

INTER-AMERICAN COURT OF HUMAN RIGHTS

ADVISORY OPINION OC-10/89
July 14, 1989

**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**

**REQUESTED BY THE GOVERNMENT OF THE
REPUBLIC OF COLOMBIA**

Present:

Héctor Gros-Espiell, President
Héctor Fix-Zamudio, Vice-President
Thomas Buergenthal, Judge
Rafael Nieto-Navia, Judge
Policarpo Callejas-Bonilla, Judge
Orlando Tovar-Tamayo, Judge
Sonia Picado-Sotela, Judge

Also present:

Manuel E. Ventura-Robles, interim Secretary

THE COURT,

composed as above,

renders the following Advisory Opinion:

1. By note of February 17, 1988, the Government of the Republic of Colombia (hereinafter "the Government") submitted to the Inter-American Court of Human Rights (hereinafter "the Court") a request for an advisory opinion on the interpretation of Article 64 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), in relation to the American Declaration of the Rights and Duties of Man (hereinafter "the Declaration" or "the American Declaration").
2. The Government requests a reply to the following question:

Does Article 64 authorize the Inter-American Court of Human Rights to render advisory opinions at the request

of a member state or one of the organs of the OAS, regarding the interpretation of the American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States in Bogotá in 1948?

The Government adds:

The Government of Colombia understands, of course, that the Declaration is not a treaty. But this conclusion does not automatically answer the question. It is perfectly reasonable to assume that the interpretation of the human rights provisions contained in the Charter of the OAS, as revised by the Protocol of Buenos Aires, involves, in principle, an analysis of the rights and duties of man proclaimed by the Declaration, and thus requires the determination of the normative status of the Declaration within the legal framework of the inter-American system for the protection of human rights.

The applicant Government points out that

for the appropriate functioning of the inter-American system for the protection of human rights, it is of great importance to know what the juridical status of the Declaration is, whether the Court has jurisdiction to interpret the Declaration, and if so, what the scope of its jurisdiction is within the framework of Article 64 of the Convention.

3. By note of February 29, 1988, the Colombian Ambassador in Costa Rica, Dr. Jaime Pinzón, informed the Court that he had been designated as Agent in this request. Subsequently, by note of June 2, 1989, the Minister of Foreign Relations of Colombia informed the Court that it had named as Agent Mrs. María Cristina Zuleta de Patiño, the new Colombian Ambassador to Costa Rica.

4. By note of March 2, 1988, pursuant to Article 52 of the Court's Rules of Procedure, the Secretariat requested written observations on the question from all the member states of the Organization of American States (hereinafter "the OAS" or "the Organization"), and through the Secretary General, from the organs listed in Article 51 of the Charter of the OAS, or Article 52 of the Charter as revised by the Protocol of Cartagena de Indias, after its entry into force for the ratifying states.

5. The President of the Court ordered that the written observations and relevant documents be submitted to the Secretariat before June 15, 1988.

6. The governments of Costa Rica, the United States, Perú, Uruguay and Venezuela responded to the Secretariat's request.

7. The International Human Rights Law Group submitted an **amicus curiae** brief.

8. On July 20, 1988, the Court held a public hearing in order to receive the oral arguments of the member states and the organs of the OAS.

9. Present at the hearing:

In representation of the Government of Colombia:

Dr. Jaime Pinzón, Agent and Ambassador to Costa Rica,

In representation of the Government of Costa Rica,

Lic. Carlos Vargas, Agent and Legal Counsel of the Ministry of Foreign Relations,

In representation of the Government of the United States of America,

Mr. Deane Hinton, Ambassador to Costa Rica,

Mr. Jeffrey Kovar, Attorney-Adviser, Office of the Legal Adviser, United States Department of State, and

Ms. Xenia Wilkinson, Senior Political Adviser, United States Mission to the OAS.

Although it was notified opportunely, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") was not represented. Because the Commission did not submit any written observations, the Court will have to decide the instant request without its valuable assistance.

10. By communication of August 3, 1988, the Government of the United States of America replied to questions posed by the Court during the public hearing on July 20, 1988, and made additional observations. On July 3, 1989, it submitted supplementary observations.

I

11. In its written observations, the Government of Costa Rica

believes that notwithstanding its great success and nobility, the American Declaration of the Rights and Duties of Man is not a treaty as defined by international law, so Article 64 of the American Convention does not authorize the Inter-American Court to interpret the Declaration. Nevertheless, that could not in any way limit the Court's possible use of the Declaration and its precepts to interpret other, related juridical instruments of a finding that many of the rights recognized therein have become international customary law.

12. The Government of the United States of America believes:

The American Declaration of the Rights and Duties of Man represents a noble statement of the human rights aspirations of the American States.

Unlike the American Convention, however, it was not drafted as a legal instrument and lacks the precision necessary to resolve complex legal questions. Its normative value lies as a declaration of basic moral principles and broad political commitments and as a basis to review the general human rights performance of member states, not as a binding set of obligations.

The United States recognizes the good intentions of those who would transform the American Declaration from a statement of principles into a binding legal instrument. But good intentions do not make law. It would seriously undermine the process of international lawmaking --by which sovereign states voluntarily undertake specified legal obligations-- to impose legal obligations on states through a process of "reinterpretation" or "inference" from a non-binding statement of principles.

13. For its part, the Government of Perú said that

although the Declaration could have been considered an instrument without legal effect before the American Convention on Human Rights entered into force, the Convention has recognized its special nature by virtue of Article 29, which prohibits any interpretation "excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have" and has this given the Declaration a hierarchy similar to that of the Convention with regard to the States Parties, thereby contributing to the promotion of human rights in our continent.

14. The Government of Uruguay affirmed that

i) The Inter-American Court of Human Rights is competent to render advisory opinions on any aspect of the American Declaration of the Rights and Duties of Man in relation to the revised Charter of the Organization of American States and the American Convention on Human Rights, within the scope of Article 64 of the latter.

ii) The juridical nature of the Declaration is that of a binding, multilateral instrument that enunciates, defines and specifies fundamental principles recognized by the American States and which crystallizes norms of customary law generally accepted by those States.

15. The Government of Venezuela asserted that

as a general principle recognized by international law, a declaration is not a treaty in the true sense because it does not create juridical norms, and it is limited to a statement of desires or exhortations. A declaration creates political or moral obligations for the subjects of international law, and its enforceability is thus limited in contrast to a treaty, whose legal obligations are enforceable before a jurisdictional body.

...

The Government recognizes that the Declaration is not a treaty in the strict sense. The Court will surely ratify this position, and it should also decide that it is not competent to interpret the American Declaration of the Rights and Duties of Man adopted in Bogotá in 1948, given that the Declaration is not a treaty "concerning the protection of human rights in the American states," as required by Article 64 of the American Convention on Human Rights.

II

16. At the public hearing, the Agent of the Government of Colombia said that

the objective of the advisory opinion request is to hear the Court's opinion whether it can, in concrete terms, interpret the American Declaration of the Rights and Duties of Man; that is, whether Article 64 authorizes the Inter-American Court of Human Rights to render advisory opinions at the request of a member state of the OAS or one of the organs of the Organization, regarding the interpretation of the American Declaration of the Rights and Duties of Man adopted at the Ninth International Conference of American States at Bogotá in 1948.

...

As a member state of the Organization, Colombia has a direct interest in the adequate functioning of the American system of human rights and in the reply to this request for an advisory opinion.

17. The representatives of the United States of America said that

It is the position of the United States that the American Declaration is not a treaty, and that therefore the Court does not have jurisdiction under Article 64 to interpret it

or determine its normative status within the inter-American human rights system.

...

Because the Declaration is not and never has been a treaty, the United States believes that the Court has no jurisdiction to consider the present request, and should therefore dismiss it.

...

In the event that the Court does reach the issues of the normative status of the Declaration, the United States' view is that the Declaration remains for all member states of the O.A.S. what it was when it was adopted: an agreed statement of non-binding general human rights principles.

...

The United States must state, with all due respect, that it would seriously undermine the established international law of treaties to say that the Declaration is legally binding.

18. The Agent of the Government of Costa Rica was of the opinion that

if the Declaration was not conceived by its authors as a treaty, it cannot then be interpreted by advisory opinions rendered by this Court.

But that does not mean, under any circumstance, that the Declaration has no juridical value, nor that the Inter-American Court of Human Rights cannot use it as evidence for the interpretation and application of other legal instruments related to the protection of human rights in the inter-American system.

...

The development of international law for the protection of human rights has incorporated many of the rights enunciated in the Declaration of the Rights and Duties of Man into obligatory international customary law.

III

19. The Court will first examine the admissibility of the instant advisory opinion request.

20. Article 64(1) of the Convention provides:

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.

21. Colombia, which is a member state of the OAS, has requested the advisory opinion. The request, therefore, has been made by an entity authorized to do so under Article 64(1) of the Convention.

22. In the observations submitted to the Court, some governments contend that the request is inadmissible because it calls for an interpretation of the American Declaration. In their view, the Declaration cannot be considered to be a treaty under Article 64(1) and, therefore, is not a proper subject matter for an advisory opinion.

23. Even if the Court were to accept the proposition that the Declaration is not a treaty, this conclusion would not necessarily make the request of the Government of Colombia inadmissible.

24. What the Government requests is an interpretation of Article 64(1) of the Convention. In fact, the Government asks whether Article 64 "authorizes" the Court "to render advisory opinions... on the interpretation of the American Declaration of the Rights and Duties of Man." Given that Article 64(1) authorizes the Court to render advisory opinions "regarding the interpretation of this Convention," a request which seeks an interpretation of any provision of the Convention, including Article 64, fulfills the requirements of admissibility.

25. It is clear that in dealing with this request for an advisory opinion, the Court might have to pass on the legal status of the American Declaration. The mere fact, however, that the interpretation of the Convention or other treaties concerning human rights might require the Court to analyze international instruments which may or may not be treaties **strictu sensu** does not mean that the request for an advisory opinions inadmissible, provided that the context is the interpretation of the instruments mentioned in Article 64(1) of the Convention. It follows therefrom that even if the Court should find it necessary to deal with the American Declaration when considering the merits of the instant request, that examination, given the manner in which Colombia has formulated its question, would involve the interpretation of an article of the Convention.

26. The question concerning the legal status of the Declaration bears on the merits of the request and not on its admissibility, for even if the Court were to conclude that the Declaration has no normative force within the inter-American system, that decision would not make the request inadmissible because it would have been reached in the context of an interpretation of Article 64(1).

27. In the instant case, the Court finds no good reason to make use of the discretionary powers it has repeatedly asserted that it possesses and which authorizes it to decline to render an advisory opinion, even when the request meets the formal admissibility requirements (**"Other Treaties" Subject to the Advisory Jurisdiction of the Court (art. 64 American Convention on Human Rights)**),

Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, paras. 30 and 31; **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. 10 and **Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)**, Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 16).

28. The Court holds that it has the competence to render the present request for an advisory opinion and therefore rules it to be admissible.

IV

29. The Court will now address the merits of the question before it.

30. Article 64(1) of the Convention authorizes the Court to render advisory opinions "regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states." That is, the object of the advisory opinions of the Court are treaties (see generally "**Other Treaties,**" *supra* 27).

31. According to the Vienna Convention on the Law of Treaties of 1969

"treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (Art. 2(1) (a)).

32. The Vienna Convention of 1986 on the Law of Treaties among States and International Organizations or among International Organizations provides as follows in Article 2(1) (a) :

"treaty" means an international agreement governed by international law and concluded in written form:

(i) between one or more States and one or more international organizations; or

(ii) between international organizations,

whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation.

33. In attempting to define the word "treaty" as the term is employed in Article 64(1), it is sufficient for now to say that a "treaty" is, at the very least, an international instrument of the type that is governed by the two Vienna Conventions. Whether the term includes other international instruments of a conventional nature whose existence is also recognized by those Conventions (Art. 3, Vienna Convention of 1969; Art. 3, Vienna Convention of 1986), need not be decided at this time. What is clear, however, is that the Declaration is not a treaty as defined by the Vienna

Conventions because it was not approved as such, and that, consequently, it is also not a treaty within the meaning of Article 64(1).

34. Here it must be recalled that the American Declaration was adopted by the Ninth International Conference of American States (Bogotá, 1948) through a resolution adopted by the Conference itself. It was neither conceived nor drafted as a treaty. Resolution XL of the Inter-American Conference on the Problems of War and Peace (Chapultepec, 1945) expressed the belief that in order to achieve the international protection of human rights, the latter should be listed and defined "in a Declaration adopted as a Convention by the States." In the subsequent phase of preparation of the draft Declaration by the Inter-American Juridical Committee and the Ninth Conference, this initial approach was abandoned and the Declaration was adopted as a declaration, without provision for any procedure by which it might become a treaty (Novena Conferencia Internacional Americana, 1948, **Actas y Documentos**. Bogotá: Ministerio de Relaciones Exteriores de Colombia, 1953, vol. I, pp. 235-236). Despite profound differences, in the Sixth Committee of the Conference the position prevailed that the text to be approved should be a declaration and not a treaty (see the report of the Rapporteur of the Sixth Committee, Novena Conferencia Internacional Americana, 1948, **Actas y Documentos**. Bogotá: Ministerio de Relaciones Exteriores de Colombia, 1953, vol. V, p. 512).

In order to obtain a consensus, the Declaration was conceived as

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 (American Declaration, Fourth Considerandum).

This same principle was confirmed on September 26, 1949, by the Inter-American Committee of Jurisconsults, when it said:

It is evident that the Declaration of Bogotá does not create a contractual juridical obligation, but it is also clear that it demonstrates a well-defined orientation toward the international protection of the fundamental rights of the human person (C.J.I., **Recomendaciones e informes, 1949-1953** (1955), p. 107. See also U. S. Department of State, **Report of the Delegation of the United States to the Ninth International Conference of American States, Bogotá, Colombia, March 30-May 2, 1948**, at 35-36 (Publ. No. 3263, 1948)).

35. The mere fact that the Declaration is not a treaty does not necessarily compel the conclusion that the Court lacks the power to render an advisory opinion containing an interpretation of the American Declaration.

36. In fact, the American Convention refers to the Declaration in paragraph three of its Preamble which reads as follows:

Considering that these principles have been set forth in the Charter of the Organization of the 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 other international instruments, worldwide as well as regional in scope.

And in Article 29(d) which indicates:

Restrictions Regarding Interpretation

No provision of this convention shall be interpreted as:

...

- d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

From the foregoing, it follows that, in interpreting the Convention in the exercise of its advisory jurisdiction, the Court may have to interpret the Declaration.

37. The American Declaration has its basis in the idea that "the international protection of the rights of man should be the principal guide of an evolving American law" (Third Considerandum). This American law has evolved from 1948 to the present; international protective measures, subsidiary and complementary to national ones, have been shaped by new instruments. As the International Court of Justice said: "an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation" (**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, p. 16 ad 31). That is why the Court finds it necessary to point out that to determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948.

38. The evolution of the here relevant "inter-American law" mirrors on the regional level the developments in contemporary international law and specially in human rights law, which distinguished that law from classical international law to a significant extent. That is the case, for example, with the duty to respect certain essential human rights, which is today considered to be an **erga omnes** obligation (**Barcelona Traction, Light and Power Company, Limited**, Second Phase, Judgment, I.C.J. Reports 1970, p. 3. For an analysis following the same line of thought see also **Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)** *supra* 37, p. 16 ad 57; cfr. **United States Diplomatic and Consular Staff in Tehran**, I.C.J. Reports 1980, p. 3 ad 42).

39. The Charter of the Organization refers to the fundamental rights of man in its Preamble ((paragraph three) and in Arts. 3(j), 16, 43, 47, 51, 112 and 150; Preamble (paragraph four), Arts. 3(k), 16, 44, 48, 52, 111 and 150 of the Charter revised by the Protocol of Cartagena de Indias), but it does not list or define them. The member states of the Organization have, through its diverse organs, given specificity to the human rights mentioned in the Charter and to which the Declaration refers.

40. This is the case of Article 112 of the Charter (Art. 111 of the Charter as amended by the Protocol of Cartagena de Indias) which reads as follows:

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

An inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters.

Article 150 of the Charter provides as follows:

Until the inter-American convention on human rights, referred to in Chapter XVIII (Chapter XVI of the Charter as amended by the Protocol of Cartagena de Indias), enters into force, the present Inter-American Commission on Human Rights shall keep vigilance over the observance of human rights.

41. These norms authorize the Inter-American Commission to protect human rights. These rights are none other than those enunciated and defined in the American Declaration. That conclusion results from Article 1 of the Commission's Statute, which was approved by Resolution No. 447, adopted by the General Assembly of the OAS at its Ninth Regular Period of Sessions, held in La Paz, Bolivia, in October, 1979. That Article reads as follows:

1. The Inter-American Commission on Human Rights is an organ of the Organization of the American States, created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter.
2. For the purposes of the present Statute, human rights are understood to be:
 - a. The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto;

- b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states.

Articles 18, 19 and 20 of the Statute enumerate these functions.

42. The General Assembly of the Organization has also repeatedly recognized that the American Declaration is a source of international obligations for the member states of the OAS. For example, in Resolution 314 (VII-0/77) of June 22, 1977, it charged the Inter-American Commission with the preparation of a study to "set forth their obligation to carry out the commitments assumed in the American Declaration of the Rights and Duties of Man." In Resolution 371 (VIII-0/78) of July 1, 1978, the General Assembly reaffirmed "its commitment to promote the observance of the American Declaration of the Rights and Duties of Man," and in Resolution 370 (VIII-0/78) of July 1, 1978, it referred to the "international commitments" of a member state of the Organization to respect the rights of man "recognized in the American Declaration of the Rights and Duties of Man." The Preamble of the American Convention to Prevent and Punish Torture, adopted by the General Assembly in Cartagena de Indias (December, 1985), reads as follows:

Reaffirming that all acts of torture or any other cruel, inhuman, or degrading treatment or punishment constitute an offense against human dignity and a denial of the principles set forth in the Charter of the Organization of American States and in the Charter of the United Nations and are violations of the fundamental human rights and freedoms proclaimed in the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights.

43. Hence it may be said that by means of an authoritative interpretation, the member states of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.

44. In view of the fact that the Charter of the Organization and the American Convention are treaties with respect to which the Court has advisory jurisdiction by virtue of Article 64(1), it follows that the Court is authorized, within the framework and limits of its competence, to interpret the American Declaration and to render an advisory opinion relating to it whenever it is necessary to do so in interpreting those instruments.

45. For the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter. Moreover, Articles 1(2)(b) and 20 of the Commission's Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that to this extent the American Declaration is for these States a source of international obligations related to the Charter of the Organization.

46. For the States Parties to the Convention, the specific source of their obligations with respect to the protection of human rights is, in principle, the

Convention itself. It must be remembered, however, that, given the provisions of Article 29(d), these States cannot escape the obligations they have as members of the OAS under the Declaration, notwithstanding the fact that the Convention is the governing instrument for the States Parties thereto.

47. That the Declaration is not a treaty does not, then, lead to the conclusion that it does not have legal effect, nor that the Court lacks the power to interpret it within the framework of the principles set out above.

48. For those reasons,

THE COURT,

unanimously

DECIDES

That it is competent to render the present advisory opinion.

unanimously

IS OF THE OPINION

That Article 64(1) of the American Convention authorizes the Court, at the request of a member state of the OAS or any duly qualified OAS organ, to render advisory opinions interpreting the American Declaration of the Rights and Duties of Man, provided that in doing so the Court is acting within the scope and framework of its jurisdiction in relation to the Charter and Convention or other treaties concerning the protection of the human rights in the American states.

Done in Spanish and in English, the Spanish text being authentic, at the seat of the Court in San José, Costa Rica, this fourteenth day of July, 1989.

Héctor Gros-Espiell
President

Héctor Fix-Zamudio

Thomas Buergenthal

Rafael Nieto-Navia

Policarpo Callejas-Bonilla

Orlando Tovar-Tamayo

Sonia Picado-Sotela

Manuel E. Ventura-Robles

Interim Secretary