INTER-AMERICAN COURT OF HUMAN RIGHTS

ADVISORY OPINION OC-3/83
OF SEPTEMBER 8, 1983

RESTRICTIONS TO THE DEATH PENALTY
(ARTS. 4(2) AND 4(4) AMERICAN CONVENTION
ON HUMAN RIGHTS)

REQUESTED BY THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Present:

Pedro Nikken, President
Thomas Buergenthal, Vice President
Huntley Eugene Munroe, Judge
Máximo Cisneros, Judge
Carlos Roberto Reina, Judge
Rodolfo E. Piza E., Judge
Rafael Nieto Navia, Judge

Also present:

Charles Moyer, Secretary
Manuel Ventura, Deputy Secretary

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The Inter-American Commission on Human Rights (hereinafter cited as Commission), by telex dated April 15, 1983, communicated its decision to submit to the Inter-American Court of Human Rights (hereinafter cited as Court) a request for an advisory opinion on the interpretation of the last sentence of Article 4(2) of the American Convention on Human Rights (hereinafter cited as Convention). The text of the request was received in the Secretariat of the Court on April 25, 1983.

2. By notes dated April 27 and May 12, 1983 the Secretariat, acting pursuant to Article 52 of the Rules of Procedure of the Court (hereinafter cited as Rules of Procedure), requested written observations on the different matters involved in the instant proceeding from the Member States of the Organization of American States (hereinafter cited as OAS) as well as, through the Secretary General, from the

organs referred to in Chapter X of the Charter of the OAS that might have an interest in the matter.

3. The President of the Court fixed July 1, 1983 as the deadline for the submission of written observations or other relevant documents.

4. Responses to the Secretariat's communications were received from the following States: Colombia, Costa Rica, Ecuador, El Salvador and Guatemala. In addition, the following OAS organs responded: the Permanent Council, the General Secretariat and the Inter-American Juridical Committee. A majority of the responses included substantive observations on the issues raised in the request. Even though the observations submitted by the Governments of Costa Rica, Ecuador and E1 Salvador were received in the Secretariat after the deadline fixed by the President, the Court decided to consider them and to include them in the file of the case, given the purpose that these observations have in advisory proceedings.

5. Furthermore, the following organizations submitted their points of view on the request as **amici curiae**: the International Human Rights Law Group & the Washington Office on Latin America; the Lawyers Committee for International Human Rights & the Americas Watch Committee; and the Institute for Human Rights of the International Legal Studies Program at the University of Denver College of Law & the Urban Morgan Institute for Human Rights of the University of Cincinnati College of Law.

6. A public hearing was set for Tuesday, July 26, 1983, to enable the Court to hear, during its Third Special Session, the oral arguments of the Member States and the organs of the OAS bearing on the advisory opinion request and on the objections to the Court's jurisdiction filed by the Government of Guatemala.

7. At the public hearing, the Court heard from the following representatives:

For the Inter-American Commission on Human Rights:

Luis Demetrio Tinoco Castro, Delegate and First Vice President
Marco Gerardo Monroy Cabra, Delegate and ex-President

For Guatemala:

Edgar Sarceño Morgan, Agent and Vice-Minister of Foreign Affairs
Mario Marroquín Nájera, Adviser and Director General of the Ministry of Foreign Affairs

For Costa Rica:

Carlos Jose Gutiérrez, Agent and Minister of Justice
Manuel Freer Jiménez, Adviser and Procurator of the Republic.

I
STATEMENT OF THE ISSUES

8. Invoking Article 64(1) of the Convention, the Commission requested the Court, in communications of April 15 and 25, 1983, to render an advisory opinion on the following questions relating to the interpretation of Article 4 of the Convention:

1) May a government apply the death penalty for crimes for which the domestic legislation did not provide such punishment at the time the American Convention on Human Rights entered into force for said state?

2) May a government, on the basis of a reservation to Article 4(4) of the Convention made at the time of ratification, adopt subsequent to the entry into force of the Convention a law imposing the death penalty for crimes not subject to this sanction at the moment of ratification?.

9. Article 4 of the Convention reads as follows:

> 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
>
> 2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
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> 3. The death penalty shall not be reestablished in states that have abolished it.
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> 4. In no case shall capital punishment be inflicted for political offenses or related common crimes.
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> 5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
>
> 6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

10. In its explanation of the considerations giving rise to the request, the Commission informed the Court of the existence of certain differences of opinion between it and the Government of Guatemala concerning the interpretation of the last sentence of Article 4(2) of the Convention as well as on the effect and scope of Guatemala's reservation to the fourth paragraph of that article. That reservation reads as follows:

> The Government of the Republic of Guatemala, ratifies the American Convention on Human Rights, signed in San Jose, Costa Rica, on the 22nd of November of 1969, making a reservation with regard to Article 4, paragraph 4 of the same, inasmuch as the Constitution of the Republic of Guatemala, in its Article 54, only excludes from the

> application of the death penalty, political crimes, but not common crimes related to political crimes.

The specific legal problem presented by the Commission is whether a reservation drafted in the aforementioned terms can be invoked by a State Party to permit it to impose the death penalty for crimes to which such penalty did not apply at the time of its ratification of the Convention. That is, in particular, whether this reservation can be invoked, as the Government of Guatemala did before the Commission, in order to justify the application of the death penalty to common crimes connected with political crimes to which that penalty did not previously apply. During the public hearing, the Delegates of the Commission stated that the problem that had arisen with respect to Guatemala's reservation had been referred to the Court as an example in order to highlight the underlying legal problem.

11. In a telex addressed to the President of the Court by the Minister of Foreign Affairs of Guatemala, which was received on April 19, 1983, the Government of Guatemala requested the Court to decline to render the requested opinion. The specific grounds upon which the Government based its plea are stated as follows:

> The Government of Guatemala respectfully requests the Honorable Inter-American Court of Human Rights to decline to render the advisory opinion requested by the Commission, since even if Article 64 of the Convention empowers the Commission, in general terms, to consult the Court on the interpretation of the Convention, the fact is that Article 62(3) of the Convention itself clearly states that:
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> The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.
>
> Since Guatemala has not declared, either upon depositing its instrument of ratification of the Convention or at any subsequent time, that it recognizes as binding, **ipso facto**, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation of the Convention, as provided in Article 62(1), it is obvious that the Court must decline to render the advisory opinion requested by the Commission for lack of jurisdiction.

12. Following the receipt of this telex, the President of the Court, after consulting the Permanent Commission and acting in accordance with the Rules of Procedure, directed that the request of the Commission as well as the submissions of the Government of Guatemala regarding the jurisdiction of the Court be forwarded to the OAS Member States and OAS organs, inviting them to submit to the Court their views on the relevant issues.

13. By telex dated May 18, 1983, the Government of Guatemala challenged the legality of this decision, claiming that the Permanent Commission should have ruled the Commission's request inadmissible or, at the very least, that it should have separated the proceedings for dealing with the jurisdictional objections filed by

Guatemala from the consideration of the merits, and that it should have decided the former as a preliminary question.

14. The President of the Court responded to the aforementioned communication by informing the Government of Guatemala that both he and the Permanent Commission lacked the power to dismiss requests for advisory opinions and that only the Plenary Court was competent to rule on the issues raised by Guatemala. The President further pointed out that the decision relating to the manner in which Guatemala's objection to the Court's jurisdiction should be dealt with was also reviewable by the latter.

II
PROCEDURAL MATTERS

15. The instant request raises a number of procedural issues that should be disposed of at the outset. Given the claim of the Government of Guatemala that the Permanent Commission did not accept Guatemala's views regarding various procedural points, the Court needs to consider the role that the Permanent Commission performs.

16. Article 6 of the Court's Rules of Procedure provides that "the Permanent Commission is composed of the President, Vice President and a third judge named by the President. The Permanent Commission assists and advises the President in the exercise of his functions". This provision indicates that the Permanent Commission is an advisory body. As such, it lacks the power to rule on the jurisdiction of the Court and, in general, on the admissibility of contentious cases or requests for advisory opinions submitted to the Court by the States or organs referred to in Articles 62 and 64 of the Convention.

17. Furthermore, Article 44(1) of the Rules of Procedure declares that "the judgments, advisory opinions, and the interlocutory decisions that put an end to a case or proceedings, shall be decided by the Court". Decisions of this type must be adopted by the Court in plenary, that is to say, by the Court duly convoked and sitting in conformity with the quorum requirements laid down in Article 56 of the Convention, which provides that " five judges shall constitute a quorum for the transaction of business by the Court." It follows from these stipulations that the Permanent Commission lacked the power to act on Guatemala's plea that it dismiss the Commission' s advisory opinion request.

18. The Court concludes that both the President and the Permanent Commission acted within the scope of their authority when they transmitted Guatemala's objections to the Member States and OAS organs entitled to participate in advisory proceedings before the Court. In doing so, they acted in conformity with the general guidelines established by the Court for the handling of advisory opinions and the provisions of Articles 6(1) and 44(2) of the Rules of Procedure.

19. This conclusion does not suffice, however, to dismiss Guatemala's contention that its jurisdictional objections should not have been joined to the merits of the Commission's request. In addressing the latter issue, the Court notes that Article 25(2) of its Statute, adopted by the OAS General Assembly, reads as follows:

> The Rules of Procedure may delegate to the President or to Committees of the Court authority to carry out certain parts of the

> legal proceedings, with the exception of issuing final rulings or advisory opinions. Rulings or decisions issued by the President or the Committees of the Court that are not purely procedural in nature may be appealed before the full Court.

This provision permits a challenge to any decisions, be they those of the President or of the Permanent Commission, " that are not purely procedural in nature." Regardless of its applicability to the instant proceedings, the Court will examine the matter **motu propio,** because the issue it raises is one that has not been previously ruled upon by this Court and because it is likely to arise in the future.

20. The question whether an objection to the exercise of the jurisdiction of the Court should be joined to the proceedings on the merits or should be considered separately as a preliminary question can come up in the context of contentious cases or of advisory opinions.

21. In contentious cases the exercise of the Court's jurisdiction ordinarily depends upon a preliminary and basic question, involving the State's acceptance of or consent to such jurisdiction. If the consent has been given, the States which participate in the proceedings become, technically speaking, parties to the proceedings and are bound to comply with the resulting decision of the Court. [Convention, Art. 68(1).] By the same token, the Court cannot exercise its jurisdiction where such consent has not been given. It would make no sense, therefore, to examine the merits of the case without first establishing whether the parties involved have accepted the Court's jurisdiction.

22. None of these considerations is present in advisory proceedings. There are no parties in the sense that there are no complainants and respondents; no State is required to defend itself against formal charges, for the proceeding does not contemplate formal charges; no judicial sanctions are envisaged and none can be decreed. All the proceeding is designed to do is to enable OAS Member States and OAS organs to obtain a judicial interpretation of a provision embodied in the Convention or other human rights treaties in the American states.

23. As the Court will demonstrate in this opinion (see paragraph 31 **et seq., infra**), there is nothing in the Convention that would justify the extension of the jurisdictional preconditions applicable to the Court's contentious jurisdiction to the exercise of its advisory functions. On the contrary, it is quite clear that the exercise of the Court's advisory jurisdiction is subject to its own prerequisites which relate to the identity and legal capacity of the entities having standing to seek the opinion, that is, OAS Member States and OAS organs acting "within their spheres of competence." It follows that none of the considerations, which would require the Court in contentious cases to hear the jurisdictional objections in separate proceedings, is present as a general rule when the Court is asked to render an advisory opinion.

24. The Court recognizes, of course, that a State's interest might be affected in one way or another by an interpretation rendered in an advisory opinion. For example, an advisory opinion might either weaken or strengthen a State's legal position in a current or future controversy. The legitimate interests of a State in the outcome of an advisory opinion proceeding are adequately protected, however, by the opportunity accorded it under the Rules of Procedure of the Court to participate fully in those proceedings and to make known to the Court its views regarding the

legal norms to be interpreted and any jurisdictional objections it might have. (Rules of Procedure, Art. 52.)

25. The delay that would result, moreover, from the preliminary examination of jurisdictional objections in advisory proceedings would seriously impair the purpose and utility of the advisory power that Article 64 confers on the Court. In fact, it is not unreasonable to assume that when an OAS organ requests an opinion, it does so in order to obtain the Court's assistance and guidance to enable it to fulfill its mission within the inter-American system. As one eminent Latin American jurist has noted, "a request for an advisory opinion normally implies a postponement of a decision on the merits by the requesting organ until the answer has been received. " [Eduardo Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice," 67 Am.J. Int'l L. l, at 9 (1973).] The need to avoid such delays has prompted the International Court of Justice, for example, to adopt an amendment to its Rules of Court, which is designed to permit that tribunal to accelerate the consideration of requests for advisory opinions. (See I.C.J., Rules of Court, Art. 103.) Another amendment to the Rules of Court, in force since 1972, which requires the Hague Court in contentious cases to consider objections to its jurisdiction prior to dealing with the merits has not been applied to advisory opinions. (I.C.J., Rules of Court, Art. 79. See, **e.g., Western Sahara**, 1975 I.C.J. 12.)

26. The promptness with which a request for an advisory opinion is complied with is linked closely to the purpose which this function of the Court performs within the system established by the Convention. It would make little sense for the Member States and organs of the OAS to make such a request and, pending the reply, to suspend consideration of the matter referred to the Court if the Court's response were unduly delayed. This would be true, in particular, in situations such as the one now before the Court, which involves an advisory opinion request that refers to Article 4 of the Convention and concerns the right to life.

27. The Court notes, furthermore, that in the instant matter it has before it a request by an OAS organ expressly identified as such in Chapter X of the OAS Charter, whose competence to deal with the issues raised in its request admit of no reasonable doubt, and which organ seeks an answer to a purely legal question involving the interpretation of the Convention. The Court is not being asked to resolve any disputed factual issue. The objection of Guatemala to the Court's jurisdiction to deal with the request also involves an interpretation of the Convention and raises no question of fact. The only consequence flowing from the decision to join the jurisdictional objection with the merits is that the interested States or organs have to present their legal arguments on both issues at the same time. Guatemala had the opportunity and was invited to address both issues, but in its written submission and at the public hearing, it dealt only with the questions bearing on the jurisdiction of the Court. In doing so, and remembering that the Court is here dealing with an advisory opinion and not a contentious case, Guatemala was in no different position than any other OAS Member State which was invited but failed to avail itself of the opportunity to address the merits of the Commission's request.

28. These conclusions are based on the premise that the Court is here dealing with a request for an advisory opinion. Doubts might arise therefore with regard to the soundness of these conclusions if it appeared that these proceedings were instituted to disguise a contentious case or, more generally, if there were circumstances present here that would alter the advisory functions of the Court. But

even if this were so, these issues could not be analyzed fully as a rule without examining the merits of the questions submitted to the Court, which would once again require the Court to look at all of the elements of the request as a whole. Although it is true that in some such situation the Court might ultimately have to decline to respond to the advisory opinion request, that fact does not weaken or invalidate the foregoing conclusions about the manner in which the proceedings should be conducted.

29. The Court finds, accordingly, that there is no valid basis for overruling the decision to merge the proceedings and to consider the jurisdictional objection and the merits of the request in one and the same hearing.

III
OBJECTIONS TO THE JURISDICTION OF THE COURT

30. The Court can now turn to the jurisdictional objections advanced by the Government of Guatemala. It contends that, although Article 64(1) of the Convention and Article 19(d) of the Statute of the Commission authorize the latter to seek an advisory opinion from the Court regarding the interpretation of any article of the Convention, if that opinion were to concern a given State directly, as it does Guatemala in the present case, the Court could not render the opinion unless the State in question has accepted the tribunal's jurisdiction pursuant to Article 62(1) of the Convention. The Government of Guatemala argues accordingly that because of the form in which the Commission submitted the present advisory opinion request, linking it to an existing dispute between Guatemala and the Commission regarding the meaning of certain provisions of Article 4 of the Convention, the Court should decline to exercise its jurisdiction.

31. The Convention distinguishes very clearly between two types of proceedings: so-called adjudicator or contentious cases and advisory opinions. The former are governed by the provisions of Articles 61, 62 and 63 of the Convention; the latter by Article 64. This distinction is also reflected in the provisions of Article 2 of the Statute of the Court, which reads as follows:

> Article 2. Jurisdiction
>
> The Court shall exercise adjudicatory and advisory jurisdiction:
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> 1. Its adjudicatory jurisdiction shall be governed by the provisions of Articles 61, 62 and 63 of the Convention, and
>
> 2. Its advisory jurisdiction shall be governed by the provisions of Article 64 of the Convention."

32. In contentious proceedings, the Court must not only interpret the applicable norms, determine the truth of the acts denounced and decide whether they are a violation of the Convention imputable to a State Party; it may also rule " that the injured party be ensured the enjoyment of his right or freedom that was violated." [Convention, Art. 63(1).] The States Parties to such proceeding are, moreover, legally bound to comply with the decisions of the Court in contentious cases. [Convention, Art. 68(1).] On the other hand, in advisory opinion proceedings the Court does not exercise any fact-finding functions; instead, it is called upon to render opinions interpreting legal norms. Here the Court fulfills a consultative

function through opinions that "lack the same binding force that attaches to decisions in contentious cases." (I/A Court H.R., **"Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights)**, Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 51; cf. **Interpretation of Peace Treaties**, 1950 I.C.J. 65.)

33. The provisions applicable to contentious cases differ very significantly from those of Article 64, which govern advisory opinions. Thus, for example, Article 61 (2) speaks of "case" and declares that "in order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 to 50 shall have been completed (emphasis added)." These procedures apply exclusively to "a petition or communication alleging violation of any of the rights protected by this Convention." [Convention, Art. 48(1).] Here the word "case" is used in its technical sense to describe a contentious case within the meaning of the Convention, that is, a dispute arising as a result of a claim initiated by an individual (Art. 44) or State Party (Art. 45), charging that a State Party has violated the human rights guaranteed by the Convention.

34. One encounters the same technical use of the word "case" in connection with the question as to who may initiate a contentious case before the Court, which contrasts with those provisions of the Convention that deal with the same issue in the consultative area. Article 61(1) provides that "only States Parties and the Commission shall have a right to submit a case to the Court." On the other hand, not only " States Parties and the Commission," but also all of the "Member States of the Organization" and the "organs listed in Chapter X of the Charter of the Organization of American States" may request advisory opinions from the Court. [Convention, Art. 64(1).] There is yet another difference with respect to the subject matter that the Court might consider. While Article 62(1) refers to "all matters relating to the interpretation and application of this Convention," Article 64 authorizes advisory opinions relating not only to the interpretation of the Convention but also to "other treaties concerning the protection of human rights in the American states." It is obvious, therefore, that what is involved here are very different matters, and that there is no reason in principle to apply the requirements contained in Articles 61, 62 and 63 to the consultative function of the Court, which is spelled out in Article 64.

35. Article 62(3) of the Convention --the provision Guatemala claims governs the application of Article 64-- reads as follows:

> The jurisdiction of the Court shall comprise all **cases** concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the **case** recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement (emphasis added).

It is impossible to read this provision without concluding that it, as does Article 61, uses the words "case" and "cases" in their technical sense.

36. The Court has already indicated that situations might arise when it would deem itself compelled to decline to comply with a request for an advisory opinion. **In Other Treaties** (**supra** 32), the Court acknowledged that resort to the advisory opinion route might in certain situations interfere with the proper functioning of the system of protection spelled out in the Convention or that it might adversely affect

the interests of the victim of human rights violations. The Court addressed this problem in the following terms:

> The advisory jurisdiction of the Court is closely related to the purposes of the Convention. This jurisdiction is intended to assist the American States in fulfilling their international human rights obligations and to assist the different organs of the inter-American system to carry out the functions assigned to them in this field. It is obvious that any request for an advisory opinion which has another purpose would weaken the system established by the Convention and would distort the advisory jurisdiction of the Court. (**Ibid**., para. 25.)

37. The instant request of the Commission does not fall within the category of advisory opinion requests that need to be rejected on those grounds because nothing in it can be deemed to interfere with the proper functioning of the system or might be deemed to have an adverse effect on the interests of a victim. The Court has merely been asked to interpret a provision of the Convention in order to assist the Commission in the discharge of the obligation it has as an OAS Charter organ " to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters." (OAS Charter, Art. 112.)

38. The powers conferred on the Commission require it to apply the Convention or other human rights treaties. In order to discharge fully its obligations, the Commission may find it necessary or appropriate to consult the Court regarding the meaning of certain provisions whether or not at the given moment in time there exists a difference between a government and the Commission concerning an interpretation, which might justify the request for an advisory opinion. If the Commission were to be barred from seeking an advisory opinion merely because one or more governments are involved in a controversy with the Commission over the interpretation of a disputed provision, the Commission would seldom, if ever, be able to avail itself of the Court's advisory jurisdiction. Not only would this be true of the Commission, but the OAS General Assembly, for example, would be in a similar position were it to seek an advisory opinion from the Court in the course of the Assembly's consideration of a draft resolution calling on a Member State to comply with its international human rights obligations.

39. The right to seek advisory opinions under Article 64 was conferred on OAS organs for requests falling "within their spheres of competence." This suggests that the right was also conferred to assist with the resolution of disputed legal issues arising in the context of the activities of an organ, be it the Assembly, the Commission, or any of the others referred to in Chapter X of the OAS Charter. It is clear, therefore, that the mere fact that there exists a dispute between the Commission and the Government of Guatemala regarding the meaning of Article 4 of the Convention does not justify the Court to decline to exercise its advisory jurisdiction in the instant proceeding.

40. This conclusion of the Court finds ample support in the jurisprudence of the International Court of Justice. That tribunal has consistently rejected requests that it decline to exercise its advisory jurisdiction in situations in which it was alleged that because the issue involved was in dispute the Court was being asked to decide a disguised contentious case. (See, **e.g., Interpretation of Peace Treaties, supra** 32; **Reservations to the Convention on Genocide**, 1951 I.C.J. 15; **Legal Consequences for States of the Continued Presence of South Africa in**

Namibia (South West Africa) **notwithstanding Security Council Resolution 276 (1970**), 1971 I.C.J. 16; **Western Sahara, supra** 25.) In doing so, the Hague Court has acknowledged that the advisory opinion might affect the interests of States which have not consented to its contentious jurisdiction and which are not willing to litigate the matter. The critical question has always been whether the requesting organ has a legitimate interest to obtain the opinion for the purpose of guiding its future actions. (**Western Sahara, supra** 25, p. 27.)

41. The Commission, as an organ charged with the responsibility of recommending measures designed to promote the observance and protection of human rights (OAS Charter, Art. 112; Convention, Art. 41; Statute of the Commission, Arts. 1 and 18), has a legitimate institutional interest in the interpretation of Article 4 of the Convention. The mere fact that this provision may also have been invoked before the Commission in petitions and communications filed under Articles 44 and 45 of the Convention does not affect this conclusion. Given the nature of advisory opinions, the opinion of the Court in interpreting Article 4 cannot be deemed to be an adjudication of those petitions and communications.

42. In **The Effect of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75)** (I/A Court H.R., Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2), this Court examined in considerable detail the requirements applicable to OAS organs requesting advisory opinions under Article 64. The Court there explained that Article 64, in limiting the right of OAS organs to advisory opinions falling "within their spheres of competence," meant to restrict the opinions "to issues in which such entities have a legitimate institutional interest." (**Ibid.**, para. 14.) After examining Article 112 and Chapter X of the OAS Charter, as well as the relevant provisions of the Statute of the Commission and the Convention itself, the Court concluded that the Commission enjoys, in general, a pervasive legitimate institutional interest in questions bearing on the promotion and protection of human rights in the inter-American system, which could be deemed to confer on it, as a practical matter, "an absolute right to request advisory opinions within the framework of Article 64(1) of the Convention." (**Ibid.**, para. 16.) Viewed in this light, the instant request certainly concerns an issue in which the Commission has a legitimate institutional interest.

43. The advisory jurisdiction conferred on the Court by Article 64 of the Convention is unique in contemporary international law. As this Court already had occasion to explain, neither the International Court of Justice nor the European Court of Human Rights has been granted the extensive advisory jurisdiction which the Convention confers on the Inter-American Court. (**Other Treaties, supra** 32, paras. 15 and 16.) Here it is relevant merely to emphasize that the Convention, by permitting Member States and OAS organs to seek advisory opinions, creates a parallel system to that provided for under Article 62 and offers an alternate judicial method of a consultative nature, which is designed to assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process. It would therefore be inconsistent with the object and purpose of the Convention and the relevant individual provisions, to adopt an interpretation of Article 64 that would apply to it the jurisdictional requirements of Article 62 and thus rob it of its intended utility merely because of the possible existence of a dispute regarding the meaning of the provision at issue in the request.

44. Article 49(2)(b) of the Rules of Procedure requires that each request for an advisory opinion by an OAS organ "shall indicate the provisions to be interpreted, how the consultation relates to its sphere of competence, the considerations giving rise to the consultation, and the name and address of its delegates." The requirement of a description of "the considerations giving rise to the consultation" is designed to provide the Court with an understanding of the factual and legal context which prompted the presentation of the question. Compliance with this requirement is of vital importance as a rule in enabling the Court to respond in a meaningful manner to the request. Courts called upon to render advisory opinions impose this requirement for reasons that have been explained as follows by the International Court of Justice:

> (A) rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part. Accordingly, if a question put in the hypothetical way in which it is posed in the request is to receive a pertinent and effectual reply, the Court must first ascertain the meaning and full implications of the question in the light of the actual framework of fact and law in which it falls for consideration. Otherwise its reply to the question may be incomplete and, in consequence, ineffectual and even misleading as to the pertinent legal rules actually governing the matter under consideration by the requesting organization. The Court will therefore begin by setting out the pertinent elements of fact and of law which, in its view, constitute the context in which the meaning and implications of the… question posed in the request have to be ascertained. (**Interpretation of the Agreement of 25 March 1951 between WHO and Egypt**, 1980 I.C.J. 73 at 76.)

Thus, merely because the Commission, under the heading of "Considerations giving rise to the consultation," has described for the Court a set of circumstances indicating that there exist differences concerning the interpretation of some provisions of Article 4 of the Convention, it certainly does not follow that the Commission has violated the Rules of Procedure or that it has abused the powers conferred on it as an organ authorized to request advisory opinions. The same conclusion is even more valid when the issue presented calls for the interpretation of a reservation, considering how difficult it is to respond with precision to a question that relates to a reservation and which is formulated in the abstract.

45. The fact that this legal dispute bears on the scope of a reservation made by a State Party in no way detracts from the preceding conclusions. Under the Vienna Convention on the Law of Treaties (hereinafter cited as Vienna Convention), incorporated by reference into the Convention by its Article 75, a reservation is defined as any "unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." [Art. 2(d).] The effect of a reservation, according to the Vienna Convention, is to modify with regard to the State making it the provisions of the treaty to which the reservation refers to the extent of the reservation. [Art. 21(1)(a).] Although the provisions concerning reciprocity with respect to reservations are not fully applicable to a human rights treaty such as the Convention, it is clear that reservations become a part of the treaty itself. It is consequently impossible to interpret the treaty correctly, with respect to the

reserving State, without interpreting the reservation itself. The Court concludes, therefore, that the power granted it under Article 64 of the Convention to render advisory opinions interpreting the Convention or other treaties concerning the protection of human rights in the American states of necessity also encompasses jurisdiction to interpret the reservations attached to those instruments.

46. Having addressed and disposed of the relevant preliminary issues, the Court is now in a position to deal with the questions submitted to it by the Commission.

IV
MEANING AND INTERPRETATION OF THE TEXTS

47. The questions formulated by the Commission present a number of more general issues which need to be explored. In the first place, in order to interpret Article 4(2) of the Convention, it is necessary to determine within what context that treaty envisages the application of the death penalty, which in turn calls for the interpretation of Article 4 as a whole. In the second place, it is also necessary to determine what general principles apply to the interpretation of a reservation which, although authorized by the Convention, nevertheless restricts or weakens the system of protection established by that instrument. Finally, it is necessary to resolve the specific hypothetical question that has been submitted to the Court.

48. The manner in which the request for the advisory opinion has been framed reveals the need to ascertain the meaning and scope of Article 4 of the Convention, especially paragraphs 2 and 4, and to determine whether these provisions might be interrelated. To this end, the Court will apply the rules of interpretation set out in the Vienna Convention, which may be deemed to state the relevant international law principles applicable to this subject.

49. These rules specify that treaties must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." [Vienna Convention, Art. 31(1).] Supplementary means of interpretation, especially the preparatory work of the treaty, may be used to confirm the meaning resulting from the application of the foregoing provisions, or when it leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. (**Ibid**., Art. 32.)

50. This method of interpretation respects the principle of the primacy of the text, that is, the application of objective criteria of interpretation. In the case of human rights treaties, moreover, objective criteria of interpretation that look to the texts themselves are more appropriate than subjective criteria that seek to ascertain only the intent of the Parties. This is so because human rights treaties, as the Court has already noted, "are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States;" rather "their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States." (**The Effect of Reservations, supra** 42, para. 29.)

51. An analysis of the system of death penalties permitted within certain limits by Article 4, raises questions about the extent to which the enjoyment and the exercise of the rights and liberties guaranteed by the Convention may be restricted. It also raises questions about the scope and meaning of the application of such restrictions.

Here the principles derived from Articles 29 and 30 of the Convention are of particular relevance. Those articles read:

> Article 29
> Restrictions Regarding Interpretation
>
> No provision of this Convention shall be interpreted as:
>
> a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
>
> b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
>
> c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
>
> d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.
>
> Article 30
> Scope of Restrictions
>
> The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

52. The purpose of Article 4 of the Convention is to protect the right to life. But this article, after proclaiming the objective in general terms in its first paragraph, devotes the next five paragraphs to the application of the death penalty. The text of the article as a whole reveals a clear tendency to restrict the scope of this penalty both as far as its imposition and its application are concerned.

53. The subject is governed by a substantive principle laid down in the first paragraph, which proclaims that "every person has the right to have his life respected," and by the procedural principle that "no one shall be arbitrarily deprived of his life." Moreover, in countries which have not abolished the death penalty, it may not be imposed except "pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime." [Art. 4(2).] The fact that these guarantees are envisaged in addition to those stipulated in Articles 8 and 9 clearly indicates that the Convention sought to define narrowly the conditions under which the application of the death penalty would not violate the Convention in those countries that had not abolished it.

54. The Convention imposes another set of restrictions that apply to the different types of crimes punishable by the death penalty. Thus, while the death penalty may be imposed only for the most serious crimes [Art. 4(2)], its application to political offenses or related common crimes is prohibited in absolute terms. [Art. 4(4).] The fact that the Convention limits the imposition of the death penalty to the most serious of common crimes not related to political offenses indicates that it was designed to be applied in truly exceptional circumstances only. Moreover, viewed in relation to the condemned individual, the Convention prohibits the imposition of the death penalty on those who, at the time the crime was committed, were under 18 or over 70 years of age; it may also not be applied to pregnant women. [Art. 4(5).]

55. Thus, three types of limitations can be seen to be applicable to States Parties which have not abolished the death penalty. First, the imposition or application of this sanction is subject to certain procedural requirements whose compliance must be strictly observed and reviewed. Second, the application of the death penalty must be limited to the most serious common crimes not related to political offenses. Finally, certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account.

56. The tendency to restrict the application of the death penalty, which is reflected in Article 4 of the Convention, is even clearer and more apparent when viewed in yet another light. Thus, under Article 4(2), **in fine**, "the application of such punishment shall not be extended to crimes to which it does not presently apply." Article 4(3) declares, moreover, that "the death penalty shall not be reestablished in states that have abolished it." Here it is no longer a question of imposing strict conditions on the exceptional application or execution of the death penalty, but rather of establishing a cut off as far as the penalty is concerned and doing so by means of a progressive and irreversible process applicable to countries which have not decided to abolish the death penalty altogether as well as to those countries which have done so. Although in the one case the Convention does not abolish the death penalty, it does forbid extending its application and imposition to crimes for which it did not previously apply. In this manner any expansion of the list of offenses subject to the death penalty has been prevented. In the second case, the reestablishment of the death penalty for any type of offense whatsoever is absolutely prohibited, with the result that a decision by a State Party to the Convention to abolish the death penalty, whenever made, becomes, **ipso jure**, a final and irrevocable decision.

57. On this entire subject, the Convention adopts an approach that is clearly incremental in character. That is, without going so far as to abolish the death penalty, the Convention imposes restrictions designed to delimit strictly its application and scope, in order to reduce the application of the penalty to bring about its gradual disappearance.

58. The preparatory work of the Convention confirms the meaning to be derived from the literal interpretation of Article 4. Thus, although the proposal of various delegations that the death penalty be totally abolished did not carry because it failed to receive the requisite number of votes in its favor, not one vote was cast against the motion. (See generally, **Conferencia Especializada Interamericana sobre Derechos Humanos, San José, Costa Rica, 7-22 de noviembre de 1969, Actas y Documentos**, OEA/Ser. K/XVI/1.2, Washington, D.C. 1973 (hereinafter cited as **Actas y Documentos**), repr. 1978, esp. pp. 161, 295-96 and 440-41.). The prevailing attitude, and clearly the majority view in the Conference, is reflected in

the following declaration, submitted to the Final Plenary Session by fourteen of the nineteen delegations present at the Conference (Costa Rica, Uruguay, Colombia, Ecuador, E1 Salvador, Panama, Honduras, Dominican Republic, Guatemala, Mexico, Venezuela, Nicaragua, Argentina and Paraguay):

> The undersigned Delegations, participants in the Specialized Inter-American Conference on Human Rights, in response to the majority sentiment expressed in the course of the debates on the prohibition of the death penalty, in agreement with the most pure humanistic traditions of our peoples, solemnly declare our firm hope of seeing the application of the death penalty eradicated from the American environment as of the present and our unwavering goal of making all possible efforts so that, in a short time, an additional protocol to the American Convention on Human Rights -Pact of San José, Costa Rica- may consecrate the final abolition of the death penalty and place America once again in the vanguard of the defense of the fundamental rights of man. (**Actas y Documentos, supra**, p. 467.).

This view is borne out by the observations of the Rapporteur of Committee I who noted that in this article "the Committee registered its firm belief in the suppression of the death penalty." (**Actas y Documentos, supra,** p. 296.)

59. It follows that, in interpreting the last sentence of Article 4(2) "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" [Vienna Convention, Art. 31(1)], there cannot be the slightest doubt that Article 4(2) contains an absolute prohibition that no State Party may apply the death penalty to crimes for which it was not provided previously under the domestic law of that State. No provision of the Convention can be relied upon to give a different meaning to the very clear text of Article 4(2), **in fine.** The only way to achieve a different result would be by means of a timely reservation designed to exclude in some fashion the application of the aforementioned provision in relation to the State making the reservation. Such a reservation, of course, would have to be compatible with the object and purpose of the treaty.

V
RESERVATIONS TO THE AMERICAN CONVENTION ON HUMAN RIGHTS

60. Article 75 of the Convention declares that it is subject to reservations only in conformity with the provisions of the Vienna Convention. As this Court has already stated, the reference in Article 75

> ... makes sense only if it is understood as an express authorization designed to enable States to make whatever reservations they deem appropriate, provided the reservations are not incompatible with the object and purpose of the treaty. As such, they can be said to be governed by Article 20 (1) of the Vienna Convention and, consequently, do not require acceptance by any other State Party. (**The Effect of Reservations, supra** 42, para. 35.)

61. Consequently, the first question which arises when interpreting a reservation is whether it is compatible with the object and purpose of the treaty. Article 27 of the

Convention allows the States Parties to suspend, in time of war, public danger, or other emergency that threatens their independence or security, the obligations they assumed by ratifying the Convention, provided that in doing so they do not suspend or derogate from certain basic or essential rights, among them the right to life guaranteed by Article 4. It would follow therefrom that a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it.

The situation would be different if the reservation sought merely to restrict certain aspects of a nonderogable right without depriving the right as a whole of its basic purpose. Since the reservation referred to by the Commission in its submission does not appear to be of a type that is designed to deny the right to life as such, the Court concludes that to that extent it can be considered, in principle, as not being incompatible with the object and purpose of the Convention.

62. Reservations have the effect of excluding or modifying the provisions of a treaty and they become an integral part thereof as between the reserving State and any other States for whom they are in force. Therefore, without dealing anew with the question of reciprocity as it relates to reservations which, moreover, is not fully applicable as far as human rights treaties are concerned, it must be concluded that any meaningful interpretation of a treaty also calls for an interpretation of any reservation made thereto. Reservations must of necessity therefore also be interpreted by reference to relevant principles of general international law and the special rules set out in the Convention itself.

63. It follows that a reservation must be interpreted by examining its text in accordance with the ordinary meaning which must be attributed to the terms in which it has been formulated within the general context of the treaty of which the reservation forms an integral part. This approach must be followed except when the resultant interpretation would leave the meaning ambiguous or obscure or would lead to a result which is manifestly absurd or unreasonable. A contrary approach might ultimately lead to the conclusion that the State is the sole arbiter of the extent of its international obligations on all matters to which its reservation relates, including even all such matters which the State might subsequently declare that it intended the reservation to cover.

64. The latter result cannot be squared with the Vienna Convention, which provides that a reservation can be made only when signing, ratifying, accepting, approving or acceding to a treaty. (Vienna Convention, Art. 19.) Thus, without excluding the possibility that supplementary means of interpretation might, in exceptional circumstances, be resorted to, the interpretation of reservations must be guided by the primacy of the text. A different approach would make it extremely difficult for other States Parties to understand the precise meaning of the reservation.

65. In interpreting reservations, account must be taken of the object and purpose of the relevant treaty which, in the case of the Convention, involves the "protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States." (**The Effect of Reservations, supra** 42, para. 29.) The purpose of the Convention imposes real limits on the effect that reservations attached to it can have. If reservations to the Convention, to be permissible, must be compatible with the object and purpose of

the treaty, it follows that these reservations will have to be interpreted in a manner that is most consistent with that object and purpose.

66. The Court concludes, furthermore, that since a reservation becomes an integral part of the treaty, the reservation must also be interpreted by reference to the principles set out in Article 29 of the Convention. Thus, consistent with the considerations that have been noted above, the Court is of the view that the application of paragraph a) of Article 29 compels the conclusion that a reservation may not be interpreted so as to limit the enjoyment and exercise of the rights and liberties recognized in the Convention to a greater extent than is provided for in the reservation itself.

VI
INTERPRETATION OF A RESERVATION TO ARTICLE 4(4)

67. Keeping the preceding considerations in mind and in view of the fact that a clear answer to the first question submitted by the Commission is provided by the text of Article 4(2) of the Convention, the Court can now proceed to an examination of the second question. It reads as follows: "2) May a government, on the basis of a reservation to Article 4(4) of the Convention made at the time of ratification, adopt subsequent to the entry into force of the Convention a law imposing the death penalty for crimes not subject to this sanction at the moment of ratification?" In other words, may a State that has made a reservation to Article 4(4) of the Convention, which article prohibits the application of the death penalty to common crimes related to political offenses, validly assert that the reservation extends by implication to Article 4(2) and invoke the reservation for the purpose of applying the death penalty to crimes to which that penalty did not previously apply notwithstanding the prohibition contained in Article 4(2)? The difficulties that might have arisen if one sought to answer this question in the abstract disappeared once the Commission called the Court's attention to the text of Guatemala's reservation. The Court will therefore analyze the question by reference to that reservation, which it will have to examine in some detail.

68. In relating Article 4(4) to Article 4(2), the Court finds that each provision, in its context, is perfectly clear and that each has a different meaning. Thus, while Article 4(2) imposes a definite prohibition on the death penalty for all categories of offenses as far as the future is concerned, Article 4(4) bans it for political offenses and related common crimes. The latter provision obviously refers to those offenses which prior thereto were subject to capital punishment, since for the future the prohibition set forth in paragraph 2 would have been sufficient. The Court is here therefore dealing with two rules having clearly different purposes: while Article 4(4) is designed to abolish the penalty for certain offenses, Article 4 (2) seeks to bar any extension of its use in the future. In other words, above and beyond the prohibition contained in Article 4(2), which deals with the extension of the application of capital punishment, Article 4(4) adds a further prohibition that bars the application of the death penalty to political offenses related to common crimes even if such offenses were previously punished by that penalty.

69. Accordingly, given the context of the Commission's request, what is the effect of a reservation to Article 4(4) of the Convention? In answering this question, it must be remembered above all, that a State reserves no more than what is contained in the text of the reservation itself. Since the reservation may go no further than to exempt the reserving State from the prohibition of applying the death penalty to

political offenses or related crimes, it is apparent that all other provisions of the article remain applicable and in full force for the reserving State.

70. Furthermore, if Article 4, whose second paragraph clearly establishes an absolute prohibition on the extension of the death penalty in the future, is examined as a whole, it becomes clear that the only subject reserved is the right to continue the application of the death penalty to political offenses or related common crimes to which that penalty applied previously. It follows that a State which has not made a reservation to paragraph 2 is bound by the prohibition not to apply the death penalty to new offenses, be they political offenses, related common crimes or mere common crimes. On the other hand, a reservation made to
paragraph 2, but not to paragraph 4, would permit the reserving State to punish new offenses with the death penalty in the future provided, however, that the offenses in question are mere common crimes not related to political offenses. This is so because the prohibition contained in paragraph 4, with regard to which no reservation was made, would continue to apply to political offenses and related common crimes.

71. The Court does not believe, moreover, that it can be reasonably argued that a reservation to Article 4(4) can be extended to encompass Article 4(2) on the grounds that the reservation relating to the prohibition of the death penalty for political offenses and related common crimes would make no sense if it were inapplicable to new offenses not previously punished with that penalty. Such a reservation does in fact have a purpose and meaning standing alone; it permits the reserving State to avoid violating the Convention if it desires to continue to apply the death penalty to common crimes related to political offenses, which penalty existed at the time the Convention entered into force for that State. The Court having established, moreover, that the aforementioned provisions of Article 4 apply to different issues (see para. 68, **supra**) there is no reason for assuming either as a matter of logic or law that a State which when ratifying the Convention, made a reservation to one provision, was in reality attaching a reservation to both provisions.

72. The foregoing conclusions apply, in general, to the reservations made by Guatemala when it ratified the Convention. The reservation is based solely on the fact that "the Constitution of the Republic of Guatemala, in its Article 54, only excludes from the application of the death penalty, political crimes, but not common crimes related to political crimes." This explanation merely refers to a reality of domestic law. The reservation does not suggest that the Constitution of Guatemala requires the application of the death penalty to common crimes related to political offenses, but rather that it does not prohibit the application of the death penalty to such crimes. Guatemala was, therefore, not debarred from making a more extensive commitment on the international plane.

73. Since the reservation modifies or excludes the legal effects of the provision to which it is made, the best way to demonstrate the effect of the modification is to read the provision as it has been modified. The substantive part of the reservation "only excludes from the application of the death penalty, political crimes, but not common crimes related to political crimes." It is clear and neither ambiguous nor obscure, and it does not lead to a result that is absurd or unreasonable, applying the ordinary meaning to the terms, to read the article as modified by the reservation as follows: "4(4). In no case shall capital punishment be inflicted for political offenses," thus excluding the related common crimes from the political offenses that were reserved. No other modification of the Convention can be derived from this

reservation, nor can a State claim that the reservation permits it to extend the death penalty to new crimes or that it is a reservation also to Article 4(2).

74. It follows that if the Guatemalan reservation is interpreted in accordance with the ordinary meaning to be given to its terms, within the general context of the Convention and taking into account its object and purpose, one has to conclude that in making the reservation, what Guatemala did was to indicate that it was unwilling to assume any commitment other than the one already provided for by its Constitution. The Court finds that in its reservation Guatemala failed to manifest its unequivocal rejection of the provision to which it attached a reservation. Although this fact does not transform the reservation into one that is unique in character, it does at the very least reinforce the view that the reservation should be narrowly interpreted.

75. The instant opinion of the Court refers of course not only to the reservation of Guatemala but also to any other reservation of a like nature.

76. Now, therefore,

THE COURT

1. Unanimously, rejects the request of the Government of Guatemala that it abstain from rendering the advisory opinion requested by the Commission;

2. unanimously, finds that it has the jurisdiction to render this advisory opinion; and

3. as regards the questions contained in the request for an advisory opinion presented

by the Commission on the interpretation of Articles 4(2) and 4(4) of the Convention,

IS OF THE OPINION:

a) In reply to the question

1) May a government apply the death penalty for crimes for which the domestic legislation did not provide such punishment at the time the American Convention on Human Rights entered into force for said state?

By an unanimous vote

that the Convention imposes an absolute prohibition on the extension of the death penalty and that, consequently, the Government of a State Party cannot apply the death penalty to crimes for which such a penalty was not previously provided for under its domestic law, and

b) In reply to the question

2) May a government, on the basis of a reservation to Article 4(4) of the Convention made at the time of ratification, adopt subsequent to the entry into force of the Convention a law imposing the death penalty for crimes not subject to this sanction at the moment of ratification?

By an unanimous vote

that a reservation restricted by its own wording to Article 4(4) of the Convention does not allow the Government of a State Party to extend by subsequent legislation the application of the death penalty to crimes for which this penalty was not previously provided.

Done in English and Spanish, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this eighth day of September, 1983.

PEDRO NIKKEN
PRESIDENTE

THOMAS BURGENTHAL

HUNTLEY EUGENE MUNROE

MAXIMO CISNEROS.

CARLOS ROBERTO REINA

RODOLFO E. PIZA E.

RAFAEL NIETO NAVIA

CHARLES MOYER
SECRETARY

SEPARATE OPINION OF JUDGE CARLOS ROBERTO REINA

My affirmative vote on the conclusions of this advisory opinion demonstrates my agreement with my fellow judges as regards the substantive issues contained therein.

Nevertheless, in view of the serious circumstances which gave rise to the request for the advisory opinion, and bearing in mind the clarity which should characterize this type of resolution by the Inter-American Court of Human Rights and in order that these decisions might serve increasingly as an example and strengthen the faith of the people in the international protection of fundamental rights, I believe that paragraph b) in reply to question 2 should have been drafted as follows:

> That a reservation restricted by its own wording to Article 4(4) of the Convention does not allow the Government of a State Party to extend by subsequent legislation, as was the intention of Guatemala, the application of the death penalty to crimes for which this penalty was not previously provided.

CARLOS ROBERTO REINA

CHARLES MOYER
SECRETARY

SEPARATE OPINION OF JUDGE
RODOLFO E. PIZA ESCALANTE

I share the arguments of my fellow judges and have voted for the conclusions contained in this advisory opinion because they do not contradict my own.

I have, however, restated my conclusions because I believe that the sense of the request of the Inter-American Commission on Human Rights and the circumstances that motivated it, require this Court to give a fuller and more direct answer to the problems underlying the request, and one to which, moreover, the many persons interested in forming an opinion on a serious situation concerning human rights in the Americas would have access.

My vote, therefore, should be understood in the following terms:

A) With respect to the objection presented by the Government of Guatemala to the jurisdiction of the Court to hear the request for an advisory opinion presented by the Commission,

I WOULD RESOLVE:

That the Court has jurisdiction to render the instant advisory opinion, not only as it refers in general to the interpretation of the texts of the Convention under consultation and to the hypothetical effects of a reservation to Article 4(4), but also as it refers concretely to the interpretation of the reservation presented by the Government of Guatemala and to the scope of the obligations assumed by that State by virtue of said reservation as a Party to the Convention.

B) As regards the merits of the case: in interpreting Articles 4(2) and 4(4) of the American Convention on Human Rights, the possible effects of a reservation to the latter with regard to the former and the concrete reservation presented by the Government of Guatemala upon ratifying the Convention,

I AM OF THE OPINION:

First:

That Article 4(2) of the Convention prohibits in absolute terms the application of the death penalty to all types of crimes for which it had not previously been established by the laws of the State in question.

Second:

That Article 4(4) of the Convention prohibits the application of the death penalty for political offenses or related crimes, even if such sanction had been previously established.

Third:

That the sole effect of a reservation to Article 4(4) of the Convention is to exclude the reserving State from the prohibition against the application of the death penalty for political offenses or related crimes for which that sanction

had been previously established by its laws but not from the prohibition created in Article 4(2) against extending that sanction in the future to new crimes regardless of their nature.

Fourth:

That the reservation made by the Government of Guatemala upon ratifying the Convention only exempted the prohibition against the application of the death penalty to common crimes related to political offenses regarding which this sanction had already been established from the commitments assumed by that country and that the Government cannot invoke that reservation in order to extend its application to new crimes regardless of their nature.

R.E. PIZA E.

CHARLES MOYER
SECRETARY