

**The ‘collective guarantee’ of international human rights:  
Creating, reinforcing, and undoing legitimacies  
and mandates between law and politics**

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1. *Introduction*

One of the three questions asked of the Inter-American Court (the Court or IACtHR) in its advisory opinion (the Opinion or OC-26)<sup>1</sup> on the consequences of the denunciation of the American Convention on Human Rights (ACHR)<sup>2</sup> and the Charter of the Organization of American States (OAS Charter)<sup>3</sup> forces the IACtHR to think beyond the immediacy of the formal legal mechanisms of denunciation and analyze the ripple effects of said denunciation to the regional human rights system. Specifically, the IACtHR answered the following question: ‘What international human rights obligations do the Member States of the Organization of American States have in relation to States in the Americas who have denounced the American Convention on Human Rights and the Charter of the Organization of American States?’<sup>4</sup> Because this request for an Advisory Opinion was triggered by the Venezuelan denunciation

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<sup>1</sup> Inter-American Court of Human Rights (IACtHR), ‘Denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the consequences for State human rights obligations (interpretation and scope of articles 1, 2, 27, 29, 30, 31, 32, 33 a 65 and 78 of the American Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States)’ Advisory Opinion OC-26/20 (9 November 2020) Series A No 26 (OC-26).

<sup>2</sup> American Convention on Human Rights ‘Pact of San Jose, Costa Rica’ (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

<sup>3</sup> Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3; amended by Protocol of Buenos Aires (entered into force 27 February, 1970) 721 UNTS 324; amended by Protocol of Cartagena (entered into force 16 November 1988) 25 I.L.M. 527; amended by Protocol of Washington (entered into force 25 September 25, 1997) 33 ILM 1005; amended by Protocol of Managua (entered into force 29 January 1996) 33 ILM 1009.

<sup>4</sup> Advisory Opinion OC-26 (n 1) para 38.3. Note that all direct quotes in this piece are my own translations, since the Court has not, at the time of writing, released an official English version of the advisory opinion.



of these two treaties, a country experiencing a range of political and economic challenges, and in some respects a failing or failed state,<sup>5</sup> the question of whether other states have residual obligations becomes all the more important. Colombia's interest in this specific question can also be understood because it is a neighboring state to Venezuela, and one with a much stronger human rights record and to where a number of Venezuelan refugees are flocking.

In their response to this question, the IACtHR said that there is a system of 'collective guarantee' underlying Inter-American human rights law, and based on the principles of good neighborliness and solidarity.<sup>6</sup> The system, acknowledged in other case law by the Court,<sup>7</sup> means 'a duty of all states to act together and cooperate to protect the rights and freedoms they committed internationally to guarantee through their belonging to the regional organization.'<sup>8</sup> Therefore, if individual states seek to leave the system, it is for others to hold them to human rights law on the basis of the latter states' international obligations. States should rally to defend international human rights in the hemisphere, under the supervision and guidance of the IACtHR.

Underlying this rallying call is a concern with the integrity and viability of the Inter-American Human Rights System, and the question of whether to uphold or overturn its bodies' (particularly the Court's) extensive jurisprudence that sought to dismiss the voluntary character of international human rights law. The Inter-American Commission and Court have over decades relied upon the idea of human rights as a special type of international legal commitment, less (or not at all) contingent upon state voluntarism,<sup>9</sup> as a central pillar of their activities. This position

<sup>5</sup> W Finnegan, 'Venezuela, a failing state' *The New Yorker* (7 November 2016) <[www.newyorker.com/magazine/2016/11/14/venezuela-a-failing-state](http://www.newyorker.com/magazine/2016/11/14/venezuela-a-failing-state)>; S Held, "Failed state": Venezuelan displacement and starvation multiply' *Al Jazeera* (20 August 2019) <[www.aljazeera.com/economy/2019/8/20/failed-state-venezuelan-displacement-and-starvation-multiply](http://www.aljazeera.com/economy/2019/8/20/failed-state-venezuelan-displacement-and-starvation-multiply)>; and K Rapoza, 'Meanwhile, In The Failed State Of Venezuela, Another 'Coup'' *Forbes* (7 January 2020) <[www.forbes.com/sites/kenrapoza/2020/01/07/meanwhile-in-the-failed-state-of-venezuela-another-coup/?sh=6f8f1cb57ab6](http://www.forbes.com/sites/kenrapoza/2020/01/07/meanwhile-in-the-failed-state-of-venezuela-another-coup/?sh=6f8f1cb57ab6)>.

<sup>6</sup> Advisory Opinion OC-26 (n 1) para 163.

<sup>7</sup> IACtHR, *Ivcher Bronstein v Peru*, Competence (24 September 1999) Series C No 54 para 41; and *González et al ("Cotton Field") v Mexico*, Preliminary Objection, Merits, Reparations and Costs (16 November 2009) Series C No 205 para 62.

<sup>8</sup> Advisory Opinion OC-26 (n 1) para 175.4.

<sup>9</sup> *ibid* paras 48-49 and 53.



emboldened these organs to develop their jurisprudence in defense of human rights in the region, and to declare their interpretive approach to be one not tied to states' will, but rather to the *pro persona* principle. In other words, these international legal obligations do not depend on the will of states. But, if states could walk away from them via the legal mechanisms of denunciation, was this pillar made of sand? At stake is therefore the power of Inter-American human rights law to withstand a core attack that could, by attacking this pillar, render the whole system off-balance.

The Opinion, in seeking to resist a fundamental challenge, positions the IACtHR closer to political mechanisms, in an attempt to shore up the Court's hard-gained legitimacy and its even harder-won jurisprudence on the status of international human rights as a source of its legitimacy and authority. The cost of this position is to muddy the waters, as discussed below, and to place the IACtHR in a difficult position in trying to make sense of the ever-fluid boundary between international law and politics. While politics have never been far from the IACtHR's orbit, it over time relied consistently on a 'higher' international legal order to make sense of itself and of states' human rights obligations. Now it seeks to rely on states themselves.

I argue that the Court's opinion in relation to collective guarantees attempts to expand the Court's reach in challenging, but potentially fruitful ways. The idea of collective guarantees, turned from a political to a judicial construct, can help strengthen the IACtHR; it can also further unravel relations between the Court and states that have accepted its jurisdiction. But I show below it is a calculated risk, and one that is almost inevitable given the Court's position in relation to its own legitimacy and mandate in the Americas.

This piece therefore, by focusing on OC-26, queries the role of politics and state cooperation with international judicial institutions as a desirable feature of international adjudication. To do so, I first examine in further detail the idea of collective guarantees articulated in the Opinion. Next, I use this discussion, and particular the dissenters to the Opinion, to query the uneasy place of collective guarantees between law and politics, and what those positions mean for the legitimacy of the Court's self-perceived mandate. Concluding remarks follow.



## 2. *Collective guarantees in Inter-American Human Rights Law*

The question of collective guarantees in Colombia's request for an advisory opinion was framed differently, and in a tone that both set out the stakes of the question more clearly, but also narrowed down its reach. Specifically, Colombia was concerned with states withdrawing from the Inter-American System and the OAS who 'presented furthermore a generalized framework of serious and systematic human rights violations, duly documented by the organs of the [OAS], including the [Inter-American Commission]', and whether 'the need arose to determine if said actions can totally eliminate the international human rights protection of individuals subject to the jurisdiction of the authorities of said state.' Said situation would 'directly affect the protection of human rights in the Americas, a matter in which all OAS Member States have a legitimate interest.'<sup>10</sup>

Therefore, Colombia formulated its question in the following terms:

'C. When there is a framework of serious and systematic human rights violations happening under the jurisdiction of a State in the Americas who has denounced the [ACHR] and the [OAS Charter],

1. What human rights obligations do the remaining OAS Member States have?
2. What mechanisms are available to Member States of the OAS to make these obligations effective?
3. To what mechanisms of international human rights protection can persons subject to the jurisdiction of the denouncing state have recourse?'<sup>11</sup>

The question as originally phrased, therefore, was narrower because of its focus on states where 'serious and systematic' human rights violations were happening and hinted at a concern with the *erga omnes* obligations of neighboring states.<sup>12</sup> The fact that these states were on the same continent and belonged to the same human rights system and regional organization that the perpetrator state had just denounced added urgency and a sense of regional responsibility, potentially rendering those

<sup>10</sup> *ibid* para 2.

<sup>11</sup> *ibid* para 3.C.

<sup>12</sup> *ibid* para 164.

specially affected states. As specially affected states, these countries could owe additional obligations to the organization in terms of ensuring compliance with decisions rendered while the denouncing state was still subject to the OAS and Inter-American human rights bodies (since the denouncing state itself would have no interest in complying with those obligations after its denunciation took effect). Further, especially affected states would potentially have standing, under international law doctrines, to query the responsibility of the denouncing state in fora outside the Inter-American System and the OAS, which would no longer be able to exert authority over the denouncing state. The question also queried the possible rights of victims of human rights violations themselves, which could have shifted the entire OC-26 away from the technical / institutional focus, and back on the mandate of protection of human rights holders.

The Court, however, saw the stakes of the question somewhat differently. It indicated that the 'serious and systematic' wording narrowed down the question unhelpfully, 'as it can be one of the relevant factors to consider in the response, but no necessarily the only one'.<sup>13</sup> And it indicated that, in order to speak to the mechanisms available to states in the region, it was of 'crucial importance to activate the mechanisms of collective guarantee, a concept that underlies the entire Inter-American system'.<sup>14</sup> Finally, it said that, in relation to remedies available to persons subject to the jurisdiction of the denouncing state, it was unable to engage with the question, as doing so would push the Court outside the hemisphere, and towards universal human rights mechanisms, thus exceeding the IACtHR's jurisdiction.

By rewriting this question to the formulation quoted above in the introduction, the Court engaged in two exclusions that focus the question on the more institutional aspects of collective guarantees. First, the IACtHR excluded the context of human rights violations (a move that ostensibly broadens the question); secondly, it excluded remedies still available to potential victims (a move that narrows down the question). Both moves effectively step away from two caveats that were about substantive human rights law (gravity of violations, and access to justice). The Court

<sup>13</sup> *ibid* para 35.

<sup>14</sup> *ibid* para 36.

later returns to the ‘serious and systematic’ issue, though, albeit as only one step to trigger the institutional machinery of collective guarantees.

The Court defines the system of collective guarantees as part of the ‘Inter-American public interest’.<sup>15</sup> The IACtHR articulates it as grounded on Article 65 of the ACHR, which requires the Court to submit an annual report to the OAS General Assembly.<sup>16</sup> The IACtHR in OC-26 sees this mechanism as a pathway to enforcement,<sup>17</sup> and therefore a means for the Court to engage with states and political organs of the OAS in the defense of human rights in the Americas.<sup>18</sup> It also leverages Article 65 in this case to make a plea of support for the work of the Court not just in relation to denunciation, but generally the enforcement of its judgments and decisions on provisional measures and compliance with judgments.<sup>19</sup>

This pathway to enforcement, however, is seldom used by the Court itself, which has its own mechanisms of monitoring compliance with judgments, with the OAS General Assembly acting as a secondary pathway.<sup>20</sup> In other words, the IACtHR uses this connection to the OAS General Assembly as a handy entryway to discuss collective guarantees. This mechanism both helps bring together all elements of the OC-26 (the ACHR, the OAS Charter, and states themselves), and to still keep the Court separate, through the OAS institutional barrier, from the direct will of (individual) states, which would go against its position of the ACHR and international human rights more generally standing above voluntarist international law.

The collective guarantee is more than a (rather weak and underutilized) institutional mechanism in the IACtHR’s eyes, however. It carries with it a duty of states to act jointly and cooperate to protect the rights

<sup>15</sup> *ibid* para 169.

<sup>16</sup> American Convention on Human Rights (n 2) art 65: ‘To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly’s consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations.’

<sup>17</sup> Advisory Opinion OC-26 (n 1) para. 82.

<sup>18</sup> *ibid* para 167.

<sup>19</sup> *ibid* para 168.

<sup>20</sup> As discussed in detail in L Lixinski, ‘Mechanisms of Systemic Change in Regional Human Rights Courts: Swinging the Pendulum between Legitimacy and Impact’ (2019) 8 *Cambridge Intl L J* 60-83.



and freedoms they committed internationally to guaranteeing through their belonging to the regional organization [the OAS], and, in particular, (1) externalize when opportune their observations and objections to any denunciation of the American Convention and / or the OAS Charter that does not withstand scrutiny in light of the democratic principle and affect the Inter-American public interest [...]; (2) guarantee that the denouncing state does not consider itself to be disconnected from the OAS until it has fulfilled the human rights obligations acquired through the multiple protection mechanisms in the framework of their respective competences, and, in particular, those related to the fulfillment of reparations ordered by the Inter-American Court until the conclusion of the proceedings; (3) cooperate to investigate and prosecute serious violations of human rights and thereby eradicate impunity; (4) give international protection in accordance with the international commitments flowing from international human rights, humanitarian, and refugee law, admitting to their territory possible asylum seekers, guaranteeing the right to seek and receive asylum and the respect to the principle of non-refoulement, among other rights, until a lasting solution is found; and (5) to undertake bilateral and multilateral diplomatic efforts, as well as exercise its good offices peacefully, so that those states that have withdrawn from the OAS return to the regional system. This is all without prejudice to the universal or other fora or mechanisms that may apply.<sup>21</sup>

In this obligation-heavy summary of what the system of collective guarantees requires of states, it is worth noting that there are many obligations that do not relate to the request for an advisory opinion at all (such as the obligations in relation to asylum). Further, only one of the five obligations in this summary relates to the enforcement pathway at the crux of collective guarantees, Article 65 of the OAS Charter discussed above. One of the other obligations is institutional (work to get denouncing states back into the OAS), and the other three are substantive obligations, including on the matter of 'serious and systematic' violations of human rights, which the Court deemed was too narrow a caveat to the question proposed by Colombia, but is still part of the answer the IACtHR gives to the question it reformulated.

<sup>21</sup> Advisory Opinion OC-26 (n 1) para 173.

This wide scope of states' obligations in relation to the collective guarantee projects onto individual states, OAS Member States taken collectively, and through the activities of OAS political organs.<sup>22</sup> States have an obligation to cooperate in good faith to maximize the effectiveness (*effet utile*) of international human rights law in the region.<sup>23</sup> The same applies to states in relation to OAS organs, and OAS organs themselves.<sup>24</sup> The collective guarantee is therefore meant to be all-encompassing, and, in addition to creating obligations onto states, it can also expand the Court's own powers. Specifically, the IACtHR seems to seek to be able to scrutinize 'the context and the formal conditions in which the decision to denounce [the ACHR and / or OAS Charter] was made internally and how it corresponds to the established constitutional procedures',<sup>25</sup> followed by 'a substantive examination of the democratic character of the decision to denounce, [...] tied to the good faith of the denunciation [...]'.<sup>26</sup> While that language is framed in the Opinion using the passive voice, and never indicating the subject of the action, it is telling of a reluctance to leave these powers to states themselves, and would be in line with the Court seeking the power to decide itself whether a denunciation of the Convention is legitimate in its own terms.

The Court also says that strict scrutiny is required of denunciations that show special gravity and can affect hemispheric democratic stability, peace, and security, with the consequent general effect on human rights, such as: (1) lack of compliance with the decision made by a protective organ and motivated by a manifest willingness to not meet its international obligations; (2) in the event of indefinite suspension of guarantees or an attempt against non-derogable human rights; (3) in the context of serious, massive, or systematic human rights violations; (4) in the framework of the progressive erosion of democratic institutions; (5) faced

<sup>22</sup> *ibid* para 170.

<sup>23</sup> *ibid* para 165.

<sup>24</sup> *ibid* para 58. Citing IACtHR, *Anzualdo Castro v Peru*, Preliminary Objection, Merits, Reparations and Costs (22 September 2009) Series C No 202 para 77; and *Rodríguez Revolorio et al v Guatemala*, Preliminary Objection, Merits, Reparations and Costs (14 October 2019) Series C No 387 para 135

<sup>25</sup> Advisory Opinion OC-26 (n 1) para 171.

<sup>26</sup> *ibid* para 172.





with a manifest, irregular, or unconstitutional change or rupture of the democratic order, and / or (6) during an armed conflict.<sup>27</sup>

This language, while referring to the ACHR, also applies to the OAS Charter, in the Court's view.<sup>28</sup> States have a particular obligation to make their observations and objections on these matters known, 'so as to activate the collective guarantee.'<sup>29</sup> In other words, states are necessary to activate the collective guarantee. But what the collective guarantee means and requires, and whether it is being successfully met, can, in the IACtHR's view, be scrutinized by the Court itself.

If it is in fact the case that the Court's powers can be enhanced via the collective guarantee mechanism, then what is the nature of the mechanism? Is it a political mechanism of pressure by states, or does it have legal content? For the Court's powers to be scrutinized, the mechanism needs to be legal, but the way in which it is connected to the initiative of states seems to suggest it is political. This question occupied the dissenting judges, and it speaks directly to the mandate and legitimacy of the IACtHR.

### *3. Mandates and legitimacies between law and politics*

The question of whether the collective guarantee is legal or political matters for the Opinion's repercussions in the Americas, and also for thinking about the roles of states as guarantors of international legal obligations that other states owe. As the International Court of Justice considers, for instance, whether the Gambia can bring a case against Myanmar for a violation of the genocide convention in Myanmar against the Rohingya minority,<sup>30</sup> it is worth considering whether states have a legal or political obligation to induce compliance with international law, and

<sup>27</sup> Id., para. 113.

<sup>28</sup> Id., paras. 147 and 158.

<sup>29</sup> Id., para. 112.

<sup>30</sup> International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*. Note that in the Order on Provisional Measures of 23 January 2020 the ICJ indicated that, at least in principle, the Gambia had the right to bring a case on the basis of the *erga omnes partes* doctrine, without needing to make further proof of it being affected by acts against the Rohingya.



the mandates of supervisory organs like international courts and tribunals. Further, should international courts and tribunals have a clear legal mandate, there are also effects on these courts' mandates and legitimacy in relation to states, the 'international community', and international law and legal ordering more broadly.

On the matter of collective guarantee, there were two dissents to OC-26. First, Judge Zaffaroni objected to the entire opinion, by claiming that the IACtHR should not have replied to Colombia's request for an advisory opinion, since the questions clearly had to do with the Venezuelan context. Specifically, he argued that the Court should have refused to engage with these questions because the Venezuelan context is much richer and more complicated than what the Court could hope to capture in the context of an Advisory Opinion, particularly one on technical questions of treaty denunciation.<sup>31</sup> In fact, he suggested that the law 'neutralizes' important political values at stake.<sup>32</sup> Therefore, the Court, by answering the questions, sidestepped important political matters the consequences of which the IACtHR lacked the means to control, meaning it could not control the 'perverse and partial deployment of its opinion', and it could be weaponized itself in the broader political dispute(s) involving Venezuela.<sup>33</sup>

I disagree with Judge Zaffaroni. Most contemporary international adjudication tends to involve very complex disputes, and an international court can often only seize one aspect of it. Sometimes multiple tribunals seize disputes involving the same two countries, and at times the disputes spill over a multiplicity of judicial and political fora.<sup>34</sup> That is just the fragmentation of international law and international legal disputes, a

<sup>31</sup> Advisory Opinion OC-26 (n 1) Dissenting Opinion of Judge E Raúl Zaffaroni para 32.

<sup>32</sup> *ibid* paras 14-18.

<sup>33</sup> *ibid* para 32.

<sup>34</sup> See eg the ongoing dispute between Qatar and the United Arab Emirates, which has already spilled onto the International Court of Justice, the World Trade Organization, and even the International Civil Aviation Organization. For a partial analysis, see C Rossi, 'Game of Thrones: The Qatar Crisis and Forced Expulsions on the Arabian Peninsula' (2018) 7 *Penn State J L & Intl Affairs* 1-52.

well-documented and -studied phenomenon.<sup>35</sup> The inevitable framing,<sup>36</sup> with its gains in focus and losses in context, is a natural consequence of international adjudication in history and even more so today. Therefore, while I appreciate the loss of context he deplores, it is legitimate in my view for the Court to seize on the matter through the prism of international human rights law, which is well in line with its mandate.

What Judge Zaffaroni's dissent does, however, is to underscore the murkiness of the relationship between law and politics, which is particularly useful in the context of collective guarantee. Unlike other parts of OC-26, which have to do with legal-technical elements of treaty denunciation, 'collective guarantee' is a notion that requires states, through a political organ of the OAS, to guarantee the implementation, effectiveness, and enforcement of international legal obligations, and, as discussed above, it potentially also expands the IACtHR's powers. It is therefore useful to query the role of politics in the making and shaping of international tribunals' mandates and legitimacy.

In this respect, the partially dissenting opinion of Judge Pazmiño Freire, which dissents from the majority precisely on the matter of collective guarantee, is enlightening. He connects his discussion of the collective guarantee precisely to a need to further the effectiveness of IACtHR judgments.<sup>37</sup> He acknowledges that collective guarantee creates obligations among states parties, but says that the concept is primarily about the effectiveness of the ACHR organs (the Inter-American Commission and the Court), which nonetheless do not give these organs a mandate to

<sup>35</sup> International Law Commission, 'Study Group on the Fragmentation of International Law. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi' UN Doc A/CN.4/L.682 and Add.1 and Corr. 1 (2006); M Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern L Rev* 1-30; and J Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 271 *Recueil des cours de l'Académie de Droit International* 101-382.

<sup>36</sup> A Nollkaemper, 'Framing Elephant Extinction' (2014) 3 *ESIL Reflections* <<https://esil-sedi.eu/framing-elephant-extinction/>>; and A van Aaken, J-P Elm, 'Framing in and through International Law' in A Bianchi, M Hirsch (eds), *International Law's Invisible Frames – Social Cognition and Knowledge Production in International Legal Processes* (OUP forthcoming) <<https://ssrn.com/abstract=3678551>> or <<http://dx.doi.org/10.2139/ssrn.3678551>>.

<sup>37</sup> Advisory Opinion OC-26 (n 1) Dissenting Opinion of Judge L Patricio Pazmiño Freire para 1.



interfere with the internal affairs of a state.<sup>38</sup> Therefore, states should not be the enforcers of the collective guarantee, because they would inevitably interfere with one another's internal affairs, which would in his view unduly politicize an internal decision as to whether to remain a party to or denounce a treaty.<sup>39</sup> Therefore, states should not be allowed to enforce the collective guarantee on their own, at least inasmuch as it refers to compliance with international human rights law obligations, nor via the OAS General Assembly, lest its 'legitimate political role [be] misconfigured under the appearance of legality, [or] instrumentalized through ambiguous legal categories'.<sup>40</sup> Only the IACtHR can exercise those functions.<sup>41</sup>

What Judge Pazmiño suggests seems sound: the concept has clear legal consequences, and therefore should be discussed by a legal organ. In this sense, he goes even further than the Court did in the majority opinion, by giving the IACtHR an even greater (at least inasmuch as it does not depend on the initiative by states or the OAS General Assembly) mandate in relation to the collective guarantee.<sup>42</sup> Rather than ostracizing the political organs of the OAS, however, what Judge Pazmiño suggests is that they become more like the Court at least in the area of supervision of compliance with and enforcement of IACtHR judgments. Specifically, he suggests a closer examination of the Council of Europe model,<sup>43</sup> and the participation of civil society in the OAS General Assembly debates on enforcement and compliance.<sup>44</sup>

What Judge Pazmiño misses in his views, however, is that, without the link to politics, the Court has no clear basis to supervise the legal content of the collective guarantee. Further, the Court misses an opportunity to rally its supporters and allies, not only to help wrestle the departing state into compliance with human rights obligations, but, most importantly, to keep other states in the hemisphere, who may be pondering the same, from leaving the system. Multiple states in the region, not

<sup>38</sup> *ibid* para 8.

<sup>39</sup> *ibid*.

<sup>40</sup> *ibid* para 12.

<sup>41</sup> *ibid*.

<sup>42</sup> *ibid* para. 15.

<sup>43</sup> Also discussed in Lixinski (n 20).

<sup>44</sup> Advisory Opinion OC-26 (n 1) Dissenting Opinion of Judge L Patricio Pazmiño Freire para 17.

only Venezuela, have been critical of the IACtHR's mandate overreach, and it being inconsiderate of domestic political contexts and domestic consensus. Argentina, Brazil, Chile, Colombia and Paraguay even issued a joint statement to this effect.<sup>45</sup> Therefore, despite Judge Pazmiño's objections, it seems like the IACtHR is being more mindful of the importance of states parties not only as the perpetrators of human rights violations, but as integral cogs for the Court to implement its mandate of enhancing human rights protection in the hemisphere.

Seen as an institutional mechanism, the collective guarantee is necessarily political, as it requires the interaction of multiple OAS and ACHR organs. It is also the version of the collective guarantee that is most clearly legitimate, as it is clearly grounded on both the OAS Charter and the ACHR Article 65. However, it lacks clear content and it can be easily co-opted, much in the way political human rights organs are co-opted, as a means to dodge the enforcement of human rights, rather than facilitate it.<sup>46</sup> If the collective guarantee is seen as a substantive concept, on the other hand, grounded on international law, it is less legitimate, and disconnected from the states and OAS organs who need to actually do the work of collectively guaranteeing human rights in the hemisphere, particularly in relation to states that have gone beyond the reach of the Court by denouncing the relevant treaties. Once the formal tether of treaty obligation has been severed, it is somewhat naïve to expect a substantive concept, without a clear institutional machinery, to gain purchase in demanding compliance. In this sense, even a politicized and potentially messy institutional machinery is better than an idealized but unachievable notion of legal collective guarantee.

Further, it is unrealistic to expect any law, let alone international (human rights) law to be fully divorced from politics. As the IACtHR acknowledged in the Opinion, the collective guarantee, and human rights more generally, are closely tied to democracy, as a 'ruling principle and interpretive guideline'.<sup>47</sup> Which is all to say, in order to make this obligation into more than a paper tiger, the Court needs to 'sully itself' in the relatively muddy waters of political engagement with the states parties it

<sup>45</sup> As discussed in Lixinski (n 20) 83.

<sup>46</sup> Critiques of the United Nations Human Rights Council in this respect abound. See eg R Freedman, 'The United Nations Human Rights Council: More of the Same?' (2013) 31 *Wisconsin Intl L J* 208.

<sup>47</sup> Advisory Opinion OC-26 (n 1) para 72.

distrusts. The collective guarantee obligation cannot be interpreted as being exclusively legal, it also has unavoidable political components. If the IACtHR treats this political component as simply a threshold question, and divorces engagement with states from the substantive legal obligations it outlines to these states, it risks facing resistance to compliance at the back end of the process, and perhaps even more so than it currently faces, since these obligations will not be as clear-cut as obligations that states owe to persons clearly under their jurisdiction. Shifting the application of human rights obligations from states to those under its control (therefore, a clear vertical line) but rather from states to other states outside the first states' control (therefore, a horizontal line). In order to overcome this hurdle, the Court needs to accept that this obligation, while having clear legal content, is more contingent on politics than the Court's habitual engagement with international human rights obligations.

Therefore, the Court seems to willingly seek a balance between international law and (domestic or regional) politics in OC-26. That choice positions the Court outside of its preferred source of legitimacy, which tends to be focused on an abstract understanding of international law, rather than the concerns of states.<sup>48</sup> But it also allows the IACtHR to impact upon international human rights law more effectively, which is a key objective of any advisory opinion and that can reach all American states, in the Court's view.<sup>49</sup> After all, the exercise of collective guarantee allows 'the settlement of disputes within the framework of the essential purposes of the OAS, which are to attain peace and justice in the American states, nurture their solidarity, strengthen their cooperation and defend their sovereignty, territorial integrity and independence, with respect to the principle of non-intervention [...].'<sup>50</sup> It seems like a welcome step in an uncharted direction for the IACtHR, and a pathway to respond to criticisms from states about mandate overreach while saving face, and, arguably, performing mandate overreach, which is not without its own inherent risks.

<sup>48</sup> L Lixinski, 'The Consensus Method of Interpretation by the Inter-American Court of Human Rights' (2017) 3 *Canadian J Comparative and Contemporary L* 65-95.

<sup>49</sup> Advisory Opinion OC-26 (n 1) paras 30-31.

<sup>50</sup> *ibid* para 174.

#### 4. *Concluding remarks*

In OC-26, attempting to shed light on the legal consequences of the legal-technical mechanism of treaty denunciation, the Inter-American Court entered the ever-volatile terrain of the region's politics, and the extent to which not only the Court, but also states and even OAS organs, have a responsibility for human rights compliance in the region. By calling states and the OAS to task, the Court also expanded its own mandate, lending legal content to an otherwise relatively vague cooperation concept.

The expansion of the Court's mandate directly or indirectly addresses concerns across the region about the IACtHR's mandate overreach. The Court for the first time made a clear pronouncement about its dependence on states and political institutions, which can come a long way in enhancing its legitimacy and the state of human rights across the hemisphere. Therefore, despite the Court traditionally mistrusting states as sources of legitimacy for enhancing human rights in the Americas, at least now it acknowledges that the job cannot be done without them. Treading between law and politics, hopefully states will rise to the challenge.