

October 13, 2017

REF.: Request for an Advisory Opinion

Sir:

I have the honor to write to you on behalf of the Inter-American Commission on Human Rights to submit to the Inter-American Court of Human Rights a request for an Advisory Opinion on “Democracy and Human Rights in the context of impeachment” in accordance with Article 64(1) of the American Convention on Human Rights.

Accept, Sir, the assurances of my highest consideration.



Paulo Abrao
Executive Secretary

Pablo Saavedra Alessandri, Secretary
Inter-American Court of Human Rights
Apartado 6906-1000,
San José, Costa Rica

Annex

REQUEST FOR AN ADVISORY OPINION
SUBMITTED TO THE INTER-AMERICAN COURT OF HUMAN
RIGHTS

DEMOCRACY AND HUMAN RIGHTS IN THE CONTEXT OF IMPEACHMENT

I. INTRODUCTION

1. The Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission” or “the IACHR”) submits to the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”) this request for an Advisory Opinion in accordance with the provisions of Articles 64(1) of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) and 70 of the Court’s Rules of Procedure.

2. The purpose of this request for an Advisory Opinion is to allow the Inter-American Court to examine the inextricable link between democracy and human rights, specifically in cases in which the Executive is changed in circumstances that cast doubt on its legitimacy or the principle of the separation of powers, including when a democratically elected President is impeached in conditions that cast strong doubts on the safeguards of due process.

3. Over recent years a process of democratization has been consolidated in the States of the American continent, resulting in the strengthening of institutions and mechanisms to protect human rights within the framework of the rule of law, as well as democracies with increased guarantees of stability. This has allowed the region to overcome a decades-old tradition of military coups d’état or the seizure of power by force.

4. However, in recent years, situations such as those mentioned in the preceding paragraph have occurred in the Americas and the Commission, through its many mechanisms, has been monitoring them closely. In this context, the Commission has raised the alarm and expressed its concern owing to the risk that such situations may pose for the full exercise of human rights in a democratic State from both a collective perspective in relation to society, and an individual perspective in relation to prejudice to specific individuals.

5. Accordingly, in the case of the *coup d’état that occurred in Honduras in 2009*, for example, the Commission made an initial statement in a press release and then, the same year, published a country report.¹ Thus, on June 28, 2009, the IACHR strongly condemned “the interruption of the constitutional order in Honduras” and made an urgent call “to restore the democratic order in Honduras and to respect human rights, the rule of law and the Inter-American Democratic Charter.”²

¹ IACHR. Honduras: Human rights and the coup d’état. OEA/ Ser.L/V/11. Doc.55, December 30, 2009.

² IACHR. Press release No. 42/09: IACHR strongly condemns the coup d’état in Honduras, June 28, 2009. Available at: <http://www.cidh.org/Comunicados/English/2009/42-09eng.htm>.

6. In this context, the Commission asked that it be allowed to visit Honduras and, at the same time, granted numerous precautionary measures, requested information on the risks for certain persons as a result of the coup d'état; asked for information pursuant to its authority under Article 41 of the American Convention, and made requests for information under Article XIV of the Inter-American Convention on Forced Disappearance of Persons.³

7. An example of the human rights violations associated with reprisals for condemning the coup d'état was dealt with by the inter-American system of petitions and cases, first by the Inter-American Commission and then by the Inter-American Court in the case of *López Lone et al. v. Honduras* concerning the dismissal of a group of judges. The Commission will refer below to some relevant points of the Court's decision in that case.

8. In 2012, the Commission also monitored the *impeachment proceedings by which the Legislature removed former President Fernando Lugo in Paraguay*. In this regard, the Commission issued a press release in which it expressed its profound concern regarding the circumstances of the impeachment process. Based on the information it had at the time, the IACHR considered "unacceptable the speed with which the impeachment of the constitutional and democratically elected President was conducted," and stated that the rule of law in Paraguay had been affected.⁴

9. More recently, and regarding *the impeachment proceedings by which the Legislature removed former President Dilma Rousseff in Brazil* in 2016, the IACHR also issued a press release expressing its concern regarding the removal of the constitutional and democratically elected President. Specifically, the Commission stated that in view of "the accusations about irregularities, arbitrariness and lack of due process guarantees during the stages of the procedure ... the monitoring and supervision functions that the competent authorities of the Judiciary in Brazil implement in this case"⁵ were especially important. Likewise, the Commission recalled that the organs of international supervision were also closely following the case, and mentioned "the potential repercussions that the destitution process had on the rights of President Rousseff and of Brazilian society."⁶

10. The Commission considers that these situations raise the alert about possible distortions of the impeachment mechanism and the consequent danger that it be used arbitrarily to conceal a parliamentary coup d'état. This danger reveals the importance of the Court issuing a general ruling, unrelated to particular cases, on the specific implications of the impeachment of a democratically

³ IACHR. Honduras: human rights and coup d'état. OEA/Ser.L/V/11. Doc. 55, December 30, 2009, para. 3. See also: IACHR. Press release No. 47/09: IACHR expresses concern over the suspension of guarantees in Honduras and amplifies precautionary measures, July 3, 2009. Available at: <https://www.cidh.oas.org/Comunicados/English/2009/47-09eng.htm>; IACHR. Press release No. 60/09: IACHR presents preliminary observations on its visit to Honduras, August 21, 2009. Available at: <http://www.cidh.org/Comunicados/English/2009/60-09eng.htm>; IACHR. Press release No. 64/09: IACHR urges Honduras' *de facto* government to respect protests, September 22, 2009. Available at: <http://www.cidh.oas.org/Comunicados/English/2009/64-09eng.htm>; IACHR. Press release No. 65/09: IACHR condemns excessive use of force in repression of demonstrations in Honduras, September 22, 2009. Available at: <http://www.cidh.org/Comunicados/English/2009/65-09eng.htm>; IACHR. Press release No. 68/09: IACHR urges Honduras to respect the rights of people who are in the Brazilian Embassy, September 25, 2009. Available at: <http://www.cidh.org/Comunicados/English/2009/68-09eng.htm>, and IACHR. Press release No. 69/09: IACHR condemns suspension of guarantees in Honduras, September 29, 2009. Available at: <http://www.cidh.org/Comunicados/English/2009/69-09eng.htm>

⁴ IACHR. Press release No. 72/12: IACHR expresses concern over the ousting of the Paraguayan President, June 23, 2012. Available at: http://www.oas.org/en/iachr/media_center/preleases/2012/072.asp

⁵ IACHR. Press release No. 126/16: IACHR expresses concern over impeachment of President of Brazil. September 2, 2016. Available at: http://www.oas.org/en/iachr/media_center/PReleases/2016/126.asp

⁶ IACHR. Press release No. 126/16: IACHR expresses concern over impeachment of President of Brazil. September 2, 2016. Available at: http://www.oas.org/en/iachr/media_center/PReleases/2016/126.asp

elected President in circumstances that raise serious questions about the safeguards of due process, from both a collective and individual perspective, in light of the American Convention on Human Rights and other applicable inter-American instruments.

11. Such a ruling of the Court is essential to safeguard human rights and the democratic institutional framework, regardless of the system used by the States in the region, whether it be presidential, parliamentary, or mixed leaning towards a more presidential or more parliamentary arrangement.

12. The principle of the separation of powers, common to different systems of political organization, in scenarios such as those submitted to the interpretation of the Inter-American Court, may be affected by the possible arbitrary use of impeachment by the Legislature against the Executive through an improper judicialization of what is essentially political. In turn, this principle can be affected by the possible arbitrary use of judicial control of such actions when the Judiciary is politicized. Possible situations of corruption in one or other of the powers of the State further complicate such situations. In both scenarios, the democratic institutions are compromised and there is significant risk to the full exercise of human rights.

13. Consequently, one of the main objectives of this request for an Advisory Opinion is to obtain from the Court and interpretation clarifying the way in which the American Convention on Human Rights and the series of rights that it protects, as well as the Charter of the Organization of American States, the American Declaration of the Rights and Duties of Man, and the Statute of the IACHR, read in conjunction with the Inter-American Democratic Charter, provide the necessary balance between the principle of the separation of powers and the full exercise of the protected rights in favor of both the person subject to impeachment and society as a whole.

14. The Commission will now outline the grounds for the request for an Advisory Opinion, referring, first, to a general and preliminary conceptualization of the mechanism for impeachment of a democratically elected President. Second, the IACHR will refer to developments in the Court's case law in relation to the subject matter of the request to demonstrate the importance of developing and reinforcing standards in this regard, and also that the questions posed in the request are innovative and distinct from this case law. Third, the Commission will advise the Court of the existence of several petitions that it is examining in order to show that this request transcends the said petitions and seeks a ruling of a general scope with an impact on the States of the region. Lastly, the Commission will pose the specific questions to the Court.

15. The Commission reserves the right to indicate its own opinions on the questions raised, once the Inter-American Court has agreed to process this request for an Advisory Opinion and within the time frame established for receiving contributions from the OAS, Member States, civil society, academia, and other interested parties.

16. The Commission appoints the IACHR President, Francisco Eguiguren Praeli, and its Executive Secretary, Paulo Abrao, as Delegates. Also, Elizabeth Abi-Mershed, Deputy Executive Secretary, and Silvia Serrano Guzmán and Christian González Chacón, Executive Secretariat lawyers, will act as Legal Advisers.

II. GENERAL AND PRELIMINARY CONCEPTUALIZATION OF THE MECHANISM FOR

IMPEACHMENT OF A DEMOCRATICALLY ELECTED PRESIDENT

17. The impeachment mechanism is of British origin, and is recognized in the United States of America. Accordingly, it is also established in the different types of political regime on the American continent, both in those of a parliamentary nature (of British origin) such as the Caribbean States and Canada, and in those of a presidential nature (inspired in the United States model) and even in the “rationalized” or “parliamentarized” presidential regimes that exist in some Latin American States, which have incorporated some institutions typical of parliamentary regimes, such as the political responsibility of ministers, the vote of no confidence, etc., into the classical presidential system.

18. Impeachment is a special procedure applied to the President of the Republic and/or certain senior state authorities whereby, when they are accused of committing offenses in the exercise of their functions, serious violations of the Constitution, or even common offenses, the decision on their responsibility and eventual punishment (by removal from office and disqualification from holding public office) will be made by the Congress, Parliament or Legislative Assembly. Thus, it is also known as a “political trial” because the organ that holds it is eminently political in nature.

19. It is necessary to differentiate the nature and scope of impeachment from the vote of censure or of no confidence that, under several legal frameworks of the continent, Parliament may adopt against senior officials in regimes of a parliamentary type or in those of a “parliamentarized” presidential type. Thus, although both impeachment and a vote of censure are adopted by Parliament, by a qualified majority of votes (which is usually two-thirds or half the votes plus one), and both lead to the removal from office of the senior official concerned, the vote of censure consists in the expression of disapproval or lack of confidence in the political performance of high-ranking officials: thus, it refers to political responsibility. To the contrary, impeachment is in order when Presidents or senior officials are accused of offenses or serious errors in the exercise of their office or during their mandate: thus, it is of a “quasi-criminal” nature. It should be noted that in some countries, such as Mexico, impeachment is not established for the President of the Republic and, in the case of senior state officials (including some elected officials, such as federal legislators or governors of federated entities), the grounds are regulated by law, in the understanding that these are not specifically of a criminal nature, because attribution of criminal responsibility is a matter for the criminal courts, following a declaration on the merits by the Chamber of Deputies.

20. Whatever it is called, the Commission considers it important to consult the Court on whether impeachment proceedings held by Congress would be restricted to grounds that are expressly established and, in principle, in the Constitution, involving the attribution of criminal offenses or serious violations of the Constitution. In other words, responsibility of a criminal nature rather than political responsibility arising from the exercise of the office, which can give rise to a different parliamentary procedure such as a vote of no confidence or censure under constitutional regimes that establish this.

21. A Court ruling on these issues would provide guidance on when the impeachment mechanism is exercised validly and when it is used inappropriately, which could occur when it is used to attribute responsibility of a political nature to the President in order to obtain his or her removal from office and eventual disqualification which, it seems, would not correspond to the nature of this “quasi-judicial” parliamentary procedure in the terms described above.

22. The Commission considers it important for the Court to be able to elaborate, in light of the numerous provisions of the American Convention and the American Declaration indicated in the

respective section of this request, on the special protection provided to the President under regimes of a presidential and “parliamentarized” presidential type, and whether this special protection means that the President is excluded from any political responsibility for his or her acts or decisions (which may be attributed in some countries to other senior officials) and can be subject to impeachment merely for the offenses specified in the Constitution or for serious violations of this instrument. Thus, the Commission deems it pertinent to ask the Inter-American Court whether, in cases in which the President is subjected to impeachment accused of responsibility of a political nature, either explicitly or implicitly, or on grounds other than those established in the Constitution, a kind of parliamentary “coup d’état” would have occurred that would be anomalous and invalid in political regimes of a presidential or “parliamentarized” presidential type.

23. As a preliminary consideration, the Commission informs the Court that, in its opinion, the special protection provided to the President, which limits the validity of impeachment to the grounds or causes established in the Constitution, would be justified by his or her status as the regime’s highest authority (Head of State and Head of Government) and democratic election by the people, as well as by the principle of the separation of powers. Thus, the eventual removal of the President should not be left to the discretionary political decision of Congress or Parliament (as in the case of a vote of censure), but rather would require verification of the existence of one of the offenses or violations established in the Constitution.

24. Although this would be the rule corresponding to the nature of impeachment found in the different Constitutions of our continent, some doubts could arise in the particular cases of Argentina (National Constitution, article 53) and Paraguay (article 225) where, in addition to the reference to grounds arising from offenses committed in the exercise of the office or common offenses, express reference is made to “poor performance” of the office. One aspect that it is important for the Court to clarify is whether such grounds signify that, in those countries, impeachment of the President would be admitted even for reasons of political responsibility arising from objections to his or her performance or actions while in office. An opinion by the Inter-American Court on this possible understanding in light of the American Declaration and the Convention would be extremely relevant.

25. In principle, the IACHR considers that the above would entail a flagrant distortion of impeachment and would equate it to the parliamentary censure of the President, which could be understood to be incompatible with the presidential and even the “parliamentarized” presidential regime, where the President has no political responsibility, and this can be required of other senior officials. Thus, the IACHR considers it important that the Court is able to evaluate, in light of the said instruments, the dangers of grounds such as “poor performance” of the office, taking into account that this could be understood as the existence of some serious functional or personal misconduct of the President that, without constituting an offense, would entail acts or conducts that were morally wrong or contrary to decorum and severely prejudiced the dignity corresponding to this high office.

26. Based on the foregoing, this request would allow the Court to determine whether, in a situation in which, during an impeachment procedure, a parliamentary majority (which is usually two-thirds or half the votes plus one) admits the indictment and approves the removal of the President of the Republic, formally invoking any grounds of a criminal nature, but concealing motives arising from the questioning of his or her political performance or actions, the said mechanism is being used to exercise a sort of vote of censure or no confidence in the leader of the Government, even though he or she has

been democratically elected by the people and Congress does not have this authority in a political regime of a presidential or “parliamentarized” presidential type, because under such regimes, the President does not incur political responsibility before Parliament. Some of the questions posed to the Court are designed to obtain an interpretation in this regard, including the impact on political rights, from both an individual and a collective perspective.

27. The fact that, in recent years, this type of political trial has been used to remove the President in several Latin American countries could mean that the possibility of a President elected by the people for a predetermined period of government remaining in office would depend on maintaining a favorable parliamentary majority, or that the opposition was unable to assemble a qualified majority of votes against them to approve their removal, without the grounds having great importance. This would lead to a significant change in the rules of the game inherent in a democratic regime of a presidential type, because it would produce a sort of “parliamentary coup d’état” or political censure of the President.

28. The Court should also clarify whether, in the case of impeachment proceedings against the President, aspects such as respect for due process, verification of the grounds cited, and the eventual punishment of removal or disqualification can be reviewed and supervised by the judicial organ, despite the fact that the Constitution of some countries may indicate that the validity of impeachment proceedings or their result is not subject to judicial review and that such proceedings relate to non-justiciable political matters.

III. RULINGS OF THE INTER-AMERICAN COURT ON IMPEACHMENT

29. Ever since it began to develop its contentious and consultative jurisprudence, the Inter-American Court has interpreted the scope of the guarantees of due process of law and the principle of legality, as well as their different sphere of application.

30. In this regard, the Court has indicated that the basic guarantees are not restricted to criminal matters; rather to the contrary, they must be observed by procedural instances of a civil, labor, fiscal or any other nature, to ensure that individuals can defend themselves adequately in the face of any kind of act of the State that could affect their rights and obligations.⁷ In its case law, the Court has indicated that any public authority, whether administrative, legislative or judicial, whose decisions can affect the rights of the individual, must take such decisions with full respect for the guarantees of due process of law. Specifically, regarding sanctions, the Court has referred to the series of basic guarantees established in Article 8(2) of the Convention to affirm that those subjected to proceedings involving sanctions, must have the said basic guarantees, which are applicable *mutatis mutandis* as appropriate.⁸

31. The Inter-American Court has indicated that under the rule of law, the principle of legality guides the actions of all the organs of the State within their respective competencies, particularly in the exercise of their punitive powers.⁹ In this regard, it has emphasized that, under a democratic

⁷ IACourtHR. Case of the Constitutional Court v. Peru. Merits, reparations and costs. Judgment of January 31, 2001. Series C No. 71, paras. 69 and 70; IACourtHR. Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 27.

⁸ IACourtHR. Case of Vélez Loo v. Panama. Preliminary objections, merits, reparations and costs. Judgment of November 23, 2010. Series C No. 218, para. 142.

⁹ Cf. IACourtHR. Case of Ricardo Canese v. Paraguay. Judgment of August 31, 2004. Series C No. 111, para. 177; IACourtHR. Case of Baena Ricardo *et al.* v. Panama. Judgment of February 2, 2001. Series C No. 72, para. 107; IACourtHR. Case of De la Cruz Flores v. Peru. Judgment of November 18, 2004. Series C No. 115, para. 80; IACourtHR. Case of Fermín

system, great care must be taken to ensure that the consequences of proceedings of a punitive nature are decided with strict respect for basic human rights and following careful verification of the existence of the wrongful conduct.¹⁰

32. Thus, the Inter-American Court has heard numerous cases relating to the exercise of the punitive power of the State, which is not limited to the criminal sphere, but applies to any proceeding that may be understood to involve sanctions. Its case law has focused above all on the right to judicial guarantees and the principle of legality.

33. In its case law, and as relevant for this request for an Advisory Opinion, the Commission notes that the Court has ruled on impeachment on two occasions, both concerning the removal of members of high courts of law using this mechanism. The Commission recapitulates the main aspects of these rulings below.

1. Case of the Constitutional Court v. Peru (2001)

34. On January 31, 2001, the Inter-American Court delivered judgment in the case of the Constitutional Court v. Peru concerning the impeachment and removal of the justices of the Constitutional Court, Manuel Aguirre Roca, Guillermo Rey Terry and Delia Revoredo Marsano.¹¹

35. In this case, the Court defined the mechanism of impeachment as “a means of controlling senior officials of both the Executive and other State organs exercised by the Legislature.”¹² However, it clarified that “this control does not mean that the organ being controlled – in this case the Constitutional Court – is subordinate to the controlling organ – in this case the Legislature, but rather than the intention of this mechanism is that the representatives of the people may examine and take decision on the actions of senior officials.”¹³

36. In this regard, even in the exercise of the congressional powers to conduct an impeachment that led to the responsibility of a public official, the Court affirmed that any person subject to a proceeding of any nature “must be guaranteed that the said organ is competent, independent and impartial, and acts in accordance with the procedure established by law for hearing and deciding the case submitted to it.”¹⁴

37. Thus, based on the role and the authority of the victims, the Court noted that, in the circumstances of the specific case, “the Legislature did not have the necessary conditions of

Ramírez. Judgment of June 20, 2005. Series C No. 126, para. 90; and IACourtHR. Case of García Asto and Ramírez Rojas v. Peru. Judgment of November 25, 2005. Series C No. 137, para. 187.

¹⁰ Cf. IACourtHR. Case of Baena Ricardo *et al.* v. Panamá. Judgment of February 2, 2001. Series C No. 72, para. 106; Citing, *inter alia*, European Court of Human Rights. *Ezelin v. France*. Judgment of April 26, 1991, Series A No. 202, para. 45; and European Court of Human Rights. *Müller and Others v. Switzerland*. Judgment of May 24, 1988, Series A No. 133, para. 29. See also: IACourtHR. Case of De la Cruz Flores v. Peru. Judgment of November 18, 2004. Series C No. 115, para. 81; and IACourtHR. Case of García Asto and Ramírez Rojas v. Peru. Judgment of November 25, 2005. Series C No. 137, para. 189

¹¹ IACourtHR. Case of the Constitutional Court v. Peru. Merits, reparations and costs. Judgment of January 31, 2001. Series C No. 71, para. I.

¹² IACourtHR. Case of the Constitutional Court v. Peru. Merits, reparations and costs. Judgment of January 31, 2001. Series C No. 71, para. 63.

¹³ IACourtHR. Case of the Constitutional Court v. Peru. Merits, reparations and costs. Judgment of January 31, 2001. Series C No. 71, para. 63

¹⁴ IACourtHR. Case of the Constitutional Court v. Peru. Merits, reparations and costs. Judgment of January 31, 2001. Series C No. 71, para. 77.

independence and impartiality to conduct the impeachment proceedings against the three justices of the Constitutional Court.”¹⁵ In this regard, the Court found that the procedure of impeachment to which the dismissed justices were subjected did not ensure that they had guarantees of due process of law in relation to the restrictions to their right to take part in the proceeding, and that the requirement of an impartial judge was not respected.¹⁶ In particular, the Court affirmed that: (i) there had been a restriction of the right of the justices to defend themselves by answering the allegations filed against them; (ii) the accused did not have complete and timely knowledge of the charges filed against them; (iii) their access to the probative material was limited; (iv) the period granted for exercising their defense was extremely short, considering that they had the right to examine the case and the evidence, and finally (v) they were not allowed to cross-examine the witnesses whose testimony formed the basis on which the members of Congress initiated the impeachment proceeding that ended with the consequent dismissal.¹⁷

2. Case of *Camba Campos et al. (Constitutional Tribunal) v. Ecuador (2013)*

38. On August 28, 2013, the Inter-American Court handed down judgment in the case of *Camba Campos et al. (Constitutional Tribunal) v. Ecuador* concerning the arbitrary termination of eight members of the Constitutional Tribunal of Ecuador by a decision of the National Congress of November 25, 2004. Relevant to the present request, the said case also included two impeachment proceedings against some of the members during which the victims were not accorded basic guarantees of due process.¹⁸

39. The Court ratified the general criteria contained in the case of the Constitutional Court *v. Peru* cited above. It also recalled that the guarantees established in Article 8 of the American Convention mean that “the victims must have ample possibilities of being heard and acting in the respective proceedings so that they may submit their claims and present probative elements, and that these are analyzed completely and rigorously by the authorities before a decision is taken on the facts, responsibilities, sanctions and reparations.”¹⁹

40. In the circumstances of this case, the Inter-American Court concluded, among other matters, that: (i) Congress was not competent to take the decision to terminate the members of the Constitutional Court;²⁰ (ii) Congress did not ensure the guarantee of impartiality to the judges who were dismissed;²¹ (iii) the members were removed from office without the possibility of appearing before the National Congress to respond to the charges being made against them, or to contest the arguments

¹⁵ IACourtHR. Case of the Constitutional Court *v. Peru*. Merits, reparations and costs. Judgment of January 31, 2001. Series C No. 71, para. 84.

¹⁶ IACourtHR. Case of the Constitutional Court *v. Peru*. Merits, reparations and costs. Judgment of January 312001. Series C No. 71, para. 81.

¹⁷ IACourtHR. Case of the Constitutional Court *v. Peru*. Merits, reparations and costs. Judgment of January 312001. Series C No. 71, para. 83.

¹⁸ IACourtHR. Case of the Constitutional Tribunal (*Camba Campos et al.*) *v. Ecuador*. Preliminary objections, merits, reparations and costs. Judgment of August 28, 2013. Series C No. 268, para. 1.

¹⁹ IACourtHR. Case of the Constitutional Tribunal (*Camba Campos et al.*) *v. Ecuador*. Preliminary objections, merits, reparations and costs. Judgment of August 28, 2013. Series C No. 268, para. 181; IACourtHR. Case of *Baldeón García v. Peru*. Merits, reparations and costs. Judgment of April 6, 2006. Series C No. 147, para. 146; and IACourtHR. Case of *Barbani Duarte et al. v. Uruguay*. Merits, reparations and costs. Judgment of October 13, 2011. Series C No. 234, para. 120.

²⁰ IACourtHR. Case of the Constitutional Tribunal (*Camba Campos et al.*) *v. Ecuador*. Preliminary objections, merits, reparations and costs. Judgment of August 28, 2013. Series C No. 268, para. 180.

²¹ IACourtHR. Case of the Constitutional Tribunal (*Camba Campos et al.*) *v. Ecuador*. Preliminary objections, merits, reparations and costs. Judgment of August 28, 2013. Series C No. 268, para. 220.

based on which they were removed,²² and (iv) the necessary clarity did not exist as regards when an impeachment procedure started and when it ended.²³

41. In this case, the Inter-American Court also referred to Article 23 of the American Convention which regulates political rights. In this regard, it indicated that Article 23(1)(c) does not establish the right to have access to public office, but rather to do so “under general conditions of equality,” which is also complied with when “the criteria and processes for appointment, promotion, suspension and dismissal are objective and reasonable” and when “no one is subject to discrimination” in the exercise of this right.²⁴

42. In summary, the Inter-American Court found that:

(i) respect for judicial guarantees entails respect for judicial independence; (ii) the dimensions of judicial independence results in the subjective right of the judge that his removal from office is exclusively for the causes permitted, either by means of a procedure that complies with judicial guarantees or because the term or period of his mandate has ended, and (iii) when the permanence of judges in office is arbitrarily affected, the right to judicial independence established in Article 8(1) of the American Convention is violated, in conjunction with the right of access to and permanence in public service, under general conditions of equality, established in Article 23(1)(c) of the American Convention.²⁵

43. In this case, the Inter-American Court included some additional consideration linked to the context of political instability in Ecuador at the time of the removal of the members of the Constitutional Tribunal. Thus, the Court developed and recalled standards on judicial independence, the separation of powers, and democracy in the perspective of analyzing to what extent “the collective termination of judges, particularly of high courts, constitutes an attack not only on judicial independence but also on the democratic order.”²⁶

44. In this regard, and taking into consideration the said context,²⁷ the Court noted that:

[...] the apparent legality and justification of these decisions concealed the intention of a parliamentary majority to exercise greater control over the Constitutional Tribunal and to facilitate the termination of the justices of the Supreme Court. The Court has verified that

²² IACourHR. Case of the Constitutional Tribunal (Camba Campos *et al.*) v. Ecuador. Preliminary objections, merits, reparations and costs. Judgment of August 28, 2013. Series C No. 268, para. 183.

²³ IACourHR. Case of the Constitutional Tribunal (Camba Campos *et al.*) v. Ecuador. Preliminary objections, merits, reparations and costs. Judgment of August 28, 2013. Series C No. 268, para. 185.

²⁴ IACourHR. Case of Apitz Barbera *et al.* (“First Contentious Administrative Court”) v. Venezuela. Preliminary objection, merits, reparations and costs. Judgment of August 5, 2008. Series C No. 182, para. 206; IACourHR. Case of the Constitutional Tribunal (Camba Campos *et al.*) v. Ecuador. Preliminary objections, merits, reparations and costs. Judgment of August 28, 2013. Series C No. 268, para. 194; and IACourHR. Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs. Judgment of June 30, 2009. Series C No. 197, para. 138. See also: Human Rights Committee, General Comment No. 25. Article 25: The right to participate in public affairs, voting rights and the right to equal access to public service, CCPR/C/21/Rev.1/Add. 7, July 12, 1996, para. 23.

²⁵ IACourHR. Case of the Constitutional Tribunal (Camba Campos *et al.*) v. Ecuador. Preliminary objections, merits, reparations and costs. Judgment of August 28, 2013. Series C No. 268, para. 199.

²⁶ IACourHR. Case of the Constitutional Tribunal (Camba Campos *et al.*) v. Ecuador. Preliminary objections, merits, reparations and costs. Judgment of August 28, 2013. Series C No. 268, para. 207.

²⁷ IACourHR. Case of the Constitutional Tribunal (Camba Campos *et al.*) v. Ecuador. Preliminary objections, merits, reparations and costs. Judgment of August 28, 2013. Series C No. 268, para. 211.

the resolutions of Congress were not adopted based on the exclusive assessment of specific factual information and to ensure proper compliance with the laws in force, but sought a very different end related to an abuse of power aimed at obtaining control of the Judiciary by different procedures: in this case, the termination and the impeachment proceedings. This resulted in a destabilization of both the Judiciary and the country in general and intensified the political crisis, with the negative effects that this entailed for the protection of the rights of the population. Consequently, the Court emphasizes that these elements allow it to affirm that a collective and arbitrary termination of judges is unacceptable, owing to the negative impact that this has on the institutional aspect of judicial independence.²⁸

45. Citing Article 3 of the Inter-American Democratic Charter,²⁹ the Court concluded that “the dismissal of all the members of the Constitutional Tribunal entailed a destabilization of the democratic order that existed at that time in Ecuador, because the attack on the three high courts of Ecuador at that time resulted in a rupture of the separation and independence of the branches of government.”³⁰ Lastly, it emphasized that “the separation of powers is closely related not only to the consolidation of the democratic system, but also seeks to preserve the human rights and freedoms of the people.”³¹

IV. OTHER RULINGS OF THE INTER-AMERICAN COURT ON HUMAN RIGHTS VIOLATIONS IN CONTEXTS OF DEMOCRATIC CRISIS

1. Case of López Lone *et al.* v. Honduras (2015)

46. On October 15, 2015, the Inter-American Court delivered judgment in the case of López Lone *et al.* v. Honduras concerning the disciplinary proceedings to which judges Adán Guillermo López Lone, Luis Alonso Chévez de la Rocha and Ramón Enrique Barrios Maldonado, and justice Tirza del Carmen Flores Lanza were subjected to punish their actions and statements in the context of the June 2009 coup d'état in Honduras.³²

47. Within a factual framework that differed from the cases mentioned above, the Court emphasized that, under international law, the events that occurred in Honduras starting on June 28, 2009, constituted an internationally wrongful act.³³ During this situation of the international illegitimacy of the *de facto* government, disciplinary proceedings were instituted against the presumed victims for conducts that, in essence, constituted actions against the coup d'état and in favor of the rule of law and

²⁸ IACourHR. Case of the Constitutional Tribunal (Camba Campos *et al.*) v. Ecuador. Preliminary objections, merits, reparations and costs. Judgment of August 28, 2013. Series C No. 268, para. 219.

²⁹ This article stipulates that “[e]ssential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, [...] and the separation of powers and independence of the branches of government.”

³⁰ IACourHR. Case of the Constitutional Tribunal (Camba Campos *et al.*) v. Ecuador. Preliminary objections, merits, reparations and costs. Judgment of August 28, 2013. Series C No. 268, para. 221.

³¹ IACourHR. Case of the Constitutional Tribunal (Camba Campos *et al.*) v. Ecuador. Preliminary objections, merits, reparations and costs. Judgment of August 28, 2013. Series C No. 268, para. 221.

³² IACourHR. Case of López Lone *et al.* v. Honduras. Preliminary objection, merits, reparations and costs. Judgment of October 5, 2015. Series C No. 302, para. 1.

³³ IACourHR. Case of López Lone *et al.* v. Honduras. Preliminary objection, merits, reparations and costs. Judgment of October 5, 2015. Series C No. 302, para. 152.

democracy.”³⁴

48. In its considerations in the judgment, the Court reiterated its case law on judicial independence,³⁵ and the relationship between this and one of its main corollaries: the guarantee of stability and tenure in office.³⁶ Likewise, it recalled that “the State must guarantee the autonomous exercise of the judicial function, as regards both its institutional function, that is in relation to the Judiciary as a system, and also as regards its individual aspect, that is in relation to the person of the specific judge.”³⁷

49. Based on these considerations, the Court established the specific scope of the guarantees of stability and tenure of judges, such as:

[That] (i) their removal must be exclusively the result of the permitted reasons, either by means of a procedure that respects judicial guarantees or because their mandate has ended; (ii) judges may only be dismissed owing to serious disciplinary offenses or incompetence; (iii) any disciplinary procedure against a judge must be decided in accordance with the established norms for judicial conduct in fair proceedings that ensure objectivity and impartiality pursuant to the Constitution or the law.³⁸

50. Regarding the specific violations suffered by the victims in this case, the Court concluded that: (i) the disciplinary proceedings to which the presumed victims were subjected were not instituted in accordance with the law; (ii) the Judicial Service Council did not have competence and lacked the necessary Independence to decide appeals against dismissal rulings by the Supreme Court of Justice; (iii) the way in which the Judicial Service Council was incorporated to decide the appeals filed by the presumed victims did not provide sufficient guarantee of its impartiality, and (iv) the Supreme Court of Justice did not provide objective guarantees of impartiality to rule on the presumed disciplinary offenses of the presumed victims, insofar as all the said conducts related to the coup d'état.³⁹

51. On that occasion and based on the context in which the disciplinary proceedings were held, the Inter-American Court reiterated the relationship that existed between political rights, freedom of expression, the right of assembly and freedom of association, and that these rights, taken together, make the democratic process possible. It added that, in this case:

[...] In situations where there is a breakdown of institutional order following a coup d'état,

³⁴ IACourtHR. Case of López Lone *et al.* v. Honduras. Preliminary objection, merits, reparations and costs. Judgment of October 5, 2015. Series C No. 302, para. 152.

³⁵ IACourtHR. Case of the Supreme Court of Justice (Quintana Coello *et al.*) v. Ecuador. Preliminary objection, merits, reparations and costs. Judgment of August 23, 2013. Series C No. 266, para. 153, and IACourtHR. Case of the Constitutional Tribunal (Camba Campos *et al.*) v. Ecuador. Preliminary objections, merits, reparations and costs. Judgment of August 28, 2013. Series C No. 268, para. 197.

³⁶ IACourtHR. Case of the Supreme Court of Justice (Quintana Coello *et al.*) v. Ecuador. Preliminary objection, merits, reparations and costs. Judgment of August 23, 2013. Series C No. 266, para. 153; and IACourtHR. Case of the Constitutional Tribunal (Camba Campos *et al.*) v. Ecuador. Preliminary objections, merits, reparations and costs. Judgment of August 28, 2013. Series C No. 268, para. 197.

³⁷ IACourtHR. Case of López Lone *et al.* v. Honduras. Preliminary objection, merits, reparations and costs. Judgment of October 5, 2015. Series C No. 302, para. 194.

³⁸ IACourtHR. Case of López Lone *et al.* v. Honduras. Preliminary objection, merits, reparations and costs. Judgment of October 5, 2015. Series C No. 302, para. 200.

³⁹ IACourtHR. Case of López Lone *et al.* v. Honduras. Preliminary objection, merits, reparations and costs. Judgment of October 5, 2015. Series C No. 302, para. 239.

the relationship between these rights is even clearer, especially when they are all exercised at the same time to protest against actions by the public authorities that are contrary to the constitutional order, and to reclaim the return to democracy. Protests and related opinions in favor of democracy should be ensured the highest protection and, depending on the circumstances, may be related to all or some of the said rights.

52. The Court referred to a “right to defend democracy” and indicated that this constituted a specific manifestation of the right to take part in public affairs and, at the same time, included the exercise of other rights such as freedom of expression and the right of assembly. Specifically, regarding freedom of expression, the Court, in addition to reiterating its case law, taking into account the context of this case, also cited Articles 3 and 4 of the Inter-American Democratic Charter which stress the importance of this right in a democratic society.

V. CONCLUSION ON THE IMPORTANCE OF RE-EXAMINING THE STANDARDS

53. The foregoing reveals that although the Inter-American Court has begun to develop standards on some of the issues that are dealt with in this request for an Advisory Opinion, it has not had sufficient opportunity to examine the matter with the required specificity to answer the questions indicated below in the respective section of this document.

54. Thus, on the issue of impeachment, the Inter-American Court has indicated, in general, that the guarantees of due process must apply. However, the Commission notes that the respective rulings were limited to the circumstances of each case and, specifically, associated with the principle of judicial independence, because the officials subjected to impeachment in these cases were high court judges. Accordingly, the Commission understands that the analysis of the applicable guarantees was informed by the principle of judicial independence and, consequently, the heightened guarantees for judges subjected to the punitive power of the State.

55. Therefore, the Commission considers that a specific ruling by the Court on the implications of the guarantees of due process and the principle of legality in the context of the impeachment of constitutional and democratically elected Presidents is pertinent and necessary. The Commission also finds that a specific ruling by the Court is pertinent and necessary on the implications for the exercise of human rights of the arbitrary use of this mechanism as a kind of covert coup d'état from a perspective that goes beyond the individual in question and extends to the persons under the jurisdiction of the State.

VI. INDIVIDUAL PETITIONS PENDING BEFORE THE IACHR

56. The Commission informs the Inter-American Court that, in recent years, it has received individual petitions in three matters that it could be understood are related to this request for an Advisory Opinion: (i) alleged human rights violations against Manuel Zelaya and others in the context of the coup d'état in Honduras; (ii) alleged human rights violations against Fernando Lugo in the context of his impeachment, and (iii) alleged human rights violations against Dilma Rousseff in the context of her impeachment.

57. Regarding the individual petition lodged against the State of Honduras concerning alleged violations of the human rights of several persons, including former President Manuel Zelaya, in the context of the coup d'état, the IACHR advises that this was received on January 25, 2010, and

forwarded to the State on February 1, 2010, pursuant to the applicable regulatory provisions. The petition is currently awaiting a ruling on admissibility.

58. With regard to the individual petition lodged against the State of Paraguay concerning alleged violations of the human rights of former President Fernando Lugo in the context of his impeachment, the Commission advises that this petition was received on January 11, 2013, and forwarded to the State on June 17, 2015, pursuant to the applicable regulatory provisions. The petition is currently awaiting a ruling on admissibility.

59. As for the individual petition lodged against the State of Brazil concerning alleged violations of the human rights of former President Dilma Rousseff in the context of her impeachment, the Commission advises that this petition was received on August 10, 2016, and is currently at the stage of the initial review.

60. The Commission considers that the existence of these petitions that have been lodged before it does not exclude the advisory competence of the Court to rule on this request. The Commission clarifies that the questions it is raising do not refer to any specific matter or State. To the contrary, this request for an Advisory Opinion seeks to go beyond the specificities of particular cases and permit a general approach with very important implications for all the States in the region in relation to human rights and democracy, with an emphasis on the scenarios described herein. In addition, owing to the limitations inherent in the contentious competence of both the Commission and the Court, the questions posed below cannot be answered by means of the said petitions, because they go far beyond the purpose of petitions.

VII. QUESTIONS

A. General questions

1. In light of the American Convention on Human Rights and other applicable inter-American instruments, how is the relationship between the democratic system and the full exercise of human rights manifested?
2. What is the relationship between the American Convention on Human Rights, the American Declaration of the Rights and Duties of Man, and the Inter-American Democratic Charter?
3. Does the Inter-American Democratic Charter constitute an instrument that supports the interpretation and application of the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man in specific cases in which human rights violations are alleged in contexts of the fragility or interruption of the democratic institutional framework – and to what extent?

B. Questions on the impeachment of constitutional and democratically elected Presidents

1. What specific guarantees of due process, established in Article 8 of the American Convention on Human Rights and Article XVIII of the American Declaration of the Rights and Duties of Man, can be required in the context of impeachment proceedings instituted by the

Legislature against constitutional and democratically elected Presidents?

2. How does the right to judicial protection established in Article 25 of the American Convention on Human Rights and Article XVIII of the American Declaration of the Rights and Duties of Man apply to impeachment proceedings instituted by the Legislature against constitutional and democratically elected Presidents?

2.1 Do Article 25 of the American Convention on Human Rights and Article XVIII of the American Declaration of the Rights and Duties of Man require judicial control over the impeachment proceedings instituted by the Legislature against constitutional and democratically elected Presidents – and what is the scope of this?

2.2 Do Article 25 of the American Convention on Human Rights and Article XVIII of the American Declaration of the Rights and Duties of Man require judicial control of the result of impeachment proceedings instituted by the Legislature against constitutional and democratically elected Presidents – and what is the scope of this?

2.3 How can it be ensured that the implementation and scope of the practice of judicial control referred to in the preceding questions does not entail a risk as regards the principle of the separation of powers and the system of checks and balances in a democracy?

3. How does the principle of legality established in Article 9 of the American Convention on Human Rights apply to impeachment proceedings instituted by the Legislature against constitutional and democratically elected Presidents?

4. Does the principle of legality established in Article 9 of the American Convention on Human Rights require that clearly delimited and previously established grounds exist for the Legislature to institute impeachment proceedings against constitutional and democratically elected Presidents?

5. In light of the principle of legality established in Article 9 of the American Convention on Human Rights, what should be the nature of the grounds that form the basis for impeachment proceedings instituted by the Legislature against constitutional and democratically elected Presidents? Should these grounds relate to political, disciplinary or any other type of responsibility?

6. Under what circumstances could impeachment proceedings instituted by the Legislature against constitutional and democratically elected Presidents violate the political rights of the person impeached in light of Article 23 of the American Convention on Human Rights and Article XX of the American Declaration of the Rights and Duties of Man?

7. Under what circumstances could impeachment proceedings instituted by the Legislature against constitutional and democratically elected Presidents violate, from a collective perspective, the political rights of those who voted for the person impeached in light of Article 23 of the American Convention on Human Rights and Article XX of the American Declaration of the Rights and Duties of Man?

8. What safeguards should exist, both in law and in practice, to prevent the use of impeachment proceedings instituted by the Legislature against constitutional and democratically elected Presidents as a covert form of coup d'état?

October 2017

A handwritten signature in black ink, appearing to read "Laurie", written in a cursive style.