiciaire des litiges de Droit international public, Paris, Pédone, 1972, pp. 49-52.

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21. This basic principle of procedural law is valid both for the countries of droit civil, like the Latin-American (by virtue of the doctrine, of classic Roman law, venire contra factum proprium non valet, developed on the basis of considerations of equity, aequitas) as well as for the countries of common law, like the United States (by reason of the institution of estoppel, of Anglo-Saxon juridical tradition). And, in any way, it could not be otherwise, so as to preserve the confidence and the principle of good faith which ought always to have primacy in the international process.

22. In order to safeguard the credibility of the work in the domain of the international protection of human rights one ought to guard oneself against the double standards: the real commitment of a country to human rights is measured, not so much by its capacity to prepare unilaterally, sponte sua and apart from the international instruments of protection, governmental reports on the situation of human rights in other countries, but rather by its initiative and determination to become a Party to the human rights treaties, thus assuming the conventional obligations of protection enshrined therein. In the present domain of protection, the same criteria, principles and norms ought to be valid for all States, irrespective of their federal or unitary structure, or any other considerations, as well as to operate to the benefit of all human beings, irrespective of their nationality or any other circumstances.

III. The Crystallization of the Subjective Individual Right to Information on Consular Assistance.

23. The action of protection, in the ambit of the International Law of Human Rights, does not seek to govern the relations between equals, but rather to protect those ostensibly weaker and more vulnerable. Such action of protection assumes growing importance in in a world torn by distinctions betweens nationals and foreigners (including de jure discriminations, notably vis-à-vis migrants), in a "globalized" world in which the frontiers open themselves to capitals, inversions and services but not necessarily to the human beings. Foreigners under detention, in a social and juridical milieu and in an idiom different from their own and that they do not know sufficiently, experiment often a condition of particular vulnerability, which the right to information on consular assistance, inserted into the conceptual universe of human rights, seeks to remedy.

24. The Latin-American countries, with their recognized contribution to the theory and practice of international law, and nowadays all States Parties to the American Convention on Human Rights, have acted in support of the prevalence of this understanding, as exemplified by the arguments in this sense of the intervening States in the present advisory proceeding (cf. supra). The United States have also given their contribution to the linking of aspects of diplomatic and consular relations with human rights, as exemplified by their arguments in the international contentieux of the Hostages in Tehran (supra). Those arguments, added to the zeal and determination revealed whenever is the case of defending the interests of their own nationals abroad [FN120], suggest that the arguments presented by the United States in the present advisory proceeding constitute an isolated fact, without further consequences.

[FN120] Cf. [Department of State/Office of American Citizens Services,] Assistance to U.S. Citizens Arrested Abroad (Summary of Services Provided to U.S. Citizens Arrested Abroad), pp. 1-3.

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25. It may be recalled that, in the already mentioned case of the Hostages (United States Diplomatic and Consular Staff) in Tehran (United States versus Iran), in the provisional measures of protection ordered on 15.12.1979 the ICJ pondered that the conduction without obstacles of consular relations, established since ancient times "between peoples", is no less important in the context of contemporary international law, "in promoting the development of friendly relations among nations, and ensuring protection and assistance for aliens resident in the territories of other States" (par. 40) [FN121]. This being so, the Court added, no State can fail to recognize "the imperative obligations" codified in the Vienna Conventions on Diplomatic Relations (of 1961) and on Consular Relations (of 1963) (par. 41) [FN122].

[FN121] ICJ Reports (1979) pp. 19-20 (emphasis added).

[FN122] Ibid., p. 20. - The language utilized by the Hague Court was quite clear, in no way suggesting a vision of the above-mentioned Vienna Conventions of 1961 and 1963 under a contractualist outlook at the level of exclusively inter-State relations; on the contrary, it warned

that the norms of the two Conventions have incidence on the relations between peoples and nations, as well as on the protection and assistance to foreigners in the territory of other States. By then already (end of the seventies), there was no way not to relate those norms to human rights.

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26. Five months later, in its judgment of 24.05.1980 in the same case of the Hostages in Tehran (merits), the ICJ, in referring again to the provisions of the Vienna Conventions on Diplomatic Relations (of 1961) and on Consular Relations (of 1963), pointed out: first, their universal character (par. 45); second, their obligations, not merely contractual, but rather imposed by general international law itself (par. 62); and third, their imperative character (par. 88) and their capital importance in the "interdependent world" of today (pars. 91-92) [FN123]. The Court came even to invoke expressly, in relation to such provisions, the contents of the Universal Declaration of Human Rights of 1948 (par. 91) [FN124].

[FN123] ICJ Reports (1980) pp. 24, 31 and 41-43.

[FN124] Ibid., p. 42. - In his Separate Opinion, Judge M. Lachs referred to the provisions of the above-mentioned Vienna Conventions of 1961 and 1963 as "the common property of the international community", having been "confirmed in the interest of all" (ibid., p. 48).

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27. The insertion of the matter under examination into the domain of the international protection of human rights thus counts on judicial recognition, there being no longer any ground at all for any doubts to subsist as to an opinio juris to this effect. This latter is so clear and forceful that there would be no way even to try to resort to the nebulous figure of the so-called "persistent objector". More than a decade ago I referred to that unconvincing formulation, which has never found the support that it sought in vain in the international case-law, as a new manifestation of the old voluntarist conception of international law, entirely unacceptable in the present stage of evolution of the international community; the international case-law, above all as from the judgment of the International Court of Justice in the North Sea Continental Shelf cases (1969), has come to confirm in an unequivocal way that the subjective element of international custom is the communis opinio juris (of at least the general majority of the States), and in no way the voluntas of each State individually [FN125].

[FN125] A.A. Cançado Trindade, "Contemporary International Law-Making: Customary International Law and the Systematization of the Practice of States", Thesaurus Acroasium - Sources of International Law (XVI Session, 1988), Thessaloniki (Greece), Institute of Public International Law and International Relations, 1992, pp. 77-79.

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28. In the interdependent world of our days, the relationship between the right to information on consular consular assistance and human rights imposes itself by application of the principle of non-discrimination, of great potential (not sufficiently developed to date) and of capital importance in the protection of human rights, extensive to this aspect of consular relations. Such

right, lying at the confluence between such relations and human rights, contributes to extend the protecting shield of Law to those who find themselves in a disadvantaged situation - the foreigners under detention - and who, thereby, stand in greater need of such protection, above all in social circles constantly threatened or frightened by police violence.

29. In issuing today the sixteenth Advisory Opinion of its history, the Inter-American Court, in the exercise of its advisory function endowed with a wide jurisdictional basis, has corresponded to the high responsibilities which the American Convention confers upon it [FN126]. From this Advisory Opinion - and in particular from its resolutory points ns. 1 and 2 - it clearly results that it is no longer possible to consider the right to information on consular assistance (under Article 36(1)(b) of the 1963 Vienna Convention on Consular Relations) without directly linking it to the corpus juris of the International Law of Human Rights.

[FN126] The Inter-American Court, as an international tribunal of human rights, finds itself particularly entitled to pronounce upon the consultation formulated to it, of distinct contents from the two contentious cases recently submitted to the ICJ on aspects of the application of the 1963 Vienna Convention on Consular Relations. It may be observed, in this respect, that, in the recent LaGrand case (Germany versus United States), in the provisional measures of protection ordered by the International Court of Justice on 03.03.1999, one of the Judges, in his Declaration, saw it fit to recall that, in its contentious function as the main judicial organ of the United Nations, the International Court of Justice limits itself to settling international disputes pertaining to the rights and duties of States (also in so far as provisional measures of protection are concerned) - (cf. Declaration of Judge S. Oda, LaGrand case (Germany versus United States), ICJ Reports (1999) pp. 18-20, pars. 2-3 and 5-6; and cf., to the same effect, Declaration of Judge S. Oda, Breard case (Paraguay versus United States), ICJ Reports (1998) pp. 260-262, pars. 2-3 and 5-7).

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30. In the framework of this latter, the international juridical personality of the human being, emancipated from the domination of the State, - as foreseen by the so-called founding fathers of international law (the droit des gens), - is in our days a reality. The Westphalian model of the international order appears exhausted and overcome. The access of the individual to justice at international level represents a true juridical revolution, perhaps the most important legacy which we will be taking into the next century. Hence the capital importance, in this historical conquest, of the right of individual petition combined with the optional clause of the compulsory jurisdiction of the Inter-American and European Courts [FN127] of Human Rights, which, in my Concurring Opinion in the case of Castillo Petruzzi versus Peru (preliminary objections, judgment of 04.09.1998) before this Court, I allowed myself to name as true fundamental clauses (cláusulas pétreas) of the international protection of human rights (paragraph 36).

[FN127] As to this latter, prior to Protocol XI to the European Convention on Human Rights, which entered into force on 01.11.1998.

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31. The "normative" Conventions, of codification of international law, such as the 1963 Vienna Convention on Consular Relations, acquire a life of their own which certainly independs from the individual will of each one of the Parties States. Such Conventions represent much more than the sum of the individual wills of the States Parties, rendering also possible the progressive development of international law. The adoption of such Conventions came to demonstrate that their functions much transcend those associated with the juridical conception of "contracts", which exerted influence in the origin and historical development of treaties (above all the bilateral ones). A great challenge to contemporary legal science lies precisely in liberating itself from a past influenced by analogies with private law (and in particular with the law of contracts) [FN128], as nothing is more antithetical to the role reserved to the Conventions of codification in contemporary international law than the traditional contractualist vision of treaties [FN129].

[FN128] Shabtai Rosenne, Developments in the Law of Treaties 1945-1986, Cambridge, Cambridge University Press, 1989, p. 187.

[FN129] In the first decades of this century, recourse to analogies with private law was related to the insufficient or imperfect development of international law (Hersch Lauterpacht, Private Law Sources and Analogies of International Law, London, Longmans/Archon, 1927 (reprint 1970), pp. 156 and 299). The evolution of international law in the last decades recommends, nowadays, a less indulgent posture on the matter.

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32. The Conventions of codification of international law, such as the above-mentioned Vienna Convention of 1963, once adopted, instead of "freezing" general international law, in reality stimulate its greater development; in other words, general international law not only survives such Conventions, but is revitalized by them [FN130]. Here, once again, the time factor makes its presence, as an instrumental for the formation and crystallization of juridical norms - both conventional and customary - dictated by the social needs [FN131], and in particular those of protection of the human being.

[FN130] H.W.A. Thirlway, International Customary Law and Codification, Leiden, Sijthoff, 1972, p. 146; E. McWhinney, Les Nations Unies et la Formation du Droit, Paris, Pédone/UNESCO, 1986, p. 53; A. Cassese and J.H.H. Weiler (eds.), Change and Stability in International Law-Making, Berlin, W. de Gruyter, 1988, pp. 3-4 (intervention by E. Jiménez de Aréchaga).

[FN131] Cf. ICJ, Dissenting Opinion of Judge K. Tanaka, North Sea Continental Shelf cases, Judgment of 20.02.1969, ICJ Reports (1969) pp. 178-179.

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33. The progressive development of international law is likewise accomplished by means of the application of human rights treaties: as I have pointed out in my already mentioned Concurring Opinion in the Castillo Petruzzi case (1998 - supra), the fact that the International Law of Human Rights, overcoming dogmas of the past (particularly those of legal positivism of sad memory), goes well beyond Public International Law in the matter of protection, in

comprising the treatment dispensed by the States to all human beings under their respective jurisdictions, in no way affects nor threatens the unity of Public International Law; quite on the contrary, it contributes to assert and develop the aptitude of this latter to secure compliance with the conventional obligations of protection contracted by the States vis-à-vis all human beings - irrespective of their nationality or of any other condition - under their jurisdictions.

34. We are, thus, before a phenomenon much deeper than the sole recourse per se to rules and methods of interpretation of treaties. The intermingling between Public International Law and the International Law of Human Rights gives testimony of the recognition of the centrality, in this new corpus juris, of the universal human rights, what corresponds to a new ethos of our times. In the civitas maxima gentium of our days, it has become indispensable to protect, against discriminatory treatment, foreigners under detention, thus linking the right to information on consular assistance with the guarantees of the due process of law set forth in the instruments of international protection of human rights.

35. At this end of century, we have the privilege to witness the process of humanization of international law, which today encompasses also this aspect of consular relations. In the confluence of these latter with human rights, the subjective individual right [FN132] to information on consular assistance, of which are titulaires all human beings who are in the need to exercise it, has crystallized: such individual right, inserted into the conceptual universe of human rights, is nowadays supported by conventional international law as well as by customary international law.

[FN132] Already by the middle of the century one warned as to the impossibility of evolution of Law without the subjective individual right, expression of a true "human right". J. Dabin, El Derecho Subjetivo, Madrid, Ed. Rev. de Derecho Privado, 1955, p. 64.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura Robles
Secretary

CONCURRING OPINION OF JUDGE SERGIO GARCÍA-RAMÍEZ

The position taken by the Inter-American Court of Human Rights in this Advisory Opinion (OC-16) is at the cutting edge of the doctrine of criminal procedure today. With it, the Court advances into a realm that is, indeed, a “critical zone” for the protection of human rights, where human dignity is most at peril and where –in practice, not mere juridical or political rhetoric- a democratic State of laws either proves itself or crumbles.

While affirming that Article 36 of the Vienna Convention on Consular Relations confers certain individual rights upon detained foreign nationals, the opinion also recognizes the evolutive and expansive character of human rights. The lofty declarations of the late XVIII century established

the fundamental rights, but were hardly an exhaustive catalogue of those rights. As time passed, new rights would emerge and be proclaimed that have by now have been incorporated into an extensive body of national constitutions and international instruments. Article 36 of that Convention is another addition to that list.

The history of democracy and human rights is closely interwoven with the evolution of the prosecutory system. The criminal justice process could not be a more fitting stage for the moral, juridical and political progress of mankind to unfold. The accused has evolved from being the target of the criminal justice process, to become instead the subject of a newly conceived juridical relationship, with rights and guarantees that are every citizen's shield against abuse of power. What we deem to be 'democratic criminal justice' recognizes and builds upon these rights.

The criminal justice process –understood in its broad sense, which also includes all prosecutory business that precedes courtroom prosecution of a case- has not remained unchanged over time.The elementary rights originally conferred have evolved into new rights and guarantees. What we now understand as due process of criminal law, the backbone of criminal prosecution, is the result of this long evolutionary ascent, nurtured by law, jurisprudence –including the United States' progressive jurisprudence- and doctrine. In a process that has played itself out at the national and international levels, the developments of the early years have been overtaken by new developments, and the years ahead will surely bring others. A democratic concept of criminal justice keeps due process in a state of constant evolution.

Advisory Opinion OC-16 is premised upon an express acknowledgment of this evolution, which is why it is at what might well be called procedure's "current frontier," certainly far beyond earlier boundaries. There is ample evidence of the steady, remarkable progress that procedure has made in the half century since the Second World War. The right to have defense representation at trial has been expanded and enriched with the addition of the right to have an attorney present from the time of one's arrest. The right to know the crimes with which one is charged has expanded to include the right to have an interpreter when one is unfamiliar with the language in which the proceedings are conducted. The right to testify on one's own behalf is now matched by its natural counterpart: the right not to incriminate oneself. These are but a few examples of the progress that procedural standards and practices have undergone; progress that must not be reversed.

With the new and different challenges that modern life poses, institutions that once seemed unnecessary have become indispensable. Every transformation gives rise to new rights and guarantees, which taken together constitute contemporary criminal due process. Thus, the increasing numbers of people migrating have triggered developments in various areas of the law, among them criminal procedure, with the introduction of the methods and guarantees needed when prosecuting aliens. Judicial development must take these new developments into account; concepts and solutions must be examined to see if they fit the emerging problems.

Aliens facing criminal prosecution –especially, although not exclusively, those who are incarcerated- must have the facilities that afford them true and full access to the courts. It is not sufficient to say that aliens are afforded the same rights that nationals of the State in which the

trial is being conducted enjoy. Those rights must be combined with others that enable foreign nationals to stand before the bar on an equal footing with nationals, without the severe limitations posed by their lack of familiarity with the culture, language and environment and the other very real restrictions on their chances of defending themselves. If these limitations persist, without countervailing measures that establish realistic avenues to justice, then procedural guarantees become rights 'in name only', mere normative formulas devoid of any real content. When that happens, access to justice becomes illusory.

Due process is never a finished product but rather a dynamic system constantly creating itself. The rights and guarantees that constitute due process are indispensable for due process. Where any one of them is lacking or diminished, there is no due process. In the end, the rights and guarantees of due process are essential parts of a whole, each one necessary for the whole to exist and survive. There can be no due process when a trial is not conducted before a competent, independent and impartial tribunal, or the accused is unaware of the charges against him, or has no opportunity to introduce evidence and present arguments, or where the verdict is not subject to review by a higher court.

Due process is undone when the accused does not have those rights and guarantees or is unaware of them. Their absence is not remedied by attempts to prove that even though the guarantees of a fair trial were lacking, the sentence that the court handed out at the end of the bogus criminal proceeding was fair. To contend that a supposedly fair outcome, i.e., a sentence befitting the subject's behavior, is sufficient to vindicate the procedure used to obtain that outcome merely resurrects the notion that "the end justifies the means" and is tantamount to arguing that a lawful outcome justifies unlawful procedure. Today, that adage has been turned around: "the legitimacy of the means justifies the ends"; in other words, a fair sentence that betokens the justice of a democratic society can only be achieved when lawful (procedural) means are used to accomplish it.

The criminal justice system would suffer a terrible setback if the effects of a right on a sentence had to be examined and demonstrated in the course of trial, on a case-by-case basis, to determine whether that right is necessary or relevant and whether exercise of that right is essential. This would be a dangerous relativization of the system's rights and guarantees. It is possible –and even inevitable- that all rights would eventually be subject to the same kind of scrutiny. Courtrooms would have to consider what weight to assign any number of factors when deciding sentence: defendant's lack of defense counsel, defendant's ignorance of the charges, his unlawful arrest, the use of torture, unfamiliarity with procedural checks and balances, and so on. In the end, the very concept of due process would be torn asunder, with all the consequences that would follow.

The relatively new right of an accused alien to be informed of his right to seek consular protection was not invented by this Court in Advisory Opinion OC-16. The Court merely took a right already established in the Vienna Convention on Consular Relations and made it part of that dynamic body of law that constitutes 'due process' in our time. In short, it recognized its character and affirmed its importance.

The individual right under analysis here is now one of those rules whose observance is mandatory during a criminal proceeding. The principle of penal legality, applicable to procedure and not just to the system of criminal classification and penalties, presupposes prompt enforcement of those rules.

If the right to consular information is already part of the body of rights and guarantees that constitute due process, then violation of that right has the same consequences that unlawful conduct of that kind invariably has: nullification and responsibility. This does not mean impunity, as a new procedure can be ordered and carried out properly. As this possibility is widely recognized in procedural law, no further comment is needed.

Advisory Opinion OC-16 mainly refers to the applicability or application of the death penalty, although the principles of procedure the Court invokes are not necessarily confined to death penalty cases. It is true, of course, that capital punishment, the most severe under punitive law, casts its shadow over the issue that concerns us. The consequences of a violation of the right to consular information when a human life is at stake are infinitely more serious than in other cases –even though, technically speaking, they are the same- and become irreparable consequences when that sentence is actually carried out. No precaution will ever be sufficient to ensure strict conformity with the proceeding in which a human life hangs in the balance.

With the position it took in Advisory Opinion OC-16, the Court is merely confirming many of the laws already on the books to perfect the criminal justice system. Acceptance of this position will help make criminal justice procedure what it can and must be: a civilized means to restore order and justice. Obviously, the Court's position is consistent with the evolution of criminal justice and the ideals of a democratic society that demands rigor in the methods it uses to dispense justice.

Sergio García-Ramírez
Judge

Manuel E. Ventura-Robles
Secretary