



UNIVERSITY OF
BIRMINGHAM

INTER-AMERICAN COURT OF HUMAN RIGHTS

**Request for an Advisory Opinion submitted by the Republic
of Colombia**

**The Figure of Indefinite Presidential Re-election in the Context of the
Inter-American System of Human Rights**

Amicus Curiae memorandum

May 2020

Birmingham, 11th May 2020

Honourable Inter-American Court of Human Rights,

Dr Damián A. González-Salzberg, Senior Lecturer in International Law and Human Rights at the University of Birmingham (United Kingdom) in collaboration with Ms Emma Jeffery and Ms Katherine Johnston (LLB students at the University of Birmingham) and Ms Tabitha Butler and Ms Charlotte Young Andrade (LLM students at the University of Birmingham), respectfully submit the present *amicus curiae* brief. This memorandum is submitted in accordance with Articles 44 and 73 of the Rules of Procedure of the Inter-American Court of Human Rights within the framework of the Request for an Advisory Opinion submitted in October 2019 by the Republic of Colombia concerning ‘The Figure of Indefinite Presidential Re-election in the Context of the Inter-American System of Human Rights’. The purpose of this brief is to succinctly express our legal opinion on the questions posed by Colombia.

The Figure of Indefinite Presidential Re-election in the Context of the Inter-American System of Human Rights

The issue of presidential term limits and its relationship with the protection of human rights and the strengthening of democracy in the Americas are topics of increasing importance. Presidential term limits mostly take the form of constitutional provisions that aim to restrict the maximum length of time that presidents can serve in office. They determine both the length of presidential terms, as well as the number of consecutive or non-consecutive terms that are permitted for a given person.¹ The present submission deals with the latter, the number of terms a president can serve.

As expressed by the OAS Secretary General, within the Americas, there is a negative and recurrent practice of incumbent presidents of modifying the domestic legal system to seek re-election. This situation motivated the Secretary General to request, in 2017, an expert opinion from the European Commission for Democracy through Law (best known as the ‘Venice Commission’) and also provides one of the bases for the current request for an Advisory Opinion submitted by Colombia. On the topic of presidential term limits and human rights, the response of the Venice Commission to the request of the OAS was clear: International Human Rights Law does not provide for a human right to stand for re-election as president;² a person who seeks re-election has already exercised their human right to stand for election.³ While there certainly is a human right to stand for election, this right is not absolute and can, therefore, be subject to limitations.⁴ What is required is for these limitations to be established by law, in pursuance of a legitimate aim, and to be proportionate to the aim sought to be realised.⁵ In the opinion of the Venice Commission, presidential term limits are a reasonable restriction to the right to be elected, as they prevent an unlimited exercise of power in the hands of an incumbent president.⁶ The Venice Commission further clarified that far from encroaching on the electoral rights of

¹ A. Baturo & R. Elgie, ‘Presidential Term Limits’ in A. Baturo and R. Elgie (eds) *The Politics of Presidential Term Limits* (OUP 2019) 1.

² European Commission for Democracy Through Law (Venice Commission), *Report of term-limits: Part I- Presidents*, Study no. 908/2017, CDL-AD(2018)010, paras. 81 and 117.

³ *ibid.*, para. 82.

⁴ *ibid.*, para. 96.

⁵ *ibid.*, para. 72.

⁶ *ibid.*, para. 96.

voters, presidential term limits help to guarantee that periodic elections are ‘genuine’, as required by International Human Rights Law.⁷

We submit that the Inter-American Court should adopt a similar approach to that of the Venice Commission when answering the questions posed by Colombia and confirm that under the American Convention on Human Rights: 1) there is no right to stand for re-election as president; 2) term limits are a reasonable restriction of the possibility to stand for presidential election; 3) term limits are even a desirable restriction of the possibility to stand for presidential election.

1) The absence of a right to stand for re-election as president

When it comes to the Right to Participate in Government (‘Derechos Políticos’ in the Spanish text) the pertinent part of Article 23 of the American Convention on Human Rights recognises the right ‘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’.⁸ However, as affirmed by the Venice Commission, the right to stand for election should not be conflated with an implicit right to stand for re-election. On the contrary, limitations to presidential re-elections help to protect political rights both by preventing the undue accumulation of political power in fewer hands and by helping to guarantee the required genuine character of periodic elections.⁹

The absence of a right to stand for presidential re-election under the American Convention on Human Rights has been confirmed by the jurisprudence of the Inter-American Commission on Human Rights, which years ago implicitly validated the ban on re-elections established in different domestic orders. The Inter-American Commission tangentially examined the topic of presidential re-elections in the context of the *Ríos Montt v Guatemala* case.¹⁰ It then affirmed that: ‘the right to be a candidate in a political election arises from Article 23 of the American Convention on Human Rights, which recognises the rights of each individual: a) to take part in the conduct of public affairs, directly or through representatives; b) to be elected; and c)

⁷ *ibid.*, paras. 99 and 123.

⁸ American Convention on Human Rights, (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No. 36, 1144 UNTS 123, article 23.1.b.

⁹ European Commission for Democracy Through Law (Venice Commission), *Report of term-limits: Part I- Presidents*, Study no. 908/2017, CDL-AD(2018)010, paras. 96, 99 and 123.

¹⁰ IACHR, Report No. 30/93, Case 10.804, *José Efraín Ríos Montt*, Annual Report of the Inter-American Commission on Human Rights 1993, OEA/Ser.L/V.85/ Doc. 9 rev., 11 February 1994.

to have access, under general conditions of equality, to the public service.’¹¹ It further recalled that: ‘**various constitutional regimes establish as a condition of ineligibility**, in some cases for a specified period, and in others as permanent ineligibility, **the fact of having been the head of or exercised the power of the executive branch after being elected thereto.**’¹² Far from objecting to this limitation to the exercise of political rights, the Commission made use of such a restriction to ground the decision adopted in the case, validating yet another reasonable limitation to the right to stand for election – the breach of the constitutional order.¹³ Therefore, the Inter-American Commission has already had the chance to analyse the compatibility of domestic bans on presidential re-elections with the American Convention on Human Rights and took the view that these did not amount to a breach of the Convention. A necessary inference from the above stance is that, under the American Convention on Human Rights, it is not possible to find a right to stand for re-election; an interpretation that should also be adopted by the Court when providing an answer to the present request.

2) Term limits as a legitimate restriction of the *possibility* to stand for presidential re-election

As discussed above, it is clear that there is no autonomous right to stand for re-election under the American Convention on Human Rights. This section further discusses that limiting the *possibility* to stand for presidential re-election is nothing but a legitimate restriction of the passive right to stand for election. As clearly established by international human rights jurisprudence, political rights are not absolute, but are subject to reasonable restrictions.¹⁴ The text of the American Convention on Human Rights seems to indicate that the grounds for restriction might be exhaustively enumerated in Article 23.2, as this provision states: ‘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.’¹⁵ In

¹¹ *ibid.*, para. 19.

¹² *ibid.*, para. 32 (emphasis added).

¹³ *ibid.*, para. 35.

¹⁴ HRC, *General Comment 25 (57)*, General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), paras. 4 and 15; ECHR, *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 52, Series A no. 113; ECHR, *Dicle and Sadak v. Turkey*, no. 48621/07, § 83, 16 June 2015.

¹⁵ American Convention on Human Rights, article 23.2 (emphasis added).

fact, the Court has, in the past, appeared to support the view that the grounds enumerated in Article 23.2 were the only ones on which restrictions to political rights could be based.¹⁶ However, the Court has explicitly refuted such a view, having accepted that reasons other than those expressed in the provision could also be considered as a reasonable basis for restricting the exercise of the right to stand for election; thus emulating the abovementioned reasoning of the Inter-American Commission.

The paradigmatic illustration of the Court's adoption of such a stance can be found in the *Castañeda Gutman v Mexico* case.¹⁷ In its judgment, the Court accepted that affiliation to a political party could be used as grounds for restricting the right to stand for election, although such a possibility is not included in the (allegedly exhaustive) list of restrictions of Article 23.2.¹⁸ In reaching its decision, the Court expressly affirmed that: 'for political rights to be exercised, **the law must establish regulations that go beyond those** related to certain State limitations to restrict those rights, **established in Article 23(2)**'¹⁹ and concluded that: 'As is evident from the foregoing, the Court finds 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.**'²⁰

In order to determine whether a restriction of the right to stand for election is compatible with the American Convention on Human Rights, the Court has made use of the jurisprudence of the European Court of Human Rights. First, it has accepted that the validity of a restriction cannot be assessed in a vacuum, but would depend on the historical and socio-political context in which it is adopted.²¹ Moreover, as is the case with other qualified rights, restrictions to the right to stand for election should be

¹⁶ I/A Court H.R., *Case of Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127, para. 206.

¹⁷ I/A Court H.R., *Case of Castañeda Gutman v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 6, 2008. Series C No. 184.

¹⁸ *ibid.*, para. 205.

¹⁹ *ibid.*, para. 157 (emphasis added).

²⁰ *ibid.*, para. 161 (emphasis added); See also I/A Court H.R., *Case of López Mendoza v. Venezuela*. Merits, Reparations, and Costs. Judgment of September 1, 2011. Series C No. 233, concurring opinion of Judge García Sayán para. 16.

²¹ I/A Court H.R., *Case of Castañeda Gutman v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 6, 2008. Series C No. 184, para. 165; ECHR, *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 54, Series A no. 113; ECHR, *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002-II.

established by law, in pursuance of a legitimate aim, and be proportionate to the aim sought to be realised.²²

It is possible to affirm that the establishment of presidential term limits is a restriction to the right to stand for election that certainly passes the tests of legality, legitimacy, and reasonableness the Inter-American Court has adopted. Term limits are usually established in national constitutions, which clearly fulfils both the formal and substantial requirements of being prescribed by law.²³ As to the purpose of the restriction, it is also evident that presidential term limits are established to achieve legitimate aims, such as the protection of the democratic order and the authenticity of elections.²⁴ Lastly, as to the need for proportionality of the restriction, the Court usually follows a three-fold test for its analysis, which looks at the existence of an essential public interest at stake, for the measure to be fitting for achieving its aims, and for it not to be more restrictive than needed.²⁵ The restriction of the possibility to stand for re-election as president satisfies an essential public interest, such as to limit the concentration of political power on those who have already held the office in order to promote the aforementioned legitimate aims. It is certainly an appropriate measure to reach such aims and it is also strictly proportionate to them, as it does not affect the right to stand for election of anyone besides those who have already been elected.

This analysis can be further confirmed by taking into consideration two additional elements, particularly applicable to the analysis of political rights. The first one is the fact that the scrutiny of a restriction on the passive aspect of political rights (the right to stand for election) should be less stringent to that of the active aspect (the right to vote).²⁶ The second element, which was mentioned above, is that the

²² I/A Court H.R., *Case of Castañeda Gutman v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 6, 2008. Series C No. 184, paras. 176-205; ECHR, *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 52, Series A no. 113; ECHR, *Dicle and Sadak v. Turkey*, no. 48621/07, § 83, 16 June 2015. HRC, *General Comment 25 (57)*, General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), paras. 4 and 15.

²³ I/A Court H.R., *Case of Castañeda Gutman v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 6, 2008. Series C No. 184, para. 176.

²⁴ ECHR, *Ždanoka v. Latvia* [GC], no. 58278/00, § 100, ECHR 2006-IV; ECHR, *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98 and 3 others, § 99, ECHR 2003-II; European Commission for Democracy Through Law (Venice Commission), *Report of term-limits: Part 1- Presidents*, Study no. 908/2017, CDL-AD(2018)010, paras. 81 and 117.

²⁵ I/A Court H.R., *Case of Castañeda Gutman v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 6, 2008. Series C No. 184, paras. 185-186.

²⁶ ECHR, *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 52, Series A no. 113; ECHR, *Davydov and Others v. Russia*, no. 75947/11, § 286, 30 May 2017.

historical and socio-political context in which the measure was adopted should be borne in mind when deciding on its validity. Sadly, the political history of Latin-America reveals a recurrent appearance of quasi-messianic figures (and families) believed, at one time or another, to be the best (if not the only) suitable candidates to rule countries (or even regions within countries).²⁷ This historical fact provides a contextual rationale for the adoption of presidential term limits. Considering all these elements, the Court should confirm the existence of presidential term limits as nothing but a legal, legitimate and reasonable restriction of the right to stand for election.

3) Term limits as a *desirable* restriction of the possibility to stand for presidential re-election

The previous two sections of this submission have supported the lack of a right to presidential re-election under the American Convention on Human Rights and the understanding of term limits as a legitimate restriction of the passive right to stand for election under Article 23.2. This section goes a step further, suggesting that term limits should actually be seen as a desirable feature of the presidential political systems in the Americas.

The convenience of establishing term limits for political office is far from being a novelty. Already in *The Politics*, Aristotle stated the importance of restricting the duration of the tenure of political mandates and the need for alterity in their exercise.²⁸ Throughout history, this idea has been adopted by the majority of presidential democracies as a constitutional rule for the election of presidents and their duration in office.²⁹ There are multiple reasons to support the presence of presidential term limits. Perhaps the strongest argument is that term limits can prevent a president from consolidating power and eroding the needed constraints to avoid functional democracies sliding into dictatorial regimes.³⁰ It is well-documented that incumbent presidents enjoy substantial advantages over political opponents because of agenda control, greater media coverage, and authority over other checking

²⁷ L. Marsteintredet, 'Presidential Term Limits in Latin America 1820-1985' in A. Baturo & R. Elgie (eds) *The Politics of Presidential Term Limits* (OUP 2019) 117.

²⁸ Aristotle, *The Politics* (E. Barker trans, OUP 1976) 258.

²⁹ M. Versteeg, T. Horley, A. Meng, M. Gium & M. Guirguis, 'The Law and Politics of Presidential Term Limit Evasion' (2020) 120 *Columbia Law Review* 173, 184; J.A. Cheibub & A. Medina, 'The Politics of Presidential Term Limits in Latin America: From Re-democratization to Today' in A. Baturo and R. Elgie (eds) *The Politics of Presidential Term Limits* (OUP 2019) 518.

³⁰ P. Stone, 'Theorizing Presidential Rotation' in A. Baturo and R. Elgie (eds) *The Politics of Presidential Term Limits* (OUP 2019) 30.

components of the government;³¹ that is not even considering the not uncommon temptation to improperly use public resources in pursuit of remaining in office.³² The existence of term limits can act as a check on presidents with (pre-existing or acquired) dictatorial ambitions, reducing the prospect of undemocratic behaviour.³³ Moreover, in countries with recurrent histories of systematic human rights violations and structural and widespread corruption, far too common in the Americas, the lack of term limits provides an opportunity for legal immunity from prosecution for wrongdoing in office, which paves the way to impunity.³⁴

Appeals for the respect and protection of voters' rights have been made in attempts to justify the abolition of existing term limits, with claims that citizens should be free to elect as president whoever they truly desire.³⁵ However, it is not hard to perceive these rhetorical arguments as hypocritical outcries that make use of the language of democratic governance to mask undemocratic ambitions of power concentration.³⁶ It can be affirmed that 'norms and institutions are more valuable than the identities of individual presidents, even if the latter are perceived as indispensable and popular at the time of their compulsory departures from power'.³⁷ As asserted by the Venice Commission, term limits aim to protect a democracy from becoming a *de facto* dictatorship. By imposing the logic of political transition as a predictable event in public affairs, term limits strengthen the democratic process and the human right to political participation.³⁸ They contribute to guaranteeing that periodic elections are 'genuine', as required by Article 23 of the American Convention on Human Rights, and to ensuring that representatives are freely chosen and accountable.³⁹ Therefore,

³¹ T. Ginsburg, J. Melton & Z. Elkins, 'On the Evasion of Executive Term Limits' (2011) 52 *Wm & Mary L Rev* 1807, 1820; M. Versteeg, T. Horley, A. Meng, M. Gium & M. Guirguis, 'The Law and Politics of Presidential Term Limit Evasion' (2020) 120 *Columbia Law Review* 173, 184-185.

³² T. Ginsburg, J. Melton & Z. Elkins, 'On the Evasion of Executive Term Limits' (2011) 52 *Wm & Mary L Rev* 1807, 1820.

³³ A. Baturo & R. Elgie, 'Presidential Term Limits' in A. Baturo & R. Elgie (eds) *The Politics of Presidential Term Limits* (OUP 2019) 6.

³⁴ M. Half, *Changing Term Limits: An electoral perspective. A policy brief of the Electoral Integrity Initiative* (Kofi Annan Foundation 2016) 7; N. Ezrow, 'Term Limits and Succession in Dictatorships' in A. Baturo & R. Elgie (eds) *The Politics of Presidential Term Limits* (OUP 2019) 282.

³⁵ European Commission for Democracy Through Law (Venice Commission), *Report of term-limits: Part I- Presidents*, Study no. 908/2017, CDL-AD(2018)010, paras. 99 and 102.

³⁶ A. Baturo & R. Elgie, 'Presidential Term Limits' in A. Baturo & R. Elgie (eds) *The Politics of Presidential Term Limits* (OUP 2019) 7.

³⁷ *ibid.*, 8.

³⁸ European Commission for Democracy Through Law (Venice Commission), *Report of term-limits: Part I- Presidents*, Study no. 908/2017, CDL-AD(2018)010, para. 93.

³⁹ *ibid.*, paras. 99, 104 and 123.

the Court should consider the existence of presidential term limits as a *desirable* restriction of the possibility to stand for re-election and, conversely, assess the trend to abolish presidential term limits as a step backwards in the process of strengthening democracy in the Americas.

Submission

Following the legal arguments provided above, in the hope that the present brief will be of assistance to the Court for delivering an answer to the questions posed by the Republic of Colombia, we request that the Honourable Court:

- Admits the present *amicus curiae* brief;
- Takes these arguments into consideration when delivering its Advisory Opinion on the questions posed by the State.

Respectfully,



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