**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]](#footnote-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 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]](#footnote-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]](#footnote-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]](#footnote-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]](#footnote-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]](#footnote-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 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]](#footnote-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 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

1. *Cf.* [*The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*](http://hrlibrary.umn.edu/iachr/A/OC-16ingles-sinfirmas.html)*.* 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. [↑](#footnote-ref-1)
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. [↑](#footnote-ref-2)
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)*](http://hrlibrary.umn.edu/iachr/b_11_4m.htm). 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. [↑](#footnote-ref-3)
4. *Cf.* [*Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights)*](http://hrlibrary.umn.edu/iachr/b_11_4i.htm)*,* 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. [↑](#footnote-ref-4)
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. [↑](#footnote-ref-5)
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.” [↑](#footnote-ref-6)
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. 35. [↑](#footnote-ref-7)