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Institution:	Inter-American Court of Human Rights
Title/Style of Cause:	Juan Pablo Olmedo Bustos, Ciro Colombara Lopez, Claudio Marquez Vidal, Alex Munoz Wilson, Matias Insunza Tagle and Hernan Aguirre Fuentes v. Chile
Alt. Title/Style of Cause:	“The Last Temptation of Christ” v. Chile
Doc. Type:	Judgment (Merits, Reparations and Costs)
Decided by:	President: Antonio A. Cancado Trindade; Vice President: Maximo Pacheco Gomez; Judges: Hernan Salgado Pesantes; Oliver Jackman; Alirio Abreu Burelli; Sergio Garcia Ramirez; Carlos Vicente de Roux Rengifo
Dated:	5 February 2001
Citation:	Olmedo Bustos v. Chile, Judgment (IACtHR, 5 Feb. 2001)
Represented by:	APPLICANT: Asociacion de Abogados por las Libertades Publicas A.G.

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In the “Last Temptation of Christ” (Olmedo Bustos et al.) case,

the Inter-American Court of Human Rights (hereinafter “the Court” or “the Inter-American Court”), pursuant to Articles 29 and 55 of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure”), delivers the following judgment in this case.

I. INTRODUCTION OF THE CASE

1. On January 15, 1999, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) submitted to the Court an application against the Republic of Chile (hereinafter “the State” or “Chile”), arising from a petition (No. 11,803), received by the Secretariat of the Commission on September 3, 1997. The Commission invoked Articles 50 and 51 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) and Articles 32 ff. of the Rules of Procedure in its application. The Commission filed this case for the Court to decide whether Chile had violated Articles 13 (Freedom of Thought and Expression) and 12 (Freedom of Conscience and Religion) of the Convention. The Commission also requested the Court to declare that, as a result of the alleged violations of the said articles, Chile had failed to fulfill Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) of the Convention.

2. According to the petition, the said violations were committed to the detriment of Chilean society and, in particular, Juan Pablo Olmedo Bustos, Ciro Colombara López, Claudio Márquez Vidal, Alex Muñoz Wilson, Matías Insunza Tagle and Hernán Aguirre Fuentes, as a result of the “judicial censorship of the cinematographic exhibition of the film “The Last Temptation of Christ”, confirmed by the Supreme Court of Chile [...] on June 17, 1997.”

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3. The Commission also requested the Court to order the State:

1. To authorize the normal cinematographic exhibition and publicity of the film "The Last Temptation of Christ."
2. To adapt its constitutional and legal norms to the standards of freedom of expression embodied in the American Convention, [in order] to eliminate prior censorship of cinematographic productions and their publicity.
3. To ensure that, in the exercise of their different powers, public bodies [,] their authorities and officials [effectively] exercise the rights and freedoms of expression, conscience and religion recognized in the American Convention and [...] abstain from imposing prior censorship on cinematographic productions.
4. To make reparations to the victims in this case for the damage suffered.
5. To pay the costs and reimburse the expenses incurred by the victims when litigating this case in both [the] domestic sphere and before the Commission and the Court, as well as reasonable fees for their representatives.

II. COMPETENCE

4. Chile has been a State Party to the American Convention since August 21, 1990, and recognized the contentious jurisdiction of the Court the same day. Therefore, the Court is competent to hear this case.

III. PROCEEDING BEFORE THE COMMISSION

5. On September 3, 1997, the Secretariat of the Commission received a petition filed by the Asociación de Abogados por las Libertades Públicas A.G., representing Juan Pablo Olmedo Bustos, Ciro Colombara López, Claudio Márquez Vidal, Alex Muñoz Wilson, Matías Insunza Tagle and Hernán Aguirre Fuentes and "the other inhabitants of the Republic of Chile." The Commission informed the State of the petition and asked it to submit the corresponding information within 90 days.

6. On January 8, 1998, the State transmitted its answer to the Commission, which forwarded it to the petitioners, who submitted their reply on February 23, 1998. On June 16, 1998, having been granted an extension, the State submitted a brief answering the reply that the petitioners had submitted to the Commission.

7. On February 27, 1998, a hearing was held at the seat of the Commission, attended by the petitioners' representatives, but not by the State, although it had been duly convened.

8. During its 99th regular session, the Commission adopted Report No. 31/98, in which it declared the case admissible. The report was forwarded to the State on May 18, 1998.

9. On June 22, 1998, the Commission made itself available to the parties in order to reach a friendly settlement in the case, pursuant to Article 48(1)(f) of the American Convention. However, it was not possible to reach this type of settlement.

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10. On September 29, 1998, during its 100th regular session, the Commission, pursuant to Article 50 of the Convention, adopted report No. 69/98. In this report, the Commission concluded:

95. That the judgment of the Court of Appeal of Santiago, Chile, of January 20, 1997, and its confirmation by the Supreme Court of Chile on June 17, 1997, annulling the administrative decision of the National Cinematographic Classification Council that approved the exhibition of the film "The Last Temptation of Christ", on November 11, 1996, when the American Convention on Human Rights, ratified by the State on August 21, 1990, had already entered into force in Chile, are incompatible with the provisions of the American Convention on Human Rights, and violate the provisions of Articles 1(1) and 2 of the Convention.
96. With regard to the persons in whose name this case has been filed, the State of Chile has failed to comply with its obligation to recognize and guarantee the rights established in Articles 12 and 13 in relation to Articles 1(1) and 2 of the American Convention on Human Rights, to which Chile is a State Party.
97. When a constitutional provision is not compatible with the Convention, pursuant to Article 2, the State Party is obliged to adopt the necessary legislative measures (of either a constitutional or ordinary nature) to make effective the rights and freedoms guaranteed by the Convention.
98. The Chilean State has not complied with the provisions of Article 2 of the American Convention, since it has not adopted the necessary legislative or other measures, in accordance with its constitutional procedures, to make effective the rights and freedoms contained in the Convention.
99. The Commission evaluates positively the democratic Government of Chile's initiatives aimed at the adoption by the competent organs of the necessary legislative or other measures, in accordance with its existing constitutional and legal procedures, to make effective the right to freedom of expression.

And the Commission recommended that Chile should:

1. Abolish the censorship in force with regard to the exhibition of the film "The Last Temptation of Christ", in violation of Article 13 of the American Convention.
2. Adopt the necessary measures to adapt its domestic legislation to the provisions of the American Convention on Human Rights, so that the right to freedom of expression and all the other rights and freedoms contained in it are fully valid and applicable in the Republic of Chile.

11. On October 15, 1998, the Commission transmitted this report to the State, and granted it a period of two months to comply with the recommendations. When the period elapsed, the State had not submitted any information on compliance with the recommendations and it did not comply with them.

IV. PROCEDURE BEFORE THE COURT

12. The application in this case was submitted to the Court on January 15, 1999. The Commission appointed Carlos Ayala Corao, Robert K. Goldman and Alvaro Tirado Mejía as its

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delegates, Manuel Velasco Clark and Verónica Gómez as its advisors, and Viviana Krsticevic, Executive Director of the Center for Justice and International Law (CEJIL) as its assistant. The Commission also advised that Juan Pablo Olmedo Bustos and Ciro Colombara López would represent themselves and that the other alleged victims, Claudio Márquez Vidal, Alex Muñoz Wilson, Matías Insunza Tagle and Hernán Aguirre Fuentes, would be represented by the Asociación de Abogados por las Libertades Públicas A.G., through Pablo Ruiz Tagle Vial, Javier Ovalle Andrade, Julián López Masle, Antonio Bascuñan Rodríguez and Macarena Sáez Torres.

13. On January 27, 1999, after the President of the Court (hereinafter "the President") had made a preliminary examination of the application, the Secretariat notified it to the State, and informed the State of the periods to answer it, file preliminary objections and appoint its representatives.

14. The same day, the Secretariat requested the Commission to forward the address of the Asociación de Abogados por las Libertades Públicas A.G., the powers of attorney certifying that Pablo Ruiz Tagle Vial, Javier Ovalle Andrade, Julián López Masle, Antonio Bascuñan Rodríguez and Macarena Sáez Torres López were the representatives of Claudio Márquez Vidal, Alex Muñoz Wilson, Matías Insunza Tagle and Hernán Aguirre Fuentes; and the addresses of Juan Pablo Olmedo Bustos and Ciro Colombara López, in order to advise them of the contents of the application, in accordance with Article 35(1)(e) of the Rules of Procedure.

15. On January 27, 1999, the Commission submitted Annex V to its application, which corresponded to the book entitled "The Last Temptation" by Nikos Kazantzakis. The following day, this annex was forwarded to the State.

16. On January 29, 1999, the Commission forwarded the addresses of the Asociación de Abogados por las Libertades Públicas A.G., and of Juan Pablo Olmedo Bustos and Ciro Colombara López. On February 2, 1999, the Secretariat notified the application to them.

17. On February 9, 1999, the Commission submitted the powers of attorney granted by Claudio Márquez Vidal, Alex Muñoz Wilson, Matías Insunza Tagle and Hernán Aguirre Fuentes to the Asociación de Abogados por las Libertades Públicas A.G.

18. On March 26, 1999, the State requested the Court to grant it an additional period of 30 days from March 27, 1999, to file preliminary objections and appoint its agent. On March 27, 1999, the Secretariat informed the State that the period for appointing its agent had expired on February 27, 1999, and that the period for filing preliminary objections expired on March 27, 1999. Lastly, it informed the State that its request would be submitted to the President for consideration, as soon as possible. On April 5, 1999, on the instructions of the President, the Secretariat informed the State that an extension had been granted until April 12, 1999.

19. On April 12, 1999, the State advised that it was "preparing a proposal intended to end the dispute and the respective litigation" and requested "an additional period of 30 days for that purpose." The same day, on the instructions of the President, the Secretariat informed the State that an extension had been granted until April 24, 1999.

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20. On April 26, 1999, Chile submitted a brief in which it expressed its willingness to "eliminate and/or modify any legislation that harms or violates freedom in its highest form" and proposed some elements for an agreement to settle the case.

21. On April 30, 1999, Jorge Reyes Zapata submitted a brief, signed by himself and by Sergio García Valdés, Vicente Torres Irarrázabal, Francisco Javier Donoso Barriga, Matías Pérez Cruz, Cristian Heerwagen Guzmán and Joel González Castillo, asking to be heard by the Inter-American Court in the capacity of amici curiae. Moreover, they requested to be heard "in all the oral and written instances that the rules of procedures allow." On June 1, 1999, on the instructions of the President, the Secretariat informed Mr. Reyes Zapata that "until the reparations stage, the possibility of participating in the proceedings before [the] Court was restricted to the parties to the respective case, that is, to the Inter-American Commission for Human Rights and the respondent State" and, consequently, it was not possible to accede to their request to be heard as collaborating third parties.

22. On May 25, 1999, the Commission submitted its observations on the State's brief of April 26, 1999.

23. On May 27, 1999, the State appointed Edmundo Vargas Carreño, Chilean Ambassador to Costa Rica, as its agent and indicated that it would receive notifications at the Chilean Embassy in Costa Rica.

24. On September 2, 1999, the State submitted its answer to the application.

25. On October 12, 1999, the Commission submitted a brief in which it stated that the answer to the application submitted by Chile was "manifestly time-barred" and requested the Court to reject it and to abstain from considering it when examining the case.

26. On October 25, 1999, the Commission submitted the final list of witnesses and expert witnesses offered in its application and requested the Court to substitute the expert witness, Lucas Sierra Iribarren, with the expert witness, Juan Agustín Figueroa Yávar. On October 26, 1999, on the instructions of the President, the Secretariat granted the State until November 1, 1999, to submit its observations on the substitution requested by the Commission.

27. On October 26, 1999, the President issued an order in which he convened the Commission and the State to a public hearing to be held at the seat of the Court at 10 a.m. on November 18, 1999, and summoned to the hearing the witnesses, Ciro Colombara López, Matías Insunza Tagle and Alex Muñoz Wilson, alleged victims in the case, and also the expert witnesses, Humberto Nogueira Alcalá, José Zalaquett Daher and Jorge Ovalle Quiroz, all of them proposed by the Commission in its application. In the same order, the parties were notified that they could present their final oral arguments on the merits of the case immediately after the evidence had been received.

28. The State did not submit observations on the substitution of the expert witness named by the Commission within the period granted to it. On November 6, 1999, the President issued an

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order convening Juan Agustín Figueroa Yávar to appear before the Court to give an expert report.

29. On November 8, 1999, Chile submitted a brief indicating that it had no objection to Juan Agustín Figueroa Yávar appearing before the Court. It also requested the Court to convene José Luis Cea Egaña and Francisco Cumplido, the persons it had proposed in its answer to the application, to give an expert report in the public hearing on the merits of the case.

30. On November 9, 1999, the Court issued an order in which it decided to reject the brief answering the application as it had been presented by the State after the statutory time limit had expired and, based on the provisions of Article 44(1) of the Rules of Procedure, to convene José Luis Cea Egaña and Francisco Cumplido to appear before the Court to give expert reports.

31. On November 15, 1999, Hermes Navarro del Valle submitted a brief to the Court, in the capacity of amicus curiae.

32. On November 11, 1999, the Commission advised that Alex Muñoz Wilson and Jorge Ovalle Quiroz, respectively witness and expert witness offered by the Commission, could not be present at the public hearing on merits convened by the Court.

33. On November 18, 1999, the Court received the statements of the witnesses and also the reports of the expert witnesses proposed by the Inter-American Commission and the expert witnesses convened by the Court itself, in accordance with Article 44(1) of the Rules of Procedure, in the public audience on merits. It also heard the final oral arguments of the Commission and the State.

There appeared before the Court:

For the Inter-American Commission of Human Rights:

Carlos Ayala Corao, delegate
Manuel Velasco Clark, advisor
Verónica Gómez, advisor
Juan Pablo Olmedo Bustos, assistant
Javier Ovalle Andrade, assistant
Viviana Krsticevic, assistant, and
Carmen Herrera, assistant

For the State of Chile:

Ambassador Edmundo Vargas Carreño, agent; and
Alejandro Salinas, advisor

As witnesses proposed by the Inter-American Commission:

Ciro Colombara López, and

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Matías Insunza Tagle.

As expert witnesses proposed by the Inter-American Commission:

José Zalaquett Daher
Humberto Nogueira Alcalá, and
Juan Agustín Figueroa Yávar.

As expert witnesses called by the Inter-American Court (Article 44(1) of the Rules of Procedure) [FN1]:

José Luis Cea Egaña, and
Francisco Cumplido.

[FN1] Article 44(1) of the Rules of Procedure of the Court states: At any stage of the case, the Court may: 1. Obtain, on its own motion, any evidence it considers helpful. In particular, it may hear as a witness, expert witness, or in any other capacity, any person whose evidence, statement or opinion it deems to be relevant.

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34. On September 18, 2000, Sergio García Valdés submitted a brief as an amicus curiae.

35. On October 6, 2000, on instructions from the President, the Secretariat notified the Commission and the State that it granted them until November 6, 2000, to submit their final written arguments on the merits of the case. On October 23, the Commission requested an extension of 20 days. On October 24, the Secretariat informed the parties that the President had granted them an extension until November 27, 2000.

36. On November 27, 2000, the Commission submitted its final written arguments.

37. On November 30, 2000, on the instructions of the Court in plenary and in accordance with Article 44 of the Rules of Procedure, the Secretariat requested the Commission to submit the documentary evidence that justified the request for payment of costs and expenses submitted in the petitionary clauses of its application, together with the corresponding arguments, by December 13, 2000, at the latest. On December 12, 2000, the Commission requested an extension of one month to submit that information. On December 13, 2000, the Secretariat informed the Commission that the President had granted it a non-extendable period until January 8, 2001.

38. On January 8, 2001, the Commission submitted the documentary evidence that, in its opinion, justified the request for the payment of expenses, submitted in the petitionary clauses of its application, together with the corresponding arguments. The following day, the Secretariat acknowledged reception and, on the instructions of the President, granted the State until January 24, 2001, to submit its observations.

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39. On January 22, 2001, the State submitted a note providing information on the procedure being followed for the draft constitutional reform that would eliminate cinematographic censorship in Chile. The same day, the Secretariat transmitted this brief to the Commission.

40. On January 25, 2001, Ambassador Guillermo Yunge Bustamante submitted a copy of the note issued by Heraldo Muñoz Valenzuela, Minister for Foreign Affairs of Chile, a.i., advising that Alejandro Salinas Rivera, Director of Human Rights of the Ministry of Foreign Affairs of Chile had been appointed agent and the Chilean Ambassador to Costa Rica, Guillermo Yunge Bustamante, deputy agent.

41. On January 31, 2001, the State submitted its observations on the Commission's brief of January 8 that year, with regard to the request for payment of expenses submitted in the petitionary clauses of the application. Although the State's brief was presented seven days after the statutory time limit, the Court admitted it, applying the criteria of reasonableness and considering that the delay did not impair the balance that the Court should ensure between the protection of human rights and legal security and procedural equity. The Secretariat informed the State of this on February 3, 2001.

V. THE EVIDENCE

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DOCUMENTARY EVIDENCE

42. With the application brief, the Commission presented copies of five documents in five annexes (supra paras. 1 and 12). [FN2]

[FN2] cf. annex I: copy of the classification document issued by the Cinematographic Classification Council on November 11, 1996, advising that the Council had reviewed the film The Last Temptation of Christ and approved it only for persons over 18 years of age; annex II: copy of the judgment of January 20, 1997, delivered by the Court of Appeal of Santiago, admitting the remedy for protection filed by Sergio García Valdés, Vicente Torres Irarrázabal, Francisco Javier Donoso Barriga, Matías Pérez Cruz, Jorge Reyes Zapata, Cristian Heerwagen Guzmán y Joel González Castillo, in the name of Jesus Christ, the Catholic Church and themselves, and annulling the administrative decision of the Cinematographic Classification Council adopted on November 11, 1996; annex III: copy of the judgment of June 17, 1997, delivered by the Supreme Court of Justice of Chile, confirming the judgment of the Court of Appeal of January 20, 1997, which was appealed; annex IV: copy of a draft constitutional reform that eliminates cinematographic censorship and substitutes it with a classification system that establishes the right to freedom of artistic creation, and copy of message No. 339-334 issued by the President of the Republic of Chile on April 14, 1997, to the Chamber of Deputies, supporting this draft reform; and annex V: a copy of the book "The Last Temptation", by Nikos Kazantzakis, published by Ediciones Lohlé-Lumen in Buenos Aires in 1996.

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43. The State did not present any evidence, because its brief answering the application was rejected by the Court as time-barred (supra paras. 24 and 30).

44. The Commission forwarded five annexes containing five documents with the brief concerning expenses requested by the Court (supra para. 38). [FN3]

[FN3] cf. Jade Hotel invoice No. 004526 dated November 19, 1999, in the name of José Zalaquett; Jade Hotel invoice No. 004540 dated November 20, 1999, in the name of the “Asoc. de Abogados por las Libe”; Jade Hotel invoice No. 004541 dated November 20, 1999, in the name of the “Asoc. de Abogados por las Libe”; Jade Hotel invoice No. 004542 dated November 20, 1999, in the name of the “Asoc. de Abogados por las Libe”; and Aeromar Agencia de Viajes Limitada invoice No. 0115909 dated November 16, 1999, in the name of the “Asoc. de Abogados por las Libertades Públicas.”

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TESTIMONIAL AND EXPERT EVIDENCE

45. In a public hearing held on November 18, 1999, the Court received the declarations of two witnesses and the reports of three expert witnesses proposed by the Inter-American Commission, and also the reports of two expert witnesses convened by the Court, by virtue of the authority indicated in Article 44(1) of the Rules of Procedure. These statements are summarized below, in the order in which they occurred.

a. Testimony of Ciro Colombara López, alleged victim in the case.

He was 28 years of age when the film “The Last Temptation of Christ” was censored. He was, and still is, a lawyer in private practice, and performed academic duties in the Catholic University of Chile. He has not seen the film “The Last Temptation of Christ”. Professionally and academically he is very interested in criminal law, freedom of expression and international human rights law. He has published a book in Chile on punitive measures relating to freedom of expression.

When the proceeding designed to prohibit the exhibition of the film was filed in Chile, through a remedy for protection filed by seven lawyers purporting to represent the Catholic Church and Jesus Christ, he decided to become involved for several reasons. He felt that it was “tremendously serious” that someone would claim to represent the Catholic Church and Jesus Christ and attempt to prohibit the exhibition of a film; an issue that was decisive for freedom of expression in Chile, because it would establish a precedent, was going to be decided; he believed that it was important that, when deciding the case, the Chilean court should give special attention to the applicable rules of international human rights law; and he believed it was particularly serious that artistic freedom of expression was violated.

The judgment that prohibited the exhibition of the film prejudiced him directly and indirectly. Although it cannot be imputed to the State, his academic career at the Catholic University ended as a result of his professional involvement in the case, because he was told that his participation

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was not compatible with the performance of his academic functions. He believes that it is extremely serious that the Chilean courts made no reference to the American Convention or to international human rights law. The fact that the film was prohibited caused him serious harm, due to his academic activities and his professional interests in freedom of expression, because he now gives classes on freedom of expression in the School of Journalism of the University of Chile and is in contact with academics in other countries. He was prejudiced as an individual, because he was prevented from having access to an artistic film with an apparently religious content. Consequently, he was deprived of the possibility of having elements of judgment, forming an opinion and having access to information that was relevant to him. Lastly, as he is not a Catholic, he considers that his freedom of conscience was violated, because a group of people of a specific religion attempted to impose their own vision about what others may see.

b. Testimony of Matías Insunza Tagle, alleged victim in the case.

When the exhibition of the film “The Last Temptation of Christ” was censored, he was in his fourth year of law studies at the University of Chile and was a student representative. He has not seen the film “The Last Temptation of Christ”, owing to the judgment of the Supreme Court of Chile.

When the proceeding designed to prohibit the exhibition of the film through a remedy of protection was filed in Chile, he had two reasons for becoming involved. One was personal, and was that, by filing a remedy of protection, a group of lawyers attempted to impede access to information. The second reason was that he had been a student representative, since the University he attended was public and tolerant, open to different ideas and expressions, and this prompted him to become part of a remedy for protection to prevent censorship of the exhibition of the film.

The judgment that prohibited the exhibition of the film caused him a moral prejudice and impaired his intellectual development, because, owing to the censorship that was imposed, he was prevented from having access to information that was fundamental in order to be able to form an opinion based on solid arguments and not on prejudices. Owing to his education and because he was a law student, he needed to have an opinion based on legal arguments and on “civic arguments.” His possibility of intellectual development in order to take part in the public discussion that was generated was restricted.

His freedom of conscience was affected by the impossibility of having access to information, and also of thinking in a specific way and establishing, maintaining or changing his own ideas and convictions on a subject. He was deprived of the possibility of growing and developing intellectually.

c. Expert report of José Zalaquett Daher, lawyer, specializing in human rights.

The protection of freedom of expression in Chile, in accordance with international law, has two stages. The first was prior to the State of Chile’s ratification of the American Convention, when the legislation had serious defects in relation to international standards. The second stage began when the American Convention was ratified, which is when the standards established in that treaty were incorporated into domestic law.

Freedom of expression may be subject to restrictions, but these must respect certain limits.

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Article 19(12) of the Constitution of Chile stipulates that the law will establish a system of censorship for the exhibition and publicity of cinematographic productions, while article 60 says that only those issues that the Constitution expressly indicates are a matter of law. If the provisions of the Convention and the rights that it regulates are considered to be of constitutional rank, the Convention would have modified article 19(12) of the Chilean Constitution, in the sense that the censorship system could only relate to classifying public entertainments in order to protect children and adolescents. Even if we believe that the Convention and the rights regulated in it only have force of law, it is to that law - the Convention - that the Constitution defers when establishing the censorship system. Also, it is a law, subsequent to Decree Law No. 679 of 1974, which establishes the obligation of the Cinematographic Censorship Council "to reject films for [numerous] reasons."

As for the role of the Chilean courts in regard to freedom of expression, there have been various decisions on cinematographic censorship. The Supreme Court's arguments establishing censorship relate to a possible conflict of rights, because, in case of doubt, when distinguishing between apparent or possible conflict between the right to privacy or honor and the right to freedom of expression, it tends to favor restriction over freedom. Furthermore, although it is of a permanent nature, the protection of honor by a precautionary measure is not considered a measure of censorship. The judgment of the Court of Appeal of Santiago of January 20, 1997, established that precautionary protection is not censorship, even when it is indefinitely extended.

Regarding the grounds for the Supreme Court of Chile's decision in this case, he believed that it used legal remedies and norms of substantive law improperly, for purposes for which they were not created. When establishing that the honor of the person of Jesus Christ has been violated by a specific artistic or philosophical interpretation and that this affects dignity and freedom of self-determination, according to a person's beliefs and values, it is confusing the issues, and this signifies that it is not regulating the possible conflict of rights appropriately. Although many people find the film shocking, others find it illustrative and instructive, and it should not be classified as blasphemy. He considers that the Supreme Court decided to suppress declarations made in the film as blasphemous or at least heretical because, in that Court's opinion, they were shocking. However, as it was unable to suppress those declarations, the Supreme Court found an indirect way of doing this, which runs counter to the rational sense of conflict of laws and juridical reasoning. Blasphemy, which is different from heresy, supposes insulting or ridiculing religious figures or beliefs, with no intention of making an artistic reflection or contributing to a debate.

With regard to freedom of conscience, in this case we are speaking of freedom of belief, conscience and religion in two ways: one that coincides with freedom of expression and another that implies the freedom to seek and receive information. The freedom to form an opinion or a religious belief and to change it exists; consequently, the ability to receive and seek information is necessary; to the contrary, a person would not have access to all the currents of information and, therefore, could not use them to maintain a belief, to change it, to contest it, or to discuss it with others. In this restricted meaning, he believes that it may be said that the Supreme Court's judgment violates Article 12 of the Convention.

As regards the reform of constitutional legislation, the good faith of the State of Chile is evident. It is also evident that Chilean justice disregards international law, owing to several factors; domestic law and its alleged supremacy, and an excess of work and the resulting difficulty to study new law. It could be counterproductive for the domestic legal system if laws are reformed or a law is enacted every time the Supreme Court disregards the fact that there has been a tacit

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derogation, because it would be considered that self-executing de jure norms are not applicable in this sphere. The most important reform would be one which authoritatively reminds the Judiciary that de jure incorporation exists. If this reform were carried out, together with the reform of article 19(12) of the Constitution, they would both be more effective.
Regarding the self-executing character of international laws in domestic law, laws that establish a mandate to codify and those of a programmatic nature are not self-executing; however, laws that establish a subjective right, affirming a right and limiting its restrictions, are self-executing. He indicated that the case of the law that prohibits imprisonment for debt is an example of the practice of the Chilean courts concerning the self-execution of norms contained in human rights treaties ratified by Chile.
Any of the Powers of the State may engage its international responsibility. Chile complies with the obligation to guarantee the free and full exercise of the rights embodied in the Convention by incorporating this treaty de jure into its domestic law. However, in view of the failure of the Judiciary to interpret it adequately, it should be understood that there is an additional obligation for the Legislature to guarantee that interpretation. This will be achieved by domestic legislation indicating that the international law should be understood to be incorporated into domestic law. If complied with, this obligation to guarantee could affect reparation but not legal responsibility.
In his opinion, the reform of article 19(12) of the Chilean Constitution does not help, because it will not produce the effect of preventing the Judiciary from censoring films, books or other artistic manifestations, using permanent precautionary measures. Moreover, the proposed reform "includes an element that distorts the international criteria"; this is the further difficulty that it is incorporated into the Criminal Code regarding crimes when it is committed "in contempt of or offending public authorities."
The Cinematographic Censorship Council has prohibited many films. In some cases it has revised the classification and allowed films that it had censored to be shown.
Using the right to honor as a basis for prohibiting the exhibition of a film is "an indirect and undue use of legal provisions that have been developed for other situations, in order to adapt them to the feelings of the Court." When the judgment states that honor is identified with the capacity for self-determination, according to a person's values and beliefs, it is, at the very least, confusing honor with the freedom to believe, which is religion.

d. Expert report of Humberto Nogueira Alcalá, lawyer, constitutional law expert.

The Chilean Constitution does not establish any norm concerning the rank of international treaty law and international common law in relation to domestic law; it only establishes the system of incorporation and applicability of international treaty law to domestic law. Articles 32(17) and 50(1) of the Constitution indicate that the President of the Republic negotiates and concludes treaties, Congress adopts or rejects them, but does not have the authority to introduce amendments and, subsequently, the President of the Republic ratifies them. The Chilean legal system, applied in good faith and according to the corresponding hermeneutics criteria, recognized the primacy of international law over domestic law when it ratified the Vienna Convention on the Law of Treaties; that took place before the Constitution entered into effect. Consequently, should there be normative conflicts between domestic law and international law, Chile is obliged to ensure that international law prevails.
With regard to admission of international human rights law into the Chilean legal system being a limitation to sovereignty, the text of article 5(1) of the 1980 Constitution established that

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sovereignty was inherent in the Nation and was exercised by the people and by the authorities established in accordance with the constitutional system. Article 5(2) established the essential rights emanating from human nature as the limit to sovereignty. In the process of transition from the authoritarian regime to democracy, 54 constitutional reforms were made and one of them was to article 5(2), by adding a phrase which stated "that the organs of the State must respect and promote the rights contained in the Constitution, and also in the international treaties that Chile has ratified and that are in force." This phrase consolidated the notion that the essential human rights constitute a system with a dual source in the Chilean legal system: one of a domestic nature - the Constitution - and the other of an international nature, which incorporates into Chilean laws, at the very least, those rights contained in the treaties that the State has ratified freely, voluntarily and spontaneously. This implies that the constitutional bloc is made up of the rights contained in the treaties and the rights embodied in the Constitution itself.

With regard to pre-trial detention, Chilean superior courts have accepted that, in accordance with the American Convention, no one may be imprisoned for debt. They have also indicated that interrogations may not be conducted using torture, invoking the provisions of the Convention. However, this is exceptional, as there are matters on which the Chilean courts and the Supreme Court disregard international human rights law and when two rights such as the right to freedom of expression and the right to honor are in conflict they favor the right to honor. This is a systematic policy.

The source of the right to freedom of expression is article 19(12) of the Constitution, which must be complemented by Article 13 of the Convention; this implies that in Chile this freedom includes freedom of expression and information. Furthermore, freedom of expression prohibits any type of censorship and only allows subsequent restrictions, except in the case of public entertainments, where an exception is established for the moral protection of children and adolescents. A second exception could be in states of emergency, because Article 27 of the Convention allows the exercise of freedom of expression to be suspended on a temporary basis.

The final sub-paragraph of article 19(12) of the Constitution establishes a system of cinematographic censorship; this resulted in a norm of legal rank establishing a Cinematographic Classification Council that could refuse to allow the exhibition of cinematographic works for adults. There are also provisions in the Internal State Security Act, the Criminal Code, and the Code of Military Justice that allow the preventive "requisition" of the complete edition of certain types of works and prevention of their circulation and dissemination. It is not only a normative problem, the jurisprudential criteria of the Chilean superior courts is fundamental and this gives the right to honor predominance over freedom of expression, in clear and evident violation of Article 13(2) of the Convention.

The principle which states that the norm that is most favorable to the exercise of human rights should be used, should apply even with regard to freedom of expression. The Supreme Court of Justice and the Court of Appeal of Santiago do not need article 19(12) of the Constitution to be amended in order to give primacy to Article 13(2) of the American Convention over the provisions of domestic law, but should apply Article 27 of the Vienna Convention on the Law of Treaties directly, that is "the hermeneutic principle of the law which best favors the exercise of the right and also the criteria of the delimitation of the right."

e. Expert report of Juan Agustín Figueroa Yávar, lawyer, expert in procedural law.

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According to the American Convention, judgments delivered by the Inter-American Court are binding. Based on Article 62(1) and 62(2) of the Convention, States Parties may recognize the jurisdiction of the Court unconditionally or may establish reservations. Chile deposited the document of ratification on August 21, 1990, and indicated that it recognized as obligatory, de jure, the jurisdiction of the Inter-American Court in cases relating to the interpretation and application of the American Convention, pursuant to the provisions of Article 62 of this treaty. The expression "de jure", signifies that commitment to the respective decision is not conditioned in any way.
The Supreme Court of Chile has stated that international law has precedence over domestic law. With regard to the ranking of international law, a significant action occurred in 1989 with the constitutional amendment of article 5 of the Constitution; this established that the fundamental rights are not only indicated and recognized in the Constitution itself, but also by international human rights treaties.
No provision in domestic legislation may have pre-eminence or in any way obstruct real and effective compliance with the decisions of the Inter-American Court. International treaties are understood to be incorporated into the law and most doctrine considers that they are incorporated with at least the same rank as constitutional laws. That is, treaties may expand the sphere of constitutional law and, furthermore, it should be understood that international laws have pre-eminence over domestic laws.
In strictly legal matters, Chilean jurisprudence has recognized the pre-eminence of the Convention over domestic laws. For example, regarding fraudulent emission of cheques "it has understood that domestic laws, which conditioned release on bail to the prior deposit of the amount of the respective document, were invalidated by the provisions [of the Pact] San José"; moreover, it granted release on bail to persons who wished to be extradited, invoking the Chilean constitutional law and the Convention. This has not been the criterion with regard to prior censorship, because the Convention was violated by applying the constitutional norm, which allowed the exhibition of films to be censored.
Chile has said that it has complied by submitting a draft constitutional reform. However, this is unnecessary because, since international laws are incorporated with a constitutional rank, they produce the tacit annulment of norms such as the one that allows prior censorship, and counterproductive because, by submitting the draft reform, it is implicitly declaring that, in order to admit international norms, a prior internal process is required. The draft reform is also belated because the international responsibility of the State originated in 1990 with the ratification of the Convention, while the constitutional reform was introduced in 1997, and reactive because it was sent when the judgment in first instance had been delivered by the Court of Appeal of Santiago.
Chileans had a right to see the film from the time the Pact of San José was ratified. If the constitutional reform is an explanatory or interpretive law, it will contribute to legal certainty.

f. Expert report of José Luis Cea Egaña, lawyer, expert in freedom of expression.

He is aware of the draft constitutional reform submitted to the Chamber of Deputies by President Eduardo Frei Ruiz-Tagle on April 16, 1997, which has already been adopted by that Chamber. The draft reform establishes two modifications to the first and final paragraphs of article 19 of the Constitution. In the first paragraph, the reform establishes the freedom to emit opinions and to inform without prior censorship, which is extended to expressions of an artistic or cultural nature. The final paragraph of the draft replaces prior censorship by a classification system in

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which the client of cinematographic exhibitions chooses whether he wishes to view this type of spectacle, in accordance with the principle of self-regulation and freedom. This constitutional reform may be accompanied by complementary reforms to the legislation.
Once the constitutional reform has been adopted, Chileans and all the country's inhabitants will be constitutionally and legally able to attend freely the exhibition of the film that was censored. Under the principle of the supremacy of the Constitution, once the constitutional reform has been adopted, its provisions become mandatory immediately and directly, and the provisions currently in force, together with the judicial decisions that are contrary to the reform are annulled.
With regard to freedom of conscience and religion, he considered that Article 12 of the Convention should be respected; this refers to freedom to profess a religion, to manifest one's religious beliefs, not to be persecuted for one's religion and to change religions. Freedom of conscience is closely related to freedom of expression. In this case, none of these conducts is codified or constituted, and therefore the above-mentioned article was not violated.
The State's proposal for a friendly settlement was based on three basic elements: facilitating the exhibition of the film, creating a fund designed to promote freedom of expression in Ibero-America and an invitation to the Special Rapporteur on Freedom of Expression of the Organization of American States (OAS). The latter has already occurred; the remaining points are subject to the fact that Chile is a democratic State of law governed by the principle of the separation of powers, and the competence of each Power cannot be disregarded. The State cannot facilitate the exhibition of the film without previously reforming the Constitution. The State authorities must carry out their obligations within the existing constitutional and democratic context. To the contrary, the President of the Republic could immediately be accused of committing the crime of desacato (contempt for public authorities) and could be politically indicted before the Chamber of Deputies for disregarding the Chilean legal system.
Prior censorship is any unlawful impediment to the exercise of freedom of expression in its generic or extensive meaning. However, not all impediments to the exercise of freedom of expression may be qualified as censorship. Any unlawful impediment of freedom of expression is contrary to the rule of law, democracy and human rights. When, as a precautionary measure, the Judiciary prohibits the circulation of a book or the exhibition of a film because they damage the honor of specific persons, it incurs in a flagrant act of censorship. An opinion that harms the honor of a person does not constitute an unlawful exercise of freedom of expression. Exercising a "precautionary order" does not constitute a legal impediment to the publication of pamphlets, leaflets or works that may irreversibly or permanently harm the honor of an individual. In many cases, the Chilean courts of justice are unaware of the latest advances in international human rights law.
Article 5(2) of the Constitution was reformed through the will of the constituent power in a 1989 plebiscite, in the sense that the fundamental rights recognized in the Convention and other international treaties ratified by Chile and in force in the country and the procedural guarantees and remedies designed to make the protection of those rights effective, constitute provisions of law and guarantees with constitutional ranking. The preamble to the Convention states that international protection should be understood in terms of reinforcing or complementing; the same words are used in Chilean constitutional and juridical laws. Consequently, a subsidiarity exists, by virtue of which, once domestic jurisdiction has been exhausted, recourse may be had to the Inter-American Court.
In a pluralist society, such as that of Chile, the courts are independent and there are sectors of the magistrature whose concept of the legal system leads them to maintain that prohibitions may be

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ordered by invoking other constitutional guarantees, such as those in article 19(4) of the Constitution on honor and intimacy. The Chilean magistrature is extremely legalistic.
Chile has not violated Articles 12, 13, 1(1) and 2 of the Convention, because the fact that judges have delivered judgments contrary to those articles is not sufficient grounds for maintaining that the State violated the Convention. The Convention should be interpreted and applied pursuant to its Article 30, because it is not sufficient that an act may theoretically or doctrinally be codified as or constitute a violation of a rule or law, but rather the context must be taken into consideration – which is that of a pluralist, democratic system with separation of powers - and the intention of the provision.
The principle of international law according to which the State is responsible for the acts of the organs of the Executive, the Legislature and the Judiciary, is a non-conventional principle, which is contained in and should be complied with by virtue of jus cogens. Article 27 of the Vienna Convention on the Law of Treaties recognizes that a State party may not invoke the provisions of its internal law as justification for its failure to perform international treaties. In the instant case, Chile is not alleging its internal law in order to fail to perform the provisions of the American Convention. Formal legal texts include international norms, but, unfortunately, there are sectors of the profession and the magistrature in Chile that have not been receptive to this situation.

g. Expert report of Francisco Cumplido, lawyer, expert in constitutional law and political law.

He has advised the Government of Chile and the National Congress on constitutional reform from 1963 to 1973 and from 1990 to date. The President of the Republic, the Chamber of Deputies and the Senate take part in the constitutional reform procedure, as a derivative constituent power, and it is governed by the Legislature's normal rules for processing reforms.
The 1980 Constitution, reformed in 1989, simplified the constitutional reform procedure; however, this still requires majorities in the Chamber of Deputies and the Senate for specific matters. In general, three-fifths of the current Deputies and Senators are required to adopt a constitutional reform, although two-thirds are required in some cases. When the chambers are not in agreement, there is a third procedure and if disagreement persists, the procedure may be transferred to a joint commission. Some reforms have taken two years, others seven. Some have required extensive negotiations. Negotiations and agreements have been necessary for most constitutional reforms, owing to the integration of the political majorities.
The draft constitutional reform to suppress cinematographic censorship was sent to the National Congress by President Eduardo Frei Ruiz-Tagle on April 15, 1997, and has already been adopted in the first constitutional procedure by the Chamber of Deputies. This period of less than 3 years is completely normal. The Senate will probably introduce amendments to the draft reform to adapt it to the provisions of the American Convention concerning the protection of children and to adapt the Constitution to international treaties ratified and in force in Chile.
Up until 1980, there was a precedent of not declaring the urgency of draft reforms. As of 1980, in view of the number of draft constitutional and legal reforms that were required by the transition to democracy and its consolidation, the Government had to use declarations of urgency. There are three types of urgency: "simple urgency", which implies than each branch must process a draft reform within 30 days; "great urgency", where the period is 10 days, and "immediate discussion" when a draft reform must be processed in three days in each branch. The Government of President Eduardo Frei Ruiz-Tagle declared the urgency of the draft

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constitutional reform of Article 19(12) as that of "immediate discussion", so that it should be dealt with by the Senate in three days. This urgency was declared as soon as it was certain that the adoption of the constitutional reform could be achieved. However, if the Senate introduces amendments, the reform is returned to the Chamber of Deputies with the urgency of "immediate discussion" and that Chamber will have to take a decision under the third procedure in three days. If there is no agreement, then there is no constitutional reform and if there is agreement, there is constitutional reform and it goes to the President of the Republic for him to sanction or veto it, and if there is a veto, the Chamber and the Senate can insist on their position, in which case, the President may call the citizens to a plebiscite. Moreover, the draft laws required to make this reform applicable with regard to the decree-law on cinematographic censorship and the law on television must be submitted.

It became evident that a constitutional reform was necessary when the Court of Appeal admitted a remedy for protection prohibiting the exhibition of the film "The Last Temptation of Christ." The intention was to resolve the problem of the interpretation by the Court of Appeal and the Supreme Court and also to be able to comply with the American Convention and the Convention on the Rights of the Child, concerning the protection of children. Since the Governments of President Patricio Aylwin and President Eduardo Frei Ruiz-Tagle did not agree with the grounds for the decisions of the Chilean courts, they had to resolve the situation within the framework of the Constitution, and the only way to do this was by submitting a draft constitutional reform, since, once this had been approved, it would give legal certainty and could be required of all the organs of the State.

Once the constitutional reform has been approved, all Chileans who have attained their majority will obviously be able to see the film "The Last Temptation of Christ."

The remedy for protection produces relative res judicata so that an action could have been brought against the State under internal law and recourse could have been had to "inapplicability due to unconstitutionality", if it was felt that the decree-law on cinematographic censorship was unconstitutional because it infringed article 19(12) of the Constitution or the American Convention.

The difficulty that arose with the Supreme Court was due to a problem of interpretation, inasmuch as that Court gave preference to applying the right to honor over freedom of opinion, following the trend of some foreign courts and doctrine that makes a distinction between human rights that correspond to the dignity of the individual such as the right to life, to honor and to intimacy, and human rights concerning means, such as freedom of opinion and information.

The 1989 constitutional reform chose not to submit modifications to all the articles of the 1980 Constitution to expand the human rights embodied in it; what was done was to establish a binding norm for all the organs of the State (article 5(2)) requiring them to guarantee and protect all the human rights guaranteed in the Constitution and in the human rights treaties ratified and in force in Chile. With the exception of the modification concerning artistic entertainment that goes beyond the American Convention, the position was adopted that the human rights embodied in the international treaties ratified by Chile and in force should be incorporated into the Constitution. Cinematographic censorship was left in force and the possibility of establishing norms on the public expression of other artistic activities was eliminated. It was argued that, should there be a contradiction between a right established in the Constitution and a right established in an international treaty, the courts would resolve it. At that time, it was thought that the courts would apply the generally admitted principles of international law. He did not agree with the interpretation of the Supreme Court, but it had the legal right to make that interpretation.

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The amendment of the Constitution with regard to the fundamental rights included in article 19(12) would occur automatically by virtue of article 5(2), unless there was a law or constitutional amendment that was indispensable in order to comply with the treaty. This position is not uniformly accepted.
The administrative channel is exhausted after all the organs of the State have intervened and not with the judgment of the Supreme Court alone. Domestic remedies were not exhausted inasmuch as the President of the Republic submitted a draft constitutional reform to ensure that the interpretation of the Legislature and the Executive on the issue is complied with and, even though the draft reform is not a judicial remedy, it is a remedy within the State. The foregoing is based on the principle of subsidiarity, in application of which, if the President of the Republic has used the remedy of constitutional reform, international justice is not yet in order.
The State must comply with the judgment of the Inter-American Court, in accordance with the Constitution and the law.If the President of the Republic should order that the film “The Last Temptation of Christ”, which was prohibited, should be exhibited without a constitutional reform, he would be violating article 73 of the Constitution, which prohibits the President of the Republic and the National Congress from taking over pending cases, reviving closed cases and giving an opinion on the merits of judgments. In other words, he could be accused of violating the Constitution of Chile.

VI. EVIDENCE ASSESSMENT

46. In order to proceed to evaluate the evidence provided in this case, it is first necessary to confirm that it was submitted at the appropriate procedural opportunity. In this respect, Article 43 of the Rules of Procedure indicates:

Items of evidence tendered by the parties shall be admissible only if previous notification thereof is contained in the application and in the reply thereto [.] Should any of the parties allege force majeure, serious impediment or the emergence of supervening events as grounds for producing an item of evidence, the Court may, in that particular instance, admit such evidence at a time other than those indicated above, provided that the opposing party is guaranteed the right of defense.

47. In this case, the Commission provided the evidence with the application, which was presented in due time. The State did not contribute any evidence, because its brief answering the application was rejected by the Court because it was submitted after the statutory time limit had expired (supra para. 24, 30 and 43).

48. Before examining the evidence in the case file, the Court must define the criteria that it will use.

49. In the first place, it must take into consideration the context of the proceeding before an international court of human rights, which is more flexible and less formal than the proceeding under domestic law.

50. The Court has indicated that the criteria for evaluating the evidence before an international human rights court is broader, because determination of the international

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responsibility of a State due to the violation of human rights allows the court a greater flexibility in the evaluation of the evidence provided to it on the pertinent facts, in accordance with the rules of logic and based on experience. [FN4]

[FN4] cf. Constitutional Court case. Judgment of January 31, 2001. Series C No. 71, para.46.

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51. Mere formalities cannot affect the justice that an individual hopes to obtain by resorting to a procedural system; although attention must always be given to legal certainty and the procedural balance of the parties.

52. It is worth emphasizing that, in this case, the State did not submit any type of evidence in answer to the application at the procedural opportunities indicated in Article 43 of the Rules of Procedure. During the public hearing on the merits of the case, Chile concentrated its defense on the argument that it had submitted a draft reform to article 19(12) of the Constitution in order to modify the norm of internal law that engaged its international responsibilities through its competent organs, and on the fact that everything that the Commission had sought in its application would be covered by the adoption of the constitutional reform, except with regard to reparations.

53. In this respect, the Court considers, as it has in other case, that when the State does not specifically answer the application, the facts about which it keeps silent are assumed to be true, provided that conclusions consistent with this can be inferred from the evidence. [FN5]

[FN5] cf. Constitutional Court case, supra note 4, para. 48.

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54. The Court will now evaluate the documents, testimonies and expert reports that comprise the pool of evidence in the instant case, according to the rule of sound critical examination that will allow it to ascertain the truth of the alleged facts.

55. With regard to the documentary evidence contributed by the Commission (supra para. 42), the Court considers that the documents submitted are valid, as they were not contested or challenged, nor was their authenticity put in doubt.

56. As to the testimonies given in the instant case, which were not contradicted or contested, the Court admits them and grants them full probative value.

57. In the case of the expert reports, the Court admits them, inasmuch as they relate to the experts' knowledge of national or comparative law and its application to the facts of the case.

58. The 1980 Constitution of Chile is considered useful to make a decision in this case, and it is therefore added to the pool of evidence, in application of the provisions of Article 44(1) of the Rules of Procedure. [FN6]

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[FN6] cf. Constitution of the Republic of Chile published in the official gazette No.30.798 on October 24, 1980.
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59. The annexes submitted by the Commission in its brief of January 8, 2001 (supra para. 44), on the expenses incurred are considered useful to make a decision in this case, and the Court incorporates them into the pool of evidence, based on the provisions of Article 44(1) of the Rules of Procedure.

VII. PROVEN FACTS

60. After examining the documents, the statements of the witnesses and expert witnesses and the declarations of the State and the Commission during the proceeding, the Court considers that the following facts have been proved:

a. Article 19(12) of the 1980 Constitution of Chile establishes a "system of censorship for the exhibition and publicity of cinematographic productions." [FN7]
b. Decree Law No. 679 of October 1, 1974, authorizes the Cinematographic Classification Council to supervise cinematographic exhibition in Chile and classify films. The Regulation to this law is contained in the Supreme Decree on Education No. 376 of April 30, 1975. The Cinematographic Classification Council is part of the Ministry of Education. [FN8]
c. On November 29, 1988, the Cinematographic Classification Council refused to allow the exhibition of the film "The Last Temptation of Christ", following a petition submitted by United International Pictures Ltd. The company appealed the Council's decision, but it was confirmed by a court of appeal, in a judgment of March 14,1989. [FN9]
d. On November 11, 1996, following a further petition by United International Pictures Ltd., the Cinematographic Classification Council reviewed the prohibition to exhibit the film "The Last Temptation of Christ" and, in session No. 244, by a majority of votes authorized its exhibition for an audience of 18 years of age or more. [FN10]
e. Following a remedy for protection filed by Sergio García Valdés, Vicente Torres Irarrázabal, Francisco Javier Donoso Barriga, Matías Pérez Cruz, Jorge Reyes Zapata, Cristian Heerwagen Guzmán and Joel González Castillo, for and in the name of Jesus Christ, the Catholic Church and themselves, on January 20, 1997, the Court of Appeal of Santiago admitted the remedy for protection and annulled the administrative decision adopted by the Cinematographic Classification Council in session No. 244, on November 11, 1996. [FN11]
f. After an appeal of the judgment of the Court of Appeal of Santiago, of January 20, 1997, filed by Claudio Márquez Vidal, Alex Muñoz Wilson, Matías Insunza Tagle and Hernán Aguirre Fuentes, the Supreme Court of Justice of Chile confirmed the decision appealed against on June 17, 1997. [FN12]
g. On April 14, 1997, the President of the Republic, Eduardo Frei Ruiz-Tagle, addressed a message to the Chamber of Deputies in which he submitted a draft constitutional reform to article 19(12) of the Constitution that intended to eliminate cinematographic censorship and substitute it by a system of classification that embodied the right to free artistic creation. [FN13]

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h. On November 17, 1999, the Chamber of Deputies adopted the draft constitutional reform that intended to eliminate prior censorship of the exhibition and publicity of cinematographic production by 86 votes in favor, no votes against and six abstentions. [FN14]
i. Up until February 5, 2001, the date on which this judgment was delivered, the steps for the adoption of the draft constitutional reform had not been completed.
j. As a result of the facts of this case, the victims and their representatives submitted elements to justify the expenses incurred while processing the different domestic and international procedures, and the Court reserves the authority to evaluate these. [FN15]

[FN7] cf. Constitution of the Republic of Chile published in the official gazette No.30.798 on October 24, 1980, article 19(12), seventh paragraph modified through the constitutional reform law No.18.825, D.O. 17-8-1989; annex II: copy of the judgment of January 20, 1997, of the Court of Appeal of Santiago, receiving the remedy for amparo filed by Sergio García Valdés, Vicente Torres Irarrázabal, Francisco Javier Donoso Barriga, Matías Pérez Cruz, Jorge Reyes Zapata, Cristian Heerwagen Guzmán and Joel González Castillo, in the name of Jesus Christ, the Catholic Church and themselves, which annulled the administrative decision of the Cinematographic Classification Council, adopted on November 11, 1996; annex III: copy of the judgment of June 17, 1997, of the Supreme Court of Justice of Chile, confirming the judgment of January 20, 1997, of the Court of Appeal, which was appealed against; annex IV: copy of a draft constitutional reform which eliminates cinematographic censorship, substituting it with a classification system that establishes the right to free artistic creation and copy of message No. 339-334 issued on April 14, 1997, by the President of the Republic of Chile to the Camber of Deputies, supporting the said draft reform; expert report by José Zalaquett Daher submitted to the Inter-American Court on November 18, 1999; expert report by Humberto Nogueira Alcalá submitted to the Inter-American Court on November 18, 1999; expert report by José Luis Cea Egaña submitted to the Inter-American Court on November 18, 1999; and expert report by Francisco Cumplido submitted to the Inter-American Court on November 18, 1999.
[FN8] cf. annex I: copy of the classification document issued by the Cinematographic Classification Council on November 11, 1996, advising that the Council had reviewed the film The Last Temptation of Christ and that it had approved it only for those of over 18 years of age; annex II: copy the judgment of January 20, 1997, of the Court of Appeal of Santiago, receiving the remedy for protection filed by Sergio García Valdés, Vicente Torres Irarrázabal, Francisco Javier Donoso Barriga, Matías Pérez Cruz, Jorge Reyes Zapata, Cristian Heerwagen Guzmán and Joel González Castillo, in the name of Jesus Christ, the Catholic Church and themselves, and annulling the administrative decision of the Cinematographic Classification Council, adopted on November 11, 1996; annex III: copy of the judgment of June 17, 1997, of the Supreme Court of Justice of Chile, confirming the judgment of January 20, 1997, of the Court of Appeal, which was appealed; and expert report by José Zalaquett Daher submitted to the Inter-American Court on November 18, 1999.
[FN9] cf. annex II: copy of the judgment of January 20, 1997, of the Court of Appeal of Santiago, receiving the remedy for protection filed by Sergio García Valdés, Vicente Torres Irarrázabal, Francisco Javier Donoso Barriga, Matías Pérez Cruz, Jorge Reyes Zapata, Cristian Heerwagen Guzmán and Joel González Castillo, in the name of Jesus Christ, the Catholic Church and themselves, and annulling the administrative decision of the Cinematographic Classification Council adopted on November 11, 1996; and annex III: copy of the judgment of June 17, 1997,

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of the Supreme Court of Justice of Chile, confirming the judgment of January 20, 1997, of the Court of Appeal, which was appealed against.
[FN10] cf. annex I: copy of the classification document issued by the Cinematographic Classification Council on November 11, 1996, advising that the Council had reviewed the film The Last Temptation of Christ and had approved it only for those over 18 years of age; annex II: copy of the judgment of January 20, 1997, of the Court of Appeal of Santiago, receiving the remedy for protection filed by Sergio García Valdés, Vicente Torres Irarrázabal, Francisco Javier Donoso Barriga, Matías Pérez Cruz, Jorge Reyes Zapata, Cristian Heerwagen Guzmán and Joel González Castillo, in the name of Jesus Christ, the Catholic Church and themselves, and annulling the administrative decision of the Cinematographic Classification Council, adopted on November 11, 1996; and annex III: copy of the judgment of June 17, 1997, of the Supreme Court of Justice of Chile, confirming the judgment of January 20, 1997, of the Court of Appeal, which was appealed against.
[FN11] cf. annex II: copy of the judgment of January 20, 1997, of the Court of Appeal of Santiago, receiving the remedy for protection filed by Sergio García Valdés, Vicente Torres Irarrázabal, Francisco Javier Donoso Barriga, Matías Pérez Cruz, Jorge Reyes Zapata, Cristian Heerwagen Guzmán and Joel González Castillo, in the name of Jesus Christ, the Catholic Church and themselves, and annulling the administrative decision of the Cinematographic Classification Council adopted on November 11, 1996.
[FN12] cf. annex III: copy of the judgment of June 17, 1997, of the Supreme Court of Justice of Chile, confirming the judgment of January 20, 1997, of the Court of Appeal, which was appealed against.
[FN13] cf. annex IV: copy of a draft constitutional reform that eliminates cinematographic censorship, substituting it with a classification system that establishes the right to free artistic creation, and copy of message No. 339-334 issued on April 14, 1997 by the President of the Republic of Chile to the Chamber of Deputies, supporting the draft reform; expert report by José Luis Cea Egaña submitted to the Inter-American Court on November 18, 1999; and expert report by Francisco Cumplido submitted to the Inter-American Court on November 18, 1999.
[FN14] cf. expert report by José Luis Cea Egaña submitted to the Inter-American Court on November 18, 1999; and expert report by Francisco Cumplido submitted to the Inter-American Court on November 18, 1999.
[FN15] cf. Jade Hotel invoice No. 004526 dated November 19, 1999, in the name of José Zalaquett; Jade Hotel invoice No. 004540 dated November 20, 1999, in the name of the "Asoc. de Abogados por las Libe"; Jade Hotel invoice No. 004541 dated November 20, 1999, in the name of the "Asoc. de Abogados por las Libe"; Jade Hotel invoice No. 004542 dated November 20, 1999, in the name of the "Asoc. de Abogados por las Libe"; and Aeromar Agencia de Viajes Limitada invoice No. 0115909 dated November 16, 1999, in the name of the "Asoc. de Abogados por las Libertades Públicas."

VIII. ARTICLE 13 (FREEDOM OF THOUGHT AND EXPRESSION)

The Commission's arguments

61. With regard to Article 13 of the Convention, the Commission alleged that:

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a. Article 19(12) of the Constitution of Chile permitted censorship of the exhibition of cinematographic productions and their publicity. Moreover, on numerous occasions, the Executive Power, through the Cinematographic Classification Council, has censored the exhibition of films. In this respect, the Judiciary has favored the right to honor over freedom of expression;

b. The prohibition of the exhibition of the film “The Last Temptation of Christ” by the Court of Appeal of Santiago, ratified by the Supreme Court of Justice, violates Article 13 of the Convention, because this article indicates that the exercise of freedom of thought and expression shall not be subject to prior censorship. Also, the aim of this provision is to protect and encourage access to information, ideas and artistic expressions of all types and to strengthen pluralist democracy;

c. The obligation not to interfere in the enjoyment of the right of access to information of all types extends to the “circulation of information and the exhibition of artistic works that may not be approved personally by those who represent the authority of the State at a certain moment”;

d. There are three alternative mechanisms by which restrictions to the exercise of freedom of expression may be imposed: subsequent liability, regulation of the access of minors to public entertainment, and the obligation to prevent the justification of religious hatred. These restrictions may not exceed the provisions of Article 13 of the Convention and may only be applied in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions were established, as stipulated in Article 30 of the Convention;

e. Subsequent liability is regulated in Article 13(2) of the Convention and is only admissible in a restricted way, when necessary to ensure respect for the rights or reputation of others. This restriction of the possibility of establishing subsequent liability is set out as a “guarantee of freedom of thought, so that certain people, groups, ideas or mediums of expression are not excluded, a priori, from public debate”. This type of restriction was not used in the instant case, but the cinematographic work was censored before it was exhibited;

f. Public entertainment may be subject by law to classification in order to regulate the access of minors, as indicated in Article 13(4) of the Convention. In this case, the Cinematographic Classification Council allowed access to the film to those over 18 years of age. However, following this classification, the domestic courts proceeded to prohibit its exhibition totally;

g. Article 13(5) of the Convention establishes the positive obligation of the State to avoid the dissemination of information that could generate illegal actions. This case does not fall within this assumption, since the Martin Scorsese film has been defined as a work of art with a religious content that does not attempt to disseminate propaganda. Moreover, during the actions before the local courts and the procedure before the Commission, the exception established in this article was never invoked. Also, Article 13(5) should be understood within the principle established in Article 13(1); that is to say, that “those who justify religious hatred should be subject to subsequent liability in accordance with the law”;

h. The prior censorship imposed on the film “The Last Temptation of Christ” did not occur in the context of the restrictions or causes established in the Convention. Rejection of the exhibition of the film was based on the fact that it would allegedly be offensive to the figure of Jesus Christ and therefore affected those who filed a petition with the judicial system, believers, and “other persons who considered him a model for their way of life”. The prohibition to project the film was based on the alleged defense of the right to honor and reputation of Jesus Christ;

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i. The honor of the individual should be protected without prejudicing the exercise of freedom of expression and the right to receive information. Also, Article 14 of the Convention establishes that any person injured by inaccurate or offensive statements has the right to reply or make a correction using the same communications outlet;
j. There is no dispute with regard to the violation of this rule, because Chile stated that the judgment of the Court of Appeal of Santiago, ratified by the Supreme Court of Justice, is a violation of freedom of expression;
k. The experts' statements to the Court demonstrated the existence of a repeated conduct whereby, in cases of conflict between freedom of expression and the right to honor of certain individuals, the Chilean courts prefer to restrict freedom of expression, which violates the principle of the indivisibility of human rights;
l. The State is responsible for the acts of the Judiciary, even in cases in which the actions of the latter exceed its authority, whatsoever the position of its other organs. Although, internally, the Executive, the Legislature and the Judiciary are distinct and independent, they comprise an indivisible unity and, therefore, the State must assume international responsibility for the acts of the organs of public authority that violate international commitments;
m. The legal system in force in Chile has incorporated the rights and freedoms embodied in the Convention, de jure, in article 5(2) of the Constitution. That is to say, there is an obligation to respect human rights, without any need to amend the Constitution or the laws. Also, the Chilean courts have applied the Convention, in relation to the rights embodied in it, without the need for any legal or constitutional amendment; for example, preference has been given to personal freedom over domestic legislation that regulates pre-trial detention for the crime of fraudulent emission of cheques; and
n. An eventual reform of the Constitution concerning freedom of expression will not make the violations of the alleged victims' human rights in which the State has incurred in this case disappear with retroactive effect.

The State's arguments

62. The State alleged that:

a. It has no substantive discrepancies with the Commission; it does not dispute the facts, although this does not mean that it accepts responsibility with regard to the facts;
b. In a message to the Congress, President Eduardo Frei Ruiz-Tagle has indicated the Chilean Government's position against prior censorship and recognized that the free expression of ideas and artistic creation is part of the essence of a society of free individuals, ready to seek the truth through dialogue and discussion and not by imposing censorship. Prior censorship cannot exist in a democracy, because a democratic system supposes an open society with free exchange of opinions, arguments and information;
c. The Government does not share the jurisprudence of the Supreme Court of Chile that gives preference to the right to honor over freedom of expression;
d. The draft constitutional reform has already been approved by the Chamber of Deputies. This project embodies the freedom to create and disseminate the arts without prior censorship as a constitution guarantee; without detriment to the need to respond for any crimes and abuses that are committed in the exercise of that freedom; it replaces censorship of the exhibition of cinematographic production with a system of classification of this production; and it eliminates

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censorship of film publicity. This reform will provide sufficient legal certainty and give the judicial authorities the legal instruments to decide any ensuing conflicts in accordance with domestic and international legislation;
e. An act of the Judiciary that is contrary to international law may engage the State's international responsibility, provided that the State as a whole assumes the criteria issued by the Judiciary. In particular, the acquiescence of the organ responsible for international relations, which is the Executive Power, is required, and this has not occurred in the instant case;
f. Chile has not invoked domestic law to disengage itself from an obligation arising from an international treaty; and
g. It requested the Court to declare that Chile is in the process of adopting the necessary measures to eliminate cinematographic censorship in accordance with Article 2 of the Convention and its own constitutional procedures, and thereby allow the exhibition of the film "The Last Temptation of Christ".

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Considerations of the Court

63. Article 13 of the American Convention establishes that:

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

64. With regard to the content of the right to freedom of thought and expression, those who are protected by the Convention not only have the right and the freedom to express their own thoughts, but also the right and freedom to seek, receive and impart information and ideas of all kinds. Consequently, freedom of expression has an individual and a social dimension:

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It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others. [FN16]

[FN16] Compulsory membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No.5, para. 30.

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65. With regard to the first dimension of the right embodied in the said article, the individual one, freedom of expression is not exhausted in the theoretical recognition of the right to speak or write, but also includes, inseparably, the right to use any appropriate method to disseminate thought and allow it to reach the greatest number of persons. In this respect, the expression and dissemination of thought and information are indivisible, so that a restriction of the possibilities of dissemination represents directly, and to the same extent, a limit to the right to free expression.

66. Regarding the second dimension of the right embodied in Article 13 of the Convention, the social element, it is necessary to indicate that freedom of expression is a way of exchanging ideas and information between persons; it includes the right to try and communicate one's point of view to others, but it also implies everyone's right to know opinions, reports and news. For the ordinary citizen, the knowledge of other people's opinions and information is as important as the right to impart their own.

67. The Court considers that both dimensions are of equal importance and should be guaranteed simultaneously in order to give total effect to the right to freedom of thought and expression in the terms of Article 13 of the Convention.

68. As the cornerstone of a democratic society, freedom of expression is an essential condition for society to be sufficiently informed.

69. The European Court of Human Rights has indicated that:

[The] supervisory function [of the Court] signifies that [itº] must pay great attention to the principles inherent in a 'democratic society'. Freedom of expression constitutes one of the essential bases of such a society, one of the primordial conditions for its progress and for the development of man. Article 10(2) [of the European Convention on Human Rights] [FN17] is valid not only for the information or ideas that are favorably received or considered inoffensive or indifferent, but also for those that shock, concern or offend the State or any sector of the population. Such are the requirements of pluralism, tolerance and the spirit of openness, without which no 'democratic society' can exist. This means that any formality, condition, restriction or sanction imposed in that respect, should be proportionate to the legitimate end sought.

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Also, those who exercise their freedom of expression assume 'obligations and responsibilities', the scope of which depends on the context and the technical procedure used. [FN18]

[FN17] This article establishes that: 2. The exercise of these freedoms, which entail rights and responsibilities, may be subject to certain formalities, conditions, restrictions or sanctions, established by law, which constitute necessary measures, in a democratic society, for national security, territorial integrity or public security, defense of order and prevention of crime, protection of health or morals, protection of the reputation or the rights of third parties, in order to prevent the dissemination of confidential information or to guarantee the authority and impartiality of the Judiciary.

[FN18] cf. Eur. Court H.R., Handyside case, judgment of 7 December 1976, Series A No. 24, para. 49; Eur. Court H.R., The Sunday Times case, judgment of 26 April 1979, Series A no. 30, paras. 59 and 65; Eur. Court H.R., Barthold judgment of 25 March 1985, Series A no. 90, para. 55; Eur. Court H.R., Lingens judgment of 8 July 1986, Series A no. 103, para. 41; Eur. Court H.R Müller and Others judgment of 24 May 1988, Series A no. 133, para. 33; and Eur. Court HR, Otto-Preminger-Institut v. Austria judgment of 20 September 1994, Series A no. 295-A, para. 49.

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70. It is important to mention that Article 13(4) of the Convention establishes an exception to prior censorship, since it allows it in the case of public entertainment, but only in order to regulate access for the moral protection of children and adolescents. In all other cases, any preventive measure implies the impairment of freedom of thought and expression.

71. In the instant case, it has been proved that, in Chile, there is a system of prior censorship for the exhibition and publicity of cinematographic films and that, in principle, the Cinematographic Classification Council prohibited exhibition of the film "The Last Temptation of Christ" and, reclassifying it, permitted it to be exhibited to persons over 18 years of age (supra para. 60 a, c and d). Subsequently, the Court of Appeal of Santiago decided to annul the November 1996 decision of the Cinematographic Classification Council, owing to a remedy for protection filed by Sergio García Valdés, Vicente Torres Irarrázabal, Francisco Javier Donoso Barriga, Matías Pérez Cruz, Jorge Reyes Zapata, Cristian Heerwagen Guzmán and Joel González Castillo, "for and in the name of [º] Jesus Christ, the Catholic Church and themselves"; a decision that was confirmed by the Supreme Court of Justice of Chile. Therefore, this Court considers that the prohibition of the exhibition of the film "The Last Temptation of Christ" constitutes prior censorship in violation of Article 13 of the Convention.

72. This Court understands that the international responsibility of the State may be engaged by acts or omissions of any power or organ of the State, whatsoever its rank, that violate the American Convention. That is, any act or omission that may be attributed to the State, in violation of the norms of international human rights law engages the international responsibility of the State. In this case, it was engaged because article 19(12) of the Constitution establishes prior censorship of cinematographic films and, therefore, determines the acts of the Executive, the Legislature and the Judiciary.

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73. In the light of the foregoing considerations, the Court declares that the State violated the right to freedom of thought and expression embodied in Article 13 of the American Convention, to the detriment of Juan Pablo Olmedo Bustos, Ciro Colombara López, Claudio Márquez Vidal, Alex Muñoz Wilson, Matías Insunza Tagle and Hernán Aguirre Fuentes.

IX. ARTICLE 12 (FREEDOM OF CONSCIENCE AND RELIGION)

The Commission's arguments

74. With regard to Article 12 of the Convention, the Commission alleges that:

a. "The prohibition of access to this work of art with a religious content is based on a series of considerations that interfere improperly with the freedom of conscience and religion of the [alleged] victims" and of the rest of the inhabitants of Chile, which violates Article 12 of the Convention;
b. Recognition of freedom of conscience is based on recognition of the human being as a rational and autonomous being. The protection of the right to this freedom is the basis of the pluralism necessary for harmonious coexistence in a democratic society, which, as any kind of society, is made up of individuals of different convictions and beliefs;
c. According to Article 12 of the Convention, "the State must take and provide the necessary measures so that those who publicly profess their beliefs, may conduct their rites and proselytize within the limits that may reasonably be imposed in a democratic society". This norm requires that the State abstain from interfering in any way in the adoption, maintenance or change in their personal convictions of a religious or other nature. The State may not use its authority to protect the conscience of certain individuals;
d. In this case, state interference does not refer to the exercise of the right to manifest and practice religious beliefs, but to access to the classified exhibition – subject to age restrictions and the payment of an entrance fee – of the audiovisual version of an artistic work with a religious content;
e. The state interference affected those who have beliefs related to the religious content of the film "The Last Temptation of Christ", because they are prevented from exercising the right to freedom of conscience by not being able to see the film and form their own opinion about the ideas expressed in it. Moreover, it affects those who belong to other creeds or who do not have religious convictions, because one creed is privileged in prejudice to the free access to information of other persons, who have the right to have access to and form their own opinion about the work;
f. The organs of the Judiciary prohibited the exhibition of the film "The Last Temptation of Christ", on the grounds that the "perception of the characters presented in this artistic work does not adjust to standards that, in their opinion, should have been taken into account to describe them". This constitutes an unlawful interference in the right to maintain or change one's own convictions or beliefs and affects, per se, the right to freedom of conscience of the people who it is alleged were wronged by the prohibition;
g. The Convention not only establishes the right of the individual to maintain or change his religious beliefs, but also to maintain or change any type of belief; and
h. Since the decision of the Supreme Court deprived the alleged victims and society as a whole of access to information that could have allowed them to maintain, change or modify their

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beliefs, there has been a violation of Article 12 of the Convention in the instant case. The statements of the witnesses, Ciro Colombara and Matías Insunza, provide evidence of this, when they indicate how the censorship affected their freedom of conscience.

The State's arguments

75. The State argued that:

a. The rights embodied in Articles 12 and 13 of the Convention are absolutely autonomous in nature;
b. The conduct that freedom of conscience and freedom of religion recognize is that of maintaining one's religion, changing it, professing it and disseminating it. None of these behaviors is endangered when a person is prohibited from seeing a film;
c. There is complete religious freedom in Chile; and
d. It requested the Court to declare that Chile has not violated the freedom of conscience and religion embodied in Article 12 of the Convention.

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Considerations of the Court

76. Article 12 of the American Convention establishes that:

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in pubic or in private.
2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.
3. Freedom to manifest one's religious and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.
4. Parents or guardians, as the case may be, have the right to provide for religious and moral education of their children or wards that is in accord with their own convictions.

77. In the instant case, the Commission believes that prohibiting the exhibition of the film "The Last Temptation of Christ", which, in their opinion, is a work of art with religious content, violated Article 12 of the Convention. This prohibition was based on a series of consideration that interfere improperly with freedom of conscience and religion. The State believes that the right embodied in this article was not affected, since it considers that the right of individuals to maintain, change, profess and disseminate their religions or beliefs was not violated by prohibiting the exhibition of the film. The Court must determine whether Article 12 of the Convention was violated by prohibiting the exhibition of this film.

78. The judgment of the Court of Appeal of Santiago of January 20, 1997, confirmed by the Supreme Court of Justice of Chile on June 17, 1997, indicated that:

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In the film, the image of Christ is deformed and diminished, to the utmost. In this way, the problem is posed of whether it is possible, in the name of freedom of expression, to destroy the sincere beliefs of a great many people. The Constitution seeks to protect the individual, his institutions and his beliefs, because these are the most central elements for the individual to participate and coexist harmoniously in a pluralist world. Pluralism does not mean denigrating and destroying the beliefs of others, whether they are a majority or a minority, but assuming them as a contribution to the interaction of society, which is based on respect for the essence and context of the ideas of others.

No one doubts that the greatness of a nation can be measured by the attention it gives to the values that allowed it to exist and grow. If these are neglected [or] abused, as the image of Christ is deformed and abused, the nation is endangered, because the values on which it is based are disregarded. Attending to the need for information or expression is closely related to the truth of the facts and, consequently, the historical distortion of a fact or a person ceases to be information or expression. Accordingly, the judges believe that the right to emit an opinion is the right to describe a reality but never to deform it, reinventing it. [FN19]

It was based on these considerations that this Court of Appeal, in a judgment confirmed by the Supreme Court of Justice, prohibited the exhibition of the film “The Last Temptation of Christ”.

[FN19] cf. annex II: copy of the judgment of January 20, 1997, of the Court of Appeal of Santiago, admitting the remedy for protection filed by Sergio García Valdés, Vicente Torres Irarrázabal, Francisco Javier Donoso Barriga, Matías Pérez Cruz, Jorge Reyes Zapata, Cristian Heerwagen Guzmán and Joel González Castillo, in the name of Jesus Christ, the Catholic Church and themselves, and annulling the administrative decision of the Cinematographic Classification Council, adopted on November 11, 1996, para.18.

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79. According to Article 12 of the Convention, the right to freedom of conscience and religion allows everyone to maintain, change, profess and disseminate his religion or beliefs. This right is one of the foundations of democratic society. In its religious dimension, it constitutes a far-reaching element in the protection of the convictions of those who profess a religion and in their way of life. In this case, however, there is no evidence to prove that any of the freedoms embodied in Article 12 of the Convention have been violated. Indeed, the Court understands that the prohibition of the exhibition of the film “The Last Temptation of Christ” did not impair or deprive anyone of their right to maintain, change, profess or disseminate their religion or beliefs with total freedom.

80. In view of the foregoing, the Court concludes that the State did not violate the right to freedom of conscience and religion embodied in Article 12 of the American Convention.

X. NON-COMPLIANCE OF ARTICLES 1(1) AND 2 (OBLIGATION TO RESPET RIGHTS AND DOMESTIC LEGAL EFFECTS)

The Commissions’s arguments

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81. With regard to Articles 1(1) and 2 of the Convention, the Commission alleged that:

a. Chile has not adopted "the necessary legislative measures to guarantee and make effective the rights and freedoms established in the Convention with regard [to] freedom of expression";
b. The final paragraph of article 19(12) of the Constitution of Chile and Decree Law No. 679 are not adjusted to the standards of Article 13 of the Convention, because the former permits prior censorship of the exhibition and publicity of cinematographic production and the latter authorizes the Cinematographic Classification Council to "reject" films. For this reason, the State violated Article 2 of the Convention;
c. Chile should have taken the necessary measures to enact the pertinent constitutional and legal norms in order to revoke the system of prior censorship of cinematographic productions and their publicity and thus adapt its domestic legislation to the Convention;
d. The State submitted a draft reform of the final paragraph of article 19(12) of the Constitution in order to eliminate cinematographic censorship, substituting it by a system of cinematographic classification. However, since the National Congress has still not adopted this draft reform, Chile continues to be in violation of Article 2 of the Convention;
e. The decisions of the courts of justice engage the international responsibility of the State. In this case, the courts did not take into consideration the provisions of the Convention with regard to freedom of expression and conscience, even though article 5(2) of the Constitution recognizes that sovereignty is limited by respect for the fundamental rights arising from the international treaties that Chile has ratified. Therefore, in prohibiting the exhibition of the film, the final judgment of the Supreme Court failed to observe the obligation to adopt "measures as may be necessary" to make effective the rights and freedoms embodied in the Convention;
f. Although the State has expressed its intention of complying with international law, the failure to annul a norm that is incompatible with the Convention, and to adjust domestic laws and the conduct of the Legislature and Judiciary to make such norms effective signifies that the State is violating the Convention;
g. Chile is responsible for violating the rights protected in Articles 12, 13 and 2 of the Convention in relation to its Article 1(1); and
h. States must respect and ensure all the rights and freedoms recognized in the Convention to the persons subject to their jurisdiction, and also change or adapt their legislation to make effective the enjoyment and exercise of those rights and freedoms. In this case, Chile has not fulfilled its obligation to respect and ensure the freedoms embodied in Articles 12 and 13 of the Convention.

The State's arguments

82. The State alleged that:

a. International human rights law forms part of Chilean law;
b. In its report, the Commission indicated that it evaluated positively the initiatives taken by the State to ensure that, subject to the constitutional and legal procedures in force, the competent organs adopt the legislative or other measures necessary to make effective the right to freedom of expression. Consequently, Chile does not understand why the Commission hastened to submit

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the application, particularly, in view of the complementary role of the inter-American human rights organs;
c. The State has the obligation to remedy the problem using the means it has available. On January 20, 1997, the Court of Appeal of Santiago delivered its judgment in this case and the Government, which did not agree with the decision adopted, submitted a draft constitutional reform to Congress on April 14, 1997. When errors or abuses are committed by one State authority and the competent authorities are in the process of remedying them, an application should not be filed before an international court, denaturalizing the essential function of the international system;
d. Chile has assumed a responsible attitude by trying to remedy the problem through a draft constitutional reform that replaces prior censorship of cinematographic production with a system of classification of this production;
e. An act of the Judiciary, which is contrary to international law, may engage the international responsibility of the State, provided that the State as a whole assumes the Judiciary's criteria. In particular, the acquiescence of the organ responsible for international relations is required, which is the Executive, and this is not the situation in the instant case;
f. Chile has not invoked domestic law to disengage itself from an obligation arising from an international treaty; and
g. Finally, it requested the Court to declare that, pursuant to Article 2 of the Convention, Chile was in the process of adopting the necessary measures to eliminate cinematographic censorship and thus permit the exhibition of the film "The Last Temptation of Christ".

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Considerations of the Court

83. Article 1(1) of the American Convention establishes that:

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

84. While Article 2 of the Convention establishes that:

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

85. The Court has indicated that the general obligations of the State, established in Article 2 of the Convention, include the adoption of measures to suppress laws and practices of any kind that imply a violation of the guarantees established in the Convention, and also the adoption of laws and the implementation of practices leading to the effective observance of the said guarantees. [FN20]

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[FN20] cf. Durand and Ugarte case. Judgment of August 16, 2000. Series C. No. 68, para. 137.
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86. The Court observes that, in accordance with the findings of this judgment, the State violated Article 13 of the American Convention to the detriment of Juan Pablo Olmedo Bustos, Ciro Colombara López, Claudio Márquez Vidal, Alex Muñoz Wilson, Matías Insunza Tagle and Hernán Aguirre Fuentes, because it has failed to comply with the general obligation to respect the rights and freedoms recognized in the Convention and to guarantee their free and full exercise, as established in its Article 1(1).

87. In international law, customary law establishes that a State which has ratified a human rights treaty must introduce the necessary modifications to its domestic law to ensure the proper compliance with the obligations it has assumed. This law is universally accepted, and is supported by jurisprudence. [FN21] The American Convention establishes the general obligation of each State Party to adapt its domestic law to the provisions of this Convention, in order to guarantee the rights that it embodies. This general obligation of the State Party implies that the measures of domestic law must be effective (the principle of effet utile). This means that the State must adopt all measures so that the provisions of the Convention are effectively fulfilled in its domestic legal system, as Article 2 of the Convention requires. Such measures are only effective when the State adjusts its actions to the Convention's rules on protection.

[FN21] cf. "principe allant de soi"; Echange des populations grecques et turques, advisory opinion 1925, C.P.J.I., series B, no. 10, p. 20; and Durand and Ugarte case, supra note 20, para. 136.
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88. In this case, by maintaining cinematographic censorship in the Chilean legal system (article 19(12) of the Constitution and Decree Law 679), the State is failing to comply with the obligation to adapt its domestic law to the Convention in order to make effective the rights embodied in it, as established in Articles 2 and 1(1) of the Convention.

89. This Court recalls that on January 20, 1997, the Court of Appeal of Santiago delivered a judgment in this case, which was confirmed by the Supreme Court of Justice of Chile on April 19, 1997. Because it did not agree with the grounds for these judgments, the Government of Chile submitted a draft constitutional reform to eliminate cinematographic censorship to Congress on April 14, 1997. The Court evaluates and underlines the importance of the Government's initiative in proposing the said constitutional reform, because it may lead to adapting domestic laws to the content of the American Convention with regard to freedom of thought and expression. However, the Court observes that, despite the time that has elapsed since the draft reform was submitted to Congress, the necessary measures have still not been adopted to eliminate cinematographic censorship, as established in Article 2 of the Convention, and thus allow exhibition of the film "The Last Temptation of Christ."

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90. Consequently, the Court concludes that the State has failed to comply with the general obligations to respect and guarantee the rights protected by the Convention and to adapt its domestic laws to its provisions, as established in Articles 1(1) and 2 of the American Convention on Human Rights.

XI. APPLICATION OF ARTICLE 63(1)

91. The Commission requested the Court to order that, as a result of the violation of Articles 12, 13, 2 and 1(1) of the Convention, the State should:

1. Authorize the normal cinematographic exhibition and publicity of the film "The Last Temptation of Christ."
2. Adapt its constitutional and legal norms to the standards of freedom of expression embodied in the American Convention, in order to eliminate prior censorship of cinematographic productions and their publicity.
3. Ensure that the Government's organs and its authorities and officials exercise their various powers so as to make effective the rights and freedoms of expression, conscience and religion recognized in the American Convention and, consequently, abstain from imposing prior censorship on cinematographic productions.
4. Make reparations to the victims in this case for the damage suffered.
5. Pay the costs and reimburse the expenses incurred by the victims in order to litigate [the] case, both in the domestic sphere and before the Commission and Court, as well as reasonable fees for their representatives.

92. Following a request from the Court (supra para. 37), of January 8, 2001, the Commission submitted a brief, with the evidentiary documents that, in their opinion, justify the request for payment of costs and expenses that had been presented in the petitionary clauses of their application, and also the corresponding arguments. In this brief, the Commission requested the Court that the Asociación de Abogados por las Libertades Públicas A.G. should be paid an amount of US$4,290 (four thousand two hundred and ninety United States dollars), representing expenses before the inter-American system, for the appearance of a representative at a hearing of the Inter-American Commission and the presence of legal representatives, witnesses and expert witnesses at the public hearing on merits held at the seat of the Court. Juan Pablo Olmedo Bustos and Ciro Colombara López, and also the Center for Justice and International Law (CEJIL) waived reimbursement of any expenses incurred. With regard to costs, the Commission informed the Court that the representatives of the victims and the Center for Justice and International Law (CEJIL) had waived claiming costs for professional fees.

The State's arguments

93. As mentioned above (supra paras. 62.g and 82.g), the State indicated that, pursuant to Article 2 of the Convention and its constitutional procedures, it was in the process of adopting the necessary measures in order to eliminate cinematographic censorship and thus allow exhibition of the film "The Last Temptation of Christ".

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94. On January 31, 2001, the State submitted its observations on the Commission's brief on expenses (supra para. 41), indicating that:

a) there was no documentary, accounting or financial evidence to indicate that the cost of the airfare for a lawyer of the Asociación de Abogados por las Libertades Públicas A.G. to travel to Washington, D.C., to take part in a hearing before the Inter-American Commission during its 98th session, was in fact paid by that organization;
b) invoice No. 4526 does not comply with the requirement of referring to necessary and essential expenses incurred by the parties to the litigation, as it is not in the name of any of the parties; and
c) invoices Nos. 4540, 4541 and 4542 were issued for hotel accommodation and food corresponding to November 16 to 19, 1999; however, the public hearing on merits held at the seat of the Court was only on November 18, 1999. Those expenses cannot be attributed to attending the hearing, and this argument applied to the airfares also.

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The considerations of the Court

95. Article 63(1) of the American Convention establishes that:

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

96. In the instant case, the Court has established that the State violated Article 13 of the Convention and failed to comply with its Articles 1(1) and 2.

97. With regard to Article 13 of the Convention, the Court considers that the State must modify its legal system in order to eliminate prior censorship and allow the cinematographic exhibition and publicity of the film "The Last Temptation of Christ", because it is obliged to respect the right to freedom of expression and to guarantee its free and full exercise to all persons subject to its jurisdiction.

98. With regard to Articles 1(1) and 2 of the Convention, the norms of Chilean domestic legislation that govern the exhibition and publicity of cinematographic production have still not been adapted to the provision of the American Convention that prior censorship is prohibited. Therefore, the State continues to fail to comply with the general obligations referred to in those provisions of the Convention. Consequently, Chile must adopt the appropriate measures to reform its domestic laws, as set out in the previous paragraph, in order to ensure the respect and enjoyment of the right to freedom of thought and expression embodied in the Convention.

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99. With regard to other forms of reparation, the Court believes that this judgment constitutes, per se, a form of reparation and moral satisfaction of significance and importance for the victims. [FN22]

[FN22] cf. Suárez Rosero case. Reparations (Article 63(1) American Convention on Human Rights). Judgment of January 20, 1999. Series C No. 44, para.72.
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100. Regarding reimbursement of expenses, this Court must prudently evaluate what they cover; this includes expenses for the steps taken by the victims before the authorities in the domestic jurisdiction, and also those arising in the course of the proceeding before the inter-American protection system. This evaluation may be carried out based on the principle of fairness. [FN23]

[FN23] cf. Suárez Rosero case, supra note 22 para. 92.
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101. To this end, based on fairness, the Court calculates those expenses in a total amount of US$ 4.290 (four thousand two hundred and ninety United States dollars), and this should be paid to the appropriate party, through the Inter-American Commission on Human Rights.

102. In accordance with its usual practice, the Court reserves the authority to monitor the integral fulfillment of this judgment. The case will be closed once the State has faithfully complied with the provisions of this decision.

XII. OPERATIVE PARAGRAPHS

103. Therefore,

THE COURT

unanimously:

1. Finds that the State violated the right to freedom of thought and expression embodied in Article 13 of the American Convention on Human Rights, to the detriment of Juan Pablo Olmedo Bustos, Ciro Colombara López, Claudio Márquez Vidal, Alex Muñoz Wilson, Matías Insunza Tagle and Hernán Aguirre Fuentes.
2. Finds that the State did not violate the right to freedom of conscience and religion embodied in Article 12 of the American Convention on Human Rights, to the detriment of Juan Pablo Olmedo Bustos, Ciro Colombara López, Claudio Márquez Vidal, Alex Muñoz Wilson, Matías Insunza Tagle and Hernán Aguirre Fuentes.
3. Finds that the State failed to comply with the general obligations of Article 1(1) and 2 of the American Convention on Human Rights in relation to the violation of the right to freedom of thought and expression indicated in decision 1 of this judgment.4. Finds that the State must

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amend its domestic law, within a reasonable period, in order to eliminate prior censorship to allow exhibition of the film “The Last Temptation of Christ”, and must provide a report on the measures taken in that respect to the Inter-American Court of Human Rights, with six months of the notification of this judgment.
5. Finds that, in fairness, the State must pay the amount of US$ 4.290 (four thousand two hundred and ninety United States dollars), as reimbursement of the expenses arising from the steps taken by the victims and their representatives in the domestic proceedings and in the international proceeding before the inter-American protection system. This amount to be paid through the Inter-American Commission on Human Rights.
6. Finds that it will monitor that this judgment is complied with and only then will it close the case.

Judge Cançado Trindade informed the Court of his Concurring Opinion and Judge De Roux Rengifo of his Separate Opinion, which accompany this Judgment.

Done, at San José, Costa Rica, on February 5, 2001 in the Spanish and English languages, the Spanish text being authentic.

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

So ordered,

Antônio A. Cançado Trindade
President

Manuel E. Ventura-Robles
Secretary

CONCURRING OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. In voting in favour of the adoption, by the Inter-American Court of Human Rights, of the present Judgment on the merits of the case "The Last Temptation of Christ" (Olmedo Bustos and Others versus Chile), which safeguards the right to the freedom of thought and expression, I feel obliged to express my thoughts on the highly relevant juridical implications of the decision of the Court, as the foundation of my position in this respect. The present Judgment of the Court on the

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case "The Last Temptation of Christ" has a bearing on the fundamental question of the very origin of the international responsibility of the State, as well as on the extent of the conventional obligations of protection of human rights. This can be inferred from its categorical paragraph 72, in which the Court expresses, in my view correctly and lucidly, its understanding to the effect that

"(...) the international responsibility of the State can generate by acts or omissions on the part of any of its powers or organs, irrespective of their hierarchy, which violate the American Convention. That is, any act or omission, imputable to the State, in breach of the norms of the International Law of Human Rights, engages the international responsibility of the State. In the present case this latter was generated by the fact that Article 19.12 of the Constitution establishes prior censorship in movie production and, thereby, determines the acts of the Executive, Legislative and Judicial Powers".

2. The question of the compatibility of a norm of domestic law of a State Party with the American Convention on Human Rights thus returns to the consideration of the Court, - and, in the present case, the norm at issue being one of constitutional level. This is a question that, by its implications, has led me to develop, on earlier occasions, some thoughts, in my Dissenting Opinions in the cases El Amparo, Caballero Delgado and Santana, and Genie Lacayo. It is not my intention here to reiterate them, as the object of my dissenting position in those cases (in my view a self-limitation of the Court of the extent of its own faculties of protection) no longer exists in the subsequent and contemporary case-law of our Tribunal, which has much evolved in this respect, above all as from the new criterion on the matter established in the case Suárez Rosero (cf. infra). Nevertheless, as it is a central question in the cas d'espèce, I deem it proper to recall the main points raised in those thoughts, in so far as they have a direct bearing on the examination of the matter in the circumstances of the present case "The Last Temptation of Christ".

3. In the case of El Amparo (Reparations, 1996) [FN1], concerning Venezuela, I sustained, in my Dissenting Opinion referred to, that the very existence of a legal provision of domestic law can per se create a situation that directly affects the rights protected by the American Convention, by the risk or the real threat that its applicability represents, without it being necessary to wait for the occurrence of a damage; otherwise, the duty of prevention, set forth in the case-law of the Inter-American Court itself, could hardly be sustained (pars. 2-3 and 6). After I referred to the international case-law in support of this position (pars. 5 and 10), I added that, as from the moment that violations of the protected human rights were found, the examination of the incompatibility of norms of domestic law with the American Convention is no longer "an abstract question"; that is, the questioning of the compatibility with the Convention of the existence of a norm of domestic law in force, which "per se creates a legal situation that affects the protected human rights", is in fact "a concrete question" (pars. 7-8).

[FN1] Inter-American Court of Human Rights (IACtHR), Judgment of 14.09.1996, Series C, n. 28.

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4. I then expressed, in that Opinion, my understanding in the sense that "it is the existence of victims that provides the decisive criterion for distinguishing the examination simply in abstracto of a legal provision, from the determination of the incompatibility of such provision with the American Convention (...) in the framework of a concrete case (...). The existence of victims renders juridically inconsequential the distinction between the law and its application, in the context of a concrete case" (pars. 7-8 and 11) [FN2]. In the same case of El Amparo (Interpretation of Judgment, 1997) [FN3], in a subsequent Dissenting Opinion, I insisted on my understanding that that responsibility of the State is engaged as from the moment in which the State fails to comply with an international obligation irrespective of the occurrence of an additional damage (pars. 24-25, 21 and 26). The American Convention, together with other human rights treaties, "were conceived and adopted on the basis of the assumption that the domestic legal orders ought to be harmonized with the conventional provisions, and not vice-versa" (par. 13). Definitively, - I warned, - one

"cannot legitimately expect that such conventional provisions be `adapted' or subordinated to the solutions of constitutional law or of internal public law, which vary from country to country (...). The American Convention, as well as other human rights treaties, seek, a contrario sensu, to have in the domestic law of the States Parties, the effect of improving it, in order to maximize the protection of the recognized rights, bringing about, to that end, whenever necessary, the revision or revocation of national laws (...) which do not conform to its standards of protection" (par. 14).

[FN2] And I added: - "(...) In the exercise of the contentious jurisdiction the Court may determine, at the request of a party, the incompatibility or otherwise of a domestic law with the Convention in the circumstances of the concrete case. The American Convention effectively authorizes the Court, in the exercise of its contentious jurisdiction, to determine whether a law, impugned by the complainant party, and which by its own existence affects the protected rights, is or not contrary to the American Convention on Human Rights" (pars. 7-8 and 11).
[FN3] IACtHR, Resolution of 16.04.1997, Series C, n. 46.
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5. This being so, sustaining the thesis of the objective international responsibility of the States Parties as the one which provides the conceptual basis of the duty of prevention, I added that

"A State, accordingly, may have its international responsibility engaged, in my view, by the simple approval and promulgation of a law in conflict with its conventional international obligations of protection, or by its failure to harmonize its domestic law in order to secure the faithful compliance with such obligations, or by its failure to adopt the legislation needed to comply with these latter. Time has come to give precision to the scope of the legislative obligations of States Parties to human rights treaties. The tempus commisi delicti is, in my understanding, that of the approval and promulgation of a law which, per se, by its existence itself, and its applicability, affects the protected human rights (in the context of a given concrete case, where victims of violations of the protected rights exist), without the need to wait for the subsequent application of that law, generating an additional damage.

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The State at issue ought to remedy promptly such situation, since failure to do so could can constitute a `continuing situation' in violation of human rights (denounced in a concrete case). It is perfectly possible to conceive of a `legislative situation' contrary to the international obligations of a given State (e.g., maintaining a legislation in conflict with the conventional obligations of protection of human rights, or failing to adopt the legislation required to give effect to such obligations in the domestic law). In this case, the tempus commisi delicti would extend so as to cover the whole period in which the national laws remained in conflict with the conventional international obligations of protection, entailing the additional obligation of reparation for the successive damages resulting from such "continuing situation" during the whole period at issue" (pars. 22-23).

The facts in the present case of "The Last Temptation of Christ" disclose, in my view, that these considerations are valid for all norms of domestic law (comprising the norms of both infraconstitutional as well as constitutional levels).

6. Further on, in another Dissenting Opinion, in the case of Genie Lacayo versus Nicaragua (Revision of Sentence, 1997) [FN4], I observed that "the notion of `continuing situation', - nowadays supported by a vast case-law in the domain of the International Law of Human Rights, - comprises violations of human rights which, e.g., cannot be divorced from the legislation from which they result (and which remains in force). (...) Such continuing situation may arise, for instance, from the persistence, either of national laws incompatible with the Convention, or of a jurisprudence constante of national tribunals clearly adverse to the victim" (pars. 9 and 27).

[FN4] IACtHR, Resolution of 13.09.1997, Series C, n. 45.

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7. Accordingly, - I added, - in my understanding, the existence itself of a norm of domestic law "entitles the victims of violations of the rights protected by the American Convention to require its compatibilization with the provisions of the Convention, (...) without having to wait for the occurrence of an additional damage by the continued application" of such law (par. 10) [FN5]. I sustained the same position, likewise, in my Dissenting Opinion (par. 21) in the case of Caballero Delgado and Santana versus Colombia (Reparations, 1997) [FN6], in which I pointed out the indissociability between the two general obligations set forth in the American Convention, namely, that of respecting and of ensuring respect for the protected rights (Article 1.1) and that of harmonizing the domestic law with the international norms of protection (Article 2) (pars. 6 and 9).

[FN5] In this respect, I saw it fit to warn that "while a clear understanding of the wide scope of the conventional obligations of protection does not prevail in all the States Parties to the American Convention, - a clear understanding that the international responsibility of a State may be engaged by any act, or omission, of any of its powers (Executive, Legislative or Judicial), - very little progress will be achieved in the international protection of human rights in our continent" (par. 24).
[FN6] IACtHR, Judgment of 29.01.1997, Series C, n. 31.

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8. Such general obligations undoubtedly require from the States Parties the adoption of legislative and other measures to guarantee the rights set forth in the Convention and to improve the conditions of their exercise (par. 3). Such obligations, in their wide scope, are incumbent upon all the powers of the State, which are "under the obligation to take the necessary measures to give effectiveness to the American Convention at domestic law level. Non-compliance with the conventional obligations, as known, engages the international responsibility of the State, for acts or omissions, either of the Executive Power, or of Legislative, or of the Judiciary" (par. 10). And I pointed out:

"In fact, those two general obligations, - which are added to the other specific conventional obligations concerning each of the protected rights, - are incumbent upon the States Parties by the application of International Law itself, of a general principle (pacta sunt servanda) whose source is metajuridical, in seeking to be based, beyond the individual consent of each State, on considerations concerning the binding character of the duties derived from international treaties. In the present domain of protection, the States Parties have the general obligation, arising from a general principle of International Law, to take all measures of domestic law to guarantee the effective protection (effet utile) of the recognized rights" (par. 8).

9. Seeking to stress the importance of the adoption of such positive measures on the part of the States, I pondered that they can bring about changes in the domestic law which trascend the particular circumstances of the concrete cases; "examples of cases", - I added, - "in which national laws were in fact modified, in accordance with the decisions of the international human rights supervisory organs in individual cases, abound in international practice. The efficacy of human rights treaties is measured, to a large extent, by their impact upon the domestic law of the States Parties" (par. 5).

10. Nevertheless, at this beginning of the XXIst century, the circumstances of the present case of "The Last Temptation of Christ" seem to indicate that the advances in this respect are slow. In the last century, already in 1937, a distinguished scholar of human rights pondered that the day when the historical evolution were to enter into "an era of conscious consolidation of international law", States will not only adopt this latter as an "integral part of their Constitution", but will also no longer adopt laws that obstruct international law forming an "integral part of its system" of domestic law [FN7]. Nowadays, in the year 2001, it may be said, in the light, e.g., of the present case, that we have not yet succeeded to achieve this degree of development of the domestic law of the States Parties to human rights treaties. One ought, thus, to keep on insisting on their legislative and judicial obligations, besides the executive ones [FN8].

[FN7] Hersch Lauterpacht, "Règles générales du droit de la paix", 62 Recueil des Cours de l'Académie de Droit International de La Haye (1937) pp. 145-146; text reproduced subsequently, in English, in International Law Being the Collected Papers of Hersch Lauterpacht, vol. I, Cambridge, University Press, 1970, p. 229.
[FN8] Cf., in this respect, e.g., Hildebrando Accioly, Tratado de Direito Internacional Público, 2nd. ed., vol. I, Rio de Janeiro, Ed. MRE, 1956, pp. 280-310; H. Dipla, La responsabilité de

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l'État pour violation des droits de l'homme - Problèmes d'imputation, Paris, Pédone, 1994, pp. 17-32. César Sepúlveda, for example, was quite clear in admitting "the responsibility of a State for the promulgation of laws contrary to this [internacional] legal order, and more clearly, of those which result in contraposition to a treaty"; and he added that "responsibility is also deduced for a member of the international community if it does not adopt a law that it had committed itself by a treaty to adopt, or to promulgate it in accordance with international law. Likewise, responsibility may ensue when it does not no act to derogate a law which is incompatible with the international obligations contracted by the State"; C. Sepúlveda, Derecho Internacional, 13th. ed., Mexico, Ed. Porrúa, 1983, pp. 237-238.
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11. It would not be exact to deny all progress in this domain either. There have been advances, but we remain regrettably far from fulfilling the ideal of the full compatibilization of the domestic legal order with the norms of the international protection of human rights. One of the advances is found in the more recently case-law itself of the Inter-American Court on the matter [FN9]. Thus, in the case of Loayza Tamayo versus Peru (Merits, 1997) [FN10], the Court determined the incompatibility with the American Convention (Article 8(4)) of the decrees-laws which tipified the crimes of "traición a la patria" and of "terrorism" (pars. 66-77). Subsequently, in the case of Castillo Petruzzi versus Peru (Merits, 1999) [FN11], the Court held that such decrees-laws violated Article 2 of the Convention, which requires not only the suppression of norms in breach of the guarantees enshrined therein, but also the adoption of norms in order to secure the observance of those guarantees (pars. 207-208); this being so, the Court ordered the respondent State to reform the norms of domestic law declared to be in violation of the American Convention (resolutory point n. 14).

[FN9] In my aforementioned Dissenting Opinion in the case of El Amparo (Interpretation of Sentence, 1997), I pondered that the Inter-American Court was, at that time (April 1997), "at a crossroads" in relation to the question dealt with herein: either it continued to insist, as to the national laws of the States Parties to the American Convention, on the occurrence of a damage resulting from its effective application as a pre-condition to determine the incompatibility or otherwise of such laws with the Convention (as it did in the cases of El Amparo and Genie Lacayo, supra), or else it would come to proceed to such determination (and of its juridical consequences in concrete cases) as from the very existence and applicability of the national laws, bearing in mind the duty of prevention incumbent upon the States Parties to the Convention (as I sustained in my Dissenting Opinions in the cases of El Amparo, Caballero Delgado and Santana, and Genie Lacayo, supra) (par. 12).
[FN10] IACtHR, Judgment of 17.09.1997, Series C, n. 33.
[FN11] IACtHR, Judgment of 30.05.1999, Series C, n. 52.
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12. In the case Garrido and Baigorria versus Argentina (Reparations, 1998) [FN12], the Court dedicated a whole section of the Judgment (part IX) to the State's duty to take action in the ambit of domestic law, in which it recalled, inter alia, that "under the law of nations, a customary norm prescribes that a State that a State that has concluded and international agreement must introduce into its domestic law whatever changes are needed to ensure execution of the

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obligations it has undertaken" (par. 68). In sum, this is the duty of the State to take positive measures of effective protection (par. 69) of the human rights of all persons under its jurisdiction.

[FN12] IACtHR, Judgment of 27.08.1998, Series C, n. 39.

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13. But the great qualitative step forward in the recent case-law of the Court, the true landmark on the question at issue, occurred in the case of Suárez Rosero versus Ecuador (Merits, 1997); in its Judgment, the Court, in declaring inter alia that a provision of the Ecuadorean Penal Code was in breach of Article 2 of the American Convention, in combination with Articles 7.5 and 1.1 of the latter (resolutory point n. 5), the Court pointed out not only that the impugned legal provision had been applied in the cas d'espèce, but also that, in its view, that provision of the Ecuadorean Penal Code violated per se Article 2 of the Convention, "whether or not it was enforced in the instant case" (par. 98) [FN13]. In this way, the Court endorsed, at last, the thesis of the international objective responsibility of the State, admitting that a norm of domestic law can, in the circumstances of a concrete case, by its own existence and applicability breach the American Convention on Human Rights.

[FN13] Emphasis added.

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14. If any dount were still to persist as to this point, i.e., that the very existence and applicability of a norm of domestic law (be it infraconstitutional or constitutional) can per se engage the responsibility of the State under a human rights treaty, the facts of the present case of "The Last Temptation of Christ" contribute, in my view decisively, to dissipate such doubt. From the facts in this case of "The Last Temptation of Christ" it is rather inferred that, in circumstances such as those of the cas d'espèce, the attempt to distinguish between the existence and the effective application of a norm of domestic law, for the purpose of determining the configuration or otherwise of the international responsibility of the State, becomes irrelevant, and discloses an extremely formalist outlook of Law, devoid of any sense.

15. In fact, in the present case of "The Last Temptation of Christ", new elements have been introduced which require a more detailed examination of the question at issue. In its brief of 17.08.1999, the respondent State argued that it was not possible for its international responsibility to be engaged in the concrete case by one sole sentence of the Judiciary, without compliance with "other requisites"; according to that brief, in the view of the State, it did not suffice for a judicial decision to be considered contrary to international law, as it became necessary that such decision were "endorsed by the support or at least the inactivity of the legislative or executive organs". In other words, according to the State, there should be a concurrence of all powers of the State, in a same sense, for its international responsibility to be engaged.

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16. Nevertheless, there is a vast and long international case-law clearly oriented a contrario sensu, sustaining that the origin of the international responsibility of the State can lie in any act or omission of any of the powers or agents of the State (be it of the Executive, or of the Legislative, or of the Judiciary) [FN14]. If it were necessary to seek support for the assertion of the existence of legislative obligations in earlier international case-law, therein we would, anyway, find it, e.g., as from the locus classicus on the matter, in the Judgment on the case concerning Certain German Interests in Polish Upper Silesia (Germany versus Poland, 1926), and in the Advisory Opinion on German Settlers in Poland (1923), both of the old Permanent Court de International Justice (PCIJ) [FN15]. To resort to classic international case-law on the matter, however, does not seem strictly necessary to me, as I have already pointed out on another occasion [FN16]: given the specificity of the International Law of Human Rights, the pronouncements, on the matter, on the part of distinct organs of international supervision of human rights, appear to me more than sufficient to affirm the existence of legislative obligations - besides the judicial, as well as the ejecutive ones - of the States Parties to human rights treaties like the American Convention [FN17].

[FN14] Cf., e.g., the digest of case-law in United Nations, Yearbook of the International Law Commission (1969)-II, especially pp. 105-106.

[FN15] In the exercise of its contentious as well as advisory jurisdiction, the PCIJ pronounced clearly on the matter: in the Judgment above-mentioned, it asserted that national laws are facts which express the will and constitute the activities of the States, in the same way as the judicial decisions or the administrative measures, and concluded that the Polish legislation at issue was contrary to the German-Polish Convention which protected the German interests in question; and in the Advisory Opinion referred to, it sustained that the Polish legislative measures at issue were not in conformity with the international obligations of Poland. Cit. in United Nations, Yearbook of the International Law Commission (1964)-II, p. 138.

[FN16] In my aforementioned Dissenting Opinion in the case Caballero Delgado and Santana versus Colombia (Reparations, 1997), par. 21, n. 24.

[FN17] Besides the case-law to this effect already quoted in my aforementioned Opinions (e.g., the judgments of the European Court of Human Rights in the cases Klass and Others (1978), Marckx (1979), Johnston and Others (1986), Dudgeon (1981), Silver and Others (1983), De Jong, Baljet and van den Brink (1984), Malone (1984), Norris (1988), as well as the Views of the Human Rights Committee - under the Covenant on Civil and Political Rights of the United Nations - in the cases Aumeeruddy-Cziffra and Others (1981), and of the Handicapped Italians (1984)), - I could add, as an additional illustration, other decisions. Thus, e.g., in its Views (of 31.03.1993) in the case J. Ballantyne, E. Davidson and G. McIntyre versus Canada (communications 359/1989 y 385/1989), the Human Rights Committee urged the State Party to put an end to the violation of Article 19 (right to freedom of expression) of the Covenant on Civil and Political Rights, "amending the [national] law" as it ought to; U.N., document CCPR/C/47/D/359/1989-385/1989/Rev.1, of 05.05.1993, p. 17, par. 13 (restricted circulation). Likewise, in its Views (of 31.03.1994) in the case N. Toonen versus Australia (communication 488/1992), the Human Rights Committee pointed out that "except in Tasmania, all the laws which sanctioned homosexuality have been derogated all over Australia", and that in the present case it was necessary to derogate the "wrongful law" (provisions of the Criminal Code of Tasmania), in breach of Articles 17(1) and 2(1) (right to private or family life, and general

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obligation to respect the protected rights, respectively) of the Covenant on Civil and Political Rights; U.N., document CCPR/C/50/D/488/1992, of 04.04.1994, p. 13, pars. 8-11 (restricted circulation). In its turn, the African Commission on Human and Peoples' Rights, in the cases (ns. 60/91 y 87/93) of the Constitutional Rights Project (1994), concerning Nigeria, established a violation inter alia of Article 7 (right to a fair trial) of the African Charter on Human and Peoples' Rights, resulting from the operation of "special tribunals" by a decree; cf. Decisions of the African Commission on Human and Peoples' Rights (1986-1997), Series A, vol. 1, Banjul, 1997, pp. 55-59 and 101-104. And the old European Commission on Human Rights, even in the examination of petitions which it rejected as inadmissible, admitted, however, that, in principle, an individual can complain of a law which, by its existence itself, would be incompatible with the European Convention of Human Rights, if he runs the risk of being directly affected by it. Cf., to this effect, e.g., application n. 24877/94, A. Casotti and Others versus Italy, decision of 16.10.1996, in 87 Decisions and Reports (1996) pp. 63 and 65; and application n. 24581/94, N. Gialouris, G. Christopoulos and 3333 Other Customs Workers versus Greece, decision of 06.04.1995, in 81-B Decisions and Reports (1995) pp. 123 and 127.
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17. As to doctrine, if it were not sufficient to count on the previously summarized considerations, developed in my Opinions in earlier cases before this Court (cf. pars. 3-9, supra, of the present Concurring Opinion), I would limit myself to refer, in addition, to the writings, on the subject, of two great jusinternationalists of the XXth century, Eduardo Jiménez de Aréchaga and Roberto Ago. In a study published in 1968, Jiménez de Aréchaga, - who was later to become President of the International Court of Justice, - recalled that the unsuccessful Hague Conference on the Codification of International Law (1930), at least contributed with the "general recognition" of the responsibility of States for judicial decisions clearly incompatible with the international obligations contracted by the respective States. On the occasion, several Delegates pointed out that, though it was certain that the independence of the Judicial Power constituted a "fundamental principle in constitutional law", nevertheless it was an "irrelevant" factor in international law [FN18].

[FN18] Eduardo Jiménez de Aréchaga, "International Responsibility", in Manual of Public International Law (ed. Max Sorensen), London/N.Y., MacMillan/St. Martin's Press, 1968, p. 551.

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18. This being so, - added the Uruguayan jurist, - one had to admit that the activity of the Judicial Power of a State effectively engaged the responsibility of the State whenever it appeared contrary to the international obligations of such State. Although independent from the Executive Power, the Judicial Power is not independent from the State, but quite on the contrary, it is part of the State, for international purposes, as much as the Executive Power [FN19]. Thereby, already seventy years ago, there were no longer traces of the surpassed doctrinal attempts, of the XIXth and beginning of the XXth centuries, that sought in vain to avoid the extension to the Judicial Power of the principle of the international responsibility of the State for acts or omissions of all its powers and organs.

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[FN19] Ibid., p. 551.
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19. On his turn, Roberto Ago, as special rapporteur of the United Nations International Law Commission on the theme of the Responsibility of the State, was categorical in that respect, in his substancial Third Report (of 1971), titled "The Internationally Wrongful Act of the State, Source of International Responsibility":

"(...) No-one now supports the old theories which purported to establish an exception in the case of legislative organs on the basis of the `sovereign' character of Parliament, or in the case of jurisdictional organs by virtue of the principle of independence of the courts or the res judicata authority of their decisions. The cases in which certain States have resorted to arguments based on principles of this kind, and have found arbitral tribunals willing to accept them, belong to the distant past. Today, the belief that the respective positions of the different powers of the State have significance only for constitutional law and none for international law (which sees the State only in its entity) is firmly rooted in international jurisprudence, the practice of States and the doctrine of international law.

(...) The doctrine of the impossibility of invoking international responsibility for the acts of legislative or judicial organs has not been advanced for a long time. On the other hand, the possibility of invoking international responsibility for such acts has been directly or indirectly recognized on many occasions. (...)" [FN20].

[FN20] Roberto Ago (special rapporteur), "Third Report on State Responsibility: The Internationally Wrongful Act of the State, Source of International Responsibility", in United Nations, Yearbook of the International Law Commission (1971)-II, part I, pp. 246-247, pars. 144 and 146.
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20. In the correct understanding of the Italian jurist, expressed as from his Second Report (of 1970), on "The Origin of International Responsibility", any conduct of a State classified by international law as internationally wrongful entails the responsibility of that State in international law; thus, any internationally wrongful act (or omission) constitutes "a source of international responsibility"; as an illustration, Ago mentioned the failure of a State to abide by the international obligation to adopt certain legislative measures required by the treaty at issue, to which it is a Party [FN21]. The damage can be taken into account, for the purpose of the determination of the reparations, "but is not a prerequisite for the determination that an internationally wrongful act has been committed" [FN22].

[FN21] Roberto Ago (special rapporteur), "Second Report on State Responsibility: The Origin of International Responsibility", in United Nations, Yearbook of the International Law Commission (1970)-II, pp. 179, 187 and 194, pars. 12, 31 and 50.
[FN22] Roberto Ago, "Third Report on State Responsibility...", op. cit. supra n. (17), p. 223, par. 74.

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21. Moreover, the independence of the characterization of a given act (or omission) as wrongful in international law from the characterization - similar or otherwise - of such act by the domestic law of the State, constitutes a general principle of the law on the international responsibility [FN23]. The fact that a given State conduct conforms itself with the provisions of domestic law, or even is required by this latter, does not mean that its internationally wrongful character can be denied, whenever it constitutes a violation of an international obligation; as pointed out by the well-known obiter dictum of the old Permanent Court of International Justice (PCIJ) in the case of Certain German Interests in Polish Upper Silesia (Merits, 1926), from the standpoint of international law, the norms of domestic law are nothing more that simple facts [FN24]. Thus, it is not the task of international law to occupy itself with the "organization" of the State [FN25].

[FN23] Ibid., pp. 226, 232 and 238, pars. 86, 88, 103-104 and 120.
[FN24] Ibid., pp. 227, 237 and 246, pars. 92, 117 and 145. - Likewise, it is jurisprudence constante of the International Court of Justice (ICJ) the principle whereby a State cannot invoke difficulties of domestic law in order to evade the observance of its international obligations, - a principle which is set forth in the two Vienna Conventions on the Law of Treaties (of 1969 and 1986, Article 27), and which was also singled out, in his work of codification, in 1957 and 1961, by the previous special rapporteur on the matter of the International Law Commission of the United Nations, the Cuban jurist F.V. García Amador, duly recalled by Roberto Ago (ibid., pp. 228 and 231, pars. 94 and 100).
[FN25] As recalled by R. Ago, in ibid., p. 236, par. 113.

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22. In fact, the question of the distribution of competences, and the basic principle of the separation of powers, are of the greatest relevance in the ambit of constitutional law, but in that of international law they are nothing but facts, which have no incidence on the configuration of the international responsibility of the State. The frustrated attempts, in an already distant past, to place the legislative and judicial powers of the State out of international contacts (under the influence, to some extent, of some of the earlier manifestations of legal positivism), would have no sense in our days. They belong to a world which no longer exists.

23. The world has substantially changed already some decades ago, and no one, in sound conscience, would today pretend to advance a reasoning to that effect. The State, as an indivisible whole, remains a center of imputation, bound to answer for the internationally wrongful acts or omissions, of any of its powers, or of its agents, irrespective of hierarchy. As very well pointed out by the Swiss jurist Max Huber, in his well-known arbitral award of 1925 in the case of the Island of Palmas (The Netherlands versus United States), the competences (territorial and jurisdictional) exercised by the States have as a counterpart the duties incumbent upon them, emanated from international law, in their relations with other States [FN26], - and, I would allow myself to add, also, under the impact of the International Law of Human Rights in the last decades, in relation to all human beings under their respective jurisdictions.

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[FN26] U.N., Reports of International Arbitral Awards / Recueil des sentences arbitrales, vol. II, pp. 838-839.
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24. It is today recognized as a contribution - a clarifying element - of the prolonged labour, still unfinished, of the United Nations International Law Commission (ILC) on the Responsibility of the State (in particular of its part I), the distinction adopted between primary rules of international law, those which impose specific obligations to the States, and secondary rules of international law, those which determine the juridical consequences of the non-compliance by the States of the obligations established by the primary rules. This distinction contributes to clarify that the responsibility of the State is engaged as from the moment of the international wrongful act (or omission), there arising therefrom a subsidiary obligation to put an end to the consequences of the violation (what may mean, in the circumstances of a concrete case, e.g., to modify a national law) and to provide reparation for the damages.

25. The present Judgment of the Inter-American Court on the merits in the case of "The Last Temptation of Christ" represents, in this respect, in my view, a sensible jurisprudential advance. As known, once established the international responsibility of a State Party to a human rights treaty, such State has the duty to reestablish the situation that secures to the victims the enjoyment of their violated right (restitutio in integrum), putting an end to the situation in breach of that right, as well as, in the light of the case, to provide reparation for the consequences of such violation. The present Judgment of the Court, besides establishing the indissociability between the general duties of Articles 1.1 and 2 of the American Convention (pars. 85-90), places such duties in the framework of reparations, under Article 63.1 of the Convention: the Court correctly determines that, in the circumstances of the cas d'espèce, the modifications in the domestic legal order required to harmonize this latter with the norms of protection of the American Convention constitute a form of non-pecuniary reparation under the Convention [FN27] (pars. 96-98). And in a case like the present one, pertaining to the safeguard of the right to freedom of thought and of expression, such non-pecuniary reparation is considerably more important than an indemnization.

[FN27] Precisely to this effect I had already pronounced in my Dissenting Opinion in the case Caballero Delgado and Santana versus Colombia (Reparations, 1997 - IACtHR, Judgment of 29.01.1997, Series C, n. 31), pars. 6 and 9 (on the indissociability between the general duties of Articles 1.1 and 2 of the American Convention), and pars. 13-14 and 20 (on the modifications of norms of domestic law as a form of non-pecuniary reparation under the Convention).
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26. Another distinction found in part I of the aforementioned project of the ILC, between the obligations of behaviour and those of result, despite all the doctrinal debate it has entailed in the last three decades, has, at least, exercised the role of demonstrating the necessity to promote a better articulation between the domestic and international legal orders [FN28]. I consider such articulation of particular importance for the future of the international safeguard of human rights, with special emphasis on the positive obligations of protection on the part of the State, on the

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basis of its objective international responsibility engaged as from the violation of its international obligations [FN29].

[FN28] P.-M. Dupuy, "Le fait générateur de la responsabilité internationale des États", 188 Recueil des Cours de l'Académie de Droit International de La Haye (1984) pp. 50 and 25; and cf. P.A. Fernández Sánchez, Las Obligaciones de los Estados en el Marco del Convenio Europeo de Derechos Humanos, Madrid, Ministerio de Justicia Publs., 1987, pp. 59-83 and 193-194.
[FN29] Cf., on the matter, e.g., Jules Basdevant, "Règles générales du droit de la paix", 58 Recueil des Cours de l'Académie de Droit International de La Haye (1936) pp. 670-674; Eduardo Jiménez de Aréchaga, El Derecho Internacional Contemporáneo, Madrid, Ed. Tecnos, 1980, pp. 319-325, and cf. pp. 328-329; Ian Brownlie, System of the Law of Nations - State Responsibility - Part I, Oxford, Clarendon Press, 1983, p. 43; Ian Brownlie, Principles of Public International Law, 4th. ed., Oxford, Clarendon Press, 1995 (reprint), p. 439; Paul Guggenheim, Traité de Droit International Public, volume II, Genève, Georg, 1954, pp. 52 and 54; L.G. Loucaides, Essays on the Developing Law of Human Rights, Dordrecht, Nijhoff, 1995, pp. 146 and 149-152; Paul Reuter, "Principes de Droit international public", 103 Recueil des Cours de l'Académie de Droit International de La Haye (1961) pp. 592-594 and 598-603; C.W. Jenks, "Liability for Ultra Hazardous Activities in International Law", 117 Recueil des Cours de l'Académie de Droit International de La Haye (1966) pp. 105-110 and 176-196; Karl Zemanek, "La responsabilité des États pour faits internationalement illicites, ainsi que pour faits internationalement licites", in Responsabilité internationale (org. Prosper Weil), Paris, Pédone, 1987, pp. 36-38 and 44-46; Benedetto Conforti, Diritto Internazionale, 5th. ed., Napoli, Ed. Scientifica, 1997, pp. 360-363; J.A. Pastor Ridruejo, Curso de Derecho Internacional Público y Organizaciones Internacionales, 6a. ed., Madrid, Tecnos, 1996, pp. 571-573.

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27. The harmonization of the norms of domestic law with the provisions of human rights treaties can in fact be considered an obligation of result. But this does not mean that compliance with it can be postponed indefinitely. The whole doctrinal and jurisprudential construction of the last decades about the positive obligations of the States Parties to human rights treaties represents a reaction against the inertia, or the slowness, or the omissions of the public power in the present domain of protection. Such construction contributes to explain, and to set the foundations of, the legislative obligations of the States Parties to human rights treaties.

28. There remains a last point for me to consider in this Concurring Opinion, which was object of attention and debate in the public hearing before the Inter-American Court on the present case of "The Last Temptation of Christ", held on 18 and 19 November 1999: I refer to the argument of the respondent State according to which the domestic remedies would not have been exhausted, given the fact that a project of constitutional reform was pending before the Legislative Poder (to replace the system in force of movie censorship); moreover, as the Executive Power did not share the interpretation of the Judicial Power on the matter, seeking to remedy the situation, the State would be exempt from international responsibility [FN30].

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[FN30] Cf. IACtHR, Transcripción de los Alegatos Finales en el Caso "La Última Tentación de Cristo" - Audiencia Pública sobre el Fondo Celebrada el 18 y 19 de Noviembre de 1999, San José of Costa Rica, pp. 68-69, 70, 76-77 and 79-80.
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29. The Government of Chile affirmed, in the hearing before the Court referred to, not to have substantive discrepancies, as to the merits, with the Inter-American Commission on Human Rights (IACHR), about the need to secure freedom of expression, and so it was that the Government took distance from the Judicial Power in this respect, and sought a solution to the problem raised in the cas d'espèce [FN31]. The agent of the State of Chile, Dr. Edmundo Vargas Carreño, commented in a timely way that "the theme of the international responsibility of the State in general is today the most difficult theme of international law" [FN32], - and so it was that, after decades, the ILC has not yet concluded its work of codification on the matter.

[FN31] Ibid., pp. 76-77 and 79.
[FN32] Ibid., p. 84.
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30. The theme of the international responsibility of the State, besides being complex, has always seemed to me to be a truly central and fundamental chapter of Public International Law as a whole. The degree of consensus that one succeeds to attain in relation to its multiple aspects, - starting with the very bases of the configuration of such responsibility, - appears to me as ultimately revealing the degree of evolution and cohesion of the international community itself. Despite the undeniable and high juridical quality which they managed to give to their presentations in the memorable public hearing before the Court on the merits of the case of "The Last Temptation of Christ", both the IACHR and the Government of Chile, in their oral arguments, as well as, in their declarations, both the witnesses and experts proposed by the IACHR and the experts originally presented by the Chilean Government and convened by the Court, - I cannot omit to formulate some precisions which seem to me indeed necessary, given the complexity and high relevance of the matter dealt with.

31. Firstly, the rule of prior exhaustion of the remedies of domestic law, as set forth in Article 46 of the American Convention, encompasses the available, adequate and effective judicial remedies, in conformity with recognized principles of international law, which the formulation of the rule in that provision of the Convention refers to. If one were to pretend unduly to extend the scope of such rule to a project of constitutional reform, or of legislative reform, it would be transformed into an unsurmountable obstacle to the petitioners, besides having its juridical content distorted.

32. Secondly, if interposed, the objection of non-exhaustion ought to be definitively resolved in limine litis, that is, at the stage of admissibility of the case, and not in the proceedings on the merits of it. This is, in my view, a question of pure admissibility, as I have consistently sustained, within this Court, since 1991 [FN33]. In the last years, the Inter-American Court itself has correctly established, as from its Judgments on Preliminary Objections in the cases of Loayza Tamayo and Castillo Páez [FN34], pertaining to Peru, that, if the respondent State failed to

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invoke the objection of non-exhaustion in the proceedings of admissibility before the IACHR, it is precluded from raising it subsequently before the Court (estoppel). In this way, the Court modified the earlier criterion - in my view inadequate - followed originally by it on this point, in the cases of Velásquez Rodríguez, Godínez Cruz and Fairén Garbi and Solís Corrales [FN35] (1987), concerning Honduras.

[FN33] Cf. my Separate Opinions in the Judgments on Preliminary Objections in the cases Gangaram Panday versus Suriname (1991, Series C, n. 12), Loayza Tamayo versus Peru (1996, Series C, n. 25), and Castillo Páez versus Peru (1996, Series C, n. 24), as well as my Dissenting Opinion in the case Genie Lacayo versus Nicaragua (Resolution of 18.05.1995), pars. 11-17, in: OAS, Informe Anual de la Corte Interamericana de Derechos Humanos - 1995, pp. 85-87.
[FN34] IACtHR, Series C, ns. 25 and 24, respectively.
[FN35] IACtHR, Judgments on Preliminary Objections, Series C, ns. 1, 3 and 2, respectively.

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33. And thirdly, in any way, in the present context of the international protection of human rights, - fundamentally distinct from that of discretionary diplomatic protection at inter-State level [FN36], - the rule of domestic remedies is endowed with a procedural rather than substantive nature. It thus conditions the implementation (mise-en-oeuvre) of the responsibility of the State (as a requisite of admissibility of an international petition or complaint), but not the birth of such responsibility.

[FN36] The basic differences of context require that the local remedies rule, in the ambit of the international safeguard of human rights, is applied with special attention to the needs of protection of the human being. The rule referred to is far from having the dimension of an immutable or sacrosanct principle of international law, and nothing impedes that it is applied with greater or lesser rigour in distinct contexts. Ultimately, local remedies form an integral part of the very system of international human rights protection, the emphasis falling on the element of redress rather than on the process of exhaustion (of those remedies). The local remedies rule bears witness of the interaction between international law and domestic law in the present context of protection. We are here before a droit de protection, endowed with a specificity of its own, fundamentally oriented towards the victims, towards the rights of human beings rather than of States.
Generally recognized rules of international law (which the formulation of the local remedies rule in human rights treaties such as the American Convention refers to), besides following an evolution of their own in the distinct contexts in which they apply, necessarily suffer, when inserted into human rights treaties, a certain degree of adjustment or adaptation, dictated by the special character of the object and purpose of those treaties and by the widely recognized specificity of the international protection of human rights. A.A. Cançado Trindade, The Application of the Rule of Exhaustion of Local Remedies in International Law, Cambridge, University Press, 1983, pp. 1-443, esp. pp. 6-56, 279-287, 290-322 and 410-412.

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34. This is the thesis which I have been constantly sustaining for more than twenty years, as from the publication of my essay on "The Birth of State Responsibility and the Nature of the Local Remedies Rule", in 1978 in Geneva [FN37]. Ever since, I have always maintained that the birth and the implementation of the international responsibility of the State correspond to two distinct moments; in the present context of the international protection of human rights, the requisite of prior exhaustion of remedies of domestic law conditions the implementation, but not the birth, of that responsibility, which is conformed as from the occurrence of an internationally wrongful act (or omission) (which may have its source, e.g., in a legal provision of domestic law, or in an administrative act, or else in a judicial decision).

[FN37] A.A. Cançado Trindade, "The Birth of State Responsibility and the Nature of the Local Remedies Rule", 56 Revue de Droit international de sciences diplomatiques et politiques - Sottile (1978) pp. 157-188.
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35. Last by not least, I would like to refer briefly to the declaration of one of the experts proposed by the IACHR: in singling out the good faith of the initiative of the project of constitutional reform pending in the State of Chile, Dr. José Zalaquett Daher pondered judiciously that "the most important reform in this case would be that which (...), by means of a Chilean legislative act, (...) were to remind imperatively the Judiciary" that "there exists the full incorporation de jure and that it ought to apply" directly the international norms of human rights protection at domestic law level [FN38]. This is a point to which I attribute the greatest importance, as it implies the need, ultimately, of a true change of mentality, in the high courts of almost all countries of Latin America.

[FN38] Cf. IACtHR, Transcripción de los Alegatos Finales..., op. cit. supra n. (28), pp. 15-16.
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36. This would hardly be achieved with attention to the merely formal aspect of legislative reforms, which ought to be accompanied by the permanent in-training in human rights of national judges in Latin America, particularly the promising new generations of judges. The sentences of the national tribunals ought to take in due account the applicable norms both of domestic law as well as of human rights treaties which bind the State Party. These latter, in setting forth and clearly defining an individual right, susceptible of vindication before a national tribunal or judge, are directly applicable at domestic law level.

37. If greater advances have not been achieved to date in the present domain of protection, this is not due to legal obstacles, - which in reality do not exist, - but rather to the lack of will (animus) of public power to promote and secure a more effective protection of human rights. This applies today to almost all Latin American countries, - and, I understand, also to Caribbean countries [FN39], - singling out the pressing need for a change of mentality, to which I have already referred. A new mentality will emerge, with regard to the Judiciary, as from the understanding that the direct application of the international norms of human rights protection is beneficial to the inhabitants of all countries, and that, instead of the adherence to juridico-formal

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constructions and syllogisms and to a hermetic normativism, what is truly required is to proceed to the correct interpretation of the applicable norms, whether of international or national origin, so as to secure the full protection of the human being.

[FN39] I regret not to be able to refer to the countries of North America (Canada and the United States), which so far have not even ratified the American Convention on Human Rights.
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38. In a visionary book published in 1944, the Chilean jurist Alejandro Álvarez forcefully called for a reconstruction of the law of nations (derecho de gentes) and a renewal of the social order itself [FN40]. We live today, at the beginning of the XXIst century, in a world entirely distinct from that of half a century ago, but the theme which in his days inspired A. Álvarez - and which nowadays would be developed in a distinct way, in the light of the evolution itself of the law of nations (derecho de gentes) in the last five decades, - is effectively a recurrent theme, which keeps on retaining in our days a great up-to-date relevance.

[FN40] Cf. Alejandro Álvarez, La Reconstrucción del Derecho de Gentes - El Nuevo Orden y la Renovación Social, Santiago of Chile, Ed. Nascimento, 1944, pp. 3-523.
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39. I cannot see how not to sustain and foster, again, at the dawn of a new century, a reconstruction and renewal of the law of nations (derecho de gentes), as from, in my view, a necessarily anthropocentric outlook, and with emphasis on the identity of the ultimate objective both of international law and of public domestic law as to the safeguard of the rights of the human being. This being so, the international norms of protection, incorporated to domestic law, cannot fail to be directly applied by the national tribunals in all the countries of Latin America and the Caribbean, which have given the good example of professing their commitment to human rights by means of the ratification of the American Convention, or the accession to it.

40. The case of "The Last Temptation of Christ", which the Inter-American Court has just decided in the present Judgment on the merits, is truly emblematic, not only for being the first case on freedom of thought and of expression resolved by the Court, at the first working session held by it in the XXIst century, but also - and above all - for having a bearing on a question which is common to so many Latin American and Caribbean countries, and which touches on the foundations of the law on the international responsibility of the State and the very origin of such responsibility. In the light of the thoughts developed in this Concurring Opinion, may I conclude, in sum, that:

- first, the international responsibility of a State Party to a human rights treaty arises at the moment of the occurrence of an international wrongful act - or omission - (tempus commisi delicti), imputable to that State, in violation of the treaty at issue;
- second, any act or omission of the State, on the part of any of the Powers - Executive, Legislative or Judicial - or agents of the State, irrespective of their hierarchy, in breach of a human rights treaty, engages the international responsibility of the State Party at issue;

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- third, the distribution of competences between the powers and organs of the State, and the principle of the separation of powers, although of the greatest relevance in the ambit of constitutional law, do not condition the determination of the international responsibility of a State Party to a human rights treaty;
- fourth, any norm of domestic law, irrespective of its rank (constitutional or infraconstitutional), can, by its own existence and applicability, per se engage the responsibility of a State Party to a human rights treaty;
- fifth, a norm of domestic law which, by being in force, per se creates a legal situation which affects the rights protected by a human rights treaty, constitutes, in the context of a concrete case, a continuing violation of such treaty;
- sixth, the existence of victims provides the decisive criterion for distinguishing an examination in abstracto of a norm of domestic law, from a determination of the incompatibility in concreto of such norm with the human rights treaty at issue;
- seventh, in the context of the international protection of human rights, the rule of exhaustion of remedies of domestic law is endowed with a procedural rather than substantive nature (as a condition of admissibility of a petition or complaint to be resolved in limine litis), thus conditioning the implementation but not the birth of the international responsibility of a State Party to a human rights treaty;
- eighth, the rule of exhaustion of remedies of domestic law has a juridical content of its own, which determines its extent (comprising the effective judicial remedies), which is not extended to reforms of a constitutional or legislative order;
- ninth, the substantive norms - pertaining to the protected rights - of a human rights treaty are directly applicable in the domestic law of the States Parties to such treaty;
- tenth, there exists no legal obstacle or impossibility at all for the direct application at domestic law level of the international norms of protection, but what is rather required is the will (animus) of the public power (above all the Judiciary) to apply them, amidst the understanding that one will thereby be giving concrete expression to common superior values, consubstantiated in the effective safeguard of human rights;
- eleventh, once established the international responsibility of a State Party to a human rights treaty, such State has the duty to reestablish the situation which guarantees to the victims the enjoyment of their violated right (restitutio in integrum), putting an end to the situation in breach of that right, as well as, in the light of the case, to provide reparation for the consequences of such violation;
- twelfth, the modifications in the domestic legal order of a State Party necessary for its harmonization with the norms of a human rights treaty can constitute, in the framework of a concrete case, a form of non-pecuniary reparation under such treaty; and
- thirteenth, at this beginning of the XXIst century, a reconstruction and renewal of the law of nations (derecho de gentes) as from a necessarily anthropocentric outlook, and no longer a State-centred one as in the past, are required, given the identity of the ultimate objective of both international law and public domestic law as to the full safeguard of the rights of the human person.

Antônio A. Cançado Trindade
Judge

Manuel E. Ventura-Robles

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Secretary

OPINION OF JUDGE ROUX RENGIFO

I have joined the Court in its decision to abstain from declaring that the State violated Article 12 of the American Convention for a specific reason: in order to vote against it, the case file would have had to contain specific evidence of the fact that, by prohibiting the exhibition of "The Last Temptation of Christ", the right to change religion or beliefs of the specific victims of this case had effectively been impaired.

Article 12 of the Convention includes several hypotheses on violating the right to freedom of conscience and religion, including preventing a person from changing his religious beliefs. To do this, the person need not be physically or mentally compelled to remain tied to the faith he professes. That would be the most evident although not the only way of affecting his freedom of conscience and religion. A change of religion or beliefs is usually the result of a long, complex process that includes hesitation, reflection and research. The State should guarantee that, if he should so decide, a person may undergo this process in an environment of complete freedom and, in particular, that no one should be prevented from gathering information and experience and all the elements of an emotional, conceptual or any other nature, without violating the rights of others, that he considers necessary in order to make a fully-informed decision to change or maintain his faith. If the State, by act or omission, fails to ensure those rights, it violates the right to freedom of conscience and religion.

In this respect, we should recall that Article 12 of the American Convention does not merely embody the right to maintain or change beliefs in the abstract, but explicitly protects the process of changing religion against any restriction or interference. This is the meaning of paragraph 2 of Article 12, when it states, "[n]o one shall be subject to restrictions that might impair his freedom to [...] change his religion or beliefs."

Therefore, I believe that, in order to reach definite conclusions on the violation of freedom of conscience and religion in this case, the Court required more convincing and extensive evidence than that which was submitted concerning the personal situation of the petitioners, the proceedings in which they were eventually involved in relation to their beliefs, and the restrictions which they did or did not experience in order to acquire, by means other than the public exhibition of "The Last Temptation of Christ", the elements that this could provide to them with a view to changing their religious beliefs.

Carlos Vicente de Roux-Rengifo
Judge

Manuel E. Ventura-Robles
Secretary