

**ORDER OF THE
THE INTER-AMERICAN COURT OF HUMAN RIGHTS¹**

OF MAY 29, 2018

**REQUEST FOR AN ADVISORY OPINION PRESENTED BY THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

HAVING SEEN:

1. The brief of October 13, 2017, in which, based on Article 64(1) of the American Convention on Human Rights (hereinafter “the Convention”), the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) submitted to the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”) a request for an advisory opinion (hereinafter “the request”) to obtain an interpretation by the Inter-American Court clarifying how 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 and the American Declaration of the Rights and Duties of Man, 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 of the person subject to impeachment. In this regard, the Commission requested the Court to make an explicit ruling 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.”

2. More specifically, the Commission asked the Court to respond to the following questions:

i. General questions:

- a) 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?
- b) 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

¹ Judge Eugenio Raúl Zaffaroni did not attend the 124th regular session of the Inter-American Court for reasons beyond his control, which were accepted by the Court in plenary session. Consequently, he did not take part in the deliberation and signature of this order.

Democratic Charter?

- c) 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?
 - ii. Questions on the impeachment of constitutional and democratically elected Presidents
 - a) 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?
 - b) 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?
 - b.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?
 - b.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?
 - b.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?
 - c) 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?
 - d) 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?
 - e) In light of the principle of legality established in Article 9 of the American Convention on Human Rights, on what grounds can impeachment proceedings be instituted by the Legislature against constitutional and democratically elected Presidents? Should these grounds relate to political, disciplinary or any other type of responsibility?
 - f) 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?
 - g) 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?

- h) 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.

3. In its brief presenting the request, the Commission considered it pertinent and necessary that the Court make an explicit ruling on the implications of the guarantees of due process and the principle of legality in the context of the impeachment of a constitutional and democratically elected President. Furthermore, it considered that it was equally pertinent that the Court rule on the potential implications of the arbitrary use of this mechanism for the exercise of human rights.

4. In notes of November 21, 2017, the Secretariat of the Court (hereinafter "the Secretariat"), in accordance with Article 73(1)² of the Rules of Procedure, forwarded the request to the Member States of the Organization of American States (hereinafter "the OAS"), the OAS Secretary General, the President of the OAS Permanent Council, and the President of the Inter-American Juridical Committee. In these notes, the Secretariat advised that the President of the Court, in consultation with the members of the Court, had established February 26, 2018, as the time limit for the presentation of any written observations on the request. Also, on the instructions of the President, and as established in Article 73(3)³ of the said Rules of Procedure, the Secretariat invited various international organizations, regional academic establishments, and members of civil society to forward their written opinions on the points submitted to consultation within the above time frame, which was later extended to April 26, 2018. Thus, a period of approximately five months was established for the submission of such opinions.

5. On the expiry of the time frame, the Secretariat had received⁴ additional comments from the Inter-American Commission on Human Rights and briefs with observations submitted by OAS States,⁵ non-governmental organizations, academic establishments, and members of civil society.⁶

² Article 73(1) of the Rules of Procedure establishes that: "Upon receipt of a request for an advisory opinion, the Secretary shall transmit copies thereof to all the Member States, the Commission, the Permanent Council through its President, the Secretary General, and, if applicable, the OAS organs whose sphere of competence is referred to in the request."

³ Article 73(3) of the Rules of Procedure stipulates that: "The President may invite or authorize any interested party to submit a written opinion on the issues covered by the request. If the request is regulated by Article 64(2) of the Convention, the President may do so after prior consultation with the Agent".

⁴ The request for an advisory opinion presented by the Inter-American Commission, the written observations of the participating States, national associations, academic establishments, non-governmental organizations and members of civil society, and also of the Inter-American Commission can be consulted on the Court's website at: http://www.corteidh.or.cr/cf/jurisprudencia2/observaciones_oc.cfm?nld_oc=1853.

⁵ Written observations presented by OAS States: 1. Argentine Republic (hereinafter "Argentina"); 2. Federative Republic of Brazil (hereinafter "Brazil"); 3. Republic of Chile (hereinafter "Chile"); 4. Republic of Ecuador (hereinafter "Ecuador"); 5. Republic of Panama (hereinafter "Panama"), and 6. Republic of Paraguay (hereinafter "Paraguay").

⁶ Written observations presented by national and international associations, non-governmental organizations and academic establishments: Human Rights Section of the Núcleo de Competições Internacionais of the Universidade Federal da Bahia, Brazil; Mazatlán Law School at the Universidad Autónoma de Sinaloa, Mexico; Postgraduate Diploma in international litigation of the Law School at the Universidad Nacional de Cuyo, Mendoza, Argentina; Human Rights Clinic of the Damas Faculty, Recife, Pernambuco, Brazil; Observatorio de Intervención Ciudadana Constitucional of the Law School at the Universidad Libre, Bogotá, Colombia; Centro Jurídico de Derechos Humanos, Medellín, Antioquia, Colombia;

CONSIDERING THAT:

1. This request for an advisory opinion was submitted to the Inter-American Court by the Inter-American Commission on Human Rights in exercise of the powers granted by Article 64(1) of the American Convention, which stipulates that:

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 like manner consult the Court.

2. In this regard, Articles 70⁷ and 71⁸ of the Court's Rules of Procedure establish the formal requirements that must be verified for the Court to consider a request. Basically, they require the organ or State presenting the request to comply with the following: (i) to state the questions precisely; (ii) to identify the provisions to be

Centro de Investigación and Promoción de los Derechos Humanos (CIPRODEH), Tegucigalpa, Honduras; Academia Interamericana de Derechos Humanos at the Universidad Autónoma de Coahuila, Mexico; Law Office of Jaramillo Dávila, Quito, Ecuador; Human Rights Clinic at the Pontificia Universidad Javeriana, Cali, Colombia; Centro Estrategia Electoral, A.C., Mexico City, Mexico; Centro Universitário Antônio Eufrásio de Toledo, Brazil; Public Interest and Human Rights Legal Clinic of the Faculty of Law and Political Science at the Universidad de La Sabana, Colombia; Constitutional Law and Human Rights Legal Clinic at the Universidad Jorge Tadeo Lozano, Bogotá, Colombia; Human Rights and Environmental Law Clinic at the Universidade do Estado do Amazonas and the Human Rights Research Group, Brazil; Instituto de Estudios Socio-Históricos Fray Alonso de Zamora, Colombia. Written observations submitted by members of civil society: Ángel Iván González Rodríguez; José Carlos Moreira da Silva Filho; José Benjamín González Mauricio; Jorge Alberto Pérez Tolentino; Alejandro Sánchez Garrido; Sergio Armando Villa Ramos; René Cosme Ramos Limón; Alejandro Rúa and Graciana Peñafort; Thairi N. Moya Sánchez and Harold Miñarro Escalona; Ezequiel Rodrigo Galván and Gustavo D. Lueiro Campos; Alicia I. Curiel and Horacio A. Mendizábal; Anibal Pérez-Liñán; Vera Karam de Chueiri and Jorge Ernesto Roa Roa; Herman Duarte; Gustavo Arosemena Solórzano and Pablo Cevallos Palomeque; Daniel Wunder Hachen, Emerson Gabardo, Eneida Desiree Salgado, Glauco Salomão Leite, Gustavo Ferreira Santos, João Paulo Allain Teixeira, Luiz Guilherme Arcaro Conci, Marcelo Labanca, Rafael Valim, Saulo Lindofer Pivetta, Silvio Luiz Ferreira da Rocha; Camila Gomes de Lima and Paloma Gomes; César Landa Arroyo and Isabel Sánchez Benites; Yzamar Griselda Machaca Rodríguez and Angela Patricia Rojas Huayta; Eva Barrientos Zepeda; Maryuri Álvarez Pérez, Andrés Mauricio Cardona Parra, Manuela Duque Correa, Manuel Felipe Grisales Mesa, Juan Camilo Luna Alarcón, Richard Stevens Molina Gómez, Natalia Ocampo Galeano, Yelcy Dalena Ortiz Correa, Juan Felipe Orozco Ospina, Julián Leonardo Peña López; Víctor Alonso Vargas Sibaja and Jorge Arturo Ulloa Cordero; David Andrés Murillo Cruz; Paulina Alba Betancourt and María De la Llata Simroth; Juliana Sánchez Vallejo, Juliana Jaramillo Henao, Alejandra Grajales López, Gustavo de la Orden, Franco Porporato, Juan Carlos Alfredo Tohom Reyes, Wendy Lucía To Wu, Juan José Margos García, Mario Alfredo Rivera Maldonado, María Fernanda Echeverría Tánchez, Rolando Wotzbelí Zúñiga González; Hermilo de Jesús Lares Contreras, Iván Enrique Rodríguez Pulido and Rodolfo Reyes Leyva; Juan Pablo Acosta Peñaloza and Alejandro Ronderos Abuchaibe; María Angélica Burgos De la Ossa, Daniela Páez Cala, Juan Andrés Castillo Lúchau; José Toro, Paulina Arango V, Eliana González O., Carolina Jiménez M, María José Puerta L. Sara Ortegón G. and Sara Roldán C.; Mónica Clarissa Henning Leal, Eduardo Biacchi Gomes, Ana Cláudia Santano, and Luiz Paulo Dammnski; Alberto Pereira-Orozco, Luis Fernando Sagastume Pastor and Alfredo Rivera Maldonado.

⁷ Article 70 of the Rules of Procedure establishes that: "Interpretation of the Convention: 1. Requests for an advisory opinion under Article 64(1) of the Convention shall state with precision the specific questions on which the opinion of the Court is being sought. 2. Requests for an advisory opinion submitted by a Member State or by the Commission shall, in addition, identify the provisions to be interpreted, the considerations giving rise to the request, and the names and addresses of the Agent or the Delegates. [...]"

⁸ Article 71 of the Rules of Procedure stipulates that: "Interpretation of Other Treaties: 1. If, as provided for in Article 64(1) of the Convention, the interpretation requested refers to other treaties concerning the protection of human rights in the American States, the request shall indicate the name of the treaty and the parties thereto, the specific questions on which the opinion of the Court is being sought, and the considerations giving rise to the request. [...]"

interpreted; (iii) to indicate the considerations giving rise to the request, and (iv) to provide the name and address of the agent.

3. It should be noted that, since Article 73 of the Court's Rules of Procedure,⁹ which sets out the procedure to be followed in the Court's advisory sphere, does not include specific provisions concerning an admissibility mechanism, the Court has the authority to suspend the processing of a request at any stage of the proceeding, and even to decide not to refer to the request when issuing its opinion. Specifically, on two occasions, the Court decided not to respond to the requests that had been submitted even though it had processed them pursuant to the Rules of Procedure.¹⁰

4. Added to this, the Court recalls that, on several occasions, it has indicated that compliance with the regulatory requirements in the presentation of a request does not mean that it is obliged to respond to the request.¹¹ To determine the admissibility of a request, the Court must take into account considerations that go beyond purely formal

⁹ Article 73 of the Rules of Procedure establishes that: "1. Upon receipt of a request for an advisory opinion, the Secretary shall transmit copies thereof to all the Member States, the Commission, the Permanent Council through its President, the Secretary General, and, if applicable, the OAS organs whose sphere of competence is referred to in the request. 2. The President shall establish a time limit for the filing of written comments by the interested parties. 3. The President may invite or authorize any interested party to submit a written opinion on the issues covered by the request. If the request is governed by Article 64(2) of the Convention, the President may do so after prior consultation with the Agent. 4. At the conclusion of the written proceedings, the Court shall decide whether oral proceedings should take place and shall establish the date for a hearing, unless it delegates this task to the President. Prior consultation with the Agent is required in cases governed by Article 64(2) of the Convention."

¹⁰ One of these requests was presented by Costa Rica on February 22, 1991, for the Court to examine the compatibility with Article 8(2)(h) of the American Convention of a bill before the Legislative Assembly to amend two articles of the Code of Criminal Procedure and to create the High Court of Criminal Cassation. The Court decided not to respond to the request considering that, to do so, could result in a decision, under cover of the advisory opinion, on several cases being processed before the Commission based on this State's presumed violation of Article 8(2)(h) of the Convention. Nevertheless, the Court admitted the request, received observations and, subsequently, issued its negative decision. See *Compatibility of Draft Legislation with Article 8.2.h of the American Convention on Human Rights*. Advisory Opinion OC-12/91 of December 6, 1991. Series A No. 12. In addition, on April 20, 2004, the Inter-American Commission presented a request concerning the compatibility of the American Convention with legislative and other measures that denied access to appeals to those sentenced to death. Some of the States and organizations that submitted observations on this request were opposed to its admissibility, considering that it was a contentious case in disguise. After receiving the observations, the Court decided to exercise its authority not to respond to the request, considering that it had already decided, and issued an opinion on, the issues raised by the Commission when ruling on the imposition of the death penalty and the implementation of this punishment in contentious cases and provisional measures, as well as in advisory opinions. See *Request for an advisory opinion presented by the Inter-American Commission on Human Rights*. Order of the Inter-American Court of Human Rights of June 24, 2005.

¹¹ Cf. *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 31; *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, para. 25; *Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System (Interpretation and scope of Article 1(2), in relation to Articles 1(2), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of the American Convention on Human Rights, as well as of Article 8(1)(A) and (B) of the Protocol of San Salvador)*. Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22, para. 21, and *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples. State Obligations in relation to Change of Name, Gender Identity, and Rights deriving from a Relationship between Same-Sex Couples (Interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights)*. Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 20.

aspects and that relate to the characteristics it has recognized for the exercise of its advisory functions.¹²

5. These broad discretionary powers should not, however, be confused with the mere authority to exercise discretion as regards whether or not to issue the requested opinion. To refrain from responding to a request presented to it, the Court must have compelling reasons based on the fact that the petition exceeds the limits of its competence in this sphere established in the Convention. Moreover, as required by Article 66 of the Convention, the Court must set out the reasons for any decision in which it considers that it should not respond to a request for an advisory opinion.¹³

6. In this regard, in addition to the formal requirements established in the Convention and in its Rules of Procedure, the Inter-American Court has developed jurisprudence concerning the admissibility and pertinence of processing or responding to a request for an advisory opinion. In particular, in its jurisprudence,¹⁴ the Court has indicated some factors that, if verified, could lead to the use of its authority not to process or not to respond to a request. Thus, the Court has indicated that a request should not: (a) conceal a contentious case,¹⁵ or try to obtain a premature ruling on a question or matter that could eventually be submitted to the Court in a contentious case;¹⁶ (b) be used as a mechanism to obtain an indirect ruling on a matter that is in dispute or being litigated at the domestic level;¹⁷ (c) be used as an instrument in a political debate in the domestic sphere;¹⁸ (d) refer, exclusively, to issues on which the Court has already ruled in its jurisprudence,¹⁹ and (e) be intended to resolve factual

¹² Cf. "Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 25; *Reports of the Inter-American Commission on Human Rights* (Art. 51 American Convention on Human Rights). Advisory Opinion OC-15/97 of November 14, 1997. Series A No. 15, para. 39; *Juridical Status and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 19; *Juridical Status and Human Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 50; *Control of Due Process in the Exercise of the Powers of the Inter-American Commission on Human Rights* (Arts. 41 and 44 to 51 of the American Convention on Human Rights). Advisory Opinion OC-19/05 of November 28, 2005. Series A No. 19, para. 17; *Article 55 of the American Convention on Human Rights*. Advisory Opinion OC-20/09 of September 29, 2009. Series A No. 20, para. 14, and *The Environment and Human Rights* (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights). Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 20.

¹³ Cf. Advisory Opinion OC-1/82 of September 24, 1982, para. 30.

¹⁴ Cf. *Request for an advisory opinion presented by the Secretary General of the Organization of American States*. Order of the Inter-American Court of Human Rights of June 23, 2016, sixth *considerandum*.

¹⁵ Cf. *Compatibility of Draft Legislation with Article 8.2.h of the American Convention on Human Rights*, Advisory Opinion OC-12/91 of December 6, 1991. Series A No. 12, para. 28, and Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, paras. 46 and 47.

¹⁶ Cf. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 45, and *Request for an advisory opinion presented by the Inter-American Commission on Human Rights*. Order of the Inter-American Court of Human Rights of June 24, 2005, sixth *considerandum*.

¹⁷ Cf. *Request for an advisory opinion presented by the Republic of Costa Rica*. Order of the Inter-American Court of Human Rights of May 10, 2005, thirteenth *considerandum*.

¹⁸ Cf. *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 30, and *Request for an advisory opinion presented by the Republic of Costa Rica*. Order of the Inter-American Court of Human Rights of May 10, 2005, eleventh *considerandum*.

¹⁹ Cf. *Request for an advisory opinion presented by the Inter-American Commission on Human Rights*.

matters. Rather it should be intended to interpret the meaning, object and purpose of international human rights provisions and, above all, to assist OAS Member States and organs to comply fully and effectively with their international obligations.²⁰ However, the criteria set out above do not constitute an exhaustive list or limits that cannot be exceeded, because it is for the Court to evaluate the pertinence of exercising its advisory function with regard to each specific request.

7. Based on the above, the Court notes that some of the written observations it received cited the above criteria "(a)", "(b)" and "(c)" to submit that the request of the Inter-American Commission should be declared inadmissible or that the Court should abstain from ruling on all or some of the questions posed. In particular, they indicated that the Inter-American Commission's request referred specifically to three individual petitions that it was examining and that were pending a decision: (i) alleged human rights violations against Manuel Zelaya in the context of the 2008 coup d'état in Honduras; (ii) alleged human rights violations against Fernando Lugo in the context of the impeachment proceedings against him, and (iii) alleged human rights violations against Dilma Rousseff in the context of the impeachment proceedings against her. According to the Inter-American Commission, the first two petitions had been forwarded to the respective States and were "awaiting a ruling on admissibility," while the third petition had not been forwarded to the State and was "at the stage of the initial review."

8. In this regard, the Court recalls, first, that, according to its jurisprudence, the mere existence of contentious cases, petitions before the Inter-American Commission, or proceedings before other international organs relating to the subject matter of the request is not sufficient to cause the Court to abstain from responding to the questions submitted to it, owing to its nature as an autonomous judicial body.²¹ The main purpose of the Court's advisory function is to provide a judicial interpretation of one or several provisions of the Convention or of other treaties concerning the protection of human rights in the American States.²² However, the fact that the Commission is currently processing three individual petitions that are pending a decision could entail the risk that, by ruling on the questions that have been posed, the Court would be providing a premature opinion in cases that it could be called on to hear in the exercise of its contentious jurisdiction.

9. Furthermore, the Court reiterates that its advisory function should not, in principle, be exercised in abstract speculations without any foreseeable application to a

Order of the Inter-American Court of Human Rights of June 24, 2005, seventh and twelfth *consideranda*, and *Request for an advisory opinion presented by the Inter-American Commission on Human Rights*. Order of the Inter-American Court of Human Rights of January 27, 2009, seventh and fifteenth *consideranda*.

²⁰ Cf. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 47; Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 63, and Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 24.

²¹ Cf. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, paras. 45 to 65; Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, paras. 62 to 66; Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 26, and Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 24.

²² Cf. *Restrictions to the Death Penalty (Arts. 4.2 and 4.4 American Convention on Human Rights)*. Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 22, and Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22, para. 26.

specific situation that would justify an interest in issuing an advisory opinion.²³ This is to prevent the exercise of its advisory jurisdiction resulting in an abstraction and thus, an impracticable ruling by the Court. Nevertheless, requests for an advisory opinion should not be so specific that they involve deciding a contentious case in disguise, or the prejudgment of specific situations. Thus, the goal is to achieve the difficult balance between the legitimate interests of the party requesting the opinion and the general purpose of the advisory function.

10. Accordingly, the purpose of the use of examples is to place a request in a particular context²⁴ and to illustrate the different interpretations that may exist on the legal issue raised in the respective advisory opinion,²⁵ without this signifying that the Court is issuing a legal ruling on the situation involved in those examples.²⁶ Furthermore, the use of such examples allows the Court to show that its advisory opinion is not mere academic speculation and is justified by the potential benefits for the international protection of human rights.²⁷ In its approach to the present matter, the Court acts in its role as a human rights court guided by the international instruments that regulate its advisory function, and proceeds to make a strictly legal analysis of the questions posed.²⁸

11. In sum, the Court has understood that, although it should not lose sight of the fact that, essentially, its advisory function entails the exercise of its interpretive powers, the requests submitted should be of a practical nature and it should be foreseeable that its opinion will be applied. At the same time, a request should not be limited to an extremely precise factual situation that would make it difficult to disassociate the response from a ruling on a specific case, which would not be in the general interest that a request is intended to serve.²⁹ Ultimately, this calls for the intelligent exercise of judicial discretion to discern the essential purpose of the request that could lay claim to general applicability and benefit all the States of the Americas, over and above the reasons that may have originated the request, or the reference to specific facts.

12. On examining the present request, the Court noted that, as the grounds for its questions, the Inter-American Commission has indicated hypotheses and specific situations that denote the inductive nature of the reasoning on which the questions are based.

²³ Cf. *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. 16; Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, para. 25, and Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22, para. 21.

²⁴ Cf. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 49; and Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 16.

²⁵ Cf. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 49; and Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, paras. 44 *in fine* and 45.

²⁶ Cf. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 49, and Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 27.

²⁷ Cf. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 49, and Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 65.

²⁸ Cf. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 35; Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, para. 25, and Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 60.

²⁹ Cf. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, paras. 38 to 41.

13. Thus, the Court observes that the Commission refers to “possible distortions of the impeachment mechanism” that could result in a “parliamentary coup d’état.” The wording of the request is incompatible with the Court’s advisory function, because it refers to factual situations. Consequently, if the Court were to respond to the request as presented by the Commission, this would subvert the purposes of the advisory function, “since the questions it poses do not turn solely on legal issues or treaty interpretation [and ...] a response to the request requires that facts in specific cases be determined.”³⁰ In this regard, it should be recalled that, “in the exercise of its advisory function, the Court is not called upon to decide questions of fact, but rather to throw light on the meaning, object and purpose of international human rights provisions.”³¹

14. The Court also recalls that interpretations made in the context of its advisory function have implications for all OAS Member States, regardless of whether or not they have ratified the American Convention.³² In this regard, the Court notes, from the observations submitted, that the Constitutions of the OAS Member States contain numerous different provisions regulating impeachment proceedings and political trials, as well as different procedures to be followed in each country, with substantial variations that make it very difficult to reduce the inter-American standards to a minimum common denominator in order to respond to the questions posed by the Commission.

15. Accordingly, as indicated in several of the written comments, even the definition of “impeachment” or “political trial” varies significantly among the countries of the region. Moreover, the classification of impeachment in the hemisphere ranges between the following extremes: (a) a legislative or parliamentary model in which the congress, parliament or assembly removes the President independent of other institutions; (ii) a judicial model in which the person impeached is dismissed from office based merely on a court order, and (iii) a mixed model that combines elements of the two preceding scenarios; that is, political proceedings but with judicial control or conclusion. Nevertheless, there are also diverse mechanisms that are not reflected in this classification, and that would have an impact when considering the answers to the questions posed by the Commission.

16. For example, when examining the legal nature of the grounds and/or procedure in impeachment proceedings, the Court has observed at least five variations in the horizontal control mechanisms: (a) proceedings of an administrative and punitive nature in which there are administrative grounds and the punishment is also administrative; (b) proceedings of a quasi-judicial nature in which legislative and congressional committees assume the roles of prosecutor and judge, and determine the individual responsibilities of the person impeached; (c) pre-trial proceedings in which parliament merely removes the immunity of the person impeached based on the presumed participation in offenses established by the country’s criminal laws; (d) strictly judicial proceedings in which the Judiciary is the only body with competence to admit a complaint, conduct a preliminary investigation and, if appropriate, try and

³⁰ Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 46.

³¹ Cf. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 47, and Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 22.

³² Cf. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 60; Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 29 and 30, and Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 27 and 28.

sentence the person in question, and (e) proceedings that are exclusively political in nature, such as the votes of no confidence included in most of the region's parliamentary systems.

17. Based on the above, the Court finds that, by responding to the Inter-American Commission's questions as they are worded – that is, developing abstract considerations on the compatibility of the numerous models of impeachment – it could not sufficiently examine the particularities of the institutional design of the different horizontal control mechanisms that exist in the region. In many cases, these designs are the product of history; they respond to the needs and the constitutional experience of each society and warrant the detailed and contextualized analysis that can only be made in the context of a contentious case to determine their compatibility with the American Convention.

18. Indeed, the Court recalls that it has already developed jurisprudence on judicial guarantees, judicial protection and impeachment that could provide input to questions raised by the Commission.³³ However, the Court considers that it would be better placed to ensure any human rights that could be at stake and to examine the compatibility of State laws with the American Convention and the inter-America *corpus juris* in general, by making a case-by-case analysis under its contentious jurisdiction. Moreover, this would avoid making a premature ruling on matters that could subsequently be submitted to the Court's consideration in the context of a contentious case.³⁴

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

In exercise of its authority under Article 64(1) of the American Convention on Human Rights,

DECIDES:

By four votes to one:

1. Not to continue processing the request for an advisory opinion presented by the Inter-American Commission on Human Rights.

Unanimously:

2. To instruct the Secretariat of the Court to notify this order to the Inter-American Commission on Human Rights, the Member States of the Organization of American

³³ Among others, see, *Case of the Constitutional Court v. Peru*. Merits, reparations and costs. Judgment of January 31, 2001. Series C No. 71; *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; *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.

³⁴ Cf. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 45; *Request for an advisory opinion presented by the Inter-American Commission on Human Rights*. Order of the Inter-American Court of Human Rights of June 24, 2005, sixth *considerandum*, and *Juridical Status and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 32.

States, the OAS Secretary General, the President of the OAS Permanent Council, the President of the Inter-American Juridical Committee, and the organizations and individuals that have presented observations on this request.

Judge Patricio Pazmiño Freire advised the Court of his dissenting opinion which is attached to this order.

Order of the Inter-American Court of Human Rights. Request for an Advisory Opinion submitted by the Inter-American Commission of Human Rights.

Eduardo Ferrer Mac-Gregor Poisot
President

Eduardo Vio Grossi

Humberto A. Sierra Porto

Elizabeth Odio Benito

L. Patricio Pazmiño Freire

Pablo Saavedra Alessandri
Secretary

So ordered,

Eduardo Ferrer Mac-Gregor Poisot
President

Pablo Saavedra Alessandri
Secretary

DISSENTING OPINION OF JUDGE L. PATRICIO PAZMIÑO FREIRE
ON THE ORDER OF MAY 29, 2018
OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

In exercise of my authority under Article 65(2) of the Rules of Procedure of the Inter-American Court of Human Rights, I respectfully state the reasons and grounds for my decision to diverge from the majority opinion in the above order.

1. Regarding the analysis that concluded with the inadmissibility decided by the majority of my colleagues, members of the Court, I do not share this because, in my opinion, the request presented by the Commission has sufficient merits to be admitted. Thus, given the significance and nature of the questions, and the guidance that our ruling would have provided by interpreting the meaning, object and purpose of the international norms indicated in the request, this ruling could have enhanced the contents of the notion of inter-American public order and, above all, from a systemic perspective, assisted the States of the Americas: "to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man," as stated in the Preamble to the American Convention on Human Rights "Pact of San José, Costa Rica."

2. This significant and pertinent request for an advisory opinion warranted a more thorough and detailed examination by the Court. Consequently, the purpose of this opinion is to place on record the essential aspects on which I disagree with my colleagues, and the grounds on which I consider that the Court is foregoing an important opportunity to develop international human rights law, and to offer elements that provide content to the notion of inter-American public order in its close and increasingly complex relationship with the substantive values of democracy in the region.

3. Without prejudice to the majority opinion expressed in the said order, I must call attention to previous rulings that the Court has made, also in the context of advisory proceedings, and to which I ratify my adhesion on this occasion, where it has established that "the mere fact that petitions related to the subject matter of the request have been lodged before the Commission is not in itself sufficient for the Court to abstain from responding to the questions submitted to it."¹ It should also be pointed out, in support of my position, that this is based specifically on the contents of Advisory Opinion OC-23 where the Court examined the

¹ Cf. *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, paras. 45 to 65; *Juridical Status and Human Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, paras. 62 to 66, and *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples. State Obligations in Relation to Change of Name, Gender Identity, and Rights deriving from a Relationship between Same-Sex Couples (Interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights)*. Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 24.

request presented by a State arguing that the individual petition that was being processed and had been highlighted by the Commission had not been declared admissible.² A situation that is similar to the present request for an advisory opinion.

4. I ratify my position in agreement with the Court when it assumed and found it admissible to examine the questions in Advisory Opinion OC-24, recently adopted by the full Court, and in which it clearly established that the Court “must go beyond the formalism that would prevent [it] from considering questions that have a juridical interest for the protection and promotion of human rights”³ while stating that its “advisory competence should not, in principle, be used for abstract speculations without a foreseeable application to specific situations that justify the issue of an advisory opinion.”⁴ Thus, the Court considered, correctly in my opinion, that the advisory function enables the Court “to perform a service for all the members of the inter-American system and is designed to assist them in fulfilling their international human rights obligation.”⁵ It is my belief, based on my academic training and professional career in the judiciary, that human rights are realized, ensured and strengthened in the sphere of concrete realities, in specific social, political, legal, economic and cultural contexts. This perception, which I have incorporated into many rulings, jurisdictional presentations, and academic texts, means that I cannot ignore or overlook what is happening in the region, or be apathetic or permissive in the face of facts, situations and actions that not only weak the institutional framework of the States but, at the same time, threaten the survival of the democratic model and, thus, distort the inter-American legal system, undermining compliance with the international obligations and commitments of political leaders and States.

5. Consequently, and with regard to some comments made by interested third parties during the Court’s deliberations on the request, advocating that the Court not examine it because caution should be exercised in the case of texts that revealed a clear or evident “political issue,” I would like to place on record my explicit objection to the said reasoning and endorse the ruling of the International Court of Justice,⁶ in the sense that those requests that involve political aspects – a legitimate right of those presenting requests and those submitting observations – can never prevent *per se* the exercise of the advisory function, especially if those aspects may lead to the sphere of a “legal issue.” Consequently, it is incumbent on the Court to provide a conventional legal interpretation of the questions

² *The Environment and Human Rights (State obligations in relation to the environment in the context of protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights)*. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 26.

³ *Cf.* Advisory Opinion OC-1/82, para. 25; *Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights)*. Advisory Opinion OC-13/93 of July 16, 1993, Serie A No. 13, para. 41; Advisory Opinion OC-15/97, para. 39, and Advisory Opinion OC-19/05, para. 17.

⁴ *Cf. 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. Serie A No. 9, para. 16; Advisory Opinion OC-21/14, para. 25, and Advisory Opinion OC-22/16, para. 21.

⁵ *Cf.* Advisory Opinion OC-1/82, para. 39; Advisory Opinion OC-19/05, para. 18; Advisory Opinion OC-21/14, para. 28, and Advisory Opinion OC-22/16, para. 23.

⁶ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of July 8, 1996, para. 13: “The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a “legal question” and to “deprive the Court of a competence expressly conferred on it by its Statute.” The Court moreover considers that the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion.”

and concerns presented to it so that, in this way, its *ratio decidendi* and the *resolusium* may contribute to inter-American *jus commune* and to strengthening inter-American public order.

6. Based on the Court's most recent precedents, in situations similar to those of this request for an advisory opinion, I consider that the Court missed an opportunity to hear the arguments during the respective public hearing, with the participation of States, OAS organs, and interested third parties. Since a public hearing is a deliberative public forum to which the parties to a request for an advisory opinion have a right – even though this does not involve rebuttal since it is not a judicial proceeding – they would, at least, have been able to express their opinions so that, subsequently, the Court could have systematized them and issued its conclusions and, as appropriate, it would even have enabled the judges to play an active role.

7. In view of recent generally known public events in the region, in circumstances in which the strength of the democratic institutional framework and also the expansion and resilience of civil and political rights were assumed, we are unexpectedly confronted by a scenario that makes it urgent, and even compulsory, for the highest court of the system to help interpret the meaning, object and purpose of the international norms that are part of the whole human rights system, providing a necessary clarification of the standards for the protection of the human rights at stake in the impeachment proceedings in the region. The analysis of these proceedings and the human rights in play, traditionally conceived as foundation stones of the liberal and republic democratic system, would evidently be better served by the authorized ruling of the Inter-American Court developing the arguments for the decisive interpretation of the American Convention on Human Rights and the Inter-American Democratic Charter in an advisory opinion.

8. Consequently, I recognize the importance of the issues raised by the Commission and the tendency towards political instability generated by the instrumentalization of impeachment proceedings in the region. This does not mean that the Court would be ruling on particular cases or specific laws, but rather that, by following its recent precedents in Advisory Opinions OC-23 and OC-24, it should perform its advisory function in the terms requested by the Inter-American Commission. This is so because we should consider that "owing to the general interest of advisory opinions, their scope should not be limited to a few specific States."⁷ This clearly means that the Court cannot and should not issue advisory opinions related to a particular situation or a specific case, but rather that, by interpreting the meaning, object and purpose of the international human rights norms, the Court should endeavor to establish common legal criteria that provide guidance to OAS Member States and organs for the full and effective compliance with their international obligations (OC-16/99).

9. I repeat, therefore, that the Court would in no way have been examining domestic laws, constitutional texts or specific cases, but rather should have decided to continue processing the advisory opinion and to interpret which judicial guarantees, as a general and acceptable common minimum, are applicable in impeachment proceedings in the hemisphere.

10. Additionally, I should like to make it clear that, to date, the Court has not issued a specific ruling on the implications of the guarantees of due process and the principle of

⁷ *The Environment and Human Rights (State obligations in relation to the environment in the context of protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights)*. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 25.

legality in the context of the impeachment of Presidents, because the cases relating to impeachment that have been submitted to the Inter-American Court's consideration have been limited to three cases concerning high court judges who were removed from office using this type of proceeding (Case of the Constitutional Court *v.* Peru, Case of the Constitutional Tribunal (Camba Campos *et al.*) *v.* Ecuador, and Case of the Supreme Court of Justice (Quintana Coello *et al.*) *v.* Ecuador). Consequently, the Court has made no explicit ruling on the potential implications of the arbitrary use of this mechanism, with no minimum normative safeguards or parameters, on the exercise of human rights in the case of democratically elected presidents in our hemisphere.

11. I regret the fact that my colleagues have not chosen to make a thorough examination of this issue which, in my opinion, is essential in order to avoid the erosion of democracy in our region. The effective guarantee and defense of civil and political rights, as well as the human rights system as a whole, has become and is a crucial part of the essence of modern democracies. Accordingly, I consider it of the highest importance that the Court establish parameters that assist States in fulfilling their international obligations and, thus, that guarantee the full effectiveness of the American Convention and the strengthening of inter-American public order.

12. The experiences of conflict and political persecution in our hemisphere, as well as constitutional reform without minimum standards of convention-based prevention, bear witness to what can happen in the absence of adequate safeguards for the democratic institutional framework. The Court had the opportunity to reflect on the best practices of OAS Member States in an advisory opinion. I must insist that I regret that this opportunity has been missed and that, now, we must wait patiently until, hopefully, one day this discussion will be undertaken in the inter-American contentious jurisdiction, where I hope that, for the corresponding members of the Court, it will not be too late to rectify the grave errors and the degradation of inter-American public order arising from the persistent and constant violation of the treaty-based civil and political rights, and human rights as a whole, to the detriment of inter-American public order and the democratic systems of the American Convention signatory States.

L. Patricio Pazmiño Freire
Judge

Pablo Saavedra Alessandri
Secretary