REQUEST FOR AN ADVISORY OPINION BY THE REPUBLIC OF COLOMBIA
CDH-OC-4-2019/068
WRITTEN OBSERVATIONS OF THE UNITED STATES

The United States appreciates the opportunity to present observations on the request by the Republic of Colombia ("Colombia") for an advisory opinion of the Inter-American Court of Human Rights (the "Court") pursuant to Article 64.1 of the American Convention on Human Rights ("American Convention").

Colombia raises two questions in its request for an advisory opinion. The first is presented as follows:

> 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 on 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?[1]

The second question is related to the first:

> 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 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?[2]

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[1] 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, ¶ 21 (October 2019) (hereinafter "Colombia 2019 Request").

[2] *Id.*

Alongside these questions, Colombia identifies a host of obligations and commitments arising from various Inter-American instruments and invites the Court to interpret such provisions in light of in its request.[3] Colombia's request for the Court's advice on these questions is animated by the risk of "abuse" of the regulation of democratic governance by an incumbent head of State in pursuit of "indefinite presidential re-election."[4]

I. Representative Democracy in the Inter-American System

The Charter of the Organization of American States ("OAS Charter") regards representative democracy within its constituent States to be a condition of its stability and a purpose of the organization. Article 3(d) of the OAS Charter specifically articulates that "[t]he solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy."[5]

American States affirmed their commitment to this principle, and elaborated on its content, in the Declaration of Santiago, Chile, adopted at the Fifth Meeting of Consultation of Ministers of Foreign Affairs in 1959 ("the Santiago Declaration").[6] The fifth preambular paragraph of the Santiago Declaration reiterates that "[h]armony among the American republics can be effective only insofar as human rights and fundamental freedoms and the exercise of representative democracy are a reality within each one of them."[7] The Santiago Declaration further identifies some features of the democratic system in this hemisphere to enable "national and international public opinion to gauge the degree of identification of political regimes and governments with that system."[8] One such principle is that "[p]erpetuation in power, or the exercise of power without a fixed term and with the manifest intent of perpetration, is incompatible with the effective exercise of democracy."[9] In this way,

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[3] The United States notes that any interpretation rendered by the Court would not bind the United States. *See, e.g.*, Advisory Opinion OC-1/82, "'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)," ¶ 51 (Sept. 24, 1982) ("It must be remembered, in this connection, that the advisory opinions of the Court and those of other international tribunals, because of their advisory character, lack the same binding force that attaches to decisions in contentious cases.").

[4] Colombia 2019 Request ¶ 3.

[5] Charter of the Organization of American States, art. 3(d), 2 U.S.T. 2394, Apr. 30, 1948 (*as amended* Feb. 27, 1970, 21 U.S.T. 607).

[6] Fifth Meeting of Consultation of Ministers of Foreign Affairs, Final Act, Part I, Declaration of Santiago, Chile, Doc. OEA/Ser.C/II.5 (English) 1959 (hereinafter "Santiago Declaration").

[7] *Id.* preamb. ¶ 5.

[8] *Id*. preamb. ¶ 7.

[9] *Id.* ¶ 3.

as early as 1959, American States can be seen to have taken a position on the important role limiting time in office can play in the effective exercise of democracy, in the particular context of preventing entrenchment or concentration of political power.

The Inter-American Democratic Charter ("the Democratic Charter") articulates a right of the peoples of the Americas to democracy and restates that "[t]he effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the member states of the Organization of American States."[10] The Democratic Charter also identifies elements essential to the effective exercise of representative democracy, to include, *inter alia*, "access to and the exercise of power in accordance with the rule of law" and "the holding of periodic, free, and fair elections."[11]

The United States supported each of these instruments affirming the importance of representative democracy within the member states of the OAS.[12] The Inter-American Court has also concluded that "representative democracy is a determinant factor of the entire system" of which Inter-American instruments are a part.[13]

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[10] Organization of American States, Inter-American Democratic Charter, arts. 1-2, OAS Doc. OEA/SerP/AG/Res.1 (2001), 28th Spec. Sess., Sept. 11, 2001 (hereinafter "Democratic Charter").

[11] *Id.* art. 3

[12] The United States respectfully recalls that the Court's authority to issue advisory opinions is set forth in Article 64 of the American Convention and, under Article 64.1, is limited to interpretations of the Convention and "other treaties concerning the protection of human rights in the American states." Article 64.1 does not empower the Court to interpret instruments which do not qualify as "treaties." As reflected in Article 2(a) of the Vienna Convention on the Law of Treaties, a treaty is "an international agreement concluded between States in written form and governed by international law"—i.e., a legally binding instrument. Vienna Convention on the Law of Treaties, art. 2(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. The Court should decline to address in its advisory opinion the interpretation of instruments that are not legally binding and thus do not constitute treaties. In this regard, the United States has consistently maintained that the American Declaration of the Rights and Duties of Man is a nonbinding instrument which does not create legal rights or obligations on OAS member States. United States courts have viewed it as such. *See, e.g.*, Garza v. Lapin, 253 F.3d 918, 925 (7th Cir. 2001) (assessing that "OAS's Charter reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members"). The text of the American Declaration and the circumstances of its conclusion demonstrate that the negotiating States did not intend for it to become a binding instrument. Similarly, neither the Santiago Declaration nor the Democratic Charter are "treaties" for purposes of Article 64.1 of the American Convention, and thus fall beyond the scope of the Court's advisory opinion authority.

[13] Castañeda Gutman v. México, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 184, ¶ 141 (Aug. 6, 2008).

II. Political Participation in the Inter-American System

The affirmation in Inter-American human rights instruments of rights associated with political participation follows from the importance of the effective exercise of representative democracy to the OAS. The American Declaration of the Rights and Duties of Man,[14] at Article XX, states that every person is "entitled to participate in the government of his country, directly or through his representatives."[15] The American Convention, for parties to that instrument, expanded upon the "rights and opportunities" to participate in government at Article 23, to include the ability to "take part in the conduct of public affairs," "to vote and be elected in genuine periodic elections," and "to have access, under general conditions of equality to the public service of his country."[16] These provisions of Article 23 of the American Convention closely parallel Article 25 of the International Covenant on Civil and Political Rights, to which thirty-one of the thirty-five OAS member States are parties.[17]

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[14] As noted above, *supra* note 12, the United States has consistently maintained that the American Declaration is a nonbinding instrument and does not create legal rights or impose legal duties on member States of the OAS. U.S. Federal Courts of Appeals have independently held that the American Declaration is nonbinding and that the Commission's decisions do not bind the United States. *See, e.g.*, Garza, 253 F.3d at 925; *accord, e.g.*, Flores-Nova v. Attorney General of the United States, 652 F.3d 488, 493-94 (3d Cir. 2011); In re Hicks, 375 F.3d 1237, 1241 n.2 (11th Cir. 2004). As explained by the U.S. Court of Appeals for the Seventh Circuit in Garza, "[n]othing in the OAS Charter suggests an intention that member states will be bound by the Commission's decisions before the American Convention goes into effect. To the contrary, the OAS Charter's reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members. The language of the Commission's statute similarly shows that the Commission does not have the power to bind member states." Garza, 253 F.3d at 925; *accord* Statute of the Inter-American Commission on Human Rights art. 20, O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88, Oct. 1979 (setting forth recommendatory but not binding powers). As nonbinding instruments, such as the American Declaration, do not create legal rights or impose legal duties on member states of the OAS, the United States further understands that a "violation" in this context means an allegation that a state has not lived up to its political commitment to uphold the such instrument.

[15] Organization of American States, American Declaration of the Rights and Duties of Man, art. XX, OEA/Ser. L./ V/II.23/doc. 2 rev. 6 (1948).

[16] Organization of American States, American Convention on Human Rights, art. 23, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (1969).

[17] U.N.G.A., International Covenant on Civil and Political Rights, art. 25, 999 U.N.T.S. 171 (Dec. 16, 1966, *entered into force* Mar. 23, 1976):

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

The rights of individuals associated with participation in political affairs support the effective exercise of representative democracy repeatedly affirmed by the American States. The Inter-American Court has affirmed this premise: "[t]he political rights embodied in the American Convention, as well as in diverse international instruments, promote the strengthening of democracy and political pluralism."[18] From this point of departure, the Court has also contemplated the permissibility of reasonable restrictions on such political rights with a view toward promoting the effective exercise of representative democracy.[19] The principles enumerated in the Santiago Declaration are relevant in this context, and in particular, that "[p]erpetuation in power, or the exercise of power without a fixed term and with the manifest intent of perpetration, is incompatible with the effective exercise of democracy."[20] Interpreting political rights in a way that undermines the effective exercise of democracy is inconsistent with the longstanding view, reflected in relevant Inter-American instruments and previously endorsed by the Court, that political rights should facilitate the effective exercise of representative democracy.

III. Presidential Term Limits in the United States

That individuals' rights associated with political participation should be interpreted in a manner that facilitates the effective exercise of representative democracy is reflected in the practice of the United States. Most relevant to the present discussion is the 22nd Amendment to the United States Constitution, which imposes a limitation on the number of terms that may be served by a U.S. President.

Article II, Section 1 of the U.S. Constitution provides for re-election of a sitting President after a term of four years but sets no limit on how many such terms might be served.[21] From the presidency of George Washington, the first president of the United States (1789-

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(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

[18] Castañeda Gutman v. México, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 184, ¶ 141 (Aug. 6, 2008).

[19] *See, e.g.*, Castañeda Gutman v. México, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 184, ¶¶ 141 *et seq.* (Aug. 6, 2008); Case of Yatama v. Nicaragua, Preliminary Objections, Merits, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶¶ 195 *et seq.* (June 23, 2005).

[20] Santiago Declaration ¶ 3.

[21] U.S. CONST. Art. II § 1 ("The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows. . . .").

1797), a practice emerged that a U.S. president would serve only two terms. The third president of the United States, Thomas Jefferson, was the first to cite concern for "perpetual reeligibility" as informing his decision not to pursue a third term in office.[22] Jefferson felt that "a representative Government responsible at short periods is that which produces the greatest sum of happiness to mankind," and that he had "a duty to do no act which shall essentially impair that principle."[23] This practice held until 1940, when President Franklin D. Roosevelt was re-elected for a third term following the outbreak of World War II.[24] Roosevelt ran for and was re-elected to a fourth term in 1944, which he served until his death in April 1945.[25]

Following Roosevelt's departure from the two-term precedent established by President Washington, the United States Congress sought to formally establish the two-term presidential term limit through constitutional amendment. The 22nd Amendment to the U.S. Constitution was proposed by the U.S. Congress in March 1947 and ratified by the states in February 1951. The 22nd Amendment limits the number of terms to which a President may be elected to two.[26] The 22nd Amendment expressly did not apply to the occupant of the office of the presidency at the time the Amendment was proposed, and expressly did not prevent the occupant of the office at the time the Amendment became operative from serving out the remainder of that term.[27] As such, the incumbent President could not be removed from office by the Amendment's establishment of term-limits. The Amendment was deliberately crafted in this way to demonstrate its nonpartisan character, i.e., it was not an effort directed toward the incumbent.[28]

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[22] THOMAS H. NEALE, CONG. RES. SERV., PRESIDENTIAL TERMS AND TENURE: PERSPECTIVES AND PROPOSALS FOR CHANGE 5 (2009), http://whitehousetransitionproject.org/wp-content/uploads/2016/04/Terms-Tenure_101909-1.pdf.

[23] Thomas Jefferson, *"To the Legislature of Vermont," reprinted in* THE WRITINGS OF THOMAS JEFFERSON, MEMORIAL EDITION (Washington: Thomas Jefferson Memorial Association, 1904), vol. 16, 292-93.

[24] THOMAS H. NEALE, CONG. RES. SERV., PRESIDENTIAL TERMS AND TENURE: PERSPECTIVES AND PROPOSALS FOR CHANGE 10 (2009).

[25] *Id.*

[26] U.S. CONST. amend. XXII § 1. The 22nd Amendment provides for a slightly different time limitation in certain circumstances where someone has held the office of or acted as President after someone else was elected President. For example, someone who, upon the death of the elected President, ascends to the presidency from the vice-presidency during the first half of the term of the elected President may only be elected President once, and thus would be limited to fewer than eight years acting as President; someone who similarly ascends to the presidency but during the latter half of the elected president's term may be elected twice, and thus could potentially serve as President for up to ten years (two years in addition to two four-year terms by election).

[27] *Id.*

[28] *See* Paul B. Davis, *The Results and Implications of the Enactment of the Twenty-Second Amendment*, 9(3) PRESIDENTIAL STUD. Q. 289-303, at 289 (Summer 1979).

President Harry Truman, the incumbent both at the time the 22nd Amendment was proposed and at the time it became operative, supported the Amendment, remarking at a press conference in 1952 that, "[w]hen we forget the example of such men as Washington, Jefferson, and Andrew Jackson, all of whom could have had a continuation of the office, then we will start down the road to dictatorship and ruin."[29]

IV. Opposition to Constitutional Backsliding around the World

The United States has consistently expressed support for reasonable executive term limits in representative democracies and cautioned against attempts by political incumbents to erode such restrictions. For example, in an address to the African Union in 2015, President Barack Obama extolled the benefits of preserving conditions for regular transfers of power and articulated the risks of backsliding:

> When a leader tries to change the rules in the middle of the game just to stay in office, it risks instability and strife . . . . And this is often just a first step down a perilous path. And sometimes you'll hear leaders say, well, I'm the only person who can hold this nation together. If that's true, then that leader has failed to truly build their nation.
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> You look at Nelson Mandela – Madiba, like George Washington, forged a lasting legacy not only because of what they did in office, but because they were willing to leave office and transfer power peacefully. And just as the African Union has condemned coups and illegitimate transfers of power, the AU's authority and strong voice can also help the people of Africa ensure that their leaders abide by term limits and their constitutions. Nobody should be president for life.[30]

That same year, Secretary of State John Kerry also addressed the alteration of presidential term limits to favor an incumbent:

> Elections are vitally important . . . . Just as important is respect for term limits. No democracy is served when its leaders alter national constitutions for personal or political gain. . . . A free, fair and peaceful presidential election does not guarantee a successful democracy, but it is one of the most important measuring sticks for progress

[29] Harry S. Truman, *Memoirs*, vol. 2, 489 (New York: Doubleday 1956). President Truman, who ascended to the presidency upon the death of President Roosevelt in 1945 (the first year of President Roosevelt's fourth term), was elected President in 1948 and served until the end of that term, in January 1953.

[30] President Barack Obama, Remarks by President Obama to the People of Africa (July 28, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/07/28/remarks-president-obama-people-africa.

> in any developing nation. . . . The United States remains committed to helping make those aspirations a reality.[31]

The United States Congress has also articulated the importance of respect for presidential term limits. For example, in "A resolution supporting democratic principles and standards in Bolivia and throughout Latin America," adopted by the United States Senate in 2019, the Senate resolved that it:

> (3) expresses concern for efforts to circumvent presidential term limits in the Bolivian constitution;
> (4) supports presidential term limits prevalent in Latin America as reasonable checks against a history of coups, corruption, and abuses of power;
> . . .
> (6) agrees with the Organization of American States Secretary General's interpretation of the American Convention of Human Rights as not applicable to presidential term limits; [and]
> . . .
> (8) calls on Latin American democracies to continue to uphold democratic norms and standards[.][32]

The United States remains committed to promoting term limits in representative democracies. Term limits promote accountability and prevent entrenchments of power. The United States will continue to caution against efforts by incumbents to undermine the effective exercise of representative democracy by modifying limitations to re-election for their own political gain.

V. Conclusion

The effective exercise of representative democracy in the American States is a pillar of the OAS. Individuals' rights associated with participation in political affairs should support the effective exercise of representative democracy, as repeatedly affirmed by the American States. Reasonable restrictions on such rights, as contemplated by Article 25 of the ICCPR, such as term limits on incumbent office-holders, have been adopted by many of the American States, including the United States, with a view toward promoting the effective exercise of representative democracy. The United States has consistently expressed support for term limits

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[31] John Kerry, U.S. Sec'y of State, Africa: "Decisive Moment for Democracy" (Oct. 6, 2015), https://bf.usembassy.gov/africa-decisive-moment-democracy/.

[32] S. Res. 35 (116th Cong., 1st Sess., Apr. 10, 2019). *See also* S. Res. 522 ¶ 7 (113th Cong., 2d Sess., July 31, 2014) ("the Senate . . . encourages leaders in Africa to make efforts toward strengthening good governance, the rule of law, and democracy, including respecting constitutional term limits[.]").

in representative democracies and will continue to caution against attempts by political incumbents to erode such restrictions for their own political gain.