INTER-AMERICAN COURT OF HUMAN RIGHTS

ADVISORY OPINION OC-15/97
OF NOVEMBER 14, 1997

"REPORTS OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS"
(ART. 51 AMERICAN CONVENTION ON HUMAN RIGHTS)

REQUESTED BY THE STATE OF CHILE

Present:

Hernán Salgado-Pesantes, President
Antônio A. Cançado Trindade, Vice President
Héctor Fix-Zamudio, Judge
Alejandro Montiel-Argüello, Judge
Máximo Pacheco-Gómez, Judge
Oliver Jackman, Judge, and
Alirio Abreu-Burelli, Judge;

Also present:

Manuel E. Ventura-Robles, Secretary, and
Víctor M. Rodríguez-Rescia, Interim Deputy Secretary.

THE COURT,

composed as above,

renders the following Advisory Opinion:

I
Background

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

> a) May the Inter-American Commission, once it has adopted the two reports referred to in Articles 50 and 51 of the Convention in respect of a State and, concerning the latter of those reports, has notified the State that it is a final report, alter the substance of those reports and issue a third report?, and

> b) In the case that the Inter-American Commission on Human Rights is not authorized to alter its final report, which of the reports should be deemed to be binding on the State?

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

> a. On September 14, 1995 the Commission approved, in accordance with Article 50 of the Convention, Report 20/95 on the Martorell case and submitted it to the Illustrious State of Chile, which replied on February 8, 1996. On March 19 of that year the Commission apprised the State of Chile of Report 11/96 and informed it that the Commission had given its final approval to the report and ordered it to be published.
>
> b. On April 2, 1996 the Commission informed the State of Chile that it had decided to postpone publication of Report 11/96 on the basis of information concerning new facts supplied to it by the petitioners on March 27 and 29, 1996.
>
> c. On May 2, 1996 a hearing was held at the request of the petitioners and attended by the petitioners and the representatives of the Chilean State and on May 3, 1996 the Commission adopted a new report on the case, which it transmitted to the State, declaring that it was "*... a copy of the Report with the amendments approved by the Commission at the session held on May 3 of this year.*"

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

> that in the opinion of the Government of Chile, Articles 50 and 51 of the Convention make no provision for revision or amendment of a final report that has been previously adopted, nor could this be inferred from the text. On the contrary, such an action constitutes a serious infringement of the legal certainty required by the system.
>
> In view of the differing opinions within the Commission itself on the decision adopted, which concerns an exceedingly important practical procedural aspect of the Convention, and considering the need for the parties involved in a proceeding before the ICHR to know what they must abide by, it is essential for the Government of Chile to be informed of the opinion of the Inter-American Court of Human Rights on this matter.

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

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

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

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

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

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

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

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

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

Accordingly,

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

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

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

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

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

> [a]lthough the request for an advisory opinion rests on a legal point of the greatest practical importance, it has nevertheless given rise to certain comments that tend to misrepresent the scope and aim of [its] initiative [.] Thus,it has been said that the aim of the advisory opinion was to undermine the resolution in the "Martorell case", or that it was an attempt to impugn a recommendation of the Commission indirectly by means of a request for an advisory opinion designed to challenge procedural or jurisdictional powers enjoyed by the Commission.

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

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

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

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

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

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

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

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

19. On September 12, 1997 the Court decided:

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

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

21. Present were:

for the State of Chile:

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

for the State of Costa Rica:

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

for the State of Guatemala:

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

for the Inter-American Commission on Human Rights;

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

for CEJIL and Human Rights Watch, Americas

> Viviana Krsticevic, Executive Director, and
> Marcela Matamoros, Director of CEJIL/Mesoamérica.

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

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

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

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

> Article 51, paragraphs 1 and 2, for the purpose of adopting the final report and deciding to publish it. The Commission's reports on cases, pursuant to Articles 50 and 51, evolve according to the specific circumstances of each situation, some of which allow them to be amended. If the State partially adopts recommendations once the second report has been transmitted to it, a third amended report will be prepared and published. Other situations that could justify amendment of a report would be: legal or factual situations that do not alter the Commission's conclusions and recommendations; supervening events which, while not affecting the conclusions or recommendations, do affect analysis of the grounds of the report, as well as new facts that could have repercussions on the conclusions of the report and which, in extraordinary situations, must be included, thereby amending the report. The Commission is empowered to reflect such amendments in a final report prior to its publication. The precedent in the American domain would be the review procedure, which must be based on pertinent facts or situations unknown at the time the judgment was issued. As to the second question, it is inadmissible on the ground that it assumes an interpretation and presumes that it would not be possible, in any circumstances, to amend the second report prepared pursuant to Article 51(1); and
>
> d. the representative of the State of Costa Rica did not speak at the public hearing.

II
Jurisdiction of the Court

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

24. The communication from the State on the withdrawal of its request for an advisory opinion raised a substantive question concerning the scope and nature of the Court's advisory jurisdiction, which derives from Article 64 of the American Convention and is governed by the Rules of Procedure. That jurisdiction "*is closely related to the purposes of the Convention*" and

> is intended to assist the American States in fulfilling their international human rights obligations and to assist the different organs of the Inter-American system to carry out the functions assigned to them in this field. ("*Other treaties*" *subject to the advisory jurisdiction of the Court (Art. 64 American Convention on Human Rights),* Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 25).

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

26. The Court therefore observes that the exercise of the advisory function assigned to it by the American Convention is multilateral rather than litigious in nature, a fact faithfully reflected in the Rules of Procedure of the Court, Article 62(1) of which establishes that a request for an advisory opinion shall be transmitted to all

the "*Member States*", which may submit their comments on the request and participate in the public hearing on the matter. Furthermore, while an advisory opinion of the Court does not have the binding character of a judgment in a contentious case, it does have undeniable legal effects. Hence, it is evident that the State or organ requesting an advisory opinion of the Court is not the only one with a legitimate interest in the outcome of the procedure.

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

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

III
Admissibility

29. In ruling on the admissibility of the Advisory Opinion, the Court bears in mind the rules of interpretation which it has applied in other cases, in conformity with the relevant provisions of the Vienna Convention of the Law of Treaties. Article 31 of that Convention states that treaties must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The object and purpose of the American Convention is the protection of human rights, so that whenever the Court is called upon to interpret it, it must do so in such a manner as to give full effect to the system of human rights protection (cf. "*Other treaties*" *subject to the advisory opinion of the Court), supra* 24, paras. 43 et seq.*; The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75),* Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, paras. 19 *et seq.; Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights),* Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, paras. 47 *et seq.; Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica,* Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, paras. 20 *et seq.; Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights),* Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, paras. 29 *et seq.; The Word* "*Laws*" *in Article 30 of the American Convention on Human Rights,* Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, paras. 13 *et seq.; Velásquez Rodríguez Case, Preliminary Objections,* Judgment of June 26, 1987. Series C No. 1, para. 30; *Fairén Garbi and Solís Corrales Case, Preliminary Objections*, Judgment of June 26, 1987. Series C No. 2, para. 35; *Godínez Cruz Case, Preliminary Objections,* Judgment of June 26, 1987. Series C No. 3, para. 33; *Paniagua Morales et al. Case, Preliminary Objections,* Judgment of January 25, 1996. Series C No. 23, para. 40.)

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

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

31. In deciding whether to accept or reject a request for an advisory opinion, the Court must base its decision on considerations that transcend merely formal aspects. In particular, the Court referred in its first Advisory Opinion to the inadmissibility of

> any request for an advisory opinion which is likely to undermine the Court's contentious jurisdiction or, in general, weaken or alter the system established by the Convention, in a manner that would impair the rights of potential victims of human rights violations *("Other Treaties" subject to the advisory opinion of the Court, supra* 24, para. 31).

32. In this regard, the fact that the request for an advisory opinion cites as antecedent a specific case in which the Commission has specifically applied the criteria on which the State seeks a response, is an argument in favor of the Court's exercising its advisory jurisdiction, inasmuch as it is not being used for

> purely academic speculation, without a foreseeable application to concrete situations justifying the need for an advisory opinion (*Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights),* Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 16).

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

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

35. The Court points out that Article 50 of the Convention essentially provides that if a friendly settlement is not reached in a case before the Commission, the latter shall draw up a report setting forth the facts and its conclusions. That report shall be submitted to "*the states concerned*", and may include such proposals and recommendations as the Commission sees fit.

36. The relevant parts of Article 51 of the Convention provide that if, within a period of three months from the date of the transmittal of the report referred to in Article 50,

> the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.

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

37. In exercising its advisory jurisdiction on matters that have a specific case as a precedent, the Court shall be particularly careful to avoid a situation in which

> a reply to the questions ... could produce, under the guise of an advisory opinion, a determination of contentious matters not yet referred to the Court, without providing the victims with the opportunity to participate in the proceedings, [which] would distort the Convention system. *(Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights,* Advisory Opinion OC-12/91 of December 6, 1991. Series A No. 12, para. 28.)

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

39. In the instant matter, the Court must take account of a number of equally important considerations when deciding whether to accept or reject the State's request that it render an advisory opinion, bearing in mind the need to

> preserve a fair balance between the protection of human rights, which is the ultimate purpose of the system, and the legal certainty and procedural equity that will ensure the stability and reliability of the international protection mechanism *(Cayara Case, Preliminary Objections,* Judgment of February 3, 1993. Series C No. 14, para. 63.)

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

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

IV
Merits

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

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

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

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

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

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

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

b. whether to publish its report, that is, its "*opinion and conclusions*" and its "*recommendations*".

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

a. the general principle that its acts must be fair and impartial in regard to the parties concerned;

b. the provision that "*the main function of the Commission shall be to promote respect for and defense of human rights*" as set forth in Article 41 of the Convention;

c. its powers to "*make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights,*" as set forth in Article 41**.b** of the Convention.

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

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

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

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

following the transmittal of the report referred to in Article 51(1) of the Convention when it stated that

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

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

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

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

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

56. In the exercise of its contentious jurisdiction, this Court has, exceptionally, agreed to hear applications for review of its final judgments, for the purpose of

> preventing the final judgment from perpetuating an obviously unjust situation owing to the discovery of a fact that, had it been known at the time the judgment was rendered, would have altered the result, or which would demonstrate the existence of a substantial flaw in the judgment. *(Genie Lacayo Case, Request for Review of the Judgment of January 29, 1997,* Order of September 13, 1997, para. 10.)

57. Such applications are admissible only in regard to judgments issued by tribunals. *A fortiori*, revision of the decisions of organs such as the Inter-American Commission is permissible, on the understanding that this is limited to exceptional circumstances

> such as those concerned with documents the existence of which was unknown at the time the judgment was rendered, documentary evidence, testimony or deposition which has been declared to be false in a sentence that brings a judicial process to a close; the existence of prevarication, bribery, violence or fraud, and events the falsity of which is subsequently proven, such as the discovery that a person declared disappeared is alive (*Genie Lacayo Case, supra* 56*,* para. 12.)

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

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

For the foregoing reasons,

THE COURT,

DECIDES

unanimously

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

AND IS OF THE OPINION,

by six votes to one,

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

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

Judge Máximo Pacheco-Gómez dissenting.

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

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

Hernán Salgado-Pesantes
President

Antônio A. Cançado Trindade Héctor Fix-Zamudio

Alejandro Montiel-Argüello Máximo Pacheco-Gómez

Oliver Jackman Alirio Abreu-Burelli

Manuel E. Ventura-Robles
Secretary

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

DISSENTING OPINION OF JUDGE MÁXIMO PACHECO-GÓMEZ

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

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

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

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

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

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

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

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

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

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

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

12. The Court has established that the object and purpose of the American Convection on Human Rights is to protect the human rights and fundamental freedoms enshrined in that instrument. However, the Court, in the Cayara Case, declared that it

> must preserve a fair balance between the protection of human rights, which is the ultimate purpose of the system, and the legal certainty and procedural equity that will ensure the stability and reliability of the international protection mechanism". It also established that [i]n the instant case, to continue with a proceeding aimed at ensuring the protection of the interest of the alleged victims in the face of manifest violations of the procedural norms established by the Convention itself would result in a loss of the authority and credibility that are indispensable to organs charged with administering the system of the protection of human rights (*Cayara Case, Preliminary Objections,* para. 63.)

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

14. The Vienna Convention on the Law of Treaties also provides, as a rule for interpretation of a treaty, that account must be taken of the practice subsequently followed in its enforcement. Since the procedure governing petitions established in the various instruments that have governed, and still govern, the Inter-American

Commission on Human Rights was first established, only in one case has the Commission substantially amended a report notified to a State as final.

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

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

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

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

> 46. These norms [Articles 50 and 51 of the American Convention] were based upon Articles 31 and 32 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, according to which, when the European Commission considers there are violations of the rights protected in that Convention, it may send the report, which is the only one, to the Committee of Ministers which will dictate the measures the State concerned should adopt or submit it in the form of a case to the European Court of Human Rights for the Court to rule, in an imperative manner, on the alleged violations.
>
> 47. Because an organ similar to the Committee of Ministers was not established in the inter-American system, the American Convention empowered the Commission to decide whether to submit the case to the Court or to continue to examine the case and prepare a final report which it may publish.

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

And in the following paragraph:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> a. the general principle that its acts must be equitable and impartial in regard to the two parties in the matter under consideration.
>
> b. the mandate whereby "*the Commission's main function is to promote the observance and defense of human rights*" established in Article 41 of the Convention.

c. its powers "*to make recommendations to the governments of the member States, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic laws and constitutional provisions as well as appropriate measures to further the observance of those rights*", as stated in Article 41(b) of the Convention.

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

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

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

35. Indeed, it would be extremely difficult in future for a State or a petitioner whose allegations have not been fully or partially examined by the Commission - aware as they will be that the final report may be altered in strict and exceptional circumstances- not to seek its amendment, adducing, for example, real or fictitious events that permit amendment of the final report. Likewise, once a report has been successfully amended, there is nothing to prevent the new report from being amended as well if the grounds sustained by the Court are invoked.

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

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

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

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

Regarding the first question asked by Chile:

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

With regard to the second question asked by the State of Chile:

That since the Inter-American Commission on Human Rights is not empowered to alter the final report, the State and the parties must deem to be binding the report notified to them as final.

Máximo Pacheco-Gómez
Judge

Manuel E. Ventura-Robles
Secretary