INTER-AMERICAN COURT OF HUMAN RIGHTS

ADVISORY OPINION OC-28/21

OF JUNE 7, 2021

REQUESTED BY THE REPUBLIC OF COLOMBIA

PRESIDENTIAL REELECTION WITHOUT TERM LIMITS IN THE CONTEXT OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

(Interpretation and scope of articles 1, 23, 24, and 32 of the American Convention on Human Rights, XX of the American Declaration of the Rights and Duties of Man, 3(d) of the Charter of the Organization of American States and of the Inter-American Democratic Charter)

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), composed of the following judges:

Elizabeth Odio Benito, President
L. Patricio Pazmiño Freire, Vice President
Eduardo Vio Grossi, Judge
Humberto Antonio Sierra Porto, Judge
Eduardo Ferrer Mac-Gregor Poisot, Judge
Eugenio Raúl Zaffaroni, Judge, and
Ricardo Pérez Manrique, Judge,

also present,

Pablo Saavedra Alessandri, Secretary, and
Romina I. Sijniensky, Deputy Secretary,

pursuant to Article 64(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and articles 70 to 75 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), issues the following advisory opinion, which is structured as follows:

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I
PRESENTATION OF THE REQUEST

1. On October 21, 2019, the Republic of Colombia (hereinafter "Colombia," "the Colombian State," or the "requesting State"), submitted—based on Article 64(1) of the American Convention and in accordance with the provisions of Article 70(1) and (2) of the Rules of Procedure—a request for an advisory opinion on "indefinite presidential reelection in the context of the inter-American human rights system" (hereinafter "the request").[1]

2. Colombia presented the considerations that led to the request and noted that:

> The issuance of the requested opinion is justified by the diversity of positions in the countries of the continent on presidential reelection.
>
> […] While some States have sought to eliminate or prohibit it, others have understood reelection—even reelection without term limits—as a right of those in power. This, however, ignores the fact that presidential reelection—particularly unlimted presidential reelection—gives rise to serious tensions between the right of the person in power to be elected and the right of all citizens to choose their leaders freely, within the framework of authentic regular elections. This situation gives rise to multiple challenges and questions of great importance to the consolidation and stability of democracies and the protection of human rights in the Americas, matters in which all OAS member States have a legitimate interest.

3. Based on this, Colombia submitted the following specific questions to the Court:

> i) Under international law, is presidential reelection without term limits a human right protected by the American Convention on Human Rights? In this sense, do regulations that limit or prohibit presidential reelection violate Article 23 of the American Convention on Human Rights, either by restricting the political rights of the individual seeking to be reelected or by restricting the political rights of voters? Or, on the contrary, is limiting or prohibiting presidential reelection a restriction of political rights that is consistent with the principles of legality, necessity and proportionality, in accordance with the case law of the Inter-American Court of Human Rights on the matter?
>
> ii) Should a State change or seek to change its legal system to ensure, promote, foster, or prolong a ruler's tenure in power through presidential reelection without term limits, what are the effects of this change with regard to States' obligations to respect and guarantee human rights? Does this change run contrary to the State's international human rights obligations and, in particular, to their obligations to guarantee the effective exercise of the rights to: (a) take part in the conduct of public affairs, directly or through freely chosen representatives; (b) vote and be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and (c) have access, under general conditions of equality, to the public service of his country.

4. Colombia appointed Mr. Camilo Gómez Alzate, Director of the National Agency for Legal Defense of the State, as its agent for this request.

II
PROCEEDINGS BEFORE THE COURT

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[1] The full text of the request can be accessed through the following link on the Court's website: http://www.corteidh.or.cr/docs/opiniones/soc_04_19_es.pdf

5. Through notes dated February 17, 2020, the Secretariat of the Court (hereinafter "the Secretariat"), in accordance with the provisions of Article 73(1)[2] of the Rules of Procedure, transmitted the query to the other Member States of the Organization of American States (hereinafter "the OAS"), the Secretary General of the OAS, the President of the Permanent Council of the OAS, the President of the Inter-American Juridical Committee and the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission "). These communications indicated that the Presidency of the Court, in consultation with the Court, had set May 18, 2020 as the deadline for submitting written observations regarding the aforementioned request.[3] Likewise, following instructions from the President and in accordance with the provisions of Article 73(3) of the Rules of Procedure,[4] the Secretariat, through notes of February 17, 2020, invited various international organizations and civil society and academic institutions of the region to submit their writtenopinions on the points raised for consultation by the aforementioned deadline. Finally, an openinvitation was issued through the Court's website to all interested parties to present their written opinions on the points raised for consultation.

6. The deadline expired and the following observations were received by the Secretariat:[5]

a. *Written observations submitted by OAS states:* 1) Plurinational State of Bolivia; 2) Republic of Colombia; 3) United States of America, and 4) Republic of Nicaragua.

b. *Written observations submitted by OAS organs:* 1) Inter-American Commission on Human Rights, and 2) OAS General Secretariat.

c. *Written observations submitted by academic institutions, non-governmental organizations, and individuals from civil society:* 1) Academia Boliviana de Estudios Constitucionales; 2) Academia Interamericana de Derechos Humanos de la Universidad Autónoma de Coahuila, Mexico; 3) Asociación Civil de Estudios Constitucionales; 4) Asamblea Permanente de Derechos Humanos, Bolivia; 5) Bloque Constitucional, Venezuela; 6) Centro de Investigación Jurídica Aplicada y Consultoría Integral, Sociedad Civil (CICACI); 7) Centro de Investigación y Promoción de los Derechos Humanos (CIPRODEH); 8) Centro Strategia Electoral A.C.; 9) Centro Universitário Antônio Eufrásio de Toledo; 10) Ciudadanos del Mundo por Derechos Humanos; 11) Clínica Interamericana de Direitos Humanos do Núcleo Interamericano de Direitos Humanos da Faculdade Nacional de Direito da Universidade Federal do Rio de Janeiro (NIDH/UFRJ); 12) Clínica de Direitos Humanos e Direito Ambiental da Universidade do Estado do Amazonas e Grupo de Pesquisa Direitos Humanos na Amazônia; 13) Clínica Jurídica de la Facultad de Derecho de la Corporación Universitaria de Sabaneta; 14) Clínica Jurídica en Derechos Humanos de la Universidad Santiago de Cali; 15) Comisión Colombiana de Juristas; 16) Presidential Human Rights Commission of the Interim Government of the Bolivarian Republic of Venezuela; 17) Corporación de Interés Público y Justicia (CIPJUS); 18) Derechos en Acción; 19) Equipo en formación continua sobre derechos humanos "Qhapaj Ñan"(Camino Noble), comprised of students of the Universidad San Francisco Xavier de Chuquisaca, Bolivia;

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[2] Article 73(1) of the Rules of Procedure: "Upon receipt of a request for an advisory opinion, the Secretary shall transmit copies thereof to all of the Member States, the Commission, the Permanent Council through its Presidency, the Secretary General, and, if applicable, to the OAS organs whose sphere of competence is referred to in the request."

[3] Because many countries in the region were affected by the disease known as COVID-19, classified by the World Health Organization as a global health emergency, the Court signed agreements 1/20 of March 17, 2020 and 2/20 of April 16, 2020, whereby it paused the calculation of all the deadlines from March 17 to May 20, 2020, thus extending the deadline for the submission of written observations to July 24, 2020.

[4] Article 73(3) of the Rules of Procedure: "The Presidency may invite or authorize any interested party to submita written opinion on the issues covered by the request. If the request is governed by Article 64(2) of the Convention,the Presidency may do so after prior consultation with the Agent."

[5] The request for an advisory opinion presented by Colombia and the written and oral observations from the participating States, the Inter-American Commission, bodies, non-governmental organizations, academic institutions, and individuals from civil society can be viewed here on the Court's website: http://www.corteidh.or.cr/observaciones_oc_new.cfm?lang=es&lang_oc=es&nId_oc=2171

20) Escuela Judicial Electoral del Tribunal Electoral del Poder Judicial de la Federación, Mexico; 21) Escuela Libre de Derecho, Mexico; 22) Defiende Venezuela and Instituto de Investigaciones Jurídicas of the Universidad Católica Andrés Bello; 23) Due Process of Law Foundation (DPLF); 24) Fundación Diversencia; 25) Grupo de Investigación Justicia, Ámbito Público y Derechos Humanos y Semillero de Fundamentos Filosóficos del Derecho Constitucional of the School of Law and Political Science of the Universidad de La Sabana; 26) Iniciativa Democrática de España y las Américas (IDEA) 27) Instituto de Gobernabilidad del Perú (INGOPE); 28) Núcleo de Estudios en Sistemas en Derechos Humanos y del Centro de Estudios de la Constitución, Universidad Federal de Paraná; 29) Observatorio de Intervención Ciudadana Constitucional Universidad Libre de Bogotá; 30) Universidad de Flores and Universidad de Córdoba; 31) Alfredo Ortega Franco; 32) Allan R. Brewer-Carías; 33) Álvaro Molinares and Luiza Tavares da Motta; 34) Amaury A. Reyes-Torres; 35) Andrés Figueroa Galvis; 36) Björn Arp; 37) Carlos Eduardo García Granados; 38) Carolina Rodríguez Bejarano and Eudoro Echeverri Quintana; 39) Damián González-Salzberg; 40) Carolina Rodriguez Bejarano, Salomé Ramírez Sierra, and Kevin Serna Álvarez; 41) Deisy Meneses Daza, Ayda Malena Imbacuán, and Anderson Muñoz Buitrón; 42) Edier Esteban Manco Pineda; 43) Federico Vaschetto, Jihde Tatiana Hernández Gutiérrez, Ricardo Fabián Pascumal Luna, Marcia Campos Delgado, Alexandra Melissa Valdivia Salazar, Kevin Leonardo Ruiz Rodríguez, Yaiza Ferrer Mezquita, Bryan Antonio Veintimilla Párraga, Antonella Balbiani Neder, Esteban Duarte Herrera, Alison Adriana Berbetty Omiste, Jael Nancy Vaquela Soto, and Daniela Beatríz Albrech; 44) Harold Bertot Triana; 45) Dolly Andrea Lugo Cortés and Elizabeth Duarte Cristancho; 46) Ilka Treminio and Juan Manuel Muñoz; 47) John Edinson Sanchez Vargas; 48) Jorge "Tuto" Quiroga Ramírez; 49) Juan Reynaldo Salinas Goytia; 50) Julián Fernando Montoya Pipicano; 51) Leonardo Rivera Mendoza; 52) Pablo Damián Colmegna; 53) Roberto Ogg Fábrega and Ainoa Prieto García; 54) Sergio Armando Villa Ramos; 55) Thairi Moya Sánchez and Víctor Rodríguez, and 56) Xochithl Guadalupe Rangel Romero.

7. Once the written procedure was completed, on September 11, 2020, the President of the Court issued an order[6]—in accordance with the provisions of Article 73(4) of the Rules of Procedure[7]—calling a public hearing and inviting the requesting State and others Member states, the Inter-American Commission on Human Rights, the General Secretariat of the OAS, and all those who submitted their written observations and were duly accredited to give their oral comments to the Court regarding the consultation.

8. The public hearing was held on September 28, 29, and 30, 2020, in the framework of the 137th regular sessions of the Inter-American Court of Human Rights, held virtually.

9. The following persons appeared before the Court:

1) For the requesting State: Mirza Gnecco Plá, Director of the Office on Human Rights and International Humanitarian Law of the Ministry of Foreign Affairs, and Camilo Gómez Alzate, Director of the National Agency for Legal Defense of the State and Agent of the State.

2) For the Plurinational State of Bolivia: William Herrera Añez, Charge d'Affaires of the Bolivian Embassy in Costa Rica; Alejandro Roda Rojas, Deputy Attorney for Defense and Legal Representation of the State, and Yoseland Cesar Pinto, General Director of Defense of Human Rights and the Environment.

3) For the United States of America: Thomas Weatherall and Oliver M. Lewis, Office of the Legal Adviser, U.S. Department of State.

[6] Article 73(4) of the Rules of Procedure: "At the conclusion of the written proceedings, the Court shall decide whether oral proceedings should take place and shall establish the date for a hearing, unless it delegates the latter task to the Presidency. Prior consultation with the Agent is required in cases governed by Article 64(2) of the Convention."

[7] *Cf.* Request for Advisory Opinion OC-28. Call to hearing. Order of the President of the Court of September 11, 2020. Available at: http://www.corteidh.or.cr/docs/asuntos/solicitud_11_09_2020_spa.pdf.

4) For the Republic of Panama: Arlette Mendieta, Director in Charge of International Legal Affairs and Treaties of the Ministry of Foreign Affairs, and Salvador Sánchez González, Director of the Institute for Democratic Studies of the Electoral Court.

5) For the Inter-American Commission on Human Rights: Joel Hernández García, President, and Marisol Blanchard, Assistant Executive Secretary.

6) For the General Secretariat of the Organization of American States: Francisco Guerrero, Secretary for Strengthening Democracy, and Gerardo de Icaza, Director of the Department of Electoral Cooperation and Observation.

7) For the Presidential Commission for Human Rights and Victim Response of the Interim Government of the Bolivarian Republic of Venezuela: Humberto Prado Sifontes, Presidential Commissioner for Human Rights and Victim Response of the Interim Government of the Bolivarian Republic of Venezuela, and Gabriel José Ortiz Crespo, International Relations and Litigation Coordinator.

8) For the Academia Interamericana de Derechos Humanos de la Universidad Autónoma of Coahuila, Mexico: Mrs. Irene Spigno, Director.

9) For the Academia Boliviana de Estudios Constitucionales: Jorge Antonio Asbun Rojas, President, and José Antonio Rivera Santibañez, Vice President.

10) For the Asamblea Permanente de Derechos Humanos de Bolivia: Amparo Carvajal Baños, President, and Lizeth Limachi Yapura, Lawyer.

11) For the Asociación Civil de Estudios Constitucionales (ACEC): Mr. and Mrs. Pedro A. Caminos, President, and María Lorena González Tocci, Treasurer.

12) For the Bloque Constitucional de Venezuela: Mrs. Cecilia Sosa Gómez, former President of the Supreme Court of Justice of Venezuela and Academic Coordinator.

13) For the Centro de Investigación Jurídica Aplicada y Consultoría Integral, Sociedad Civil (CICACI): Mr. Jorge Alberto Pérez Tolentino.

14) For the Grupo de Estudios de Derecho Internacional Público y Privado of the Centro Universitario Antonio Eufrasio de Toledo de Presidente Prudente: Lucas Octávio Noya dos Santos and Lucas Rocha Bragato.

15) For the Centro de Investigación y Promoción de los Derechos Humanos (CIPRODEH): Ariel Edgardo Díaz and Carlos Joaquín Méndez Quan.

16) For the Clínica de Litigio Electoral del Centro Strategia Electoral A.C.: Arturo Espinosa Silis and Rafael Cruz Vargas.

17) For Ciudadanos del Mundo por Derechos Humanos: Gloria Perico de Galindo and Gloria Ríos Rendón.

18) For the Clínica Jurídica en Derechos Humanos de la Universidad Santiago de Cali: Mayra Alejandra García Ramírez and Liliana Ambuila Valencia.

19) For the Inter-American Human Rights Clinic of the Inter-American Human Rights Hub of the Law School of the Universidade Federal do Rio de Janeiro (NIDH/UFRJ): Siddharta Legale and Maria Carolina Ribeiro de Sá.

20) For the Comisión Colombiana de Juristas: Gustavo Gallón and Esteban Vargas Pelaez.

21) For the Corporación Centro de Interés Público y Justicia (CIPJUS): Karen Daniela Rosero Narváez and Álvaro Cubillos Ruiz.

22) For Defiende Venezuela and the Instituto de Investigaciones Jurídicas of the Universidad Católica Andrés Bello: Harold Miñarro Escalona and Jaiber Núñez.

23) For the Human Rights and Environmental Law Clinic of the Universidad del Estado de Amazonas and the Grupo de Investigaciones de Derechos Humanos de la Amazonía: Sílvia Maria da Silveira Loureiro and Laís Rachel Brandão de Mello.

24) For Derechos en Acción: Mr. Guido Ibargüen, Executive Director.

25) For the Fundación por el Debido Proceso (DPLF): Claudia Martin and Ramiro Orias Arredondo.

26) For the Grupo de Investigación Justicia, Ámbito Público y Derechos Humanos y Semillero de Fundamentos Filosóficos del Derecho Constitucional of the School of Law and Political Science of the Universidad de La Sabana: María Camila Osorio Acevedo and Jacobo Gómez Posada.

27) For the Instituto de Gobernabilidad del Perú (INGOPE): Luis Ángel Zavala Espino, President.

28) For the Núcleo de Estudios en Derechos Humanos (NESIDH) and the Centro de Estudios de Constitucional (CCONS) of the Universidad Federal de Paraná: Mrs. Melina Girardi Fachin and Mrs. Ana Carolina Lopes Olsen.

29) For the Observatorio de Intervención Ciudadana Constitucional of the School of Law of the Universidad Libre de Bogotá: Jorge Kenneth Burbano Villamarín, Director, and David Andrés Murillo Cruz.

30) For the Universidad de Flores and the Universidad Católica de Córdoba: Christian G. Sommer and Agustina Vázquez.

31) For the Universidad Libre de Colombia, Pereira Campus: Salomé Ramírez Sierra and Kevin Serna Álvarez.

32) For the Iniciativa Democrática de España y las Américas (IDEA): Andrés Pastrana, former President of the Republic of Colombia, and Asdrúbal Aguiar, Secretary General of IDEA.

33) For the Escuela Libre de Derecho México: Andrea Marlenne Castillo.

34) Álvaro Molinares and Luiza Tavares da Motta

35) Alfredo Ortega Franco

36) Amaury A. Reyes-Torres

37) Andrés Figueroa Galvis

38) Björn Arp

39) El señor Carlos Eduardo García Granados

40) Carolina Rodríguez Bejarano and Eudoro Echeverri Quintana

41) Damian González-Salzberg

42) Ayda Malena Imbacuán and Anderson Muñoz Buitrón

43) Dolly Andrea Lugo Cortés and Elizabeth Duarte Cristancho

44) Edier Esteban Manco Pineda

45) Jihde Tatiana Hernández Gutiérrez and Alexandra Melissa Valdivia Salazar

46) Harold Bertot Triana

47) Ilka Treminio Sánchez and Juan Manuel Muñoz

48) Jorge "Tuto" Quiroga Ramírez, former President of the Plurinational State of Bolivia, and Luis Ángel Vásquez Villamor

49) Juan Reynaldo Salinas Goytia

50) Leonardo Rivera Mendoza

51) Roberto Ogg Fábrega and Ainoa Prieto García

52) Sergio Armando Villa Ramos

53) Thairi Moya Sánchez and Víctor Rodríguez Cedeño

54) Xochithl Guadalupe Rangel Romero.

10. At the hearing, the representatives of the Plurinational State of Bolivia asked that Judge Eugenio Raúl Zaffaroni consider excusing himself from this advisory opinion. Regarding this,

this Court notes that the advisory function differs from its contentious jurisdiction in that there is no dispute to be resolved.[8] In this sense, this decision does not refer to a particular State and constitutes a general pronouncement on the issues raised by the requesting State. This Court therefore finds that none of the grounds for recusal set forth in paragraph 1 of Article 19 of the Statute apply, and Judge Eugenio Raúl Zaffaroni thus shall participate in the deliberation and voting of this advisory opinion.

11. On November 3, 2020, under a memorandum of understanding between the Inter-American Court of Human Rights and the Permanent Secretariat of the Ibero-American Judicial Summit, the high courts of the States Parties were consulted on their jurisprudence regarding the reelection of presidents and other popularly-elected officials. Inputs were received from the following courts: 1) Superior Court of Justice of Brazil; 2) Supreme Court of Justice of Colombia; 3) Constitutional Court of Colombia; 4) Constitutional Chamber of the Supreme Court of Justice of Costa Rica; 5) Constitutional Court of Ecuador; 6) Supreme Court of Justice of the Nation of Mexico, and 7) Supreme Court of Justice of Uruguay.[9]

12. For the resolution of this request for an advisory opinion, the Court examined, took into account, and analyzed the 62 briefs of observations, as well as the 54 contributions given during hearings and interventions by States, the Inter-American Commission, the General Secretariat of the OAS, non-governmental organizations, academic institutions, and people from civil society, as well as the inputs provided by the region's different courts (supra paras. 6, 9, and 11). The Court is grateful for these valuable contributions, which helped enlighten it on the different issues submitted for consultation for the purposes of issuing this advisory opinion.

13. The Court began deliberating on this advisory opinion on June 3, 2021, through a virtual session.[10]

III
COMPETENCE AND ADMISSIBILITY

14. Article 64(1) of the American Convention marks one of the aspects of the advisory function of the Inter-American Court, by establishing that:

> 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.

15. The consultation submitted to the Court by the requesting State is covered by the aforementioned Article 64(1) of the Convention. Colombia is a member State of the OAS and

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[8] *Cf. Reports of the Inter-American Commission on Human Rights* (Article 51 of the American Convention on Human Rights). Advisory Opinion OC-15/97 of November 14, 1997. Series A No. 15, paras. 25 and 26, *The institutionof asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights).* AdvisoryOpinion OC-25/18 of May 30, 2018. Series A No. 25, para. 50.

[9] The Superior Court of Justice of Brazil indicated the tools available on its website to search its case law. The Supreme Court of Justice of Colombia reported that the matter addressed by the consultation was outside its competence, but forwarded the request to the Constitutional Court of Colombia, which did provide case law. The Supreme Court of Justice of Uruguay reported that the Uruguayan Judicial Branch lacks jurisprudence on the matter,as it falls within the competence of the independent Electoral Court. However, it did indicate the constitutional provisions applicable to presidential reelection. All the other courts contributed internal case law on the subject.

[10] Due to the exceptional circumstances brought about by the COVID-19 pandemic, this advisory opinion was deliberated and approved during the one hundred and forty-second regular sessions, which was held remotely, using technological means, as provided for by the Rules of Procedure of the Court.

is therefore authorized, under the Convention, to request an advisory opinion from the Inter-American Court.

16. The central purpose of this advisory function is that the Inter-American Court issue an opinion regarding the interpretation of the American Convention or other treaties concerning the protection of human rights in the American States, thereby establishing the scope of its competence. Along these lines, the Court has found that, where it refers to the Court's power to issue an opinion on "other treaties concerning the protection of human rights in the American States," Article 64(1) of the Convention is broad and not restrictive.[11]

17. Likewise, Articles 70[12] and 71[13] of the Rules of Procedure establish the formal requirements that must be met for a request to be considered by the Court. Basically, they place the following requirements on the requesting State or body: (i) formulate the questions precisely; (ii) specify the provisions that must be interpreted; (iii) indicate the considerations originating it, and (iv) provide the name and address of the agent. As previously established, requirements (iii) and (iv) were duly met.

18. Regarding requirements (i) and (ii), the Court notes that the consultation submitted by the State of Colombia has the following characteristics: (a) it contains a section called "Specific Provisions," in which the Court is asked to interpret various norms of "the American Declaration, the OAS Charter, the American Convention, and the Inter-American Democratic Charter," and lists the sentences from the preambles and articles of these instruments that the Court is requested to interpret; (b) only the first question refers specifically to Article 23 of the American Convention, while the second question does not specifically indicate which provisions listed in the "Specific Provisions" section it would like interpreted; (c) the interpretation of different legal provisions involving various regional instruments is requested, and (d) the second question refers, as a factual presupposition, to "a State changing or seeking to change its legal system to ensure, promote, foster, or prolong a ruler's tenure in power through presidential reelection without term limits."

19. During the procedure related to this request, multiple written and oral comments offered a variety of considerations on the Court's competence to issue this advisory opinion, as well as on the admissibility of the questions posed. Therefore, the competence of the Court and admissibility of the question posed by the requesting State will be examined below, for which the pertinent considerations will be offered, in the following order: (a) the formal requirement to specify the provisions to be interpreted; (b) the existence of certain petitions pending before the Inter-American Commission; (c) competence over the regional instruments involved; (d) the admissibility of the request for an advisory opinion; and (e) the formal requirement to word the questions precisely and the Court's authority to rephrase the questions posed.

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[11] *Cf. "Other treaties" subject to the consultative jurisdiction of the Court* (Article 64 of the American Conventionon Human Rights) Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, first opinion paragraph, and *Denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the consequences for State human rights obligations* (interpretation and scope of articles 1, 2, 27, 29, 30, 31, 32, 33 to 65 and 78 of the American Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States). Advisory Opinion OC-26/20, November 9, 2020. Series A No. 26, para. 14.

[12] Article 70 of the Rules of Procedure of the Court establishes the following: "Interpretation of the Convention: 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. 2. Requests for an advisory opinion submitted by a Member State or by the Commission shall, in addition, identify the provisions to be interpreted, the considerations giving rise to the request, and the names and addresses of the Agent or the Delegates [...]."

[13] Article 71 of the Rules of Procedure of the Court establishes the following: "Interpretation of other treaties: 1.If, as provided for in Article 64(1) of the Convention, the interpretation requested refers to other treaties concerningthe 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 [...]."

A. The formal requirement to specify the provisions to be interpreted

20. The Court notes that only the second part of the first question asked by Colombia specifies Article 23 of the American Convention as the norm for which interpretation is requested. However, Colombia's request included a general section called "Specific provisions" with a list of the provisions whose interpretation is requested (*supra* para. 18). In this sense, based on the nature of the questions raised, the Court understands both questions to be related to all the provisions listed in that section, with respect to which an interpretation is requested, namely: the four unnumbered paragraphs of the recitals of the resolution of the Ninth International American Conference; the six unnumbered paragraphs of the preamble and Articles XX and XXXIII of the American Declaration of the Rights and Duties of Man (hereinafter "American Declaration"); the first to fifth and seventh unnumbered paragraphs of the preamble, and article 3.d) of the Charter of the Organization of American States (hereinafter "OAS Charter"); the five unnumbered paragraphs of the preamble and Articles 1, 2, 23, 24, 29 and 32(2) of the American Convention on Human Rights; and the first, fifth, sixth, eighth, ninth, sixteenth, seventeenth, nineteenth and twentieth paragraphs, not numbered in the preamble, as well as Articles 2 to 7 of the Inter-American Democratic Charter (hereinafter "Democratic Charter").

21. In sum, the Court finds that Colombia fulfilled its duty to specify the provisions of the American Convention, the OAS Charter, the American Declaration, and the Democratic Charter that require interpretation in accordance with the State's consultation.

B. The existence of certain petitions pending before the Inter-American Commission

22. Some observations made reference to petitions pending before the Inter-American Commission related to the subject matter of the consultation.[14] Regarding this, the Commission informed the Court of the existence of three petitions in the admissibility stage regarding Bolivia and one in the merits stage regarding Nicaragua,[15] all four related to the questions posed by Colombia. Likewise, during the processing of this Advisory Opinion, a person presented a written observation to the Court stating that he was the representative in the petition against Nicaragua and asked the Court to declare this request inadmissible because, in his opinion, an Advisory Opinion issued by the Court would undermine the contentious jurisdiction of the Court in this individual case.

23. In this regard, the Court recalls that, as it has found in other advisory opinion proceedings, the mere fact that there are petitions before the Commission or contentious cases related to the question of the consultation is not enough for the Court to refrain from responding to the questions submitted for consultation.[16] This conclusion of the Court is broadly in line with the case law of the International Court of Justice, which has repeatedly

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[14] Comments of the Comisión Interamericana, de la Fundación por el Debido Proceso (DPLF) and Mr. Björn Arp.

[15] According to the Admissibility Report, the petition against Nicaragua refers to the alleged violation of a person's political rights to stand as a candidate for the Presidency of Nicaragua in the same elections in which President Daniel Ortega was seeking to be reelected for the third time. *Cf.* IACHR, Report No. 179/18; Petition 1360-11 *Fabio Gadea Mantilla v. Nicaragua*, December 25, 2018. Available at: http://www.oas.org/es/cidh/decisiones/2018/NIAD1360-11ES.pdf.

[16] *Cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law.* Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, paras. 45 to 65, and *Gender identity and equal protection, and nondiscrimination for same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights).* Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 24.

rejected any request to refrain from exercising its advisory jurisdiction in situations where it is argued that, because there is a dispute related to the matter in question, the request is for the Court to rule surreptitiously on a contentious case.[17]

24. The interpretive work that this Court must perform in the exercise of its advisory function differs from its contentious jurisdiction in that there is no dispute to be resolved.[18] The main purpose of the advisory function is to obtain a judicial interpretation of one or more provisions of the Convention or of other treaties concerning the protection of human rights in the American States.[19] Therefore, the advisory function is intended to assist the OAS Member States and organs to comply fully and effectively with their relevant international obligations, and to define and implement public policies to protect human rights, which does not constitute a prejudgment of cases or petitions that are pending before the inter-American system.

25. Based on the foregoing considerations, the Court finds it has competence to rule on the questions posed by Colombia.

C. Competence regarding the regional instruments involved

26. The Court has already established that the advisory function allows it to interpret any norm of the American Convention, without excluding any aspect of it from the scope of interpretation. In this sense, it is clear that because it is the "final interpreter of the American Convention,"[20] the Court has competence to issue, with full authority, interpretations of all the provisions of the Convention, including those of a procedural nature.[21]

27. Likewise, as already established in other precedents, the OAS Charter is a treaty regarding which the Court can exercise its advisory jurisdiction pursuant to Article 64(1) of the Convention.[22] Additionally, Article 64(1) of the American Convention authorizes the Court to render advisory opinions on the interpretation of the American Declaration, within the framework and within the limits of its competence in relation to the OAS Charter and the Convention or other treaties concerning the protection of human rights in the American States.[23] Therefore, in this opinion, the Court will resort to the American Declaration when interpreting the obligations emanating from the OAS Charter in its approach to the questions posed by Colombia.

28. Additionally, the Court notes that the State has referred to multiple sentences in the preambles of the four instruments. Regarding this, the Court deems it pertinent to specify that

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[17] *Cf. Restrictions to the Death Penalty* (Arts 4.2 and 4.4 American Convention on Human Rights). Advisory Opinion, OC-3/83 of September 8, 1983. Series A No. 3, paras. 38 to 40, and International Court of Justice, Interpretation of Peace Treaties, Advisory Opinion of March 30, 1950 (first phase), page 71; Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 19; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970), Advisory Opinion, I.C.J. Reports 1971, paras. 32 to 33, and Legal Consequences of the Construction of a Wallin the Occupied Palestinian Territory. Advisory Opinion of July 9, 2004, paras. 43 to 50.

[18] *Cf.* Advisory Opinion OC-15/97, *supra*, paras. 25 and 26, and Advisory Opinion OC-*supra*, 25/18, para. 50.

[19] *Cf.* Advisory Opinion OC-3/83, *supra*, para. 22, and Advisory Opinion OC-*supra*, 25/18, para. 50.

[20] *Cf. Article 55 of the American Convention on Human Rights.* Advisory Opinion OC-20/09 of September 29, 2009. Series A No. 20, para. 18, and Advisory Opinion OC-26/20, *supra*, para. 25.

[21] *Cf.* Advisory Opinion OC-20/09, *supra*, para. 18, and Advisory Opinion OC-26/20, *supra*, para. 25.

[22] *Cf. Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article64 of the American Convention on Human Rights.* Advisory Opinion OC-10/89, July 14, 1989, para. Series A No. 10,para. 44, and Advisory Opinion OC-26/20, *supra*, para. 26.

[23] *Cf.* Advisory Opinion OC-10/89, *supra*, first and only opinion paragraph, and Advisory Opinion OC-26/20, supra, para. 26.

the advisory function may involve examining the preambles of the international instruments brought before the Court, and they may play different roles in the framework of the interpretive activity.[24] In this regard, the Vienna Convention on the Law of Treaties[25] (hereinafter "Vienna Convention") establishes in its Article 31(2), that the text of a treaty also includes the preamble and the annexes. The Court has, for example, referred to the preamble of the American Convention because it contains "references that establish the object and purpose of the treaty,"[26] as well as to elucidate the intentions of its drafters.[27]

29. Lastly, the Court notes that the State explicitly requested the interpretation of certain provisions of the Inter-American Democratic Charter. Regarding this instrument, the Court has found that it constitutes an interpretive text of both the OAS Charter and the American Convention.[28] Consequently, in interpreting the American Convention and the OAS Charter, the Court will resort, where pertinent, to the provisions of the Democratic Charter when addressing the questions posed by Colombia.

30. In conclusion, the Court is empowered to rule in its advisory capacity on the preamble and all the provisions of the American Convention, the OAS Charter, the American Declaration, and the Democratic Charter brought for consultation by the Colombian State, in the terms indicated and insofar as they concern the protection of human rights in the American States and therefore fall within the jurisdiction of the Court.

D. The admissibility of the request for an advisory opinion

31. Some comments emphasized that the request would be trying to respond to specific events of a political nature[29] that are matters of sovereignty and self-determination of the States of the region, and that, in addition, the second question referred to specific cases. Therefore, the questions should be declared totally or partially inadmissible.

32. Regarding the first point, this Court emphasizes that it will only rule on the content and scope of the human rights obligations arising from international law. Regarding the second point, the Court notes that the mention of some examples serves the purpose of illustrating the potential importance of setting criteria and interpreting the broad and general scope of the legal question that is the subject of the consultation, without implying that the Court is issuing a legal ruling on specific situations.[30] Quite the contrary, this allows the Court to signal that its advisory opinion is not mere abstract speculation and that interest in it is justified by

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[24] *Cf.* Advisory Opinion OC-26/20, *supra*, para. 27.

[25] Vienna Convention on the Law of Treaties, U.N. Doc A/CONF.39/27 (1969), U.N.T.S. vol. 1155, pg. 331, signedin Vienna on May 23, 1969, entered into force on January 27, 1980.

[26] *Cf. Entitlement of legal entities to hold rights under the Inter-American Human Rights System (Interpretationand scope of Article 1(2), in relation to Articles 1(2), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of the American Convention on Human Rights, as well as of Article 8(1)(A) and (B) of the Protocol of San Salvador).* AdvisoryOpinion OC-22/16 of February 26, 2016. Series A No. 22, para. 41.

[27] *Cf.* Advisory Opinion OC-22/16, *supra*, para. 47.

[28] *Cf.* Advisory Opinion OC-26/20, *supra*, para. 42.

[29] See, for example, observations of the Núcleo de estudos em direitos humanos (NESIDH) and the Centro de estudos da constituição (CCONS) of the Universidad Federal de Paraná, the Clínica Jurídica en Derechos Humanos ofthe Universidad Santiago, the Clínica de Derechos Humanos y Derecho Ambiental of the Universidad del Estado de Amazonas, and the Grupo de Investigación "Derechos Humanos en Amazonia" and Mr. Andrés Figueroa Galvis.

[30] *Cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law.* Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 49, and Advisory Opinion OC-26/20, *supra*, para. 30.

the benefit it may bring in terms of the international protection of human rights, as it refers to an issue that is fundamental to the inter-American system as a whole.[31]

33. In sum, the Court has found that although it must not lose sight of the fact that its advisory function essentially entails the exercise of an interpretative authority, the consultations must be practical in scope and have predictability of application. At the same time, they should not be limited to an extremely precise factual circumstance that makes it difficult to dissociate it from a pronouncement on a specific case, something that would be detrimental to the general interest that a consultation could serve.[32] This ultimately requires a careful exercise of judicial appraisal to discern the substantive object of the request whose validity can be generalized and extended to all American States, beyond the reasons from which it may have originated or references to particular facts, in order to assist the member States and the organs of the OAS to fully and effectively comply with their international obligations.[33]

34. Consequently, the Court finds, without referring to any specific matter that may have been indicated in the processing of this advisory proceeding by way of example, that it is appropriate to proceed with consideration of the substantive object of this request in order to serve the general interest that the Court rule on a matter of regional legal significance—that is, indefinite presidential reelection in the context of the inter-American system.

E. The formal requirement to word the questions precisely and the Court's authority to rephrase the questions posed.

35. In the exercise of its advisory function, the Court is called upon to unpack the meaning, purpose, and reasoning of international human rights norms.[34] Thus, in exercise of its powers inherent to the competence granted by Article 64 of the Convention, it may have to refine or clarify and, in certain cases, rephrase the questions posed to it, in order to clearly determine the substantial object of its interpretive work.[35]

36. In this regard, the Court finds that the first question posed by Colombia was stated clearly and does not require rephrasing beyond the reference to the relevant legal provisions, as indicated above. However, the Court notes that the second question is conditioned on certain facts, insofar as it refers to hypothetical State conduct and asks the Court to determine in the abstract their possible consequences, as well as whether they are in compliance with the international normative framework. Regarding this point, the Court reiterates that, in the exercise of its advisory function, it is not called upon to resolve matters of fact but to unpack the meaning, purpose, and reasoning of international human rights norms.[36] Therefore, this Court will reword the second question on the compatibility of presidential reelection without term limits with representative democracy in the inter-American human rights protection system. The Court finds that this wording allows for a better exercise of its advisory function and reflects the essence of the second question posed by Colombia.

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[31] *Cf.* Advisory Opinion OC-16/99, *supra*, para. 49, and Advisory Opinion OC-26/20, *supra*, para. 30.

[32] *Cf.* Advisory Opinion OC-16/99, *supra*, paras. 38 to 41, and Advisory Opinion OC-26/20, *supra*, para. 31.

[33] *Cf.* Advisory Opinion OC-16/99, *supra*, para. 47, and Advisory Opinion OC-26/20, *supra*, para. 31.

[34] *Cf. International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*(Arts. 1 and 2 American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series ANo. 14, para. 23, and Advisory Opinion OC-26/20, *supra*, para. 33.

[35] *Cf.* Advisory Opinion OC-25/18, *supra*, para. 55, and Advisory Opinion OC-26/20, *supra*, para. 33.

[36] *Cf.* Advisory Opinion OC-14/94, *supra*, para. 23, and Advisory Opinion OC-26/20, *supra*, para. 33.

37. The Court therefore proceeds to rephrase the questions posed by Colombia as follows:

> In view of the four unnumbered paragraphs of the recitals of the resolution of the Ninth International American Conference; the six unnumbered paragraphs of the preamble and Articles XX and XXXIII of the American Declaration of the Rights and Duties of Man; the first to fifth and seventh unnumbered paragraphs of the preamble, and article 3.d) of the Charter of the Organization of American States; the five unnumbered paragraphs of the preamble and Articles 1, 2, 23, 24, 29 and 32(2) of the American Convention on Human Rights; and the first, fifth, sixth, eighth, ninth, sixteenth, seventeenth, nineteenth and twentieth paragraphs, not numbered, in the preamble, as well as Articles 2 to 7 of the Democratic Charter:
>
> i. 1) Is presidential reelection without term limits a human right protected by the American Convention on Human Rights? In this sense, 2) Do regulations that limit or prohibit presidential reelection violate Article 23 of the American Convention on Human Rights, either by restricting the political rights of the individual seeking to be reelected or by restricting the political rights of voters? Or, on the contrary, 3) Is limiting or prohibiting presidential reelection a restriction of political rights that is consistent with the principles of legality, necessity and proportionality, in accordance with the case law of the Inter-American Court of Human Rights in the matter?
>
> ii. Is presidential reelection without term limits compatible with representative democracy in the inter-American human rights protection system?

38. For the purposes of this advisory opinion, this Court will define "presidential reelection without term limits" as when a person serving as President of the Republic remains in office for more than two consecutive periods of reasonable duration. The length of this term may not be changed while it is being served.

39. In this regard, this Court notes that the request made by Colombia only refers to presidential reelection without term limits and not presidential reelection in general. Furthermore, it is inferred from the request that Colombia's questions are related to presidential reelection without term limits in a presidential system. Therefore, the considerations set forth by this Court in this advisory opinion are limited to the possibility of presidential reelection without term limits in a presidential system like the one described in paragraph 87 *infra*. Likewise, it should be emphasized that no reference will be made to unlimited reelection to positions other than the Office of the President of the Republic, nor to the possibility of presidential reelection in general when it is not unlimited, as defined in the previous paragraph.

40. This Court also recalls that the advisory function constitutes "a service for all of the members of the Inter-American system and is designed to assist them in fulfilling their international human rights obligations."[37] The Court also reiterates, as it has found on other opportunities,[38] that the task of interpretation that it performs in the exercise of its advisory function not only seeks to clarify the reason for, meaning and purpose of international human rights norms, but also, and above all, to assist the OAS Member States and organs to comply

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[37] *Cf.* Advisory Opinion OC-1/82, para. 39, and *Rights to freedom to organize, collective bargaining, and strike, and their relation to other rights, with a gender perspective.* (interpretation and scope of articles 13, 15, 16, 24, 25,and 26 in relation to articles 1(1) and 2 of the American Convention on Human Rights; articles 3, 6, 7, and 8 of the Protocol of San Salvador; articles 2, 3, 4, 5, and 6 of the Convention of Belém do Pará; articles 34, 44, and 45 of the Charter of the Organization of American States; and articles II, IV, XIV, XXI, and XXII of the American Declaration on the Rights and Duties of Man). Advisory Opinion OC-27/21 of May 5, 2021. Series A No. 27, para. 35.

[38] *Cf.* Advisory Opinion OC-1/82, para. 25, and Advisory Opinion OC-27/21, *supra*, para. 35.

fully and effectively with their relevant international obligations, and to define and implement public policies to protect human rights. Thus, its interpretations aim to help strengthen the human rights protection system.

41. The Court also finds it necessary to recall that, pursuant to international law, when a State is a party to an international treaty, such as the American Convention on Human Rights, the treaty is binding for all its organs, including the judiciary and the legislature, so that a violation by any of these organs gives rise to the international responsibility of the State. Accordingly, the Court considers that the different organs of the State must carry out the corresponding enforcement of international treaty obligations, based also on theconsiderations of the Court in exercise of its non-contentious or advisory competence, which undeniably shares with its contentious jurisdiction the goal of the inter-American human rightssystem, which is "the protection of the fundamental rights of the human being."[39]

42. In order to adequately answer the questions posed, the Court has decided to structure this opinion as follows: (1) Chapter IV contains considerations on democracy, the rule of law, and human rights; (2) Chapter V offers some considerations on the principles of representative democracy; (3) Chapter VI answers Colombia's first question; and (4) Chapter VII answers the second question.

IV
DEMOCRACY, THE RULE OF LAW, AND HUMAN RIGHTS

43. From its earliest decisions, the Court has established that "[t]he concept of rights and freedoms as well as that of their guarantees cannot be divorced from the system of values and principles that inspire it. In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them, and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning."[40]

44. The mere existence of a democratic regime does not guarantee, *per se*, permanent respect for international law, including international human rights law, something established even in the Inter-American Democratic Charter itself.[41] The democratic legitimacy of certain facts or acts in a society is limited by the international norms and obligations for the protection of human rights recognized in treaties such as the American Convention, such that the existence of a true democratic regime is determined by both its formal and substantive characteristics.[42] In this regard, there are limits to what is "susceptible to being decided" by a democratic majority, in which enforcement of the Convention must also be prioritized, which is the function and task of all government authorities and not solely the judiciary.[43]

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[39] *Cf. Rights and guarantees of children in the context of migration and/or in need of international protection, para.* Advisory Opinion OC-21/14 dated August 19, 2014. Series A No. 21, para. 31, and Advisory Opinion OC-27/21,*supra*, para. 36.

[40] *Habeas corpus in Emergency Situations* (Arts. *27(2), 25(1), and 7(6) American Convention on Human Rights.* Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 26, and Advisory Opinion OC-27/21, *supra*, para. 39.

[41] *Cf.* OAS General Assembly, Inter-American Democratic Charter, Resolution AG/RES. 1 (XXVIII-E/01) of September 11, 2001.

[42] *Cf. Case of Gelman v. Uruguay. Merits and Reparations.* Judgment of February 24, 2011. Series C No. 221, para. 239.

[43] *Cf. Case of Gelman v. Uruguay*, *supra*, para. 239.

45. Although the democratic principle means that leaders are to be elected by the majority, one of the main objectives of a democracy must be respect for the rights of minorities. This respect is guaranteed through the protection of the rule of law and human rights.

46. The interdependence between democracy, the rule of law, and the protection of human rights is the basis of the entire system of which the Convention forms part.[44]

47. In effect, the recitals of the Resolution of the Ninth International Conference of American States adopting the American Declaration establish as follows:

> The affirmation of essential human rights by the American States together with the guarantees given by the internal regimes of the states establish the initial system of protection considered by the American States as being suited to the present social and juridical conditions, not without a recognition on their part that they should increasingly strengthen that system in the international field as conditions become more favorable.[45]

48. The preamble to the American Convention indicates that it was agreed to "Reaffirm[...] their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man." Likewise, five of its articles expressly refer to democracy,[46] assuming it to be the form of government in which it is possible to respect and guarantee the human rights contained in the Convention.

49. Furthermore, the democratic principle is set forth in the Charter of the OAS, the founding instrument of the organization and fundamental to the inter-American system.[47] Indeed, following the amendment made through the Cartagena Protocol of 1985, the preamble to the OAS Charter establishes "that representative democracy is an indispensable condition for the stability, peace and development of the region." Thus, Article 2 of the OAS Charter establishes a series of essential aims, including "To strengthen the peace and security of the continent" and "promote and consolidate representative democracy, with due respect for the principle of nonintervention" in order to "put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations."

50. Additionally, Article 3 of the OAS Charter states that "the 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" and "every State has the right to choose, without external interference, its political, economic, and social system and to organize itself in the way best suited to it."

51. Several OAS resolutions have highlighted the importance of strengthening the rule of law, as well as the interrelationship between it, democracy, and the guarantee of human

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[44] *Mutatis mutandi, The Word "Laws" in Article 30 of the American Convention on Human Rights.* Advisory OpinionOC-6/86 of May 9, 1986. Series A No. 6, para. 34, and Advisory Opinion OC-26/20, *supra*, para. 72. Similarly, the preamble to the Universal Declaration of Human Rights states, "This resolution considers it essential that "such rights be protected by a juridical system, so that men will not be driven to the extreme expedient of revolt against tyranny and oppression." Likewise, the Warsaw Declaration highlighted in its preamble "the interdependence between peace, development, human rights and democracy." *Cf.* Warsaw Declaration, adopted by the Ministerial Conference of the Community of Democracies held in Warsaw, Poland, on June 27, 2000.

[45] Resolution of the Ninth International Conference of American States, "Whereas" paragraph four.

[46] Articles 15, 16, 22, 29, and 32.

[47] *Cf.* Advisory Opinion OC-6/86, *supra*, para. 34, and Advisory Opinion OC-26/20, *supra*, para. 72.

rights.[48] In this sense, for example, Resolution XXVII of the Tenth Inter-American Conference, held in Caracas in 1954, stated that:

> […] The strengthening and effective exercise of democracy and the prevention of totalitarian intervention require, not only repressive measures, but also other measures that ensure the proper functioning of democratic institutions, among which measures the systems for protecting human rights are of significant importance, along with the freedoms of human beings through international or collective action.[49]

52. Likewise, the Protocol of San Salvador recognizes that it is extremely important for economic, social, cultural and environmental rights to be "reaffirmed, developed, perfected and protected in order to consolidate in America, on the basis of full respect for the rights of the individual, the democratic representative form of government as well as the right of its peoples to development, self-determination, and the free disposal of their wealth and natural resources."[50]

53. The relationship between human rights, the rule of law, and democracy was embodied in the Inter-American Democratic Charter.[51] This legal instrument is a norm used for authentic interpretation of the treaties to which it refers, since it reflects the interpretations of the norms pertaining to democracy that OAS member states themselves make—including the States parties to the Convention—both of the OAS Charter and of the Convention.[52]

54. The Democratic Charter expressly states that, "The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it."[53] In this regard, it recognizes that "Democracy is essential for the social, political, and economic

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[48] *Cf.* Tenth Inter-American Conference, Caracas, 1954. Resolution XXVII on Strengthening the system for the protection of Human Rights, and General Assembly of the Organization of American States. Resolution AG/RES 835 (XVI O/86) of November 15, 1986; OAS General Assembly, Resolution AG/RES. 1504 (XXVII-O/97) adopted at the seventh plenary session, held on June 5, 1997; OAS General Assembly, Resolution AG/DEC. 85 (XLVI-O/16), adopted at the second plenary session, held on June 14, 2016, Whereas 2; OAS General Assembly. Resolution AG/RES 2894 (XLVI-O/16), adopted at the fourth plenary session, held on June 15, 2016, Resolution 1; OAS General Assembly. Resolution AG/RES 2905 (XLVII-O/17), adopted at the first plenary session, held on June 20, 2017, Resolution 1; OAS General Assembly. Resolution AG/RES 2927 (XLVIII-O/18), adopted at the fourth plenary session, held on June 5, 2018), Resolution 1; Resolution AG/RES. 2931 (XLIX-O/19), adopted at the first plenary session, held on June 27, 2019, Resolutions 1 and 2, and Resolution AG/RES. 2958 (L-O/20), adopted at the fourth plenary session, held on October 21, 2020, item "v", Resolution 2

[49] Tenth Inter-American Conference, Caracas, 1954. Resolution XXVII on Strengthening the system for the protection of Human Rights.

[50] The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador), Preamble.

[51] *Cf.* OAS. Inter-American Democratic Charter. Approved at the first plenary session of the OAS General Assembly, held on September 11, 2001 during the Twenty-eighth Period of Sessions, Articles 3 and 4. The Inter- American Juridical Committee has held that "the Inter-American Democratic Charter was conceived as a tool to update, interpret and apply the fundamental Charter of the OAS, and represents a progressive development of International Law." CJI/RES. 159 (LXXV-O/09).

[52] The "Whereas" paragraphs 2 and 4 of the Preamble of the Convention establish the following: "Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personalliberty and social justice based on respect for the essential rights of man; [...] Considering that these principles havebeen set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined [...]." In this sense, the Charter could also be classified as an agreement between the States parties to both treatiesregarding the application and interpretation of those instruments (Art. 31.3.a) of the Vienna Convention on the Lawof Treaties: "There shall be taken into account, together with the context: a) any subsequent agreement between theparties regarding the interpretation of the treaty or the application of its provisions." *Cf. Case of San Miguel Sosa etal. v. Venezuela. Merits, Reparations, and Costs.* Judgment of February 8, 2018. Series C No. 348, para. 114, and Advisory Opinion OC-26/20, *supra*, para. 139.

[53] Inter-American Democratic Charter, article 1.

development of the peoples of the Americas."[54] Likewise, the Democratic Charter establishes that "The 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."[55] Such is the fundamental role that the States of the region have given to representative democracy, that the Democratic Charter establishes a system of collective guarantee through which, when there is "an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state," other States or the Secretary General can immediately call a meeting of the Permanent Council, and if it is found that "there has been an unconstitutional interruption of the democratic order of a member state, and thatdiplomatic initiatives have failed, the special session shall take the decision to suspend said member state from the exercise of its right to participate in the OAS by an affirmative vote oftwo thirds of the member states."[56]

55. Taking into account the above, it is clear that the effective exercise of democracy in the States of the Americas constitutes an international legal obligation and they have, in their sovereignty, agreed that such exercise is no longer solely a matter of their domestic, internal, or exclusive jurisdiction.[57]

56. Therefore, the democratic principle inspires, orients, and guides the application of the American Convention in a crosscutting manner. It is both a guiding principle and aninterpretive guideline. As a guiding principle, it articulates the form of political organization chosen by the States of the Americas to achieve the values that the system wants to promoteand protect, among which is the full exercise of human rights.[58] As an interpretative guideline,it provides clear orientation for its observance through the separation of powers and the properfunctioning of the democratic institutions of the States parties within the framework of the rule of law.[59]

57. One of the ways in which the inter-American system ensures the strengthening of democracy and political pluralism is through the protection of the political rights enshrined in Article XX of the American Declaration and Article 23 of the Convention.[60] The effective exercise of political rights constitutes an end in itself, as well as an essential means for democratic societies to ensure the other human rights established in the Convention.[61]

58. Article XX of the American Declaration establishes that, "Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free."

59. For its part, Article 23(1) of the Convention establishes that all citizens shall enjoy the following rights and opportunities: i) the right to participation in the conduct of public affairs,

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54 Inter-American Democratic Charter, article 1.

55 Inter-American Democratic Charter, article 2.

56 Inter-American Democratic Charter, articles 20 and 21.

57 *Cf. Case of San Miguel Sosa et al. v. Venezuela.* Merits, Reparations and Costs, *supra*, and Advisory Opinion OC-26/20, *supra*, para. 72.

58 *Cf.* Advisory Opinion OC-26/20, *supra*, para. 72.

59 *Cf.* Advisory Opinion OC-26/20, *supra*, para. 72.

60 *Cf. Case of Castañeda Gutman v. Mexico. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 6, 2008. Series C No. 184, para. 141, and *Case of Petro Urrego v. Colombia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of July 8, 2020. Series C No. 406, para. 93.

61 *Cf. Case of Castañeda Gutman v. Mexico*, *supra*, para. 143, and *Case of Petro Urrego v. Colombia*, para. 93.

directly or through freely chosen representatives; ii) the right 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 voters; and iii) the right to access, on general terms of equality, public service in their country. Unlike other articles of the Convention, Article 23 establishes that its holders shall enjoy not only rights, but also "opportunities." The latter term entails the obligation to ensure, by taking positive measures, that anyone who is the formal holder of political rights has the real possibility of exercising them.[62] Consequently, the State must facilitate the ways and means to ensure that these rights can be exercised effectively, respecting the principles of equality and non-discrimination.[63]

60. Political participation may include diverse and wide-ranging activities that the population carries out individually or on an organized basis in order to intervene in the appointment of those who will govern a State or who will be in charge of managing public affairs, as well as to influence the development of State policies through direct participation mechanisms.[64]

61. Citizens have the right to actively participate in the conduct of public affairs, directly through referendums, plebiscites, or consultations, or through freely chosen representatives. The right to vote is an essential element of democracy and one of the ways in which citizens freely express their will and exercise their right to participate in government. This right means that citizens can decide directly and choose freely and on equal terms who will represent them in decision-making in public affairs.[65]

62. For its part, political participation by exercising the right to be elected presupposes that citizens can run as candidates on equal terms and that they can hold public office subject to election if they are able to get the number of votes needed.[66]

63. The right and opportunity to vote and to be elected enshrined in Article 23(1)(b) of the American Convention is exercised in genuine periodic elections, conducted through universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters.[67]

64. Lastly, the right to access to public service under general conditions of equality protects access to a direct form of participation in terms of the design, development and execution of State policy through public service. These general conditions of equality are understood to cover access to public service both by popular election and by appointment or nomination.[68]

65. The obligations arising from Article 23 of the Convention must be interpreted in view of the States of the region's commitment to establishing representative democracies and

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62 *Cf. Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of June 23, 2005. Series C No. 127, para. 195, and *Case of Petro Urrego v. Colombia*, para. 93.

63 *Cf. Case of Yatama v. Nicaragua*, *supra*, para. 192, and *Case of Petro Urrego v. Colombia*, *supra*, para. 93.

64 *Cf. Case of Castañeda Gutman v. Mexico*, *supra*, para. 146, and *Case of Petro Urrego v. Colombia*, *supra*, para. 93.

65 *Cf. Case of Castañeda Gutman v. Mexico*, *supra*, para. 147.

66 *Cf. Case of Castañeda Gutman v. Mexico*, *supra*, para. 148.

67 *Cf. Case of Yatama v. Nicaragua*, *supra*, para. 207, and *Case of Castañeda Gutman v. Mexico. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 6, 2008. Series C No. 184, para. 149.

68 *Cf. Case of Yatama v. Nicaragua*, *supra*, para. 200, and *Case of Human Rights Defender et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 28, 2014. Series C No. 283, para. 186.

respecting the rule of law, which is derived from the American Convention itself, the Charter of the OAS, and the Inter-American Democratic Charter.

V
THE PRINCIPLES OF REPRESENTATIVE DEMOCRACY

66. The Court recalls that the object and purpose of the Convention is "the protection of the fundamental rights of the human being."[69] It was therefore designed to protect the human rights of individuals regardless of their nationality, vis-à-vis their own State or any other.[70] The State's commitment to full respect for and guarantee of human rights, as mandated by Article 1 of the American Convention, constitutes an essential precondition for consolidating a democracy and gives the State legitimacy before the international community.[71]

67. According to the Inter-American Democratic Charter, "Essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government."[72]

68. Also, its Article 4 establishes that "Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy. The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy."

69. These articles then define the basic characteristics of a representative democracy, without which a political system would cease to be one. To that extent, it is the Court's view that they constitute the guiding criteria for answering the questions posed in the request for an advisory opinion. Next, we will proceed to develop some of these characteristics, which are related to this advisory opinion.

70. In previous paragraphs of this opinion (*supra* paras. 43 to 65), the Court described respect for human rights and fundamental freedoms as one of the fundamental elements of a representative democracy. In this sense, the only way human rights can truly and effectively establish norms is through the recognition that they cannot be subject to majority rule, as it is precisely these rights that have been defined as limitations on the principle of majority rule. This Court has highlighted that the protection of human rights constitutes an insurmountable limit on majority rule—that is, on what is "susceptible to being decided" by the majority by democratic means.[73] Indeed, the validity of a human right recognized by the Convention cannot be conditioned on the judgment of the majority and its compatibility with the objectives

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69 Advisory Opinion OC-2/82, *supra*, para. 29, and Advisory Opinion OC-26/20, *supra*, para. 53.

70 *Cf.* Advisory Opinion OC-2/82, *supra*, para. 33, and Advisory Opinion OC-26/20, *supra*, para. 53.

71 Advisory Opinion OC-26/20, *supra*, para. 53.

72 Inter-American Democratic Charter, article 3.

73 *Cf. Case of Gelman v. Uruguay, supra*, para. 239.

of public opinion, since that would remove all effectiveness from the Convention and international human rights treaties.

71. Second, Article 3 of the Inter-American Democratic Charter establishes access to power and its exercise—subject to the rule of law—as a constitutive element of representative democracy. In a representative democracy, the exercise of power must be subject to rules set in advance and of which citizens are informed beforehand in order to avoid arbitrariness. This is precisely the meaning of the concept of the rule of law.[74] To that extent, to protect minorities, the democratic process requires certain rules that limit the power of the majority as expressed at the polls. Therefore, those who are temporarily exercising political power cannot be allowed to make changes without limit to the rules on access to the exercise of power. Identifying popular sovereignty with the majority opinion as expressed at the polls is not enough to classify a system as democratic. True democratic systems respect minorities and the institutionalization of the exercise of political power, which is subject to legal limits and a set of controls.

72. The Democratic Charter, Article 23 of the American Convention, and Article XX of the American Declaration all establish an obligation to hold regular elections. In this regard, the Court has indicated that holding elections to choose the representatives of the people is a cornerstone of representative democracy.[75] This obligation to hold regular elections indirectly implies that the terms of office of the Presidency of the Republic must have a fixed period. Presidents cannot be elected for indefinite terms. This Court highlights that the majority of the States Parties to the Convention include time limitations on the President's term.[76]

73. This prohibition on indefinite terms in office aims to prevent people who hold popularly-elected office from keeping themselves in power. In this regard, the Court emphasizes that representative democracy is characterized by the fact that the people exercise power through their representatives as established by the Constitution, who are chosen through universal elections. When a person can hold a public office perpetually, there is a risk that the people will cease to be duly represented by their elected leaders, and that the system of government will come to resemble an autocracy more than a democracy. This can happen even with regular elections and limits on term lengths.

74. In this regard, the States in the region declared in the 1959 Declaration of Santiago that "Perpetuation in power, or the exercise of power without a fixed term and with the manifest

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[74] In this sense, the Inter-American Juridical Committee has emphasized that "there is a vital link between the effective exercise of representative democracy and the rule of law which is expressed concretely in the observance of all the essential elements of representative democracy and the fundamental components of the exercise of same. Therefore democracy does not consist only in electoral processes, but also in the legitimate exercise of power within the framework of the rule of law, which includes respect for the essential elements, components and attributes of democracy [...]." Inter-American Juridical Committee. Essential and fundamental elements of representative democracy and their relation to collective action within the framework of the Inter-American Democratic Charter, Resolution CJI/RES. 159 (LXXV-O/09) of August 12, 2009, Resolution 4.

[75] *Cf. Mutatis mutandis, Case of Castañeda Gutman v. Mexico*, *supra*, para. 147.

[76] See, for example, Constitution of the Argentine Nation, Article 90; Political Constitution of the Plurinational State of Bolivia, article 169; Political Constitution of the Federative Republic of Brazil, article 82; Political Constitutionof the Republic of Chile, article 25; Political Constitution of the Republic of Colombia, article 190; Political Constitutionof the Republic of Costa Rica, article 134; Political Constitution of the Republic of Ecuador, article 144; Political Constitution of the Republic of El Salvador, article 154; Political Constitution of the United Mexican States, article 83;Political Constitution of the Republic of Guatemala, article 184; Political Constitution of the Republic of Nicaragua, article 148; Political Constitution of the Republic of Panama, article 177; Constitution of the Republic of Paraguay, article 229; Political Constitution of the Republic of Peru, article 112; Political Constitution of the Dominican Republic,article 124; Political Constitution of the Eastern Republic of Uruguay, article 152, and Political Constitution of the Bolivarian Republic of Venezuela, article 230.

intent of perpetuation, is incompatible with the effective exercise of democracy."[77] Regarding this Declaration, the Inter-American Juridical Committee has indicated that it "enunciated some of the essential attributes of Democracy that are fully in effect and should be taken into account along with essential elements and fundamental components spelled out in the Inter-American Democratic Charter."[78]

75. Consequently, this Court finds that it is possible to conclude from the obligation to hold periodic elections, together with the provisions of the Declaration of Santiago, that the principles of representative democracy on which the inter-American system is based include the obligation to prevent a person from remaining perpetually in power.

76. Additionally, the Court notes that the regularity of the elections also has the aim of ensuring that different political parties or ideological currents can access power. On this point, the Inter-American Democratic Charter establishes that another of the elements of representative democracy is the "the plural regimen of parties and political organizations."[79] In this sense, this Court emphasizes that political groups and parties play an essential role in democratic development.[80]

77. Political pluralism is fostered by the American Convention where it establishes the right of all citizens to be elected and to have access—under general conditions of equality—to public service in their country, freedom of thought and expression, the right to assembly, the right of association, and the obligation to guarantee rights without discrimination. The Court has established that these rights make democracy possible.[81] In this sense, the Inter-American Democratic Charter establishes that "Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order."[82] Similarly, the Declaration of Viña del Mar stated that:

> Democratic governance entails the representation and participation of all the inhabitants of our States, regardless of origin, race, religion, or sex, with special consideration to indigenous populations, as this affirms the legitimacy of political democracy. This means recognizing the contribution of majorities and minorities to the improvement of our democratic models. Making these requirements compatible with respect for the principle of equality between all men and women who inhabit Ibero-America is a challenge for our societies.[83]

78. A democratic system means that the person with the most votes takes popularly-elected office.[84] However, the right of minorities to propose alternative ideas and projects—as well as opportunities for them to be elected—must always be guaranteed. In this regard, political pluralism entails an obligation to guarantee rotation of power—that is, that a governance platform can be replaced by a different one once it has obtained the necessary electoral

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[77] Minutes of the Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, August 12 to 18, 1959. Declaration of Santiago, declarative point 3.

[78] Inter-American Juridical Committee CJI/RES. 159 (LXXV-O/09), *supra*, Resolution 3.

[79] Inter-American Democratic Charter, article 3.

[80] Sixth Ibero-American Conference of Heads of State and Governments: Declaration of Viña del Mar, November 10 and 11, 1996, para. 24.

[81] *Cf. Case of Castañeda Gutman v. Mexico. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 6, 2008. Series C No. 184, para. 140,

[82] *Cf.* Inter-American Democratic Charter, article 2.

[83] Declaration of Viña del Mar, *supra*, para. 19.

[84] This can be through direct or indirect elections.

majority. There must be a real and effective possibility that different political movements and their candidates can win popular support and replace the ruling party.

79. On the other hand, Articles 3 and 4 of the Inter-American Democratic Charter emphasize that in democracies, power must be accessed and exercised subject to and under the rule of law. Democratic life is only possible if all parties respect the limits imposed by law that enable the very existence of democracy, such as limits on the length of presidential terms. In this sense, full respect for the rule of law means that changing the rules on access to power in a way that benefits the person in power and puts political minorities at a disadvantage is not something that can be done by majorities or their representatives (*supra* para. 70). In this way, authoritarian governments are prevented from staying in power indefinitely by changing the rules of the democratic game and thereby eroding the protection of human rights.

80. Lastly, article 3 of the Inter-American Democratic Charter places the separation and independence of powers among the constitutive elements of a democracy. The separation of State powers into different branches and organs is linked closely with the aim of preserving related freedoms, with the understanding that concentration of power leads to tyranny and oppression. At the same time, the separation of State powers allows for the efficient fulfillment of the various aims entrusted to the State.

81. Therefore, the separation and independence of powers limits the scope of power exercised by each State body, thus preventing them from unduly interfering in the activities of the other bodies and guaranteeing the effective enjoyment of greater freedom.

82. However, the separation and independence of powers assumes the existence of a system of controls and oversight to constantly regulate the balance of powers. This so-called "checks and balances" model does not assume that harmony between the bodies playing the classic roles of branches of government will be a spontaneous consequence of adequate and functional delimitation of their powers and the absence of interference in their exercise thereof. On the contrary, the balance of powers is continuously struck and reestablished through the political oversight performed by some bodies of the tasks corresponding to others and the collaborative relationships between the different branches government in the exercise of their powers.

83. All the foregoing criteria are closely related. Indeed, the separation of powers, political pluralism, and holding of regular elections also function as guarantees of effective respect of fundamental rights and freedoms.

84. Therefore, this Court finds that the principles of representative democracy include, in addition to regular elections and political pluralism, the obligation to prevent a person from remaining in power and to guarantee the rotation of power and the separation of powers.

85. The measures that the State can take to prevent a person from holding onto power and to guarantee the separation of powers and the rotation of power are varied and will depend on the political system of the particular country.

86. The inter-American system, the American Declaration, and the Convention do not impose a particular political system on States,[85] nor a specific modality of limitations on exercising political rights.[86] States can establish their political systems and regulate political rights according to their historical, political, social and cultural needs, which may vary from

[85] OAS Charter, Article 3.

[86] *Case of Castañeda Gutman v. Mexico*, *supra*, para. 162.

one country to another and even within one country, at different historical moments.[87] However, the regulations that States implement must be compatible with the American Convention and, therefore, with the principles of representative democracy that underpin the inter-American system, including those derived from the Inter-American Democratic Charter.

87. This Court notes that most of the States Parties to the American Convention have adopted a presidential political system.[88] In this type of system, the duration of the President's mandate is not conditional on support from another branch of government but based rather on the length of time established by law for the term.[89]

88. Although the powers of the presidents vary in each State, certain commonalities have been observed in constitutional executive systems. In general, the president is the head of the executive branch and acts as the head of State and head of government.[90] The president is therefore in charge of appointing and removing the ministers and those leading the main government agencies.[91] In fourteen OAS member States, the President is also the commander-in-chief of the armed forces.[92]

89. Additionally, the Court observes that the checks and balances system that most OAS member States have implemented grants the President certain powers that influence how

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87 *Case of Castañeda Gutman v. Mexico*, *supra*, para. 166.

88 *Cf.* Comments from: the Academia Boliviana de Estudios Constitucionales; Ilka Treminio and Juan Manuel Muñoz, from the Centro de Investigación y Estudios Políticos (CIEP) of the Universidad de Costa Rica; the Clínica deDireitos Humanos e Direito Ambiental of the Universidade do Estado do Amazonas e Grupo de Pesquisa Direitos Humanos na Amazônia; the Corporación Centro de Interés Público y Justicia (CIPJUS); the Fundación para el DebidoProceso (DPLF); the Instituto de Gobernabilidad of Peru (INGOPE); the Núcleo de Estudios en Derechos Humanos (NESIDH) and the Centro de Estudios de Constitucional (CCONS) of the Universidad de Flores and Universidad Católica de Córdoba; the Universidad Libre Facultad de Derecho in Bogotá, and Edier Esteban Manco Pineda.

89 In this sense, this advisory opinion does not address parliamentary systems.

90 This is established explicitly in, for example, the constitutions of Argentina, Chile, Colombia, Ecuador, Guatemala, Nicaragua, Peru, the Dominican Republic and Venezuela. *Cf.* Constitution of the Argentine Nation, article99; Political Constitution of the Republic of Chile, article 24; Political Constitution of the Republic of Colombia, article115; Political Constitution of the Republic of Ecuador, article 141; Constitution of the United States of America, article2 section I.1; Political Constitution of the Republic of Guatemala, article 182; Political Constitution of the Republic ofNicaragua, article 144; Political Constitution of the Republic of Peru, article 110; Political Constitution of the DominicanRepublic, article 122, and Political Constitution of the Bolivarian Republic of Venezuela, article 226.

91 See, for example, Constitution of the Argentine Nation, article 99.7; Political Constitution of the Plurinational State of Bolivia, articles 172.15, 172.21 and 172.23; Political Constitution of the Federative Republic of Brazil, articles84.14, 84.15 and 84.17; Political Constitution of the Republic of Chile, articles 32.7 and 32.9 to 32.12 and 32.18; Political Constitution of the Republic of Colombia, articles 189.1 and 189.13; Political Constitution of the Republic of Costa Rica, articles 140.1, 140.2 147.4; Political Constitution of the Republic of Ecuador, article 147.9; Political Constitution of the Republic of El Salvador, article 162; Constitution of the United States of America, article 2 sectionII.2; Political Constitution of the United Mexican States, article 89 (II); Political Constitution of the Republic of Guatemala, article 183 (s); Political Constitution of the Republic of Honduras, article 245.5; Political Constitution of the Republic of Nicaragua, article 150.5; Political Constitution of the Republic of Panama, article 184; Political Constitution of the Republic of Paraguay, article 238.6; Political Constitution of the Dominican Republic, article 128.2, and Political Constitution of the Bolivarian Republic of Venezuela, articles 236.3 and 236.16.

92 Such is the case in, for example, Argentina, Brazil, Chile, Colombia, Ecuador, the United States, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, the Dominican Republic, Uruguay and Venezuela. *Cf.* Constitution of the Argentine Nation, article 99.12; Political Constitution of the Federative Republic of Brazil, article 142; Political Constitution of the Republic of Chile, article 32.18; Political Constitution of the Republic of Colombia, article 189.3; Political Constitution of the Republic of Ecuador, article 147.16; Constitution of the United States of America, article 2 section II.1; Political Constitution of the Republic of Guatemala, article 182; Political Constitution of the Republic of Honduras, article 245.16; Political Constitution of the United Mexican States, article 89 (VI); Political Constitution of the Republic of Nicaragua, article 144; Political Constitution of the Republic of Paraguay, article 238.9; Political Constitution of the Republic of Peru, article 167; Political Constitution of the Dominican Republic, article 128; Political Constitution of the Eastern Republic of Uruguay, article 168.2, and Political Constitution of the Bolivarian Republic of Venezuela, article 236.5.

other branches of government function. In particular, Presidents often have the power to participate in the lawmaking process[93] and can call special sessions of the legislative branch.[94] In regard to how they relate to the judiciary, in six OAS Member States, the president appoints the judges of the Supreme Court, for subsequent approval by the legislative branch.[95] In three States Parties to the American Convention, the President can also appoint certain judges.[96]

90. In view of the broad powers that presidents have in presidential systems and the importance of ensuring that a person does not hold onto power, the legal systems of most OAS member States place limits on presidential reelection in presidential systems. Thus, presidential reelection is prohibited in Colombia,[97] Guatemala,[98] Mexico,[99] and Paraguay;[100] it

[93] This is the case in, for example, Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, the Dominican Republic, Uruguay and Venezuela. *Cf.* Constitution of the Argentine Nation, articles 99.3 and 77; Political Constitution of the Federative Republic of Brazil, article 61; Political Constitution of the Republic of Chile, article 32.1; Political Constitution of the Republic of Colombia,article 154; Political Constitution of the Republic of Costa Rica, article 123; Political Constitution of the Republic of Ecuador, article 147.11; Political Constitution of the Republic of El Salvador, article 133.2; Political Constitution of theRepublic of Guatemala, article 183 (g); Political Constitution of the Republic of Honduras, article 245.9; Political Constitution of the United Mexican States, article 71 (I); Political Constitution of the Republic of Nicaragua, article 140.2; Political Constitution of the Republic of Paraguay, article 238.12; Political Constitution of the Republic of Peru, article 107; Political Constitution of the Dominican Republic, article 96.2; Political Constitution of the Eastern Republicof Uruguay, article 168.7, and Political Constitution of the Bolivarian Republic of Venezuela, article 204.1.

[94] This is the case in, for example, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the Dominican Republic, Uruguay and Venezuela. *Cf.* Constitution of the Argentine Nation, article 99.9; Political Constitution of the Plurinational State of Bolivia, article 172.6; Political Constitution of the Federative Republic of Brazil, article 57.6; Political Constitution of the Republic of Chile, article 32.2; Political Constitution of the Republic of Colombia, article 138; Political Constitution of the Republic of Costa Rica, article 118; Political Constitution of the Republic of Ecuador, article 147.15; Political Constitution of the Republic of Guatemala, article 183 (l); Political Constitution of the Republic of Honduras, article 245.6; Political Constitution of the United Mexican States, article 89 (XI); Political Constitution of the Republic of Nicaragua, article 150.6; Political Constitution of the Republic of Panama, article 183.4; Political Constitution of the Republic of Paraguay, article 238.11; Political Constitution of the Republic of Peru, article 118.6; Political Constitution of the Dominican Republic, article 89; Political Constitution of the Eastern Republic of Uruguay, article 168.8, and Political Constitution of the Bolivarian Republic of Venezuela, article 236.9.

[95] This is the case of, for example, Argentina, Brazil, Chile, the United States, Nicaragua, and Mexico. *Cf.* Constitution of the Argentine Nation, article 99.4; Political Constitution of the Federative Republic of Brazil, article 84.14; Political Constitution of the Republic of Chile, article 78; Constitution of the United States of America, article 2 section II; Political Constitution of the Republic of Nicaragua, article 150.14, and Political Constitution of the UnitedMexican States, article 89 (XVIII).

[96] This is the case in, for example, Argentina, Brazil, and Chile. *Cf.* Constitution of the Argentine Nation, article 99.4; Political Constitution of the Federative Republic of Brazil, articles 84.14 and 84.16; and Political Constitution ofthe Republic of Chile, article 32.12.

[97] Article 197 of the Constitution of Colombia, amended in 2015, establishes that "A citizen who has held the presidency in any capacity may not be elected President of the Republic. This prohibition does not apply to the Vice President when they have served for fewer than three months, continuously or discontinuously, during the four-year term. The ban on reelection can only be amended or repealed by means of a popular referendum or constituent assembly."

[98] Article 187 of the Constitution of Guatemala establishes that "[…] persons who have held the office of Presidentof the Republic for any length time by popular election, or who have held it for more than two years in substitution of the incumbent, may not under any circumstances hold it again."

[99] Article 83 of the Constitution of Mexico establishes that "[…] The citizen who has held the position of Presidentof the Republic, having been popularly elected or having held the office of Federal executive on an interim, substitute,or provisional basis shall under no circumstances or for any reason able to hold the office again."

[100] Article 229 of the Constitution of Paraguay establishes that "the President of the Republic and the Vice Presidentshall hold office for five years, non-extendable, starting on the 15th of August following the elections. Under no circumstances can they be reelected. The Vice President may only be elected President for the following term if he/she resigns six months prior to the general elections. Anyone who has served as president for more than 12 months may not be elected Vice President of the Republic."

is limited to a single additional term in Ecuador,[101] the United States,[102] and the Dominican Republic;[103] reelection is limited to one consecutive term in Argentina,[104] and allowed only non-consecutively in Brazil,[105] Chile,[106] Costa Rica,[107] El Salvador,[108] Panama,[109] Peru,[110] and Uruguay.[111]

VI
COMPATIBILITY OF PROHIBITING INDEFINITE PRESIDENTIAL RE-ELECTION WITH THE AMERICAN CONVENTION

[101] Article 114 of the Constitution of Ecuador establishes that "popularly-elected authorities may be reelected onlyonce, consecutively or not, for the same position. Popularly-elected authorities who run for a different office must resign from the one they hold."

[102] Amendment XXII of February 27, 1951 establishes: "1. No person shall be elected to the office of the Presidentmore than twice, and no person who has held the office of President, or acted as President for more than two years of a term to which some other person was elected President shall be elected to the office of the President more thanonce. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as Presidentduring the remainder of such term. Constitution of the United States of America.

[103] Article 124 of the Constitution of the Dominican Republic establishes that "the Executive Power is exercised bythe President of the Republic, who shall be elected every four years by direct vote. The President of the Republic mayopt for a second consecutive constitutional term but may never run again or for the Vice-Presidency of the Republic."

[104] Article 90 of the Constitution of the Argentine Republic establishes that "the President and Vice President shallserve a term of four years and may be re-elected or succeed each other for a single consecutive period. If they havebeen reelected or have succeeded each other, they cannot be elected to either of the offices, except after an intervalof one term."

[105] Article 82 of the Brazilian Constitution establishes that "The term of the President of the Republic shall be five years, with no reelection for the following term, and will begin on January 1 of the year following his election."

[106] Article 25 of the Constitution of Chile establishes that "to be elected President of the Republic, one must have Chilean nationality in accordance with the provisions of parts 1 or 2 of article 10; be thirty-five years old; and possess the other qualities necessary to be a citizen with the right to vote. The President of the Republic shall exercise the authorities of the office for a term of four years and may not be re-elected for the following term."

[107] Article 132 of the Constitution of Costa Rica establishes that "the following may not be elected President or Vice President: 1) Whoever has served in the Presidency in any period within the eight years prior to the term for which the election will take place, nor the Vice President or whoever replaces them having served during the majorityof any of the terms included in those eight years."

[108] Article 152, section 1 of the Constitution of El Salvador establishes that "those who have held the Presidency of the Republic for more than six months, consecutive or not, during the immediately preceding term, or within the last six months prior to the start of the presidential term" cannot stand as candidates for President of the Republic.

[109] Article 178 of the Political Constitution of the Republic of Panama establishes that "citizens who have been elected President and Vice President of the Republic may not be re-elected for the same position in the two immediately-following presidential terms."

[110] Article 112 of the Constitution of Peru establishes that "the presidential term is five years, with no immediate reelection. After at least on more constitutional term, the former president can run again, subject to the same conditions."

[111] Article 152 of the Constitution of Uruguay establishes that "the President and Vice President shall serve for five years in their offices, and in order to hold them for another term, five years must have elapsed from the end of the last term. This provision covers the President with respect to the Vice Presidency and not the Vice President with respect to the Presidency, save for the exceptions set forth in the following paragraphs. The Vice President and citizen who served as President due to a definitive vacancy for more than one year cannot be elected to those offices until the passage of the same amount of time established in the first paragraph. Neither can the Vice President or the person who served as President during the term including the three months prior to the election be elected President.

91. The Court notes that two main issues emerge from the first question posed by Colombia: A) if presidential reelection without term limits is an autonomous human right, and B) if prohibiting it amounts to a restriction of political rights that violates the American Convention.

A. Presidential reelection without term limits as an autonomous human right

92. In the framework of the inter-American system, the Court notes that, from the literal meaning of the relevant provisions of the Convention and the American Declaration, "presidential reelection without term limits" is not expressly protected as an autonomous right. Additionally, the Court notes that there was no discussion regarding presidential reelection in the preparatory work for the American Convention and Declaration.[112]

93. The Court has indicated that, when exercising its interpretive function, it resorts to international human rights law by taking into account relevant sources of international law.[113] To this extent, it has specified that the *corpus iuris* of international human rights law is comprised of both a series of rules expressly established both in international treaties and by customary international law,[114] along with the general principles of law.

94. Regarding international treaties, it is noted that there is no mention of presidential reelection without term limits in the OAS Charter or the Inter-American Democratic Charter, or in any human rights treaty in the region. There is also no explicit reference to presidential reelection without term limits as a human right in international human rights treaties in the universal,[115] European,[116] or African[117] systems.

95. The right expressly derived from the American Convention and the International Covenant on Civil and Political Rights is the right to vote and be elected.[118] Similarly, the European Court of Human Rights and the African Court of Human Rights have further

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[112] *Cf.* Ninth International Conference of American States of 1948. Summary Minutes of the Sixth Session of the Sixth Committee of the Ninth International American Conference on the approval of Article XX of the American Declaration, pgs. 588 to 590, and Minutes and Documents of the Inter-American Specialized Conference on Human Rights (OEA/Ser.K/XVI/1.2), pgs. 254 to 258.

[113] *Cfr*. *Rights and guarantees of children in the context of migration and/or in need of international protection, para.* Advisory Opinion OC-21/14 dated August 19, 2014. Series A No. 21, para. 60, and Advisory Opinion OC-26/20,*supra*, para. 28.

[114] Cf. Advisory Opinion OC-21/14, *supra*, para. 60, and Advisory Opinion OC-26/20, *supra*, para. 28.

[115] Article 25 of the International Covenant on Civil and Political Rights (hereinafter the "ICCPR") establishes as follows: "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; (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." For its part, Article 21 of the Universal Declaration of Human Rights establishes that "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. 2. Everyone has the right of equal access to public service in his country. 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

[116] The third Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms recognizes in its article 3 that "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

[117] The African Charter on Human and Peoples' Rights, establishes in its article 13 that "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representativesin accordance with the provisions of the law. 2. Every citizen shall have the right of equal access to the public serviceof the country [...]."

[118] ICCPR, article 25;

understood that the right to run for elective office is also derived from the European Convention and the African Charter, respectively.[119]

96. In this sense, international human rights treaties do not recognize the existence of an autonomous right to be reelected to the office of the Presidency.

97. Additionally, with respect to regional customary international law, it must be analyzed whether there is evidence of a practice generally accepted as law. Thus, in its jurisprudence, the Court has resorted to the analysis of the legislation and internal jurisprudence of OAS member States to establish State practice.[120]

98. In this regard, this Court reiterates that the majority of the OAS member States place restrictions on presidential reelection (*supra* para. 90). Only four States lack limits on the number and frequency of presidential reelections, thereby allowing presidential reelection without term limits (Bolivia,[121] Honduras,[122] Nicaragua,[123] and Venezuela[124]). Of these States, court rulings in three cases arrived at the interpretation that limiting presidential reelection—as initially established in the respective constitutions—amounted to discriminatory and

[119] See, for example, ECHR, *Case of Podkolzina v. Latvia* (Application No. 46726/99). Judgment of the Fourth Section of April 9, 2002, para. 35, and African Court on Human and Peoples' Rights, *Tanganyika Law Society and theLegal and Human Rights Center v. Tanzania* (Application No. 009/2011) and *Reverend Christopher R. Mtikila v. Tanzania* (Application No. 011/2011). Judgment of June 14, 2013.

[120] *Cf.* Advisory Opinion OC-26/20, paras. 62 to 63.

[121] Regarding reelection to the posts of Presidency and Vice-presidency of the Republic, Article 168 of the Bolivian Constitution established that "the term of office is five years […] and they can be reelected only once consecutively." Likewise, article 52.III of the Electoral Regime Law established that the President or Vice President can be reelected "for a single consecutive term." These limitations were declared unconstitutional by the Plurinational Constitutional Court of Bolivia in its judgment No. 0084-2017 dated November 28, 2017.

[122] In a judgment of April 22, 2015, the Supreme Court of Justice of Honduras declared articles 42.5 and 239 of the Constitution inapplicable and found article 330 of the Penal Code unconstitutional. Article 42.5 of the Constitutionof Honduras stated that "[t]he status of citizen is lost […] upon inciting, promoting, or supporting the continuation in power or reelection of the President of the Republic." Article 239 also established that "citizens who have held the office of head of the Executive Branch may not be President or Vice President of the Republic. Anyone who violates this provision or proposes its reform and all those who support it directly or indirectly shall be immediately removed from their respective offices and disqualified for ten (10) years from holding any public office." For its part, article 330 of the Honduran Penal Code established that "anyone who exercises the Presidency of the Republic in any capacity, promotes or executes acts that violate the constitutional article that prohibits them from exercising it again or serving in that position again under any title shall be punished with a prison term of six to ten years. Those who directly support this person or propose amending the article shall incur the same penalty. When the perpetrators of these crimes are public officials, they shall also be punished with a total ban on public service for ten years, counting from the date of the violation or their attempt to amend the article."

[123] Article 147 of the Political Constitution of Nicaragua stated the following: "the following may not stand for President or Vice President of the Republic: a) anyone exercising or who has exercised the Presidency of the Republicat any point during the term preceding the election held for the following term, nor anyone who has exercised it for two presidential terms; b) the Vice President of the Republic or the person called to replace them, if the person has held the office or that of President during the twelve months prior to the date on which the election is held for the following term." Nicaragua's Constitutional Chamber of the Supreme Court of Justice found this article inapplicable inJudgment 504 of October 19, 2009. For its part, the Nicaraguan Supreme Court of Justice granted *erga omnes* effectsto the inapplicability of the limits set in Article 147 of the Constitution on presidential reelection through judgment 06of September 30, 2010.

[124] Article 230 of the Constitution of Venezuela established that "the presidential term is six years. The President of the Republic can be reelected immediately and only once for another term." In 2009, the article was amended by the National Assembly, eliminating the time limitation, worded as follows: "The presidential term is six years. The President of the Republic can be reelected."

disproportionate treatment that violated the rights to elect and be elected, and should therefore be eliminated.[125]

99. Therefore, although constitutional regulation of presidential reelection in OAS member States is mixed, currently only four of them allow "presidential reelection without term limits." Consequently, there is not enough of a State practice at a regional level with regard to the alleged human right to presidential reelection without term limits. In this sense, there is also no evidence that such a practice is considered a right. On the contrary, the States of the region have assumed the obligation to guarantee that their system of government is a representative democracy, and one of the principles of this system of government is to guarantee rotation of power and prevent a person from holding onto it (*supra* para. 75). Therefore, the Court rules out the customary recognition of presidential reelection without term limits as an autonomous right. Likewise, in the absence of a basis in international and domestic law, its recognition as a general principle of law must also be ruled out.

100. In this regard, the Court highlights that in 2018, in response to a request from the Secretary General of the OAS on this point, the European Commission for Democracy through Law (hereinafter the "Venice Commission"[126]) analyzed presidential reelection and concluded that "Term-limit clauses for presidents are found in constitution chapters referring to the institution of the presidency, not in the bills of rights."[127] In this regard, it highlighted that:

> Human rights may be understood as recognized claims: "to have a right is to have a claim to something and against someone, the recognition of which is called for by legal rules or, in the case of moral rights, by the principle of an enlightened conscience." Rights require social recognition as such. In a democratic state, this recognition must be institutionalized and acknowledged by the state. Without such recognition, human rights may be morally justifiable, but not enforceable.[128]

101. Taking the foregoing into account, and after analyzing existing national and international legislation, the Venice Commission concluded that "there is no specific and distinct human right to reelection. The possibility to stand for office for another period foreseen by the law is a modality of, or a restriction to, the right to political participation and, specifically, to stand for office."[129]

102. In view of the foregoing, this Court concludes that "presidential reelection without term limits" does not constitute an autonomous right protected by the American Convention or by the *corpus iuris* of international human rights law.[130] Presidential reelection and its prohibition stem from the constitutional regulations established by States regarding the right to be elected, in accordance with their historical, political, social, and cultural needs.[131] Therefore,

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[125] *Cf.* Constitutional Chamber of the Supreme Court of Justice of Nicaragua. Resolution No. 504 of October 19, 2009, pgs. 20 to 23; Plurinational Constitutional Court of Bolivia. Resolution No. 0084-2017 of November 28, 2017, pgs. 75 and 76, and Supreme Court of Justice of Honduras. Judgment of April 22, 2015, "whereas" paragraphs 18 and 24 to 26.

[126] The Venice Commission is an advisory body of the Council of Europe, comprised of independent experts in thefield of constitutional law.

[127] European Commission for Democracy through Law. Report on Term Limits. Part I - Presidents. Adopted by the Venice Commission at its 114th Plenary Session, Venice, 16-17 March 2018, para. 78.

[128] European Commission for Democracy through Law. Report on Term Limits*, supra*, para. 79.

[129] European Commission for Democracy through Law. Report on Term Limits*, supra*, para. 117.

[130] European Commission for Democracy through Law. Report on Term Limits*, supra*, para. 117.

[131] *Cf. Mutatis mutandis, Case of Castañeda Gutman v. Mexico*, *supra*, para. 165, and ECHR, *Case of Zdanoka v. Latvia.* Judgment of March 16, 2006 [Grand Chamber], para. 103.

it must be examined whether the prohibition is a restriction on political rights, and if so, whether it is compatible with the American Convention and the American Declaration.

B. Compatibility of prohibition on presidential reelection without term limits with political rights

103. The first paragraph of Article 23 of the Convention recognizes the rights of all citizens: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (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; and (c) To have access, on general terms of equality, to public service in his country.[132] Similarly, the American Declaration recognizes the right to "participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free." This Court has therefore found that the rights recognized have an individual and collective dimension, as they protect both those who stand as candidates and those who vote for them.[133]

104. The Court notes that the prohibition on presidential reelection without term limits constitutes a restriction on the right to be elected. In this sense, the Court recalls that political rights are not absolute. Their exercise may be subject to regulations or restrictions. However, the power to regulate or restrict rights is not discretionary. Rather, it is limited by international law, which requires compliance with certain requirements, and if they are not respected, the restriction is illegitimate and in violation of the American Convention.[134] In this sense, Article 23, paragraph 2 of the Convention establishes that:

> 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.

105. This Court has found that in establishing a list of possible grounds for limiting or regulating political rights, Article 23(2) of the Convention aims to set clear criteria and specific regimes under which these rights may be limited. The goal of this is the ensure limiting political rights is not left up to the discretion or will of the current ruler, so as ensure the political opposition can operate without undue restrictions.[135]

106. However, this Court notes that Article 23(2) establishes two acceptable categories of restrictions. The first is in regard to general restrictions that the law may establish (age, nationality, residence, language, education, civil or mental capacity), while the second refers to restrictions on political rights imposed by means of a sanction on a specific person (conviction, by a competent judge, in criminal proceedings). According to the case law of this Court, interpretation of the term "exclusively" found in Article 23(2) depends on whether it involves restrictions on general political rights (first category) or an individual's political rights (second category).

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132 *Cf. Case of Yatama v. Nicaragua*, *supra*, paras. 195 to 200, and *Case of Petro Urrego v. Colombia*, *supra*, para. 92.

133 *Cf. Case of Yatama v. Nicaragua*, *supra*, paras. 195 to 200, and *Case of Petro Urrego v. Colombia*, *supra*, para. 92.

134 *Cf. Case of Yatama v. Nicaragua*, *supra*, para. 195, and *Case of Petro Urrego v. Colombia*, *supra*, para. 94.

135 *Cf. Case of Castañeda Gutman v. Mexico*, *supra*, para. 155, and *Case of Petro Urrego v. Colombia*, *supra*, para. 98.

107. On the one hand, in the cases *López Mendoza v. Venezuela* and *Petro Urrego v. Colombia*, the Court was clear in establishing that, in cases of restrictions on political rights via sanction, the term "exclusively" implies that these restrictions can only be implemented following a guilty verdict handed down by a competent judge in a criminal proceeding. Therefore, the sanctions of dismissal and disqualification of democratically elected public officials applied by an administrative disciplinary authority are prohibited by Article 23(2) of the Convention, in terms of both its wording and its object and purpose.[136]

108. On the other hand, in cases related to general restrictions on political rights, the Court has found when interpreting the term "exclusively" in Article 23(2) that it is not possible to set aside paragraph 1 of the article to interpret paragraph 2 in isolation, nor is it possible to ignore the other provisions of the Convention or the basic principles that inspire it and are used for its interpretation.[137]

109. In this sense, Article 23 of the Convention entails certain obligations for the State. From the moment Article 23(1) establishes that the right to participate in the conduct of public affairs can be exercised directly or through freely chosen representatives, States have a positive obligation to take certain actions, engage in conduct, or adopt measures deriving from the obligation to guarantee the free and full exercise of human rights of the persons subject to their jurisdiction (Article 1(1) of the Convention) and from the general obligation to adopt measures in domestic law (Article 2 of the Convention).[138]

110. The positive obligation is to devise a system under which representatives can be elected to conduct public affairs. Indeed, for political rights to be exercised, the law must establish regulations that go beyond those having to do with limits on restricting those rights established in Article 23(2) of the Convention. States must organize electoral systems and establish a complex series of conditions and formal standards to ensure citizens are able to exercise of the right to vote and be voted for.[139]

111. Consequently, not only does the State have the general obligation established in Article 1(1) of the Convention to guarantee the exercise of rights, it must follow specific guidelines in complying with this obligation. According to the American Convention, the electoral system that States establish must make it possible to hold 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 voters. The State therefore has a specific mandate regarding the modality it must choose to comply with its general obligation to "guarantee" the exercise of the rights established in Article 1 of the Convention, compliance that, as stated in general by article 1(1), must not be discriminatory.[140] In this sense, for example, the Court has concluded that in order to guarantee political rights, States must regulate organizational or institutional aspects of electoral processes, amounting to the imposition of limitations on political rights not expressly included in Article 23(2).[141]

112. By virtue of the foregoing, the Court has found that it is not possible to ensure an electoral system can function by applying solely the limitations of Article 23, paragraph 2, of

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136 *Cf. Case of López Mendoza v. Venezuela. Merits, Reparations, and Costs.* Judgment of September 1, 2011. Series C No. 233, para. 107 to 109, and *Case of Petro Urrego v*. *Colombia*, *supra*, paras. 94 to 98.

137 *Cf. Case of Castañeda Gutman v. Mexico*, *supra*, para. 153.

138 *Cf. Case of Castañeda Gutman v. Mexico*, *supra*, para. 156.

139 *Cf. Case of Castañeda Gutman v. Mexico*, *supra*, para. 157.

140 *Cf. Case of Castañeda Gutman v. Mexico*, *supra*, para. 158.

141 *Cf. Case of Castañeda Gutman v. Mexico*, *supra*, para. 159.

the American Convention.[142] The establishment and enforcement of general requirements to exercise political rights does not constitute, *per se*, an undue restriction on political rights.[143] Therefore, just because restrictions on presidential reelection without term limits are not explicitly included in Article 23(2) does not mean they run contrary to the Convention.

113. However, States' power to regulate or restrict rights is not discretionary. It is limited by international law, which requires compliance with certain requirements that, if not respected, make the restriction illegitimate and contrary to the American Convention Pursuant to the provisions of Article 29(a) *in fine* of said treaty, no provision of the Convention can be interpreted in the sense of limiting rights to a greater extent than what it establishes.[144] In this regard, it must be examined whether this limitation represents an undue restriction of the human rights enshrined in the Convention.[145]

114. Article 32(2) of the Convention establishes that, "The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy." This Court has established in its case law that a right may be restricted by States provided that the interference is not abusive or arbitrary. Therefore, it must be established by law—formally and materially[146]—pursue a legitimate purpose, and comply with the requirements of suitability, necessity and proportionality.[147]

115. The first step in evaluating whether a restriction to a right established in the American Convention is permitted under it is to examine whether the limiting measure meets the requirement of legality. This means that the general conditions and circumstances that authorize a restriction on the exercise of a specific human right must be clearly established by law.[148] In this sense, to be in accordance with the Convention, limitations on presidential reelection must be clearly established both formally and materially.[149]

116. The second limit on any restriction involves the purpose of the restrictive measure: that is, the cause invoked to justify the restriction must be allowed under the American Convention, established in specific provisions that are included for certain rights (for example, protecting public order or public health, set forth in articles 12(3), 13(2)(b), and 15, among others), or

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142 *Cf. Case of Castañeda Gutman v. Mexico*, *supra*, para. 161.

143 *Cf. Case of Yatama v. Nicaragua*, *supra*, para. 206, and *Case of Castañeda Gutman v. Mexico*, *supra*, para. 174.

144 *Cf. Case of Castañeda Gutman v. Mexico*, *supra*, para. 174.

145 Similarly, ECHR, *Case of Gitonas et al. v. Greece.* Judgment of the Chamber 18747/91; 19376/92; 19379/92 of July 1, 1997, para. 39, and *Case of Hirst v. United Kingdom, (No. 2).* Judgment of the Grand Chamber 74025/01 of October 6, 2005, para. 62.

146 *Cf.* Advisory Opinion OC-6/86, supra, paras. 35 and 37, and *Case of Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of November 28, 2012. Series C No. 257, para. 273.

147 *Cf. Case of Tristán Donoso v. Panama. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 27, 2009. Series C No. 193. para. 56, and *Case of Fernández Prieto and Tumbeiro v. Argentina. Argentina. Merits and Reparations.* Judgment of September 1, 2020. Series C No. 411, para. 105.

148 Article 30 of the American Convention establishes that "The restrictions that, pursuant to this Convention, maybe placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."

149 *Cf.* Advisory Opinion OC-6/86, *supra*, paras. 27 and 32, and *Case of Castañeda Gutman v. Mexico. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 6, 2008. Series C No. 184, para. 176.

in norms that establish legitimate general purposes (for example, "the rights of others" or "the just demands of the general welfare, in a democratic society," both in Article 32).[150]

117. Unlike other rights whose wording specifically establishes the legitimate purposes that could justify the restrictions to a right, Article 23 of the Convention does not explicitly establish the legitimate grounds or the permitted aims for which the law can restrict political rights. Indeed, the article is limited to outlining certain aspects or reasons (civil or mental capacity, age, among others) based on which the exercise of political rights can be regulated, but does not explicitly determine the aims nor the specific restrictions that will necessarily have to be imposed when designing an electoral system, such as residency requirements, electoral districts, and others elements. However, the legitimate aims the restrictions must pursue derive from the obligations arising from Article 23(1) of the Convention, to which reference has been made above.[151]

118. In this sense, this Court recalls that, according to Article 32(2) of the Convention, "The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy." Within the context of the Convention, the general welfare can be understood as a concept referring to the conditions of social life that allow the members of society to achieve the highest degree of personal development and the greatest effectiveness of democratic values. In this sense, organizing social life in a way that strengthens the functioning of democratic institutions and preserves and promotes the full realization of the rights of the human person can be considered an imperative of the common good.[152]

119. The Court considers that prohibiting presidential reelection without term limits has a purpose in accordance with Article 32 of the Convention, as it seeks to guarantee representative democracy by serving as a safeguard of the essential elements of democracy established in Article 3 of the Inter-American Democratic Charter. In particular, the prohibition on presidential reelection without term limits seeks to prevent a person from holding on to power, and, in this way, to ensure political pluralism and rotation of power, while protecting the system of checks and balances that guarantee the separation of powers (*supra* paras. 43 to 85). Since representative democracy is one of the principles on which the inter-American system is founded, the measures taken to guarantee it have a legitimate purpose under the Convention.

120. The third step is to assess whether the restriction is suitable to achieve its aim. In this regard, the Court notes that, in view of how much power is concentrated in the presidency in a presidential system, restricting the possibility of reelection without term limits is a suitable means of ensuring that a person does not hold onto power, and thus that the fundamental principles of a representative democracy are not affected (*supra* paras. 43 to 85).

121. Next, it must be evaluated whether the restriction is necessary, for which the existing alternatives must be examined for securing the legitimate aim pursued, with their greater or lesser harmfulness identified.[153] In this regard, this Court notes that it does not identify other equally suitable measures to ensure that a person does not hold onto power, finding that with

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150 *Cf.* Advisory Opinion OC-6/86, *supra*, paras. 27 and 32, and *Case of Argüelles et al. v. Argentina. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 20, 2014. Series C No. 288, para. 226

151 *Cf.* Advisory Opinion OC-6/86, *supra*, paras. 27 and 32, and *Case of Castañeda Gutman v. Mexico*, *supra*, para. 181.

152 *The compulsory licensing of journalists. (Arts.* 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 66, and Advisory Opinion OC-6/86, *supra*, para. 61.

153 *Cf. Case of Yatama v. Nicaragua*, *supra*, para. 206, and *Case of Usón Ramírez v. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 20, 2009. Series C No. 207, para. 72

this measure, the separation of powers, the plural regime of political parties and organizations, and the rotation of political parties in the exercise of power are not affected. In the same sense, the Venice Commission has pointed out that, in a State with a presidential or semi-presidential system, "power tends to be concentrated on the President, while that of the Legislature or the Judiciary is relatively weaker. Therefore, the regular change of regime through the process of election is the very method to prevent too strong a concentration of powers in the hands of the President."[154]

122. Finally, it must be evaluated whether the restriction is strictly proportional, such that the sacrifice inherent in it is not exaggerated or excessive compared to its benefits.[155] In this regard, this Court has indicated that the restriction must be proportional to the interest justifying it and closely adhere to achieving the legitimate aim, interfering as little as possible in the effective exercise of the right at stake.[156] Indeed, even if a restriction is established by law is suitable and necessary, it must be determined whether it is strictly proportional.

123. In view of the questions posed, it is necessary to consider whether the advantages of prohibiting indefinite presidential reelection for democratic rotation of power are proportional as regards the right of the person holding the office of the presidency to be reelected, as well as with respect to the right of other citizens to vote and to participate in the conduct of public affairs through freely-elected representatives.

124. Regarding the right of the person holding the office of the presidency to be reelected, this Court has already established that there is no autonomous right to reelection (*supra* para. 102). The right that is established in the American Convention is the right "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." Prohibiting presidential reelection without term limits only restricts the person who is currently exercising the presidency from participating in the elections. In this sense, this Court finds that the sacrifice involved in this restriction is minor and justified to ensure that a person does not hold onto power, thereby preventing representative democracy from being degraded.

125. Additionally, regarding the rights of other citizens, this Court recalls that Article 23 of the Convention establishes the right to participate in the conduct of public affairs, through freely elected representatives, as well as the right to vote in elections that "guarantee[...] the free expression of the will of voters." In this regard, this Court notes that the right to vote does not entail a right to have unlimited options for candidates for the Presidency.[157] Instead, the right protects voters' ability to choose freely between registered candidates and ensures restrictions on running as a candidate do not violate the Convention.[158] The prohibition on presidential reelection without term limits restricts citizens from reelecting the President for more than two consecutive terms when they believe him to be the most suitable person for the office. However, this Court reiterates that, pursuant to Article 32 of the Convention, the

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[154] European Commission for Democracy through Law. CDL-AD (2009) 010 Opinion on the Draft Amendments tothe Constitution of the Republic of Azerbaijan adopted by the Venice Commission at its 78th Plenary Session (Venice,13-14 March 2009), para. 10.

[155] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of November 21, 2007. Series C No. 170, para. 93; and *Case of Álvarez Ramos v. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 30, 2019. Series C No. 380, para. 108.

[156] *Cf.* Advisory Opinion OC-5/85, *supra*, para. 46, and *Case of Usón Ramírez v. Venezuela, supra,* para. 79.

[157] *Cf.* Caribbean Court of Justice, in the appeal of the Court of Appeal of Guyana in the case of the *Attorney General of Guyana v. Cedric Richardson.* Judgment of June 26, 2018, Decision of Judge Sir Dennis Byron, para. 27.

[158] *Cf.* Human Rights Committee, General Comment No. 25 on participation in public affairs and the right to vote (article 25), para. 15, and Caribbean Court of Justice, in the appeal of the Court of Appeal of Guyana in the case of the *Attorney General of Guyana v. Cedric Richardson.* Judgment of June 26, 2018, Decision of Judge Wit, para. 141.

rights of individuals are limited by the rights of others, by the security of all, and by the just demands of the common good. In this sense, the demands of the common good require that democracy safeguards be established, such as by prohibiting indefinite presidential reelection (*infra* paras. 145 and 146). Furthermore, the Court emphasizes that this prohibition does not affect the right of voters to select, from among the candidates, the person most in line with their preferences, even a representative of the same political party as the sitting president. Therefore, the Court observes that this limitation is minor when compared to the benefits to society of prohibiting presidential reelection without term limits.

126. Therefore, the Court concludes that prohibiting reelection without term limits is compatible with the American Convention, the American Declaration, and the Inter-American Democratic Charter.

VII
THE COMPATIBILITY OF UNLIMITED PRESIDENTIAL REELECTION WITH HUMAN RIGHTS OBLIGATIONS

127. This Court reiterates that in the inter-American system, the American Declaration, and the Convention do not impose a particular political system on States,[159] nor a specific modality of limitations on exercising political rights.[160] However, the regulations that States implement must be compatible with the American Convention and, therefore, with the principles of representative democracy that underpin the inter-American system, including those derived from the Inter-American Democratic Charter.

128. The American States assumed the obligation to guarantee the effective exercise of democracy within their countries. This obligation means States must hold authentic regular elections and take the measures necessary to guarantee the separation of powers, the rule of law, political pluralism, and rotation of power, and to prevent a single person from holding onto power (*supra* paras. 43 to 85 and 103 to 126). Otherwise, the system of government would not be a representative democracy.

129. At the same time, in accordance with Articles 23, 24, 1(1) and 2 of the Convention, States have the obligation to guarantee the enjoyment of political rights, which means they must regulate the exercise of these rights and their application, consistent with the principle of equality and non-discrimination, and they must adopt the measures necessary to guarantee their full exercise.[161] These obligations under the American Convention must be interpreted in accordance with the obligation to guarantee the effective exercise of democracy (*supra* para. 128).

130. In application of the foregoing, this Court will proceed to analyze whether presidential reelection without term limits runs contrary to the American Convention.

131. First, the Court notes that establishing a set time period for a popularly-elected president to serve in office is one of the main characteristics of presidential systems, and its observance depends on whether the foundational elements of a representative democracy are preserved

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159 OAS Charter, Article 3.

160 *Case of Castañeda Gutman v. Mexico. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 6, 2008. Series C No. 184, para. 162.

161 *Cf. Juridical Condition and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 89, and *Case of Chitay Nech et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs.* Judgment of May 25, 2010. Series C No. 212, para. 106.

or have been eroded to such a degree that, in fact, it must be understood to have been replaced by another—even opposite—system of government.

132. Setting a finite period of time for the presidential term itself limits their expectations and effective exercise of their power. It also constitutes a mechanism of control, since limiting the length of the term places an obligation on the head of State to abide by it and to facilitate succession in accordance with the established rules in order to avoid the prolonged concentration of power in this single individual and to preserve the balance inherent to the separation of powers and the system of checks and balances through regular renewal of the high court.

133. In this sense, when a single person remains the President of the Republic for a long period of time, it is harmful to the pluralistic regimen of parties and political organizations, typical of a representative democracy, because it favors the hegemony of certain sectors and ideologies. Representative democracy and the obligation to guarantee human rights without discrimination are based on the fact that there is a diversity of political thought and ideology in society. Thus, no opinions or leanings are accepted unanimously. Regardless of whether the person in power has the support of the majority of voters, States must always respect and guarantee the freedom of expression and the right to political participation of the minorities. In this sense, the Court reaffirms that, pursuant to the terms of Article 1(1) of the Convention, in a democratic society, a person can never be discriminated against for their political opinions or for legitimately exercising political rights.[162] Therefore, this Court finds that when a single person can hold the powers of the office of the president without limit, it fosters hegemonic tendencies that impair the political rights of minority groups and, consequently, undermine the plural regime of political parties and organizations.

134. Second, the lack of limitations on presidential reelection leads to the weakening of the political parties and movements that make up the opposition, as they do not have a clear expectation of an opportunity to access the exercise of power. The weakening of political parties has a negative impact on the functioning of democracy, since they play an essential role in its development.[163] This affects the political pluralism that must exist in a democratic society, which is fostered by Articles 13, 16, and 23 of the American Convention. In this regard, the Constitutional Court of Colombia has indicated that respect for political pluralism means recognizing that one political platform can always replace "another in the government of the nation." Therefore:

> […] minorities, far from being silenced for the sake of majority rule, have the right to offer their opinions and platforms as alternatives, with a real possibility of inspiring citizens to join and thus become a majority, which requires providing rules to guide the dynamics of the political process and, of course, compliance with those rules, especially by those who represent the majority.[164]

135. In the same sense, the Supreme Court of Justice of the Nation of Mexico has found that "democracy means ensuring that people rotate in the exercise of public functions and that no one can be considered indispensable to the exercise of State power."[165] Likewise, the Constitutional Court of Ecuador has found that term-limiting presidential reelection "allows

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[162] *Case of San Miguel Sosa et al. v. Venezuela. Merits, Reparations, and Costs.* Judgment of February 8, 2018. Series C No. 348, para. 117.

[163] *Cf.* Declaration of Viña del Mar, *supra*, para. 24.

[164] Constitutional Court of Colombia, Judgment C-141-10 of February 26, 2010. Available at: https://www.corteconstitucional.gov.co/Relatoria/2005/C-1041-05.htm.

[165] Supreme Court of Justice of the Nation of Mexico, Action of Unconstitutionality 47/2006, combined with 49/2006, 50/2006, and 51/2006, p. 98.

democratic rotation and promotes the right to participation of other members of society,"[166] and indicated that "the lack of a time limit on the exercise of power may lead to it becoming associated with a single person, ostensibly affecting democratic participation under equal conditions."[167]

136. On this point, the Venice Commission indicated that limits on presidential reelection "may strengthen a democratic society, as they impose the logic of political transition as a predictable event in public affairs" and "keep alive the opposition parties' hope of gaining power in the near future through institutionalized procedures."[168]

137. Similarly, the Secretary-General of the United Nations has pointed out that "where they have been adopted, mostly in presidential or semi-presidential political systems, term limits can be important mechanisms to safeguard against 'winner-take-all' politics. Under certain circumstances, the removal of or a change in term limits can undermine the confidence necessary for the political system to function well."[169]

138. In this regard, it is this Court's view that States must establish clear limits to the exercise of power in order to allow for the possibility that different political movements are able to access it and for all citizens to be duly represented in a democratic system.

139. Third, depending on the powers that each State confers to the President of the Republic, when a president remains in power for a long period of time, it impacts the independence and separation of the branches of government. In this regard, this Court recalls that this, pursuant to Article 3 of the Inter-American Democratic Charter, is one of the essential elements of a representative democracy.

140. As noted above, in the presidential political system adopted by the States of the region, constitutions frequently confer significant power to presidents, including the power to nominate or appoint the authorities of other branches of government. One way of preventing this from affecting the separation of powers is by establishing terms of a different length than the presidential term for positions appointed by the president. When the same person holds power for a long period of time, it invalidates this democratic safeguard. When a single person holds the office of President for several consecutive terms, there are more opportunities to appoint or remove officials from other branches of government or oversight bodies. Therefore, in these types of regimes, it is essential for the system of checks and balances to include clear term limits for the office of president, as established in the constitutions of the vast majority of States of the region.

141. Fourth, according to Article 23 of the Convention, every citizen has the right to participate in the conduct of public affairs, to be elected, and to access public functions under general conditions of equality, which applies both to offices that are popularly elected and offices that are nominated or appointed (*supra* para. 64). This Court notes that presidents seeking reelection have a broad advantage in terms of media exposure and familiarity to voters. Also, the exercise of power itself can give the idea that keeping the same person in office is essential for the State to function.

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166 Constitutional Court of Ecuador, Opinion No. 7-19-RC / 19 of November 5, 2009, para. 40. [8504]

167 Constitutional Court of Ecuador, Opinion No. 7-19-RC/19 of November 5, 2009, para. 44. [8505]

168 European Commission for Democracy through Law. Report on Term Limits*, supra*, para. 93.

169 Report of the Secretary General, Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization (A/72/260) of August 1, 2017, para. 43.

142. Furthermore, if the systems to check and balance the president's power are not working for the reasons outlined above, the president may use public resources to directly or indirectly favor their reelection campaign. Therefore, this Court concludes that the office of the president gives the person holding it an advantage during elections. The longer the time spent in office, the greater this advantage becomes.

143. Similar to the considerations already set forth, the Venice Commission has indicated that "abolishing limits on presidential reelection represents a step back in terms of democratic achievement, at least in presidential or semi-presidential systems." In this regard, it explained that:

> By eliminating an important protection against distortive concentrations of power, abolishing term limits also risks undermining various aspects of the human right to participate in public life. These include the right to participate in genuine periodic elections, the ability to ensure that persons entitled to vote have a free choice of candidates, that representatives are freely chosen and accountable, and that the authority of government continues to be based on the free expression of the will of electors.[170]

144. Finally, this Court reiterates that respect for the rule of law means that the people who exercise power must respect the norms that make life in democracy possible. In view of the above considerations, this Court highlights that enabling presidential reelection without term limits by allowing the incumbent president to stand for reelection has serious consequences in terms of access to power and the functioning of democracy in general. Therefore, the removal of the limits preventing presidential reelection without term limits must not be subject to being decided by the will of the majority or their representatives for their own benefit (*supra* para. 79).

145. This Court emphasizes that, as a general rule, the risks posed to democracy in the region by presidential reelection without term limits have materialized. Therefore, this Court concludes that when enabling presidential reelection without term limits keeps political forces other than the person holding the office of the presidency from gaining popular support and being elected, it affects the separation of powers and, in general, weakens the functioning of democracy. This Court warns that the greatest current danger facing the region's democracies is not the abrupt breakdown of the constitutional order, but the gradual erosion of democratic safeguards that can lead to an authoritarian regime, even if it is popularly elected. Consequently, democratic safeguards should provide for prohibiting presidential reelection without term limits. This does not mean that persons other than the current president but from the same party or political movement should be restricted from running for the office of the presidency.

146. Therefore, from a systematic reading of the American Convention—including its preamble, the OAS Charter, and the Inter-American Democratic Charter—it must be concluded that enabling indefinite presidential reelection is contrary to the principles of a representative democracy and, therefore, to the obligations established in the American Convention and American Declaration of the Rights and Duties of Man.

147. In this regard, this Court reiterates that the inter-American system, the American Declaration and the Convention do not impose a political system on the States, nor a specific modality in terms of the limits on exercising political rights. States can regulate presidential reelection according to their historical, political, social and cultural needs (*supra* para. 86). However, the American states have sovereignly consented that the effective exercise of democracy constitutes an international legal obligation (*supra* para. 55) and have agreed to comply with the human rights obligations derived from the international instruments that are

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[170] European Commission for Democracy through Law. Report on Term Limits*, supra*, para. 101

part of the inter-American human rights protection system. Therefore, regulations on presidential reelection must be compatible with the American Convention, the American Declaration, and the principles of representative democracy, and consequently, domestic legal provisions on the exercise of political power must be harmonized with the human rights recognized in the international instruments of the inter-American human rights protection system.

148. In this sense, the purpose of this Advisory Opinion is not to restrict presidential reelection in general, but to clarify that the absence of a reasonable limitation on presidential reelection or the implementation of mechanisms that materially allow existing formal limitations to be disregarded and directly or indirectly enable the same person to continue to serve in the office of president is contrary to the obligations established in the American Convention and the American Declaration of the Rights and Duties of Man.

VIII
OPINION

149. Therefore, in interpretation of articles 1, 23, 24, and 32 of the American Convention on Human Rights, XX of the American Declaration of the Rights and Duties of Man, 3(d) of the Charter of the Organization of States Americans, the Inter-American Democratic Charter, and other instruments that concern the protection of human rights in the American States,

THE COURT,

DECIDES,

by five votes in favor and two opposed, that:

1. It is competent to issue this Advisory Opinion, in the terms of paragraphs 14 to 41.

Judge L. Patricio Pazmiño Freire and Judge Eugenio Raúl Zaffaroni dissent.

AND IS OF THE OPINION

by five votes in favor and two opposed, that:

2. Presidential reelection without term limits does not constitute an autonomous right protected by the American Convention on Human Rights or by the *corpus iuris* of international human rights law.

3. Prohibiting reelection without term limits is compatible with the American Convention on Human Rights, the American Declaration of the Rights and Duties of Man, and the Inter-American Democratic Charter.

4. Enabling presidential reelection without term limits is contrary to the principles of representative democracy and, therefore, to the obligations established in the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man.

Judge L. Patricio Pazmiño Freire and Judge Eugenio Raúl Zaffaroni dissent.

Judges L. Patricio Pazmiño Freire and Eugenio Raúl Zaffaroni informed the Court of their individual dissenting opinions.

DONE, at San José, Costa Rica, on June 7, 2021, in the Spanish languag

Inter-American Court. Presidential reelection without term limits in presidential systems in the context of the inter-American human rights system. (Interpretation and scope of articles 1, 23, 24, and 32 of the American Convention on Human Rights, XX of the American Declarationof the Rights and Duties of Man, 3(d) of the Charter of the Organization of American States and of the Inter-American Democratic Charter) Advisory Opinion OC-28/21 of June 7, 2021.

Elizabeth Odio Benito
President

L. Patricio Pazmiño Freire

Eduardo Vio Grossi

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Eugenio Raúl Zaffaroni

Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri
Secretary

So ordered,

Elizabeth Odio Benito
President

Pablo Saavedra Alessandri
Secretary

DISSENTING OPINION OF

JUDGE L. PATRICIO PAZMIÑO FREIRE

ADVISORY OPINION OC-28/21

OF JUNE 7, 2021.

REQUESTED BY THE REPUBLIC OF COLOMBIA

PRESIDENTIAL REELECTION WITHOUT TERM LIMITS IN THE CONTEXT OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

Summary

For the argumentation and development of this dissenting opinion, an interpretation and reflection will be carried out of the four unnumbered paragraphs of the recitals of the resolution of the Ninth International American Conference; of the preamble and Articles XX and XXXIII of the American Declaration of the Rights and Duties of Man; the first to fifth and seventh unnumbered paragraphs of the preamble, and article 3.d) of the Charter of the Organization of American States (hereinafter "OAS Charter"); the preamble and Articles 1, 2, 23, 24, 29 and 32(2) of the American Convention on Human Rights; and paragraphs 1, 5, 6, 7, 8, 9, 16, 17, 19, y 20, not numbered, in the preamble, as well as Articles 2 to 7 of the Inter-American Democratic Charter.

This opinion develops the arguments based on which I disagree with the majority decision adopted by the Court in this advisory opinion, for which I present four components: first, I argue that the Court insufficiently analyzed the reasons for granting admissibility of the request for an advisory opinion presented by Colombia by omitting and avoiding referring to a substantial part of its own case law, and therefore the conclusion reached in this procedural phase was incorrect. Second, I intend to establish through my reasoning and the grounds offered that the Court exceeded its advisory jurisdiction by directly interpreting provisions of the Inter-American Democratic Charter, granting it the status of a human rights instrument, without having jurisdiction and lacking the power to do so. Third, I postulate that by rephrasing the second question presented by Colombia, the Court introduced, *ex officio*, aspects that were not part of the original request, thus undermining the object of the request for an advisory opinion. Finally, and by way of conclusion, I offer what I consider some relevant reflections on the complex, diverse, and even contradictory political and constitutional architecture that is a substantial part of the rule of law in our region and, based on my opinion, I reflect on some of the roles that international bodies should play when supporting their development, strengthening, and deepening, always in accordance with the founding principles approved by the founding States of the system, the free self-determination of the peoples, while avoiding external interference in the internal affairs of our republics.

1. Formal considerations

1. Before addressing the aspects with which I disagree, I consider it important to recall what the advisory function of the Inter-American Court of Human Rights (hereinafter "the Court") is and its basis in the Convention and the Rules of Procedure establishing and regulating it.

2. The American Convention on Human Rights (hereinafter "the Convention") grants the Court broad interpretative power through which the States and some organs of the Inter-American System can ask the Court about the interpretation of the Convention or other treaties concerning the protection of human rights in the American States. Additionally, through the exercise of this power, the Court is allowed to issue opinions on the compatibility between any domestic law and international instruments, at the request of a State.[1] In the same sense, the Rules of Procedure[2] of the Court develop the guidelines to be followed in the event of a request for an advisory opinion, as well as some formal requirements that must be followed, such as (i) formulate the questions precisely; (ii) specify the provisions that must be interpreted; (iii) indicate the considerations originating it, and (iv) provide the name and address of the agent.

3. Throughout its settled case law, the Court has adopted interpretative criteria that give content to the provisions of Article 64 of the Convention, as well as the provisions of the Rules of Procedure governing the advisory opinion process. In this regard, and as far as what is of interest to this dissenting opinion, I will refer, first of all, to three formal aspects that were analyzed by the Court and with which I disagree: (i) regarding the existence of certain petitions being processed before the Inter-American Commission, (ii) jurisdiction over the regional instruments involved, and (iii) the formal requirement to ask questions.

i. The existence of certain petitions pending before the Inter-American Commission

4. During the processing of the Request for an advisory opinion that led to this dissenting opinion, the Court was informed, during the public hearing and by the Inter-American Commission itself, of the existence of petitions related to the purpose of the advisory opinion. In this regard, the Commission informed the Court of the existence of three petitions at the admissibility stage regarding Bolivia and one at the merits stage regarding Nicaragua, all four related to the questions posed by Colombia. The Court also received a written observation in which it was asked to find the request inadmissible because, according to the observation, the decision by the Court would undermine its contentious jurisdiction in the pending case.[3]

5. Regarding the foregoing, although when analyzing this, the Court concludes that it has jurisdiction to rule on Colombia's question, simply by referring to its jurisprudence by stating that "the mere fact that there are petitions before the Commission or contentious cases related to the question of the consultation is not enough for the Court to refrain from responding to the questions submitted for consultation," this sole reference is clearly insufficient, given that a more in-depth, thoughtful, and specific analysis was not carried out for each of these three cases brought to the attention of the Court, especially the one that was already under its jurisdiction, considering that on other occasions, requests for an advisory opinion have been rejected precisely based on the reasons now used to admit them.

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1 Article 64 of the American Convention on Human Rights.

2 Title III of the Rules of Procedure the Inter-American Court of Human Rights

3 Paragraph 22 of the advisory opinion resolution.

6. In particular, the Court failed to include in its analysis on admissibility what its case law has established as "generic limitations" to its advisory function. According to these limitations, a request for an advisory opinion: (a) cannot cover a contested case or seek to prematurely obtain a ruling on an issue or matter that could eventually be brought before the Court in a contentious case; (b) must not be used as a mechanism for obtaining an indirect ruling in a matter being litigated or a domestic conflict; (c) must not be used as a tool of domestic political discussion; (d) must not exclusively address issues on which the Court has already ruled in its case law; and e) cannot seek rulings on matters of fact but rather aim at disentangling the sense, purpose, and reason of international human rights law, especially to assist OAS member States to fully and effectively comply with their international obligations.[4] Not only has the Court established these "generic limits," it has applied them to reject, recently, a request for an advisory opinion presented by the Secretary General of the Organization of AmericanStates on the grounds that "it could constitute a premature ruling on the subject or matter in question, which could be submitted later in the framework of a contentious case."[5]

7. Along the same lines as the "generic limits" developed in the Court's case law, the Court, at the time of issuing the Order originating this dissenting opinion, not only failed to analyze the aforementioned limits, but also failed to rule on the fact of that the case "Fabio Gadea Mantilla regarding Nicaragua"—at the time presented by the Inter-American Commission itself as a case in the merits stage, and regarding which one of the observations received asked the request for an advisory opinion be declared inadmissible—was already a party and was submitted, as a contentious case, before the jurisdiction of the Court by the Inter-American Commission, **as of June 5, 2021, the date prior to the beginning of the deliberation of this advisory opinion order**.[6]

8. Since the case "Fabio Gadea Mantilla regarding Nicaragua"—the name under which it was submitted by the Inter-American Commission—was already known to the Court, I am of the opinion that the Court was obliged to include in its reasoning a meticulous and sufficient analysis clarifying the generic limits to the advisory function of the Court in light of the object of the dispute in the aforementioned case, in order to determine objectively, accurately and clearly, whether to issue an advisory opinion order on the issue before us, whether or not one or more of the generic limitations already defined by the Court applies, and, in particular, it would have been of interest for clarifying and consolidating the Court's case law and authorities, for the Court to indicate whether or not the admission and eventual decision represents a premature ruling on a case that, clearly, was already submitted to the Court as a contentious.

ii. Competence regarding the regional instruments involved

9. The Court's authority to interpret any provision of the American Convention is not up for debate in the inter-American juridical realm. Nor do I intend to dispute the Court's jurisdiction to interpret the American Declaration and to exercise its advisory jurisdiction with respect to the OAS Charter. However, my attention is drawn to the prominence granted to the Democratic Charter in the order to which this dissenting opinion responds

[4] *Cf. Rejection to the Request for an Advisory Opinion presented by the Secretary General of the Organization of American States.* Order of the Inter-American Court of Human Rights of June 23, 2016, paras.5 and 6.
[5] *Cf. Rejection to the Request for an Advisory Opinion presented by the Secretary General of the Organization of American States.* Order of the Inter-American Court of Human Rights of June 23, 2016, para.7.
[6] See http://www.oas.org/es/CIDH/jsForm/?File=/es/cidh/prensa/comunicados/2021/169.asp.

and the Court's conclusions with respect to that instrument, as well as its interpretation of it.

10. Although the order states that the Court had previously determined that the Democratic Charter constitutes an interpretive text of the OAS Charter and the American Convention, which is why it will use their provisions to address the questions posed by Colombia, it is my opinion that the Court oversteps its own conclusion—and its competence—by directly interpreting the provisions of the Democratic Charter.

11. Since its first Advisory Opinion, the Court has recognized that the breadth of the Court's advisory function cannot be confused with a lack of limits on it with regard to matters that may be the subject of consultations and the treaties that can be interpreted.[7] Furthermore, even using a literal interpretation of Article 64 of the Convention, it would not be possible for the Court to interpret the Democratic Charter, since its jurisdiction is limited to the Convention and to "other treaties concerning the protection of human rights," so interpreting this instrument under the advisory function would mean raising it to the rank of a human rights "treaty," which, due to its nature and purpose, is inappropriate and inaccurate, as this would grant it a legal status not provided for in the text of the Charter itself.

12. The Democratic Charter was established as and constitutes a document of public international law aimed at promoting the democratic development of the States of the region. The subjects implicated in its provisions are strictly States and international organizations, it being recognized as one of the inter-American instruments enacted for the "promotion and strengthening of the principles, practices and democratic culture among the states of the Americas."[8] Thus, because it is an instrument to be applied "among the states of the Americas," it would be a serious interpretive distortion to try to equate it with or assign it the rank or category of an international human rights instrument, which, by their intrinsic nature, recognized by the Universal Declaration of Human Rights, are international instruments created and approved with provisions aimed specifically at protecting the human rights of persons, with the subjects involved and obligated to comply with the object of those treaties in terms of guaranteeing and protecting being, specifically, States and their agents.

13. Therefore, it is my opinion that the analysis carried out by the Court throughout the order explicitly and directly interprets the provisions of the Democratic Charter, thus improperly exceeding its advisory competence.

iii. The requirement to ask questions

14. The Court's authority to specify, clarify, or rephrase the questions brought before it in order to clearly determine the substantive object of its interpretive work is not in dispute. Upon making the request for an Advisory Opinion, Colombia asked two questions, one of which the Court concluded was "conditioned on certain facts," for which reason it reworded it. The question submitted was the following:

> ii) Should a State change or seek to change its legal system to ensure, promote, foster, or prolong a ruler's tenure in power through indefinite presidential reelection, what are the effects of this change with regard to States' obligations to respect and guarantee human rights? Does this change run contrary to the State's international human rights obligations and, in particular, to their obligations to

[7] *Cf. "Other treaties" subject to the consultative jurisdiction of the Court (Article 64 of the American Convention on Human Rights).* Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 18.

[8] See: Inter-American Democratic Charter https://www.oas.org/es/centro_noticias/comunicado_prensa.asp?sCodigo=D-014/16.

guarantee the effective exercise of the rights to: (a) take part in the conduct of public affairs, directly or through freely chosen representatives; (b) vote and be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and (c) have access, under general conditions of equality, to the public service of his country.

15. The Court, justifying its actions based on its authority to "unpack the meaning, purpose, and reasoning of international human rights norms, decides to reduce the question to the "compatibility of presidential reelection without term limits with representative democracy in the inter-American human rights protection system." It is my feeling that by introducing the concept of "compatibility" of so-called "presidential reelection without term limits", the Court decided, on its own account, to address and even set the limits, profile, and content of the *sui generis* qualification, not of a right, but of a term, a figure, a concept, that is, so-called "presidential reelection without term limits," whose origin, nature, characteristics, and theoretical presuppositions, at least in my opinion, are quite broad and indefinite, whether in political science, social sciences, and the legal sciences themselves, and regarding which there is no consensus in terms of rigor or doctrine. More precisely, with this decision, the Court decided to address the delicate, complex and not a little controversial democratic architecture and structure, and the forms of government that States choose in the exercise of their sovereignty. Beyond the legitimate motivations and convictions that inspire my colleagues, this advisory opinion, transformed into an order with which the States Parties must comply, is a legal gambit whose animus will hardly be able to homogenize the conduct, tradition, values, and actions of the peoples of the Central and South American region, regarding which if anything never ceases to surprise us, it is their vibrant vitality and constant movement toward the best futures that they can secure for their peoples.

16. I am not interested in challenging the Court's power to rephrase or refine questions that are submitted to it in the framework of a request for an Advisory Opinion, but, in this specific rephrasing, in addition to the thoughts put forth in the preceding paragraph, I disagree technically with the way in which the majority resolved to redirect the question. Not only does it rephrase it *ex officio*, since at no time was it mentioned, referred to or requested by Colombia, but it also constructs and gives it its own definition and characterization, for which, in my opinion, it does not offer legal or doctrinal evidence that it is empowered to make such a decision, since the Court changes the object of the question originally presented by Colombia and introduces legally indeterminate elements to the analysis, fostering a *sui generis* uniformity and codification of the laws of the states of the Hemisphere, with far-reaching political and legal consequences for the democracies and States of the region. Also, these areas of reflection, discussion, and proposal may eventually have been addressed and probably resolved by other instances of the system, such as the Inter-American Juridical Committee, a body that, according to its website (https://www.oas.org/en/sla/iajc/inter-american_juridical_committee.asp): "… is one of the principal organs of the Organization of American States (OAS). **The Committee serves the Organization as an advisory body on juridical matters to promote the progressive development and codification of international law and to study the possibility of standardizing legislation across the countries of the Hemisphere**" (emphasis added). Finally, I would argue that the question originally formulated should indeed be clarified and reworded, but in such a way as to maintain its essence and object, which did not happen in how the Court did it.

2. Considerations of substance

17. Having established my position on some of the formal aspects analyzed by the Court, I would now like to make a few points regarding representative democracy and political rights, which are relevant not only by virtue of the order adopted by the Court in this case, but also for the current context of the region and the prospect of what will result from the opinion.

i. The road to representative and participatory democracy

18. Context is important, because as I write this opinion, our political, social, and legal institutions have suffered a radical breakdown as a result of the devastation brought by the pandemic. Along with this reality, the historical and brutal inequality that has dragged down our region since colonial times has been made clear. This context is very relevant because at this time, there are many protests throughout our region demanding comprehensive solutions from our political, economic, and social systems.

19. If ignoring this context is to try to blot out the sun with a finger, arguing a political system can be a formula to guarantee democracy is as fruitless an endeavor as damming a river with sand. Since the attempted globalization of the economy and the free market with the Washington Consensus, we have lived through years of failed attempts at economic, social, and political programs with failed recipes from the neocolonial laboratory in our region that reveal that at the very heart of the Latin American discontent lies a gap between democratic promise and reality. Almost 25 years into the 21st century, the peoples have decided that their leaders are not up to the task of projects that seek solutions to the problems we face as societies. Long-standing and rooted problems, just to name a few: concentration of wealth and socialization of inequality, organized crime on the rise, drug trafficking co-opting spheres of political power, extrajudicial executions of social communicators, community leaders and human rights defenders, an unstoppable rise in femicide rates, collapse of health, education and public security services, gruesome devastation of jungles, tropical forests and water sources, accompanied by a persistent loss of respect for and faith in democratic institutions, evidenced by figures showing a steady decrease in people's active participation in the electoral political processes and in public affairs in general.

20. I am fully convinced that, first of all, the answer to these problems lies in consolidating public policies from a human rights perspective. However, I am not similarly convinced when it is posed to me that the political pathologies that we live with can be resolved with a simple formula prescribed by international bodies, a formula that includes damming the river of popular discontent using models of democracy that inhibit and shield against any hint of change or challenge to its centuries-old foundations. The fact is this river of social demands will never find its course with inflexible, imported, and model democratic systems that resist any call for change and the substantive reformulation of its foundations. The remedy would be much worse than the disease.

21. Without wanting to be self-referential, but considering that the argumentative logic requires it and in order to be consistent in my thinking and actions, I must note that I already started a conversation about participatory democracy in my opinion supporting and partially dissenting from Advisory Opinion 26 on "The obligations in matters of human rights of a State that has denounced the American Convention on Human Rights and the Charter of the Organization of American States."[9] At that time, the majority of

[9] *Cf. Denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the consequences for State human rights obligations (interpretation and scope of articles 1, 2, 27, 29, 30, 31, 32, 33 to 65 and 78 of the American Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States).* Advisory Opinion OC-26/20, November 9, 2020. Series A No. 26. Vote in favor and partially dissenting of Judge L. Patricio Pazmiño Freire.

the Court did not choose to delve into more precisely developing the content of the democratic principle. Like this advisory opinion, the Inter-American Democratic Charter was used as "inspiration" to reiterate the relevance of certain formulas that may seem discursive, but that deep down bring with them the danger of repeating something until it becomes an unassailable truth or the only version of what we consider to be democracy. We cannot continue to end the discussion on the democratic principle and democracy by concluding it is moralistic and almost exclusively so: a form of democracy in which we are represented and those who we choose to represent us govern the nations in our name. The quindennium of this century witnessed a coalescence of constitutional yearnings that reformulated institutional frameworks that had been considered immovable, concepts that reformulated and enriched the notion of representation by adding participation by the people and reformulating economic models inspired by production and the redistribution of profits. From these unprecedented social processes, the region has undertaken profound constitutional transformations in the framework of electoral democracy. The common people cry out, in the streets or in the last beating of the hearts silenced by this pandemic, for models that truly represent us Americans, from the contents of a representative democracy that includes the active, responsible, and purposeful participation of citizens in its institutional and cultural DNA, people wanting to participate in the design and management of public affairs that revolve around the common good and a good life.

22. As I indicated at the time, in our region, where there is a plurality of deeply-rooted, traditional, and culturally-diverse legal and political systems, representative democracy, in its most limited conception, is insufficient to meet the requirements of the democratic principle. Several years ago, following the disastrous dictatorial era, starting in the eighties, a constitutionalism has been developing in Latin America that seeks not only to recognize the rights of women, indigenous and tribal peoples, and sexually-diverse groups, but their full participation in public affairs.[10] For this reason, I assert that as a touchstone for the juridical debate on treaty obligations, the Inter-American Court should expand the concept of democracy to enrich both the notion of representative democracy and its participatory component. This will mean not only fulfilling the democratic principle in terms of formal representation, but also incorporating the concept of substantial participatory, inclusive, non-exclusive democracy that is generous and lavish in terms of how it transforms and changes, far removed from confrontation and hatred in favor of the diverse, the different, the other.

23. There is an urgent and pressing need to offer a hermeneutic for treaty obligations whose assumptions are oriented toward and willing to recognize that "reformulation of the constitutional [and international order introduces] and develops the most cutting-edge concepts[, such as,] local or national referendums, primary elections to select candidates, plebiscites, referendums, the recall of popularly elected officials,"[11] as well as the innovative creation of new government authorities, such as the electoral function, the establishment of constitutional mechanisms for citizen participation in the management, control, and oversight of government authority, as well as the emergence of constitutional reform processes through constituent assemblies with broad social and popular participation that go beyond cosmetic reforms and constitutional changes carried out by legislators and designed by the powerful, elite, or exclusive or selective groups, generally the beneficiaries of the changes sought.

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[10] *Cf.* Pazmiño, Patricio. Descifrando Caminos. Del Activismo Social a la Justicia Constitucional. Flacso, 2010.

[11] *Cf.* Pazmiño, Patricio. Descifrando Caminos. Del Activismo Social a la Justicia Constitucional. Flacso, 2010, p. 50.

ii. Incorrect methodological approach and rephrasing of political rights

24. There is a methodological problem in the majority's formulation concluding that "presidential reelection without term limits" is something regarding which the Court must issue an opinion. A supposed right to reelection has been integrated via analogy, ignoring that this is the result of the exercise of a right and not a right in itself. It is not necessary for an international court to limit spaces for democratic participation, but rather to promote their expansion. An approach to the questions posed by the Colombian State would not mean developing them to address a so-called "right to reelection without term limits" but rather approach from the perspective of the right to elect and be elected and to access a position under **conditions of equality**.

ii.1 The content of the political rights set forth in Article 23 of the American Convention

25. I believe that the Court should have rephrased this question to deepen—if necessary—the content of political rights, but not address them from the perspective of a hypothetical consequence such as the possibility of reelection. I would note the importance of the content of political rights. In this regard, in its Article 23 on political rights, the American Convention itself places particular emphasis on "rights and opportunities" being accessed on an equal footing. It is no coincidence that the literal wording of the Convention refers to equality as a necessary precondition for adequate participation, nor is it a coincidence that the first case resolved on political rights was *Yatama v. Nicaragua*, on the possibility of an indigenous political party participating in elections. The notion of equality and liberty is what underpins political rights: Equal access to office, as well as the liberty of the people to elect, and therefore, decide.

26. I therefore conclude that it is a mistake to assert that "reelection" is a human right. From a human rights perspective, it is clearly inconsistent to think that reelection—which is at the same time a possibility and also, depending on the result, the product of an electoral process—can be conceived of as a right. Approaching it in this way would limit interpretation in particular cases under Article 23, that is, the right to elect and be elected. Methodologically, this distinction is vital, as the Court has been asked to analyze a right based on its violation, not its exercise. It was suggested that there is a supposed right to "reelection without term limits." I wonder, are we talking about abuse of the right? Are we looking at a violation of this right? Or are we considering the possibility that the political system may allow someone to stand for reelection regularly and consecutively? These are all legitimate doubts that arise from having asked the questions from an approach that nominally does not provide a clear analysis of Article 23.

27. The Court has already indicated that Article 23 specifically establishes what States must guarantee under equal conditions. Specifically, it indicates that it is about the right: i) to participation in the conduct of public affairs, directly or through freely chosen representatives; ii) 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 voters; and iii) to access public service in their country.

28. It is part of the content and logical consequence of Article 23 of the Convention that an unlimited mandate is contrary to international law. Therefore, when we speak of '' unlimited mandate,'' we are referring to one that does not allow for regular elections, of freely elected representatives, without universal and equal suffrage, that does not guarantee the free expression of voters.

iii. Constitutional and political architecture as a power inherent to the peoples

29. The application by analogy of reelection with an unlimited mandate makes a response from the Court methodologically incoherent. Personally, I do not think reelection is a human right or that its content can even be formulated as a right, so its analysis is abstract. It leads us irreversibly to addressing the political or constitutional architecture of the States of the region.

30. Going far back, and for historical reasons, in Latin America, we have dismissed all possibility of a monarch or similar figures that grant someone the right, based on surname, blood, or caste, to govern, to receive contributions or privileges. Anachronistic figures such as the monarchy or the nobility have been eradicated from our systems that consider equality before the law to be the fundamental principle on which our political, social and legal regimes rest.

31. Along these lines, should the Court decide to issue an opinion, it should also reaffirm, as we have on several occasions, the standards related to political rights. We could have developed the democratic principle from the perspective of the right to elect and be elected on an equal footing. Unfortunately, because of the way it was worded, the question runs the risk of raising doubts as to the political and constitutional architecture of our countries, attempting a type of homogenization or legislative unification that affects the rights to sovereignty, self-determination, and noninterference in States' internal affairs, which are the cornerstones of the OAS Charter.

32. For the liberator Simón Bolívar "freedom has to adjust to the history and traditions of peoples."[12] The Court found likewise in the case of *Castañeda Gutman v. México* in 2008, the second case on political rights:

> the Court finds it necessary to indicate that, in general, international law does not impose a specific electoral system or a specific means of exercising the rightsto vote and to be elected. This is clear from the norms that regulate political rights in both the universal and the regional sphere, and from the authorized interpretations made by their organs of application.

33. In this specific case, in which it was debated whether or not Mexico should, in accordance with international obligations, allow independent candidacies or maintain a system built exclusively on the basis of political parties for the election of the President of the Republic in that country, the Court concluded that it was not necessary to determine which political system is in accordance with the American Convention and quite rightly found that:

> The Court is aware that there is a profound crisis as regards the political parties, the legislatures and those who conduct public affairs in the region, which calls for a thorough and thoughtful debate on political participation and representation, transparency, and the rapprochement of the institutions to the people, in brief, on strengthening and improving democracy. **Civil society and the State have the fundamental responsibility**, which cannot be waived, **to carry out this discussion and make proposals** to reverse the situation. In this regard, the States must assess the measures that will strengthen political rights and democracy **according to their particular historical and political evolution**, and independent candidacies may be one among many of these mechanisms.[13]

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[12] Permanent Council of the Organization of American States, Minutes of the Protocol Session held on July 24, 2007. OEA/Ser.GCP/ACTA1603/07, July 24, 2007.

[13] *Cf. Case of Castañeda Gutman v. Mexico. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of August 6, 2008. Series C No. 184, para. 204.

34. In conclusion, we have shown how the Court found that it is a responsibility "which cannot be waived" of the State itself and organized civil society to reflect and undertake political and reform projects. It is therefore unnecessary, if not absurd and outside its juridical competence, to consider that the Court, or a majority of it, can decide on the best system of political or constitutional architecture to "... strengthen political rights and democracy..." in our countries.

This is my opinion.

L. Patricio Pazmiño Freire
Judge

Pablo Saavedra Alessandri
Secretary

DISSENTING OPINION OF JUDGE E. RAÚL ZAFFARONI

REGARDING

ADVISORY OPINION OC-28/21

OF JUNE 7, 2021.

REQUESTED BY THE REPUBLIC OF COLOMBIA

PRESIDENTIAL REELECTION WITHOUT TERM LIMITS IN THE CONTEXT OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

(Interpretation and scope of articles 1, 23, 24, and 32 of the American Convention on Human Rights, XX of the American Declaration of the Rights and Duties of Man, 3(d) of the Charter of the Organization of American States and of the Inter-American Democratic Charter)

1. The commendable aim of the responses

First of all, it is worth highlighting the great importance of the noble objective pursued in the majority response of the Court to this advisory opinion, the text of which shows at all times the healthy intention of avoiding any deformation of our representative democracies or the installation of autocracies and of other ways of subverting the will of the people.

The vicissitudes of the political histories of our States, plagued by abuses of power, sad episodes of dictatorship, and regimes of frank lawlessness, from the Rio Bravo southward, is typical of a geopolitical region disadvantaged by its submission to five hundred years of successive stages of colonialism.

History, with its sad experience of millions of dead and enslaved, and their marks and scars still raw, amply explains the noble intention of the answers offered in the majority opinion of the Court.

Unfortunately, I find myself needing to push back on the optimism expressed by the majority. If only this Court could prevent any eventual deformation of representative democracies and any autocracy or deviation from the principles of the rule of law on the continent.

For legal reasons, my opinion is that the Court is not competent to judge the particularities of the forms of government that our States adopt, beyond the strict limits essential to any representative democracy indicated by the international instruments that the Court has the duty to enforce, none of which make any reference to reelection without term limits.

But even if the Court had competence to reach beyond those limitations and set detailed guidelines for the internal projection of the institutional engineering of the democratic systems of the States—that is, to impose detailed political and constitutional guidelines on them, beyond the essential and basic principles indicated in the international instruments—my opinion is that this enterprise would in fact be unsuccessful, even should it fall into exhausting casuism, due to the accelerated dynamics of how power mutates in response to the various situations arising from the unforeseeable accidents of small-scale, cunning, and over-the-top politics, which has been the lesson of the historical experience always and everywhere.

2. Personal citizen preferences

I must point out that, as a citizen and as my personal conviction, I do not prefer reelection without term limits, nor even presidential systems. As a citizen, I think that one day it will be unavoidable for my country and others in our region to adopt the parliamentary system. I do not share the frequently-made argument that our tradition prevents it. My view is that it represents an underestimation of the people to argue that presidentialism is imposed upon us because that supposed tradition requires strong political leadership. I believe that all people aspire to leadership of that nature and not only ours. All peoples aspire to elect leaders democratically and to be led by the best and noblest and the most capable, upright, and intelligent of its citizens who, in addition, have gifts of empathy. But these are personal conditions that do not depend on the particular form of the more or less precise constitutional regulation of democratic systems, since they are not granted by the constitutions: *Quod natura non dat, Constitutio non præstat.*

Undoubtedly, people with these qualities have excelled and governed within the framework of parliamentary systems and have been repeatedly reelected by their peoples, while there have also been those who, without any of these conditions, have governed in presidential systems.

In any case, it is only my personal conviction as a citizen, so I congratulate myself that reelection without term limits is not allowed in my country and I am sorry that it does not adopt the parliamentary system.

3. The neutralization of defense

mechanisms

In any case, the exercise of the judicial function, and especially, that of enforcing the Constitution—in this case international treaty obligations—requires the judiciary to make a considerable effort to separate personal preferences from what should sincerely be deduced when technically interpreting legal texts.

Of course, this is not easy, because no judge stops being human, and therefore, the intellectual and sentimental or emotional spheres interact and, among other tricks, rationalizations tend to come into play.

The emotional imp easily dresses itself in rationality when exercising the power to declare unconstitutional laws sanctioned by parliamentary majorities and, consequently, sets the trap that leads to the error of finding unconstitutional any law that is disagreeable or contrary to the personal preferences or values of the judge. Hence, there is a need to be aware of the risk in order to remove this temptation when deciding on questions that require the utmost delicacy in the exercise of the task of making the rules at the top of the legal pyramid effective.

This requirement is most important when it comes to nothing less than assessing a question related to the limits that the States imposed on themselves via international treaty to delimit the scope of their domestic constitutional authorities—that is, the definition and valuation of the specific political institutions established by each people on

the continent when establishing the particular profiles of their respective democratic systems.

4. Admissibility of the advisory opinion

Once the temptation to rationalize is removed, the first question that I observe regarding this advisory opinion is with regard to its admissibility. In this regard, during the public hearing, it became clear that the request was motivated by the institutional conflict impacting the Plurinational State of Bolivia and that made that country go through a period of lawlessness, leading to one of the most difficult moments in recent years for the validity and effectiveness of the democracies of the continent, in particular because of the extreme similarity of these events to the *coups d'état* of other times. Fortunately, the country's democracy was recovered through its institutions.

The statements made by the representative of the unlawful regime in place in that State at the time of the public hearing on September 28, 29, and 30, 2020, clear up any doubts as to the particular motivation behind the advisory opinion.

It cannot be ignored that this regime was established in response to an election called into questioned by one of the candidates and with international intervention, by the way, very unfortunate. Under that regime, unarmed civilians were killed, citizens were kidnapped, armed groups operated that raided homes, the rights of people were ignored by refusing exit for one year to people under diplomatic protection,

threats were made of violating the immunity of diplomatic headquarters, to the indifference of the police, and people were arbitrarily deprived of liberty, to the point of endangering the lives of some people and leading a constitutional government official to lose her pregnancy, among other very serious human rights violations. These are facts that are currently being investigated by the judges of that State.

At the time, and with good reason, the Court found the advisory opinion requested by the Secretary General of the OAS based on the impeachment of the President of Brazil inadmissible because it referred to a specific and possibly contentious case. The facts involved in the now-removed lawless regime in Bolivia are undoubtedly potential contentious cases.

I could conclude my opinion with this first observation, but given that the reasons that lead me to consider this advisory opinion inadmissible are not limited exclusively to it and I rather believe that this reason coincides with the limits set on the Court by the Convention, I must also delve into the remaining considerations as to why I depart from the enlightened and well-intentioned responses of the majority of the Court.

5. Competence according to the historical legislator

When interpreting any law—national or international—the so-called *will of the legislator* is usually invoked, although in general it is not precisely understood who is the subject

invoked, with the subject often being little more than mythical.

It is questionable, but if that expression is intended to refer to the *historical legislator*—that is, a person of flesh and blood—it will always be difficult to know what the members of a parliament or legislature thought, given that they generally vote with their party's caucus, and, as is natural, many of them are barely informed of the content of the laws they pass, particularly when it comes to texts with highly specialized technical details. In such cases, the author or authors of the project are considered to be the *historical legislator*, as in the case of codes.

Thus, for international treaties, and especially multilateral ones, the real authors are those who write them and not the parliamentarians or the ministers and executives who sanction and promulgate the laws that ratify them in their respective countries.

In this regard, it is known that these instruments are the result of long processing with the involvement of national and international experts, seasoned diplomats, legal departments of the foreign ministries, and academics who influence the texts. The preparation of treaties and other international instruments is never the result of improvisation, although those who ratify them in each State may not know the details of these complicated processes. The sophisticated technical expertise and political experience of several of the jurists who took part in the preparation, drafting, and approval of the American Convention on Human Rights is indisputable.

The responses of the majority of this Court delve widely into international treaties and instruments, the texts of which say nothing about reelection without term limits of those holding executive power in the States.

It is unthinkable to imagine that this issue has been ignored inadvertently by those we can consider as its historical legislators, who drafted these texts so meticulously and in detail, with care paid even to the verb tenses and the smallest details of semantics and punctuation.

The only possible conclusion of the journey through these instruments and the subsequent verification of the silence on unlimited re-election is that omission of its consideration was on purpose—that is, if the qualified and true historical legislators did not mention it, this was because they did not want to, that is, they did not wish to prohibit it.

6. Competence under international law

But the value of the will of the historical legislator is relative, because—as Gustav Radbruch once pointed out—upon enacting the law, they stay on the dock while the law sails free, and it is impossible to rope a ship back in that is already sailing the seas. What is fundamentally needed is to interpret the text, get on board the ship and see where its helmsman is pointing or in which direction the wind is driving its sail.

In principle, at the level of the primary exegetical analysis, we can verify that the law says nothing about the reelection without term limits of the holders of executive

powers. If it says nothing, the issue becomes whether the interpreter is entitled to infer from the text a prohibition applicable to an institution in States' political systems that is not explicit.

Therefore, it should be noted, first of all, that in the absence of an explicit reference, the prohibition should be the result of an extension of the legal text that could take two different routes: based on a *broad interpretation* or, more radically, on an *application by analogy*.

Broad interpretation is when the flexibility of the legal text allows it to be given its greatest semantic breadth. *Application by analogy*, on the contrary, exceeds the semantic resistance of the legal text and consists in adding to its wording an assumption or hypothesis not contemplated in it. In the final analysis, *application by analogy* is not *interpretative* but rather *supplementary*.

7. Application by analogy

In order to conclude that a prohibition on unlimited executive reelection is contained in the American Convention and in some or all of the instruments referring to the form of government that the Court must enforce, one must acknowledge that this would entail the inclusion of an unconsidered scenario—that is, an application by analogy of the legal text must be made, because none of these instruments allows for a broad interpretation.

This is based on the fact that the only claim of broad interpretation that can be made, based on the prohibition of

an *indefinite term*, is not admissible. In this regard, it could be argued that it is a broad interpretation considering that the *prohibition of reelection without term limits* would be contained or could be inferred from the *prohibition of indefinite tenure or indefinite term*.

It is not methodologically correct or prudent to argue by forcing a text to the limit of confusing the very different characteristics of two institutions that are completely different and have always been perfectly identified—even in our own region—for well-known historical reasons dating back quite a long time, to the criticisms made of Bolívar's constitutional project for Bolivia, which, by the way, was not being established for himself, but for the unfortunate Mariscal Sucre.

It is more than obvious that an *unlimited presidency or term* is decidedly and clearly undemocratic, since it presupposes the exclusion of periodic elections and, therefore, also of reelection.

What international law prohibits is the old *lifetime presidency*, an institution that, by definition, excludes reelection and that was always known to trace its roots to the Napoleonic title of First Consul for Life, a title of which I do not think our region has seen cases other than that of Gaspar Rodríguez of France in Paraguay in the 19th century and that of François Duvalier in Haiti in the last century.

Unlimited reelection, for its part and by definition, is not possible with the above situation and, therefore,substantially different. It is not necessarily incompatible with democracy because it inevitably requires periodically submitting the executive to a popular vote, a vote that is notalways won, even if executive power is exercised or has been

exercised, as proven by the North American cases of Ulysses Grant, who tried for reelection in 1880, but his party chose not to nominate him for a third term, or the case of Theodore Roosevelt, who ran for a third term and lost to Woodrow Wilson.

But not even all the presidents who ran for a second term—trying to run while exercising executive power—succeeded; there were only ten in the entire history of the United States. Neither did all the presidents who sought a second term in our region succeed: the case of Macri, who ran for a second term in my country, is an eloquent demonstration that the people are the ones who decide, despite support from the media oligopoly, a prevaricating and obedient judiciary, an intelligence service that persecuted and criminalized opponents, and national and transnational financial power closing ranks and pushing the candidacy of the purest of its local agents.

All this makes it possible to verify that not everyone who governs wins a second term, even less-so a third term, provided, of course, that there are non-fraudulent elections, which is what this Court and all international organizations should really be focusing on, while being careful not to throw in with any opposition figure who, just because they lost, screams victim and alleges fraud to evade the decision made at the polls or weaken the legitimacy of the winner, as in the American case of Trump. Unfortunately, such care is not always observed, even by international agencies.

The only president of the United States who served a third term was Franklin Delano Roosevelt, and he was even voted in for a fourth term, which he could not serve because he died. Of course, no one would dare to call Roosevelt an

autocrat. Also, it seems hardly admissible that the Constitution of the United States, pursuant to the historical text prior to its twenty-second amendment—that is, the text in force from March 4, 1789 to 1951 and that, furthermore, was a model for almost all of our republics—would have been today, based on the issue raised now, considered in violation of the American Convention on Human Rights and the rest of the aforementioned instruments.

8. Subjects that do not allow for application by analogy or broad interpretation

The American Convention contains flexible texts, such as the one referring to progressive development, but not all subjects allow for broad interpretation of their provisions, and less so application by analogy to cases not provided for. There are matters in which the rigidity of the text must be strictly respected, due to the very nature of international human rights law.

When the source of international law is treaties, it should be noted that, unlike other branches of law, it is not a matter of norms emanating from a higher body such as a national parliament. Its power is due rather to limitations on the sovereignty of the States that they themselves cede in the exercise of their respective sovereignties.

Therefore, when the treaties do not allow for interpretive flexibility, judges cannot force their wording without affecting the sovereignty of the States that ratified them, the treaties being limited to what the States yielded.

In terms of Human Rights, as is known—and leaving aside background is not broadly applicable to this branch of law — the history of international law in this regard began in the last postwar period. Until then, international law dealt with relations between States, but not with relations between States and the inhabitants of their territories.

The negative cultural experience of humanity, especially rising to its worst with the atrocities of that catastrophe, but fed secularly by the terrible crimes on all five continents, generated a special sensitivity in the postwar period, preceded by the Atlantic Charter, by the Declaration of Philadelphia of the International Labour Organization, and by four-time reelected President Roosevelt's four freedoms speech.

The matter in question here in this advisory opinion—that is, what is really under discussion and sought for discussion on this occasion—is not so much the right of a person to exercise the executive power of a State, which, although not without importance, has a secondary relevance to the people's right to vote for whom they want to govern them.

What is under discussion here is nothing less than the very *exercise of popular sovereignty*, the right of the people who, by definition, are the true sovereigns in any democracy—that is, what is being addressed directly is the most elementary foundation of the democracies of all countries of the world that have opted for this system.

In this respect, interpretive flexibility cannot be permitted. Rather, the interpreter must adhere with all due precision to the limitations established by the letter of the

treaty, since the rest is reserved for the people to exercise their sovereign power.

Of course, application by analogy is even less allowable. Leaving aside far-fetched cases, such as the analogical punishment of religious circumcision through analogy to abortion in the Soviet Union, when one opts for integration in a more rational way, one appeals to the argument of the *greater reason*—that is, if one is considering a less-serious situation, it is understood to include the more-serious less-serious situations, as is the case with prohibiting reelection without term limits but not an unlimited term length, a situation in which, inverse as we have here, the argument of *greater reason* would also not apply.

9. The limitations of international law

It is clear that international law establishes limitations on States' forms of government when they commit to adopting the democratic system. However, they are strictly limited and narrowed to what is essential for all plural democracies.

Just as a *lifetime presidency* would not be admissible for being undemocratic, neither would a so-called single-party *popular democracy* be admissible, since the democratic model that must be respected according to the wording of the Convention is a *plural democracy*.

It is obvious that a so-called *plebiscitary democracy*, which has nothing to do with democracy, would not be admissible either, because it would eliminate respect for

minorities, preventing them from one day becoming majorities, while at the same time damaging all institutions, as I expressed at the time in response to the request for provisional measures in the case of the referendum of President Lenin Moreno in Ecuador.

These limitations are imposed because otherwise there is no democratic system, since these limitations are its essence and the ones that the Court inevitably has the duty to enforce.

Furthermore, it cannot be ignored that every constitution, as Peter Häberle points out, is integrated into a historically-conditioned culture, as it cannot be otherwise, since law—and in particular constitutional law—is always a social, cultural, political, and historical phenomenon. Of course, these obvious limitations that the States agreed to in the treaties are none other than the ones that reflect the continent's culture, tradition, and historical experience.

It is clear in these instruments that States are limiting their sovereignty in matters of government systems, but when it comes to the exercise of nothing less than the sovereignty of their peoples, the *republican and democratic sovereign* of each of the governments of the States that ratified the treaties, the nature of the matter imposes its strict interpretation, prohibits any broad interpretation, and—with much more reason—its application by analogy, such as by introducing a prohibition to an institution on which all instruments keep the most absolute and hermetic of silences.

10. Internationalization of constitutional law

From the perspective of the internal rights of the States, the limitations they have placed on themselves by signing the treaties entail the limitation of their sovereignty in terms of their power to establish forms of government—that is, they have limited it to some extent through the so-called *internationalization of constitutional law*.

There is no question that, in principle, each independent State is sovereign and has the right to whatever form of government it chooses. What distinguishes an independent State from a colony is its self-governance. In this regard and at the international level, the principle of non-intervention applies as a general rule.

However, in the exercise of their own sovereignty, the States of our continent committed themselves with the other States to limit their constitutional sovereignty.

Given that this constitutional sovereignty derives from their own status as independent States, the degree of internationalization of their constitutional law can only be limited to the strict extent of the limitation that they had agreed to in the respective treaty: it is not conceivable that, by means of a treaty, an independent State would leave its sovereign right to self-government to the mercy of anyone, as this would mean leaving the attribute that is the essence of its status as an independent State undefined or placing it in the hands of third parties.

Consequently, any extension of the transfer of sovereignty or limitation of its independence by way of application of the text of the treaty by analogy would mean moving upon the constitutional sovereignty of the States, that is, on an attribution that is inherent to its very status

of independent State, which would unquestionably be a violation of the elementary principle of non-intervention, that is, in some way, a partial but serious disregard of the independence of the States.

11. Factual impotence

Although the aforementioned legal reasons take precedence, it cannot be ignored that the sound and generous aim of the majority of this Court, in terms of the facts, is absolutely unsuccessful and in any case irreparably doomed to failure.

The struggle for power that is always a part of political activity is, like democracy itself, sometimes flawed and even downright bad, but so far nothing better has been invented.

Therefore, *anti-politics* or the rejection of politics is a sign of a reactionary and always authoritarian attitude, although it is sometimes directly totalitarian, since—as is well known—the totalitarian regimes between the wars were based on the ruthless criticism of the plural democracy of parties: they tried to supersede the departing parties, invoking a desire for a supposed single-leader organicist nation terminating in the all-embracing will of a conductor in accordance with the irrational *Führerprinzip* or other more or less analogous ideological equivalents.

But the rejection of *antipolitical* totalitarianism does not mean rejecting that politics is often degraded to a game of pettiness, opportunism, disloyalty, deception, and lies that crosses even the most basic ethical lines, deploys unusual and contrived justifications, and uses all manner of tricks.

I am sorry to say that it is impossible to foresee all the deceptive twists and turns it can take because the imaginations of the competitors sometimes play host to an incredible wealth of evil creativity, impossible to overcome with legal provisions or the good intentions of judges. It is impossible to foresee all the situations that may lead to the establishment or continuity of a regimen.

Taking a look at history, one might think that prohibiting reelection without term limits would have prevented the Mexican *porfiriato*, but with absolute security it can be said that it would not have prevented the oligarchic republics of our region. It may have the capacity to prevent an individual from establishing an autocracy, but not a clique brought together by its interests in exploiting the labor of a people.

In some of our countries, nothing prevented the consolidation of a social minority, a small group, formed around the same landowner interests as Porfirio Díaz, supporter of the same racism and the same positivist philosophy, nourished by a biological reductionism identical to that of the *group of scientists*, equally or more genocidal toward Indians and an excellent teacher of electoral fraud, persecutor of opponents and even oppressor of his people. However, this autocratic group, considered racially superior to the people, was extremely respectful of *nonreelection* and its members took turns as the executive, resolving in friendly gatherings between elegant men whose turn it was to hold the office.

This is precisely what happened in Argentina with the so-called *bovine oligarchy*, which murdered the Patagonian

Indians and shot workers, or with the Brazilian *Velha Republic*, whose army massacred the thousands of starving followers of Conselheiro in Canudos.

However, in both cases, a meticulous and absolute respect was shown for the no-reelection rule, not to guarantee democracy—which did not exist—but to take turns holding power, passing it back and forth between fellow members of select Europeanized clubs.

The imaginative legal attempts to prevent anyone from getting around the prohibition on reelection without term limits also led to prohibiting the people from voting for relatives and partners of presidents, as provided for in some constitutional texts, based on some experiences with Trujillo's tricks or the case of the Somoza family. But is this not a violation of the human rights of the people or the relatives? Why can a person not be elected by their people just because their sibling is president? On what basis can they be deprived of the full exercise of their citizenship? On the basis of *brotherhood*? *Marriage*? Siblings and even spouses can belong to different and opposing parties. But even if one were to allow for this exception, there could always be the case of two brothers who pretended to oppose each other in order to secure the majority and minority of the legislature and end up leading all the deputies.

The perverse imagination in politics is unpredictable, and preventing it by law will only lead to extreme and indefensible casuism. Also, given the rapid dynamic of situations that are permanently in flux, we can also never know when the autocrat

will employ their own casuistic measures to remove the opposition from an election.

Unfortunately, no democratic political system is so perfect that it has no crevice through which autocracy can leak, even to the point of totalitarianism, despite the strenuous efforts of institutional engineering theorists. At the same time, political systems that at first glance seem extremely imperfect and easy to pierce make elections and democracies possible.

Let us not forget that Nazism arose in a parliamentary republic, and it did not even bother to formally repeal the *Weimarer Reichverfassung*. Although the *Statuto Albertino* or *Statuto Fondamentale della Monarchia di Savoia* of March 4, 1848 was more flawed, it was ultimately a parliamentary monarchy and, nevertheless, fascism emerged. Kelsen's admirable and refined *Bundes-Verfassungsgesetz* did not prevent Dollfuss's coup either. Conversely, the United States Constitution, presidential and allowing indefinite reelection, resulted in the election and re-election of Roosevelt.

Everything is unpredictable in the face of power and the twists and turns of politics, and naturally, by definition, it is impossible to predict the unpredictable. Legal training inclines one to prefer linear and geometric shapes in which politics does not fit, as it is a living and mimetic organism that is fascinating precisely because it is never known for sure if it will birth a scorpion or a butterfly.

12. Risk is not danger, and danger is not injury

Without prejudice to the foregoing reasoning, a thought should be added regarding the question of harm, risk and danger. The objective of finding that allowing reelection without term limits under their domestic legal systems means States are not complying with their treaty obligations is to prevent the risk of a human rights violation. Unlimited reelection would not, therefore, be a human rights violation—that is, a violation of these rights—but rather poses a *risk of eventual violations*, and not even a danger, because *it would not be necessary for the risk to lead to a certain situation of danger of these violations*. The alleged failure to comply with treaty obligations would be based on a presumption of risk that would not admit evidence the contrary.

Usually, the presumptions are based on what tends to happen according to experience, but they are still presumptions, and what tends to happen does not always happen.

Above all, the very existence of the risk on which the presumption is based is extremely debatable, according to this Court's own lengthy experience. Effectively, the Court repeatedly sanctions States, often for grave human rights violations, some of which involve the loss of many human lives. Generally, the States sanctioned do not allow reelection without term limits in their internal law, and some do not allow reelection at all, nor are the human rights violations committed by presidents serving for more than two terms. Therefore, according to this Court's own experience, it is more than likely that prohibiting indefinite reelection will not

have any impact on the frequency and seriousness of the human rights violations committed by our States.

In any case, according to the respectable answers given by the majority, it would be presumed *juris et de jure*—that is, without admitting evidence to the contrary—that there is a mere risk (not rising to a danger) that a people would not be duly represented in the event of reelection without term limits, even though it is the people themselves voting for its executive.

This statement contains a contradiction, because if the people elect—of course in elections conducted without fraud or proscriptions—that is, if they really choose their executive by voting fairly and by democratic majority, it is not explained how they could possibly not be represented by the one they elected.

The only way to resolve this contradiction is to take for granted—to presume—that when a people votes for its executive for the third time, it is choosing wrongly, making a mistake, because the executive is cheating and, therefore, this Court would decide to prevent it from making a mistake or from being deceived by them or, furthermore, from running the risk of making a mistake or being deceived. In this regard, the Court would take on the role of caring for, guarding, or protecting the peoples of the continent to prevent them from running the risk of making a mistake or being deceived when voting.

Obviously, this means that the people must be provided with assistance because after two terms of one president, voters experience a certain degree of incapacity that

requires this protective assistance. It does not seem reasonable to conclude that the American Convention empowers the court to play this role of protecting the peoples of the continent.

There are many other ways in which one can confuse or deceive an electorate before an election. *Völkisch* or mob political tactics, which are based on prejudices and deepen them, are a clear case of deception. The lies about the candidates, smears that gratuitously accuse them of crimes or behaviors or totalitarian ideologies, false ethical accusations, and many other tactics are common in electoral campaigns, despite being political dirty tricks.

But it would be extremely dangerous for this Court, competent to sanction the States that commit human rights violations, to assume jurisdiction to prevent all potential deception or ploys frequently used to get votes.

13. Risk prevention has no end

Some time ago in general law, due to technological developments, people began to talk about the *risk society*, and from there some deduced the need to intervene legislatively before harm was caused, not even danger, arguing that it was more effective to prohibit and sanction conduct that does not do harm to rights or even lead to the creation of dangerous situations but poses the risk of causing harm to rights.

This could clearly lead to a true form of suffocating totalitarianism across the entire social liberty space because there is practically no behavior that cannot be classified as

risky, depending on the imaginative capacity of each legislator and their personal fears. In the Roman Empire, the manufacture of purple fabrics was severely punished because it was an imperial color, and therefore, if someone manufactured them without authorization from the emperor, they ran the risk of been seen as participating in the planning of a *coup d'état*.

Risk prevention is endless, since there are close, distant, and remote risks, and assessment will always depend on imaginative capacity and the individual—even paranoid—fears of each evaluator.

In today's technological society—and as has always been the case in politics—there is always a risk of cheating and fraud. If the Court assumes this competence of protecting the peoples, which I do not think falls to it in any way, it treads a difficult path without end, at least no happy one.

In democracies, as in traffic, there are risks that the law must tolerate, otherwise the traffic itself would have to be stopped, which does not mean that those who drive while intoxicated should not be punished. The risks are endless because, inevitably, we always run a certain degree of risk, both as individuals and as the people.

14. The preventive role of the Court

The above does not mean rejecting that the Court plays the important role of preventing human rights violations, including violations that are attributed here to the institution of reelection without term limits. Based on the claim, even

endorsed here by the majority of the Court, that respect for human rights is guaranteed by protecting the rule of law and human rights, sanctioning violations thereof in a timely and just manner, is precisely the means of dissuading States and preventing other violations, as they will abstain from committing them to the degree that they have certainty with regard to the existence of an effective international human rights jurisdiction that will hold them accountable.

Notwithstanding the foregoing, the due guarantees of non-repetition included in most of the Court's judgments are also preventive, as are the appropriate provisional measures that the Court may order.

Since the international human rights jurisdiction is effective, one wonders what reasons there would be to prohibit a people from voting for a president who wants to stand for popular reelection for a third term, within the framework of a State that does not persecute opponents, does not have political prisoners, does not systematically violate human rights, respects freedom of opinion, does not ban parties or candidates, whose elections are clear and transparent, especially if they want to vote because in that society, the Gini coefficient and poverty and unemployment rates are decreasing and GDP is increasing. It cannot explain why such reelection should be considered a violation of the American Convention and protect the people—assuming they can be deceived—by preventing them from voting for that candidate.

In the absence of these conditions, as if they did not exist in other countries that do not allow reelection without

term limits, what is lacking would be the prevention of human rights violations, meaning that the Inter-American system itself is failing with regard to its sanctioning and therefore preventative function.

It follows from the foregoing that the best and most effective way to prevent human rights violations is to improve the system itself, a system that should enforce upon the State the proper operation of its national judiciary, which should punish the violations committed by ordering an end to arbitrary deprivation of liberty, limitations on freedom of expression, political prisoners, persecution of opponents, etc. None of this depends on whether or not there is reelection without term limits, but rather on the proper functioning of our regional system. If an autocracy is established in the region, it is not because of reelection without term limits, but because the system was not efficient enough to prevent it.

In short: the effectiveness of the inter-American system is the only and best key to prevention. Toward this, processing times must be shortened for complaints submitted before our bodies, ordering provisional measures by theCourt in urgent cases and especially when human life is at risk,and adequately sanctioning—within a reasonable period of time—the States that violate the human rights of their inhabitants.

15. The current dangers facing our democracies

Based on the difference between risk as a possibility that danger will materialize and danger as the materialization of risk, there is no doubt that the democracies of our countries only run risks, and that some of them are in danger, of which browsing through current public information provides enough evidence.

In no way is there at this time any danger that could be attributed purely to reelection without term limits of executives that, at the very most, could be viewed as something remote and not materialized without, in any case, either with or without reelection without term limits, as we have indicated, the danger deriving from the impunity of States that commit human rights violations.

First of all, the current dangers to the democracies of the continent, unquestionably materialized in a number of cases, include the persecution, imprisonment, and criminalization of opposition politicians by illegal groups comprised of some prevaricating judges, instigated by the executives—generally not reelected without limits and not even a second time—with the complicity of intelligence service agents and the operators of hegemonic, monopolistic, or oligopolistic media with the clear objective of threatening and banning certain political candidates and parties, thus not only disregarding the rights of minorities but even majorities.

Second in the current dangers facing our democracies—not completely independent from the above—is limitation on freedom of expression, uni-polar discourse, and the construction of a homogeneous reality as a result of media monopolies and oligopolies through total deregulation of

these media, which has left them exposed to large corporations that accumulate TV channel concessions, newspapers, radio stations, and electronic services without any legal limit on their accumulation, in a way that no respectable democracy in the hemisphere would allow.

This media concentration is not compatible with the plural democracy model that we all aspire to on the continent because these enormous and economically powerful media corporations operate, in reality, like unified parties, capable of disorienting and promoting greater errors as a result of the complete lack of ethics with which they disseminate fake news, including on health, encouraging noncompliance with health measures, recommending with impunity the ingestion of remedies that are fake and even toxic in the current emergency our region and the world are facing, endangering human lives.

Additionally, the monopolistic hegemony of the media affects our national cultures, deprives minorities of a voice, gives a voice to wild extremists and even neo-Nazis, and generates unrest in the population with fake news of all kinds. They do not resort to public lynching of those they consider bothersome, they do not kill as in times of dictatorship for reasons of national security, but they annihilate the honor of whomever they want with total impunity, destroying public figures like Túpac Amaru in the plaza of Cusco.

Third, but perhaps first, because the others in some way derived from this, fraudulent administration of the States' economies has been found, financial manipulations of abusive indebtedness to the tune of billions of dollars that

were not invested in the country but rather went into foreign accounts on the pretext of *capital flight*, when in reality, there was no obstacle to the unrestricted exit of foreign exchange, such that in the end, the State had in its possession only the papers indicating that the debt had to be paid.

This *crime of political economy* undermines the property of the people, who must repay astronomical debts. It is a *macro-crime* that is agreed to via *psuedo-contracts*, that is, agreements that lack an outside authority that can guarantee the right of the parties—that is, the lender and the borrower. Instead, the borrower is subjected to the jurisdiction of the lender, which, in addition, demands budgetary adjustments be made to reduce investment in social issues, education, health, social security, etc., along with repealing labor law in borrower States, so called *flexibilization*.

Added to all of the above is the extortion of the *holdouts*, who take advantage of the *default* caused by the *crimes of political economy* to purchase devalued debt, await the renegotiation with the majority of the lenders on the sidelines, and then demand face value before the lenders' courts. This is a criminal space made possible by the lack of a rational procedure for States that fall into arrears or default.

As a result of all of the above—that is to say of phenomena that are not totally independent, but are closely linked—not only are our democracies in serious danger, but the human right to progressive development is openly

violated, as poverty rates go up, small and medium-sized companies go bankrupt, unemployment rises, domestic consumption and tax collection decrease, GDP falls, and almost the entire region has the highest Gini coefficients in the world, all of which costs many lives due to the deaths caused by insufficient vaccination and health campaigns, non-universal health care, suicides, high homicide rates, domestic violence and femicides, police repression and lethal violence, job insecurity, and roads that are inadequate to the vehicles imposed upon us.

All these current dangers and damages have already emerged, without any guarantee of discontinuance and non-repetition, and they are what injure and threaten our democracies at this precise continental moment, in a much more acute and immediate way than the eventual results of reelection without term limits, given that, if in any country, with or without reelection without term limits, human rights are violated, it is because those violations were not punished in a timely manner and that impunity paved the way for other equal or worse violations.

Nor is there any problem of reelection without term limits in the State whose situation led to this advisory opinion, which happily overcame its moment of crisis democratically.

16. The risk to human rights

Finally, taking into account that within the limits to the internationalization of the constitutional law of our States, neither the American Convention nor other international

instruments mention reelection without term limits and that, therefore, its application by analogy means advancing international jurisdiction to supersede the sovereignty of the peoples beyond what has been agreed to, it is my understanding that to the above considerations must be added a serious concern, this time about the negative consequences that a step down this path may have for the future of international law of the human rights.

International human rights law universally made positive the basic norm of a duty to respect and treat every human being as a person (from which all the more specific norms on the matter are ultimately derived), sowing a seed of planetary citizenship.

The facts leading to this date back a long time, driven by the pressure of the accumulated experience of victimization by mass crimes that built a true negative cultural heritage of humanity, beginning along with the world, if by that we mean the moment when global relations began as a result of the knowledge of the existence of all humans, that is, at the end of the 15th century.

Millions of deaths piled up in the criminal experience of this negative human cultural heritage until, those who up to that moment and practicing the most ruthless colonialism, had sown death in America, Africa, Asia and Oceania, entered into a brutal conflict and one of them did not hesitate to use the same colonial methods, but in an even more shocking way, because to commit them, they used the industrial technology of mass production, in this case the production of deaths. This blew up the armor of denialism and rationalization that

concealed the entire experience of the genocides stretching over almost five centuries and brought to light the entire horrifying negative culture of humanity.

International human rights law was not born from reason, but from fear that imposed a minimum of rationality and brought out with all its horror the totality of the negative cultural heritage of humanity, until that moment denied or normalized through disparate and wild discourse, ethnocentric ideological principles, legitimizing an invented colonizing civilizational superiority that, of course, also quickly fell silent in the midst of it, because its supporters were quickly silenced.

The path of international human rights law, like that of all law, goes from the duty between beings, with the difficulties that entails, to becoming an instrument of struggle of the peoples. In this sense, a hopeful and successful future awaits, for which it must be driven forward, but knowing that it also has ideological and factual enemies who are determined to obstruct the difficult path toward its increasing effectiveness.

Not only is its effectiveness hampered at the factual level, but also attempts are made to neutralize its realization by way of the heinous and malignant perversion of its own foundations, when the aim is to ideologically manipulate it to turn it into a new ethnocentric discourse of alleged cultural superiority or civilization, legitimizing also new stages of geopolitical submission. To put it more clearly, the most perverse way to neutralize it is to distort it as a discourse of liberation of the peoples, to degrade it into a new discourse

of domination. This is the greatest risk that in today's world weighs on the future of international human rights law.

To the extent that we overstep the limits on State sovereignty—clearly indicated in the letter of the provisions of international treaties—to limit the sovereignty of the peoples beyond what they have agreed to, on the argument that they can make mistakes, a protective function is assumed that easily leads to ethnocentrism, therefore running the true risk of distorting the liberating nature that is the essence of that branch of international law.

For all the aforementioned reasons, I conclude that this advisory opinion is not admissible.

I so vote.

Eugenio Raúl Zaffaroni
Judge

Pablo Saavedra Alessandri
Secretary