INTER-AMERICAN COURT OF HUMAN RIGHTS

REQUEST FOR AN ADVISORY 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"

WRITTEN OBSERVATIONS OF LAW

Submitted by the

UNIVERSITY COLLEGE LONDON

PUBLIC INTERNATIONAL LAW PRO BONO PROJECT

Pursuant to Article 73(3) of the
Rules of Procedure of the Inter-American Court of Human Rights

Submitted on behalf of the UCL PIL Pro Bono Project on 15 December 2019 by:

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1. Introduction

The UCL PIL Pro Bono Project ('the Project') respectfully submits these written observations of law in accordance with conventional and procedural rules governing third party interventions before the Inter-American Court of Human Rights in the exercise of its advisory jurisdiction.

Information about the UCL PIL Pro Bono Project is set out in **Annex 1**.

The details of the individuals who have contributed to the preparation of these written observations are set out in **Annex 2**.

This Request presents the Court with an opportunity to continue its contribution to ensuring the centrality of human rights in the Americas, through the articulation and clarification of some important points of law around the denunciation of human rights treaties. The Project hopes and trusts that the following observations may be of assistance to the Court in its work to assist the American States in fulfilling their international human rights obligations.

These observations begin by addressing the questions of Jurisdiction and Admissibility (**Section 2**), which are important issues for the Court to consider in this matter. It is the Project's submission that the Court both can and should exercise its advisory jurisdiction in this matter, although there are notable jurisdictional constraints on the Court's advisory jurisdiction which should shape the exercise of this authority.

These observations then consider in turn the points of international law raised by each of the questions presented by the Republic of Colombia (**Sections 3-7**).

The following abbreviations are used in these observations:

ACHR	American Convention on Human Rights (22 January 1969, entered into force 18 July 1978) OAS Treaty Series No 36; 1144 UNTS 123
American Declaration	American Declaration of the Rights and Duties of Man American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser L/V/I.4 Rev 9 (2003)
ARSIWA	International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, adopted by UNGA Res 62/61 (8 January 2008) 62nd Session A/RES/62/61
Charter, or OAS Charter	Charter of the Organisation of American States (signed 30 April 1948, entered into force 13 December 1951) 119 UNTS 3 (as amended)
Commission, or IACHR	Inter-American Commission on Human Rights
Court, or IACtHR	Inter-American Court of Human Rights

OAS	Organisation of American States
Rules of Procedure	Rules of Procedure of the Inter-American Court of Human Rights, approved by the Court during its XLIX Ordinary Period of Sessions, held from November 16 to 25, 2000, and partially amended by the Court during its LXXXII Ordinary Period of Sessions, held from January 19 to 31, 2009
VCLT	Vienna Convention on the Law of Treaties (23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

2. Jurisdiction and Admissibility

Before the Court can engage with the substantive issues involved in a request for an advisory opinion, it must satisfy itself that it has jurisdiction to do so and that engaging with the questions posed to the tribunal does not constitute an improper exercise of its jurisdiction (the question of admissibility). Each of these points is discussed in turn below.

2.1. Jurisdiction

There are two points which must be satisfied for the Court to have advisory jurisdiction – the subject matter must fall within its jurisdictional authority (referred to below as jurisdiction *ratione materiae*), and the request must come from a party with the power to make such a request (referred to below as jurisdiction *ratione personae*).

2.1.1. Jurisdiction ratione materiae

Article 64(1) ACHR states 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.

Thus, the Court has advisory jurisdiction *ratione materiae* over (a) the ACHR, and (b) other treaties concerned with human rights in the American States. The Court's jurisdiction over the ACHR is self-explanatory. The meaning of "other treaties" has required further explanation. In its advisory opinion on *"Other Treaties" Subject to the Consultative Jurisdiction of the Court*, the Court identified that its advisory jurisdiction under Article 64(1) has a "broad scope".[1] It entails the "power to interpret any treaty as long as it is directly related to the protection of human rights in a Member State of the inter-American system".[2]

The Court's approach to the interpretation of Article 64 is "not restrictive",[3] and seeks to give effect to the purposes for which the advisory jurisdiction was created. As stated in *"Other Treaties"*:

> The advisory jurisdiction of the Court is closely related to the purposes of the Convention. This jurisdiction is intended to assist the American States in fulfilling their international human rights obligations and to assist the different organs of the inter-American system to carry out the functions assigned to them in this field.[4]

The only *ratione materiae* condition for the exercise of this advisory jurisdiction is that:

> it speaks of international agreements concerning the protection of human rights in the American States. The provisions of Article 64 do not require that the agreements

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[1] *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights),* Advisory Opinion OC-1/82 of 24 September 1982, Ser A No 1 ('*Other Treaties Advisory Opinion*'), para 15.

[2] Ibid, para 21.

[3] Ibid, para 37.

[4] Ibid, para 25.

> be treaties between American States, nor that they be regional in character, nor that they have been adopted within the framework of the inter-American system.[5]

Moreover, the Court has said of the scope of Article 64 that:

> The distinction implicit in Article 64 of the Convention alludes rather to a question of a geographical-political character. Put more precisely, it is more important to determine which State is affected by the obligations whose character or scope the Court is to interpret than the source of these obligations.[6]

In the Court's jurisprudence, the definition of an "American State" is thus more critical than the source of the obligations. The Court has interpreted this to refer to "all those States which may ratify or adhere to the Convention, in accordance with its Article 74, i.e., to Member States of the OAS".[7] Therefore, the Court has held that it necessarily has jurisdiction "if the principal purpose of a request for an advisory opinion relates to the implementation or scope of international obligations assumed by a Member State of the inter-American system".[8]

The Request identifies several treaties within the inter-American system to which the Court is invited to refer in its identification of international human rights obligations (paragraph 26). Each of these treaties is directly related to the protection of human rights within Members States of the OAS, and thus qualifies as an "other treaty" for the purposes of Article 64(1). As explained further below, the Court may consider it appropriate to interpret these treaties in answering the questions asked. The treaties referred to in the Request are not exhaustive of the treaties to which the Court may refer: the Court may refer to other applicable treaties, such as the International Covenant on Civil and Political Rights,[9] where they fall within the subject matter jurisdiction of the Court, or where this is incidental to its jurisdiction (for example, where it is relevant to the interpretation of another treaty within the jurisdiction *ratione materiae* of the Court).

The Court may further, in the exercise of its advisory jurisdiction, examine matters beyond the treaties referred to in Article 64(1), where these are relevant to the interpretation of either the ACHR or another treaty within the subject matter jurisdiction of the Court. This includes the American Declaration of the Rights and Duties of Man. The Declaration is not a treaty within the meaning of Article 64(1).[10] However, the Court has held that "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."[11]

The primary context in which the Court may have regard to the Declaration is in the interpretation of the unspecific references in the OAS Charter to "human rights". The Court has held that:

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[5] Ibid.

[6] Ibid, para 38.

[7] Ibid, para 35.

[8] Ibid.

[9] As occurred in eg *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 1 October 1999, Ser A No 16.

[10] *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the ACHR*, Advisory Opinion OC-10/89 of 14 July 1989, Ser A No 10, para 33.

[11] Ibid, para 35.

> by means of an authoritative interpretation, the member states of the Organization have signalled 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.[12]

Thus, the Court may and indeed must use the Declaration in order to interpret the Charter provisions on human rights. This is discussed further in **Section 3** below.

The Court may also look to other sources of international law where these are incidental to the fulfilment of its advisory functions.[13] Thus, the Court has, in the exercise of its advisory jurisdiction, interpreted provisions of the Convention, *inter alia*, in light of "general principles of international law"[14] including the general principle of good faith in international law,[15] and taken cognizance of developments in individual responsibility,[16] *jus cogens*,[17] *erga omnes*,[18] the customary norm of non-refoulement,[19] and the customary 'principle of prevention of environmental damage'.[20] In using customary international law to interpret the relevant treaties, the Court is acting in conformity with the general principles of treaty interpretation contained with Article 31, VCLT – notably the rule of systemic interpretation in Article 31(3)(c).[21]

The Court is asked, in this Request, to interpret the human rights obligations of (1) a Member State of the OAS which is denouncing the ACHR, (2) a Member State of the OAS which is denouncing the OAS Charter in addition to the ACHR, and (3) remaining Member States where the Denouncing State is committing "serious and systemic" human rights violations (paragraph 35). The Request also asks the Court to identify the available enforcement mechanisms to remaining Member States and individuals in such circumstances.

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[12] Ibid, para 43.

[13] *Rights and guarantees of children in the context of migration and/or in need of international protection,* Advisory Opinion OC-21/14 of 19 August 2014, Ser A No 21, paras 51-60; *Titularidad de Derechos de Las Personas Jurídicas en el Sistema Interamericano de Derechos Humanos (Interpretación y Alcnace del Artículo 1(2), en Relación con los Artículos 1(2), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 y 62(3) of the American Convention on Human Rights, Así como del Artículo 8(1)(A) y (B) del Protocolo de San Salvador)*, Advisory Opinion OC-22/16 of 26 February 2016, Ser A No 22, para 29.

[14] *Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights)*, Advisory Opinion OC-11/90 of 10 August 1990, Ser A No 11, paras 36, 41.

[15] *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights),* Advisory Opinion OC-14/94 of 9 December 1994, Ser A No 14, para 35.

[16] Ibid, para 52.

[17] *Juridical Condition and Rights of the Undocumented Migrants,* Advisory Opinion OC-18/03 of 17 September 2003, Ser A No 18, paras 99-100; *"Article 55 of the American Convention on Human Rights",* Advisory Opinion OC-20/09 of 29 September 2009, Ser A No 20, para 54.

[18] Ibid, para 109.

[19] *Rights and guarantees of children in the context of migration and/or in need of international protection,* Advisory Opinion OC-21/14 of 19 August 2014, Ser A No 21, para 211.

[20] *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights),* Advisory Opinion OC-23/17 of 15 November 2017, Ser A No 23, para 129.

[21] VCLT, Art 31(3): "There shall be taken into account, together with the context … (c) any relevant rules of international law applicable in the relations between the parties".

The requirement that the subject-matter of a request falls within the geo-political space of the inter-American system, and concerns the human rights obligations of OAS Member States, is clearly satisfied. Such States will be the addressees and only addressees of the Court's opinion, and it is to their obligations that the Request pertains.

The questions in the Request ask about human rights obligations more widely than the ACHR or treaty law. The first question, in particular, refers to "international law, conventions and common law, and in particular, the American Declaration of the Rights and Duties of Man of 1948" (paragraph 35). Declaring the content of customary international law does not, in itself, fall within the advisory jurisdiction of the Court. However, the Court is being asked to interpret the effect of the withdrawal provisions contained in the ACHR and OAS Charter (which is well-established as an "other treaty" for the purposes of Article 64(1))[22] on the continued effectiveness of the obligations contained therein. This is primarily a question of the interpretation of those treaties and their effects. This is more apparent when one considers which provisions the Court is asked to interpret, namely provisions under the ACHR, OAS Charter and American Declaration (paragraph 34). Incidental recourse to customary international law in such circumstances falls within the well-established scope of the Court's advisory jurisdiction, and the Court's powers of interpretation.

In conclusion, the Project submits that Court has jurisdiction *ratione materiae* over the Request. In responding to it, the Court is required to interpret the effect of withdrawal from the ACHR and OAS Charter in light of the provisions explicitly referred to in paragraph 34 of the Request. In doing so, the Court may refer to other relevant international law, including other treaties which fall within its advisory jurisdiction, and customary international law, including *jus cogens*.

2.1.2. Jurisdiction ratione personae

The second precondition for the exercise of its advisory jurisdiction requires the Court to satisfy itself that the Requesting State has *standing* to request an advisory opinion from the Court.[23] Under Article 64(1) ACHR, "[t]he *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" (emphasis added). The position of other States is irrelevant for the determination of jurisdiction *ratione personae* (although it may have relevance for admissibility as discussed below) because, as this Court has stated, in an advisory proceeding:

> There are no parties in the sense that there are no complainants and respondents…. All the proceeding is designed to do is to enable OAS Member States and OAS organs to obtain a judicial interpretation of a provision embodied in the Convention or other human rights treaties in the American states.[24]

Since it is clearly the case that the Republic of Colombia, the Requesting State, is a Member State of the OAS, the Court has jurisdiction *ratione personae*.

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[22] See eg *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the ACHR*, Advisory Opinion OC-10/89 of 14 July 1989, Ser A No 10, para 144.

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

[24] *Restrictions to the Death Penalty (Arts 4(2) and 4(4) ACHR),* Advisory Opinion OC-3/83 of 8 September 1983, Ser A No 3, para 22.

2.2. Admissibility

This section considers the admissibility requirements for the Court's advisory jurisdiction, including the question of the Court's discretion in the exercise of its jurisdiction.

2.2.1. Procedural Requirements in Advisory Proceedings

Article 70(1) of the Rules of Procedure stipulates that "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." Article 70(2) contains the further requirements that "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." Article 71 further provides that "If [...] the interpretation requested refers to other treaties concerning the 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."

As noted above, the Court is asked, in this Request, to interpret the human rights obligations of (1) a Member State of the OAS which is denouncing the ACHR, (2) a Member State of the OAS which is denouncing the OAS Charter in addition to the ACHR, and (3) remaining Member States where the Denouncing State is committing "serious and systemic" human rights violations (paragraph 35). The Request also asks the Court to identify the available enforcement mechanisms to remaining Member States and individuals in such circumstances.

The Project submits that these questions are specific juridical questions which satisfy the requirements of Article 70(1). Moreover, these questions satisfy the requirement that they constitute "questions that are of juridical interest for the protection and promotion of human rights".[25] When viewed against other questions upon which the Court has given advisory opinions in the past, the questions are no less specific than other questions which the Court has determined to be admissible.[26]

The requirements of Articles 70(2) and 71 of the Rules of Procedure are also satisfied in the Request. In conformity with Article 70(2), paragraph 34 of the Request identifies nine relevant provisions of the ACHR for which the Court's interpretation is sought. Since the OAS Charter is an "other treaty" for the purposes of Article 71, it is necessary for the Request to identify the specific provisions of which an interpretation is sought. The relevant provisions of the OAS Charter are identified in paragraph 34 of the Request. In addition, paragraph 34 identifies the relevant provisions of the American Declaration which the Court is also invited to interpret.

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[25] *Control of due process in the exercise of the powers of the Inter-American Commission on Human Rights (Articles 41 and 44 to 51 of the American Convention on Human Rights),* Advisory Opinion OC-19/05 of 28 November 2005, Ser A No 19, para 17.

[26] See eg *Other Treaties Advisory Opinion*; *Juridical Condition and Rights of the Undocumented Migrants,* Advisory Opinion OC-18/03 of 17 September 2003, Ser A No 18; *Control of due process in the exercise of the powers of the Inter-American Commission on Human Rights (Articles 41 and 44 to 51 of the American Convention on Human Rights),* Advisory Opinion OC-19/05 of 28 November 2005, Ser A No 19.

2.2.2. Position of Non-Parties to the ACHR and OAS

In conformity with general principles of international law, this Court has made clear that an advisory opinion may be declared inadmissible where the rights of non-Parties to the OAS are at issue. As this Court has held:

> if a request for an advisory opinion has as its principal purpose the determination of the scope of, or compliance with, international commitments assumed by States outside the inter-American system, the Court is authorized to render a motivated opinion refraining to pass on the issues submitted to it.[27]

The Court's power to declare a request inadmissible on the grounds that it seeks to determine the obligations of non-Parties to the OAS reflects the underlying purpose of its advisory jurisdiction, which is to provide the Member States of the OAS with assistance in fulfilling *their* international human rights obligations.[28]

No impropriety arises, however, where any implications of the advisory opinion for the rights or obligations of non-Party States are incidental to the request. It is only where the *principal purpose* of the request is to determine such rights or obligations that any question of impropriety arises. As this Court has recognized, incidental implications for non-Party States do not constitute a bar to the exercise of its advisory jurisdiction, because:

> It must be remembered, in this connection, that the advisory opinions of the Court and those of other international tribunals, because of their advisory character, lack the same binding force that attaches to decisions in contentious cases. (Convention, Art. 68.) This being so, less weight need be given to arguments based on the anticipated effects that the Court's opinions might have in relation to States lacking standing to participate in the advisory proceedings here in question.[29]

It is submitted that the principal purpose of this Request is to assist current OAS Member States to know what their continuing human rights obligations are in the event that they denounce the ACHR or OAS Charter, and to know what the obligations of remaining Member States are in respect of a denouncing State.

2.2.3. Judicial Propriety

The Court may decline to exercise its advisory jurisdiction on grounds of judicial propriety. It is submitted, however, that no question of impropriety arises in this case that would justify a refusal to admit the Request.

The Court has identified various bases on which it may refuse to admit a request for an advisory opinion on grounds of judicial propriety.[30] The key consideration for refusing to admit a request

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[27] *Other Treaties Advisory Opinion*, para 49.

[28] See above.

[29] *Other Treaties Advisory Opinion*, para 51.

[30] See *Rejection to the Request of an Advisory Opinion submitted by the Secretary-General of the Organisation of American States*, Order of the IACtHR of 23 June 2016 (only in Spanish).

on ground of judicial propriety is whether admitting it "would distort the advisory jurisdiction of the Court."[31] Two bases are potentially relevant in relation to this Request.

First, the Court has held that it is improper to admit a Request where:

> a reply to the questions presented […] could produce, under the guise of an advisory opinion, a determination of contentious matters not yet referred to the Court, without providing the victims with the opportunity to participate in the proceedings.[32]

The Court will equally not admit cases which have "the specific purpose of impairing the effectiveness of the proceedings in a case being dealt with by the Commission 'to avoid having to accept the contentious jurisdiction of the Court and the binding character of the Court's decision'".[33]

Second, the Court has also held that its:

> jurisdiction should not, in principle, be used for purely academic speculation, without a foreseeable application to concrete situations justifying the need for an advisory opinion.[34]

As part of the factual background to the Request, paragraph 22 states: "recent events in the region show that a situation may occur at any time, that a State in the continent pursues actions to disengage itself from its obligations in the terms of the American Convention and of the OAS Charter". The allusion to "recent events" in the background context may appear to implicate potentially contentious matters. It is submitted, however, that this is not an impediment to the Court exercising its advisory jurisdiction, but rather demonstrates that the Request is not a matter of "academic speculation", as discussed further below. The Request's reference to "recent events" merely provides part of the "juridical, historical and political context"[35] that highlights the need for the Court to assist Member States with regard to their future conduct. As this Court has noted: "the use of examples serves the purpose of referring to a specific context … without implying that the Court is rendering a legal ruling on the situation described in such examples".[36] In this case, the Court has no reason to decline the Request on this basis.

Where the Court has previously been faced with potential overlap between its advisory jurisdiction and contentious cases pending before the Commission or the Court, it has declared the application admissible where it is able to respond to the Request without interfering with underlying contentious cases.[37] The pertinent question when considering this issue is whether, by admitting a

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[31] *Other Treaties Advisory Opinion*, para 25.

[32] *Other Treaties Advisory Opinion*, para 31; *Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights,* Advisory Opinion OC-12/91 of 6 December 1991, Ser A No 12, para 28.

[33] *Other Treaties Advisory Opinion*, para 24 (footnote omitted).

[34] *Judicial Guarantees in States of Emergency (Arts 27(2), 25 and 8 ACHR)*, Advisory Opinion OC-9/87 of 6 October 1987, Ser A No 9, para 16.

[35] Ibid, para 17.

[36] *Juridical Condition and Rights of the Undocumented Migrants,* Advisory Opinion OC-18/03 of 17 September 2003, Ser A No 18, para 65.

[37] See eg *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 1 October 1999, Ser A No 16, para 50.

request, the exercise of the Court's advisory jurisdiction "might weaken its contentious jurisdiction or worse still, that it might undermine the purpose of the latter, thus changing the system of protection provided for in the Convention to the detriment of the victim".[38] Nothing in this Request requires the Court to examine any facts arising in contentious cases either currently pending or which may potentially[39] come before the Court. Thus, it is submitted that there is no overlap with any contentious proceedings, and certainly nothing in this Request which interferes with the Court's contentious jurisdiction to the detriment of individuals.

As to the question of whether the questions in the Request amount to mere "academic speculation", it is submitted that they do not. The Request's reference in paragraph 22 to "recent events in the region" highlights the fact that the prospect of the situation it asks the Court to consider occurring is a real one. The potential harm to the basic rights of the individual created by the uncertainty arising from withdrawal from the Inter-American system presents the participants in that system with a similar sort of "critical problem" to the one identified by the Court in *Judicial Guarantees in States of Emergency*.[40] As this Court identified in that case, an advisory opinion by the Court is "useful within a reality in which the basic principles of the system have often been questioned".[41] The "recent events" alluded to in the Request suggest that an opinion on this question is likely to have a "foreseeable application to concrete situations". Moreover, if those "recent events" are placed within a wider, global context, in which treaty withdrawal appears to be an increasing phenomenon,[42] the potential for the situations envisioned in the Request arising in future is certainly foreseeable. As such the Request falls into a category that is not "mere academic speculation and is justified by its potential benefit for the international protection of human rights and for strengthening the universal juridical conscience".[43]

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[38] *Other Treaties Advisory Opinion*, para 24.

[39] *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 of 17 September 2003, Ser A No 18, para 62.

[40] *Judicial Guarantees in States of Emergency (Arts 27(2), 25 and 8 ACHR)*, Advisory Opinion OC-9/87 of 6 October 1987, Ser A No 9, para 17.

[41] Ibid. See also, *"Article 55 of the American Convention on Human Rights",* Advisory Opinion OC-20/09 of 29 September 2009, Ser A No 20, paras 15-17; *Rights and guarantees of children in the context of migration and/or in need of international protection,* Advisory Opinion OC-21/14 of 19 August 2014, Ser A No 21, para 27.

[42] See eg C McLachlan, 'The Assault on International Adjudication and the Limits of Withdrawal' (2019) 68 ICLQ 499.

[43] *Juridical Condition and Rights of the Undocumented Migrants,* Advisory Opinion OC-18/03 of 17 September 2003, Ser A No 18, para 65.

3. Question 1

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 matters of human rights does a member State of the Organization of American States have when it has denounced the American Convention on Human Rights?*

This question asks the Court to clarify the human rights obligations of a Member State of the OAS which has denounced the ACHR. Five different potential sources of obligations are considered in turn below: (i) continuing obligations under the ACHR; (ii) the OAS Charter; (iii) other human rights treaties and protocols; (iv) customary international law; and (v) the American Declaration.

3.1. Continuing obligations under the ACHR

Article 78 of the ACHR sets out the mechanism for withdrawal.

> 1) The States Parties may denounce this Convention at the expiration of a five-year period from the date of its entry into force and by means of notice given one year in advance. Notice of the denunciation shall be addressed to the Secretary General of the Organization, who shall inform the other States Parties.
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> 2) Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation.

Article 78(2) thus confirms that, until the effective date of denunciation, the denouncing State remains bound by the ACHR, and that even after that date, the denouncing State remains bound by any "obligations contained in this Convention" with respect to any act prior to the effective date.

The continuing existence of potential obligations under the ACHR with respect to any act prior to the effective date of denunciation accords with the position under general international law, set out in Article 70(1)(b) of the VCLT:

> Article 70
>
> 1) Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: (a) Releases the parties from any obligation further to perform the treaty; (b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

Although evidently a denouncing State will not be bound by the substantive obligations under the treaty after the effective date of denunciation, it is unremarkable that the State will continue to be bound by some obligations in respect of the treaty even after its denunciation has come into effect. The precise meaning of "obligations contained in this Convention" under Article 78(2) of the ACHR is discussed further in **Section 6** below.

3.2. The OAS Charter

A State which has denounced the ACHR, but is still a member of the OAS Charter, will still be bound by certain human rights obligations under the Charter. The obligations set out under the Charter bind all Member States of the OAS irrespective of whether they are bound by the ACHR.

The OAS Charter refers on numerous occasions to the rights of the individual, including the following:

1. In the preamble, "Confident that the true significance of American solidarity and good neighbourliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man".

2. Chapter II, Principle l of Article 3: "The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex".

3. Article 17: "Each State has the right to develop its cultural, political, and economic life freely and naturally. In this free development, the State shall respect the rights of the individual and the principles of universal morality."

4. Article 45: "The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms:
(a): All human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security;
…
(i): Adequate provision for all persons to have due legal aid in order to secure their rights."

5. Article 46: "The Member States recognize that, in order to facilitate the process of Latin American regional integration, it is necessary to harmonize the social legislation of the developing countries, especially in the labour and social security fields, so that the rights of the workers shall be equally protected, and they agree to make the greatest efforts possible to achieve this goal."

The obligation under Article 17 for each OAS Member State to "respect the rights of the individual and the principles of universal morality" is perhaps particularly notable in this regard. It is our submission that the meaning of "the rights of the individual" for the purposes of this provision refers to the rights of the individual under customary international law, as well as under any applicable treaties. This is because Article 17 should be interpreted in light of "any rules of international law applicable in the relations between the parties".[44] The interpretation of these obligations may also require consideration of the American Declaration on the Rights and Duties of Man, because this Declaration may be considered as an authoritative statement of the "rights of the individual" under customary international law in the Americas or as establishing a "special meaning" of the expression "rights of the individual",[45] as discussed in **Section 2** above and further in **Section 3.5** below.

[44] VCLT, Art 31(3)(c).

[45] VCLT, Art 31(4).

3.3. Other Human Rights Treaties and Protocols

An OAS Member State which has denounced the ACHR will also continue to have human rights obligations under each of the international and regional human rights treaties to which they remain parties. As noted in **Section 2** above, although Article 64 of the ACHR confines the jurisdiction *ratione materiae* of the court to the Convention itself and to 'other treaties', the Court has interpreted 'other treaties' to encompass all human rights treaties ratified by one or more OAS Member States, even if non-OAS members are parties as well and human rights are ancillary to the main purpose of the treaty.[46] For example, the court has interpreted the International Covenant on Civil and Political rights, drawing on the Vienna Convention on Consular Relations, in advising on the relevant human rights standards under these instruments.[47]

Setting out an exhaustive list of regional and international human rights treaty obligations is a difficult proposition in the abstract, not least because State party status varies, and treaties which are not exclusively directed to human rights protection may nevertheless have relevant human rights implications. The Court has, for example, referred to the Vienna Convention on Consular Relations[48] and to the Geneva Conventions (governing humanitarian law)[49] in articulating human rights obligations. The Court may nevertheless wish to articulate a non-exhaustive list or statement of principle to affirm that such treaties form part of the human rights protection system in the Americas.

Annex 3 to these observations includes a list of American regional human rights treaties and protocols, as well as of the 18 'core' human rights treaties and optional protocols as determined by the Office of the United Nations High Commissioner for Human Rights.[50] Ratification of these instruments among American States is relatively high. Canada and almost all Latin America States have ratified more than 10 of the instruments listed.

This list of instruments includes two Protocols to the American Convention on Human Rights, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador). Each of these instruments states that it is only open to ratification or accession by a State Party to the ACHR.[51] These instruments do not include clauses dealing with denunciation or termination. It is therefore unclear whether denunciation of the ACHR would have the effect of terminating State Party status to these Protocols, although the terminology of a 'protocol' and the fact that accession is limited to ACHR State Parties are indications that this is likely to be the case. The Court may wish to consider and articulate whether these Protocols form independent treaties, requiring separate denunciation in accordance with the general rules of international law (in the absence of special treaty provision), or whether they are dependent agreements whose status would automatically be affected by a denunciation of the ACHR. As discussed further in **Section 4.2** below, other Inter-American

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[46] *Other Treaties Advisory Opinion.*

[47] *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 1 October 1999, Ser A No 16.

[48] Ibid.

[49] IACHR, *La Tablada v Argentina,* Case 11.137, Report 55/97, 18 November 1997; *Case of the 'Mapiripán Massacre' v Colombia*, Judgment of 15 September 2005, Ser C No 134; *Case of Vargas-Areco v Paraguay*, Judgment of 26 September 2006, Ser C No 155.

[50] <https://indicators.ohchr.org/>, accessed 15 December 2019.

[51] Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Art 3; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Art 21.

human rights treaties have their own provisions on denunciation and are open to (at least) all OAS Member States regardless of their ACHR party status, and thus these treaties will continue to bind a State party unless they are specifically denounced alongside the ACHR.

3.4. Customary International Law

As noted in **Section 2** above, Article 64 of the ACHR leaves the interpretation of the content of customary international law generally outside of the competence of the Court in the exercise of its advisory jurisdiction. However, there are two ways in which the Court may make reference to customary international law consistently with the limits on its advisory jurisdiction.

First, any interpretation of the human rights obligations owed under the Convention or other treaties necessarily will involve an assessment of the customary rules relevant to those instruments. This is consistent with the practice of the Court. For example, in *Roach v Pinkerton*, the Court referred to customary international law to find that, at the time, there was not – contrary to the petitioners' submissions – a rule of customary international law that set the minimum age for capital punishment at 18.[52] In relation to the ACHR itself, this position is reinforced by Article 29, which provides specific interpretive principles:

> Article 29
>
> No provision of this Convention shall be interpreted as:
>
> a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
>
> b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
>
> c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
>
> 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.

Article 29 precludes interpretations which would restrict rights protected in the ACHR, those 'inherent in the human personality', and those rights recognized in municipal law or other international treaties. Consequently, a theme of the court's jurisprudence has been to interpret the convention in a *pro homine*[53] manner – in that its interpretation has sought to give the greatest possible protection to human rights. Consequently, the Court may interpret the ACHR in light of relevant customary international law, and may do so in a manner that gives the greatest protection to human rights in the circumstances. As noted above, the Court may also interpret obligations under the OAS Charter in light of relevant customary international law, including the American Declaration.

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[52] IACHR, *James Terry Roach and Jay Pinkerton (United States),* Case 9647, Report 3/87, 22 September 1987, paras 55-63.

[53] M Fitzmaurice, *Interpretation of Human Rights Treaties* in D Shelton, (ed) *Oxford Handbook on International Human Rights Law* (OUP 2013).

The second way in which the Court may make reference to customary international law consistently with the limits on its advisory jurisdiction is in analysing the effect of the ACHR or other treaties on customary international law. Whether the ACHR has displaced or otherwise affected customary international law is a matter of interpretation of the ACHR, which falls within the advisory jurisdiction of the Court. It is our submission that the ACHR does not displace customary international law, but rather contributes to its development, such that a State which denounces the ACHR will be subject to substantially similar human rights obligations as a matter of customary international law.

As the Court stated in *Interpretation of the American Declaration*:

> 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.[54]

This is consistent with the position under general international law regarding the effect of treaties on customary international law. For example, the International Court of Justice in the *Nicaragua* case held that there are:

> no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter "supervenes" the former, so that the customary international law has no further existence of its own. There are a number of reasons for considering that, even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence.[55]

The ICJ also confirmed in that case that a treaty and the practice arising under it could affect the development of customary international law, such that customary obligations (far from being displaced) could align dynamically with later developed treaty obligations. In that case, the treaty concerned was the UN Charter, and the Court confirmed that:

> the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it[56]

This approach was also articulated previously by the ICJ in the North Sea Continental Shelf Cases.[57] A similar position has also been adopted recently by the International Law Commission, in its Draft Conclusions on Identification of Customary International Law (2016), which notes that:

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[54] *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the ACHR,* Advisory Opinion OC-10/89 of 14 July 1989, Ser A No 10, para 46.

[55] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* [1986] ICJ Rep 14 95.

[56] Ibid, 96.

[57] *North Sea Continental Shelf Cases* [1969] ICJ Rep 3, paras 70-73.

> A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:
>
> (a) codified a rule of customary international law existing at the time when the treaty was concluded;
>
> (b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or
>
> (c) has given rise to a general practice that is accepted as law (*opinio juris*) thus generating a new rule of customary international law.[58]

Articulating the full content of customary international human rights law is a difficult question, and one which it is not necessary for the Court to answer for the purposes of this advisory opinion. Consequently, it is our submission that the Court can and should simply confirm, consistently with the limits on its advisory jurisdiction, that as a matter of interpretation of the ACHR a State which has denounced the ACHR will still be bound by any human rights obligations under customary international law, because the ACHR does not displace applicable custom, and that the ACHR itself could assist in identifying relevant rules of customary international law, as it may have contributed to their development or crystallisation.

3.5. The American Declaration of the Rights and Duties of Man 1948

As discussed in **Section 2** above, the American Declaration of the Rights and Duties of Man is not a treaty, and thus falls outside of the direct competence of the Court in its advisory jurisdiction. However, the Court has held that "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."[59] The American Declaration may in particular be relevant as an aid to interpretation of the obligations under the ACHR, as well as under the OAS Charter. Indeed, as discussed above, it is our submission that the obligation under Article 17 of the OAS Charter for each OAS Member State to "respect the rights of the individual and the principles of universal morality" should be interpreted in light of "any rules of international law applicable in the relations between the parties",[60] which includes customary international law. The Declaration may be relevant in this regard as an authoritative statement of the "rights of the individual" under customary international law in the Americas or as establishing a "special meaning" of the expression "rights of the individual" among OAS Member States.[61]

The Court, in its Advisory Opinion regarding the *Interpretation of the American Declaration*, noted that the fact:

> 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 … the Charter of the Organization cannot

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[58] International Law Commission, 'Draft Conclusions on Identification of Customary International Law' A/73/10 (2018) Ybk ILC, Conclusion 11(1).

[59] *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the ACH*, Advisory Opinion OC-10/89 of 14 July 1989, Ser A No 10, para 35.

[60] VCLT, Art 31(3)(c).

[61] VCLT, Art 31(4).

> 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.[62]

In *Coard et al.,* the Commission stated that "Pursuant to the Charter, all member states undertake to uphold the fundamental rights of the individual, which, in the case of non-parties to the Convention, are those set forth in the American Declaration, which constitutes a source of international obligation".[63] It is unclear whether this is intended to suggest that the American Declaration is itself a formal source of binding obligations, or rather whether it may be relied on as a material source to identify the content of the treaty obligations under the OAS Charter.

In response to Question 1 of this Request, it therefore may be of particular assistance to the American States for the Court to offer further clarification of the role of the American Declaration in interpreting the human rights obligations under the OAS Charter.

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[62] *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the ACHR,* Advisory Opinion OC-10/89 of 14 July 1989, Ser A No 10, para 47.

[63] IACHR, *Coard et al. v United States*, Report No 109/99, Case 10.951, 29 September 1999, para 36.

4. Question 2

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

This Question invites the Court to offer guidance to the American States on the further effect of a denunciation of the OAS Charter. It is our submission, as discussed in **Section 2** above, that this falls within the advisory jurisdiction of the Court. This is because the Court is not being asked to advise on the international law obligations of a non-Member State, but rather because the Court is being asked to advise on the legal effects of the OAS Charter on a denouncing State which is a Member State at the time it takes such action. We have addressed these questions below, examining (i) continuing obligations under the OAS Charter; and (ii) other obligations.

4.1. Continuing Obligations under the OAS Charter

Article 143 of the OAS Charter provides that:

> The present Charter shall remain in force indefinitely but may be denounced by any Member State upon written notification to the General Secretariat, which shall communicate to all the others each notice of denunciation received. After two years from the date on which the General Secretariat receives a notice of denunciation, the present Charter shall cease to be in force with respect to the denouncing State, which shall cease to belong to the Organization after it has fulfilled the obligations arising from the present Charter.

The requirement for written notification and two years notice under Article 143 is clearly a formal requirement for denunciation. The second sentence of Article 143 is more difficult to interpret. On the one hand, it suggests that the Charter automatically ceases to "be in force" with respect to the denouncing State on the effective date of denunciation. On the other hand, Article 143 also states that the denouncing State shall only "cease to belong to the Organization after it has fulfilled the obligations arising from the present Charter". The interpretation of Article 143, and in particular of the "obligations arising from the present Charter" which require fulfilment, is thus a matter on which the Court's advice may be of assistance to the American States.

One view which has been expressed is that the obligations which need to be fulfilled are only financial obligations.[64] It is certainly logical that a State should not be able to escape its financial obligations to the OAS through denouncing the OAS Charter,[65] although determining what those financial obligations are in relation to continuing budgetary commitments may be practically difficult (as the United Kingdom's Brexit negotiations have highlighted). There is a strong argument, however, that the obligations which need to be fulfilled under Article 143 go beyond financial obligations. It has even been argued that Article 143 may be interpreted to require the denouncing State "to fulfill all its obligations under the OAS Charter, including its obligations to

[64] E Benz, 'The Inter-American Court's Advisory Function Continues to Boom – A few comments on the requests currently pending' (*EJIL: Talk!*, 25 November 2019) <https://www.ejiltalk.org/the-inter-american-courts-advisory-function-continues-to-boom-a-few-comments-on-the-requests-currently-pending/> accessed 15 December 2019.

[65] See similarly eg Art 127 of the Rome Statute of the International Criminal Court 1998, which expressly states that "A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued."

respect democracy, before its … withdrawal can take effect".[66] This is evidently an issue of treaty interpretation with which the Court could provide assistance.

As noted above, the general international law position on the effects of a treaty withdrawal is set out in Article 70 of the VCLT, which provides:

> 1) Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: (a) Releases the parties from any obligation further to perform the treaty; (b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

It is our submission that the denunciation provision of the OAS Charter should be interpreted consistently with this rule, and with the overriding objective of the OAS Charter to ensure the protection of human rights. This has two implications.

First, until the effective date of the denunciation (two years from written notice), the substantive obligations of the OAS Charter (including its human rights obligations) remain binding on the denouncing State. This is consistent with the practice of the Court in relation to the (later withdrawn) decision to denounce the ACHR by Trinidad and Tobago.[67]

Second, the "obligations arising from the present Charter" which require fulfilment before a State ceases to belong to the OAS should be interpreted to include secondary obligations arising from breaches of the OAS Charter prior to the effective date of denunciation. A breach of the OAS Charter would, under international law, give rise to secondary obligations under the law of state responsibility, which may include the obligation to provide reparations to those harmed by the breach. As this Court has recognised, these obligations should not be extinguished by the denunciation coming into effect.[68]

A further aspect of this issue is discussed in **Section 6** below.

4.2. Other Obligations

An OAS Member State may be a party to a range of other international or regional human rights treaties. The Court may, consistently with the limits on its advisory jurisdiction, wish to clarify the question of the legal effect of a denunciation of the OAS Charter under Article 143 on the status of such human rights treaties.

As noted and discussed in **Section 3** above, **Annex 3** to these observations includes a list of American regional human rights treaties and protocols, as well as of the 18 'core' human rights treaties and optional protocols as determined by the Office of the United Nations High Commissioner for Human Rights.[69] The list of instruments includes a number of Inter-American regional human rights treaties, beyond the ACHR. These contain their own provisions on denunciation. The denunciation of the ACHR should not therefore affect the applicability of these

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[66] AF Perez, 'Democracy Clauses in the Americas: The Challenge of Venezuela's Withdrawal from the OAS' (2017) 33 American University International Law Review 391.

[67] *Hilaire v Trinidad and Tobago*, Judgment of 1 September 2001 (Preliminary Objections), Ser C No 80.

[68] *Caesar v Trinidad and Tobago*, Judgment of 11 March 2005 (Merits, Reparations and Costs), Ser C No 123.

[69] <https://indicators.ohchr.org/> accessed 15 December 2019.

treaties. It appears that at least one of these treaties is, however, only open to ratification or accession by Member States of the OAS.[70] It is unclear what effect denunciation of the OAS Charter should have on the status of such treaties. The Court may wish to consider and articulate whether treaties whose membership is limited to OAS Member States are automatically denounced through the denunciation of the OAS Charter, or whether these treaties remain independently applicable unless and until denounced in accordance with their specific provisions on denunciation.

Most of the Inter-American human rights treaties noted in **Annex 3** are, however, open for accession by non-OAS Member States.[71] Under these treaties, membership of the specific human rights instrument is clearly not interdependent with OAS membership status, and denunciation of the OAS Charter should not affect the status of the treaty. The point is not, however, dealt with expressly in the text of these treaties, and the Court may wish to provide an authoritative determination to clarify the point.

A State which has effectively denounced the OAS Charter will also remain subject to customary international law human rights obligations, which may also be influenced by the American Declaration, for the reasons discussed in **Section 3** above. Although articulation of the substance of customary international law does not itself fall within the advisory jurisdiction of the Court, the Court may wish to confirm as a matter of treaty interpretation the point that the OAS Charter does not extinguish customary international law, and thus customary obligations will continue to apply to a State which has denounced the OAS Charter.

[70] Inter-American Convention on Protecting the Human Rights of Older Persons, Art 37. The Inter-American Convention Against All Forms of Discrimination and Intolerance is unclear but is arguably open to accession by non-OAS Member States: Art 18.

[71] See, for example, Inter-American Convention to Prevent and Punish Torture, Art 20; Inter-American Convention on Forced Disappearance of Persons, Art 18; Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, Art 17; Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, Art 8. As noted above, the Inter-American Convention Against All Forms of Discrimination and Intolerance is unclear but is arguably also open to accession by non-OAS Member States: Art 18.

5. Question 3, Part 1

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?

This Question concerns the obligations of the OAS Member States where a situation of serious and systematic violations of human rights occurs in a State which has denounced the ACHR and OAS Charter. The rules of state responsibility in international law do contemplate that, in limited situations, a serious breach of certain rules of international law may give rise to obligations on all States. There is a potential issue here in relation to the advisory jurisdiction of the Court, because these obligations arise from breaches of peremptory norms (jus cogens norms) rather than from breaches of a human rights treaty, and thus do not fall directly under the jurisdiction *ratione materiae* of the Court.

However, the OAS Charter does establish obligations on Member States which may be relevant (further set out above in **Section 3.2**), including under Article 45:

> The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms:
>
> a) All human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security;

A question which may arise for interpretation by the Court is what this agreement "to dedicate every effort" entails where a serious and systemic violation of human rights arises in a non-Member State. One possible interpretation would be that it requires that each Member State should take reasonable action to protect human rights and to try to bring to an end the violation, in accordance with their rights and obligations under general international law. The meaning of Article 45 would then turn on the rights and obligations of States under general international law. If the Court were to adopt this interpretation of Article 45, it would be within the advisory jurisdiction of the Court to explain what obligations arose under general international law, because this would be an indirect reliance on general international law to inform a process of treaty interpretation (see similarly **Section 2** above) of a provision of the OAS Charter. OAS Member States may be parties to other human rights treaties which could similarly be interpreted to require performance of the obligations set out in the general international law of state responsibility, to ensure respect for the human rights protected by the treaty.

The following analysis sets out the general international law rules governing obligations on States arising from serious breaches of peremptory norms, in case this will be of assistance to the Court in formulating its response to this Question. It examines (i) the regime of state responsibility; (ii) the conditions for an obligation to be established under this regime; and (iii) the nature of the obligations which are established.

5.1. Regime of State Responsibility For 'Serious and Systemic' Violations of Peremptory Norms

International law regarding the consequences that arise when States breach their international obligations is reflected in the Articles on the Responsibility of States for Internationally Wrongful Acts ('ARSIWA'). While the ARSIWA are not a binding source of law,[72] they have generally been considered to reflect customary international law,[73] and they (or earlier drafts of the Articles) have been referred to approvingly in the decisions of international courts.[74] The acceptance of the ARSIWA as reflecting customary international law (including in respect of its treatment of peremptory norms) can be seen in the approving comments of States in the General Assembly. For example, the United Kingdom has expressed the opinion that:

> States generally have accepted the draft articles in their current form. At present, the draft articles reflect an authoritative statement of international law and have been referred to by international courts and tribunals, writers and, more recently, domestic courts. […] Interestingly, reliance on the draft articles is not restricted to generally accepted provisions. As is seen in section III, reference has also been made to more controversial articles, including those concerning countermeasures and violation of peremptory norms.[75]

In the same report Norway (on behalf of the Nordic Countries) also indicated their acceptance of the ARSIWA as reflecting customary international law on State Responsibility:

> The draft articles have in a few years since their adoption become the most authoritative statement available on questions of State responsibility. The draft articles express to a large extent customary law in the matter.[76]

As a final point Germany noted in their comments that their local courts had referred to these articles, and finally concluded that:

> […T]he International Law Commission draft articles on the responsibility of States for internationally wrongful acts, […] are a useful statement of customary international law.[77]

The above statements go some way to showing that there is at least some international acceptance of the ARSIWA as being reflective of customary international law. It should also be noted that while the provisions in Art 40 and 41 are considered controversial by some, this has not stopped

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[72] J Crawford and S Olleson 'The Continuing Debate on a UN Convention on State Responsibility' (2005) 54 ICLQ 959.

[73] Ibid, 968.

[74] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, 87, para 62; *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Jurisdiction and Admissibility) ICJ [1984] ICJ Rep 558, Dissenting Opinion of Judge Schwebel, 607-8, para 74; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 583, Dissenting Opinion of Judge Higgins, para 5; M Ragazzi, *The Concept of International Obligations Erga Omnes* (OUP 2000) 14.

[75] UNGA 'Report of the Secretary-General 62/63' (2007) UN Doc A/62/63, 6.

[76] Ibid, 3.

[77] Ibid, 17.

them from being accepted as reflecting customary international law by some countries[78] as well as being referred to by international courts.[79]

Generally, the law on state responsibility gives each State an *entitlement* to enforce its rights against a State that has breached international obligations owed to that State, rather than creating an *obligation* on the innocent State to enforce those rights.[80] This position is different with regard to serious and systematic breaches of peremptory (*jus cogens*) norms, which are subject to special rules set out in Articles 40-41 of the ARSIWA.[81] These are discussed below.

5.2. Conditions for an Obligation to Arise under ARSIWA Article 41

The obligations found in Art 41 of ARSIWA are only triggered when there is (i) a breach of a peremptory (*jus cogens*) norm, that is (ii) serious in terms of its scale and character.[82]

5.2.1. Peremptory Norms of International Law

Jus cogens norms (sometimes also called 'peremptory norms' or 'non-derogable norms') are rules of international law which are recognised as having a higher status than other rules of international law. Not all 'human rights' are accepted as being *jus cogens* norms.[83] The existence of a category of *jus cogens* norms is now firmly established, and there is substantial agreement on some of the key implications of a norm being identified as *jus cogens*. However, there remains significant disagreement as to how a norm of *jus cogens* should be identified, and which norms have this status in international law.

The VCLT identifies a peremptory norm as:

> a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character[84]

The special nature of these norms is tied to the importance of the fundamental and superior values[85] they are seen to protect.[86] One effect of the elevated status of peremptory norms in

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[78] Ibid, 15-16.

[79] *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory* (Advisory Opinion) [2004] ICJ Rep 219, Separate Opinion of Judge Koojimans, 231-232, paras 40-43; *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18 of 17 September 2003 (IACtHR), Ser A No 18, Concurring Opinion of Judge Trindade, para 70.

[80] ARSIWA, Arts 42 and 48.

[81] Similar rules have also been adopted by this Court, establishing obligations to cooperate in preventing and punishing violations of peremptory norms of international law: see *Case of Goiburú et al. v Paraguay*, Judgment of 22 September 2006 (Merits, Reparations and Costs), Ser C No 153, discussed below in **Section 7**.

[82] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) ILC Yearbook, vol II part 2 ('*ARSIWA Commentaries*'), 110.

[83] E Criddle and E Fox-Decent 'Human Rights and Jus Cogens' in *Fiduciaries of Humanity: How International Law Constitutes Authority* (OUP 2016) 77, 78.

[84] VCLT, Art 53.

[85] M Shaw, *International Law* (CUP 2017) 93.

[86] *Prosecutor v Furundzija* (Judgement) ICTY-98-17/1-T, para 153.

international law is that the threshold for gaining this status is high.[87] This has led to what has been referred to as a rule of 'double acceptance' with regards to identifying *jus cogens*.[88] A norm must be proven to be a generally accepted rule of international law, in the same way as customary international law, and further recognised by the international community as being a higher norm from which no derogation is possible.[89] Alternatively, it is sometimes argued that *jus cogens* norms refers to those rules that are so fundamental to the community of States that they form the foundation of the entire international legal system – the rules without which the international community as it is conceptualised at the relevant time, would not exist.[90]

There is no definitive list of peremptory norms, but the following have been widely recognised, including in some instances by this Court, as possessing this status:

- the prohibition of genocide;[91]
- the prohibition of torture;[92]
- the prohibition of slavery;[93]
- the prohibition of racial and potentially other forms of discrimination;[94]
- the prohibition on the use of force in international relations (other than in self-defence or with UN Security Council authorisation);
- the principle of self-determination.[95]

5.2.2. Serious Breach

For obligations to arise under Article 41 of the ARSIWA, it is also necessary that the breach of a peremptory norm be serious.[96] There is some assistance as to what constitutes a serious breach in

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[87] MW Janis, 'Nature of Jus Cogens' (1988) 3 Connecticut Journal of International Law 359, 362.

[88] E de Wet, 'Jus Cogens and Obligations *Erga Omnes'* in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 541, 542.

[89] Ibid.

[90] MW Janis, 'Nature of Jus Cogens' (1988) 3 Connecticut Journal of International Law 359, 363.

[91] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Further Request for Indication of Provisional Measures: Order) [1993] ICJ Rep 407, Separate Opinion of Judge ad hoc Lauterpacht, para 100; *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v Rwanda)* (Jurisdiction and Admissibility, Judgment) [2006] ICJ Rep 6, 32 para 64.

[92] *Landaeta Mejías Brothers et al. v Venezuela. Preliminary Objections* (Merits, Reparations and Costs) Judgment of 27 August 2014, Ser C No 281, 44 para 111.

[93] IACHR, *James Terry Roach and Jay Pinkerton (United States),* Case 9647, Report 3/87, 22 September 1987, para 54.

[94] *"Article 55 of the American Convention on Human Rights"*, Advisory Opinion OC-20/09 of 29 September 2009, Ser A No 20, 58, para 54.

[95] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970) (Advisory Opinion) [1971] ICJ Rep 67, Separate Opinion of Vice President Ammoun, 89-90; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion), 25 February 2019, Separate Opinion of Judge Robinson.

[96] *ARSIWA Commentaries*, 113.

Article 40(2) which refers to a "gross or systematic" failure by the responsible State to comply with its obligations. It follows that responsibility under Article 40 is reserved for (a) situations where the breach of a peremptory norm is part of a large scale, organised and deliberate effort, or (b) situations where the effect or nature of the breach amounts to a "direct and outright assault" on the values the rule aimed to protect.[97]

It is noted in the Commentaries to the ARSIWA that various considerations such as the intent to violate the norm, the scope and number of individual violations, and the gravity of consequences for victims are important in determining whether a breach is serious.[98] Essentially the point is to limit the scope of these provisions to only the most serious violations of *jus cogens*.[99]

5.3. Obligations under ARSIWA Article 41

Article 41 of ARSIWA distinguishes the severity of a serious breach of an obligation arising under a peremptory norm of international law from other kinds of violations by establishing that third State obligations arise from breaches of this nature.[100] Article 41 comprises three paragraphs. Paragraphs 1 and 2 prescribe legal obligations on States while paragraph 3 provides that the obligations contained in the first two paragraphs are without prejudice to the content of responsibility contained in the other chapters of Part 2 or, as it were, to any other consequences arising under international law.

5.3.1. Duty of Cooperation

Paragraph 1 of Article 41 provides that "States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40." According to the Commentary to Article 41, all States are subject to the duty of cooperation irrespective of whether they have been individually affected by the serious breach.[101] The duty of cooperation is a positive duty. As such, States must take certain action to cooperate to bring to an end a serious breach. The Commentary adds that the cooperation shall be collective among all States ("joint and coordinated").

Article 41 does not specify what measures States should take in order to comply with the obligation set out therein. However, the Commentary provides that the measures must be lawful and that States may choose measures according to the circumstances of a given situation. Examples of cooperative measures could potentially include (non-exhaustively) retorsive sanctions, criminal prosecutions, and extraditions.[102] The mechanisms which are available could also potentially include the exercise of jurisdiction by national courts, an issue discussed further in **Section 7** below.

Article 41 also remains silent in respect of the form the cooperation should take. However, the Commentary contemplates institutionalised and non-institutionalised forms of cooperation. For example, States could structure their cooperation with and/or within international organisations

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[97] Ibid.

[98] Ibid.

[99] Ibid.

[100] E Cannizzaro, *The Present and Future of Jus Cogens* (Sapienza University Editrice 2015) 136.

[101] *ARSIWA Commentaries*, 113.

[102] A Bird, 'Third State Responsibility for Human Rights Violations' (2011) 21 EJIL 883, 888.

like the United Nations or the OAS. States could also multilaterally agree to take lawful measures to bring to an end a serious breach.

5.3.2. Duties of Abstention

Paragraph 2 of Article 41 provides that "No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation." Thus, the second paragraph comprises two distinct but related obligations, collectively termed duties of abstention.

The first limb of Article 41(2) is the duty of non-recognition.

The duty of non-recognition applies to all States irrespective of whether any injured State waives or recognises a situation as lawful.[103] It is not entirely clear from the ICJ's Advisory Opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* whether States are individually under the duty of non-recognition or whether the responsibility falls on the international community as a whole.[104]

The Commentary provides that the duty of non-recognition extends to "situations" created by "serious" breaches in the sense of Article 40. This encapsulates the duty not to recognize *as lawful* the result of a serious breach.[105] The example provided by the Commentary includes the "attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples."[106] The Commentary further provides that acts of non-recognition include acts beyond the formal recognition of a situation resulting from a serious breach by a State that would imply recognition of that situation as lawful.[107]

The duty of non-recognition is reproduced in a suite of international instruments and case law. Inter-American regional references to the duty of non-recognition include the 1933 Saavedra Lamas Pact ("contracting parties…will not recognise any territorial arrangement which is not obtained by pacific means, nor the validity of the occupation or acquisition of territories that may be brought about by force of arms.").[108] Other examples include the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (1970) ("No territorial acquisition resulting from the threat or use of force shall be recognized as legal").[109]

There are numerous instances of collective State non-recognition of a serious breach of the right of self-determination and from the prohibition of racial discrimination.[110] The first instance in

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[103] *ARSIWA Commentaries*, 115.

[104] E Cannizzaro, *The Present and Future of Jus Cogens* (Sapienza University Editrice 2015)

[105] J Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) ('*Brownlie's Principles*') 574-6.

[106] *ARSIWA Commentaries*, 114.

[107] Ibid.

[108] Anti-war Treaty of Non-aggression and Conciliation (adopted at Rio de Janeiro, 10 October 1933) Art 2.

[109] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV).

[110] S Talmon, 'The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?' in C Tomuschat and J-M

which the International Court of Justice referred to the obligation of non-recognition was in the advisory opinion of 1971 in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*.[111] The Court advised that the presence of South Africa in the territory of Namibia was illegal. It further stated that the duty not to recognise the situation as lawful included both to refrain from express and implied endorsements, including in particular any dealings with the Government of South Africa which might imply such recognition.

The ICJ reaffirmed the obligation of non-recognition in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, referring to the consequences of a serious breach listed in Article 41, albeit without explicit reference to it. In its opinion, the ICJ considered the consequences for third States as a result of Israel's breach of its international legal obligations to respect the right of self-determination of the Palestinian people following Israel's construction of the wall in the Occupied Palestinian Territory. It was the Court's view that:

> all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.[112]

However, there is no State practice as yet with regards to the duty of non-recognition arising from a serious breach of other *jus cogens* norms, such as the "prohibitions of slavery and slave trade, genocide, torture and other cruel, inhuman or degrading treatment, crimes against humanity, or the basic rules of international humanitarian law."[113]

The second limb of Article 41(2) prohibits States from aiding or assisting the violating State to maintain the situation arising from a serious breach.

Thouvenin (eds) *The Fundamental Rules of the International Legal Order* (Brill 2006) Ch 6; A Bird, 'Third State Responsibility for Human Rights Violations' (2011) 21 EJIL 883, 889.

[111] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16.

[112] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 159.

[113] S Talmon, 'The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?' in C Tomuschat and J-M Thouvenin (eds) *The Fundamental Rules of the International Legal Order* (Brill 2006) Ch 6.

6. Question 3, Part 2

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,

2. What mechanisms do member States of the OAS have to enforce those obligations?

This Question invites the Court to consider the mechanisms available to OAS Member States to enforce the human rights obligations of non-OAS Member States. (Paragraph 51 of the Request makes it clear that the references to "those obligations" in Question 3, Part 2, should be understood in this way, and not as the obligations referred to in Question 3, Part 1.)

This submission considers two issues: (i) the possible availability of the enforcement mechanisms under the ACHR and OAS Charter; (ii) other potential enforcement mechanisms.

6.1. Enforcement Mechanisms under the ACHR and OAS Charter

The ACHR and OAS Charter establish enforcement mechanisms that include the Commission and the IACtHR. The Member States of the OAS could take recourse to the possibility of inter-State communications to the Commission and the Court before any withdrawal from the ACHR becomes effective.

The Commission's competence to receive inter-State communications regarding violations of human rights is set out in Articles 45-47 of the ACHR. The principal rules governing the jurisdiction of the Court are set out in Articles 61-2. The Court may only hear a case upon acceptance of the Court's jurisdiction. This acceptance can be declared unconditionally or with a limit to a specific time period or specific cases (Article 62(2) ACHR). However, once a State has accepted the Court's jurisdiction, it cannot withdraw its acceptance without denouncing the ACHR as a whole.[114]

For those Member States of the OAS that are not parties to the ACHR, the Commission is still authorised to adopt recommendations on alleged violations of human rights.[115] This procedure can be initiated by an inter-State communication. This is set out in Article 20(b) of the Statute of the Commission. Importantly, these matters cannot be referred to the IACtHR.

After a State has withdrawn from the ACHR and OAS, the ability of remaining Member States to have recourse to the legal enforcement mechanisms under those treaties is limited. This section examines the remaining enforcement mechanisms under those treaties. First, it will examine the ability of States to bring proceedings before the Inter-American Court. The ability to do so varies according to the time that proceedings are brought. The first part of this section sets out what the Project submits is the uncontroversial proposition that States may bring proceedings before the Court in the one-year period between a Denouncing State's notification of withdrawal from the ACHR and that withdrawal taking effect. The second part of this section sets out the ability of States to bring proceedings before the Court after the withdrawal becomes effective, in respect of a Denouncing State's *continuing obligations*. The third part considers the competence of the Court

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[114] *Ivcher Bronstein v Peru*, Judgment of 24 September 1999 (Competence) Ser C No 54, paras 40, 46, 50; *Constitutional Court v Peru*, Judgment of 24 September 1999 (Competence) Ser C No 55, paras 39, 45, 49.

[115] IACHR, *James Terry Roach and Jay Pinkerton (United States),* Case 9647, Report 3/87, 22 September 1987, paras 46-49; O De Schutter, *International Human Rights Law - Cases, Materials, Commentary* (3rd edn, CUP 2019) 1007.

and Inter-American Commission in respect of human rights violations which occur after the Denouncing State's withdrawal from the treaty takes effect.

For the purpose of these submissions, it is assumed that other jurisdictional requirements are satisfied.

6.1.1. Competence of IACtHR over Proceedings Commenced Before Withdrawal Takes Effect

According to Article 78(1) ACHR, the denunciation of the ACHR takes effect one year after the Secretary General of the Organization has been given notice by the Denouncing State. It is only at the point at which a State's withdrawal from the Convention takes effect that the Inter-American Court may cease to have jurisdiction over a State which has recognized the Court's jurisdiction. This follows both from general international law[116] and the Court's own jurisprudence on the particular position under the ACHR.[117]

The general position under international law is that a State's withdrawal from the jurisdiction of an international court does not deprive a court of jurisdiction over proceedings which have been initiated prior to that withdrawal coming into effect.[118] In the *Nottebohm* case, the International Court of Justice held that a withdrawal from a court's jurisdiction did not deprive it of jurisdiction over proceedings which had already been commenced prior to the date at which the withdrawal came into effect:

> Once the Court has been regularly seised, the Court must exercise its powers, as these are defined in the Statute. After that, the expiry of the period fixed for one of the Declarations on which the Application was founded is an event which is unrelated to the exercise of the powers conferred on the Court by the Statute, which the Court must exercise whenever it has been regularly seised and whenever it has not been shown, on some other ground, that it lacks jurisdiction or that the claim is inadmissible…. [A]n extrinsic fact, such as the subsequent lapse of the Declaration, by reason of expiry of the period or by denunciation, cannot deprived the Court of the jurisdiction already established.[119]

The IACtHR adopted the same position in *Hilaire v Trinidad and Tobago*. In this case, the Commission submitted the case to the Court on 25 May 1999. On 26 May 1999, Trinidad and Tobago's denunciation of the ACHR took effect. The Court held that it had jurisdiction over the case because the facts occurred prior to the denunciation taking effect:

> The facts, to which the instant case refers, occurred prior to the effective date of the State's denunciation. Consequently, the Court has jurisdiction, under the terms of

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[116] For recent practice on this in similar circumstances, see the uncontroversial assumption of jurisdiction by the Court of Justice of the European Union over claims against the United Kingdom submitted to it in the period between the UK's notification of withdrawal and that withdrawal taking effect: eg Judgment of 10 December 2018, *Wightman*, C- C621/18.

[117] For example *Hilaire v Trinidad and Tobago*, Judgment of 1 September 2001 (Preliminary Objections), Ser C No 80, para 28.

[118] J Collier and V Lowe, *The Settlement of Disputes in International Law* (OUP 1999) 152. On the practice of the ICJ they write: 'it is clear that a State cannot withdraw a declaration after the Court has been seised of a case so as to deprive it of jurisdiction'.

[119] *Nottebohm Case (Liechtenstein v Guatemala)* (Preliminary Objections) [1953] ICJ Rep 111, 122-123.

> Articles 78(2) and 62(3) of the Convention, to entertain the present case and render a judgment on the State's preliminary objection.[120]

The Court's decision would also have been justified under the *Nottebohm* rule.

Thus, other States Parties to the ACHR may commence proceedings before the Inter-American Court prior to the date upon which a Denouncing State's withdrawal takes effect.

6.1.2. Competence of Court Over Proceedings Commenced After a Denouncing State's Withdrawal Takes Effect

It is submitted that the Inter-American Court also has competence to hear applications submitted *after* a denunciation of the treaty takes effect, in respect of *continuing obligations*. This proposition is derived from both a textual and purposive interpretation of Articles 62(3) and 78(2) ACHR, and has been affirmed in the Court's jurisprudence.[121]

Under Article 78(2) ACHR:

> a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation.

On closer inspection of the language used, Article 78(2) ACHR provides for continuing obligations more broadly than simply obligations under human rights provisions. It applies to 'the obligations contained in this Convention *in respect of acts that may constitute* a violation of those obligations' (emphasis added). The focus on obligations in respect of *acts* is wide enough to encompass secondary obligations in respect of those acts, and indeed wide enough to encompass *all* obligations under the Convention in respect of those acts. The obligation is continuing to the extent that the obligation arises (1) before the withdrawal takes effect, (2) is an obligation which arises under the Convention, and (3) arises in respect of acts which may constitute violations of other obligations in the Convention. These necessarily include secondary obligations of cessation and reparation, which arise from acts that constitute violations of the Convention.

The provision is framed more broadly, in such a manner as to envision continuing obligations in respect of proceedings before the Court and Commission. It applies to obligations in respect of acts that '*may* constitute' ('pudiendo constutir') violations. This formulation clearly envisions a situation where violations of the Convention are disputed or have not been finally determined. It is only sensible for this possibility to have been provided for if the scope of continuing obligations includes procedural obligations and/or the provision envisages jurisdiction for the Court.

Under Article 62(3) ACHR, the Court's jurisdiction extends to:

> all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize *or have recognized* such jurisdiction[.] (emphasis added)

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[120] *Hilaire v Trinidad and Tobago*, Judgment of 1 September 2001 (Preliminary Objections), Ser C No 80, para 28.

[121] *Caesar v Trinidad and Tobago*, Judgment of 11 March 2005 (Merits, Reparations and Costs), Ser C No 123 – here the case was submitted to the Court on 26 February 2003, after the denunciation of Trinidad and Tobago had taken effect.

The Court's jurisdiction is thus not limited to cases where there is an existing declaration *in force*. Rather, there must have been a previous recognition (for example, by declaration under Article 62(1) ACHR), which is no longer in force. To construe it otherwise – only to apply to existing declarations – would make the phrase just mean 'recognize'. The words 'or have recognized' would be superfluous, a result contrary to an effective reading of the words of Article 62(3) ACHR. Thus, the Court's jurisdiction was intended to apply in cases even after a declaration has been withdrawn, which necessarily (according to the jurisprudence of the Court noted above) means after the ACHR has been denounced.

The interpretation—which so far has been based predominantly upon a textual analysis—is shown to be correct when one considers the Convention's object and purpose and the principle of effectiveness. As this Court has said of the Convention and other human rights treaties:

> their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.[122]

The Convention ought to be interpreted in a manner which takes account of the special nature of human rights obligations.

The Court has noted that the dispute settlement provisions of the ACHR, in particular the judicial enforcement mechanisms, are 'fundamental to the operation of the Convention's system of protection'.[123] As such, the effectiveness of the Convention also extends to procedural protections:

> [The jurisdictional] clause, essential to the efficacy of the mechanism of international protection, must be interpreted and applied in such a way that the guarantee that it establishes is truly practical and effective, given the special nature of human rights treaties[..] and their collective enforcement.[124]

Interpretation of the Convention must ensure the integrity of the Convention as a whole. The Project submits that the integrity of the Convention is undermined where Article 78(2) and 62(3) ACHR are interpreted as allowing the Denouncing State to avoid the Court's jurisdiction after the effective withdrawal from the ACHR for alleged violations of human rights obligations which have occurred prior to the date of effective withdrawal.[125] In particular, given that the question is specifically concerned with 'systemic and serious' violations, a different interpretation would mean that a State systemically violating human rights would be allowed to unilaterally place its own acts prior to the effective withdrawal outside of the regime of judicial oversight.

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[122] *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82, 24 September 1982, Ser A No 2, para 29.

[123] *Constitutional Court v Peru*, Judgment of 24 September 1999 (Competence), Ser C No 55, para 35.

[124] Ibid, para 36.

[125] This would include breaches which commenced prior to the date of effective withdrawal and were of a continuing nature, even if the breach extends in time beyond the date of effective withdrawal. In such cases, the Court's jurisdiction would, it is submitted, extend to the entirety of the breach.

6.1.3. Competence of Court Over Proceedings Regarding Alleged Violations of Human Rights Occurring After the Denouncing State's Withdrawal Takes Effect

The interpretation advanced above does not in any way impair the meaningful exercise of a State's right to withdraw from the Convention. The scope of jurisdiction contended for only extends to a State's obligations in effect until the date of effective withdrawal and the *continuing obligations* with regard to judicial oversight indivisibly linked to these obligations. This submission does not extend to arguing for judicial oversight of acts occurring, in their entirety, after the date of withdrawal. It ought to be unobjectionable, therefore to any *bona fide* Denouncing State. Indeed a *bona fide* Denouncing State would not, it is submitted, act for the purpose of suppressing 'the enjoyment or exercise of the rights and freedoms recognized in the Convention or to restrict them to a greater extent than is provided for therein', contrary to Article 29(a) ACHR. It could not effectuate its withdrawal, in accordance with the requirements of good faith, in order to deprive judicial enforcement of acts which violate the rights and freedoms in the Convention, and the provisions governing its withdrawal cannot be interpreted in such a manner as to enable it do so.[126]

Thus, other State Parties to the ACHR may not bring cases before the Court with regard to alleged violations of human rights protected under the Convention that occurred after the withdrawal took effect.

6.2. Other Potential Enforcement Mechanisms

This part considers the potential mechanisms for OAS Member States to enforce the human rights obligations of non-OAS Member States under general international law. This part of Question 3 could be viewed as raising concerns regarding the permissible scope of the advisory jurisdiction of the Court. As noted in **Section 5** above, it is possible, however, that the Court might interpret Article 45 of the OAS Charter to require that each Member State should take reasonable action to protect human rights and to try to bring to an end the violation, in accordance with their rights and obligations under general international law. The meaning of Article 45 would then turn on the rights and obligations of States under general international law. If the Court were to adopt this interpretation of Article 45, it would be within the advisory jurisdiction of the Court to explain what rights arose under general international law, because this would be an indirect reliance on general international law to inform a process of treaty interpretation (see similarly **Section 2** above) of a provision of the OAS Charter. The following analysis sets out the general international law rules and mechanisms governing the rights of States in the relevant circumstances, in case this will be of assistance to the Court in formulating its response to this Question.

6.2.1. Enforcement of Human Rights Obligations That Form Part of Customary International Law and Jus Cogens Through ARSIWA

Where serious and systemic violations of human rights occur under the jurisdiction of a State that has denounced the American Convention and the OAS Charter, the remaining Member States may enforce the violated human rights obligations based on the regime set out in the ARSIWA. In the following section, the relevant rules for the invocation of responsibility after an effective withdrawal under the ARSIWA will be established. It is submitted that the remaining Member States may invoke responsibility under Article 48 ARSIWA as the human rights obligations still binding upon the Denouncing States under customary international law have the character of *erga omnes* obligations – obligations owed to the international community as a whole. Article 45 of the

[126] On the relevance to good faith to the withdrawal from international adjudication, see C McLachlan, 'The Assault on International Adjudication and the Limits of Withdrawal' (2019) 68 ICLQ 499.

OAS Charter may further *require* the invocation of such responsibility, at least in some circumstances, if it is interpreted to establish an obligation to exercise the rights that a state has under international law in order to protect human rights.

The ARSIWA allow two different groups of States to invoke responsibility in two defined ways. Responsibility is invoked either by an 'injured State' as set out in Article 42 ARSIWA or by a State or a group of States that are not 'injured' by an internationally wrongful act but allowed to invoke responsibility based on the conditions set in Article 48 ARSIWA.

States are 'injured States' if the obligation that has been breached was either owed to that State individually (Article 42(a) ARSIWA), or owed to a group of States that the State belongs to and the invoking State is either specially affected (Article 42(b)(i) ARSIWA) or the breach of the obligation 'is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation' (Article 42(b)(ii) ARSIWA).

Article 48(1) ARSIWA allows any State to invoke responsibility for an internationally wrongful act if:

> a. the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
>
> b. the obligation breached is owed to the international community as a whole.

The human rights obligations binding upon the Denouncing State under customary international law, including under *jus cogens* norms, are not (or at least not only) owed to another State individually but instead to the individuals under a State's jurisdiction. Absent connections of foreign nationality, no other State is specially affected by serious and systemic violations of human rights by a Denouncing State. If the human rights of one or more foreign nationals are affected, their State of nationality may however consider this a violation of obligations owed specifically to that State, and may exercise rights of diplomatic protection. Diplomatic protection is the right of a State to take certain actions against another State on behalf of its nationals who have been treated in a manner contrary to the other State's international obligations. The available means under diplomatic protection are most relevant to individuals (see **Section 7** below).

Where a State violates the human rights of its own nationals, the remaining Member States of the OAS may rely on Article 48(1)(b) ARSIWA as human rights obligations under customary international law are not only owed to individuals but also to the international community as a whole.[127] An invocation of responsibility under Article 48(1)(b) ARSIWA is limited in Article 48(2) ARSIWA to the claim of cessation and assurances of non-repetition and performance of reparation in the interest of any injured State or of the beneficiaries of the obligation breached (in this case, the individuals whose human rights have been violated).

An invocation of responsibility may be made in various forms. It could include the commencement of proceedings in any available court or tribunal – it is possible, for example, that proceedings could be commenced before the International Court of Justice against a State which had denounced the ACHR and OAS Charter, if the denouncing State has consented to the jurisdiction of the ICJ in a relevant manner (such as through an optional clause declaration or compromissory

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[127] *Case concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1963) (Belgium v Spain)*, [1970] ICJ Rep 3, para 34.

clause) or accepts the jurisdiction of the court on an *ad hoc* basis.[128] Depending on its basis of jurisdiction, the ICJ may be able to determine the rights and responsibilities of States under both treaties and customary international law.[129] In the event that the denouncing State has not given consent to the jurisdiction of the ICJ, the court may nevertheless be competent to give an advisory opinion under Article 65 of the Statute of the International Court of Justice at the request of a body authorized by the UN Charter concerning "any legal question".

Certain UN Human Rights Treaties also include the possibility of filing inter-State complaints with the respective treaty body,[130] sometimes under the precondition of acceptance of a signatory State of the Committee's competence in that respect.[131] In 2018, the Committee on the Elimination of All Forms of Racial Discrimination has received three inter-State complaints.[132] Where an OAS Member State has such mechanisms available, Article 45 of the OAS Charter could potentially be interpreted as establishing an obligation to exercise them, at least in certain circumstances.

The ARSIWA addressed the question whether countermeasures may be taken by States invoking responsibility under Article 48 ARSIWA but held that State practice is too scarce to determine which kinds of measures are regarded as lawful.[133] This view has been disputed by academia[134] but the question remains unresolved.[135]

6.2.2. Enforcement Through International Criminal Law

According to Article 53(1) of the Rome Statute of the International Criminal Court ('ICC'), the Office of the Prosecutor of the ICC may open an investigation into a situation in a Member State of the Rome Statute, if information is transferred to her which gives the "reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed" and if the investigation is admissible under Article 17 Rome Statute and "serve[s] the interests of justice". If the remaining Member States and the denouncing State are parties to the Rome Statute and determine the situation to constitute a breach of international criminal law, the Rome Statute in Article 14 allows State Parties to refer their findings to the Prosecutor. Recent State practice in the Americas can be seen in the referral of Argentina, Canada, Chile, Colombia, Paraguay, and Peru

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[128] *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v Rwanda)* [2006] ICJ Rep 6, 125; C Tomuschat, 'Article 36' in A Zimmermann, CJ Tams, K Oellers-Frahm, and C Tomuschat (eds), *Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2017) 712–798.

[129] Art 38 (1) ICJ Statute; see M Wood, 'Customary International Law and Human Rights' (2016) European University Institute Academy of European Law, Working Paper AEL 2016/03, 3; BD Lepard, 'Why Customary International Law Matters in Protecting Human Rights' (*Völkerrechtsblog*, 25 February 2019) <https://voelkerrechtsblog.org/why-customary-international-law-matters-in-protecting-human-rights/> accessed 15 December 2019.

[130] For example, the International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965, entered into force 4 January 1969), Art 11(1).

[131] See eg the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984 entered into force 26 June 1987), Art 21(1).

[132] See <https://www.ohchr.org/EN/HRBodies/CERD/Pages/InterstateCommunications.aspx> accessed 15 December 2019.

[133] *ARSIWA Commentaries*, 139.

[134] L Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community' in Crawford, Parlett et al, (eds), *The Law of International Responsibility* (OUP 2010) 1147; M Dawidowicz, 'Third-party countermeasures: A progressive development of international law?' (2016) 29 QIL Zoom-in 3, 11.

[135] J Crawford, *State Responsibility: The General Part* (CUP 2013) 703.

with regard to the situation in Venezuela on 26th September 2018.[136] If Article 45 of the OAS Charter were interpreted to require OAS Member States to exercise available rights under international law in protection of human rights, at least in some circumstances this could establish an obligation on such States to refer situations involving serious and systemic violations of human rights to the Prosecutor.

6.2.3. Enforcement Through Non-Judicial Mechanisms

In reaction to serious and systemic violations of human rights, the remaining Member States could voice their concerns within the UN structures. While the Human Rights Council does not allow for inter-State complaints, the UNGA, the UNSC, the Human Rights Council, the Secretary-General and the High Commissioner for Human Rights can mandate inquiries and fact-finding missions and investigation. Such undertakings are mandated by a resolution of the respective body.[137] As noted above, there is an argument that the OAS Charter could, at least in some circumstances, require OAS Member States to utilise such mechanisms in response to serious human rights violations.

In international law, States are permitted to adopt what would ordinarily be unlawful measures in response to a breach of obligations owed to them, as a means of pressuring the State responsible for the prior breach of international law to bring its conduct into compliance with its obligations. These are known as counter-measures, and they are subject to strict limitations under Articles 49 to 53 of the ARSIWA. These provisions contemplate that it is the injured State which is adopting these measures. Such measures could be adopted as a mechanism for the enforcement of human rights where, for example, a State violated the human rights of a foreign national, thereby also violating its obligations to the State of nationality of the victim – the State of nationality could adopt counter-measures as a means of pressuring the wrongdoing State into ceasing the violations. As noted above, the ARSIWA are deliberately silent on the possibility that States other than the injured State could also adopt what would ordinarily be unlawful measures, in response to a breach of international law by another State, as a means of collective enforcement.[138] These are known as collective counter-measures. While their lawfulness in international law is a contentious question, they are sometimes adopted in practice, and could be another means through which Member States of the OAS were able (and could arguably be viewed as obliged under the OAS Charter, at least in some circumstances) to enforce human rights obligations against a non-OAS Member State.

Where large scale human rights breaches are committed or threatened, it has increasingly been suggested that the international community has a responsibility to protect these populations.[139] In 2005 the UNGA recognized a responsibility of the international community "to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity".[140] The UNSC reaffirmed this "responsibility to protect" in a legally binding resolution[141] and authorized

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[136] N Ortiz, 'Understanding the State Party Referral of the Situation in Venezuela' (*EJIL Talk!*, 1 November 2018) <https://www.ejiltalk.org/understanding-the-state-party-referral-of-the-situation-in-venezuela/> accessed 15 December 2019.

[137] For a list of all International Commissions, Fact-finding Missions and Other Investigations and the establishing resolutions, see the Research Guide provided by the United Nations Library and Archives at Geneva, <libraryresources.unog.ch/c.php?g=462695&p=3162764> accessed 15 December 2019.

[138] ARSIWA, Art 54.

[139] AJ Bellamy, 'Introduction: A Defense of R2P' in AJ Bellamy (ed), *Responsibility to Protect: A Defense* (OUP 2015) 2.

[140] UN General Assembly, Resolution 60/1 (2005): World Summit Outcome (2005) 139.

[141] UN Security Council, Resolution 1674 (2006): Protection of Civilians in Armed Conflict S/RES/1674, 4.

the use of force (Chapter VII of the UN Charter) by UN Member States against Libya[142] on this basis to prevent further atrocities against the local population. Although this legal construct has been criticized,[143] the OAS Member States could appeal to the UN Security Council to authorise protective enforcement measures against a State responsible for serious human rights breaches.

[142] UN Security Council, Resolution 1973 (2011) S/RES/1973, 4.

[143] Summary of critics in S Brockmeier, O Stuenkel and M Tourinho, 'The Impact of the Libya Intervention Debates on Norms of Protection' (2016) 30 Global Society 113, 114.

7. Question 3, Part 3

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, *3. To what mechanisms of international protection of human rights can persons subject to the jurisdiction of the denouncing state take recourse?*

This Question invites the Court to articulate the mechanisms available to individuals subject to human rights violations at the hands of a State which has denounced the ACHR and OAS Charter. It raises further concerns regarding the issue of the scope of the Court's advisory jurisdiction *ratione materiae*, as discussed in **Section 2** above.

One aspect of this Question which is relatively uncontroversial in jurisdictional terms is the question of whether individuals may have continued recourse to mechanisms under the Inter-American human rights system. This question, which is considered first below, requires interpretation of the treaties underlying those mechanisms.

The second part of this section considers other individual enforcement mechanisms in international law. Some of these derive from international human rights treaties which are potentially within the scope of the Court's advisory jurisdiction. The mechanisms available to individuals to enforce obligations under these instruments are potentially matters of treaty interpretation, which it would be open to the Court to clarify. The mechanism of diplomatic protection is also potentially within the scope of the advisory jurisdiction of the court, based on the argument presented in **Section 6.2** above.

7.1. Competence of Inter-American Commission and Court to Receive Individual Applications Following Denunciation

The Commission is not only entitled to receive inter-State communications (see **Section 6.1** above), but also petitions from individuals and certain NGOs.[144] In the case of a State denouncing some of the treaties of the human rights system, the question of the competence of the Commission to receive these individual petitions arises. Article 19(a) of the Statute of the Commission elaborates its competence "to act on petitions and other communications" under Articles 44-51 ACHR where there are alleged violations of human rights by a Member State of the ACHR. This mechanism, under which the Commission may also ultimately refer cases to the Court, is not generally available for claims against non-ACHR State parties. For the reasons set out in **Section 6.1** above, however, it may be available for cases where the breach of obligations occurred prior to the effective date of denunciation of the ACHR.

Article 20(b) of its Statute gives the Commission the competence "to examine communications submitted to it" and "to make recommendations" to the government of an OAS Member State which is not a party to the ACHR. If a State has denounced the ACHR but is still an OAS Member State, the Commission can – and in fact has frequently in the past[145] – adopt an opinion on a

[144] Rules of Procedure of the Commission, Art 23; Statute of the Commission, Arts 19-20; ACHR, Arts 44-51; OAS Charter, Arts 53, 106.

[145] For example: IACHR, *James Terry Roach and Jay Pinkerton (United States),* Case 9647, Report 3/87, 22 September 1987, para 17; IACHR, *Walker v United States*, Petition 12.049, Report 62/03, 10 October 2003, para 36.

petition filed by an individual under the procedure laid down in Article 50 of the Rules of Procedure of the Commission.

7.2. Other Individual Enforcement Mechanisms

7.2.1. Individual Claims Before Other International Dispute Settlement Bodies

Traditionally in public international law, individuals have no right to bring claims,[146] except as permitted by particular courts or treaties. Exceptionally, some human rights treaties expressly give individuals the right to file an individual communication to a certain dispute resolution mechanisms. Mention should first be made of those regional human rights treaties in the inter-American system which give individuals a right to petition the Commission.[147] To the extent that a non-ACHR or non-OAS Member State remains a party to these treaties (see **Section 4.2** above), the Court is arguably competent to receive petitions from individuals under the jurisdiction of Member States of the respective treaty, in accordance with the general procedures of the Commission and the Court.

Under the universal human rights system, some UN treaty bodies monitoring human right treaties may receive communications from individuals alleging violations.[148] Such mechanisms are generally activated through accession to an optional protocol or through a voluntary declaration. These individual application mechanisms may therefore open a mechanism of recourse to individuals, if the denouncing State is party to the respective treaty and if it has opted into the individual complaint procedure by becoming party to the protocol or by making the necessary declaration.[149] The Human Rights Council also allows complaints by individuals, groups or non-governmental organisations.[150] The individual complaint procedure serves "to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances."[151]

7.2.2. Individual Claims Before Domestic Courts

Individual victims of human rights abuses may in some cases have recourse to one or more domestic courts, which are not necessarily limited to those of the place of violation. Recourse to domestic courts is not, *stricto sensu*, an "international mechanism", but domestic enforcement is one of the principal methods by which international human rights norms are enforced by individuals. This is particularly so in cases where either no international body with a right of

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[146] A Clapham, 'The Role of the Individual in International Law' (2010) 21 EJIL 25.

[147] Inter-American Convention on Forced Disappearance of Persons, Arts XIII, XIV; Inter-American Convention on the prevention, punishment and eradication of Violence against Women (Convention of Belém do Para), Art 12; Inter-American Convention Against All Forms of Discrimination and Intolerance, Art 15(i); Inter-American Convention on Protecting the Human Rights of Older Persons, Art 36.

[148] Human Rights Committee (CCPR), Committee on Elimination of Discrimination against Women (CEDAW), Committee against Torture (CAT), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Rights of Persons with Disabilities (CRPD), Committee on Enforced Disappearances (CED), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Rights of the Child (CRC).

[149] A Seibert-Fohr, 'The Human Rights Committee - Legacy and Promise' in G Oberleitner, *International Human Rights: Human Rights Institutions, Tribunals and Courts - Legacy and Promise* (Springer 2017) 1-17, para 13.

[150] Human Rights Council, Res 5/1 of 18 June 2007, A/HRC/RES/5/1.

[151] Ibid, para 85.

individual petition is available and/or where there is a situation of serious and systemic human rights violations.

First, the denouncing State continues to have obligations to permit individuals to bring claims of human rights violations before its own domestic courts. Insofar as the State only denounces the ACHR, the State will continue to be obliged to provide for access to justice under the OAS Charter, interpreted in light of the American Declaration. Article XVIII of the Declaration provides that: "Every person may resort to the courts to ensure respect for his legal rights". If the State has also denounced the OAS Charter, but continues to be a party to the ICCPR, the right of access to domestic courts remains protected by that Convention.[152] There is also sufficiently strong evidence of a general state practice accompanied by *opinio juris*[153] to suggest that the norm is protected under customary international law,[154] and the Project invites the Court to find accordingly. While effective recourse to domestic courts may be unlikely in a situation of "serious and systemic" human rights violations, affirmation of a denouncing State's obligations to provide access to justice remains important.

Second, it may be possible for individuals to bring criminal or civil proceedings before the courts of States other than the denouncing State, including remaining OAS Member States. Under general international law, an important distinction must be made between (a) a *right* to exercise universal jurisdiction and (b) an *obligation* to do so.

In respect of criminal proceedings, international law places limits on the scope of a State's ability to (i) prescribe and (ii) enforce its criminal law. A State only has a right to prescribe conduct under its criminal law where that conduct falls within certain accepted bases of jurisdiction.[155] Where an offence falls within an accepted basis of jurisdiction, international law's approach to whether a State should prescribe certain conduct as criminal is permissive. The accepted bases of jurisdiction include: territoriality, nationality, the protective principle, passive personality, and universal jurisdiction.[156] The latter category has been defined as:[157]

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[152] Art 14 (right to a fair trial); Art 9 (right to liberty, including judicial oversight). According to the Human Rights Committee, the right to a fair trial includes the right of access to a court: General Comment No 32, UN Doc CCPR/C/GC/32 (2007).

[153] *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3, 74.

[154] See *In the Matter of El Sayed* (Order Assigning Matter to Pre-Trial Judge) STL CH/PRES/2010/01 (15 April 2010) paras 30-32. This Court has gone so far as to suggest it is a 'peremptory norm of international law': *Case of Goiburú et al. v Paraguay*, Judgment of 22 September 2006 (Merits, Reparations and Costs), Ser C No 153, at para 131. Regardless of whether this applies generally, or only where the norm being enforced in domestic proceedings is also peremptory, the proposition that the norm is at least customary is clearly supportable. The notion has been recognized in numerous international Conventions: including, arts 8, 25 ACHR; art 6, ECHR; art 7, ACHPR; art 14, ICCPR. It has been repeatedly asserted in international soft-law instruments, which provides evidence of *opinio juris*: including, art XVIII, ADRDM; art 10, UDHR. The right of access to a Court has been long recognized as part of the 'international minimum standard of treatment for aliens': *Ambatielos (Greece/UK)* (1956) 12 RIAA 83, 111. Moreover, the modern international minimum standard has developed in light of relevant human rights standards: M Paparinskis, *The International Minimum Standard of Treatment and Fair and Equitable Treatment* (OUP 2013) 210.

[155] R O'Keefe, *International Criminal Law* (OUP 2015) para 1.22. The so-called '*Lotus* presumption', deriving from the Permanent Court of International Justice's case of the same name, does not reflect modern customary international law, ibid paras 1.16-1.21.

[156] *Brownlie's Principles*, 441-455; R O'Keefe, *International Criminal Law* (OUP 2015) paras 1.30-1.64.

[157] R O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 Journal of International Criminal Justice 735, 745.

> prescriptive jurisdiction over offences committed abroad by persons who, at the time of the commission, are non-resident aliens, where such offences are not deemed to constitute threats to the fundamental interests of the prescribing state or, in appropriate cases, to give rise to effects within its territory.

In other words, it is a right of extra-territorial jurisdiction which does not fall within one of the other recognized bases of jurisdiction. 'Universal jurisdiction' only applies to a set of crimes, over which customary international law permits a State to apply its prescriptive jurisdiction. These crimes include "the so-called 'core crimes' of customary international law, viz genocide, crimes against humanity, and breaches of the laws of war, and especially of the Hague Convention of 1907 and grave breaches of the Geneva Conventions of 1949".[158] Torture within the meaning of the Torture Convention 1984 is also subject to universal jurisdiction.[159]

A similarly permissive approach to jurisdiction applies in respect of civil laws.[160] Although few States adopt rules asserting universal civil jurisdiction, there is no rule of international law which prohibits a State from asserting it.[161] Although the precise contours of universal civil jurisdiction are less clear than those of its criminal counterpart, it would appear that it permits the bringing of civil claims for serious violations of customary international law, in particular the human rights norms which also apply to universal criminal jurisdiction.[162]

A further question is whether the Member States of the OAS are *obliged* to provide for universal jurisdiction. The general position in international law is unclear. Certain treaties may obligate States to exercise universal jurisdiction. For instance, States parties to the CAT are obliged to exercise criminal jurisdiction,[163] and perhaps also civil jurisdiction,[164] over allegations of torture. The development of the right of access to a court as a human right—i.e. an international obligation owed to individuals—provides a normative basis for asserting that States are obliged to exercise universal jurisdiction over serious human rights violations, at least as a forum of necessity.[165] However, the European Court of Human Rights has held that there is no violation of the right to a fair trial (art 6(1)) where a State fails to exercise universal jurisdiction, on the basis that no customary international norm obliging States to exercise universal jurisdiction exists.[166] The Court may wish to consider whether the Article 45 OAS Charter obligation on all Member States to "dedicate every effort" to the protection of human rights goes further, and creates an obligation

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158 *Brownlie's Principles*, 452. A more limited view of universal jurisdiction was adopted by Judge Guillaume in the *Arrest Warrant Case (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3, Separate Opinion of Judge Guillaume, 44, para 16.

159 See eg *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 3)* [2000] 1 AC 147.

160 *Brownlie's Principles*, 455-459.

161 See App No 51357/07 *Naït-Liman v Switzerland*, Judgment of 15 March 2018, which held that it was a matter within the margin of appreciation of ECHR member states.

162 *Brownlie's Principles*, 459-460.

163 Convention Against Torture, Art 4.

164 Convention Against Torture, Art 14; General Comment No. 3 of the Committee against Torture, 19 November 2012, UN Doc CAT/C/GC/3, at para 22. But see *Jones v Saudi Arabia* [2006] UKHL 26; App Nos 34356/06 and 40528/06 *Jones v United Kingdom*, Judgment of 14 January 2014 (ECtHR).

165 A Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 BYIL 187, 219-30.

166 App No 51357/07 *Naït-Liman v Switzerland*, Judgment of 15 March 2018.

(at least in some circumstances) to exercise the international legal right to establish and exercise universal jurisdiction.

The Inter-American Commission on Human Rights has recommended that all members of the OAS "adopt such legislative and other measures as may be necessary to invoke and exercise universal jurisdiction in respect of individuals in matters of genocide, crimes against humanity, and war crimes."[167] The Commission did not go so far as to state that universal jurisdiction was obligatory in these cases. This Court has appeared to go further in the *Goiburú* case, where it stated, in respect of a State party to the ACHR's obligations under arts 8, 25, that:

> in a context of systematic human rights violations, the need to eliminate impunity establishes an obligation for the international community to ensure inter-State cooperation to this end. Impunity will not be eliminated unless it is accompanied by the determination of the general responsibility (of the State) and the specific criminal responsibility (of its agents or of individuals), which are complementary. Access to justice is a peremptory norm of international law and, as such, gives rise to obligations *erga omnes* for the States to adopt all necessary measures to ensure that such violations do not remain unpunished, *either by exercising their jurisdiction to apply their domestic law and international law to prosecute and, when applicable, punish those responsible*, or by collaborating with other States that do so or attempt to do so.[168]

The facts in that case concerned a failure on the part of the State responsible for the violations to seek extradition and thereby fulfil its obligations to ensure a fair trial within a reasonable time. It was not strictly concerned with universal jurisdiction, but rather with the *aut dedere aut judicare* obligation. However, the scope of the Court's conclusions—that "the mechanisms of collective guarantee established in the American Convention, together with the regional and universal international obligations on this issue, bind the States of the region to collaborate in good faith in this respect, either by conceding extradition *or prosecuting those responsible for the facts of this case on their territory*"[169]—are broad enough to cover an obligation on Member States to the ACHR to provide for universal jurisdiction. The Project invites the Court to clarify the scope of its *dicta* in *Goiburú*, and state whether there exists under international law in general, or for Member States of the ACHR or OAS under arts 8, 25 and XVIII respectively, an obligation to provide for universal jurisdiction. As noted above, Article 45 of the OAS Charter may be relevant in this regard.

In conclusion, where other States provide, in accordance with international law, for either universal criminal and/or civil jurisdiction, it may be possible for individuals to enforce their human rights before the domestic courts of those States.[170]

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[167] IACHR, Recommendations on Universal Jurisdiction and the International Criminal Court (1998) <http://oas.org/dil/Recommendation_of_the_Inter-American_Commission_on_Human_Rights.pdf> accessed 15 December 2019. See also IACHR, Res 1/03 On Trial For International Crimes, 24 October 2003.

[168] *Case of Goiburú et al. v Paraguay*, Judgment of 22 September 2006 (Merits, Reparations and Costs), Ser C No 153, para 131 (emphasis added).

[169] Ibid, para 132 (emphasis added). On the effect of *jus cogens* norms on the exercise of a state's jurisdiction, see also the Court's decision in *Almonacid-Arellano v Chile*, Preliminary Objections, Merits, Reparations and Costs, Ser C No 154, 26 September 2006, para 153.

[170] Although the existence of state immunity might limit the utility of this avenue for individuals: *Jurisdictional Immunities of the State (Italy v Germany; Greece Intervening)* [2012] ICJ Rep 99.

7.3. Diplomatic Protection

If a foreign national is subject to human rights violations in a State which has denounced the ACHR and OAS Charter, they may have recourse to diplomatic protection. Strictly speaking, diplomatic protection is a means of vindicating inter-State rights rather than a mechanism for individual redress. Classically, the Permanent Court of International Justice explained that:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its rights to ensure, in the person of its subjects, respect for the rules of international law.[171]

Rights of diplomatic protection may be asserted through diplomatic communications or through formal mechanisms such as courts or tribunals. Because this is ultimately a right of the State, it will be within the discretion of the State of nationality whether such a claim is espoused. As the International Court of Justice has explained:

> The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular claim[172]

This right of a State to exercise diplomatic protection on behalf of its own nationals has been further elaborated by the International Law Commission in its Draft Articles on Diplomatic Protection of 2006.[173]

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[171] *Mavrommatis Palestine Concessions Case* [1924] PCIJ Rep Ser A, No 2.

[172] *Barcelona Traction, Light and Power Co. Case (Belgium v Spain)* [1970] ICJ Rep 44, para 79.

[173] UNGA, 61st Session, Supplement No 10, UN Doc A/61/10, 16.

8. Conclusion

It is our sincere hope that the analysis above may be of assistance to the Court in its important work. Should it be useful to the Court, we would welcome the opportunity to clarify or elaborate on any aspect of the above.

Annex 1 – About the UCL Public International Law Pro Bono Project

The UCL Public International Law Pro Bono Project ('PILPBP') is a community of collaborative learning and practice based at the UCL Faculty of Laws, which operates in service of human rights protection – supporting members of civil society and international organisations in their important protective missions, while enhancing the educational experience of our students.

The PILPBP is comprised of three 'generations' of law scholar: Two Co-Directors, who are Professors in the UCL Faculty of Laws; several PhD Coordinators, all of whom are also Teaching Fellows in the UCL Faculty of Laws; and LLM Researchers – in 2019-20 we have sixteen LLM student participants. The PILPBP is not a formal part of the curriculum, relying entirely on volunteer participation. We partner with leading international non-governmental and inter-governmental organisations, providing legal research, analysis and advice to help address some of the world's most pressing and difficult human rights challenges. We also contribute to the work of international courts and tribunals, such as the Inter-American Court of Human Rights, through the submission of *amicus curiae* briefs. Students work together in teams, based on a particular project, with a PhD Coordinator and Co-Director directing their research and managing each project and the relationship with our partner organisations.

The PILPBP began as a PhD and LLM student initiative, inspired by public-spiritedness in an era of serial global crises. With Faculty support, it has become an innovative collaborative educational enterprise, connecting our LLM and PhD students with UCL Laws academic staff, enhancing the skills development of our students and putting them at the centre of research-based learning. But it remains, perhaps most importantly, an outward-facing project – driven by the highest traditions of public service in academia in striving to make a positive contribution to the world.

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Annex 3 – Regional and International Human Rights Treaties

The following is a non-exhaustive list of regional and international human rights protocols and treaties which may, depending on State party status, set out human rights obligations applicable to States which have denounced the ACHR or both the ACHR and OAS Charter.

Additional protocols to the ACHR

- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)
- Protocol to the American Convention on Human Rights to Abolish the Death Penalty

Regional human rights treaties

- Inter-American Convention to Prevent and Punish Torture
- Inter-American Convention on Forced Disappearance of Persons
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belem do Para)
- Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities
- Inter-American Convention on Protecting the Human Rights of Older Persons
- Inter-American Convention Against All Forms of Discrimination and Intolerance

International instruments

- International Convention on the Elimination of All Forms of Racial Discrimination
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

- International Convention for the Protection of All Persons from Enforced Disappearance

- Optional Protocol to the Covenant on Economic, Social and Cultural Rights
- Optional Protocol to the International Covenant on Civil and Political Rights
- Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty
- Optional Protocol to the Convention on the Elimination of Discrimination against Women
- Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict
- Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
- Optional Protocol to the Convention on the Rights of the Child on a communications procedure
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Optional Protocol to the Convention on the Rights of Persons with Disabilities