

INTER-AMERICAN COURT OF HUMAN RIGHTS

REQUEST FOR ADVISORY OPINION

Submitted by

THE REPUBLIC OF COLOMBIA

Regarding

THE FIGURE OF INDEFINITE PRESIDENTIAL RE-ELECTION IN THE
CONTEXT OF THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

San José de Costa Rica

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ANTHONY LETTS
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INTRODUCTION

1. The Republic of Colombia (hereinafter referred to as "Colombia"), Member State of the Organization of American States and State party to *the American Convention on Human Rights - Pact of San José* (hereinafter referred to as "the American Convention", "the Pact of San José" or "the Pact"), submits before the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") this Request for Advisory Opinion, in the exercise of the prerogative enshrined in Article 64.1 of said Covenant, according to which:

"[...]

The member States of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American States. "

[...]"

2. This request is made further in conformity with the terms of paragraphs 1 and 2 of Article 70 of the Rules of Court, according to which:

"[...]

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 sought.*
2. *Requests for an advisory opinion made 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 address of the Agent or Delegates.*

[...]"

3. This request refers to the risks posed by the abuse of the figure of indefinite presidential re-election in a democracy based on a system of direct election.
4. The Request for Advisory Opinion submitted to the Court refers to three aspects of general scope derived from this specific issue, namely:

"[...]

(one) The characterization of presidential reelection as an alleged human right protected by the American Convention;

(two) The ability of States to limit or prohibit presidential re-election and, in particular, whether this illegitimately restricts the rights of candidates or electors; and

(three) The effects that would be generated if an incumbent leader were permitted to remain in power by means of the indefinite presidential re-election on the human rights of persons who are under the jurisdiction of the member States of the Organization of American States, and in particular, on their political rights.

5. First and foremost, the requesting Government wishes to make it clear that this Request has been formulated in abstract terms and that the questions it proposes are of general applicability, as is appropriate for a question of law submitted to a court of law, whose business is to exercise competency in advisory matters, in the context of the provisions of the Convention.
6. In this regard, the requesting government would like to make it clear that, at present, presidential re-election is prohibited in Colombia, and the Government has no interest in having said figure restored within the national legal system. Thus, the considerations that motivate the present consultation are not based on the particular situation of the Colombian State, but on the multiple and very diverse interpretations made by different authorities of several American States in relation to this matter.
7. For this reason, the opinion that the Court may issue with respect to these questions has a permanent value and will serve to provide guidance to all member States and the Organization and their organs, in the event that any State in the Continent may feel inclined to take actions designed at establishing, regulating or suppressing the figure of indefinite presidential re-election. For this reason, the usefulness and significance that the Advisory Opinion will have, if the Honorable Court decides to issue it, are evident
8. The structure of this Advisory Opinion request is the following:
 - I. Competency and Admissibility
 - II. Specific questions on which the opinion of the Honorable Court is sought
 - III. Considerations originating the consultation

IV. Provisions for which an interpretation is requested

V. Name and Address of the Agent of the State.

I. COMPETENCY AND ADMISSIBILITY

A. Competency of the Court to issue an opinion

9. In the light of the terms of Article 64 of the American Convention, cited above, the Court is fully competent to deal with this Request and to reply to the questions formulated.
10. Its competency *ratione personae* is established by the fact that the Republic of Colombia, as an applicant, is a member State of the OAS and is therefore entitled to place consultations before the Court.
11. The Court has competency *ratione loci* because the consultation refers to the protection of human rights in any American State.
12. With regard to the competency *ratione materiae*, this Request refers to the interpretation of the Convention and of "other treaties concerning the protection of human rights in the American States", in particular the OAS Charter, the American Declaration on the Rights and Duties of Man of 1948 ["the American Declaration"] and the Inter-American Democratic Charter.
13. Section IV of the Application will list the specific provisions of these instruments on which an interpretation is requested. For now, it should be noted that the Court has already specified that it is competent to interpret the rules of the OAS Charter that refer to human rights.¹
14. With regard to the American Declaration, in its Advisory Opinion OC-10 of July 14, 1989, the Court held that for the member states of the OAS it constitutes "a source of international obligations" and specified "That the Declaration is not a treaty does not, then, lead to the conclusion that it does not

¹ Inter-American Court of Human Rights, "Otros Tratados", *Objeto de la Función Consultiva de la Corte* (Art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982, Series A, No. Par. 34; Inter-American Court of Human Rights, *Interpretación de la Declaración Americana de los Derechos y Deberes del Hombre en el Marco del Artículo 64 de la Convención Americana sobre Derechos Humanos*. Advisory Opinion OC-10/89 of July 14, 1989, Series A, No. 10 par. 44

have legal effect, nor that the Court lacks the power to interpret it within the framework of the principles set out above.. "[...]"²

15. Based on these considerations, the Court concluded:

"[...]"

That Article 64(1) of the American Convention authorizes the Court, at the request of a member state of the OAS or any duly qualified OAS organ, to render advisory opinions interpreting the American Declaration of the Rights and Duties of Man, provided that in doing so the Court is acting within the scope and framework of its jurisdiction in relation to the Charter and Convention or other treaties concerning the protection of the human rights in the American states..

[...]"³

B. Legitimacy of the Request.

16. It should also be remembered that the Court has developed very precise jurisprudential criteria regarding the origin and relevance of responding to a request for an advisory opinion, since in the practice and jurisprudence of the court, it is very clear that compliance with the regulatory requirements for the formulation of a consultation do not imply that the Court is obliged to respond to it. It is always up to the Court to evaluate in each specific request the relevance of exercising its advisory function.

17. The Court therefore has a broad power of assessment to determine the source of any consultation, although this power of assessment cannot be confused with a simple discretionary power to issue the opinion requested or not to do so. As the Court has said:

[...]"

"To refrain from answering a question the Court has to have decisive reasons, derived from the fact that the request exceeds the limits established by the Convention for its competence in that field. Furthermore, if the Court considers that it should not respond to a request for an advisory opinion it must give reasons for the decision, as required under Article 66 of the Convention."

² Inter-American Court of Human Rights, *Interpretación de la Declaración Americana de los Derechos y Deberes del Hombre en el Marco del Artículo 64 de la Convención Americana sobre Derechos Humanos*. Advisory Opinion OC-10/89 of July 14, 1989, Series A. No. 10.

³ *Ibid*, resolution

[...]"⁴

18. In particular, the Court has indicated some specific assumptions that, if verified, could lead to the use of the power not to respond to a request. According to the Court, in general, a request for an advisory opinion:

- must not conceal a contentious case or claim to obtain a pronouncement on an issue or matter which may eventually be submitted to the Court in a contentious case;
- must not be used as a mechanism to obtain an indirect pronouncement on a matter in litigation or in dispute at the internal level;
- must not be used as an instrument of an internal political debate;
- must not exclusively cover issues on which the Court has already pronounced in its jurisprudence, and;
- must not attempt to secure a solution on matters of fact, but should seek to clarify the meaning, purpose and reason of international laws on human rights and, above all, assist the OAS member States and organs to comply fully and effectively with its international obligations.⁵

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

20. To the extent that the Request refers to a very specific situation and does not give rise to abstract speculation, the legitimate interest of Colombia, as an OAS member State and party to the American Convention, is fully justified, for it to issue this advisory opinion. For the above reasons, it is appropriate for the Court to respond to this Request.

⁴ Inter-American Court of Human Rights, *La Institución del Asilo y su Reconocimiento como Derecho Humano en el Sistema Interamericano de Protección* (Interpretation and Scope of Articles 5, 2.7 and 22.8, regarding Article 1.1 of the American Convention on Human Rights), Advisory Opinion, OC-25/18 of May 30, 2018, par. 18

⁵ Cfr. IACHR. *El derecho a la información sobre la asistencia consular en el marco de las garantías del debido proceso legal*. Advisory Opinion OC-16/69 of October 1, 1999. Series A. No. 16, par. 47; IACHR. *Condición jurídica y derechos de los migrantes indocumentados*. Advisory Opinion OC-18/03 of September 17, 2003; Series A No. 18, par. 63, and IACHR. *Identidad de género, e igualdad y no discriminación a parejas del mismo sexo. Obligaciones estatales en relación con el cambio de nombre, la identidad de género, y los derechos derivados de un vínculo entre parejas del mismo sexo* (interpretation and scope of Articles 1.1, 3, 7, 11.2, 13, 17, 18 and 24, regarding Article 1 of the American Convention of Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24. Par. 22.

II SPECIFIC QUESTIONS ON WHICH THE OPINION ON THE HONOURABLE COURT IS SOUGHT

21. The Republic of Colombia respectfully requests the honorable American court for human rights to answer the following questions:

FIRST QUESTION

In the light of international law, Is indefinite presidential re-election human rights protected by the American Convention on human rights? In this sense, Are regulations that limit or prohibit presidential election contrary to Article 23 of the American Convention of Human Rights, whether by restricting the political rights of the incumbent leader who seeks to be elected, or by restricting the political rights of the voters? Or on the contrary, Is the limitation or prohibition of presidential re-election a restriction of political rights which is in accordance with the principles of legality, necessity and proportionality, in line with the jurisprudence of the Inter-American Court of Human Rights on this matter?

SECOND QUESTION

In the event that a State modifies or seeks to modify its legal order in order to assure, promote, propitiate or prolong the permanence of an incumbent leader in power through indefinite presidential re-election, what are the effects of that modification on the obligations of that State in area of respect and guarantees of for human rights? Is that modification contrary to the international obligations of States in matters of human rights, and particularly, their obligation to guarantee the effective exercise of rights a) to participate in the management of public affairs, directly or through freely elected representatives; b) to vote and be elected in authentic and regular elections, conducted by universal and equal suffrage or by secret ballot, to guarantee the free expression of the will of the electors, and c) to have access, in general conditions of equality, to the public functions of that country?

22. The following are some considerations which will allow an understanding of the true purpose and scope of the questions of the object of this Request.

III. CONSIDERATIONS THAT GIVE RISE TO THE REQUEST

A. General considerations

23. The Court's jurisprudence considers it necessary that an Advisory Opinion should have some practical development in Inter-American law. The Court said in this regard:

[...]

"[In effect] the advisory competency of the Court is "an alternative judicial method" (Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American 4 Convention on Human Rights), Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 43) for the protection of internationally recognized human rights, which shows that this jurisdiction should not, in principle, be used for purely academic speculation, without a foreseeable application to concrete situations justifying the need for an advisory opinion. ⁶

(..)"

24. The issue of the opinion requested is justified on the basis of diversity of positions existing in the countries of the continent, in relation to the application of the figure of presidential election. Some States have limited presidential re-election, others have recently promoted constitutional reform or judicial interpretation designed to permit it, indeed, for it be indefinite, favouring incumbent leaders. In such a situation, there is currently a complex context in this continent, which has motivated pronouncements by organizations such as the Inter-American Human Rights Commission and the United Nations Human Rights Committee.
25. So, for example, in 2009 the Constitutional Bench of the Supreme Court of Justice Nicaragua declared Articles 147 and 148 of the Constitution, which prohibited the continuous election the President, the Vice president, the Mayor and the Deputy Mayor, to be inapplicable,. This decision permitted the immediate re-election of President Daniel Ortega.⁷
26. Subsequently, in 2015, the Constitutional Bench of the Supreme Court of Justice of Honduras declared that Article 239 of the Constitution⁸, which prohibited the re-election, to be inapplicable,. This decision permitted president Juan Orlando Hernández to stand again as presidential candidate.⁹
27. Finally, in 2017, the Plurinational Constitutional Court of Bolivia, in decision 008/2017 declared the preferential application of Article 23 of the American Convention, over Article 168 of its Constitution, which limited presidential election to a single consecutive presidential re-election; and the validity of this position had been ratified in a popular referendum held on February 21, 2016. In the same line, this decision also annulled several Articles of the electoral regime law, which limited the re-election to a single consecutive period of office, thus permitting President Evo Morales to stand for a fourth consecutive

⁶ IACHR, *Garantías Judiciales en Estados de Emergencia* (Articles 27.2, 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987. Series A, No. 9, par. 16

⁷ Supreme Court of Justice of Nicaragua, Constitutional Bench, Decision 504, 2009. Available at: <http://enlaceacademico.ucr.ac.cr/sites/default/files/publicaciones/20091022-SENTENCIA-504-2009.pdf>

⁸ Political Constitution of the Republic of Honduras, Article 239

⁹ Supreme Court of Justice of Honduras, Constitutional Bench, Decision RI-1343-14.

presidential mandate.¹⁰

28. By contrast, other American States have adopted reforms to limit or eliminate presidential elections. For example, in Legislative Act 2/2015, Colombia eliminated the figure of presidential re-election and limited the constitutional period of a Head of State to a single four-year mandate¹¹. And in February 2018, Ecuador held a popular referendum, to approve the elimination of indefinite presidential re-election, which was valid at that time, and all authorities of popular election were limited to a single re-election to the same post¹². Subsequently, in October that year, the Constitutional Tribunal referring to the report of the Venice commission of March 2018, ratified the prohibition of election of local authorities¹³. Finally, in December 2018, the State of Peru held a referendum to prohibit the re-election of members of its Congress.¹⁴
29. Now, as mentioned earlier, a number of human rights organisations have expressed their concern in relation to the matter of presidential re-election.
30. As can be inferred from the foregoing, there is in effect a wide diversity of positions among countries in the continent with regard to the figure of presidential re-election. So, while some States have sought to eliminate or prohibit it, others have understood that re-election, including indefinite re-election, is a right of persons in power. This however ignores the fact that presidential re-election, and particularly indefinite presidential re-election, gives rise to serious tensions between the right of a person who is in power to be re-elected, and the right of all citizens to hold free elections in the context of regular and authentic elections. This situation gives rise to a number of challenges and questions of great importance, in relation to the consolidation and stability of democracies, and the protection of human rights in the Americas - a matter in which all member states of the OAS have a legitimate interest.

¹⁰ Plurinational Constitutional Court of Bolivia, Decision 0084 of 2017. Available at: <https://edwinfigueroa.files.wordpress.com/2017/sentencia-0084-2017-tcp-bolivia-reeleccion-evo-morales.pdf>

¹¹ Republic of Colombia, Legislative Act 2, 2015, "Adopting a reform of power balance and institutional adjustment and issuing other provisions". Available at: <http://wp.presidencia.gov.co/sitios/normativa/actoslegislativos/ACTO%20LEGISLATIVO%2002%20DEL%2001%20JULIO%DE%2015.pdf>

¹² CNE proclaims the final results of the referendum and popular consultation of 2018 in Ecuador. El Universo 8 February 2018. Available at: <https://www.eluniverso.com/noticias/2018/02/08/nota/6615580/vivo-audiencia-publica-escrutinio-referendum-consulta-popular>

¹³ Constitutional Tribunal of the Republic of Peru. Case 0008-2018-PJ/TC Decision of 4 October 2018. Available at: <https://gestion.pe/peru/politica/tribunal-constitucional-rastifica-prohibicion-reeleccion-alcaldes-nndc-246359>

¹⁴ Peru approves referendum to do away with the re-election of members of Congress. El Periódico 10 December 2018. Available at <https://www.elperiodico.com/es/internacional/20181210/referendum-peru-no-reeleccion-congresistas-7192596>

B. Considerations regarding the structure of the Request.

31. As can be seen, the questions posed are logically related: the first question seeks to determine whether indefinite presidential re-election constitutes a human right protected under the American Convention on Human Rights. In this sense, the intention is to clarify whether it is legitimate to establish limits or restrictions to presidential re-election, or whether on the contrary, those limits or restrictions are a violation of political rights, whether of the candidates or of the electors.
32. With regard to the second question, this seeks to clarify what the effects of the adoption of modifications of law designed to permit indefinite presidential election would be on the obligation of States in the matter of protection of human rights. The foregoing, taking account of the potential negative consequences that indefinite presidential re-election could bring to democracy and to the rule of law.
33. In other words, while the first question pretend aims to clarify whether presidential election is a right protected under the Convention, and whether, in that sense, its limitation would constitute a violation of the Convention; the second question seeks to determine whether the fact of permitting indefinite presidential re-election, facilitating the permanence of an incumbent leader, may be contrary to the obligations acquired by the States under the Convention.

C. Considerations regarding the First Question

34. In relation to the first question, it is important to highlight that, in accordance with the provisions of the Inter-American Court in the *Castañeda Gutman v. Mexico* case, "*The political rights embodied in the American Convention, as well as in diverse international instruments, promote the strengthening of democracy and political pluralism.*"¹⁵ The Court has explained that "*representative democracy is a determinant factor of the entire system of which the Convention forms part,*" and constitutes "*a 'principle' reaffirmed by the American States in the OAS Charter, a basic instrument of the Inter-American system.*"¹⁶
35. Regarding the right to be elected, the Court has indicated that "*Political participation by exercising the right to be elected supposes that citizens can postulate themselves as candidates in conditions of equality and that they can occupy public office subject to*

¹⁵ I/A Court HR. Case of Castaneda Gutman v. United Mexican States. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of August 6, 2008. Series C No. 184, para. 141

¹⁶ Idem; I/A Court HR. The Expression "Laws" in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6186 of May 9, 1986. Series A No. 6, par. 3. 4

election if they are able to achieve the necessary number of votes."¹⁷ For its part, in the *Yatama v. Nicaragua* case, the Court established that for the exercise of the political rights enshrined in Article 23 of the Convention, *"It is essential that the State should generate the optimum conditions and mechanisms to ensure that these political rights can be exercised effectively, respecting the principles of equality and non-discrimination."*¹⁸

36. The Court has determined that it is possible to establish requirements for the exercise of political rights, without necessarily resulting contrary to the Convention. Thus, in the case of *Yatama v. Nicaragua*, the Court established that *"instituting and applying requirements for exercising political rights is not, per se, an undue restriction of political rights. These rights are not absolute and may be subject to limitations."*¹⁹ However, the limitations imposed on political rights must observe *"the principles of legality, necessity and proportionality in a democratic society."* Thus, *"The restriction should be established by law, non-discriminatory, based on reasonable criteria, respond to a useful and opportune purpose that makes it necessary to satisfy an urgent public interest, and be proportionate to this purpose."*²⁰ Consequently, *"States may establish minimum standards to regulate political participation, provided they are reasonable and in keeping with the principles of representative democracy."*²¹ For this purpose, it is necessary to consider Article 6 of the Inter-American Democratic Charter, that *"promoting and fostering diverse forms of participation strengthens democracy."*²²
37. Similarly, in the case of *Castañeda Gutman v. Mexico*, the Court explained that *"it is not possible to apply only the limitations of paragraph 2 of Article 23 of the American Convention to the electoral system established in a State."*²³ Accordingly, it is possible to establish *"requirements that the titleholders of political rights must comply with so as to be able to exercise them"*²⁴ even if these requirements exceed the limitations indicated in Article 23.2 of the Convention, provided that they are not *"disproportionate or unreasonable."*²⁵
38. According to the foregoing, the Court has established that: (i) the right to be elected is a right protected under Article 23 of the Convention; (ii) the State is obliged to generate the optimum conditions and mechanisms to ensure that these political rights can be exercised effectively; (iii) for this purpose, it is possible to establish limitations and

¹⁷ I/A Court HR. Case of Castaneda Gutman v. United Mexican States. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of August 6, 2008. Series C No. 184, para. 148

¹⁸ I/A Court HR. Case of Yatama v. Nicaragua. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127, para. 195

¹⁹ I/A Court HR. Case of Yatama v. Nicaragua. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127, para. 206

²⁰ 20 Idem.

²¹ 21 Ibid., Para. 207

²² Idem.

²³ I/A Court HR. Case of Castaneda Gutman v. United Mexican States. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of August 6, 2008. Series C No. 184, para. 161

²⁴ I/A Court HR. Case of Castaneda Gutman v. United Mexican States. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of August 6, 2008. Series C No. 184, para. 141."Idem

²⁵ Idem.

requirements for the exercise of political rights, provided that such limitations or requirements respect the principles of legality, necessity and proportionality; and (iv) it is possible that these requirements exceed the limitations indicated in Article 23.2, without this being, *per se*, contrary to the Convention.

39. In view of the foregoing, it is pertinent to determine whether: (i) the right to indefinite presidential re-election is a human right protected under Article 23 of the Convention, within the framework of the rights to vote and to be elected; and if (ii) the limitations or restrictions on indefinite presidential re-election are contrary to Article 23 of the Convention or, on the contrary, constitute a restriction of political rights that is consistent with the principles of legality, necessity and proportionality.

40. In order to provide the request with greater context, it is relevant to note that the OAS Secretary General consulted the European Commission for Democracy through Law, or "Venice Commission," regarding limitations on the presidential re-election and compatibility with international standards on the protection of human rights. The Venice Commission responded to the questions posed by the Secretary General, as follows:

Does a human right to re-election exist? If so, what are the limits to this right?

117. The Venice Commission is of the view that there is no specific and distinct human right to re-election. The possibility to stand for office for another period foreseen by the constitution is a modality of or a restriction to the right to political participation and, specifically, to stand for office.

118. Under international standards, notably the ICCPR, whatever form of constitution or government in force, the States should adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Any conditions which apply to the exercise of the rights protected by Article 25 must not be discriminatory and should be based on objective and reasonable criteria.

Do term limits unduly limit the human and political rights of aspirant candidates?

119. In modern democracies, while the principle of universal suffrage is widely accepted and carefully protected, the right to be elected can be more easily limited as a consequence of both legal requirements and a limited number of elective offices available. The governmental system is decided by the people who are the sovereign constitution-making entity."

121. *In conclusion, term limits that satisfy the above criteria do not unduly limit the human and political rights of aspirant candidates.*

122. *In a constitutional and representative democracy it is implicit that the representatives exercise only those powers which are allocated to them in accordance with constitutional provisions. Genuine, free and periodic elections in accordance with paragraph (b) of Article 25 of the International Covenant on Civil and Political Rights are essential to ensure the accountability of representatives for the exercise of the powers vested in them. Such elections must be held at intervals which are not unreasonably long and that ensure that the authority of the government continues to be based on the free expression of the will of electors."*

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protecting the human right to political participation. They contribute to guaranteeing that periodic election are "genuine" in the sense of Article 25 ICCPR and Art. 23(1b) ACHR and to ensuring that representatives are freely elected and responsible before the citizens. In addition, when the people choose to adopt a presidential or semi-presidential system, they also have the authority to decide the presidential power and the term of office of the president. Presidential term limits are therefore a self-imposed restriction on the power of the people to choose a representative at their will with the aim of maintaining a democratic system.

124. In the Commission's view and in light of the comparative analysis of the constitutions of the 58 countries under consideration, abolishing limits on presidential re-election represents a step back in terms of democratic achievement. Be that as it may, if the people wish to modify the limits to re-election, a constitutional amendment must be sought in accordance with the relevant constitutional rules.

125. To the extent that a prohibition or restriction on re-election may affect citizens' right and ability to hold those in power accountable, it should be noted that this capacity is always limited by legal conditions related to suffrage regulations, such as age, citizenship and legal capacity, among others, and by the regulations governing the right to stand for office and access to the ballot, that is, the nomination rules."

126. Furthermore, term limits can help ensure accountability among elected representatives by helping to prevent inappropriate concentrations of power."

What is the best way to modify term limits within a constitutional state?

127. Presidential term limits are entrenched in the Constitution; a constitutional amendment is therefore required to modify them. Only the people, who have sovereign legal power, can modify the scope of the delegation granted to the President. A decision to alter or remove presidential term limits should be subject to thorough public scrutiny and debate and must fully respect the relevant constitutional and legal procedures.

128. *To the extent that constitutional amendments strengthening or prolonging the power of high offices of state are proposed, such amendments (if enacted) should have effect only for future holders of the office, not for the incumbent.*

129. *While approval by referendum strengthens the legitimacy of the constitutional amendment, in the Commission's view for constitutional reform, it is equally legitimate either to include or not include a popular referendum as part of the procedure. However, recourse to a referendum should not be used by the executive in order to circumvent parliamentary amendment procedures. Popular referendums aimed at abolishing limits on presidential terms are particularly dangerous, to the extent that it is usually the incumbent who—directly or indirectly—calls on the referendum and the referendum itself is a manifestation of such plebiscitarian power which limitations on presidential mandates seek to prevent. Recourse to a popular referendum to lift or amend limits on presidential re-election should be confined to those political systems in which this is required by the constitution, applied in accordance with the established procedure, and should not be used as an instrument in order to circumvent parliamentary procedures, or to undermine fundamental democratic principles and basic human rights.*

130. *As regards the possible role of the Constitutional or Supreme courts, they should intervene after the relevant amendment has been adopted by the constitutional legislator pursuant to the special constitutional requirements. The possibility for the Court to carry out a substantive a posteriori review that the amendment adopted is not in breach of "unamendable" provisions or principles should only be exercised in those countries where it already follows from clear and established doctrine and even there with care, allowing a margin of appreciation for the constitutional legislator."²⁶*

D. Considerations regarding the Second Question

41. In relation to the second question, it is important to keep in mind that alternating power is a necessary democratic value for the construction of the rule of law. The foregoing is in accordance with the Declaration of Santiago de Chile, approved at the Fifth Meeting of Consultation of Ministers of Foreign Affairs held in 1959. The third operative paragraph declared that "*perpetuation in power, or the exercise of power without a fixed term, and*

²⁶ European Commission for Democracy through Law (Venice Commission). report on the limits to reelection. Part I - Presidents. Approved by the Venice Commission at its 114th Plenary Session. Venice, March 16 and 17, 2018. Available in: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)010-spa](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)010-spa).

*with manifest intent of perpetuation is incompatible with the effective exercise of democracy.*²⁷

42. In spite of the above, there is a possibility that different States in the region may seek to make regulatory changes in order to allow indefinite presidential re-election, favoring the perpetuation of incumbent leaders in power. In line with the foregoing in this Request, this could have serious consequences for democracy and for the rule of law, which are essential postulations for the guarantee of human rights. Consequently, this question seeks to determine the effects of said regulatory modification on the obligations of States in relation to the guarantee of human rights. In other words, the aim is to determine if a regulatory modification that allows for indefinite presidential re-election, favoring the perpetuation of the incumbent leaders in power, could be contrary to the obligations of the States under the American Convention on Human Rights.

IV PROVISIONS OF WHICH AN INTERPRETATION IS SOUGHT

A. General Considerations

43. The obligations to protect, respect and guarantee human rights by the American States are incorporated in different international instruments that seek to protect people in their rights and guarantee their fundamental freedoms.
44. Within the collection of international instruments on the subject, the Inter-American System provides, inter alia, the following: *American Declaration of the Rights and Duties of Man*; *American Convention on Human Rights*; *Inter-American Democratic Charter*, and the *Declaration of Santiago de Chile*, approved at the Fifth Meeting of Consultation of Ministers of Foreign Affairs held in 1959.
45. In turn, the *American Convention on Human Rights* constitutes, par excellence, the Statute that culminates the process of American codification in the field of human rights, because it incorporates a catalog of inviolable rights and obligations for the human person and it establishes a system of regional protection of the fundamental rights of persons comprising the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.
46. In this context, the present request for an Advisory Opinion is intended to allow the Honorable Inter-American Court to deepen the interpretation of norms for the protection of human rights, conventional and customary, in accordance with the provisions of Article 64.1 of the *American Convention on Human Rights*, and which are covered by the expression "other treaties" contained in said Article.²⁸

²⁷ Fifth Meeting of Consultation of Ministers of Foreign Affairs. Declaration of Santiago de Chile, 1959. para. op. 3

²⁸ I/A Court HR, "Other Treaties" Purpose of the Advisory Function of the Court (art. 64 American Convention on Human Rights). Advisory Opinion OC-1182 of September 24, 1982, Series A, No. 1

47. As expressed by the Honorable Court in Advisory Opinion OC-1/82 of September 24, 1982:

"[...]

the advisory jurisdiction of the Court can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto.

[...]”²⁹

48. Special mention should be made to Article 23 of the Convention, which establishes the political rights that every citizen must enjoy:

1. Every citizen shall enjoy the following rights and opportunities:

a) to take part in the conduct of public affairs, directly or through freely chosen representatives;

b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and

c) to have access, under general conditions of equality, to the public service of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

49. This provision stipulates that citizens must have access, under general conditions of equality, to the public functions of their country. It also establishes that all citizens must enjoy the right to be elected in authentic periodic elections, made by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the electors. Finally, it is established that the law can regulate the exercise of these rights “only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent judge, in criminal proceedings.”

²⁹ I/A Court HR, “Other Treaties” Purpose of the Advisory Function of the Court (art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982, Series A No. 1, first device paragraph.

50. However, the Article in question makes no reference to the possibility of States to regulate the exercise of the political rights of their citizens based on the limitation of the figure of indefinite presidential re-election. Nor does it refer to the limits and/or obligations of a State that seeks to favor the permanence in power of an incumbent leader through the figure of indefinite presidential re-election. It is important to take into account the foregoing, in particular, the tensions that this figure may create between the right to be elected of the incumbent and the right of all citizens to freely choose, within the framework of "authentic" periodic elections.

51. In this context, several provisions of the Inter-American Democratic Charter are also relevant. In the first place, the Preamble of this instrument, which states that *"the participatory nature that attends to the exercise of democracy in our countries in different aspects of public life contributes to consolidate its values, as well as freedom and solidarity in the Hemisphere"*.

52. Second, Article 2, in which *"Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order"*.

53. Third, Article 3 of that instrument, which states the following:

"Essential 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, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government."

54. Fourth, Article 4 of the aforementioned Charter, the second paragraph of which states that *"The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy."*

55. Fifth, Article 7 of the Charter, which states that:

"Democracy is indispensable for the effective exercise of fundamental freedoms and human rights in their universality, indivisibility and interdependence, embodied in the respective constitutions of states and in Inter-American and international human rights instruments."

56. Finally, it is necessary to bring up the Declaration of Santiago de Chile, approved at the Fifth Meeting of Consultation of Ministers of Foreign Affairs held in 1959, which declared, in the third section that "the perpetuation in power, or the exercise thereof without a fixed term and with a clear purpose of perpetuation, are incompatible with the effective exercise of democracy."
57. With the above provisions in mind, it is highly relevant to determine whether, under international instruments applicable in the matter, protected political rights include the right to be reelected, even indefinitely; or if, on the contrary, the States have the possibility, or the obligation, to limit the figure of the indefinite presidential re-election, especially in order to avoid the permanence of an incumbent leader in power, the excessive concentration of power in the figure of that leader and the consequent weakening of democratic institutions.
58. With this background and taking into account that human rights treaties, rather than focusing on establishing a balance of interests between States center on guaranteeing the enjoyment of human rights and freedoms, Colombia considers it highly desirable that the Honorable Court interpret the scope of several norms of the OAS Charter, the American Declaration, the American Convention on Human Rights and the Inter-American Democratic Charter.

B. Specific Provisions

59. The provisions requested for interpretation belong to the following diplomatic instruments: the American Declaration, the OAS Charter, the American Convention and the Inter-American Democratic Charter.

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

- a. The four un-numbered paragraphs of the Considerations of the resolution of the Ninth International American Conference adopting the American Declaration;
- b. The six un-numbered paragraphs of the Preamble of the Declaration itself;
- c. Article XX, "Right to vote and participate in government"; and
- d. Article XXXIII, "Duty to obey the law";

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

- a. First to fifth and seventh paragraphs, un-numbered, of the Preamble; and
- b. Article 3.d).

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

- a. The five paragraphs, un-numbered, of the Preamble;
- b. Article 1, "Obligation to Respect Rights"
- c. Article 2, "Domestic Legal Effects"
- d. Article 23, "Right to Participate in Government"
- e. Article 24, "Equality before the Law"
- f. Article 29; "Restrictions Regarding Interpretation"; and
- g. Article 32.2, "Relationship between Duties and Rights"

(four) The Court is requested to interpret the following Articles of the Inter-American Democratic Charter:


- a. First, fifth, sixth, eighth, ninth, sixteenth, seventeenth, nineteenth and twenty-ninth, un-numbered paragraphs of the Preamble;
- b. Article 2;
- c. Article 3;
- d. Article 4;
- e. Article 5;
- f. Article 6; and
- g. Article 7

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[Signed]
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Minister of Foreign Affairs
Republic of Colombia


ANTHONY LETTS
Traductor Juramentado
Res. 139/80 Minjusticia