

INTERAMERICAN COURT OF HUMAN RIGHTS

REQUEST FOR A CONSULTATIVE OPINION

Presented by

THE REPUBLIC OF COLOMBIA

with regard to

**OBLIGATIONS IN MATTERS OF HUMAN RIGHTS OF A STATE THAT HAS
DENOUNCED THE *AMERICAN CONVENTION ON HUMAN RIGHTS*, AND
ATTEMPTS TO WITHDRAW FROM THE OAS**

San José de Costa Rica

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Content

Introduction

- I. Competency and Admissibility
 - A. Competency of the Court to Give an Opinion
 - B. Legitimacy of the Request
- II. Considerations giving rise to the Consultation
- III. Provisions for which an interpretation is sought
 - A. General Considerations
 - B. Specific Provisions
- IV. Specific questions on which the Honorable Court's opinion is sought
 - A. Structure of the Request
 - B. First question: The effect of Denunciation of the Convention
 - C. Second question: The Effect of Withdrawal from the OAS
 - D. Third question: Mechanisms of Protection of Human Rights
- V. Name and Address of the Agent of the State

INTRODUCTION

1. The Republic of Colombia (hereinafter, "Colombia"), a Member State of the Organization of American States and a State party of the *American Convention on Human Rights - the Pact of San Jose* (hereinafter, "the American Convention", "the Pact of San Jose" or "the Pact") submits this Request for a Consultative Opinion to the Inter-American Court of Human Rights (hereinafter, "the Inter-American Court" or "the Court") in the exercise prerogatives contained in Article 64.1 of the Pact, according to which:

[...]

"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".

[...]

2. This request is made further in conformity with the terms of Article 70.1 and 70.2 of the Court's Regulations, according to which:

[...]

1. *Requests for consultative opinions provided for in Article 64.1 of the Convention shall formulate specific and precise questions on which the Court's opinion is sought.*
2. *Requests for Consultative Opinion formulated by a member State or by the Commission shall also indicate the provisions for which an interpretation is sought, the considerations that originate the consultation and the name and address of the Agent or Delegates.*

[...]

3. This Request refers to the mechanisms for the international protection of human rights available in those countries which claim to abandon the Inter-American System of Human Rights ["the Inter-American System"], and for this purpose, denounce the Convention and likewise denounce the Charter of the Organization of American States itself ["the Charter" and "the OAS", respectively], and therefore attempt to cease to be members of that regional organization.
4. The "Request for a Consultative Opinion" proposed to the Court refers to three aspects of a general nature, namely:

(one) The scope of international obligations in the matter of the protection and promotion of human rights of a member State of the OAS which has

denounced the American Convention;

(two) The effects on those obligations of the fact that that State subsequently takes the extreme measure of denouncing the Charter of the OAS, and seeks effectively to withdraw from it; and,

(three) The mechanisms available, on the one hand, to the international community, and in particular OAS member States, to demand compliance with those obligations and to enforce them; and on the other, to the individuals subject to the jurisdiction of the denouncing State, to demand protection of their human rights, when there is a situation of serious and systematic violations of those rights.

5. First and foremost, the requesting Government wishes to make clear that this Request has been made in abstract terms, and that the questions proposed in it are of general application, as is appropriate for a question of law which is submitted to a court of law, whose business it is to exercise competency in consultative matters, in the context of the provisions of the Convention.
6. For this reason, the Opinion that the Court may issue with respect to these questions has a permanent value, and will serve to provide guidance to all member States and to the Organization and its organs, in the event that at some State in the continent in the future feels inclined to take actions designed to secure its disengagement from the Inter-American System. For this reason, the usefulness and importance which the Consultative Opinion will have, should the Honorable Court decide to issue one, are evident.
7. This Request for a Consultative Opinion has the following structure:
 - I. Competency and admissibility
 - II. Considerations which gave origin to the consultation
 - II. Provisions for which an interpretation is requested
 - III. Specific questions on which the opinion of the Honourable Court is sought
 - V. Name and address of the Agent of the State.

I. COMPETENCY AND ADMISSIBILITY

A. Competency of the Court to issue the Opinion

8. In the light of the terms of Article 64 of the American Convention, cited above, the Court is fully competent occupy itself with this Request, and to reply to the

questions formulated.

9. Its competency *ratione personae* is established by the fact that the Republic of Colombia, as requesting State, is a member State of the OAS, and is therefore entitled to place consultations before the Court.
10. The Court has competency *ratione loci* because the consultation clearly refers to the protection of human rights in any state in the Americas. It is important to place it on record at the outset, that a State that denounces the Charter of the OAS does not lose its status as "a State in the Americas", by the fact that the regime that governs it seeks to withdraw from the OAS; and this in itself is a factor which may be pertinent when the Court comes to make its analysis of the questions submitted to it, through this Request, in particular the Third Question.
11. With regard to competency *ratione materiae*, this Request refers to an interpretation of the Convention and of "other treaties concerning the protection of human rights in the States of the Americas", in particular the Charter of the OAS and the American Declaration on the Rights and Duties of Man of 1948 "[the American Declaration]".
12. In Section III of this Request, there is an account of the specific provisions of these instruments for which an interpretation is requested; but for the time being, it would be appropriate to emphasize that the Court has already stated that it is competent to interpret the provisions of the Charter referring to human rights¹.
13. With regard to the American declaration, in its consultative opinion OC-10 of 40 July 14, 1989 the Court concluded that for member states of the OAS, that opinion is "a source of international obligations", and issued some pronouncements in the same context which it is worth reproducing in their entirety, because they serve to provide an appropriate framework for this consultation.

14. The Court said:

[...]

44. Taking account of the fact that the OAS Charter and the American Convention are treaties with respect to which the Court may exercise consultative competency under Article 64.1, the Court may interpret the American Declaration and issue a consultative opinion on it in the context

¹ ICHR [Court], "Otros Tratados" Objeto de la Función Consultiva de la Corte (art. 64 Convención Americana sobre Derechos Humanos). Consultative Opinion OC-1/82 September 2, 1982, Series A, No. 1, par. 34; ICHR [Court], *Interpretación de la Declaración Americana de los Derechos y Deberes del Hombre en el Marco del Artículo 64 de la Convención Americana sobre Derechos Humanos*. Consultative Opinion OC-10/89 July 14, 1989, Series A, No. 10, par 44

and within the limits of its competency where necessary to interpret such instruments.

45. For the OAS member States the Declaration is the text that determines what human rights are referred to in the Charter. Further, Articles 1.2b) and 20 of the Commission's Statute also define the competency of the same with regard to the human rights covered by the Convention. In other words. For these States, the Americana Declaration is, where relevant and in relation to the OAS Charter, a source of international obligations.

46. For the States Parties to the Convention, the specific source of their obligations with regard to their protection of human rights is, in principle, the Convention itself. However, it should be noted that according to Article 29.d), although the Convention itself is the principal instrument governing the States Parties to it, that fact of being members of the OAS does not release them from the obligations derived for them from the Declaration.,

47. The circumstance that the Declaration is not a treaty does not therefore mean that it lacks legal effects nor that the Court is impeded from interpreting it in the context of the above."

[...]"² of the

15. On the basis of these considerations, the Court concluded:

"[...]

... that Article 64.1 of the American Convention authorizes the Court, upon the request of a member State of the OAS, or, where competent, one of its organs, to render consultative opinions on the interpretation of the American Declaration of the Rights and Duties of Man in the context and within the limits of competency in relation to the Charter and the Convention or other treaties related to the protection of human rights in the States of the Americas.

[...]"³

B. The Legitimacy of the Request.

16. It is also appropriate to remember that the Court has developed certain very precise jurisprudential criteria with regard to the relevance and pertinence of replying to a Request for a Consultative Opinion, because in practice and in jurisprudence of the Court, it is very clear that compliance with the regulatory

² ICHR [Court], *Interpretación de la Declaración Americana de los Derechos y Deberes del Hombre en el Marco del Artículo 64 de la Convención Americana sobre Derechos Humanos*. Consultative Opinion OC-10/89 July 14, 1989, Series A No. 10

³ *Ibid*, Resolution.

requirements for the formulation of a consultation does not imply that the Court is obliged to respond to it. The Court is always obliged to evaluate each specific request for the pertinence of exercising its consultative function.

17. The Court therefore has wide powers of appreciation in order to determine whether a consultation is in order in each case, though this power of appreciation may not be confounded with a simple discretionary authority to issue the opinion requested, or not to do so. The Court itself has said:

[...]

If it refrains from giving a response to a consultation received, the Court must have reasons for its decision derived from that the petition goes beyond the limits that the Convention sets for its competency in this field. And further any decision in which the Court considers that it should not provide a response to a request for a consultative opinion shall be motivated as required by Article 66 of the Convention."

[...]⁴

18. In particular, the Court has indicated certain specific conditions which, if present, may lead to the use of its option not to provide a response to a request. According to the Court, in general, a request for a consultative opinion:

- must not conceal a contentious case, or claim to obtain a premature pronouncement on an issue or matter which may eventually be submitted to the Court in a contentious case;
- must not be used as a mechanism to obtain an indirect pronouncement on a matter in litigation or in dispute, at internal level;
- must not be used as an instrument of internal political debate;
- must not exclusively cover issues on which the Court has already been pronouncement in its jurisprudence; and
- must not attempt to secure a solution on matters of fact, but should seek to clarify the meaning, purpose and reason of international laws on human rights, and above all, assist OAS member States and organs to comply fully

⁴ ICHR [Court], *La Institución del Asilo y Reconocimiento como Derecho Humano en el Sistema Interamericano de Protección* (Interpretación y Alcance de los Artículos 5, 22.7 and 22.8, in relation to Article 1.1 of the American Convention on Human Rights), Consultative Opinion OC-25/18 of May 30, 2018, par. 19.

and effectively with their international obligations⁵.

19. The requesting Government is convinced that none of the situations given above are present in the case of this Request for a Consultative Opinion.

20. To the extent that the Request refers to a very specific situation, and does not give rise to abstract speculation, there is full justification for the legitimate interest that Colombia, as a OAS member State and as a party to the American Convention, has for a consultative opinion to be issued. For the reasons given, it is therefore in order for the Court to provide a full response to this consultation.

II. CONSIDERATIONS THAT GAVE RISE TO THE CONSULTATION

21. The jurisprudence of the Court considers it necessary that a consultative opinion have a practical development in Inter-American law. It said as much, when it held that:

[...]

"In effect, the consultative competency of the Court is, as it has itself said, an "alternative judicial method" (Restrictions on the death penalty) (Arts 4.2 and 4.4, American Convention on Human Rights). Consultative Opinion OC-3/83 of September 8, 1983 Series A No. 3 paragraph 43) for the protection of internationally-recognized human rights, and this indicates that that competency must not in principle be exercised through purely academic speculation, but be a foreseeable application to concrete situations that justify the interest that it issue a consultative opinion."

[...] ⁶

22. The concrete situation that justifies the issue of the opinion requested is that recent events in the region show that a situation may occur at any time, that a State in the continent pursues actions to disengage itself from its obligations in the terms of the American Convention and of the OAS Charter.

23. If in that State there is also a general situation of serious and systematic

⁵ Cfr. ICHR [Court]. *El derecho a la información sobre la asistencia consular en el marco de las garantías del debido proceso legal* Consultative Opinion OC-16/99 October 1, 1999. Series A No. 16, par. 47; ICHR [Court]. *Condición jurídica y derechos de los migrantes indocumentados*. Consultative Opinion OC-18/03 September 17, 2003. Series A No. 18, par. 63 y ICHR [Court]. *Identidad de género, e igualdad y no discriminación a parejas del mismo sexo. Obligaciones estatales en relación con el cambio de nombre, la identidad de género, y los derechos derivados de un vínculo entre parejas del mismo sexo* (interpretation and scope of Articles 1.1, 3, 7, 11.2, 13, 17, 18 y 24, in relation to Article 1 of the American Convention on Human Rights). Consultative Opinion OC-24/17 of November 24, 2017. Series A No. 24, par.

⁶ ICHR [Court], *Garantías Judiciales en Estados de Emergencia* (Arts. 27.2, 25 and 8 American Convention on Human Rights Consultative Opinion OC-9/87 October 6, 1987. Series A, No. 9. par. 16

violations of human rights, duly documented by organs of the organization including the IHRC, there arises a need to determine whether those actions produce the effect of entirely eliminating the international protection of human rights from individuals subject to the jurisdiction of the authorities of that State.

24. A situation such as that proposed will directly affect the protection of human rights in the Americas, a matter in which all member States of the OAS have a legitimate interest, and this is the reason for the formulation of this Request.

III. PROVISIONS FOR WHICH INTERPRETATION IS REQUESTED

A. General Considerations

25. The obligations of States in the Americas to protect, respect and guarantee human rights are incorporated into a number of international instruments which claim to protect individuals and their rights, and to guarantee their fundamental liberties.
26. In the set of international instruments on the matter, the Inter-American System has the following, amongst others: *The American Declaration of the Rights and Duties of Man; the Final Act of the V Meeting of Foreign Ministers, 1959; the American Convention on Human Rights; the Interamerican Convention to Prevent and Sanction Torture; the Protocol of San Salvador; the Additional Protocol to the American Convention on Matter of Economic, Social and Cultural Rights; the Protocol to the American Convention on Human Rights related to the Abolition of the Death Penalty; the Convention of Belem do Para; the Inter-American Convention to Prevent, Sanction and Eradicate Violence against Women; the Interamerican Convention on the Forced Disappearance of Persons; the American Declaration on the Rights of Indigenous Peoples; the Inter-American Democratic Charter; Principles and Good Practices on the Protection of Persons Deprived of their Liberty in the Americas.*
27. The *American Convention on Human Rights* is, by definition, the statute which culminates the process of codification of human rights matters in the Americas, because it incorporates a catalogue of rights and obligations which are inviolable for the human person, and establishes a system of regional protection of the fundamental rights of the individual, or persons, which comprises the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights.
28. In this context, the Request for a Consultative Opinion is intended to enable the honourable Inter-American Court to make a deeper interpretation of the provisions for the protection of human rights in conventions and in common law, attending to the provisions of Article 64.1 of the *American Convention on Human Rights*, and which are covered by the expression "other treaties",

which appears in that Article⁷.

29. As the Honorable Court said in Consultative Opinion OC-1/82 of September 24, 1982

[...]

The consultative competency of the Court may be exercised in general over any provision concerning the protection of human rights of any international treaty applicable in the States of the Americas, regardless of whether it is bilateral or multilateral, whatever its principal object, or of which States alien to the Interamerican System are or may be parties."

[...]⁸

30. Article 78 of the Convention deserves special mention, because it establishes the possibility of denouncing that international treaty. It states that denunciation will not affect obligations concerning acts performed by the State denouncing "prior to the date on which the denunciation produces its effect", but it says nothing on obligations related to acts performed after that date.

31. Therefore, when there is a rupture of the democratic order in the denouncing State, and there is a situation of systematic and generalised violation of human rights there, it might be thought that the denunciation of the American Convention would individuals under the jurisdiction of that State without protection.

32. Additionally, it has long been recognized that, totally regardless of the Convention, the Inter-American Court, as the mechanism for protection and promotion of human rights, has, in respect of all the States in the Americas, whether or not they be parties to the treaty, certain statutory competencies directly derived from the OAS Charter and the American Declaration. But if the State in question further decides to denounce the Charter, and attempts to abandon the regional body and the inter-American system altogether, it would be necessary to determine whether this implies a total absence of effective mechanisms for the protection of human rights in a situation such as that described.

33. Against this background, and taking account of the fact that human rights treaties are designed not so much to establish a balance of interest between States, but rather, to guarantee the enjoyment of rights and liberties of the

⁷ ICHR [Court], "Otros Tratados" Objeto de la Función Consultiva de la Corte (Art. 64 American Convention on Human Rights). Consultative Opinion OC-1182 of September 24, 1982, Series A, No. 1

⁸ ICHR [Court], "Otros Tratados" Objeto de la Función Consultiva de la Corte (Art. 64 American Convention on Human Rights). Consultative Opinion OC-1/82 of September 24, 1982, Series A No. 1, Para 1, decision.

human being, Colombia considers that it is highly convenient that the Honorable Court should interpret the scope not only of several provisions of the Charter and of the American Declaration, but also of a number of substantive Articles of the Convention, and Article 78.2, referring to the scope and effects of denunciation of the Convention.

B. Specific Provisions

34. The provisions for which interpretation is requested belong to three diplomatic instruments, namely, the American Declaration, the OAS Charter and the American Convention.

(one) The Court is requested to interpret clauses of the Preamble of the American Declaration, specifically:

- a. The four un-numbered paragraphs in the Considerations of Resolution XXX of the IX American International Conference, adopting the American Declaration; and
- b. The six un-numbered paragraphs of the Preamble of the Declaration itself;

(two) The Court is requested to interpret the following Articles of the OAS Charter:

- a. The first five paragraphs, unnumbered, of the Preamble;
- b. Article 3.I);
- c. Article 17;
- d. Article 45;
- e. Article 53;
- f. Article 106.

(three) The Court is requested to interpret the following Articles of the American Convention:

- a. The five unnumbered paragraphs of the Preamble;
- b. Article 1, "Obligation to respect rights";
- c. Article 2, "Duty to adopt provisions of internal law";
- d. Article 27, "Suspension of guarantees";
- e. Article 29, "Rules of interpretation";
- f. Article 30, "Scope of restrictions";
- g. Article 31, Recognition of other rights;
- h. Part II, "Means of protection" (Articles 33-65);
- i. Article 78.

IV. SPECIFIC QUESTIONS ON WHICH THE COURT'S OPINION IS SOUGHT.

35. With the foregoing considerations, the Republic of Colombia respectfully requests the Honorable Inter-American Court of Human Rights to answer the following questions:

FIRST QUESTION

In the light of international law, conventions and common law, and in particular, the American Declaration of the Rights and Duties of Man of 1948: "*What obligations in the matters of human rights does a member State of the Organization of American States have when it has denounced the American Convention on Human Rights?*"

SECOND QUESTION

In the event that that State further denounces the Charter of the Organization of American States, and seeks to withdraw from that Organization, *What effects do that denunciation and withdrawal have on the obligations referred to in the FIRST QUESTION?*

THIRD QUESTION

When a situation of serious and systematic violations of human rights arises under the jurisdiction of a State in the Americas which has denounced the American Convention and the Charter of the OAS,

1. *What obligations do the remaining member States of the OAS have in matters of human rights?*
2. *What mechanisms do member States of the OAS have to enforce those obligations?*
3. *To what mechanisms of international protection of human rights can persons subject to the jurisdiction of the denouncing state take recourse?*

36. The following are some considerations which allow the true scope and purpose of the three questions which are the object matter of the Request to be better understood.

A. Structure of the Request

37. As can be seen, the three questions posed follow a logical sequence: the first question refers to international provisions on human rights that create binding obligations and are applicable to a State which, although it continues to be a



member of the OAS, decides to denounce the American Convention. The second question refers to a legal situation in which, with regard to those provisions, that State places itself when it takes the additional step of denouncing the Charter of the OAS, and separating itself entirely from the regional organization.

38. The intention of the third question is to obtain the enlightenment of the Court as to the remaining obligations of member States of the OAS with regard to the State denouncing, and the practical mechanisms that exist in international law in general (i) to demand that the State that has taken these extreme measures comply with the obligations mentioned, and, by those means, enforce them; and (ii) to secure the protection of the human rights of the individuals subject to the jurisdiction of that State.
39. In other words, while the first two questions refer to the content of substantive obligations which a State has under international law when it adopts the course of action described, the third question refers rather to the adjective or instrumental question of what mechanisms exist to secure compliance with those obligations.

B. First Question. The effect of Denunciation of the Convention

40. With regard to the First Question, it would be appropriate to emphasize, first, that the mention made in it of the American declaration is not an idle one, since it is so very widely known that the Declaration is a fundamental instrument in the Inter-American System of Human Rights, and on the basis of that Declaration, the organs of protection, and in particular the Inter-American Commission for Human Rights ["ICHR"], may act in the terms of its Statute.
41. What the first question seeks is to obtain an indication from the Court as to what obligations a State has in the matter of human rights when, although it has denounced the Convention, it continues to be a member of the OAS.
42. For the requesting Government, it is clear that when State loses its status of party to the Convention, it ceases to be subject to certain contractual obligations in relation to the other States Party, but this cannot mean that it is released from all international ties in relation to the promotion and protection of human rights of the individuals subject to its jurisdiction and control.
43. On the one hand, in the light of general international law or common law - and part of it is without doubt contained in the Universal Declaration of Human Rights, and in the American Declaration, both of 1948 - there is a basic obligation in relation to the protection of human rights and fundamental liberties from which no State belonging to the international community can escape. In relation to specific rights, it is also possible that these are examples

of *ius cogens*, or authentic obligations *erga omnes*. It would be very valuable have the Court's analysis on these aspects of the matter in the light of general international law.

44. Further, all States in this continent, whether or not they are members of the OAS, are bound in one way or another by the American Declaration, in which many of the universal provisions mentioned in the preceding paragraphs are contained; and for this reason the ICHR may exercise certain competences with regard to those States, regardless of their situation in relation to the Convention.
45. The point is to determine which legal bonds bind members of the OAS in the matter of human rights, aside from the Convention. In other words, the intension of the First Question is to obtain clarity as to what legal framework would be applicable to States in the continent which, for whatever reason, cease to be parties to the Convention but continue to be bound by the Charter, and the provisions that develop it, as is the case of the American Declaration.

C. Second Question. The Effect of an Eventual Withdrawal from the OAS

46. The proposal in the second question to the Court is to discover what happens to the obligations of a member state of the OAS when his attempts to withdraw from that organisation. Once the Court has dealt with the first question, and there is greater certainty as to what the precise content of the obligations on human rights are which shall remain for a state which is no which is not a party to the convention in the light of international common law and the American declaration, it is would be convenient to determine whether these obligations disappear entirely due to the fact that the authorities of that state seek to abandon the regional organization.
47. Here, the reasoning meant to be applied might be similar to that mentioned above: it is difficult to accept that by the simple fact that the authorities de facto of an American other state in the Americas attempt to terminate the membership with the OAS, that state remains totally free from any international legal bonds in the matter of human rights. For this reason, the question addresses the question to determine what the legal effect is of an eventual withdrawal from the OAS with regard to the obligations mentioned, that is, what are the obligations of those questions was obligations remain on those matters, and continue to be binding for that State in the light of general international law.
48. Therefore, it will be particularly interesting to have the opinion of the Court as to whether the positive obligations which all States of the Americas have in the light of the American Declaration, are affected by the circumstance that one of those States attempts to terminate its membership of the Organization.

D. Third Question. Mechanisms of Protection of Human Rights

49. Finally, with the Third Question, the intention is to obtain guidance from the Court as to the manner of enforcing obligations referred to in Questions 1 and 2. This is the core of the Request for the Consultative Opinion, because with the reply which the Court gives to it, the remaining States of the Americas will know how to proceed if the State denouncing continues to be in a generalized and systematic situation of human rights violations of human rights and fundamental liberties.
50. As an introduction, the generic question is posed as to what obligations in terms of international law, the remaining member States of the OAS have with respect to the denouncing State (Section 1)
51. Next, the question is whether the mechanisms of protection of the Inter-American System, ICHR, are legitimized to act with regard to a country which has placed itself in the situation described, and what other practical mechanisms are offered by general international law both for States and for individuals, to demand and enforce compliance with international legal obligations which that country may have, despite the fact that it may have ceased to be a party to the Convention, and may have attempted or is attempting to withdraw from the OAS (Sections 2 and 3).
52. In this context, further, it will evidently be most useful to know whether there are international mechanism mechanisms of protection to which the individuals subject to the jurisdiction to the State which has separated itself from the Convention and from the OAS Charter may seek remedy, in order to secure the protection of his or her fundamental rights and liberties.

V. NAME AND ADDRESS OF THE AGENT OF THE STATE

Name of the Agent: Ambassador JUAN JOSÉ QUINTANA

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(Signed)

JUAN JOSÉ QUINTANA
Representative of the Republic of Colombia