

ZOOM IN

The question:

Should I stay or should I go? The effects of denunciation of the American Convention and the Inter-American Court of Human Rights' Advisory Opinion 26/2020

Introduced by Lucas C. Lima

There is little disagreement that the advisory function of the Inter-American Court of Human Rights (IACtHR) has been growing and engaging on a more active role in recent times. Since 2014, the Court has ruled on rights and guarantees of children in the context of migration, the relationship between human rights and environment, gender identity, and equality and non-discrimination to same-sex couples and the institution of asylum. Other important issues are now under the consideration of the Court's advisory jurisdiction, such as the political right to re-election and trade union rights. These examples reveal the Court's growing willingness to use its advisory power – an important modality of judicial action – especially in a human rights system that allows the direct request of advisory opinions from States.

At least two consequences can be drawn from the increase in IACtHR's advisory activity. On the one hand, the American Convention, a 'living instrument' for the protection of human rights in the American continent, finds an opportunity for its updating and evolutive interpretation. At the same time, States receive an authoritative direction to implement the rights inscribed in the Convention that they have to apply in their domestic legal orders. It is well known that the guidance of advisory opinions can often have a robust domestic impact in the continent's countries.¹ On the other hand, when exercising its advisory function, the Inter-American Court incorporates into its normative arsenal a series of pronouncements that it does

¹ Cf. AA Cançado Trindade, 'The Humanization of Consular Law: The Impact of Advisory Opinion No. 16 (1999) of the Inter-American Court of Human Rights on International Case-Law and Practice' (2007) 6 Chinese J Intl L 1, 16.

not refrain from using later in the contentious cases.² For some, the Court goes even too far. They reproach that the it acts in a quasi-legislative function, with the risk of unchaining resistance and pushback from States in the continent.

While the examples mentioned above dealt directly with the interpretation of individual rights protected by the American Convention on Human Rights, the 26th Opinion, issued on November 9, 2020, focuses on a problem regarding the very participation of States in the system. To some extent, it is also about resistance and discontent: the effects of denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the consequences for these State's human rights obligations. Put differently, the Court needed to explain what happens if a State decides to trigger Article 78 of the American Convention or Article 143 of the Treaty establishing the Organization of the American States (OAS) Charter, which permit the withdrawal from the treaties. Both rules prescribe a transition period (one year and two years, respectively). Still, several remaining questions nudged Colombia to ask the Court for an advisory opinion. QIL decided to examine some of the most pressing issues of the answers provided by the Court in Opinion OC-26/20.

Colombia's request for an Advisory Opinion cannot be read outside the specific context of backlash and resistance to the Court. As explained in its request, '[r]ecent events in the region show that a situation may occur at any time whereby a State in the continent may pursue actions to disengage itself from its obligations in the terms of the American Convention and of the OAS Charter'. As a matter of fact, in 2019 the system was targeted with some criticism from member States and this follows a long history of threatening of withdrawal.³ It is difficult to avoid the impression that the Opinion was particularly connected with Venezuela's situation, whose departure from the

² Eg *Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v Argentina* (Merits, Reparations and Costs) IACtHR Series C No 400 (6 February 2020) paras 201 ff. See, in this regard, LC Lima 'The Protection of the Environment before the Inter-American Court of Human Rights: Recent Developments' (2020) 3 *Rivista Giuridica dell'Ambiente* 495.

³ See, for instance, J Contesse, 'Resisting the Inter-American Human Rights System' (2019) 44 *Yale J Intl L* 179, 237; X Soley, S Steininger, 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights' (2018) 14 *International J L in Context* 237, 257; A Huneu, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 *Cornell Intl L J* 493, 533.



Convention took effect in 2003. On this matter, judge Eugenio Raúl Zaffaroni raised a dissonant voice and considered the Opinion inadmissible – for dealing with a situation too close to a State's crisis – and inappropriate – for dealing too intimately with political questions.

Against this backdrop and despite the specific criticism, OC-26/20 appears as a full-fledged study on treaty law and touches upon several thorny issues. To sum up some of its most relevant conclusions, the IACtHR confirmed that the obligations under the Convention and the Charter remain intact in the respective transition periods; there are no retroactive effects concerning the denunciation of the treaties; the Inter-American Commission continues to have monitoring powers in the case of the denunciation of the Convention and; customary law and *jus cogens* rules (the Court took the occasion to identify some) remain unbroken if a State decides to leave the Convention or the OAS.

Additionally, as to the specific procedures required for the withdrawal, the IACtHR recognizes that there are no specific common domestic rules within the States to be followed for the denunciation to take effect. Nonetheless, the Court observed that 'the denunciation of a human right treaty must be subject to a pluralistic, public and transparent debate within the States, as it is a matter of great public interest because it implies a possible curtailment of rights and, in turn, of access to international justice'.⁴ Consequently, the Court seems to suggest that the principle of 'parallelism of forms' should be taken into consideration and, 'if a State has established a constitutional procedure for assuming international obligations it would it be appropriate to follow a similar procedure when it seeks to extricate itself from those obligations'.⁵ The Court's approach in this regard seems to be an additional contribution to the law of the treaties, which increments the difficulties of leaving the treaties through another procedural rule.

But the Court did not just clarify the obligations of the State withdrawing from the Convention and the OAS Charter. The Court invoked the notion of 'collective guarantee mechanism' to rule also on the obligations of the remaining parties. Indeed, the Inter-American Court has developed an interesting mechanism that calls upon states that remain parties to the treaties to

⁴ *Denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the consequences for State human rights obligations*, Advisory Opinion OC-26, IACtHR, Series A No 26 (9 November 2020) para 64.

⁵ *ibid.*



exercise a series of actions arising from their *erga omnes partes* obligations regarding both the protection of human rights in the State leaving the Convention and diplomatic efforts to bring back the withdrawing State to the system.

To shed light on some of the problems pointed out, QIL asked three contributors to address three different questions that complement each other and offer an overview of what is at stake either for states in case of a party's withdrawal from the American Convention but also, and more generally, as to the IACtHR's advisory function. Cecilia Bailliet addresses judge Zaffaroni's dissenting opinion and its attempt to determining the limits of the political function of the Court. Acutely, Bailliet traces the criticism made by judge Zaffaroni to other courts and tribunals and delves into the proper limits of advisory and contentious jurisdiction in international adjudication. Lucas Lixinski tackles the significance of the Court's innovative move in relation to the 'collective guarantee'. Lixinski is adamant in identifying the close relationship between this mechanism and political questions, and the potential consequences for the Court's legitimacy. A last question raised by the Court's reasoning is whether, in order to interpret procedural rules, the Court uses distinct interpretative techniques from the traditional rules of interpretation that it employs in its judicial activity, where the *pro persona* principle plays a leading role. Laurence Burgorgue-Larsen analyses this issue based on the different interpretative techniques already developed by the IACtHR. Interestingly, she detects and elaborates on the emergence of a *pro democratia* principle present in the Advisory Opinion.

The three highlights chosen by the QIL contributors (the overcoming of the limits of the advisory function; the reinforcement of new techniques for interpretation; and the Court's legal techniques to inhibit the withdrawing from the system) leaves one with the impression that OC-26/20 was the Court's response to the wave of criticism it received recently. At the same time that it clarified and guaranteed the protection of human rights by establishing new barriers against the possibility of leaving the system, the resort to the 'collective guarantee mechanism' gives the impression that the Court built a 'safety net' which involved all the participants of the system. What remains to be seen, and this is also an element present in the three contributions, is how the implementation of this opinion will occur, especially in light of the future elections for new members of the Court. Be that as it may, the message the Inter-American Court is sending to the parties to the Convention is clear: if you leave, do not close the door.

