

INTER- AMERICAN COURT OF HUMAN RIGHTS

REQUEST FOR AN ADVISORY OPINION

Submitted by the Republic of Colombia

IN THE MATTER OF

“Obligations in matters of human rights of a State that has denounced the American convention on human rights, and attempts to withdraw from the OAS”

WRITTEN OBSERVATIONS OF LAW

Submitted by Muhammad Muzahidul Islam

According to Article 73(3) of the Rules of Procedure of the Inter-American Court of Human Rights

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When a State decides to denounce a human rights instrument or decides to withdraw from a system where the human rights ensuring mechanisms are operating, that particular decision is always shocking for a human rights activist or member of the civil society; because there may be an apprehension that the inhabitants of that denouncing State would be the victims of the violations of human rights and would not find the mechanisms to recourse to redress those violations. And being a human rights activist, a member of the civil society and a human rights lawyer the author is concerned and finds an interest to make an effort to present amicus curiae submissions as a response to the open call of the President of the Court and this effort is a part of pro bono works of his Chamber.

Author does not intend to participate or attend any oral public argument before the Court; because the written submissions have been made in a clear and plain language and those are self-explanatory.

Author is a member of Bangladesh Supreme Court Bar Association. The observations expressed herein are his own and do not necessarily represent the observations of any institution.

INTRODUCTION

1. It is not necessary to mention the details of the advisory opinion request that has been presented by the Republic of Colombia as a member-state of the Organisation of American States (OAS), to the American Court of Human Rights (IACtHR, “the Court”). The provision of the American Convention on Human Rights [(ACHR, article 64(1))] authorizes a member state to submit a request for advisory opinion on the issues relating to the interpretation of the convention or other international treaties connecting human rights in the American regions. According to paragraph 25 of the Advisory Opinion OC-1/82 of 24 September 1982, ‘the advisory jurisdiction of the Court is closely related to the purposes of the Convention. This jurisdiction is intended to assist the

American States in fulfilling their international human rights obligations and to assist the different organs of the inter American system to carry out the functions assigned to them in this field.' The provision of the Rules of Procedure of the Court [(article73(3))] allows and authorizes its President to invite or permit any interested party to come forward with a written opinion, as a friend of the court, on the issues that have been sought for clarification in the request. And when the legal position is so, I would present my written submissions on the issues raised in the request for the kind consideration of the Honourable Court. I would start with the jurisdiction and admissibility issues first and then the principles of interpretation that the Court may apply and finally the following issues that are central to the request:

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

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

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

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

JURISDICTION AND ADMISSIBILITY

2. In order to provide an opinion on the matters requested by a member of the OAS the Court itself needs to satisfy that it has jurisdiction to entertain the issues requested and its engagement would be justifiable (admissible). As per article 64(1)¹ of ACHR a

¹ Article 64

member state of OAS may consult the Court for the interpretation of this convention or other treaties regarding the protection of human rights in the American states. The wording of this article implies that the Court has jurisdiction over the matters requested when they relate to the protection of human rights in the American states and the interpretation regards either the convention or the other treaties.

3. The Court needs to consider the provisions of the instruments that have been invoked in the request for clarification and whether they come within the ambit of article 64(1) of ACHR or of other provision in order to have jurisdiction. Paragraph 26 of the request states that- 'In the set of international instruments on the matter, the Inter-American System has the following, amongst others: The American Declaration of the Rights and Duties of Man; the Final Act of the V Meeting of Foreign Ministers, 1959; the American Convention on Human Rights; the Inter-American Convention to Prevent and Sanction Torture; the Protocol of San Salvador; the Additional Protocol to the American Convention on Matter of Economic, Social and Cultural Rights; the Protocol to the American Convention on Human Rights related to the Abolition of the Death Penalty; the Convention of Belem do Para"; the Inter-American Convention to Prevent, Sanction and Eradicate Violence against Women; the Interamerican Convention on the Forced Disappearance of Persons; the American Declaration on the Rights of Indigenous Peoples; the Inter-American Democratic Charter; Principles and Good Practices on the Protection of Persons Deprived of their Liberty in the Americas'.

4. For the interpretation purposes the Court may apply the provisions of the Vienna Convention on the Law of Treaties (VCLT) 1969; because the customary law had been incorporated by this particular instrument. 'Treaty'² has been defined in article 2(1)(a) of the VCLT and according to that definition not all the instruments mentioned in the preceding paragraph come within the ambit of article 64(1) of ACHR.

5. With regard to the American Declaration of the Rights and Duties of Man it has already been settled, by the IACHR³, that it is a legally binding instrument for the

1. 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 Article 2 Use of terms 1. For the purposes of the present Convention: (a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

³ Report of Inter American Commission on Human Rights 6 March 1981, Para-15, The international obligation of the United States of America, as a member of the Organization of American States (OAS), under the jurisdiction of the Inter-American Commission on Human Rights (IACHR) is governed by the Charter of OAS (Bogotá, 1948) as amended by the Protocol of Buenos Aires on February 27, 1967,

American states even though it was not originally so intended. And thus the Court's jurisdiction on this particular instrument is established and maintained. With regard to the American Declaration on the Rights of Indigenous Peoples one could argue that specific rights that had attained the norms of jus cogens (non-derogable) have been incorporated into this particular instrument (art. XI Prohibition against genocide, art XII Prohibition against racial discrimination) and this particular aspect implies that as a regional mechanism the Court has jurisdiction to interpret the relevant provisions of that instrument.

6. Since the request for opinion has been drafted by the Republic of Columbia in line with the requirements of articles 70(1)⁴ and 71⁵ of the Rules of Procedure of IACtHR and the fact that it was drafted neutrally without involving any third party⁶, the Court's engagement with the proceeding would be justifiable.

ratified by United States on April 23, 1968, Para-16, As a consequence of articles 3 i, 16, 51 e, 112 and 150 of this Treaty, the provisions of other instruments and resolutions of the OAS on human rights, acquired binding force. Those instruments and resolutions approved with the vote of U.S. Government, are the following-

- American Declaration of the Rights and Duties of Man (Bogotá, 1948)
- Statute and Regulations of the IACHR 1960, as amended by resolution XXII of the Second Special Inter-American Conference (Rio de Janeiro, 1965)
- Statute and Regulations of IACHR of 1979-1980.

⁴Article 70(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.

⁵Article 71- 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 parties thereto, the specific questions on which the opinion of the Court is being sought, and the considerations giving rise to the request.

⁶ ICJ in Portugal v Australia case 1995 para 26. The Court recalls in this respect that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction. This principle was reaffirmed in the Judgment given by the Court in the case concerning Monetary Gold Removed from Rome in 1943 and confirmed in several of its subsequent decisions (see Continental Shelf (Libyan Arab Jarnahiriyu/ Malta), Application for Permission to Intervene, Judgment, I. C. J. Reports 1984, p. 25, para. 40; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I. C. J. Reports 1984, p. 431, para. 88 ; Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I. C. J. Reports 1986, p. 579, para. 49; Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I. C. J. Reports 1990, pp. 114-1 16, paras. 54-56, and p. 112, para. 73; and Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I. C. J. Reports 1992, pp. 259-262, paras. 50-55).

CONCLUSION

7. On the basis of foregoing analyses it is respectfully submitted that the Court may find that it has jurisdiction on the issues requested by the Republic of Colombia and engagement with the proceeding would not be inappropriate and rather be justifiable.

PRINCIPLES OF INTERPRETATION

8. This particular request of the Republic of Colombia involves the rights and obligations enshrined in the human rights instruments. And that is why the Court may note that interpretation of those instruments may warrant the recourse to the established principles of interpretation.

9. The commonly acknowledged 'Schools of Interpretation'⁷ and instructions of articles 31-32 of Vienna Convention on Law of Treaties (VCLT)⁸ are outlined below and the Court may apply the right one to interpret the provisions of the applicable instruments mentioned in the request:

- a. As per 'Textualist' interpretation begins with the words of a provision itself, as they are commonly understood. Article 31 of VCLT also calls for an examination of a text's 'ordinary meaning'.
- b. Where the text is ambiguous or obscure or the plain meaning of the text leads to a manifestly absurd or unreasonable result, the 'Intentionalist-Approach' can be applied in

⁷ International Judicial Monitor, Published by the American Society of International Law and the International Judicial Academy
September 2006, Volume 1, Issue 4

⁸ [INTERPRETATION OF TREATIES Article 31, GENERAL RULE OF INTERPRETATION 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. SUPPLEMENTARY MEANS OF INTERPRETATION Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 : (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.]

order to reach a sensible result. And this approach has been reflected in the provision of VCLT which permits to analyze the negotiating history to reach a confirmed and sensible result.

c. 'Teleological Approach' seeks to effectuate the purpose of an agreement rather than slavishly following the text or attempting to divine the intent of the drafters. It is captured in the VCLT's requirement that treaties be construed in light of their "object and purpose" and in view of "relevant rules of international law".

CONCLUSION

10. It is respectfully submitted that the Court may find VCLT as an aiding instrument for the interpretation purposes. Since the customary rules had been incorporated into this instrument the Court may safely apply the relevant provisions of this instrument to interpret a particular instrument without giving due regard to the ratification etc. issues.

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

11. In order to answer this question the Court needs to consider specific provisions of particular instruments that are in force under the inter-American system and the norms that those provisions have attained under the customary international law. The Court is required to consider whether a State which has denounced the American Convention on Human Rights is allowed to ignore a provision of American Convention that has attained the norm of customary international law.

12. The Court has been requested for interpretation of specific provisions of three diplomatic instruments, namely, the American Declaration, the OAS Charter and the American Convention and to interpret clauses of the Preamble of the American Declaration, specifically: The four un-numbered paragraphs in the Considerations of Resolution XXX of the IX American International Conference, adopting the American Declaration; and the six un-numbered paragraphs of the Preamble of the Declaration itself.

13. The Court has also been requested to interpret the following Articles of the OAS Charter:

the first five paragraphs, unnumbered, of the Preamble; Article 3.1); Article 17; Article 45; Article 53; Article 106.

14. The Court has further been requested to interpret the following Articles of the American Convention: the five unnumbered paragraphs of the Preamble; Article 1, "Obligation to respect rights; Article 2, "Duty to adopt provisions of internal law: Article 27, "Suspension of guarantees"; Article 29, "Rules of interpretation"; Article 30, "Scope of restrictions"; Article 31, Recognition of other rights; Part 11, "Means of protection" (Articles 33-65); Article 78.

15. Upon a careful analysis of the provisions of the American Convention mentioned above the Court may find that those provisions have attained particular norms in the regional and international instruments causing binding effect and the derogation of which is not permitted.

16. The Court, applying the principles of interpretation mentioned above, may note that the framers of the Convention, by incorporating article 27⁹, meant that certain provisions are non-derogable even in the state of public emergency and the Court may take into consideration the following analyses on jus cogens norm and erga omnes obligations as they are pertinent to address the first question:

JUS COGENS

17. There are certain rights that have attained so compelling status and norms that derogation from which is not permitted by way of particular agreements. And this is what is called Jus Cogens. There is no exhaustive official list of rights that have attained the peremptory norms, however, the following are commonly accepted being so: the prohibition of the use of force between states, prohibition of genocide, the prohibition of slavery, the prohibition of torture, racial discrimination as well as peoples' right to self-determination. One would refer article 4(2) of ICCPR¹⁰ to find some rights of peremptory norms that may not be derogated even at the time of public emergency.

⁹ Article 27. Suspension of Guarantees

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

¹⁰ *Article 4*

18. It is necessary to mention here the comments made by the UN Human Rights Committee (ICCPR). In its General Comment no. 29¹¹ on States of Emergency, the Committee noted the following:

“ (7). Article 4, paragraph 2, of the Covenant explicitly prescribes that no derogation from the following articles may be made: article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent), article 8, paragraphs 1 and 2 (prohibition of slavery, slave-trade and servitude), article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), article 15 (the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty), article 16 (the recognition of everyone as a person before the law), and article 18 (freedom of thought, conscience and religion). The rights enshrined in these provisions are non-derogable by the very fact that they are listed in article 4, paragraph 2.”

19. Upon a thorough examination of the wording used in article 38(1)(b)¹² of the statute of the ICJ it can be found that both the “conduct” and “belief” of a state have been meant for the pre-requisition of a status of a customary international law. It would be pertinent to mention here the North Sea Continental Shelf cases¹³ (Germany/Denmark and Germany/ Netherlands) which were decided in 1969 by the ICJ and in this case, the World Court set the elements in order to form a binding customary international law.

1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

¹¹ CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency* Adopted at the Seventy-second Session of the Human Rights Committee, on 31 August 2001 CCPR/C/21/Rev.1/Add.11, General Comment No. 29. (General Comments).

¹² Article 38(1)(b)The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: international custom, as evidence of a general practice accepted as law.

¹³ INTERNATIONAL COURT OF JUSTICE, REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS NORTH SEA CONTINENTAL SHELF CASES (FEDERAL REPUBLIC OF GERMANY/DENMARK; FEDERAL REPUBLIC OF GERMANY/NETHERLANDS) JUDGMENT OF 20 FEBRUARY 1969.

20. Paragraph 81¹⁴ of the judgment of this case goes as follows:

'The Court accordingly concludes that if the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle for the delimitation of continental shelf areas between adjacent States, neither has its subsequent effect been constitutive of such a rule; and that State practice up-to-date has equally been insufficient for the purpose.' And this implies that one needs to prove two elements, i.e state practice and *opinio juris*, in order to argue that a customary rule has emerged.

21. Subsequently, in 1986 the ICJ in Nicaragua case¹⁵ clarified that in order for a customary rule to come into force a complete consistency in state-practice is not necessary and the court's view was reflected in paragraph 186¹⁶ of the judgment and that is quoted here below:

' It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.'

22. ICJ in paragraph 207¹⁷ of the same case explained the *opinio juris* in the following words:

' In considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the North Sea Continental Shelfcases, for a new customary rule to be formed, not only must the acts concerned "amount to a settled practice", but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief. i.e., the existence

¹⁴ *ibid*

¹⁵ INTERNATIONAL COURT OF JUSTICE REPORTS OF JUDGMENTS. ADVISORY OPINIONS AND ORDERS CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (NICARAGUA v. UNITED STATES OF AMERICA) MERITS JUDGMENT OF 27 JUNE 1986

¹⁶ *ibid*

¹⁷ *ibid*

of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*." (I.C.J. Reports 1969, p. 44, para. 77.)'

ERGA OMNES OBLIGATIONS

23. The Court may note that when the elements mentioned above are satisfied in order for the status of customary international law and the same also attains the norm of *jus cogens*, *erga omnes* obligations are then attributed to the world community at large.

24. The concept *Erga Omnes* has been used in international law as a legal term describing obligations owed by States towards the community of States as a whole. The nature of this concept is such that if a State is of a breach of the said rule any State can come forward with a complaint of that breach by the other State; because every State has an interest in the protection of the rules that generate *erga omnes* obligations.

25. The concepts of *jus cogens* and *erga omnes* are closely related and it is difficult to draw a difference between them. The former creates the latter *erga omnes* obligations for the States to comply and if this analysis is right it necessary follows that an *erga omnes* obligation is the consequence of a rule being characterized as *jus cogens*.

26. According to the 1969 and 1986 Vienna Conventions on the Law of Treaties, a treaty is void if it conflicts with *jus cogens* (Art. 53¹⁸ and 64¹⁹). It is important to mention here some cases where ICJ and other international courts decided *erga omnes* obligations. For example, in *Barcelona Traction case*²⁰ the ICJ enumerated four *erga omnes* obligations; the outlawing of acts of aggression, the outlawing of genocide, protection from slavery, and protection from racial discrimination. Subsequently, obligations to respect the principles of self-determination and obligations prohibiting the

¹⁸ Article 53. TREATIES CONFLICTING WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW ("JUS COGENS") A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

¹⁹ Article 64 Emergence of a new peremptory norm of general international law (*jus cogens*) If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

²⁰ INTERNATIONAL COURT OF JUSTICE, REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS CASE CONCERNING THE BARCELONA TRACTION, LIGHT AND POWER COMPANY, LIMITED (NEW APPLICATION : 1962) (BELGIUM v. SPAIN) SECOND PHASE JUDGMENT OF 5 FEBRUARY 1970, para-34

use of torture were recognized as erga omnes obligations by the courts in East Timor²¹ and Furundzija²² case respectively.

CONCLUSION

27. In the light of the foregoing analyses it is respectfully submitted that the Court would need to peruse whether or not the provisions mentioned in article 27 of the Convention come within the ambit of jus cogens satisfying the required elements mentioned above in order to attribute obligations (erga omnes) to the world community. It is worth noting that some of the rights mentioned in article 27 have already crossed the inter-American boundary and been incorporated into particular international human rights instruments and attained the norms of jus cogens and they generate obligations to the community with regard to the outlawing of acts of aggression, genocide, protection from slavery, protection from racial discrimination, the principles of self-determination and prohibition of the use of torture. And in such a position a State (member state of OAS) can not escape the obligations owed to its inhabitants by excusing a mere reason that it has denounced the American Convention.

28. It is further submitted that the Court may note that in case of a scenario where a State has denounced the Convention and decides to remain in the inter-American system by ratifying the Charter of OAS and its subsequent amendments and accepting other relating statutes and regulations, the State concerned, then, is to implement the relevant provisions of the American Declaration of the Rights and Duties of Man under the Commission (IACHR) and it is so by virtue of article 112²³ of the Protocol of Amendment to the Charter of the Organisation of American States ("Protocol of Buenos Aires"), 27 February 1967, article 1(2)(b)²⁴ of the statute of the Inter-American

²¹ INTERNATIONAL COURT OF JUSTICE REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS CASE CONCERNING EAST TIMOR (PORTUGAL v. AUSTRALIA) JUDGMENT OF 30 JUNE 1995, para-29

²² International Tribunal for former Yugoslavia , Prosecution v Furundzija, Case No.: IT-95-17/1-T, 10 December 1998, para 151

²³ Article 112, There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.

²⁴ Approved by Resolution No. 447 adopted by the General Assembly of the OAS at its ninth regular session, held in La Paz, Bolivia, October 1979

Article 1

1. The Inter-American Commission on Human Rights is an organ of the Organization of American States created to promote the observance and defense of human rights and to serve as an advisory body to the Organization in this area.

2. For the purposes of this Statute, human rights are understood as:

to. the rights defined in the American Convention on Human Rights in relation to the States parties to it;

b. the rights enshrined in the American Declaration of the Rights and Duties of Man, in relation to the other member states.

Commission on Human Rights and further by the reason of the decision²⁵ of the Commission (IACHR).

29. It is submitted that the obligations that have been undertaken by a State for tackling violence against children under article 19(Rights of the Child) of the Convention can not be avoided on the ground that the State concerned has denounced that Convention. And the State concerned, then, would undertake obligation not by virtue of article 19 of the Convention but under the following articles of the American Declaration:

- Article 1: Right to life, liberty and security of person
- Article 2: Right to equal protection under the law without discrimination
- Article 5: Right to protection of honour, personal reputation, and private and family life
- Article 6: Right to a family and to protection thereof
- Article 7: Right to protection for mothers and children
- Article 11: Right to the Preservation of health and to wellbeing
- Article 12: Right to education
- Article 13: Right to the benefits of culture
- Article 14: Right to work and fair remuneration
- Article 17: Right to recognition of juridical personality and civil rights
- Article 18: right to judicial protection.

And in addition to that the State concerned is to undertake other obligations under other relevant international instruments namely Convention on the Rights of the Child (CRC) and its protocol etc [if those are ratified] and further by virtue of erga omnes obligations if a child is a victim of the violations of certain rights. The Court may also note that in 1977 the Additional Protocols to the 1949 Geneva Conventions prohibited the military recruitment and use of children under the age of 15, which is now recognised as a war crime under the Rome Statute of the International Criminal Court (2002) and this prohibition was incorporated into the CRC (1989). Optional Protocol to the Convention to the Rights of the Child on the involvement of children in armed conflict (OPAC) also prohibits the conscription of children under the age of 18 and their participation in hostilities. And considering Rules 135²⁶ and 136²⁷ of ICRC the Court may find their legally binding force on a State even in the conflict situations. And it is further submitted that sexual violence including rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilisation or any [other] form of sexual violence against children in conflict situations may constitute crimes against humanity, war crimes or genocide and even in normal situations they may constitute the crime of genocide or crimes against humanity and the jus cogens norms of the rights generate erga omnes obligations to the world community including the denouncing State.

²⁵ Report of Inter American Commission on Human Rights 6 March 1981, Para-15,

²⁶ Rule 135. *Children affected by armed conflict are entitled to special respect and protection.*

²⁷ Rule 136, Children must not be recruited into armed forces or armed groups.

30. It is respectfully submitted that the Court would need to consider whether or not the State concerned that has denounced the Convention should be allowed to do the things that go against the rights that were guaranteed under the Convention to its inhabitants. Let me go for an instance:

X, in good faith, undertakes something as 'good'. Can X, then, be allowed to say that that thing is 'bad' without excusing any defect or shortcoming (of that thing)?

This question needs to be clarified in the light of the general principles that are in practice within the civilized nations for example, good faith, equity and estoppel that have been a source of international law under article 38(1)(C)²⁸ of the statute of the International Court of Justice. And it is worth noting that as per article 93(1) of the UN Charter all Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice.

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

31. To answer this question the Court may find that the customary norms and erga omnes obligations are still relevant and deciding factors. The Court would need to examine the human rights instruments that were applicable regionally under the inter - American system before the denunciation and the particular provisions of those regional instrument that have been incorporated into the international human rights instruments and attained the customary norm and jus cogens. The Court would, then, need to examine the attributed binding erga omnes obligations to the denouncing State. The Court may find that by the reason of jus cogens norm and by virtue of erga omnes obligations a State would still be legally obliged even after the denunciation or the withdrawal from the organization (OAS).

32. The Court may kindly note that a regional human rights instrument that was not originally intended to be a legally binding instrument may contain certain provisions of customary norms in it. And for those particular provisions a State can not avoid obligations even after the denunciation or withdrawal from the OAS. For example, the American Declaration on the Rights of Indigenous Peoples contains specific rights that

²⁸ Article 38 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states ; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations ; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law

had attained the norms of jus cogens (art. XI, Prohibition against genocide, art XII, Prohibition against racial discrimination).

CONCLUSION

33. Since the analyses made in the foregoing paragraphs (17-26) are relevant to the Second Question it is respectfully submitted that the Court may consider those analyses to find the answers mentioned in paragraph no(s) 31 and 32 above.

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

1. What obligations do the remaining member States of the OAS have in matters of human rights?

2. What mechanisms do member States of the OAS have to enforce those obligations?

3. To what mechanisms of international protection of human rights can persons subject to the jurisdiction of the denouncing state take recourse?

34. The Court may kindly note that when a member- state of OAS denounces the Convention it goes beyond the jurisdiction of the Court (IACtHR). However, it still remains under the jurisdiction of the Commission (IACHR) in the inter-American system. When a member –state of OAS decides to withdraw from the organization (OAS) it means that those two mechanisms lack jurisdiction on the human rights related affairs of that denouncing State.

35. By virtue of the jus cogens norms of particular rights (mentioned in paragraphs 17-22 above) and by the reason of erga omnes obligations (mentioned in paragraphs 23-26) the remaining member-states of OAS have interests to take initiatives against the denouncing state where there is a situation of serious and systematic violations of human rights.

36. The Court may note that the particular rights that are enforceable under the inter-American system have got their places in the international human rights system through

the treaties and conventions. And under that system there are 'state to state'²⁹ , 'individual complaint'³⁰ and 'inquiry'³¹ procedures (treaty based mechanisms) to combat

²⁹HumanRightsBodies-ComplaintsProcedures

(<https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#interstate>, accessed on 26.07.2019)

Inter-state communications

Several of the human rights treaties contain provisions to allow for State parties to complain to the relevant treaty body (Committee) about alleged violations of the treaty by another State party.

Note: In 2018, three inter-state communications were submitted under Article 11 of the Convention on the Elimination of All Forms of Discrimination, first time in its history.

CAT, CMW, CED, ICESCR and CRC: Article 21 CAT, article 74 CMW article 32 CED article 10 of the Optional Protocol to ICESCR and article 12 of the Optional Protocol (on a communications procedure) to the Convention on the Rights of the Child set out a procedure for the relevant Committee itself to consider complaints from one State party which considers that another State party is not giving effect to the provisions of the Convention. This procedure applies only to States parties who have made a declaration accepting the competence of the Committee in this regard.

CERD, CCPR and CRC: Articles 11-13 ICERD, articles 41-43 ICCPR set out a more elaborate procedure for the resolution of disputes between States parties over a State's fulfilment of its obligations under the relevant Convention/Covenant through the establishment of an *ad hoc* Conciliation Commission. The procedure normally applies to all States parties to ICERD, but applies only to States parties to the ICCPR and CRC which have made a declaration accepting the competence of the relevant Committees in this regard.

Resolution of inter-State disputes concerning interpretation or application of a convention

CERD, CEDAW, CAT, CMW and CED : Article 22 ICERD article 29 CEDAW, article 30 CAT, article 92 CMW and article 32 CED provide for disputes between States parties concerning interpretation or application of the Convention to be resolved in the first instance by negotiation or, failing that, by arbitration. One of the States involved may refer the dispute to the International Court of Justice if the parties fail to agree arbitration terms within six months. States parties may exclude themselves from this procedure by making a declaration at the time of ratification or accession, in which case, in accordance with the principle of reciprocity, they are barred from bringing cases against other States parties.

³⁰Human Rights Bodies- Complaints Procedures
(<https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#interstate>, accessed on 26.07.2019)

Individual Communications

There are nine core international human rights treaties. Each of these treaties has established a "treaty body" (Committee) of experts to monitor implementation of the treaty provisions by its States parties.

Treaty bodies (CCPR, CERD, CAT, CEDAW, CRPD, CED, CMW, CESC and CRC) may, under certain conditions, consider individual complaints or communications from individuals.

Not all treaty body based complaint mechanisms have entered into force.

Currently, eight of the human rights treaty bodies (CCPR, CERD, CAT, CEDAW, CRPD, CED, CESC and CRC) may, under certain conditions, receive and consider individual complaints or communications from individuals:

The **Human Rights Committee (CCPR)** may consider individual communications alleging violations of the rights set forth in the International Covenant on Civil and Political Rights by States parties to the First Optional Protocol to the International Covenant on Civil and Political Rights;

The **Committee on Elimination of Discrimination against Women (CEDAW)** may consider individual communications alleging violations of the Convention on the Elimination of All Forms of Discrimination against Women by States parties to the Optional Protocol to the Convention on the Elimination of Discrimination against Women;

The **Committee against Torture (CAT)** may consider individual complaints alleging violations of the rights set out in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by States parties who have made the necessary declaration under article 22 of the Convention;

The **Committee on the Elimination of Racial Discrimination (CERD)** may consider individual petitions alleging violations of the International Convention on the Elimination of All Forms of Racial Discrimination by States parties who have made the necessary declaration under article 14 of the Convention;

The **Committee on the Rights of Persons with Disabilities (CRPD)** may consider individual communications alleging violations of the Convention on the Rights of Persons with Disabilities by States parties to the Optional Protocol to the Convention;

The **Committee on Enforced Disappearances (CED)** may consider individual communications alleging violations of the International Convention for the Protection of All Persons from Enforced Disappearance by States parties who have made the necessary declaration under article 31 of the Convention.

The Committee on Economic, Social and Cultural Rights (CESCR) may consider individual communications alleging violations of the International Covenant on Economic, Social and Cultural Rights by States parties to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

The Committee on the Rights of the Child (CRC) may consider individual communications alleging violations of the Convention on the Rights of the Child or its two first Optional Protocols on the sale of children, child prostitution and child pornography (OPSC), and on the involvement of children in armed conflict (OPAC) by State Parties to the Third Optional Protocol on a communications procedure (OPIC).

For the Committee on Migrant Workers (CMW) the individual complaint mechanism has not yet entered into force:

Article 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families gives the Committee on Migrant Workers (CMW) competence to receive and consider individual communications alleging violations of the Convention by States parties who made the necessary declaration under article 77. This individual complaint mechanism will become operative when 10 states parties have made the necessary declaration under article 77.

Who can complain?

Anyone can lodge a complaint with a Committee against a State:

- That is party to the treaty in question (through ratification or accession) providing for the rights which have allegedly been violated;
- That accepted the Committee's competence to examine individual complaints, either through ratification or accession to an Optional Protocol (in the case of ICCPR, CEDAW, CRPD, ICESCR and CRC) or by making a declaration to that effect under a specific article of the Convention (in the case of CERD, CAT, CED and CMW).

the human rights violations and in order to recourse to those mechanisms the member-state of the OAS and the denouncing state concerned would be required to ratify those human rights instruments.

37. It is respectfully submitted that certain charter based mechanisms namely UN Special Procedures³² and Human Rights Council Complaint Procedure³³ may be

Complaints may also be brought by third parties on behalf of individuals, provided they have given their written consent (without requirement as to its specific form). In certain cases, a third party may bring a case without such consent, for example, where a person is in prison without access to the outside world or is a victim of an enforced disappearance. In such cases, the author of the complaint should state clearly why such consent cannot be provided.

³¹ Human Rights Bodies- Complaints Procedures
(<https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#interstate>, accessed on 26.07.2019)

Inquiries

Upon receipt of reliable information on serious, grave or systematic violations by a State party of the conventions they monitor, the Committee against Torture (article 20 CAT), the Committee on the Elimination of Discrimination against Women (article 8 of the Optional Protocol to CEDAW), the Committee on the Rights of Persons with Disabilities (article 6 Optional Protocol to CRPD), the Committee on Enforced Disappearances (article 33 of CED), the Committee on Economic, Social and Cultural Rights (article 11 of the Optional Protocol to ICESCR) and the Committee on the Rights of the Child (article 13 of the Optional Protocol (on a communications procedure) to CRC) may, on their own initiative, initiate inquiries if they have received reliable information containing well-founded indications of serious or systematic violations of the conventions in a State party.

Which States may be subject to inquiries?

Inquiries may only be conducted with respect to States parties that have recognized the competence of the relevant Committee in this regard. States parties may opt out from the inquiry procedure, at the time of signature or ratification or accession (article 28 CAT; article 10 of the Optional Protocol to CEDAW; article 8 of the Optional Protocol to CRPD; article 13(7) of the Optional Protocol (on a communications procedure) to CRC) or anytime (article 11(8) of the Optional Protocol to ICESCR) by making a declaration that they do not recognize the competence of the Committee in question to conduct inquiries. In this regard CED is an exception as the competence to conduct inquiries is not subject to the acceptance by States parties (article 33 ICPPED).

³² Special Procedures of Human Rights Council

The special procedures of the Human Rights Council are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective. The system of Special Procedures is a central element of the United Nations human rights machinery and covers all human rights: civil, cultural, economic, political, and social. As of 1 August 2017, there are 44 thematic and 12 country mandates.

approached to redress the allegation of violations of human rights by the State concerned and in such a case ratification of a particular instrument is not required.

38. The Court may kindly note that the remaining member- states of the organization (OAS), by virtue of the interests derived from erga omnes obligation, may take the matter to the International Court of Justice (ICJ). However, in order to avail the jurisdiction of the ICJ the parties concerned must satisfy the requirements of article 36³⁴ of the statute of ICJ and the requirement of consent of the parties was confirmed by a decision³⁵ of the same court.

39. The Court may further note that the inhabitants of a State that ratified the Rome Statute³⁶ may recourse to the International Criminal Court (ICC) to establish individual criminal liability for certain crimes. The Security Council may send a matter to the ICC under article 13³⁷ of the Rome Statute even when the State concerned did not ratify the Rome Statute.

³³ Human Rights Council Complaint Procedure, On 18 June 2007, the Human Rights Council adopted resolution 5/1 entitled "Institution-Building of the United Nations Human Rights Council" by which a new complaint procedure was established to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances. The complaint procedure addresses communications submitted by individuals, groups, or non-governmental organizations that claim to be victims of human rights violations or that have direct, reliable knowledge of such violations.

³⁴ Article 36, 1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. 2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation 3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time. 4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court. 5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms. 6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

³⁵ INTERNATIONAL COURT OF JUSTICE, REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS CASE CONCERNING ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO (NEW APPLICATION: 2002) (DEMOCRATIC REPUBLIC OF THE CONGO v. RWANDA) JURISDICTION OF THE COURT AND ADMISSIBILITY OF THE APPLICATION JUDGMENT OF 3 FEBRUARY 2006, PARA-64.

³⁶ Rome Statute of the International Criminal Court (Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, Depository: Secretary-General of the United Nations, <http://treaties.un.org>)

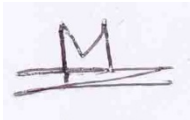
³⁷ *ibid*

40. It is respectfully submitted that when the violations of human rights are so serious that that pose a threat to international peace and security, the Security Council may consider to take appropriate measure under article 39³⁸ of the UN Charter. The Security Council may take non-armed force measures under article 41³⁹ of the UN Charter and if it is proved to be inadequate and/or deemed to be inadequate then armed force measure under article 42⁴⁰ of the UN Charter may be taken.

CONCLUSION

41. On the basis of foregoing analyses it is finally submitted that the Court may kindly note that it is unlikely that the remaining member-states of OAS and the inhabitants of a denouncing State would be in a position to recourse to inter-American mechanisms (IACtHR and IACHR) against a State that has withdrawn herself from the OAS. However, the remaining member states of OAS and inhabitants of the denouncing state concerned will have rights to recourse to particular international bodies and courts and those rights would not be absolute and would be subject to fulfilment of the requirements warranted by the constituting instruments concerned.

All of which is respectfully submitted,



Muhammad Muzahidul Islam, 1 August, 2019.

³⁸ Article 39, The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

³⁹ Article 41 The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

⁴⁰ Article 42 Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.