(Translation)

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

# ADVISORY OPINION OC-4/84
# OF JANUARY 19, 1984

## PROPOSED AMENDMENTS TO THE NATURALIZATION PROVISION OF THE CONSTITUTION OF COSTA RICA

**REQUESTED BY**
**THE GOVERNMENT OF COSTA RICA**

Present:

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

Also present:

Charles Moyer, Secretary
Manuel Ventura, Deputy Secretary

**THE COURT,**

**composed as above,**

**gives the following Advisory Opinion:**

1. In a telegram dated June 28, 1983, received that same day at the Inter-American Court of Human Rights (hereinafter "the Court"), the Executive Secretariat of the Standing Committee on Legal Affairs of the Legislative Assembly of the Republic of Costa Rica reported that the Special Committee set up to study certain proposed amendments to Articles 14 and 15 of the Constitution (hereinafter "the Constitution") of that country had decided to seek an advisory opinion from the Court on the proposed constitutional amendments.

2. By document No. 1588-84 SGOI-PE, dated July 21, 1983 and received at the Court one day later, the Vice-Minister of Foreign Affairs of Costa Rica expressed his Government's desire to obtain the opinion of the Court relating to the

aforementioned proposed amendments. With his communication to the Court, the Vice-Minister enclosed the present text of Articles 14 and 15 of the Constitution, the text of the proposed amendments, and the report of the Special Legislative Committee that had reviewed these amendments.

3. By a communication dated August 8, 1983, signed by the Minister of Justice and received at the Court on August 9, the Government of Costa Rica (hereinafter "the Government") made a formal request for the aforementioned advisory opinion, conforming it to the rules governing the advisory proceedings of the Court and, in particular, to the provisions of Article 51 of the Rules of Procedure.

4. In accordance with the decision made by the Court at its Third Special Session, held from July 25 to August 5, 1983, the Secretary of the Court invited certain Costa Rican juridical institutions to present their views on the instant request and any other information or relevant documents by September 1, 1983. The designated institutions were selected by the Court in consultation with the Government of Costa Rica.

5. During the Ninth Regular Session, the President of the Court fixed the date of the public hearing for September 7, 1983, in order to hear the views of the Government's Agent as well as those of the institutions that had indicated their desire to participate in the hearing.

6. At the public hearing, the following representatives presented oral arguments to the Court:

Carlos José Gutiérrez, Agent and Minister of Justice

Francisco Sáenz Meza, President of the Supreme Electoral Tribunal

Guillermo Malavassi, Member of the Legislative Assembly

Rafael Villegas, Director of Civil Registry, and

Luis Varela, Professor of the Faculty of Law of the University of Costa Rica.

## I
## STATEMENT OF THE ISSUES

7. The relevant parts of the Government's request for an advisory opinion read as follows:

> II. PROVISIONS TO BE ANALYZED IN THE DETERMINATION OF COMPATIBILITY
>
> a) Domestic legislation:
>
> 1) Present text of Articles 14 and 15 of the Constitution of Costa Rica:
>
> Article 14. The following are Costa Ricans by naturalization:
>
> 1. Those who have acquired this status by virtue of former laws;

2. Nationals of the other countries of Central America, who are of good conduct, who have resided at least one year in the republic, and who declare before the civil registrar their intention to be Costa Ricans;

3. Native-born Spaniards and Ibero-Americans who obtain the appropriate certificate from the civil registrar, provided they have been domiciled in the country during the two years prior to application;

4. Central Americans, Spaniards and Ibero-Americans who are not native-born, and other foreigners who have been domiciled in Costa Rica for a minimum period of five years immediately preceding their application for naturalization, in accordance with the requirements of the law;

5. A foreign woman who by marriage to a Costa Rican loses her nationality or who indicates her desire to become a Costa Rican;

6. Anyone who receives honorary nationality from the Legislative Assembly.

Article 15. Anyone who applies for naturalization must give evidence in advance of good conduct, must show that he has a known occupation or means of livelihood, and must promise to reside in the republic regularly.

For purposes of naturalization, domicile implies residence and stable and effective connection with the national community, in accordance with regulations established by law.

2) AMENDMENTS PROPOSED by the Special Committee of the Legislative Assembly in its Report of June 22, 1983.

Article 14. The following are Costa Ricans by naturalization:

1) Those who have acquired this status by virtue of previous laws;

2) Native-born nationals of the other countries of Central America, Spaniards and Ibero-Americans with five years official residence in the country and who fulfill the other requirements of the law;

3) Central Americans, Spaniards and Ibero-Americans, who are not native-born, and other foreigners who have held official residence for a minimum period of seven years and who fulfill the other requirements of the law;

4) A foreign woman who, by marriage to a Costa Rican loses her nationality or who after two years of marriage to a Costa Rican and the same period of residence in the country, indicates her desire to take on our nationality; and

5) Anyone who receives honorary nationality from the Legislative Assembly.

Article 15. Anyone who applies for naturalization must give evidence of good conduct, must show that he has a known occupation or means of livelihood, and must know how to speak, write and read the Spanish language. The applicant shall submit to a comprehensive examination on the history of the country and its values and shall, at the same time, promise to reside within the national territory regularly and swear to respect the constitutional order of the Republic.

The requirements and procedures for applications of naturalization shall be established by law.

3) MOTION OF AMENDMENT to Article 14(4) of the Constitution presented by the Deputies of the Special Committee:

> A foreigner, who by marriage to a Costa Rican loses his or her nationality and who after two years of marriage to a Costa Rican and the same period of residence in the country, indicates his or her desire to take on the nationality of the spouse.

b) Articles of the Convention

The above-mentioned legal texts should be compared to the following articles of the American Convention on Human Rights in order to determine their compatibility:

Article 17. Rights of the Family

> Paragraph 4. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.

Article 20. Right to Nationality

> 1. Every person has the right to a nationality.
>
> 2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
> 3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

Article 24. Right to Equal Protection

> All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

III. SPECIFIC QUESTIONS ON WHICH THE OPINION OF THE COURT IS SOUGHT

In accordance with the request originally made by the Special Committee to study amendments to Articles 14 and 15 of the Constitution, the Government of Costa Rica requests that the Court determine:

a) Whether the proposed amendments are compatible with the aforementioned provisions of the American Convention on Human Rights.

Specifically, within the context of the preceding question, the following questions should be answered:

b) Is the right of every person to a nationality, stipulated in Article 20(1) of the Convention, affected in any way by the proposed amendments to Articles 14 and 15 of the Constitution?

c) Is the proposed amendment to Article 14(4), according to the text proposed in the Report of the Special Committee, compatible with Article 17(4) of the Convention with respect to equality between spouses?

d) Is the text of the motion of the Deputies found in their opinion to amend this same paragraph compatible with Article 20(1) of the Convention?.

...

## II
## ADMISSIBILITY

8. This advisory opinion has been requested by the Government pursuant to Article 64(2) of the American Convention on Human Rights (hereinafter "the Convention"). The Court's opinion is sought concerning the compatibility of certain proposed amendments to the Constitution with various provisions of the Convention.

9. Article 64 of the Convention reads as follows:

> 1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in a like manner consult the Court.
>
> 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

10. Costa Rica, being a Member State of the Organization of American States (hereinafter "the OAS"), has standing to request an advisory opinion under Article 64 (2) of the Convention.

11. It should be noted that the instant request was initially referred to the Court by a Committee of the Legislative Assembly, which is not one of the governmental entities empowered to speak for Costa Rica on the international plane. Only when the Minister of Foreign Affairs formally filed the request, followed by the communication of the Minister of Justice supplying relevant information bearing on it, did the Court become seized of the matter now before it.

12. The instant request, being the first to be referred to the Court under Article 64 (2), raises a number of issues bearing on its admissibility that have not been previously considered by the Court.

13. Since the instant request does not relate as such to laws in force but deals instead with proposed amendments to the Constitution, it should be asked whether the reference in Article 64(2) to "domestic laws" includes constitutional provisions and whether the proposed legislation comes within the scope of the Court's advisory jurisdiction under that article of the Convention.

14. The answer to the first question admits of no doubt: whenever an international agreement speaks of "domestic laws" without in any way qualifying that phrase, either expressly or by virtue of its context, the reference must be deemed to be to all national legislation and legal norms of whatsoever nature, including provisions of the national constitution.

15. The answer to the second question is more difficult. The request does not seek an advisory opinion referring to a domestic law in force; it involves a legislative proposal for a constitutional amendment which has not as yet been adopted by the Legislative Assembly, although it has been admitted for debate by the latter and was approved by the appropriate Committee.

16. It should be borne in mind that under Article 64(1) the Court would have jurisdiction to render an advisory opinion requested by a Member State of the OAS on the question of whether a proposed law is compatible with the Convention. Although it is true that in this context the request would be formulated in a different manner, it could nevertheless involve an issue identical in character to the one that is envisaged under Article 64(2).

17. The only major difference between opinions dealt with under Article 64(1) and those falling under Article 64(2) is one of procedure. Under Article 52 of the Rules of Procedure, advisory opinions filed under Article 64(2) of the Convention are not ipso facto subject to the system of notices that applies to Article 64(1) opinions. Instead, in dealing with requests under Article 64(2), the Court enjoys broad discretion to fix, on a case by case basis, the procedures to be followed, it being quite likely that the requested opinion, by its very nature, can properly be resolved without seeking views other than those of the applicant state.

18. Any attempt to interpret Article 64(2) as referring exclusively to laws in force, that is, to laws that have passed through all the required stages resulting in their enactment, would have the effect of preventing states from seeking advisory opinions from the Court relating to draft legislation. This would mean that states would be compelled to complete all steps prescribed by domestic law for the enactment of a law before being able to seek the opinion of the Court regarding the

compatibility of that law with the Convention or with other treaties concerning the protection of human rights in the American states.

19. It should also be kept in mind that the advisory jurisdiction of the Court was established by Article 64 to enable it "to perform a service for all of the members of the inter-American system and is designed to assist them in fulfilling their international human rights obligations." [**I/A Court H.R., " Other treaties " Subject to the Advisory Jurisdiction of the Court (Art.64 American Convention on Human Rights**), Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, par. 39.] Moreover, as the Court noted elsewhere, its advisory jurisdiction "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." [**I/A Court H.R., 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, par. 43.]

20. Article 29 of the Convention contains the following specific rules applicable to questions of interpretation:

> 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.

This provision was designed specifically to ensure that it would in no case be interpreted to permit the denial or restriction of fundamental human rights and liberties, particularly those rights that have already been recognized by the State.

21. This Court has determined, moreover, that "the rules of interpretation set out in the Vienna Convention [on the Law of Treaties]...may be deemed to state the relevant international law principles applicable to this subject." [**Restrictions to the Death Penalty,** supra 19, par. 48.]

22. In determining whether the proposed legislation to which the request relates may form the basis of an advisory opinion under Article 64(2), the Court must therefore interpret the Convention "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its

object and purpose." [**Vienna Convention on the Law of Treaties**, Article 31(1); **Restrictions to the Death Penalty**, supra 19, par. 49.]

23. It follows that the "ordinary meaning" of terms cannot of itself become the sole rule, for it must always be considered within its context and, in particular, in the light of the object and purpose of the treaty. In -its Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations, the International Court of Justice declared that "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur" [**Competence of the General Assembly for the Admission of a State to the United Nations**. Advisory Opinion, I.C.J. Reports 1950, p. 8], which of necessity includes the object and purpose as expressed in some way in the context.

24. The Court has held [**Restrictions to the Death Penalty**, supra 19, par. 47] in dealing with reservations, but this argument is equally valid when applied to the articles of the Convention, that the interpretation to be adopted may not lead to a result that "weakens the system of protection established by [the Convention]," bearing in mind the fact that the purpose and aim of that instrument is "the protection of the basic rights of individual human beings." [**I/A Court H.R., The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts.74 and 75**), Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, par. 29.]

25. In this context, the Court concludes that its advisory function, as embodied in the system for the protection of basic rights, is as extensive as may be required to safeguard such rights, limited only by the restrictions that the Convention itself imposes. That is to say, just as Article 2 of the Convention requires the States Parties to "adopt...such legislative or other measures as may be necessary to give effect to [the] rights and freedoms" of the individual, the Court's advisory function must also be viewed as being broad enough in scope to give effect to these rights and freedoms.

26. Thus, if the Court were to decline to hear a government's request for an advisory opinion because it concerned "proposed laws" and not laws duly promulgated and in force, this might in some cases have the consequence of forcing a government desiring the Court's opinion to violate the Convention by the formal adoption and possibly even application of the legislative measure, which steps would then be deemed to permit the appeal to the Court. Such a requirement would not "give effect" to the objectives of the Convention, for it does not advance the protection of the individual's basic human rights and freedoms.

27. Experience indicates, moreover, that once a law has been promulgated, a very substantial amount of time is likely to elapse before it can be repealed or annulled, even when it has been determined to violate the state's international obligations.

28. Keeping the above considerations in mind, the Court concludes that a restrictive reading of Article 64(2), which would permit states to request advisory opinions under that provision only in relation to laws already in force, would unduly limit the advisory function of the Court.

29. The foregoing conclusion is not to be understood to mean that the Court has to assume jurisdiction to deal with any and all draft laws or proposals for legislative action. It only means that the mere fact that a legislative proposal is not as yet in force does not ipso facto deprive the Court of jurisdiction to deal with a request for an advisory opinion relating to it. As the Court has already had occasion to note, "its advisory jurisdiction is permissive in character [and]...empowers the Court to decide whether the circumstances of a request for an advisory opinion justify a decision rejecting the request." ["**Other treaties**", supra 19, par. 28. See also **Restrictions to the Death Penalty**, supra 19, par. 36.]

30. In deciding whether to admit or reject advisory opinion requests relating to legislative proposals as distinguished from laws in force, the Court must carefully scrutinize the request to determine, inter alia, whether its purpose is to assist the requesting state to better comply with its international human rights obligations. To this end, the Court will have to exercise great care to ensure that its advisory jurisdiction in such instances is not resorted to in order to affect the outcome of the domestic legislative process for narrow partisan political ends. The Court, in other words, must avoid becoming embroiled in domestic political squabbles, which could affect the role which the Convention assigns to it. In the instant case which, moreover, is without precedent in that it involves a government's request for the review by an international court of a proposed constitutional amendment, the Court finds no reason whatsoever to decline complying with the advisory opinion request.

## III
## ISSUES RELATING TO THE RIGHT TO NATIONALITY

31. The questions posed by the Government involve two sets of general legal problems which the Court will examine separately. There is, first, an issue related to the right to nationality established by Article 20 of the Convention. A second set of questions involves issues of possible discrimination prohibited by the Convention.

32. It is generally accepted today that nationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual's legal capacity.

Thus, despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manners in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights.

33. The classic doctrinal position, which viewed nationality as an attribute granted by the state to its subjects, has gradually evolved to the point that nationality is today perceived as involving the jurisdiction of the state as well as human rights issues. This has been recognized in a regional instrument, the American Declaration of the Rights and Duties of Man of May 2, 1948 (hereinafter "the American Declaration"), whose Article 19 reads as follows:

> Every person has the right to the nationality to which he is entitled by law and to change it, if he so wishes, for the nationality of any other country that is willing to grant it to him.

Another instrument, the Universal Declaration of Human Rights (hereinafter "the Universal Declaration"), approved by the United Nations on December 10, 1948, provides the following in its Article 15:

> 1. Everyone has the right to a nationality.
>
> 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

34. The right of every human being to a nationality has been recognized as such by international law. Two aspects of this right are reflected in Article 20 of the Convention: first, the right to a nationality established therein provides the individual with a minimal measure of legal protection in international relations through the link his nationality establishes between him and the state in question; and, second, the protection therein accorded the individual against the arbitrary deprivation of his nationality, without which he would be deprived for all practical purposes of all of his political rights as well as of those civil rights that are tied to the nationality of the individual.

35. Nationality can be deemed to be the political and legal bond that links a person to a given state and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that state. In different ways, most states have offered individuals who did not originally possess their nationality the opportunity to acquire it at a later date, usually through a declaration of intention made after complying with certain conditions. In these cases, nationality no longer depends on the fortuity of birth in a given territory or on parents having that nationality; it is based rather on a voluntary act aimed at establishing a relationship with a given political society, its culture, its way of life and its values.

36. Since it is the state that offers the possibility of acquiring its nationality to persons who were originally aliens, it is natural that the conditions and procedures for its acquisition should be governed primarily by the domestic law of that state. As long as such rules do not conflict with superior norms, it is the state conferring nationality which is best able to judge what conditions to impose to ensure that an effective link exists between the applicant for naturalization and the systems of values and interests of the society with which he seeks to fully associate himself. That state is also best able to decide whether these conditions have been complied with. Within these same limits, it is equally logical that the perceived needs of each state should determine the decision whether to facilitate naturalization to a greater or lesser degree; and since a state's perceived needs do not remain static, it is quite natural that the conditions for naturalization might be liberalized or restricted with the changed circumstances. It is therefore not surprising that at a given moment new conditions might be imposed to ensure that a change of nationality not be effected to solve some temporary problems encountered by the applicants when these have not established real and lasting ties with the country, which would justify an act as serious and far-reaching as the change of nationality.

37. In the "Nottebohm Case", the International Court of Justice voiced certain ideas which are consistent with the views of this Court, expressed in the foregoing paragraph. The International Court declared:

> Naturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human

> being. It involves his breaking of a bond of allegiance and his establishment of a new bond of allegiance. It may have far-reaching consequences and involve profound changes in destiny of the individual who obtains it. It concerns him personally, and to consider it only from the point of view of its repercussions with regard to his property would be to misunderstand its profound significance. [**Nottebohm Case (second phase**), Judgment of April 6th, 1955, I.C.J. Reports 1955, p. 24.]

38. It follows from what has been said above that in order to arrive at a satisfactory interpretation of the right to nationality, as embodied in Article 20 of the Convention, it will be necessary to reconcile the principle that the conferral and regulation of nationality fall within the jurisdiction of the state, that is, they are matters to be determined by the domestic law of the state, with the further principle that international law imposes certain limits on the state's power, which limits are linked to the demands imposed by the international system for the protection of human rights.

39. An examination of the provisions of the proposed amendment submitted to this Court by the Government makes clear that the amendment as a whole seeks to restrict the conditions under which an alien may acquire Costa Rican nationality. Some of the problems dealt with by the proposed amendment are not of a legal nature; others, although legal in character, are not for this Court to consider, either because they are of little consequence from the point of view of human rights or because, although tangentially important thereto, they fall within the category of issues within the exclusive domain of Costa Rica's domestic laws.

40. The Court will consequently not address certain issues that were raised during the public hearing, despite the fact that many of these issues reveal the overall purpose sought to be achieved by the amendment and expose differences of opinion on that subject. Here one might note, among other things, the doubts that were expressed at the hearing regarding the following questions: whether the spirit underlying the proposed amendments as a whole reflects, in a general way, a negative nationalistic reaction prompted by specific circumstances relating to the problem of refugees, particularly Central American refugees, who seek the protection of Costa Rica in their flight from the convulsion engulfing other countries in the region; whether that spirit reveals a tendency of retrogression from the traditional humanitarianism of Costa Rica; whether the proposed amendment, in eliminating the privileged naturalization status enjoyed by Central Americans under the current Constitution of Costa Rica, is indicative of a position rejecting the unity and solidarity that has historically characterized the peoples of Central America who achieved independence as a single nation.

41. Mindful of the foregoing considerations, the Court is now in a position to examine the question whether the proposed amendments affect the right to nationality guaranteed in Article 20 of the Convention, which reads as follows:

> Article 20. Right to Nationality
>
> 1. Every person has the right to a nationality.

> 2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
>
> 3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

42. Since the proposed amendments are designed, in general, to impose stricter requirements for the acquisition of Costa Rican nationality by naturalization, but since they do not purport to withdraw that nationality from any citizen currently holding it, nor to deny the right to change that nationality, the Court concludes that the proposals do not in any formal sense contravene Article 20 of the Convention. Although Article 20 remains to be more fully analyzed and is capable of development, it is clear in this case that since no Costa Ricans would lose their nationality if the proposed amendments entered into force, no violation of paragraph 1 can be deemed to take place. Neither is there a violation of paragraph 2 of that same Article, for the right of any person born in Costa Rica to the nationality of that country is in no way affected. Finally, considering that the proposed amendments are not intended to deprive any Costa Rican nationals of their nationality nor to prohibit or restrict their right to acquire a new nationality, the Court concludes that no contradiction exists between the proposed amendments and paragraph 3 of Article 20.

43. Among the proposed amendments there is one that, although it does not violate Article 20 as such, does raise some issues bearing on the right to nationality. It involves the amendment motion to Article 14, paragraph 4, of the proposal presented by the Members of the Special Legislative Committee. Under that provision, Costa Rican nationality would be acquired by

> A foreigner who, by marriage to a Costa Rican loses his or her nationality and who after two years of marriage to a Costa Rican and the same period of residence in the country, indicates his or her desire to take on the nationality of the spouse.

44. Without entering into an examination of all aspects of the present text that touch on the subject of discrimination -a topic which will be considered later on this opinion [cf. infra Chapter IV] some related problems raised by the wording of the proposal need to be addressed. As a matter of fact, the above wording differs in more than one respect from the text of Article 14, paragraph 5, of the present Constitution and from the text of Article 4, paragraph 4, of the proposed amendment as originally presented. The two latter texts read as follows:

> Article 14. The following are Costa Ricans by naturalization:
>
> 5. A foreign woman who by marriage to a Costa Rican loses her nationality or who indicates her desire to become a Costa Rican;
>
> Article 14. The following are Costa Ricans by naturalization:
>
> 4. A foreign woman who, by marriage to a Costa Rican loses her nationality or who after two years of marriage to a Costa Rican and the same period of residence in the country, indicates her desire to take on our nationality.

The above provisions indicate that a foreign woman who loses her nationality upon marrying a Costa Rican would automatically acquire Costa Rican nationality. They prescribe additional specific requirements only for cases where no automatic loss of the previous nationality occurs.

45. It is clear, on the other hand, that the text proposed by the Members of the Special Legislative Committee effects a substantial change in the here relevant provision, for it imposes additional conditions which must all be complied with in order for a person to become eligible for naturalization.

46. One consequence of the amendment as drafted is that foreigners who lose their nationality upon marrying a Costa Rican would have to remain stateless for at least two years because they cannot comply with one of the obligatory requirements for naturalization unless they have been married for that period of time. It should also be noted that it is by no means certain that statelessness would be limited to a period of two years only. This uncertainty results from the fact that the other concurrent requirement mandates a two-year period of residence in the country. Foreigners forced to leave the country temporarily due to unforeseen circumstances would continue to be stateless for an indefinite length of time until they will have completed all the concurrent requirements established under this proposed amendment.

47. Furthermore, whereas in the text here under consideration the automatic loss of nationality is one of the concurrent conditions for naturalization by reason of marriage, no special provisions are made to regulate the status of foreigners who do not lose their nationality upon marriage to Costa Ricans.

48. The amendment proposed by the Members of the Special Legislative Committee would not as such create statelessness. This status would in fact be brought about by the laws of the country whose nationals, upon marrying a Costa Rican, lose their nationality. It follows that this amendment cannot therefore be deemed to be directly violative of Article 20 of the Convention.

49. The Court nevertheless considers it relevant, for the sole purpose of providing some guidance to the Costa Rican authorities in charge of this subject and without doing so in extenso and with lengthy citations, to call attention to the stipulations contained in two other treaties bearing on the subject. The Court refers to these treaties, without enquiring whether they have been ratified by Costa Rica, to the extent that they may reflect current trends in international law.

50. Thus, the Convention on the Nationality of Married Women provides in its Article 3:

> 1. Each Contracting State agrees that the alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged naturalization procedures; the grant of such nationality may be subject to such limitations as may be imposed in the interests of national security or public policy.
>
> 2. Each Contracting State agrees that the present Convention shall not be construed as affecting any legislation or judicial practice

> by which the alien wife of one of its nationals may, at her request, acquire her husband's nationality as a matter of right.

51. The Convention on the Elimination of all Forms of Discrimination against Women provides in its Article 9:

> States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during the marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

## IV
## ISSUES RELATING TO DISCRIMINATION

52. The provisions of the proposed amendments that have been brought before the Court for interpretation as well as the text of the Constitution that is now in force establish different classifications as far as the conditions for the acquisition of Costa Rican nationality through naturalization are concerned. Thus, under paragraphs 2 and 3 of Article 14 of the proposed amendment, the periods of official residence in the country required as a condition for the acquisition of nationality differ, depending on whether the applicants qualify as native-born nationals of "other countries of Central America, Spaniards and Ibero-Americans" or whether they acquired the nationality of those countries by naturalization. Paragraph 4 of that same Article in turn lays down special conditions applicable to the naturalization of " a foreign woman " who marries a Costa Rican. Article 14 of the Constitution now in force makes similar distinctions which, even though they may not have the same purpose and meaning, suggest the question whether they do not constitute discriminatory classifications incompatible with the relevant texts of the Convention.

53. Article 1(1) of the Convention, a rule general in scope which applies to all the provisions of the treaty, imposes on the States Parties the obligation to respect and guarantee the free and full exercise of the rights and freedoms recognized therein "without any discrimination." In other words, regardless of its origin or the form it may assume, any treatment that can be considered to be discriminatory with regard to the exercise of any of the rights guaranteed under the Convention is per se incompatible with that instrument.

54. Article 24 of the Convention, in turn, reads as follows:

> Article 24. Right to Equal Protection
>
> All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Although Articles 24 and 1(1) are conceptually not identical --the Court may perhaps have occasion at some future date to articulate the differences-- Article 24 restates to a certain degree the principle established in Article 1(1). In recognizing equality before the law, it prohibits all discriminatory treatment originating in a legal

prescription. The prohibition against discrimination so broadly proclaimed in Article 1(1) with regard to the rights and guarantees enumerated in the Convention thus extends to the domestic law of the States Parties, permitting the conclusion that in these provisions the States Parties, by acceding to the Convention, have undertaken to maintain their laws free of discriminatory regulations.

55. The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character.

56. Precisely because equality and nondiscrimination are inherent in the idea of the oneness in dignity and worth of all human beings, it follows that not all differences in legal treatment are discriminatory as such, for not all differences in treatment are in themselves offensive to human dignity. The European Court of Human Rights, "following the principles which may be extracted from the legal practice of a large number of democratic States," has held that a difference in treatment is only discriminatory when it "has no objective and reasonable justification." [**Eur.Court H.R., Case relating to " Certain Aspects of the Laws on the Use of Languages in Education in Belgium" (Merits)**, Judgment of 23rd July 1968, p. 34.] There may well exist certain factual inequalities that might legitimately give rise to inequalities in legal treatment that do not violate principles of justice. They may in fact be instrumental in achieving justice or in protecting those who find themselves in a weak legal position. For example, it cannot be deemed discrimination on the grounds of age or social status for the law to impose limits on the legal capacity of minors or mentally incompetent persons who lack the capacity to protect their interests.

57. Accordingly, no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.

58. Although it cannot be denied that a given factual context may make it more or less difficult to determine whether or not one has encountered the situation described in the foregoing paragraph, it is equally true that, starting with the notion of the essential oneness and dignity of the human family, it is possible to identify circumstances in which considerations of public welfare may justify departures to a greater or lesser degree from the standards articulated above. One is here dealing with values which take on concrete dimensions in the face of those real situations in which they have to be applied and which permit in each case a certain margin of appreciation in giving expression to them.

59. With this approach in mind, the Court repeats its prior observation that as far as the granting of naturalization is concerned, it is for the granting state to determine whether and to what extent applicants for naturalization have complied with the conditions deemed to ensure an effective link between them and the value system and interests of the society to which they wish to belong. To this extent there exists no doubt that it is within the sovereign power of Costa Rica to decide what standards should determine the granting or denial of nationality to aliens who seek it, and to establish certain reasonable differentiations based on factual differences which, viewed objectively, recognize that some applicants have a closer affinity than others to Costa Rica's value system and interests.

60. Given the above considerations, one example of a non-discriminatory differentiation would be the establishment of less stringent residency requirements for Central Americans, Ibero-Americans and Spaniards than for other foreigners seeking to acquire Costa Rican nationality. It would not appear to be inconsistent with the nature and purpose of the grant of nationality to expedite the naturalization procedures for those who, viewed objectively, share much closer historical, cultural and spiritual bonds with the people of Costa Rica. The existence of these bonds permits the assumption that these individuals will be more easily and more rapidly assimilated within the national community and identify more readily with the traditional beliefs, values and institutions of Costa Rica, which the state has the right and duty to preserve.

61. Less obvious is the basis for the distinction, made in paragraphs 2 and 3 of Article 14 of the proposed amendment, between those Central Americans, Ibero-Americans and Spaniards who acquired their nationality by birth and those who obtained it by naturalization. Since nationality is a bond that exists equally for the one group as for the other, the proposed classification appears to be based on the place of birth and not on the culture of the applicant for naturalization. The provisions in question may, however, have been prompted by certain doubts about the strictness of the conditions that were applied by those states which conferred their nationality on the individuals now seeking to obtain that of Costa Rica, the assumption being that the previously acquired nationality --be it Spanish, Ibero-American or that of some other Central American country-- does not constitute an adequate guarantee of affinity with the value system and interests of the Costa Rican society. Although the distinctions being made are debatable on various grounds, the Court will not consider those issues now. Notwithstanding the fact that the classification resorted to is more difficult to understand given the additional requirements that an applicant would have to meet under Article 15 of the proposed amendment, the Court cannot conclude that the proposed amendment is clearly discriminatory in character.

62. In reaching this conclusion, the Court is fully mindful of the margin of appreciation which is reserved to states when it comes to the establishment of requirements for the acquisition of nationality and the determination whether they have been complied with. But the Court's conclusion should not be viewed as approval of the practice which prevails in some areas to limit to an exaggerated and unjustified degree the political rights of naturalized individuals. Most of these situations involve cases not now before the Court that do, however, constitute clear instances of discrimination on the basis of origin or place of birth, unjustly creating two distinct hierarchies of nationals in one single country.

63. Consistent with its clearly restrictive approach, the proposed amendment also provides for new conditions which must be complied with by those applying for naturalization. Draft Article 15 requires, among other things, proof of the ability to "speak, write and read" the Spanish language; it also prescribes a "comprehensive examination on the history of the country and its values." These conditions can be deemed, prima facie, to fall within the margin of appreciation reserved to the state as far as concerns the enactment and assessment of the requirements designed to ensure the existence of real and effective links upon which to base the acquisition of the new nationality. So viewed, it cannot be said to be unreasonable and unjustified to require proof of the ability to communicate in the language of the country or, although this is less clear, to require the applicant to "speak, write and read" the language. The same can be said of the requirement of a "comprehensive examination on the history of the country and its values. " The Court feels compelled to emphasize, however, that in practice, and given the broad discretion with which tests such as those mandated by the draft amendment tend to be administered, there exists the risk that these requirements will become the vehicle for subjective and arbitrary judgments as well as instruments for the effectuation of discriminatory policies which, although not directly apparent on the face of the law, could well be the consequence of its application.

64. The fourth paragraph of draft Article 14 accords "a foreign woman who [marries] a Costa Rican" special consideration for obtaining Costa Rican nationality. In doing so, it follows the formula adopted in the current Constitution, which gives women but not men who marry Costa Ricans a special status for purposes of naturalization. This approach or system was based on the so-called principle of family unity and is traceable to two assumptions. One has to do with the proposition that all members of a family should have the same nationality. The other derives from notions about paternal authority and the fact that authority over minor children was as a rule vested in the father and that it was the husband on whom the law conferred a privileged status of power, giving him authority, for example, to fix the marital domicile and to administer the marital property. Viewed in this light, the right accorded to women to acquire the nationality of their husbands was an outgrowth of conjugal inequality.

65. In the early 1930's, there developed a movement opposing these traditional notions. It had its roots in the acquisition of legal capacity by women and the more widespread acceptance of equality among the sexes based on the principle of nondiscrimination. These developments, which can be documented by means of a comparative law analysis, received a decisive impulse on the international plane. In the Americas, the Contracting Parties to the Montevideo Convention on the Nationality of Women of December 26, 1933 declared in Article 1 of that treaty that "There shall be no distinction based on sex as regards nationality, in their legislation or in their practice." [Adopted at the Seventh International Conference of American States, Montevideo, December 3-26, 1933. The Convention is reproduced in **International Conferences of American States - Supplement 1933-1940**. Washington, Carnegie Endowment for International Peace, 1940, p. 106.] And the Convention on Nationality, signed also in Montevideo on that same date, provided in Article 6 that "Neither matrimony nor its dissolution affects the nationality of the husband or wife or of their children." [Ibid., at 108.] The American Declaration, in turn, declares in Article II that "All persons are equal before the law and have the rights and duties established in this declaration, without distinction as to race, sex, language, creed or any other factor." These same principles have been embodied in Article 1(3) of the United Nations Charter and in Article 3(j) of the OAS Charter.

66. The same idea is reflected in Article 17(4) of the Convention, which reads as follows:

> The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.

Since this provision is consistent with the general rule enunciated in Article 24, which provides for equality before the law, and with the prohibition of discrimination based on sex contained in Article 1(1), Article 17(4) can be said to constitute the concrete application of these general principles to marriage.

67. The Court consequently concludes that the different treatment envisaged for spouses by paragraph 4 of Article 14 of the proposed amendment, which applies to the acquisition of Costa Rican nationality in cases involving special circumstances brought about by marriage, cannot be justified and must be considered to be discriminatory. The Court notes in this connection and without prejudice to its other observations applicable to the amendment proposed by the members of the Special Legislative Committee [cf. supra, paras. 45 et seq.] that their proposal is based on the principle of equality between the spouses and, therefore, is more consistent with the Convention. The requirements spelled out in that amendment would be applicable not only to "a foreign woman" but to any "foreigner" who marries a Costa Rican national.

68. For the foregoing reasons, responding to the questions submitted by the Government of Costa Rica regarding the compatibility of the proposed amendments to Articles 14 and 15 of its Constitution with Articles 17(4), 20 and 24 of the Convention,

**THE COURT IS OF THE OPINION**

**As regards Article 20 of the Convention,**

By five votes to one

1. That the proposed amendment to the Constitution, which is the subject of this request for an advisory opinion, does not affect the right to nationality guaranteed by Article 20 of the Convention.

**As regards Articles 24 and 17( 4 ) of the Convention,**

By unanimous vote

2. That the provision stipulating preferential treatment in the acquisition of Costa Rican nationality through naturalization, which favors Central Americans, Ibero-Americans and Spaniards over other aliens, does not constitute discrimination contrary to the Convention.

By five votes to one

3. That it does not constitute discrimination contrary to the Convention to grant such preferential treatment only to those who are Central Americans, Ibero-Americans and Spaniards by birth.

   By five votes to one

4. That the further requirements added by Article 15 of the proposed amendment for the acquisition of Costa Rican nationality through naturalization do not as such constitute discrimination contrary to the Convention.

   By unanimous vote

5. That the provision stipulating preferential treatment in cases of naturalization applicable to marriage contained in Article 14(4) of the proposed amendment, which favors only one of the spouses, does constitute discrimination incompatible with Articles 17(4) and 24 of the Convention.

Dissenting:

Judge Buergenthal with regard to point 3.

Judge Piza Escalante with regard to points 1 and 4.

Done in English and Spanish, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this nineteenth day of January, 1984.

PEDRO NIKKEN
PRESIDENT

THOMAS BUERGENTHAL MAXIMO CISNEROS

CARLOS ROBERTO REINA RODOLFO E. PIZA E.

RAFAEL NIETO NAVIA

CHARLES MOYER
SECRETARY

**DISSENTING OPINION**
**OF JUDGE THOMAS BUERGENTHAL**

1. I regret that I am unable to accept the Court's interpretation contained in paragraph 3 of its conclusions. I concur in all other parts of the opinion.

2. The interpretation from which I dissent concerns the Court's conclusion that Articles 14(2) and 14(3) of the proposed constitutional amendment would be compatible with the Convention. In my opinion, the proposed amendment, if adopted, would violate Article 24 of the Convention because it would establish a discriminatory distinction between Central Americans, Spaniards and Ibero-Americans who are nationals of those countries by birth, and those who have acquired their nationality by naturalization.

3. In my opinion, Articles 14(2) and 14(3) of the proposed constitutional amendment would be compatible with the Convention if they were drafted as follows:

> Article 14
>
> (2) Nationals of other Central American countries, Spaniards and Ibero-Americans, whether by birth or naturalization, with five years of official residence in the country who comply with the other requirements of the law;
>
> (3) All other foreign nationals with seven years of official residence in the country who comply with the other requirements of the law.

4. The manner in which the Court has interpreted Article 24 of the Convention, and I agree with that interpretation, in my view compels the conclusion that the distinction sought to be established is discriminatory because it is disproportionate and not reasonably related to the governmental objective sought to be accomplished by it. In reaching this conclusion, I do not deny the right of a State Party to the Convention to adopt legislative classifications based on the historical, cultural, social, linguistic and political ties that bind Central Americans, Spaniards and Ibero-Americans. No one familiar with this region of the world would deny the reality of these ties, notwithstanding the fact that exaggerated claims are at times made in its name. But given this reality and the standards that govern the interpretation and application of Article 24 of the Convention, I have no choice but to recognize, even if I wished to question the wisdom of the proposed legislation, that it is not incompatible with the Convention for Costa Rica to treat other Central Americans, Spaniards and Ibero-Americans differently for purposes of naturalization than it treats nationals of other nations. But when Central Americans, Spaniards and Ibero-Americans are classified differently depending upon whether they are nationals of these countries by birth or by naturalization, I must ask, applying the standard of interpretation the Court adopts, how reasonable and proportionate the classification is, given the legitimate governmental objective sought to be achieved.

5. In answering this question, it must be noted that Article 15 of the proposed constitutional amendment would require all individuals seeking to obtain Costa Rican nationality to demonstrate that they speak, write and read Spanish. They would also

have to pass a comprehensive examination about the history of the country and the values to which Costa Rica is dedicated. Furthermore, individuals cannot legitimately acquire by naturalization the nationality of any Central American or Ibero-American country or of Spain if they are nationals of any other state unless they have resided in those countries for a substantial period of time, usually between three to seven years. If to this period we add the requirement of five years of residence in Costa Rica contained in Article 14(2) of the proposed legislation, it would follow that Central Americans, Spaniards and Ibero-Americans by naturalization could not become Costa Rican citizens in less than eight years, and in most cases many more years, even if they were treated in exactly the same way as Article 14(2) would treat nationals by birth of these countries.(1)

6. What legitimate governmental end will be accomplished by requiring these naturalized Central Americans, Spaniards and Ibero-Americans to wait two years longer than their co-nationals? It can be argued that these individuals might have acquired their earlier nationality by fraud. True, but under international law, Costa Rica is not required to recognize any nationality that is not based on real and effective ties between the individual and the state granting the nationality. Moreover, the likelihood that a very small percentage of individuals might act dishonestly is hardly a legitimate reason for punishing the vast majority of honest foreigners. It can also be argued that the additional two years are required to permit these people to speak better Spanish or to acquire a more profound knowledge of Costa Rican history, culture and life. True, but Article 15 of the same proposed constitutional amendment already addresses that issue; it would require the Government of Costa Rica to accomplish that objective in a much more rational and disproportionately less harmful manner by examinations designed to test what each individual knows about Costa Rica, rather than by assuming ignorance on the part of all.

7. For the reason explained above, I reach the conclusion that the distinction between nationals by birth and nationals by naturalization, which Article 14 of the proposed constitutional amendment makes, is not reasonably related to the governmental objective sought to be achieved by the draft legislation if it is examined as a whole, as it must be, and that it is therefore not compatible with Article 24 of the Convention.

8. In reaching this conclusion, I do not wish to be understood as believing that Articles 14 or 15 of the existing Constitution of Costa Rica violate the Convention. In the first place, that issue is not before the Court. Secondly, the constitutional provisions now in force establish, for example, much shorter residence requirements --only one year for Central Americans and two years for Spaniards and Ibero-Americans by birth-- and they contain no language or other examination requirements. In that context, the distinction which the current law makes between nationals by birth and nationals by naturalization, might well be deemed to bear a much more reasonable relationship to the governmental objective sought to be achieved by Costa Rica than does the proposed legislation.

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(1) I realize, of course, that the proposed legislation enables these individuals to acquire Costa Rican nationality after they have resided in the country for a period of seven years. My point is, however, that to place Central Americans, Ibero-Americans and Spaniards by naturalization in the same category as all other foreigners, and to give a preferred status to Central Americans, Ibero-Americans and Spaniards by birth, disregards the many years of residence in these countries by the naturalized citizens and their special ties to the regions favored by the proposed legislation.

THOMAS BUERGENTHAL

CHARLES MOYER
Secretary

**SEPARATE VOTE OF**
**JUDGE RODOLFO E. PIZA E.**

(Translation)

I have concurred with the opinion of the majority of the Court in its Conclusions Nos. 2, 3 and 5. I disagree partially with Conclusions Nos. 1 and 4, and I add a sixth conclusion in order to deal with matters not considered by the principal opinion. Therefore I set forth my separate opinion as follows:

**CONCLUSIONS:**

With regard to Article 20 of the Convention:

1(a) That the right to nationality recognized by Article 20 of the Convention is not involved in general in the draft constitutional amendment involved in this opinion.

1(b) Nevertheless, in paragraph 1 of the Article, according to which " every person has the right to a nationality, " this right is involved in the cases to which my separate opinion refers in Nos. 4 and 6 below.

With regard to Articles 1(1), 24, 20(1) and 17(1), (2) and (4) of the Convention:

2. That it is not a discrimination contrary to the Convention to stipulate preferential conditions for obtaining Costa Rican nationality through naturalization, in favor of Central Americans, Ibero-Americans and Spaniards as compared to the other foreigners. [Art. 14(2), (3) and (4) Const., Art. 14 (2) and (3) of draft.]

3. That it is not a discrimination contrary to the Convention to limit that preference to Central Americans, Ibero-Americans and Spaniards by birth, and not by naturalization (idem cit.).

4(a) That it is not a discrimination contrary to the Convention to stipulate among the requirements for obtaining Costa Rican nationality by naturalization the ability to speak the Spanish language so as to be able to communicate in that language and to swear to respect the Constitutional order of the Republic. (Arts. 15 Const. and draft).

4(b) But it is a discrimination contrary to the Convention to require such knowledge of the Spanish language to be able to read and write it as well as the additional requirement of submitting to a comprehensive (sic) examination on the country's history and values (idem cit.), even though such discrimination does not stem from the very text of the standard proposed, in its literal meaning, but because its sense of finality leads, and its foreseeable and normal application would lead, in practice, to arbitrary exclusions and distinctions among specific individuals and groups of persons.

4(c) On the other hand, it is not, in itself, a discrimination contrary to the Convention, although it does not seem to be an institutional step forward, to replace the present material requirements of residence or domicile, only qualified as "residence and stable and effective connection with the national

community, in accordance with regulations established by law," which the draft eliminates, by the purely formal requirements of "official residence," which it establishes. [Arts. 14(2), (3) and (4), and 15 Const., Arts. 14(2) and (3), and 15 of the draft.]

5(a) That it is a discrimination incompatible with Articles 17(4) and 24 of the Convention to stipulate preferential conditions for naturalization through marriage in favor of only one of the spouses. [Art. 14(5) Const., Art. 14(4) of the draft.]

5(b) Nevertheless, this discrimination would be overcome in this regard through the motion of the Special Committee which proposes replacing the concept of "foreign woman" by that of "foreign person." ( Art. 14(4) motion.]

I add the following:

6(a) That conditioning the concession of voluntary naturalization through matrimony on additional requirements of two years of matrimony and of residence in the country concurrently [Art. 14(5) Const., Art. 14(4) draft] is not in itself a discrimination contrary to the Convention, although it is a hardly convincing regression.

6(b) On the other hand, that proposition does seem to be directly incompatible with the right to nationality recognized by Article 20(1) of the Convention, in itself, and also in relation to the principles of unity of the family implied in the rights established in paragraphs 1 and 2 of Article 17, by imposing for two years an unreasonable impediment and a serious obstacle to the natural interest of the spouses in the strengthening of that family unity (idem cit.).

6(c) Moreover, it does seem to be a discrimination contrary to the Convention and a factor incompatible in itself with the aforementioned rights to nationality and to family unity, and with the specific interest of the international community in progressively eliminating possible cases of statelessness, to extend the additional requirement of two years of marriage and residence concurrently to the spouse who, due to his or her marriage with a Costa Rican, loses his or her nationality, especially because the Constitution already automatically grants him or her status as a national. [Art. 14(4) motion.]

6(d) It is also a discrimination contrary to the Convention and an incompatibility in itself with the aforementioned rights to nationality and to unity of the family established in it, to combine, as the Committee wishes, the requirements of two years of marriage and residence concurrently, with the loss of the nationality of the foreigner who marries a Costa Rican, thus excluding himself from any preference to obtain "voluntary " naturalization through marriage with a Costa Rican, who does not for that reason lose his original nationality. [Art. 14(4) motion.]

**REASONING:**

1. With the differences set forth regarding Conclusions Nos. 1 and 4 of the principal opinion, and certain few basic differences that I shall indicate in each instance, I agree basically with almost all of the reasoning of the majority, with whom in general I do not have basic differences but rather differences of emphasis

and explicitness born of my old inclination to have the Court, in performing its duties, especially its advisory duties, gradually abandon the traditional reluctance of all Courts of Justice to state principles, doctrines, and criteria of interpretation that are not those indispensable for resolving each specific case it considers, and plunging forward on the pretext of such consideration, to establish its more far-reaching mission of creating jurisprudence with the audacity, breadth, intensity and flexibility that are possible without any restriction other than the impassable limits of its competence-- and a little beyond that, if possible !

## I. Criteria of Interpretation

2. In this regard, in my opinion, both the principles of interpretation established in the Vienna Convention on the Law of Treaties, and those stemming from Article 29 of the American Convention, correctly understood above all in the light of the law on human rights, serve as a basis for the application of criteria of interpretation and even of integration that are principles, ends, and established for the greatest protection of the rights established. These criteria in one way or another have been utilized by the Court. [See for example OC-1/82 (paras. 24-25, 41); OC-2/82 (paras. 27 ff., sp. 27, 29, 30-31); OC-3/83 (paras. 50, 57, 61, 65-66 ), as well as my separate opinion in the case "Gallardo et al.," (par. 21).] These criteria also point to the need to interpret and integrate each standard of the Convention by utilizing the adjacent, underlying or overlying principles in other international instruments, in the country's own internal regulations and in the trends in effect in the matter of human rights, all of which are to some degree included in the Convention itself by virtue of the aforementioned Article 29, whose innovating breadth is unmatched in any other international document.

3. With regard to my separate opinion, I invoke as of special importance first of all the principle that human rights are progressive and expansive in addition to being requirable. These features require the consequent interpretative approach and, therefore, they impose the need to consider in each instance not only the meaning and scope of the very standards interpreted in their literal text, but also their potential for growth, in my judgment put in the form of legislated law by Articles 2 and 26 of the American Convention, among other international instruments on the subject, the first for all rights, and the second in terms of the so-called economic, social and cultural rights. In fact, in accordance with those articles:

> Article 2. Domestic Legal Effects
>
> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.
>
> Article 26. Progressive Development
>
> The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the right implicit in the economic, social, education, scientific, and cultural

> standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

4. It should be remembered with regard to Article 2 that the States Parties undertook along with the duty "to respect the rights and freedoms recognized" in the Convention, the duty "to ensure... the free and full exercise of those rights and freedoms" [Article 1(1)], which must be interpreted, in the light of Article 2, as also the commitment to "adopt...such legislative or other measures as may be necessary to give effect to those rights or freedoms" Thus, to the negative duty of not failing to respect there is added the positive one of ensuring and, therefore, of continuing to ensure those rights and freedoms increasingly better and more efficiently. It would certainly be absurd and not desired by the Convention to intend for that positive duty always to involve specific penalties for noncompliance; the truth is that such positive duties do not necessarily involve "subjective rights" with the specific scope of that expression, i.e., rights requirable in themselves, through a specific "action of restitution" ; but it is obvious that if they are "rights," they at least bring about, from the legal standpoint, a sort of "reflex action" in the style, e.g., of the action to declare void, linked in domestic public law to the so-called "legitimate interests," which make it possible to oppose any of the State's measures that tend to disavow, restrict, or overlook them, or to grant them to others with discrimination, or that have such results.

5. All of this obliges me, in the context of the inquiry, to examine the matter of whether the draft constitutional amendment, by reducing in specific ways the rights now enjoyed by foreigners to be naturalized in Costa Rica may not be in contradiction with the right assumed by that State to develop human rights progressively, in the case of the right to a nationality established by Article 20(1) of the Convention, as well as the more specific problem of whether restriction of the opportunities already granted for naturalization through matrimony is seriously encumbering the duty progressively to ensure the rights of the family established in Article 17 of the Convention, particularly in its paragraphs 1 and 2, according to which:

> Article 17. Rights of the Family
>
> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
>
> 2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.

6. Moreover, the mention of Article 26 of the Convention comes out of my conviction that the difference between civil and political rights and economic, social and cultural rights follows merely historical reasons and not juridical differences among them. Thus, in fact, the important thing is to distinguish, with a technical legal criterion, between fully requirable subjective rights, i.e., "directly requirable in themselves," and progressive rights, which in fact behave rather like reflected rights or legitimate interests, i.e., "indirectly requirable," through positive political demands or pressure on the one hand and through legal actions to disavow what is set up against them or what is given them on the basis of discrimination. The specific criteria for determining in each instance whether one set or another of rights is

involved are circumstantial and historically conditioned; but it can be stated that, in general, whenever it is concluded that a specific basic right is not directly requirable in itself, one is facing a right that is at least indirectly requirable and that can be progressively materialized. This is why the principles of "progressive development" contained in Article 26 of the Convention, although they refer literally to the economic, social, educational, scientific, and cultural standards contained in the Charter of the Organization of American States, should in my judgment be understood to be applicable to any of the "civil and political" rights established in the American Convention, to the extent and in the ways in which they are not reasonably requirable in themselves, and vice versa, that the standards of the Convention itself may be understood to be applicable to the so-called "economic, social and cultural rights," to the degree and in the ways in which they are reasonably requirable in themselves (as occurs, e.g., with the right to strike). In my opinion, this flexible and reciprocal interpretation of the Convention's standards with other international standards on the subject, and even with those of national legislation, is consistent with the "standards of interpretation" of Article 29 thereof, applied in accordance with the aforementioned criteria of principles and ends.

7. Another important derivative from the criteria adopted leads me to the personal conclusion, concerning which, as concerning the others, I have no right to interpret that of my colleagues, that, from the standpoint of the law of human rights, the standards consulted --in this instance, the proposed constitutional amendments-- not only should be examined from the standpoint of their literal text and purely regulatory context, but also in terms of their application to specific cases. In this sense, I am not unaware of the validity of the thesis in principle that, when the standard in itself is compatible with the Convention, any violations of the latter to which its application might lead would not invalidate the standard itself, but rather would constitute violations of conduct independent of the former. Nevertheless, this thesis in principle must be given an important shading: I believe, that in certain hypotheses, even though and when the standard does not "necessarily" involve a violation of the Convention, in which case it would be obvious that it would be invalidated in itself, it would also be incompatible with the former when, due to the defectiveness or vagueness of its text, or due to the purposes or criteria that objectively inspire it, its "normal" and "foreseeable" application would lead to such a violation, because it is obvious that this would be the conduct "desired" by the standard itself. Thus, upon studying the inquiry of the Costa Rican Government, I would take into account this aspect, which is very important to me, of the pertinent standards of interpretation.

## II. The Principles of Equality and Nondiscrimination

8. In general, I share the reasoning in the majority opinion on the different areas of application corresponding to Articles 1(1) and 24 of the Convention, the former by establishing and determining the principles of equality and nondiscrimination that constitute specifically the rights established therein, and the latter by creating a sort of independent right to equality and nondiscrimination, which functions as a criterion for all the subjective rights, i.e., even those not based on or established in the Convention. I also agree with the conclusion in principle that not every inequality or distinction is illegal or, therefore, discriminatory, for whose determination it is necessary to resort to more or less objective criteria of reasonability, proportionality, and justice (see principal opinion, paras. 53-59). Nevertheless, for a more objective and clear justification of the application of

necessarily indeterminate concepts like those mentioned, I consider it useful to add the following explanation:

9. In the first place, that very difference of assumptions and areas of application suggests the need to establish whether the criteria of equality and nondiscrimination of Article l(l)'s general character are the same as those of Article 24. For it could be argued that the basic rights and freedoms guaranteed directly by the Convention and the other subjective rights, left to the domestic jurisdiction of each state, are not equally important, for which reason possible inequalities or discriminations with regard to certain ones and certain others would not be equally serious. Nevertheless, I believe that, despite those differences in degree or intensity between certain rights and certain others, there is no valid reason for attributing different meanings to the concepts of equality and nondiscrimination in one case and the other. This is true in the first place because the Convention did not attribute different meanings to them, but rather in Article 24 it merely did not define them fully. This leads to the assumption that it merely was referring to the content that is defined in Article 1. It is true in the second place because Article 24 does establish equality and nondiscrimination as independent rights protected by the Convention, which implies that, as such, they are fundamental rights ensured by international law, which causes them to be qualified by Article 1, and which implies that there is no justification for asserting that they are not qualified with the same amplitude and intensity. Put in another way, the States Parties to the Convention, upon undertaking "to respect the rights and freedoms recognized therein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination..." also assumed that obligation with regard to the independent right to equality and nondiscrimination established by Article 24 of the Convention, so that there is no reason to assume that the concepts of equality and nondiscrimination in the latter article are less precise or more flexible than those in Article 1.

10. In the second place, it appears clear that the concepts of equality and nondiscrimination are reciprocal, like the two faces of one same institution. Equality is the positive face of nondiscrimination. Discrimination is the negative face of equality. Both are the expression of a juridical value of equality that is implicit in the very concept of law as an order of justice for the common good. Equality became part of international law when constitutional law, where it originated, had already succeeded in overcoming the original mechanical feeling of "equality before the law," which called for identical treatment for everyone in every situation, and which, in its exercise, came to deserve being called " the worse of the injustices, " and succeeded in replacing it with the modern concept of "juridical equality," understood to be a measure of justice that provides for reasonably equal treatment to everyone in the same circumstances, without arbitrary discrimination and recognizing that inequalities merit unequal treatment. In this sense "juridical equality" calls for the right of people to share in the common good under general conditions of equality without discrimination; and nondiscrimination involves that same juridical equality from the standpoint of the right not to be treated unequally, i.e., not to be subject to differences, duties, burdens, or restrictions that are unfair, unreasonable, or arbitrary. For historical reasons, the weight of the inequalities has caused juridical equality to be defined in international law basically through the concept of nondiscrimination.

11. This concept of nondiscrimination is characterized, although not defined, in the American Convention only in Article 1(1), whereby:

Article 1. Obligation to Respect Rights

> 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

12. The literal expression of this principle in the Convention's text ("without any discrimination", "sin discriminación alguna" "sem discriminação alguma", "sans distinction aucune," in the English, Spanish, Portuguese, and French texts) requires that the question be posed in terms similar to those which led the European Court of Human Rights to the following doctrinal argumentation, which is cited in paragraph 56 of the majority opinion, and which I set forth below:

> 10. In spite of the very general wording of the French version ("sans distinction aucune"), Article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognised. This version must be read in the light of the more restrictive text of the English version (without discrimination"). In addition, and in particular, one would reach absurd results were one to give Article 14 an interpretation as wide as that which the French version seems to imply. One would, in effect, be led to judge as contrary to the Convention every one of the many legal or administrative provisions which do not secure to everyone complete equality of treatment in the enjoyment of the rights and freedoms recognised. The competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions; moreover, certain legal inequalities tend only to correct factual inequalities. The extensive interpretation mentioned above cannot consequently be accepted.
>
> It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth, contravenes Article 14. On this question the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.
>
> In attempting to find out in a given case, whether or not there has been an arbitrary distinction, the Court cannot disregard those legal and factual features which characterise the life of the society in

> the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention. [**Eur. Court H.R., Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" (Merits**), Judgment of 23rd July 1968, pp. 34-35.]

13. In order to provide a clearly objective differentiation between the arbitrary discrimination proscribed by the Convention and legitimate differences that are wholly of each State's competence and that are not apt to give rise to incompatible standards or, in such a case, behavior violating the human rights established in the Convention, I believe that the concept of discrimination, with whose general definition in the majority opinion I agree, should be characterized in terms of three basic criteria, which I will call "reasonability," in terms of the nature and purpose of the right or institution it characterizes; "proportionality," with relation to the principles and values involved in the over-all system to which that right or institution belongs; and "suitability," to the historical, political, economic, cultural, spiritual, ideological, and similar circumstances of the society in which it functions.

14. In accordance with the criterion of "reasonability," a distinction, for one of the reasons listed in Article 1(1) of the Convention or of the similar reasons implied therein, would be discriminatory and, therefore, illegal, when it was contrary to the principles of fair reason, justice, and the common good, applied reasonably to thecorresponding standard or behavior, in terms of the nature and purposes of the right or institution, which that standard or behavior concerns. The characterization of those criteria of reasonability in each specific instance is a task of determining what is to be done upon interpreting and applying the right, making use, indeed, of the most objective mechanisms possible and suiting them to those principles.

15. In accordance with the criterion of "proportionality," a distinction, even though it is reasonable in terms of the nature and purposes of the specific right or institution in question, would be discriminatory if it was not in accord with the logical position of that right or institution in the unity of the corresponding over-all juridical system, i.e., if it did not fit harmoniously into the system of principles and values that objectively characterized that system as a whole. Thus a reasonable distinction in the matter of granting nationality that could be objectively justified in accordance with the nature and purposes of that specific institution could always be discriminatory and, therefore, illegal, if, examined in the light of the principles and values of the Convention as a whole, it was contradictory to those principles, as would occur, e.g., if it were based on standards of racial discrimination, because such standards are absolutely repudiated by international law.

16. Finally, in accordance with the criterion of "suitability," a distinction, even though reasonable and based on the reasoning in the two preceding paragraphs, may still be discriminatory and illegal in view of the relative historical, political, economic, social, cultural, spiritual, ideological, and similar circumstances of the specific society in which the standards or behavior questioned occur or produce their

effects. In this regard, it is possible for certain restrictions or preferences, for example, for reasons of educational level, reasonable, proportioned, and justifiable in a developed society in that field, could be unacceptable in a society with a high illiteracy index: it is obvious that, in the light of democratic principles, the requirement to be able to read and write in order to participate in elections or to be elected could not be characterized as the same in a society in which the bulk of the population is illiterate as in one in which it is not.

## III. Application of the Foregoing to the Inquiry in General

17. In the first place, I agree with the majority in not harboring doubts regarding the Costa Rican State's sovereign right to grant or deny its nationality to any foreigner or, therefore, to impose conditions of residence or domicile or of stable and effective connections with the nation. In this sense, I can think of no valid reason to examine, much less to object to, from the standpoint of human rights, the general conditions and periods proposed for domicile or residence, or those in effect. Although perhaps it is not superfluous to say that the residence periods in the present Costa Rican Constitution sound more reasonable than those proposed, in the light of worldwide trends in the field of human rights, they are even broader than those of the great majority of the hemisphere's constitutions.

18. In the second place, I also agree with the majority that one cannot characterize as illegal the inequalities or distinctions resulting both from the present Constitution [Art. 14 (2), (3) and (4)], and from the proposed amendments [Art. 14(2) and (3)], upon setting more favorable time periods for the naturalization of Central Americans, Ibero-Americans, and Spaniards than those established for other foreigners. This is because, as paragraph 61 of the principal opinion states, it seems clear that it is in accordance with the nature and purposes of granting nationality to favor those who objectively have with the Costa Ricans much closer historical, cultural and spiritual ties, which lead to the assumption that they will incorporate themselves into the national community faster and more simply and that they have a more natural identification with the beliefs, values, and institutions of Costa Rican tradition, which the State has the right and duty to preserve.

19. For the same reason, I also agree with the belief that the difference made between native-born Central Americans, Ibero-Americans and Spaniards on the one hand and those who have been naturalized on the other hand is reasonable and legal. But I do not agree with the reticence of the majority reflected in paragraph 61 of the principal opinion. This is because, in my judgment, it is appropriate to assume that in general, the incorporation and identification of native-born citizens of sister nations in terms of history, culture, language, religion, traditions, institutions, and shortcomings themselves, must occur more spontaneously and naturally. This may not be as true for other countries and communities, but in the case of the Central American community and of the broader Ibero-American community, including Spain, it is a permanent and tangible historical reality, the closest imaginable thing to one single nation and one single nationality separated but not divided by accidental circumstances. To legally recognize that community is as legitimate as it is to grant nationality to the children of nationals born abroad, because in both cases the national identity comes to them from the cradle: "Salamanca does not provide what nature does not give," as the Spanish refrain drawn from an age-old tradition proclaims!

20. Nevertheless, it might not be superfluous to indicate a complementary concern that, for the sake of a more complete adjustment in the Costa Rican system to the nature and purposes of nationality, it would be desirable to leave to ordinary legislation the possibility of anticipating exceptions to the system's rigidity, which would take care of special circumstances, such as, for example, the circumstances of foreigners naturalized in those countries since their childhood or residents in those countries since their childhood, who should be assumed to have assimilated the culture and values of their community to practically the same degree as the native-born.

21. Differing with the main opinion, I consider it a very different matter to include in the draft amendment to Article 15 of the Constitution rigorous additional requirements to obtain Costa Rican nationality: specifically those of knowing the Spanish language and of submitting to a comprehensive (sic) examination on the history of the country and its values. I analyze these requirements later in light of the interpretation given by the majority, and further developed by myself, to the principles of equality and nondiscrimination with relation to the right to a nationality.

22. With regard to the requirement included in the draft amendments to "speak, read, and write the Spanish language," the first matter to be examined is whether this requirement constitutes "discrimination for reasons of...language," which is expressly proscribed by Article 24 and by the standards of Article 1(1) of the Convention, in the sense already stated of an "unreasonable and disproportionate discrimination" in accordance with the nature and purpose of the right to a nationality with its inclusion in the law of the Convention as a whole, and with the circumstances of the society in which it is designed to function.

23. In principle, I share the concern expressed in the draft constitutional amendment in question that, since Spanish is the official language of the country, it is desirable that all Costa Ricans know it and be able to communicate in that language. Nevertheless, equality and nondiscrimination cannot function in a vacuum nor, therefore, without the specific conditions of the society in which the people live. In this regard, my concern comes from the fact that there are among the country's own native-born people persons and substantial communities that do not know Spanish or that do not know it well and that do not even speak that language as their native tongue: Indian communities that, although they are small and isolated, retain their ancestral languages and even resist learning or having to use the official one; and there is an important Costa Rican community of Jamaican origin that retains its language and many of whose members at least have problems in expressing themselves correctly in Spanish. Of course, the Costa Rican State, aware of the desirability and even the duty of preserving the native cultures and the rights of minorities in the country, is conducting programs of instruction and for promotion of the culture in the Indian languages and, recognizing its cultural situation, has provided courts and public bureaus with official interpreters of those native or minority languages.

24. Nevertheless, it does not appear unreasonable, disproportionate, or arbitrary to require persons desiring to acquire Costa Rican nationality to know the official language well enough to communicate in it, without which language it would be little less than impossible to carry on friendly relations, assimilate its culture and tradition, understand and perform their civic and legal duties, and exercise their rights, in brief, to integrate themselves fully into the nation in accordance with the excellent

constitutional definition of domicile as "residence and stable and effective connection with the national community." (Art. 15(2) Constitution.)

25. What would in my judgment indeed be in conflict with human rights law, and specifically discrimination in the terms of the Convention, would be to carry that language requirement to the extremes of the draft in question "to know how to speak, write and read the Spanish language." (Art. 15 draft.) This is because it is not reasonable, in terms of the nature and purpose of nationality, as they are described in this opinion and in the principal opinion, to restrict that privilege for reasons of educational level --which has little or nothing to do with integration into the national community-- and because, moreover, in the light of the clearly restrictive and distrustful feeling the draft shows, as well as the atmosphere by which it has been surrounded since before its birth, and of the very context of the amendments proposed, it is reasonable to expect in its foreseeable and normal application, rigorous application of academic standards implemented to reduce the granting of nationality to persons of high intellectual quality and, perhaps, even a heroic boldness. In this regard, I dissent from the reasoning set forth in paragraph 63 of the principal opinion.

26. Similar reasons related both to the standard in itself and to its foreseeable and normal application lead me to state, also dissenting from the majority reasoning in that same paragraph 63 of the principal opinion, that the draft's proposal to require as a condition for naturalization, taking a "comprehensive examination on the history of the country and its values" seems to me unreasonable and disproportionate and, therefore, discriminatory in the sense prohibited by the Convention. The memory of similar practices for granting the vote in the United States (to know the Constitution), which for years allowed the exclusion of southern Negroes, which practices that country's Supreme Court finally declared unconstitutional because they were discriminatory, makes it unnecessary for me to comment further.

## IV. Application of Naturalization through Matrimony

27. I have concurred with the majority, for the very reasons they set forth in paragraphs 64 through 67 of the principal opinion, in Conclusion No. 5 [No. 5(a) of this separate opinion], that both the present version of the Constitution [Article 14(5)] and the proposed amendment [Article 14(4)] involve a discrimination that is illegal, and, therefore, contrary to Articles 24 and 17(4) of the Convention, by restricting the privilege of so-called "naturalization through marriage" to foreign women who marry Costa Ricans, denying it under the same circumstances to men without any justification that is acceptable from the standpoint of human rights. In this regard, I have limited myself to bringing together in the expression of my own opinion the recognition that is aptly made in paragraph 67 of the principal opinion to the effect that the substitute motion suggested by the Special Committee satisfactorily overcomes that discrimination. [Conclusion No. 5(b), supra.]

28. On the other hand, I do not share the reasons or the conclusions of the principal opinion related to other aspects of the regulations proposed for naturalization through marriage, either in the draft constitutional amendments or in the substitute motion in question [Art. 14(5) Const.; Art. 14(4) draft and motion]:

> PRESENT CONSTITUTION:
> Article 14. The following are Costa Ricans by naturalization:

> 5) A foreign woman who by marriage to a Costa Rican loses her nationality or who indicates her desire to become a Costa Rican;
>
> DRAFT:
> Article 14. The following are Costa Ricans by naturalization:
>
> 4) A foreign woman who by marriage to a Costa Rican loses her nationality or who, after being married for two years with a Costa Rican and residing for the same period in the country, indicates her desire to acquire our nationality;

29. In short, both the present constitutional provision and the draft amendment, in addition to limiting the privilege of naturalization through marriage to women, establish two different hypotheses:

a) the "compulsory" one of a foreign woman who, upon marrying a Costa Rican, loses her nationality, who in both instances is granted unconditional and automatic naturalization;

b) the "voluntary" one of a foreign woman who does not lose her nationality, to whom both texts grant an option of naturalization. In this hypothesis, the draft amendment merely adds new requirements of two years marriage and residence in the country concurrently. (See principal opinion, par. 44.).

30. Nevertheless, the text of the motion by the Special Committee clearly shows, and the minutes confirm, that the change was intentional:

a) That the additional requirements in reference of two years marriage and residence in the country, the same as the original opportunity to choose Costa Rican nationality, would apply to what I have called "compulsory" naturalization --which it would no longer be-- of the foreign spouse who loses her nationality, and for this reason would be stateless as long as she had not fulfilled the time periods in reference. (See principal opinion, paras. 45-47);

b) That, by virtue of this same concurrence of requirements, the motion completely eliminates the hypothesis of "voluntary" naturalization, i.e., that of the foreign spouse who does not lose her nationality through marriage, who then would be "deprived of a privilege" and submitted to the normal procedures and requirements of every other naturalization. (See principal opinion, par. 48.).

31. In this matter, my first disagreement with the majority is that, although I recognize that the Costa Rican State has no specifically compulsory obligation to grant a specific privilege for naturalization through marriage, I believe nevertheless that, upon having granted it in the broad manner in which the present text of the Constitution does so (see No. 29, supra), several substantive principles and standards of interpretation that reject the possibility of restricting it come into play. In this regard, I refer to what has been said concerning the progressive nature and the expansive force of human rights (supra, No. 3 ff.), by virtue of which the right to a nationality, established by Article 20(1) of the Convention, would incorporate the accidental historical contents that the State freely gave it, if not in every instance, because I believe that in this matter the criteria of reasonability, proportionality,

equality, and nondiscrimination are necessarily relative and variable, then, in dealing with naturalization through marriage, because there is a confluence here of other principles of content and even duties assumed by the States, such as those established in Article 3 of the 1957 Convention on the Nationality of Married Women, in accordance with which:

> Article 3
>
> 1. Each Contracting State agrees that the alien wife of one of its nationals may, at her request, acquire the nationality of her husband through a specially privileged naturalization procedure; the grant of such nationality may be subject to such limitations as may be imposed in the interest of national security or public policy.
>
> 2. Each Contracting State agrees that the present Convention shall not be construed as affecting any legislation or judicial practice by which the alien wife of one of its nationals may, at her request, acquire her husband's nationality as a matter of right.

32. These principles apply to the case under study, in my opinion, upon taking up the Convention through Article 29, as means of interpretation, not only to channel the criteria of reasonability applicable to the principles of equality and nondiscrimination by reason of sex or social status (matrimony obviously is such) [Arts. 24 and 1(1) American Convention; see supra, No. 8 ff.], but also, and finally, to enhance the very content of the rights to protection of the family in Article 17(1) and (2) thereof, which seems clearly to postulate the social and legal unity of matrimony as a basis of family unity itself.

33. Therefore, under the aforementioned hypothesis, I disagree in the sense that the privilege of voluntary naturalization through marriage, at least in favor of women, already established in the Constitution as a secondary right or legitimate interest, although not requirable in itself, positively, at least claimable by refuting whatever impairs or restricts it without sufficient justification, as I see the case of the amendments proposed here to be, by imposing a new restriction of two years of marriage and residence in order to make naturalization possible, without such restriction having an objectively convincing basis. In this regard, I disagree with the conclusion set forth in paragraph 48 of the principal opinion, which led to vote No. 1 of the majority. [See my Conclusion No. 6(b).]

34. I have to admit that one could see a certain apparent contradiction behind all of this: how can I on the one hand accept as legitimate the State's hardening conditions for granting nationality in general, for example, by increasing the periods of residence required, while on the other hand affirm the right for the privileged status of the foreign spouse not to be hardened, not even through the establishment of short periods of marriage or residence, whether or not the spouse loses his former nationality through marriage. The truth is that, aside from the objective and, in my opinion, clear reasons that link naturalization through marriage not so much to the right to nationality in itself, as to that right, seen in relation to the right to family unity, in the end, a series of values and criteria of personal value also impress themselves on the judge's mind. Nevertheless, they are not as subjective as would appear, because they are tied in with a shared cultural background. Actually, there is no need for a further argument to state, with the certainty of being in agreement, that conjugal unity is a right and a fundamental duty in our societies, that an

important factor of that unity is that of equal opportunities for the spouses, and stemming therefrom, their right to one same nationality, and that the discretion the state enjoys in granting, restricting, or denying the privilege of its nationality to any foreigner is not the same as the obligation or the almost absolute obligation it has to make that status available to a person establishing with one of its native-born citizens a family, which all national and international instruments have called the core and basis of society.

35. The amendments proposed by the Special Committee in its motion to replace Article 14(4) of the draft posed in the first place what consider a clearly unreasonable, disproportionate, and discriminatory aggravation to the detriment of a foreign spouse who loses his nationality through marriage and who is left stateless without suitable justification for such detriment at least for the two years of marriage and residence that the draft proposes. As I said, the true fact that this statelessness will not be directly imputable to the state of Costa Rica but rather to the original nationality does not remove from the former certain responsibility derived from the over-all commitment it has as a member of the international community to seek progressively the elimination of such " juridical limbo " or, above all, the more specific responsibility not to aggravate it by withdrawing the concession that it has already granted, which was generous in the beginning, but which later was made conditional, in favor of persons condemned to that limbo by the fact of having married a Costa Rican. Again, the application of these criteria of interpretation that are principles and ends, expressed earlier (see supra, No. 22 ff.), permits me to reach the conclusion that the amendments proposed are contrary to the right to a nationality set forth in Article 20(1) of the Convention, in relation to the rights to protection of the family in Article 17(1) and (2) and to the principles of equality and nondiscrimination in Articles 1(1) and 24. In this regard, I formally dissent from the conclusion announced in paragraph 48 of the principal opinion, which in general became Conclusion No. 1 thereof. [See my Conclusion No. 6(c).]

36. In the second place, the motion of the Special Committee, in excluding from the preferential right to naturalization through marriage, as has been stated, a foreign spouse who does not lose his nationality through such marriage [see supra, No. 30(b) and principal opinion par. 47], in my judgment would create an- even more patent discrimination, totally unjustified and wholly coincidental, to the detriment of persons who merit no different characterization from the standpoint of the granting of Costa Rican nationality, because it is obvious that the preference given some and the secondary position given others have nothing to do with their greater or lesser assimilation into the national community, which is, in the final analysis, the only reasonable standard for justifying legal distinctions in this area. With regard to this point, then, I believe that the motion is discriminatory and incompatible with Articles 20(1), 24 and 1(1) of the Convention. Again I dissent from paragraph 48 and from Conclusion No. 1 of the principal opinion. [See my Conclusion No. 6(d).]

R. E. PIZA E.

CHARLES MOYER
Secretary