

Dissenting Opinion of Judge Jackman

I have, regretfully, found myself unable to join the majority of the Court in its decision to respond favourably to the “Request for an Advisory Opinion” dated March 30th 2001, by the Inter-American Commission on Human Rights (*“the Commission”*) because, in my view, the Request does not fulfill the criteria for admissibility set out in Article 64 of the Convention, as consistently interpreted by this Court from the moment of its very first advisory opinion.

In its communication requesting the issuing of an advisory opinion, the Commission states the “objective” of the request in the following terms.

“The Commission deems it necessary to interpret whether Articles 8 and 25 of the American Convention on Human Rights include limits to the good judgment and discretion of the States to issue special measures of protection in accordance with Article 19 thereof and requires (*sic*) the Court to express general and valid guidelines in conformance to the framework of the Convention.”

The Commission then indicates the five “special measures of protection” on which it desires the Court to pronounce (*cf.* para 4 of this Opinion):

- a. separation of young persons (minors) from their parents and/or family, on the basis of a ruling by a decision-making organ, made without due process, that their families are not in a position to afford their education or maintenance;
- b. deprivation of liberty of minors by internment in guardianship or custodial institutions on the basis of a determination that they have been abandoned or are prone to fall into situations of risk or illegality, motives (*“causales”*) which should not be considered of a criminal nature, but, rather, as the result of personal or circumstantial vicissitudes;
- c. the acceptance of confessions by minors in criminal matters without due guarantees;
- d. judicial or administrative proceedings to determine fundamental rights of the minor without legal representation of the minor; and
- e. determination of rights and liberties in judicial and administrative proceedings without guarantees for the right of the minor to be personally heard; and failure to take into account the opinion and preferences of the minor in such determination.*

* My translation

With the greatest respect to the Inter-American Commission on Human Rights, the so-called “objective” of the requested advisory opinion is, in my view, vague almost to the point of meaninglessness, a vagueness that is fatally compounded by the “requirement” that the Court should express “general and valid guidelines”.

Repeatedly in its examination of the scope of the “broad ambit” (*el amplio alcance*) of its consultative function, (cf para. 34 of the present Opinion) the Court has insisted that the fundamental purpose of that function is to render a service to member-states and organs of the Inter-American system in order to assist them “in fulfilling and applying treaties that deal with human rights, without submitting them to the formalities and the system of sanctions of the contentious process”.

It should not be forgotten that in the exercise of its vocation to “throw light on the meaning, object and purpose of the international norms on human rights [and], above all, to provide advice and assistance to the Member States and organs of the OAS in order to enable them to fully and effectively comply with their international obligations in that regard” “the Court is a **judicial** institution of the inter-American system” (OC-1/82: para 19) (my emphasis). As such, the Court should resist invitations to indulge in “purely academic speculation, without a foreseeable application to concrete situations justifying the need for an advisory opinion” (cf. OC-9/87, para 16).

I would suggest that a request to provide “general and valid guidelines” to cover a series of hypotheses that reveal neither public urgency nor juridical complexity is, precisely, an invitation to engage in “purely academic speculation” of a kind which assuredly “would weaken the system established by the Convention and would distort the advisory jurisdiction of the Court.” (cf. OC-1/82, para 25).

For these reasons I have declined to participate in the deliberations on this Opinion, and herewith record my vote against it in its entirety.

Oliver Jackman
Judge

Manuel E. Ventura Robles
Secretary

