



United States Department of State

*United States Permanent Mission to the
Organization of American States*

Washington, D.C. 20520

December 16, 2019

Mr. Pablo Saavedra Alessandri
Registrar
Inter-American Court of Human Rights
P.O. Box 6906-1000
San José, Costa Rica

**Re: Request for an Advisory Opinion by the Republic of Colombia
CDH-SOC-1-2019/002
Written Observations of the United States**

Dear Mr. Saavedra:

The United States Government has the honor of submitting to the Inter-American Court of Human Rights, pursuant to Article 73 of the Rules of Procedure of the Inter-American Court of Human Rights, observations on the request for an advisory opinion forwarded to the United States in the above-referenced matter on June 7, 2019. Please find enclosed the United States' observations. We trust this information is useful to the Court and thank the Court for its attention to this matter.

Please accept renewed assurances of my highest consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Carlos Trujillo', written over a white background.

Carlos Trujillo
Ambassador

Enclosure: as stated.

**REQUEST FOR AN ADVISORY OPINION BY THE
REPUBLIC OF COLOMBIA
CDH-SOC-1-2019/002
WRITTEN OBSERVATIONS OF THE UNITED STATES**

Pursuant to Article 64.1 of the American Convention on Human Rights, the Republic of Colombia (“Colombia”) has requested an advisory opinion of the Inter-American Court of Human Rights (the “Court”). The Colombian request raises three questions. The first is presented by Colombia as follows:

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

The second question elaborates on the first:

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

The third question is presented as:

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

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

In connection with these questions, Colombia notes that member States of the Organization of American States (“OAS”) are subject to a range of human rights obligations arising from various instruments that are part of the Inter-American human rights system; that “a situation may occur at any time” that a State chooses to “disengage itself from its obligations in the terms of the

American Convention and of the OAS Charter;”¹ and in the case of a situation of serious and systematic violations of human rights, withdrawal from the American Convention and the OAS may “entirely eliminat[e] the international protection of human rights [for] individuals subject to the jurisdiction . . . of that State.”² Colombia posits that a determination from the Court regarding this type of situation would “directly affect the protection of human rights in the Americas” and is thus “a matter in which all member States of the OAS have a legitimate interest.”³

The Inter-American human rights system advances important protections for human rights and fundamental freedoms. This system includes the valuable work of the Inter-American Commission on Human Rights (the “Commission”) and the Court, for those States that submit to its jurisdiction, in interpreting the scope of human rights obligations under the binding instruments of the Inter-American system and monitoring States’ compliance with these obligations. Both the American Convention on Human Rights (the “Convention”) and the Charter of the Organization of American States (“OAS Charter”) authorize State Parties to withdraw from those instruments.⁴ A State that chooses to exercise its right to withdraw from the Convention and the OAS Charter in accordance with the instruments’ respective terms is released, upon the effective date of its withdrawal, from any obligations further to perform the Convention or OAS Charter. While there would undoubtedly remain other human rights obligations incumbent upon a State that denounces the Convention and the OAS Charter—not least under customary international law and applicable human rights instruments outside the Inter-American system to which that State is party—the Court is not a body of general jurisdiction. The United States respectfully submits that the Court should refrain from addressing elements of Colombia’s request that invite the Court to address the scope or enforcement of human rights obligations established outside of the Inter-American system.

I. The Court’s jurisdiction over Human rights obligations of member States of the OAS that have denounced the American Convention on Human Rights is limited to binding instruments which are in force with respect to that State and which are within the competence of the Court.

A State that denounces the American Convention would remain bound by any other international human rights obligations it has undertaken, including those within the Inter-American system. However, the Court should refrain from addressing human rights obligations set forth in instruments which are either beyond the competence of the Court and / or outside of the Inter-American system altogether.

¹ Request for a Consultative Opinion Presented by the Republic of Colombia with regard to Obligations in Matters of Human Rights of a State that Has Denounced the American Convention on Human Rights, and Attempts to Withdraw from the OAS, ¶22 (2019) (hereinafter “Colombian 2019 Request”).

² *Id.* at ¶23.

³ *Id.* at ¶24.

⁴ See American Convention on Human Rights art. 78, 22 Nov. 1979, 1144 U.N.T.S. 143 (hereinafter “American Convention”); Charter of the Organization of American States art. 143, 30 Apr. 1948, 119 U.N.T.S. 47, as amended (hereinafter “OAS Charter”).

a. The instruments within the competence of the Court are defined by relevant authorities.

The Court's authority to issue advisory opinions is set forth in Article 64.1 of the American Convention and is limited to interpretations of the Convention and "other treaties concerning the protection of human rights in the American states."⁵ As Colombia identified in its request, this competence encompasses a number of human rights treaties in the Americas for those States that have ratified them, including the American Convention, the Inter-American Convention to Prevent and Punish Torture, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, and the Inter-American Convention on the Forced Disappearance of Persons.⁶

So long as the human rights treaties in the Inter-American system remain in force, a State party to such instruments would continue to be bound by those treaties unless and until the State suspended, terminated or withdrew from the instrument in accordance with the terms of the treaty or as otherwise consistent with customary international law.

b. The Court is not a body of general jurisdiction and should decline to address the applicability of human rights instruments or obligations under customary international law (CIL) that are outside of its competence.

The Court's competence under Article 64.1 does not include human rights obligations established in sources other than treaties—such as customary international law obligations—or in treaties which are outside of the Inter-American system. Article 64.1 does not charge the Court with interpreting the scope of treaties outside of the Inter-American system nor have parties to such treaties, many of which include non-American state parties wholly beyond the Court's jurisdiction, consented to the Court's competency to interpret or render decisions concerning the terms therein. Accordingly, the Court should decline to address the scope of obligations under instruments that are not relevant to its functions, such as the Universal Declaration of Human Rights. The Court should also refrain from addressing customary international law pursuant to Article 64.1.

Similarly, Article 64.1 does not direct the Court to interpret instruments which do not qualify as "treaties." As reflected in Article 2 of the Vienna Convention on the Law of Treaties, a treaty is an international agreement concluded between States in written form and *governed by international law*" (emphasis added) – i.e. a legally binding instrument. The Court should decline to address in its advisory opinion the scope of instruments that are not legally binding and thus do not constitute treaties. In this regard, the United States has consistently maintained that the American Declaration is a nonbinding instrument which does not create legal rights or

⁵ American Convention, *supra* note 4, at art. 64.1.

⁶ See 2019 Colombia Request, *supra* note 1, at ¶26; see also http://www.oas.org/DIL/treaties_subject.htm.

obligations on OAS member States. United States courts have viewed it as such.⁷ The text of the Declaration and the circumstances of its conclusion demonstrate that the negotiating States did not intend for it to become a binding instrument. The United States recognizes that the American Declaration establishes standards against which States' conduct is assessed and can inform the interpretation of other instruments in the Inter-American human rights system. Consistent with its nonbinding text, however, it does not create independent human rights obligations for States.⁸ As the Court has recognized, the American Declaration is not a treaty within the meaning of the Vienna Convention on the Law of Treaties, and is thus "not a treaty within the meaning of Article 64(1)."⁹

From the perspective of the Court's competence, therefore, it is appropriate for the Court to avoid addressing any nonbinding instruments, instruments that exist outside of the Inter-American human rights system, or customary international law.

II. A State remains bound by other obligations which it has undertaken regardless of its status under the OAS Convention; however, to the extent the American Declaration of the Rights and Duties of Man is understood to acquire a binding normative character as incorporated under the OAS Charter, a State would cease to be bound by any obligations under the American Declaration following its denunciation of the OAS Charter.

Withdrawal from the OAS does not affect a State's obligations under other treaties to which it is a party unless those treaties so provide. Accordingly, following a State's withdrawal from the OAS, in general, it would remain bound by the terms of any treaties from within the Inter-American human rights system to which it is a party. If the State wished to terminate its obligations under such a treaty, it would need to do so according to the treaty's provisions regarding withdrawal or as otherwise permitted under customary international law.¹⁰ Withdrawal from the OAS Charter itself would not have the effect of terminating the withdrawing State's human rights obligations under instruments other than the OAS Charter (to the extent that the OAS Charter is understood to be a source of such human rights obligations), including instruments in the Inter-American system for which membership in the OAS was a condition precedent to accession or ratification. The United States notes that suspension of an OAS

⁷ See, e.g., *Garza v. Lapin*, 253 F.3d 918, 925 (7th Cir. 2001) (assessing that "OAS's Charter reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members").

⁸ For a further discussion of the U.S. position regarding the extent of obligations created by the American Declaration, see Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America (1988).

⁹ *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶33 (July 14, 1989) (hereinafter "1989 Advisory Opinion").

¹⁰ See Vienna Convention on the Law of Treaties art. 54(a), 27 Jan. 1980, 1155 U.N.T.S. 331.

Member State from participation in the OAS under Article 21 of the Inter-American Democratic Charter does not affect its human rights obligations.¹¹

- a. A State is not bound by any human rights obligations derived from the OAS Charter after it has denounced the Charter.

The OAS Charter explicitly contemplates that a State may denounce the OAS Charter and withdraw from the OAS so long as the denouncing State provides written notice and “fulfill[s] the obligations arising from the . . . Charter.”¹² Two years after notice is provided, the Charter “shall cease to be in force with respect to the denouncing State.”¹³ By its plain language, Article 143 of the OAS Charter confirms that States parties retain the ability to withdraw from the OAS if they so choose; a State which has denounced the Charter must be understood as having no further obligations arising under it under international law following the effectiveness of denunciation.

- b. Even if the American Declaration were understood to have acquired a normative character by virtue of the OAS Charter, it would no longer bind a State that has withdrawn from the OAS.

Although the United States respectfully opposes this view, the Court and the Commission have asserted that the American Declaration has taken on a binding “normative character.”¹⁴ In making this claim, the Court and Commission have reasoned that such binding force arises from States’ adoption of the OAS Charter; they have not claimed that such binding status arises from the text of the Declaration itself or from the intent of the States that adopted the Declaration.¹⁵ Thus, if a State properly denounces the OAS Charter and ceases to be a member of the OAS, the reasoning of the Court and Commission would mean that the Declaration would no longer apply to the denouncing State.

III. Whether OAS Member States have obligations in matters of human rights with respect to a denouncing State, and whether mechanisms exist for the enforcement of such obligations, depend upon the provisions of instruments to which OAS Member States and the denouncing State remain parties.

¹¹ See Inter-American Democratic Charter art. 21 (Sept. 11, 2001) (“The suspended member state shall continue to fulfill its obligations to the organization, in particular its human rights obligations.”).

¹² OAS Charter, art. 143.

¹³ *Id.*

¹⁴ See, e.g., 1989 Advisory Opinion, *supra* note 9, at ¶¶42–43; *Roach & Pinkerton v. United States*, Case 9647, Inter-Am. C.H.R., Report No. 3/87, ¶¶48–49 (1987) (describing the American Declaration as having “acquired binding force”).

¹⁵ See 1989 Advisory Opinion, *supra* note 10, at ¶43 (“Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms . . . to the corresponding provisions of the Declaration.”); *Roach & Pinkerton*, Report No. 3/87, at ¶48 (“As a consequence of articles . . . of the Charter, the provisions of other instruments of the OAS on human rights acquired binding force. Those instruments . . . [include the] American Declaration of the Rights and Duties of Man . . .”).

- a. OAS Member States do not have obligations under the OAS Charter and the American Convention with respect to a State that has denounced those instruments.

To the extent that the OAS Charter and the American Convention create obligations between States parties to those instruments, States parties would not be subject to such obligations vis-à-vis a State that has withdrawn from the OAS Charter and the American Convention. Whether or not OAS Member States have obligations in matters of human rights vis-à-vis such a denouncing State would depend on the provisions of instruments to which OAS Member States and the denouncing State remain parties.

- b. The Court and the Commission have competence with respect to instruments within their competence that a State has recognized as binding on it, but the Court should refrain from addressing mechanisms available to States or individuals to enforce human rights obligations outside of the Inter-American system.

As discussed above, where a State denounces the OAS Charter and withdraws from the OAS, such a denouncing State remains subject to human rights obligations it has undertaken in treaties to which it remains a party. Whether mechanisms exist for enforcing such obligations depends on the relevant provisions of the treaties to which the denouncing State remains a party. As addressed already, however, the Court should decline to opine on the availability of alternate mechanisms of human rights enforcement which may exist outside of the Court's competence or the Inter-American system.