INTER-AMERICAN COURT OF HUMAN RIGHTS

ADVISORY OPINION OC-5/85
OF NOVEMBER 13, 1985

COMPULSORY MEMBERSHIP IN AN ASSOCIATION PRESCRIBED BY LAW FOR THE PRACTICE OF JOURNALISM (ARTS. 13 AND 29 AMERICAN CONVENTION ON HUMAN RIGHTS)

REQUESTED BY THE GOVERMENT OF COSTA RICA

Present:

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

Also present:

Charles Moyer, Secretary, and
Manuel Ventura, Deputy Secretary

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. By note of July 8, 1985, the Government of Costa Rica (hereinafter "the Government") submitted to the Inter-American Court of Human Rights (hereinafter " the Court") an advisory opinion request relating to the interpretation of Articles 13 and 29 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") as they affect the compulsory membership in an association prescribed by law for the practice of journalism (hereinafter "compulsory licensing"). The request also sought the Court's interpretation relating to the compatibility of Law No. 4420 of September 22, 1969, Organic Law of the Colegio de Periodistas (Association of Journalists) of Costa Rica (hereinafter "Law No. 4420" and "the Colegio", respectively), with the provisions of the aforementioned articles. According to the express declaration of the Government, its request was formulated in fulfillment of a commitment it had made to the Inter-American Press Association (hereinafter "the IAPA").

2. In a note of July 12, 1985, the Secretariat of the Court, acting pursuant to Article 52 of the Rules of Procedure of the Court, requested written observations on the issues involved in the instant proceeding from the Member States of the Organization of American States (hereinafter "the OAS") as well as, through the Secretary General, from the organs listed in Chapter X of the Charter of the OAS.

3. The Court, by note of September 10, 1985, extended, until October 25, 1985, the date for the submission of written observations or other relevant documents.

4. Responses to the Secretariat's communication were received from the Government of Costa Rica, the Inter-American Commission on Human Rights (hereinafter "the Commission") and the Inter-American Juridical Committee.

5. Furthermore, the following non-governmental organizations submitted **amici curiae** briefs: the Inter-American Press Association; the Colegio de Periodistas of Costa Rica; the World Press Freedom Committee, the International Press Institute, the Newspaper Guild and the International Association of Broadcasting; the American Newspaper Publishers Association, the American Society of Newspaper Editors and the Associated Press; the Federación Latinoamericana de Periodistas; the International League for Human Rights; and the Lawyers Committee for Human Rights, the Americas Watch Committee and the Committee to Protect Journalists.

6. In view of the fact that the advisory opinion request, as formulated, raised issues involving the application of both Article 64(1) and Article 64(2) of the Convention, the Court decided to sever the proceedings because, whereas the first was of interest to all Member States and principal organs of the OAS, the second involves legal issues of particular concern to the Republic of Costa Rica.

7. Consistent with the provisions of Article 64(2) of the Convention, a first public hearing was held on Thursday, September 5, 1985 during its thirteenth Regular Session (September 2-6) to enable the Court to listen to the oral arguments of the representatives of the Government of Costa Rica, the Colegio de Periodistas of Costa Rica and the IAPA. The latter two were invited by the Court after consultation with the Government of Costa Rica. This hearing dealt with the compatibility of Law No. 4420 with Articles 13 and 29 of the Convention.

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

For the Government of Costa Rica:

Carlos José Gutiérrez, Agent and Minister of Foreign Affairs,

Manuel Freer Jiménez, Alternate Agent and Legal Adviser of the Ministry of Foreign Affairs

For the Colegio de Periodistas of Costa Rica:

Carlos Mora, President,

Alfonsina de Chavarría, Legal Adviser

For the Inter-American Press Association:

Germán Ornes, President of the Legal Commission,

Fernando Guier Esquivel, Legal Adviser, and

Leonard Marks, Attorney.

9. Consistent with the provisions of Article 64(1) of the Convention, a second public hearing was held on Friday, November 8, 1985. On this occasion, the Court, meeting in its Fourth Special Session (November 4-14), listened to the arguments of the representatives of the Government of Costa Rica and the Delegates of the Inter-American Commission on Human Rights. This hearing dealt with the general question involving the interpretation of Articles 13 and 29 of the Convention as they applied to compulsory licensing.

10. The following representatives appeared at this hearing:

For the Government of Costa Rica:

Carlos José Gutiérrez, Agent and Minister of Foreign Affairs,

Manuel Freer Jiménez, Alternate Agent and Legal Adviser of the Ministry of Foreign Affairs

For the Inter-American Commission on Human Rights:

Marco Gerardo Monroy Cabra, Delegate,

R. Bruce McColm, Delegate.

I
STATEMENT OF THE ISSUES

11. Invoking Article 64 of the Convention, the Government requested the Court to render an advisory opinion on the interpretation of Articles 13 and 29 of the Convention with respect to the compulsory licensing of journalists, and on the compatibility of Law No. 4420, which establishes such licensing requirements in Costa Rica, with the aforementioned articles of the Convention. The communication presented the request in the following manner:

> The request that is presented to the Inter-American Court, therefore, also includes a specific request for an advisory opinion as to whether there is a conflict or contradiction between the compulsory membership in a professional association as a necessary requirement to practice journalism, in general, and reporting, in particular, -according to the aforementioned articles of Law No. 4420- and the international norms (Articles 13 and 29 of the American Convention on Human Rights.) In this respect, it is necessary to have the opinion of the Inter-American Court regarding the scope and limitations on the right to freedom of expression, of thought and of information and the only permissible limitations contained in Articles 13 and 29 of the American Convention, with an indication as to whether the domestic

> norms contained in the Organic Law of the Colegio de Periodistas (Law No. 4420) and Articles 13 and 29 are compatible.
>
> Is the compulsory membership of journalists and reporters in an association prescribed by law for the practice of journalism permitted or included among the restrictions or limitations authorized by Articles 13 and 29 of the American Convention on Human Rights? Is there any incompatibility, conflict or disagreement between those domestic norms and the aforementioned articles of the American Convention?

12. Both the briefs and the oral arguments of the Government and the other participants in the proceedings clearly indicate that the Court is not being asked to define in the abstract the reach and the limitations permitted on the right of freedom of expression. Instead, the request seeks an opinion, under Article 64(1) of the Convention, concerning the legality, in general, of the requirement of compulsory licensing. It also seeks a ruling under Article 64(2) of the Convention on the compatibility of Law No. 4420, which establishes such compulsory licensing in Costa Rica, with the Convention.

13. The instant request originated in an IAPA petition that the Government seek the opinion

> inasmuch as there are serious doubts in Costa Rica as well as in the entire hemisphere regarding the compulsory membership of journalists and reporters in an association prescribed by law for the practice of journalism and in view of the different opinions regarding the legality - in light of the norms of the American Convention on Human Rights- of these institutions of prior licensing.

14. The Government agreed to present the request because the IAPA does not have standing to do so under the terms of the Convention. Article 64 of the Convention empowers only OAS Member States and, within their spheres of competence, the organs listed in Chapter X of the Charter of the OAS, as amended by the Protocol of Buenos Aires in 1967, to present requests for advisory opinions. In presenting its request, the Government indicated that laws similar to those involved in the instant application exist in at least ten other countries of the hemisphere.

15. The application of the Government clearly indicates, however, that it is in complete disagreement with the position of the IAPA. The Government also recorded its full agreement with Resolution No. 17/84 of the Commission, which declared:

> that Law No. 4420 of September 18, 1969, the Organic Law of the Costa Rican Association of Journalists, as well as the provisions that govern it, and the decision handed down by the Third Chamber of the Supreme Court of Justice of Costa Rica on June 3, 1983, by which Stephen Schmidt was sentenced to three months in prison for the illegal exercise of the profession of journalism, as well as other facts established in the petition, do not constitute a violation of Article 13 of the Convention. (Resolution No. 17/ 84 Case 9178 (Costa Rica) OEA/Ser.L/V/ II.63, doc.l5, October 2, 1984).

II
ADMISSIBILITY

16. As has already been observed, the advisory jurisdiction of the Court has been invoked with respect to Article 64(1) of the Convention with regard to the general question and with respect to Article 64(2) concerning the compatibility of Law No. 4420 and the Convention. Since Costa Rica is a Member State of the OAS, it has standing to request advisory opinions under either provision, and no legal argument suggests itself that could prevent a state from invoking both provisions in one request. Hence, the fact that both provisions were invoked does not make the petition of Costa Rica inadmissible.

17. It is now necessary to ask whether that part of the request of Costa Rica which refers to the compatibility of Law No. 4420 with the Convention is inadmissible because it is a matter that was considered in a proceeding before the Commission (**Schmidt** case, **supra** 15), and to which the Government made specific reference in its request.

18. Under the protective system established by the Convention, the instant application and the **Schmidt** case are two entirely distinct legal proceedings, even though the latter case dealt with some of the same questions that are before the Court in this advisory opinion request.

19. The **Schmidt** case grew out of an individual petition filed with the Commission pursuant to Article 44 of the Convention. There Mr. Schmidt charged the Government of Costa Rica with a violation of Article 13 of the Convention, which he alleged resulted from his conviction in Costa Rica for violating the provisions of Law No. 4420. After ruling the petition admissible, the Commission examined it in accordance with the procedures set out in Article 48 of the Convention and, in due course, adopted a Resolution in which it concluded that Law No. 4420 did not violate the Convention and that Mr. Schmidt's conviction did not violate Article 13. (**Schmidt** case, **supra** 15).

20. Costa Rica has accepted the contentious jurisdiction of the Court (Art. 62 of the Convention). However, neither the Government nor the Commission exercised its right to bring the case to the Court before the proceedings in the **Schmidt** case had run their full course, thereby depriving the individual applicant of the possibility of having his petition adjudicated by the Court. This result did not divest the Government of the right to seek an advisory opinion from the Court under Article 64 of the Convention with regard to certain legal issues, even though some of them are similar to those dealt with in the **Schmidt** case.

21. The Court has already had occasion to hold

> 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. (**Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights**), Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 43).

The Court has recognized, however, that its advisory jurisdiction is not unlimited and that it would consider inadmissible

> any request for an advisory opinion which is likely to undermine the Court's contentious jurisdiction or, in general, to 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 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. 31).

22. The Court realizes, of course, that a State against which proceedings have been instituted in the Commission may prefer not to have the petition adjudicated by the Court under its contentious jurisdiction, in order thus to evade the effect of the Court's judgments which are binding, final and enforceable under Articles 63, 67 and 68 of the Convention. A State, confronted with a Commission finding that it violated the Convention, may therefore try, by means of a subsequent request for an advisory opinion, to challenge the legal soundness of the Commission's conclusions without risking the consequences of a judgment. Since the resulting advisory opinion of the Court would lack the effect that a judgment of the Court has, such a strategy might be deemed to "impair the rights of potential victims of human rights violations" and "undermine the Court's contentious jurisdiction."

23. Whether a request for an advisory opinion does or does not have these consequences will depend upon the circumstances of the particular case. (**"Other treaties", supra** 21, para. 31). In the instant matter, it is clear that the Government won the **Schmidt** case in the proceedings before the Commission. By making the request for an advisory opinion with regard to a law that the Commission concluded did not violate the Convention, Costa Rica gains no legal advantage. True, Costa Rica's willingness to make this advisory opinion request after winning its case in the Commission enhances its moral stature, but that is not a consideration justifying the dismissal of the application.

24. The Court does believe, moreover, that Costa Rica's failure to refer the **Schmidt** case to the Court as a contentious case does not make its advisory opinion request inadmissible. Costa Rica was the first State Party to the Convention to accept the contentious jurisdiction of the Court. The Commission could therefore have referred the **Schmidt** case to the Court. Notwithstanding the views expressed by one of the Delegates of the Commission at the hearing of November 8, 1985, neither Article 50 nor Article 51 of the Convention requires that the Commission determine that the Convention has been violated before the case may be referred by it to the Court. It would hardly be proper, therefore, to deny Costa Rica the right to seek an advisory opinion merely because it failed to exercise a power that was conferred on the Commission as a Convention organ charged with the responsibility, **inter alia**, of safeguarding the institutional integrity and functioning of a Convention system. (**In the Matter of Viviana Gallardo et al.** Resolution of November 13, 1981, paras. 21-22).

25. Although the Convention does not specify under what circumstances a case should be referred to the Court by the Commission, it is implicit in the functions that the Convention assigns to the Commission and to the Court that certain cases should be referred by the former to the Court, provided they have not been the subject of a friendly settlement, notwithstanding the fact that there is no legal obligation to do so. The **Schmidt** case clearly falls into this category. The controversial legal issues it

raised had not been previously considered by the Court; the domestic proceedings in Costa Rica produced conflicting judicial decisions; the Commission itself was not able to arrive at a unanimous decision on the relevant legal issues; and its subject is a matter of special importance to the hemisphere because several states have adopted laws similar to that of Costa Rica.

26. Considering that individuals do not have standing to take their case to the Court and that a Government that has won a proceeding in the Commission would have no incentive to do so, in these circumstances the Commission alone is in a position, by referring the case to the Court, to ensure the effective functioning of the protective system established by the Convention. In such a context, the Commission has a special duty to consider the advisability of coming to the Court. Where the Commission has not referred the case to the Court and where, for that reason, the delicate balance of the protective system established by the Convention has been impaired, the Court should not refuse to consider the subject when it is presented in the form of an advisory opinion.

27. Furthermore, the question whether decisions of the Commission adopted pursuant to Articles 50 or 51 can in certain circumstances have the legal effect of finally determining a given issue is not relevant in the matter now before the Court.

28. Therefore, since there are no grounds for rejecting the advisory opinion request filed by the Government, the Court declares it admitted.

III
FREEDOM OF THOUGHT AND EXPRESSION

29. Article 13 of the Convention reads as follows:

> **Article 13. Freedom of Thought and Expression**
>
> 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
>
> 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:*
>
> a. respect for the rights or reputations of others; or
>
> b. the protection of national security, public order, or public health or morals.

* The English text of this provision constitutes an erroneous translation of the original Spanish text. The here relevant phrase should read " and be necessary to ensure.... "

> 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
>
> 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
>
> 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

Article 29 establishes the following rules for the interpretation of the Convention:

> **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.

30. Article 13 indicates that freedom of thought and expression "includes freedom to seek, receive, and impart information and ideas of all kinds...." This language establishes that those to whom the Convention applies not only have the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds. Hence, when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to "receive" information and ideas. The right protected by Article 13 consequently has a special scope and character, which are evidenced by the dual aspect of freedom of expression. It requires, on the one hand, that no one be arbitrarily limited or

impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.

31. In its individual dimension, freedom of expression goes further than the theoretical recognition of the right to speak or to write. It also includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible. When the Convention proclaims that freedom of thought and expression includes the right to impart information and ideas through "any... medium," it emphasizes the fact that the expression and dissemination of ideas and information are indivisible concepts. This means that restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely. The importance of the legal rules applicable to the press and to the status of those who dedicate themselves professionally to it derives from this concept.

32. In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication. It includes the right of each person to seek to communicate his own views to others, as well as the right to receive opinions and news from others. For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions.

33. The two dimensions mentioned (**supra** 30) of the right to freedom of expression must be guaranteed simultaneously. One cannot legitimately rely on the right of a society to be honestly informed in order to put in place a regime of prior censorship for the alleged purpose of eliminating information deemed to be untrue in the eyes of the censor. It is equally true that the right to impart information and ideas cannot be invoked to justify the establishment of private or public monopolies of the communications media designed to mold public opinion by giving expression to only one point of view.

34. If freedom of expression requires, in principle, that the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media, it must be recognized also that such media should, in practice, be true instruments of that freedom and not vehicles for its restriction. It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, **inter alia**, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists.

35. The foregoing does not mean that all restrictions on the mass media or on freedom of expression in general, are necessarily a violation of the Convention, whose Article 13(2) reads as follows:

> Article 13(2) -The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

a. respect for the rights or reputations of others; or

b. the protection of national security, public order, or public health or morals.

This language indicates that the acts which by law are established as grounds for liability pursuant to the quoted provision constitute restrictions on freedom of expression. It is in that sense that the Court will hereinafter use the term "restriction," that is, as liabilities imposed by law for the abusive exercise of freedom of expression.

36. The Convention itself recognizes that freedom of thought and expression allows the imposition of certain restrictions whose legitimacy must be measured by reference to the requirements of Article 13 (2). Just as the right to express and to disseminate ideas is indivisible as a concept, so too must it be recognized that the only restrictions that may be placed on the mass media are those that apply to freedom of expression. It results therefrom that in determining the legitimacy of restrictions and, hence, in judging whether the Convention has been violated, it is necessary in each case to decide whether the terms of Article 13 (2) have been respected.

37. These provisions indicate under what conditions a limitation to freedom of expression is compatible with the guarantee of this right as it is recognized by the Convention. Those limitations must meet certain requirements of form, which depend upon the manner in which they are expressed. They must also meet certain substantive conditions, which depend upon the legitimacy of the ends that such restrictions are designed to accomplish.

38. Article 13 (2) of the Convention defines the means by which permissible limitations to freedom of expression may be established. It stipulates, in the first place, that prior censorship is always incompatible with the full enjoyment of the rights listed in Article 13, but for the exception provided for in subparagraph 4 dealing with public entertainments, even if the alleged purpose of such prior censorship is to prevent abuses of freedom of expression. In this area any preventive measure inevitably amounts to an infringement of the freedom guaranteed by the Convention.

39. Abuse of freedom of information thus cannot be controlled by preventive measures but only through the subsequent imposition of sanctions on those who are guilty of the abuses. But even here, in order for the imposition of such liability to be valid under the Convention, the following requirements must be met:

a) the existence of previously established grounds for liability;

b) the express and precise definition of these grounds by law;

c) the legitimacy of the ends sought to be achieved;

d) a showing that these grounds of liability are "necessary to ensure" the aforementioned ends.

All of these requirements must be complied with in order to give effect to Article 13(2).

40. Article 13(2) is very precise in specifying that the restrictions on freedom of information must be established by law and only in order to achieve the ends that the Convention itself enumerates. Because the provision deals with restrictions as that concept has been used by the Court (**supra** 35), the legal definition of the liability must be express and precise.

41. Before analyzing subparagraphs (a) and (b) of Article 13 (2) of the Convention, as they relate to the instant request, the Court will now consider the meaning of the expression "necessary to ensure," found in the same provision. To do this, the Court must take account of the object and purpose of the treaty, keeping in mind the criteria for its interpretation found in Articles 29 (c) and (d), and 32 (2), which read as follows:

> **Article 29. Restrictions Regarding Interpretation**
>
> No provision of this Convention shall be interpreted as:
>
> ...
>
> 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 32. Relationship between Duties and Rights**
>
> ...
>
> 2. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

The Court must also take account of the Preamble of the Convention in which the signatory states reaffirm "their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man."

42. These articles define the context within which the restrictions permitted under Article 13(2) must be interpreted. It follows from the repeated reference to "democratic institutions", "representative democracy" and "democratic society" that the question whether a restriction on freedom of expression imposed by a state is "necessary to ensure" one of the objectives listed in subparagraphs (a) or (b) must be judged by reference to the legitimate needs of democratic societies and institutions.

43. In relation to this point, the Court believes that it is useful to compare Article 13 of the Convention with Article 10 of the (European) Convention for the Protection

of Human Rights and Fundamental Freedoms (hereinafter "the European Convention") and with Article 19 of the International Covenant on Civil and Political Rights (hereinafter "the Covenant"), which read as follows:

EUROPEAN CONVENTION - ARTICLE 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

COVENANT - ARTICLE 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (**ordre public**), or of public health or morals.

44. It is true that the European Convention uses the expression "necessary in a democratic society," while Article 13 of the American Convention omits that phrase. This difference in wording loses its significance, however, once it is recognized that the European Convention contains no clause comparable to Article 29 of the American Convention, which lays down guidelines for the interpretation of the Convention and prohibits the interpretation of any provision of the treaty "precluding other rights and guarantees... derived from representative democracy as a form of government." The Court wishes to emphasize, furthermore, that Article 29(d) bars interpretations of the Convention "excluding or limiting the effect that the American

Declaration of the Rights and Duties of Man... may have," which instrument is recognized as forming part of the normative system for the OAS Member States in Article 1(2) of the Commission's Statute. Article XXVIII of the American Declaration of the Rights and Duties of Man reads as follows:

> The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.

The just demands of democracy must consequently guide the interpretation of the Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions.

45. The form in which Article 13 of the American Convention is drafted differs very significantly from Article 10 of the European Convention, which is formulated in very general terms. Without the specific reference in the latter to "necessary in a democratic society," it would have been extremely difficult to delimit the long list of permissible restrictions. As a matter of fact, Article 19 of the Covenant, which served, in part at least, as a model for Article 13 of the American Convention, contains a much shorter list of restrictions than does the European Convention. The Covenant, in turn, is more restrictive than the American Convention, if only because it does not expressly prohibit prior censorship.

46. It is important to note that the European Court of Human Rights, in interpreting Article 10 of the European Convention, concluded that "necessary," while not synonymous with "indispensable," implied "the existence of a 'pressing social need'" and that for a restriction to be "necessary" it is not enough to show that it is "useful," "reasonable" or "desirable." (Eur. Court H. R., **The Sunday Times Case**, judgment of 26 April 1979, Series A no. 30, para. 59, pp. 35-36.) This conclusion, which is equally applicable to the American Convention, suggests that the "necessity" and, hence, the legality of restrictions imposed under Article 13(2) on freedom of expression, depend upon a showing that the restrictions are required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts the right protected must be selected. Given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees. Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected by Article 13 more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it. (**The Sunday Times Case, supra**, para. 62, p. 38. See also Eur. Court H. R., **Barthold** judgment of 25 March 1985, Series A no. 90, para. 59, p. 26.)

47. Article 13(2) must also be interpreted by reference to the provisions of Article 13(3), which is most explicit in prohibiting restrictions on freedom of expression by "indirect methods and means... tending to impede the communication and circulation of ideas and opinions." Neither the European Convention nor the Covenant contains a comparable clause. It is significant that Article 13(3) was placed immediately after a provision -Article 13(2)- which deals with permissible restrictions on the exercise of freedom of expression. This circumstance suggests a desire to ensure that the

language of Article 13(2) not be misinterpreted in a way that would limit, except to the extent strictly necessary, the full scope of the right to freedom of expression.

48. Article 13(3) does not only deal with indirect governmental restrictions, it also expressly prohibits "private controls" producing the same result. This provision must be read together with the language of Article 1 of the Convention wherein the States Parties "undertake to respect the rights and freedoms recognized (in the Convention)... and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms...." Hence, a violation of the Convention in this area can be the product not only of the fact that the State itself imposes restrictions of an indirect character which tend to impede "the communication and circulation of ideas and opinions," but the State also has an obligation to ensure that the violation does not result from the "private controls" referred to in paragraph 3 of Article 13.

49. The provisions of Article 13(4) and 13(5) have no direct bearing on the questions before the Court in the instant application and, consequently, do not need to be analyzed at this time.

50. The foregoing analysis of Article 13 shows the extremely high value that the Convention places on freedom of expression. A comparison of Article 13 with the relevant provisions of the European Convention (Article 10) and the Covenant (Article 19) indicates clearly that the guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas.

51. With respect to the comparison between the American Convention and the other treaties already mentioned, the Court cannot avoid a comment concerning an interpretation suggested by Costa Rica in the hearing of November 8, 1985. According to this argument, if a right recognized by the American Convention were regulated in a more restrictive way in another international human rights instrument, the interpretation of the American Convention would have to take those additional restrictions into account for the following reasons:

> If it were not so, we would have to accept that what is legal and permissible on the universal plane would constitute a violation in this hemisphere, which cannot obviously be correct. We think rather that with respect to the interpretation of treaties, the criterion can be established that the rules of a treaty or a convention must be interpreted in relation with the provisions that appear in other treaties that cover the same subject. It can also be contended that the provisions of a regional treaty must be interpreted in the light of the concepts and provisions of instruments of a universal character. (Underlining in original text.)

It is true, of course, that it is frequently useful, -and the Court has just done it- to compare the American Convention with the provisions of other international instruments in order to stress certain aspects concerning the manner in which a certain right has been formulated, but that approach should never be used to read into the Convention restrictions that are not grounded in its text. This is true even if these restrictions exist in another international treaty.

52. The foregoing conclusion clearly follows from the language of Article 29 which sets out the relevant rules for the interpretation of the Convention. Subparagraph (b) of Article 29 indicates that no provision of the Convention may be interpreted as

> 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.

Hence, if in the same situation both the American Convention and another international treaty are applicable, the rule most favorable to the individual must prevail. Considering that the Convention itself establishes that its provisions should not have a restrictive effect on the enjoyment of the rights guaranteed in other international instruments, it makes even less sense to invoke restrictions contained in those other international instruments, but which are not found in the Convention, to limit the exercise of the rights and freedoms that the latter recognizes.

IV
POSSIBLE VIOLATIONS OF THE AMERICAN CONVENTION

53. Article 13 may be violated under two different circumstances, depending on whether the violation results in the denial of freedom of expression or whether it results from the imposition of restrictions that are not authorized or legitimate.

54. In truth, not every breach of Article 13 of the Convention constitutes an extreme violation of the right to freedom of expression, which occurs when governmental power is used for the express purpose of impeding the free circulation of information, ideas, opinions or news. Examples of this type of violation are prior censorship, the seizing or barring of publications and, generally, any procedure that subjects the expression or dissemination of information to governmental control. Here the violation is extreme not only in that it violates the right of each individual to express himself, but also because it impairs the right of each person to be well informed, and thus affects one of the fundamental prerequisites of a democratic society. The Court believes that the compulsory licensing of journalists, as that issue is presented in the instant request, does not fall into this category.

55. Suppression of freedom of expression as described in the preceding paragraph, even though it constitutes the most serious violation possible of Article 13, is not the only way in which that provision can be violated. In effect, any governmental action that involves a restriction of the right to seek, receive and impart information and ideas to a greater extent or by means other than those authorized by the Convention, would also be contrary to it. This is true whether or not such restrictions benefit the government.

56. Furthermore, given the broad scope of the language of the Convention, freedom of expression can also be affected without the direct intervention of the State. This might be the case, for example, when due to the existence of monopolies or oligopolies in the ownership of communications media, there are established in practice "means tending to impede the communication and circulation of ideas and opinions".

57. As has been indicated in the preceding paragraphs, a restriction of the right to freedom of expression may or may not be a violation of the Convention,

depending upon whether it conforms to the terms in which such restrictions are authorized by Article 13(2). It is consequently necessary to analyze the question relating to the compulsory licensing of journalists in light of this provision of the Convention.

58. The compulsory licensing of journalists can result in the imposition of liability, including penal, for those who are not members of the "colegio" if, by imparting "information and ideas of all kinds... through any... medium of one's choice" they intrude on what, according to the law, is defined as the professional practice of journalism. It follows that this licensing requirement constitutes a restriction on the right of expression for those who are not members of the "colegio." This conclusion makes it necessary for the Court to determine whether the law is based on considerations that are legitimate under the Convention and, consequently, compatible with it.

59. Accordingly, the question is whether the ends sought to be achieved fall within those authorized by the Convention, that is, whether they are "necessary to ensure: a) respect for the rights or reputations of others; or b) the protection of national security, public order, or public health or morals" (Art. 13(2)).

60. The Court observes that the arguments employed to defend the legitimacy of the compulsory licensing of journalists are linked to only some, but not all, of the concepts mentioned in the preceding paragraph. It has been asserted, in the first place, that compulsory licensing is the normal way to organize the practice of the professions in the different countries that have subjected journalism to the same regime. Thus, the Government has pointed out that in Costa Rica

> there exists an unwritten rule of law, of a structural and constitutive nature, regarding the professions. This rule can be stated in the following terms: each profession must organize itself, by law, into a public corporation called a “colegio.”

Similarly, the Commission has indicated that

> There is no opposition to the supervision and control of the exercise of the professions, either directly by government agencies, or indirectly through an authorization or delegation made for that purpose by a corresponding statute to a professional organization or association, under the vigilance and control of the state, since the former, in performing its mission, must always be subject to the law. Membership in a professional association or the requirement of a card for the exercise of the profession of journalists does not imply restriction of the freedoms of thought and expression, but rather a regulation that the Executive Branch may make on the validation of academic degrees, as well as the inspection of their exercise, as an imperative of social order and a guarantee of a better protection of human rights (**Schmidt Case, supra** 15).

The Colegio de Periodistas of Costa Rica also pointed out that "this same requirement (licensing) exists in the organic laws of all professional 'colegios'. " For its part, the Federacion Latinoamericana de Periodistas, in the observations that it submitted to the Court as **amicus curiae**, stated that some Latin American constitutions stipulate the compulsory licensing for the professions in a manner

similar to that prescribed by the here relevant law, and that this stipulation has the same normative rank as does freedom of expression.

61. Second, it has been argued that compulsory licensing seeks to achieve goals, linked with professional ethics and responsibility, that are useful to the community at large. The Government mentioned a decision of the Costa Rican Supreme Court, which stated that

> it is true that these "colegios" also act in the common interest and in defense of its members, but it is to be noted that in addition to that interest, there is one of a higher authority that justifies establishing compulsory licensing in some professions, namely, those which are generally known as the liberal professions, because in addition to a degree that assures an adequate education, it also requires strict observance of the standards of professional ethics, as much for the type of activity that is carried out by these professionals as for the confidence that is deposited in them by those who require their services. This is all in the public interest and the State delegates to the "colegios" the power to oversee the correct exercise of the profession.

On another occasion the Government said:

> Something else results from what we could call the practice of journalism as a "liberal profession." This explains why the same Law of the Colegio de Periodistas of Costa Rica allows a person to become a commentator and even a paid and permanent columnist of a communications medium without having to belong to the Colegio de Periodistas.

The same Government has emphasized that

> the practice of certain professions involves not only rights but also duties toward the community and the social order. That is what justifies the requirement of special qualifications, regulated by law, for the practice of some professions, such as journalism.

Expressing similar views, a Delegate of the Commission, in the public hearing of November 8, 1985, concluded that

> compulsory licensing of journalists or the requirement of a professional identification card does not mean that the right to freedom of thought and expression is being denied, nor restricted, nor limited, but only that its practice is regulated so that it fulfills a social function, respects the rights of others and protects the public order, health, morals and national security. Compulsory licensing seeks the control, inspection and oversight of the profession of journalists in order to guarantee ethics, competence and the social betterment of journalists.

In the same vein, the Colegio de Periodistas affirmed that "society has the right, in order to protect the general welfare, to regulate the professional practice of journalism"; and also that "the handling of the thoughts of others, in their presentation to the public, requires not only a trained professional but also one with

professional responsibility and ethics toward society, which is overseen by the Colegio de Periodistas of Costa Rica."

62. It has also been argued that licensing is a means of guaranteeing the independence of journalists in relation to their employers. The Colegio de Periodistas has stated that rejection of compusory licensing

> would be the equivalent of granting the objectives of those who establish organs of mass media in Latin America not in the service of society but rather to defend personal interests and those of special interest groups. They would prefer to continue to have absolute control over the whole process of social communication, including the employment of individuals as journalists, who appear to have those same interests.

Following the same reasoning, the Federación Latinoamericana de Periodistas stated**, inter alia**, that such licensing seeks

> to guarantee to their respective societies the right to freedom of expression of ideas in whose firm defense they have concentrated their struggle.... And with relation to the right of information our unions have always emphasized the need for making democratic the flow of information in the broadcasterlistener relationship so that the citizenry may have access to and receive true and pertinent information, a struggle that has found its principal stumbling block in the egoism and business tactics of the mass news media.

63. The Court, in relating these arguments to the restrictions provided for in Article 13(2) of the Convention, observes that they do not directly involve the idea of justifying the compulsory licensing of journalists as a means of guaranteeing "respect for the rights or reputations of others" or "the protection of national security" or "public health or morals" (Art. 13(2)). Rather, these arguments seek to justify compulsory licensing as a way to ensure public order (Art. 13(2)b)) as a just demand of the general welfare in a democratic society (Art. 32(2)).

64. In fact it is possible, within the framework of the Convention, to understand the meaning of public order as a reference to the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles. In that sense, restrictions on the exercise of certain rights and freedoms can be justified on the ground that they assure public order. The Court interprets the argument to be that compulsory licensing can be seen, structurally, as the way to organize the exercise of the professions in general. This contention would justify the submission of journalists to such a licensing regime on the theory that it is compelled by public order.

65. The concept of general welfare, as articulated in Article 32(2) of the Convention, has been directly invoked to justify the compulsory licensing of journalists. The Court must address this argument since it believes that, even without relying on Article 32(2), it can be said that, in general, the exercise of the rights guaranteed by the Convention must take the general welfare into account. In the opinion of the Court that does not mean, however, that Article 32(2) is automatically and equally applicable to all the rights which the Convention protects, including especially those rights in which the restrictions or limitations that may be

legitimately imposed on the exercise of a certain right are specified in the provision itself. Article 32(2) contains a general statement that is designed for those cases in particular in which the Convention, in proclaiming a right, makes no special reference to possible legitimate restrictions.

66. Within the framework of the Convention, it is possible to understand the concept of general welfare as referring to the conditions of social life that allow members of society to reach the highest level of personal development and the optimum achievement of democratic values. In that sense, it is possible to conceive of the organization of society in a manner that strengthens the functioning of democratic institutions and preserves and promotes the full realization of the rights of the individual as an imperative of the general welfare. It follows therefrom that the arguments that view compulsory licensing as a means of assuring professional responsibility and ethics and, moreover, as a guarantee of the freedom and independence of journalists in relation to their employers, appear to be based on the idea that such licensing is compelled by the demands of the general welfare.

67. The Court must recognize, nevertheless, the difficulty inherent in the attempt of defining with precision the concepts of "public order" and "general welfare." It also recognizes that both concepts can be used as much to affirm the rights of the individual against the exercise of governmental power as to justify the imposition of limitations on the exercise of those rights in the name of collective interests. In this respect, the Court wishes to emphasize that "public order" or "general welfare" may under no circumstances be invoked as a means of denying a right guaranteed by the Convention or to impair or deprive it of its true content. (See Art. 29(a) of the Convention) Those concepts, when they are invoked as a ground for limiting human rights, must be subjected to an interpretation that is strictly limited to the "just demands" of "a democratic society," which takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention.

68. The Court observes that the organization of professions in general, by means of professional "colegios," is not **per se** contrary to the Convention, but that it is a method for regulation and control to ensure that they act in good faith and in accordance with the ethical demands of the profession. If the notion of public order, therefore, is thought of in that sense, that is to say, as the conditions that assure the normal and harmonious functioning of the institutions on the basis of a coherent system of values and principles, it is possible to conclude that the organization of the practice of professions is included in that order.

69. The Court also believes, however, that that same concept of public order in a democratic society requires the guarantee of the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole. Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard. In this sense, the Court adheres to the ideas expressed by the European Commission of Human Rights when, basing itself on the Preamble of the European Convention, it stated

> that the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but... to establish a common public order of the free democracies of Europe

> with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law. ("Austria vs. Italy," Application No. 788/60, **4 European Yearbook of Human Rights** 116, at 138 (1961).)

It is also in the interest of the democratic public order inherent in the American Convention that the right of each individual to express himself freely and that of society as a whole to receive information be scrupulously respected.

70. Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a **conditio sine qua non** for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.

71. Within this context, journalism is the primary and principal manifestation of freedom of expression of thought. For that reason, because it is linked with freedom of expression, which is an inherent right of each individual, journalism cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are enrolled in a certain professional "colegio."

72. The argument that a law on the compulsory licensing of journalists does not differ from similar legislation applicable to other professions does not take into account the basic problem that is presented with respect to the compatibility between such a law and the Convention. The problem results from the fact that Article 13 expressly protects freedom "to seek, receive, and impart information and ideas of all kinds... either orally, in writing, in print...." The profession of journalism - the thing journalists do- involves, precisely, the seeking, receiving and imparting of information. The practice of journalism consequently requires a person to engage in activities that define or embrace the freedom of expression which the Convention guarantees.

73. This is not true of the practice of law or medicine, for example. Unlike journalism, the practice of law and medicine -that is to say, the things that lawyers or physicians do- is not an activity specifically guaranteed by the Convention. It is true that the imposition of certain restrictions on the practice of law would be incompatible with the enjoyment of various rights that the Convention guarantees. For example, a law that prohibited all lawyers from acting as defense counsel in cases involving anti-state activities might be deemed to violate the accused's rights to counsel under Article 8 of the Convention and, hence, be incompatible with it. But no one right guaranteed in the Convention exhaustively embraces or defines the practice of law as does Article 13 when it refers to the exercise of a freedom that encompasses the activity of journalism. The same is true of medicine.

74. It has been argued that what the compulsory licensing of journalists seeks to achieve is to protect a paid occupation and that it is not directed against the exercise of freedom of expression as long as it does not involve remuneration and that, in that sense, it deals with a subject other than that dealt with by Article 13 of the Convention. This argument is based on a distinction between professional journalism and the exercise of freedom of expression that the Court cannot accept. This

argument assumes that it is possible to distinguish freedom of expression from the professional practice of journalism, which is not possible. Moreover, it implies serious dangers if carried to its logical conclusion. The practice of professional journalism cannot be differentiated from freedom of expression. On the contrary, both are obviously intertwined, for the professional journalist is not, nor can he be, anything but someone who has decided to exercise freedom of expression in a continuous, regular and paid manner. It should also be noted that the argument that the differentiation is possible could lead to the conclusion the guarantees contained in Article 13 of the Convention do not apply to professional journalists.

75. The argument advanced in the preceding paragraph does not take into account, furthermore, that freedom of expression includes imparting and receiving information and has a double dimension, individual and collective. This fact indicates that the circumstance whether or not that right is exercised as a paid profession cannot be deemed legitimate in determining whether the restriction is contemplated in Article 13(2) of the Convention because, without ignoring the fact that a guild has the right to seek the best working conditions for its members, that is not a good enough reason to deprive society of possible sources of information.

76. The Court concludes, therefore, that reasons of public order that may be valid to justify compulsory licensing of other professions cannot be invoked in the case of journalism because they would have the effect of permanently depriving those who are not members of the right to make full use of the rights that Article 13 of the Convention grants to each individual. Hence, it would violate the basic principles of a democratic public order on which the Convention itself is based.

77. The argument that licensing is a way to guarantee society objective and truthful information by means of codes of professional responsibility and ethics, is based on considerations of general welfare. But, in truth, as has been shown, general welfare requires the greatest possible amount of information, and it is the full exercise of the right of expression that benefits this general welfare. In principle, it would be a contradiction to invoke a restriction to freedom of expression as a means of guaranteeing it. Such an approach would ignore the primary and fundamental character of that right, which belongs to each and every individual as well as the public at large. A system that controls the right of expression in the name of a supposed guarantee of the correctness and truthfulness of the information that society receives can be the source of great abuse and, ultimately, violates the right to information that this same society has.

78. It has likewise been suggested that the licensing of journalists is a means of strengthening the guild of professional journalists and, hence, a guarantee of the freedom and independence of those professionals and, as such, required by the demands of the general welfare. The Court recognizes that the free circulation of ideas and news is possible only through a plurality of sources of information and respect for the communications media. But, viewed in this light, it is not enough to guarantee the right to establish and manage organs of mass media; it is also necessary that journalists and, in general, all those who dedicate themselves professionally to the mass media are able to work with sufficient protection for the freedom and independence that the occupation requires. It is a matter, then, of an argument based on a legitimate interest of journalists and the public at large, especially because of the possible and known manipulations of information relating to events by some governmental and private communications media.

79. The Court believes, therefore, that the freedom and independence of journalists is an asset that must be protected and guaranteed. In the terms of the Convention, however, the restrictions authorized on freedom of expression must be " **necessary to ensure** " certain legitimate goals, that is to say, it is not enough that the restriction be **useful** (**supra** 46) to achieve a goal, that is, that it can be achieved through it. Rather, it must be **necessary**, which means that it must be shown that it cannot reasonably be achieved through a means less restrictive of a right protected by the Convention. In this sense, the compulsory licensing of journalists does not comply with the requirements of Article 13(2) of the Convention because the establishment of a law that protects the freedom and independence of anyone who practices journalism is perfectly conceivable without the necessity of restricting that practice only to a limited group of the community.

80. The Court also recognizes the need for the establishment of a code that would assure the professional responsibility and ethics of journalists and impose penalties for infringements of such a code. The Court also believes that it may be entirely proper for a State to delegate, by law, authority to impose sanctions for infringements of the code of professional responsibility and ethics. But, when dealing with journalists, the restrictions contained in Article 13(2) and the character of the profession, to which reference has been made (**supra** 72-75), must be taken into account.

81. It follows from what has been said that a law licensing journalists, which does not allow those who are not members of the "colegio" to practice journalism and limits access to the "colegio" to university graduates who have specialized in certain fields, is not compatible with the Convention. Such a law would contain restrictions to freedom of expression that are not authorized by Article 13(2) of the Convention and would consequently be in violation not only the right of each individual to seek and impart information and ideas through any means of his choice, but also the right of the public at large to receive information without any interference.

V
COMPATIBILITY OF LAW NO. 4420 WITH THE CONVENTION

82. The second part of the request concerns the compatibility between the Convention and the relevant aspects of Law No. 4420. For the purpose of this advisory opinion, the following are the relevant provisions of that law:

> Article 2. -The Association of Journalists of Costa Rica shall be composed of the following:
>
> a) Holders of a Licenciate or Bachelor degree in Journalism, graduated from the University of Costa Rica or from comparable universities or institutions abroad, admitted to membership in the Association in accordance with laws and treaties; and
>
> b) If the Association ascertains that no professional journalist is interested in filling a specific vacancy, the Association may authorize, at the request of the publishing company, that it be filled temporarily, but in equal conditions, by a student of the School of Journalism who has finished at least the first year of studies and is enrolled in the second year, until such time as a

> member of the Association is interested in the post. During the period that the student is authorized to fill the post, he is required to meet the professional ethical and moral duties that the present law stipulates for members of the Association and to continue his studies in the School of Journalism.
>
> Article 22.-The functions of a journalist can only be carried out by duly registered members of the Association.
>
> Article 23.-For purposes of this law, the phrase "practicing professional journalist" shall be understood to mean the person whose principal, regular or paid occupation it is to practice his profession in a daily or periodic publication, or in radio or television news media, or in a news agency, and for whom such work represents his or her principal source of income.
>
> Article 25.-Columnists and permanent or occasional commentators in all types of news media may, whether or not they receive pay, freely carry out their activities without being obliged to belong to the Association, however, their scope of activities shall be restricted to that specific area and they shall not be permitted to work as specialized or non-specialized reporters.

To resolve the question of the compatibility between the law and the Convention, the Court must apply the same test that it applied to the general question in this opinion.

83. The Court observes that, pursuant to Article 25 of Law No. 4420, it is not necessary to be a member of the Colegio in order to be a commentator or columnist, whether full or part-time, whether paid or not. That provision has been invoked to argue that the law does not prevent the free circulation of ideas and opinions. Without entering into a detailed consideration of the force of this argument, it does not affect the conclusions of the Court with respect to the general question, since the Convention not only guarantees the right to seek, receive and impart ideas but also information of all kinds. The seeking and dissemination of information does not fall within the practice authorized by Article 25 of Law No. 4420.

84. Pursuant to these provisions and leaving aside some exceptions not here relevant, Law No. 4420 authorizes individuals to engage in the remunerated practice of journalism only if they are members of the Association. It also provides that only individuals who are graduates of a particular university have a right to join the association. This regime conflicts with the Convention in that it restricts, in a manner not authorized under Article 13(2), the right to freedom of thought and expression that belongs to each individual. Moreover, it also violates the Convention because it unduly limits the right of the public at large to receive information from any source without interference.

85. Consequently, in responding to the questions presented by the Government of Costa Rica concerning the compulsory licensing of journalists and the application of Articles 13 and 29 of the Convention as well as the compatibility of Law No. 4420 with the aforementioned provisions,

THE COURT IS OF THE OPINION

First,

By unanimity,

That the compulsory licensing of journalists is incompatible with Article 13 of the American Convention on Human Rights if it denies any person access to the full use of the news media as a means of expressing opinions or imparting information.

Second,

By unanimity,

That Law No. 4420 of September 22, 1969, Organic Law of the Association of Journalists of Costa Rica, the subject of the instant advisory opinion request, is incompatible with Article 13 of the American Convention on Human Rights in that it prevents certain persons from joining the Association of Journalists and, consequently, denies them the full use of the mass media as a means of expressing themselves or imparting information.

Done in English and Spanish, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this thirteenth day of November, 1985.

Thomas Bergenthal
President

Rafael Nieto-Navia — Huntley Eugene Munroe

Máximo Cisneros — Rodolfo E. Piza E. — Pedro Nikken

Charles Moyer
Secretary

(Translation)

SEPARATE OPINION OF
JUDGE RAFAEL NIETO-NAVIA

1. The advisory opinion request presented by the Government of Costa Rica only mentioned Articles 13 and 29 of the Convention. The Minister of Foreign Affairs of that Government, however, in the public hearing that was held on September 5, 1985, stated that "the problem here is not a problem of freedom of expression: it is a problem of the right of association and it is a problem of the regulation of a profession".

2. The right to work is not directly regulated by the Convention. But the right of association is, in Article 16, by whose light it is necessary to analyze the phenomenon of the Association of Journalists of Costa Rica which, created and not merely permitted or tolerated by law, is a corporation of public law that exercises, through a delegation on the part of the State, normative, disciplinary and ethical powers with respect to its members and monopolizes the exercise of the profession in such a way that nobody may exercise it who is not a member of the Association (Art. 22 of Law No. 4420).

3. Article 16 of the Convention reads as follows:

> **Article 16. Freedom of Association**
>
> 1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.
>
> 2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.
>
> 3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.

4. The text of Article 16(1) deals with, at the same time, both a right and a freedom, that is to say, with the right to form associations, which cannot be restricted except in the cases and for the purposes contemplated in paragraphs (2) and (3) of Article 16, and with a freedom, in the sense that nobody can be compelled or obligated to join an association. It is necessary to understand that both extremes are protected by the Convention, although the Convention does not mention the negative freedom -the right not to join an association which disappeared from the original draft of the Convention without any indication of the reason for the decision (**Conferencia Especializada Inter-americana sobre Derechos Humanos, San Jose, Costa Rica, 7-22 de noviembre de 1969, Actas y Documentos,** OEA/Ser.K/-XVI/1.2, Washington, D.C., 1978, p. 283) but it is

expressly contemplated in Article 20 in fine of the Universal Declaration of Human Rights according to which "No one may be compelled to belong to an association." Under the doctrine of this Court, human rights must be interpreted in favor of the individual (**In the Matter of Viviana Gallardo et al**. Decision of November 13, 1981, para. 16) and it would be against all reason and an aberration to interpret the word freedom as "right" only and not as "the inherent power that man has to work in one way or another, or not to work" (Real Academia Española, Diccionario de la Lengua Española, Vigésima Edición) according to his free will.

5. The tendency to join an association, as Aristotle said in **Politics** (Book I, Chap. I, para. 11), derives from nature and was only converted to a "right" during the l9th century and is, along with suffrage, one of the pillars on which the contemporary democratic State is built.

6. Freedom of association is the right of the individual to join with others in a voluntary and lasting way for the common achievement of a legal goal. Associations are characterized by their permanence and stability, the ideal or spiritual nature -as opposed to physical or material- of the union, for the rather complex structure that develops in time and for the tendency to expand and embrace the greatest number of members interested in the same goals. As to those goals, the members who have voluntarily joined together cannot engage in activities that belong to or are reserved to government, nor may they use impermissible means to achieve their goals, nor carry out activities that are prohibited to human beings as such.

7. One might ask whether public bodies with an associative structure, be they called associations, corporations, or whatever, violate the voluntary nature -the voluntariness of the action- contained in freedom of association. One would have to respond that the imperative norm of public law that compels individuals to join professional associations (colegios) is valid and cannot be considered **per se** a violation of freedom of association when those associations fulfill strictly public aims which transcend private interests, that is, when the State delegates to them functions that the State could fulfill directly but the delegation is made because it is thought to be the best way to achieve the end proposed. Such associations cannot be thought to be those associations referred to in Article 16.

8. On the other hand, one could say that freedom of association is violated if the law compels individuals to join associations, if the proposed aims of that association are such that they could be achieved by associations created by individuals using their freedom, that is, if such associations are those that are referred to in Article 16.

9. The question that must be asked is whether the public corporation called Association of Journalists of Costa Rica is one of those associations referred to in Article 16 of the Convention or, simply, a body that acts through a delegation of the State in areas that pertain to the State. Before answering the question, it is necessary to study the aims of such corporation, which are contained in Article 1 of Law No. 4420:

> Article 1- The Association of Journalists of Costa Rica is hereby established as a corporation composed of professional journalists empowered to practice their profession within the country. The seat of the Association shall be the city of San Jose and its aims shall be as follows:

a) To support and promote the science of mass communications;

b) To defend the interests of its members, both individually and collectively;

c) To support, promote and stimulate culture and all other activities contributing to the improvement of the Costa Rican people;

d) To negotiate or arrange, whenever possible, suitable social and medical assistance systems or support in order to protect its members when they face difficulties as a result of sickness, old age or the death of close relatives, or when their family members find themselves in a difficult situation because of the aforementioned contingencies, it being understood that for purposes of this law "family members" refers only to the spouse, children or parents of a member;

e) To cooperate whenever possible with all cultural public institutions, at their request or when the law so ordains;

f) To uphold and stimulate the spirit of unity among professional journalists;

g) To contribute to the improvement of the republican, democratic system and defend national sovereignty and the nation's institutions; and

h) To issue statements on public problems, when it deems it advisable.

It is clear that the aims mentioned in clauses a), c), e), g) and h) can be achieved by other types of bodies, not necessarily associative nor public. Those contemplated in b), d) and f) have to do directly with the interests or welfare of the "members" and can be achieved satisfactorily by private associations such as trade unions. They are, then, aims which are not strictly public nor important to the private interest and a glance shows that it is clear that they are not "necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others" (Article 16(2)) -the reasoning of this Advisory Opinion on these concepts is also fully applicable here- but rather concern trade union interests of journalists. In this sense, it is clear that the Association is one of those associations referred to in Article 16, that is to say, its aims can be achieved by associations created under freedom of association, without the necessity of a law that is not limited to tolerating or permitting their existence but rather creates the corporation, regulates it in its organization and administration and makes it compulsory for those who wish to practice journalism to belong to it, which means that it creates restrictions to freedom of association.

10. The fact that Article 4 of Law No. 4420 stipulates that "all journalists are entitled to resign from the Association, either on a temporary or a permanent basis," can only be interpreted in conjunction with Article 22 which states that " the functions of a journalist can only be carried out by duly registered members of the

Association." This means that a person who leaves the Association cannot practice the profession (Decree No. 14931-C, Regulations of Law No. 4420, Art. 10).

11. Law No. 4420, consequently, is not limited to protecting the right of association but rather to making it compulsory, thus violating that freedom. Any person who practices journalism without belonging to the Association illegally practices a profession and is subject to the respective criminal sanctions (Inter-American Commission on Human Rights. Resolution No. 17/84 Case 9178 (Costa Rica) OEA/Ser.L/V/II.63, doc. 15, October 2, 1984). On the other hand, a person who does belong has a legal privilege that is denied to everyone else, as the Opinion of the Court has stated so well.

12. Applying the Court's line of reasoning in its Advisory Opinion to freedom of association, one must conclude that Law No. 4420 in so far as it compels journalists, in order to practice their profession, to belong to the Association of Journalists of Costa Rica, a public corporation whose aims could be accomplished by associations established under freedom of association, creates impermissible restrictions under Article 16 of the Convention and is thus incompatible with it.

RAFAEL NIETO-NAVIA

CHARLES MOYER
Secretary

(Traslation)

DECLARATION OF JUDGE MAXIMO CISNEROS

1. I have signed this Advisory Opinion because I share its broad and closely-reasoned arguments which have led to the conclusions which are a faithful and inescapable interpretation of the American Convention on Human Rights, to which I must conform as a judge of the Court.

2. As a man of the law, however, I cannot avoid a deep concern for the scope that may be given the Opinion, according to the criteria that may be used for its interpretation and, notwithstanding the fact that I respect each and every one of them, I believe it useful to give my own criteria because the fact that the text adopted agrees with my personal interpretation has been the determining factor enabling me to concur in this Opinion.

3. To my way of thinking, what is stated in the first operative paragraph of this Advisory Opinion does not signify the adoption of a generic concept that the compulsory membership in an association prescribed by law for the practice of journalism must necessarily disappear as an essential condition for the existence of freedom of expression.

4. I personally believe that Associations of Journalists (Colegios), in general, are useful for the social well-being because, among their aims and activities, they pursue goals of obvious general welfare. Among those goals, mention might be made, for example, of their important work in constantly improving the training of their members in order to equip them to use advanced technology, rapidly changing in our day, a characteristic of the science of communications and, above all, in the indispensable oversight of professional ethics.

5. If there is a profession that requires a Code of Professional Ethics and the jealous and effective application thereof, it is without a doubt that of journalism, more so than any other profession because the journalist's activities are carried out through the mass media, that is, with the enormous power that signifies as a determining factor in the formation of public opinion. The excesses that may be committed in its exercise affect in a very serious way the rest of society in such important values as personal honor and dignity. I also believe that the manner of exercising the oversight of professional ethics most congruent with the principles of a democratic society is precisely through associations because that, in a certain way, means a self-limitation of the personal rights of journalists for the common welfare.

6. I should emphasize that, to my way of thinking, the Advisory Opinion in the terms adopted in its first operative paragraph leaves the door open so that the provisions that regulate the joining together of journalists can be amended in such a way that the incompatibilities that have been pointed out disappear, thus correcting the legal difficulty. I believe that in that way, although the change might be substantial and their adaption might appear to be extremely difficult, if it is achieved it will have served in the best way the principle of freedom of expression, the cause of human rights, and the stability of democratic institutions which, at least in the majority of Latin countries, include Associations of Journalists.

7. For this same reason, I do not believe that what is stated in the second operative paragraph of this Advisory Opinion necessarily signifies the derogation of Law No. 4420 but rather what is desired is, likewise, its amendment and adaption so that the incompatibility indicated would disappear.

8. The Association of Journalists of Costa Rica, governed by the law referred to in the preceding paragraph, has a Code of Professional Ethics, adopted democratically by a majority of its members. This Code, which was brought up during one of the public hearings on this matter, contains a Chapter II entitled "Duties of Journalists toward Society" from which I believe it useful to cite several norms:

> Article 6. -A journalist must be aware that he must actively participate in the social transformation to promote respect for freedom and human dignity. He must strive for the equality of all persons without discrimination for reasons of race, sex, language, religion, opinion, origin, position and status. All persons have the equal and the unquestionable right that society and hence the mass media respect human dignity and work to put the theory into practice. The journalist shall make an effort to put these principles into effect.
>
> Article 7. -It is the duty of those who practice the profession of journalism to report events with precise accuracy, completely, concisely, clearly and with absolute respect for the truth, thinking at all times that the news should be reported in such a way that it promotes the common welfare.
>
> Article 10. -A journalist must treat with discretion the origin of confidential information that he might have obtained, but never invoke professional secrecy to defend or shield interests foreign to those of the State, of democratic institutions and of the true values of the common welfare.
>
> Article 14. -Freedom of the press must be protected by the journalist as an essential right of humanity and anything that hinders it should be immediately denounced in a clear and decisive manner. (Emphasis added)

9. The consideration that principles of this nature can be duly qualified as a contribution to "the just demands of the general welfare of a democratic society," reinforces my opinion that it would be worth the effort, no matter how difficult it might appear, to adapt Law No. 4420 to the Convention so that Costa Rica might enjoy unrestricted freedom of expression, within the especially high level set by the Convention, together with the contribution that the Association of Journalists might bring to its democratic system, a system that is also a substantial and essential principle for the full effect of the American Convention on Human Rights.

10. Finally, I wish to close this declaration by emphasizing the importance and transcendence of what has been stated in paragraphs 24, 25 and 26 of the Advisory Opinion because it indicates the very serious and deplorable deficiency that the Inter-American system of human rights has been accused of. More than six years ago, on September 4, 1979, in my role as one of the original judges of the Inter-

American Court of Human Rights, and on the occasion of the ceremonies of installation of the Court, in a speech that I gave before the Supreme Court of Costa Rica, I said:

> In this Supreme Court of Justice I would like to state that those of us who make up the Inter-American Court are ready to fulfill our task with love and an awareness of what it represents for the hopes of all upright men throughout America: that the dream of justice may become a reality for our people.

Now, whereas in signing this Advisory Opinion I am performing my last act as a judge of the Inter-American Court of Human Rights, I wish to say that the "love " that we have put into our work has not been sufficient to avoid the sense of frustration that I feel in leaving the Court before it has had the opportunity to hear a single case of a violation of human rights, in spite of the sad reality of our America in this field.

As a consolation, my only hope is that in pointing out in this Opinion the deficiency

> that individuals do not have standing to take their case to the Court and that a Government that has won a proceeding in the Commission would have no incentive to do so, in these circumstances the Commission alone is in a position, by referring the case to the Court, to ensure the effective functioning of the protective system established by the Convention. In such a context, the Commission has a special duty to consider the advisability of coming to the Court (para. 26).

I do so in order that those persons who are committed to this important cause of human rights join forces to make our system truly work through the full participation of all of its organs.

MAXIMO CISNEROS

CHARLES MOYER
Secretary

(Translation)

SEPARATE OPINION OF
JUDGE RODOLFO E. PIZA E.

1. I have concurred with the pronouncement of the Court contained in this Advisory Opinion in its totality. I have formulated a separate opinion, however, because I believe that I must refer to some other aspects implied in the request, applicable as much to the compulsory licensing of journalists, in general, as to Law No. 4420, the Organic Law of the Association of Journalists of Costa Rica.

2. In the first place, I share the opinion of the Court in that the content of the activity of journalists totally coincides with the exercise of freedom of expression, as it is guaranteed by Article 13 of the American Convention, so that any restriction to such activity is a restriction to that freedom. (See, **e.g**., paras. 72, 74, 75 and 77 of the Opinion.) In addition the only permissible restrictions to freedom of expression are those specifically listed in paragraph 2 of the same article; those derived from a broad interpretation of that text cannot be allowed (paras. 39, 46 and 52), neither from the application of other norms, as the general one of Article 32 of the Convention itself (para. 65), nor, with less reason, from those of other international instruments (paras. 51 and 52), that have, of course, a very high interpretive value. Compared with the latter, however, it is obvious that the drafters of the American Convention wished to go much further in the definition and in the protection of freedom of expression, distancing it clearly on this point from its European and universal models - Article 10 of the European Convention and Article 19 of the International Covenant on Civil and Political Rights (paras. 43, 45 and 50).

3. In this sense, it appears to me that much of the substantive position of the Government of Costa Rica may be due to the fact that Costa Rican tradition guarantees this freedom only as the right to express freely one's own thoughts. As Articles 28 and 29 of the Constitution state:

> **Article 28. (expression of opinions...)**
>
> No one may be disturbed or molested for an **expression of his opinions** nor for any act which does not infringe the law.
>
> **...**
>
> **Article 29. (freedom of press)**
>
> Everyone may **communicate his thoughts** orally or in writing and **publish them without prior censorship**; but he shall be responsible for abuses committed in the exercise of this right, in such cases and in the manner established by law..

4. The Convention, on the other hand, as noted in the Opinion (para. 30), defines it as the right to "**seek, receive, and impart information and ideas of all kinds**, regardless of frontiers, either orally, in writing, in print, in the form of art, **or through any other medium of one's choice**" (Art. 13(1)), which implies, obviously, the freedom to impart not only thought, opinion, one's own imagination or

inspiration, but also those of others, as well as the simple facts that one is aware of, in a way that totally coincides with the content of the activity of journalists, in general, and also in accordance with the very definition found in Law No. 4420 (Arts. 22 **et seq.**) and, above all, with its Regulations (Arts. 29 and 30).

5. The Court has expressly used the word **restrictions**, not in the strict sense of preventive limitations to the exercise itself of freedom of expression, impermissible under Article 13(2) of the Convention in any case, but rather in general of actions specifically pre-established by law as sources of the **subsequent imposition of liability**, derived from the exercise of that freedom, the only ones that the norm authorizes, within the formal and material conditions that are authorized (para. 35 **in fine**). On this matter, I am in full agreement with my colleagues.

6. I believe, however, that the compulsory licensing of journalists must be analyzed not only in relation with those restrictions **lato sensu**, as sources of the subsequent imposition of liability but also in so far as it might imply, at the same time, a true **restriction stricto sensu** as a preventive condition for the exercise itself of freedom of expression, barred in any case by the Convention. It thus results, as much from the text of Article 13 as from its context, according to its object and purpose, that they are obligatory criteria of interpretation in accordance with Article 31 of the Vienna Convention on the Law of Treaties (as the Court has said repeatedly: See OC-1/82, "**Other treaties**", para. 33; OC-2/82, **The Effect of Reservations**, para. 19; OC-3/83, **Restrictions to the Death Penalty**, paras. 48 and 49 and OC-4/84, **Naturalization (Costa Rica)**, paras. 21 and 22), and also from the nature of the freedom as an essential institution of the democratic system and a condition for the enjoyment of the other basic rights and freedoms (paras. 42, 44 and 70). All of this points to the necessity of a broad interpretation of the norms that it guarantees and a restrictive interpretation of those that allow them to be limited. It follows that Article 13(2) should be understood as prohibiting all of those restrictions that are not expressly and specifically authorized by it, that is, only "subsequent imposition of liability... expressly established by law... necessary to ensure: a) respect for the rights or reputations of others, or b) the protection of national security, public order, or public health or morals" (paras. 39, 40 and 52).

7. On this point, it must be borne in mind that paragraphs 1 and 2 of Article 13 of the Convention are almost a literal copy of paragraphs 2 and 3 of Article 19 of the International Covenant on Civil and Political Rights of the United Nations, which establish:

ARTICLE 19.

> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in any form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (**ordre public**), or of public health or morals.

8. As can be seen, Article 19(3) of the International Covenant corresponds almost exactly to Article 13(2) of the American Convention, except in so far as the latter adds the barring of all prior censorship and to which it expressly substituted the possibility of "certain restrictions " of the former for that of " subsequent imposition of liability, " a substitution that cannot be considered accidental or semantical but rather intentional and substantive.

9. The Court pointed out those differences (paras. 43, 45 and 50) and insisted on the need to distinguish between the **restrictions** authorized by Article 13(2), which can only be established in the form of the **subsequent imposition of liability** and those not authorized, which may be either the measures that may lead to prior censorship or, much less, to the suppression of freedom of expression, or even those that may impose **preventive conditions** on its exercise. (See, **e.g**., paras. 38, 39, 53, 54, 55 and 82). The Court also pointed out the qualifying effect that Article 13(3) must be given with respect to such restrictions in so far as it bars restrictions "by indirect methods or means... (that tend) to impede the communication and circulation of ideas and opinions" (paras. 47 and 48). It, likewise, established that the compulsory licensing of journalists is incompatible with the Convention in so far as it blocks access to the Association of Journalists and the practice of the profession to those who are not able to join the Association (paras. 77 and 82), and at the least it warned of the attention that must be paid when the State exercises or delegates to the Association disciplinary powers capable of restricting that practice further than the limits authorized specifically by such provision (para. 81).

10. It is, however, my opinion that we must go deeper into the difference that exists between the **subsequent imposition of liability** which alludes to infractions of the law that are only produced when freedom of expression is exercised and are only sanctioned after exercise and the imposition of **restrictions qua** restrictions directed to limiting the exercise itself of the freedom, as is the case with licenses and authorizations. In effect, their very definition characterizes them as forms of preventive guardianship consistent with the removal of an obstacle imposed by law on the exercise of the right itself, in such a way that its specific normative sense is not to subject that exercise to a subsequent imposition of liability for the abuse that is committed, but rather that of impeding the exercise itself while the license or authorization has not been granted. It can certainly occur that an activity requiring a license or authorization be carried out, in fact, without obtaining it, in which case it would appear to convert itself into a subsequent imposition of liability, but that would not be, in such a case, more than a secondary consequence of the violation of such condition. The question would then turn on a simple problem of the efficacy of the same, not in its normative sense, which is always the problem when the conduct does not occur at all without prior licensing or authorization and when everything is done so that it does not occur. This is very different from the subsequent imposition of liability that Article 13(2) authorizes restrictively, which cannot tend in itself to produce that impeding effect, but rather only to achieve, through indirect and non-preventive means (subsequent punishment deriving from the abuse), the exercise of the right within legitimate limits.

11. I believe that the compulsory licensing of journalists is a restriction of that nature, whose specific normative sense is that of preventing the exercise itself of

journalism, which coincides, as has already been said, with freedom of expression, for those who are not members of the association, subjecting them to the condition of a license or an authorization and, hence, conditioning the freedom itself to a **restriction stricto sensu** not authorized as such by Article 13(2) of the Convention. In this manner, I believe that the compulsory licensing of journalists is, in itself, incompatible with the Convention, however it is regulated and even though it only consists in a formality available to any person who wishes to practice journalism, without the need for any other requirement. Freedom of expression is a basic right that every individual possesses by the simple fact of his existence, whose exercise cannot be restricted nor conditioned to the fulfillment of previous requirements of any nature that he cannot or does not wish to fulfill.

12. One arrives at the same conclusion on recalling that Article 13(3) bars any type of restriction to freedom of expression by means of "indirect methods or means... tending to impede the communication and circulation of ideas and opinions." In effect, if the Convention bars such indirect restrictions one cannot understand how it would permit those that are direct. The fact, moreover, that express prohibition only refers to the communication or circulation of ideas and opinions cannot be interpreted so as to permit restrictions to freedom of **information** in the sense of seeking and disseminating news free of ideological content, because this freedom also implies communication and, above all, the circulation of ideas and opinions of others, in addition to just the news, which would be the only thing not expressly included in the prohibition. In any event, that can and should be considered implicitly contemplated in them by virtue of the principle of broad interpretation of human rights and that of restrictive interpretation with respect to their limitations (principle **pro homine**), and of the universal criterion of hermeneutics that "where there is the same reason, there is the same disposition."

. . .

13. On the other hand, it appears to me that the essential link of the practice of journalism to that of freedom of expression gives rise to other incompatibilities with the Convention, if not necessarily with respect to all compulsory licensing of journalists, at least the manner in which it is normally structured in the countries where it exists, as well as, with all certainty, in the Organic Law of the Association of Journalists of Costa Rica. To my way of thinking, it is necessary to point out two of these incompatibilities that are of fundamental importance.

14. The first, resulting from the fact that, normally, compulsory licensing signifies the creation of a public body of a corporate nature with the specific purpose of attributing to it not only the oversight and discipline of the professional activity of its members, which would be legitimate under certain conditions, but also the sole power to establish codes of ethics and other disciplinary standards that imply restrictions, responsibilities and sanctions **ex novo**, not specifically provided for by the law itself. In this sense, I think that as much Article 13(2) of the Convention, in authorizing only the "subsequent imposition of liability**...expressly established by law**," as the general principle of penal legality to which Article 9 of the Convention refers, in the sense that "no one shall be convicted of any act or omission that did not constitute a criminal offense **under the applicable law**, at the time it was committed," allude precisely to the principle of the **reserve of the law (reserva de la ley**). If it is true that those provisions do not specify the meaning of the words **law** and **right**, the application of universally recognized general principles shared by democratic nations and all **States of Law** permits the affirmation that it concerns

matters strictly reserved to the **formal law**, emanating from a democratic parliament with all of the guarantees implied thereby, because if there is anything definitive in this area it is that the regime of basic human rights and freedoms is subject to the **reserve of the law**.

15. In any event, it is so in the case of Costa Rican law in which the principle has constitutional rank and is, moreover, guaranteed expressly in the General Law of Public Administration (Art. 19: "the juridical regime of constitutional rights shall be reserved to the law..." ; Art. 124: "the rules, regulations, circulars, instructions and other administrative provisions of a general nature shall not establish penalties nor impose taxes, levies, fines or other similar charges" as well as by constitutional, administrative and penal jurisprudence (which have declared the guarantees of penal legality applicable to disciplinary material) so that, at least with respect to Costa Rican Law No. 4420, said principle is applicable not only in domestic but also in international law, but in the latter as a criterion of interpretation under the provisions of Article 29(b) of the Convention (which specifically allude to "any right or freedom recognized by virtue of the laws of any State Party... ").

16. On the other hand, it is also normal that the organic laws of the professional associations of journalists, and positive that Law No. 4420 of Costa Rica, imposes on its members, directly or indirectly, restrictions on the exercise of their profession or sanctions that imply restrictions, for the fulfillment of aims purely of a trade union nature or others of a social or private order that cannot justify their public nature and, much less, be thought necessary in a democratic society to ensure respect for the rights or the reputations of others or the protection of national security, public order or public health or morals, as results restrictively from Article 13(2), in relation with the fundamental values of the system of the Convention.

. . .

17. Therefore:

I am in agreement with the two conclusions of the Advisory Opinion, but I would add the following as a Separate Opinion:

Third:

That, furthermore, the very licensing of journalists in general, and that established by Law No. 4420 in particular, are also incompatible with Article 13 of the Convention in so far as they impose a license or prior authorization for the practice of that profession, which is the same as a preventive restriction, not authorized by Article 13(2) of the Convention, to the exercise of freedom of expression.

Fourth:

That, in addition to the incompatibilities indicated in the previous conclusions, the compulsory licensing of journalists normally and Law No. 4420 in any case, imply other violations to freedom of expression in at least two fundamental aspects, that are:

a. that of granting to the respective association powers to establish restrictions and sanctions that are not specifically defined by law, violating

the principle of the reserve of the law set forth in Article 13(2) of the Convention and the principle of penal legality guaranteed by Article 9 of the Convention;

b. that of imposing restrictions derived from the obligation of joining an association for the fulfillment of trade union and other goals that are not necessary to ensure respect for the rights or reputations of others, nor the protection of national security, public order, or public health or morals in a democratic society, as results restrictively from the same Article 13(2) in relation with the fundamental values of the system of the Convention.

18. By virtue of what is expressed in Conclusion 4(b) (**supra**), I concur also with the Separate Opinion of Judge Nieto, with the admonition that the Association of Journalists of Costa Rya does exercise activities of a public nature that are not set out in Article 1 of its Organ Law.

RODOLFO E. PIZA E.

CHARLES MOYER
Secretary

(Translation)

DECLARATION OF JUDGE PEDRO NIKKEN

1. I have concurred in the decision of the Court and I agree as much with the analysis as with the conclusions of this Advisory Opinion because I think that it expresses the truest interpretation of the American Convention on Human Rights. I have thought it useful, however, to draft a declaration that specifies some aspects both on the grounds and on the scope of the interpretation of the Court that are implicit, in my view, in the Opinion.

. . .

2. With respect to the **grounds**, I believe that the Court's conclusions must be linked to the premise from which they spring, such as the contrast between the text of Articles 13 and 29 of the Convention, on the one hand, and a certain type of licensing of journalists, on the other.

3. The American Convention, as the Court has stated, defines in the broadest possible way freedom of expression, which includes, under Article 13, the right of each individual to seek and impart information through the medium of one's choice. A text that is so categorical cannot coexist logically with a legal regime that authorizes the seeking of information and its dissemination through the mass media to only a limited group of persons, such as the members of an association of journalists and that thus excludes the majority of the population from that activity.

4. As the Court emphasized, the text of the Convention offers a **broader guarantee** than that of other similar treaties, not so much because it grants more powers to the individual but rather because it authorizes fewer restrictions on him. In fact, the Convention does not even use this latter expression. It is limited to indicating that there will be liability when, in exercise of freedom of expression, laws are broken that are necessary to safeguard the rights or reputations of others, national security, public order or public health or morals.

5. In this respect, I believe to be true what was mentioned in the public hearings in the sense that because the American Convention is broader than the other treaties, what is legitimate under the International Covenant of Civil and Political Rights or under the European Convention on Human Rights may not be legitimate in this hemisphere because it does not conform to the American Convention. One only has to recall the special regulation of the death penalty contained in Article 4 or the right of reply of Article 14 to find evidence of that circumstance. This is not surprising as the establishment of the international regime for the protection of human rights reveals that, frequently, the latest treaties are broader than their predecessors and that it is easier to conclude more advanced treaties where fewer cultural and political differences exist among the States that negotiate them. Nor is it surprising, then, that the American Convention, signed almost twenty years after that of Europe and covering only the American Republics, is more advanced than the latter and also than the Covenant, which aspires to be an instrument that binds all of the governments of the planet.

6. On the other hand, the compulsory licensing of journalists, conceived in the terms in which it was presented to the Court, represents an **extreme regime** because:

A. The acts considered by the law as those pertaining to the practice of journalism can only be complied with by members. In this way, under several of the licensing laws that exist in the hemisphere, it would be enough for a person to "disseminate" by himself, "through a medium of (his) choice" -press radio or television- information that he "sought" freely, in order to be in violation -including penal- of the illegal practice of journalism. I believe that any interpretation of the Convention to the effect that such a hypothesis is authorized by the treaty does not conform to what it literally says.

B. The Association is only open to graduates of journalism schools, even if they don't practice the profession, and moreover in some cases to those who, lacking an academic title, have shown, in the judgment of the Association, that they have practiced journalism for a fixed number of years before the licensing law came into force. In this way, the advantages that are gained in belonging to the Association do not depend on whether one is now practicing journalism and, in some cases, whether one has ever practiced it. It does not appear logical that a person can belong to the Association who is not truly a journalist while the possibility of access is closed to those who might perform, on the practical level, a journalistic activity that would benefit the community. It would, on the other hand, be logical to authorize such access because the laws have admitted that there are journalists who lack a university degree which accredit them as journalists and who have a right to enroll in the Association, but limit that recognition to those who were in such a position before the law came into force. Why this limitation in an activity that profoundly involves an inherent right of each individual?

7. I believe that the conclusions of the Court derive from that contrast between the vast protection afforded by the Convention and the exaggerated exclusivity of licensing; but I do not believe that this is **per se** contrary to the Convention, even in the case of journalists and even if the licensing is compulsory. What happens is that, if compulsory licensing is going to be established for a profession whose exercise involves that of a right of each individual, access to the association cannot be restricted in terms such as are found in various laws of the hemisphere. Neither do I believe that isolated acts in the sole exercise of freedom of expression should be considered as exercising the practice of journalism -a notion that involves a certain stability. In this sense, if what is desired is to subject journalism to the licensing applicable to other professions, it should be done by adapting the association's regime, not to the characteristics of those other professions but to those proper for the exercise of that occupation, which includes that of freedom of expression.

. . .

8. As to **the scope** of the Opinion of the Court, I believe, in the first place, what the Opinion itself states should be underlined in the sense that the compulsory licensing of journalists, if it does restrict, does not suppress freedom of expression in such a way that the Opinion be interpreted as considering that in the countries where compulsory licensing exists, there is, for this fact alone, no freedom of expression. This observation is particularly valid with respect to Costa Rica, the seat of the Court and inevitable term of reference of the democratic institutions of Latin

America, which presented this request as one more expression of its commitment to the rule of law and of respect for the Convention.

9. In the second place, I do not believe that the Opinion of the Court can be interpreted as taking a position on the relationship between the mass media enterprises and those who work for them. With respect to the strictly labor question, the Court has not made any pronouncement and I believe that the activities of unions to obtain worthy and satisfactory working conditions cannot be considered other than necessary and plausible.

10. With reference to the part more strictly journalistic, that is, that relating to the respect that the journalist merits, even if opposed to the editorial line of the means of communication where he works, especially with respect to the veracity of the information that he collects and which is published under his responsibility, I believe it necessary to underline what has been said by the Court in the sense that "the freedom and independence of journalists is an asset that must be protected and guaranteed." I think that licensing can fill a role towards that end, although I also believe that it is not the only way to obtain it. One can conceive of a statute having legal force that would protect those who truly practice journalism when faced with improper commands of their employers, without the necessity of recurring to a licensing scheme that protects those enrolled in the association even if they don't work as journalists, but restricts inscriptions and unnecessarily limits the rights of the majority. In addition, it has not been shown that licensing is the most effective means for the protection of journalists, nor that where such licensing exists there are no longer abuses by the owners of newspapers.

11. I do not believe, however, that the pure and simple suppression of licensing laws in those countries where it exists would lead necessarily to an improvement of the real possibilities of expression and information. A weak trade union, without a statute to guarantee its independence, can be the context through which "private controls" are established as indirect means, barred by Article 13(3), "tending to impede the communication and circulation of ideas and opinions." I do not believe that it would be fair or prudent to interpret the Opinion of the Court as indicating that licensing limits freedom of expression and that it is enough to eliminate licensing in order to reestablish automatically that freedom, because such a statement is not true. The mere suppression of licensing can lead to granting greater power " private controls " to the few owners of the press, without any benefit for society and without any certainty that access to the means of dissemination will be opened for those not licensed. It may rather encourage a situation in which the journalist has no say, vis-à-vis his superior, regarding his activities, even if they might tend to violate the ethics of the profession, which could also lead to a violation of the values preserved by Article 13(2).

12. I therefore think that the Opinion of the Court has the advantage in this case of being characteristically a means to "assist States... to comply with and to apply human rights treaties without subjecting them to the formalism... associated with the contentious judicial process." (**Restrictions to the Death Penalty** (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83 of September 8, 1983. Series A No.3, para. 43). In that perspective, I think that the Opinion can fill a very useful role in so far as it could result in a point of departure in order that the States Parties where compulsory licensing laws exist can, to the extent necessary and in compliance with Article 2 of the Convention, adopt "legislative or other measures" to adapt the professional regulation of journalism in

such a way that, maintaining or reinforcing provisions designed to preserve the freedom and independence of journalists, it does not unnecessarily or unduly restrict the right of each individual to seek, receive and impart information and ideas by any means of his choice and that of society to receive information from every source.

PEDRO NIKKEN

CHARLES MOYER
Secretary