Interpreting Articles 78 of the ACHR & 143 of the OAS Charter
Is there something special at play when the IACtHR comes to interpreting 'procedural clauses'?

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1. *Introduction*

Interpretation is a fascinating topic for scholars. It has always been at the core of the study of law for the simple and sole reason that when judges interpret norms, they are able to, in effect, become legislators, that is to say if they consider it is an absolute necessity, given – for instance – the context in which the case has evolved and/or the issue at stake. It is this tiny frontier between interpretation and creation which makes the interpretation process so interesting. International judges – as well as constitutional ones – are constantly under the scrutiny of scholars who, analysing their argumentation, are asking themselves: are judges developing an innovative and creative interpretation generating bold results or, are they instead, keeping their function within the strict legal boundaries delineated by the master of the treaties, eg, States Parties?[1] Those very

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[1] We know the academia landscape is, roughly, divided between two groups of thinkers; those who are keen to accept, even encourage, the interpretation of rights in a bold way, and those who, even though they are sensitive to the importance of protecting human rights, are also keen to preserve the respect for States' will. For a *disputatio* related, precisely, to the IACtHR methods of interpretation where using external sources are common, see G Neuman, 'Import, Export and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 Eur J Intl L 101 and L Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21 Eur J Intl L 585.

classical questions become even more critical when Human Rights treaties are at stake. Their 'specificity' is embedded in the human rights narrative, as well as in the legal practice and has triggered a very singular way of interpreting them.

That the permanent question which arises is about the results of such an interpretation process: yes or no, will the outcome be far from States' will? Yes or no, are the rules of interpretation enshrined in the Vienna Convention of Law of Treaties (VCLT) being fully respected?

The Inter-American Court of Human Rights is well-known for mobilizing all kinds of interpretation techniques in order to provide a *pro persona* result, when interpreting human rights enshrined within the American Convention on Human Rights (ACHR) or other Inter-American Specialized treaties which are part of the so-called 'Inter-American *corpus juris*'. Based on a progressive reading of Article 29 ACHR, more specifically Article 29(b) *decompartmentalization*[2] – which appears to be a common process to both other Regional Human Rights Courts[3] – is very often, if not constantly present when interpreting human rights. Even though such a technique is not always welcomed by all members of the Court,[4] it is still today, very powerful. If using external sources is common when it comes to interpreting the Inter-American *corpus juris*, a question arises when a procedural clause is at stake as to whether the *decompartmentalization* process remains valid? Is there something special

[2] L Burgorgue-Larsen, '"Decompartmentalization": The Key Technique for Interpreting Regional Human Rights Treaties' (2018) 16 Intl J Constitutional L 187.

[3] For a deep analysis on this trend, L Burgorgue-Larsen, *Les 3 Cours régionales des droits de l'homme in context. La justice qui n'allait pas de soi* (Pedone 2020) 247 ff.

[4] Separate opinions have always been present in the case law of the Court. However, since 2010, they have been more frequent and, more importantly, their content has changed. While most dissenting opinions previously protested against the Court's lack of audacity (this was obvious during the Antonio Cançado-Trindade tenure), recent ones have criticized its activism. The recent evolution of the Economic Social and Cultural Rights case law since the *Lagos del Campo* ruling (31 August 2017) highlights this internal division within the Court. Systematically, Humberto Sierra Porto (Colombian judge) and Eduardo Vio Grossi (Chilean judge), have published dissenting opinions in order to express their opposition to the bold interpretation chosen by the majority, but also their concern for the potential backlash from States. This ruling was the first judgment (of a long series) that recognized the direct enforceability of ECCR under art 26 of the ACHR (a labour leader successfully asserted a claim against Peru for violating his rights to work, to freedom of expression and to a fair trial).

at play when the Court is asked to interpret a clause which is not linked, as such, to the protection of a specific human rights?

Prima facie, when analysing the 26th Advisory Opinion,[5] we can assert that there is indeed something very special: the inexistence of external sources. The Court relies on general rules of International Law where the VCLT appears ever-present. The absence of *decompartmentalization* might suggest, then, that the Court's reasoning would be more orthodox than usual, putting aside the human interest when facing the issues of sovereignty through procedural clauses (section 2).

In fact, what a closer look at the way in which the overall argumentation is constructed, shows is that the Court never forgot the *pro persona clause* (Article 29 ACHR), its object and purpose and, beyond that, the overall object and purpose of the Inter-American System as such, where the American Declaration of Human Rights (ADHR), the Organisation of American States Charter (OAS) Charter, as well as the Inter-American Charter of Human Rights (IADC) are some of its major foundations. In other words, the Court showed that it is inclined to interpret procedural clauses while always bearing in mind the axiological aspect underlying the system into which they have been inserted (section 3).

At the end of the day, the *pro persona* approach is still there and still powerful. It allows the Court to present an impressive argumentation, highlighting the new kind of obligations for the community of American States. *Values* metamorphose the interpretation of procedural clauses.

2. *The valorisation of the 'Law of treaties' (VCLT)*

It is a very common trend when analysing the Inter-American case law to discover the way in which the Inter-American Court uses all kind of external sources (eg, non ratified treaties, soft law, case law from the European and African Court and so on).[6] Notwithstanding this, the reading of the fundamental 26th Advisory Opinion delivered on 9 November

[5] IACtHR, *Withdrawal of the American Convention on Human Rights y of the OAS Charter and its effects on Human Rights' States Obligations (Interpretation and scope of Arts. 1, 2, 27, 29,30 31, 32, 33 to 65 and 78 of the ACHR*, OC-26/20 (9 November 2020) (hereinafter '*Withdrawal of the American Convention'*).

[6] The Inter-American Court refers to non-ratified treaties in *Yean and Bosico Girls v The Dominican Republic* (8 September 2005) para 140 (ie, The UN Convention on the

2020 shows – and it is unquestionable – the striking absence of all kinds of external sources. The first[7] and second[8] question posed by the Colombian Government were related, implicitly but clearly, to the interpretation of Article 78 of the ACHR[9] and Article 143 of the OAS Charter.[10] When discovering the overall argumentation of the Court concerning the first (paras 40-116) and second question (paras 117-161), what is surprising is the place and role granted to the VCLT.

When it comes to answering the first question, the Court states at para 41:

> 'In order to give its opinion on the interpretation of the legal provisions submitted for consultation, the Court will have recourse to Articles 31

Reduction of Statelessness); it relies on soft law in *Serrano Cruz Sister v El Salvador* (1 March 1 2005) para 103 and *Claude Reyes v Chile* (19 September 2006) para 81; it quotes African Commission jurisprudence in *Juridical Condition and Rights of Undocumented Migrants* OC-18/03 (17 September 2003) paras 95 and 119 and the UN Human Rights Committee jurisprudence in *Yatama v Nicaragua* (23 June 2005) para 208; it relies on the European Court's jurisprudence for the consent concerning medical acts and forced sterilization in *I.V. v Bolivia* (30 November 2014) para 174; and for release on bail in *Andrea Salmón v Bolivia* (1 December 1 2016) para 119.

[7] The first question has been presented as follows: 'In the light of international law, conventions and common law, and in particular, the American Declaration of the Rights and Duties of Man of 1948: What obligations in 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?'.

[8] The second question has been presented as follows: '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?'.

[9] This clause provides that: '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.

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'.

[10] This clause 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.'

> and 32 of the Vienna Convention on the Law of Treaties, which set out the general rule of interpretation of international treaties of a customary nature. This implies the simultaneous application of *good faith,* the *ordinary meaning* of the terms used in the treaty in question, their *context* and their *object and purpose*'.[11] (italics added)

When it comes to interpreting the meaning of the last words of Article 143 – '*the obligations arising from the present Charter*', the Court affirms blatantly at para 124:

> 'In this sense, an interpretation based on objective criteria (linked to the texts themselves) and subjective criteria (relating to the intention of the parties) is appropriate, since the OAS Charter is a multilateral treaty constituting a regional organisation. It is a *constant trend* of the jurisprudence of the Court to use the methods of interpretation stipulated in Articles 31 and 32 of the Vienna Convention in order to carry out such interpretation. The Court will proceed to interpret Article 143 of the Charter in the following order: (1). *Literal interpretation*; (2) *teleological interpretation*; (3) *contextual and systematic interpretation*; and (4) *supplementary methods of interpretation*'.[12] (italics added)

Although the pedagogical presentation of the main elements of the VCLT are slightly different when we look at paras 41 and 124,[13] the point here is that the VCLT appears to be, no more, no less, the analytical basis on which the Court intends to build its argumentation.

In order to verify the Court's claim – eg the existence of a 'constant

[11] The original version is written as follows: 'Para emitir su opinión sobre la interpretación de las disposiciones jurídicas traídas a consulta, la Corte recurrirá a los artículos 31 y 32 de la Convención de Viena sobre el Derecho de los Tratados, que recogen la regla general de interpretación de los tratados internacionales de naturaleza consuetudinaria. Ello implica la aplicación simultánea de la buena fe, el sentido ordinario de los términos empleados en el tratado de que se trate, el contexto de éstos y el objeto y fin de aquél'.

[12] *Withdrawal of the American Convention* (n 5). The Spanish version is written as follows: 'En este sentido, resulta idónea la interpretación basada en criterios objetivos (vinculados a los textos mismos) y subjetivos (relativos a la intención de las partes pues la Carta de la OEA constituye un tratado multilateral constitutivo de una organización regional. Es jurisprudencia constante de la Corte hacer uso de los método de interpretación estipulados en los artículos 31 y 32 de la Convención de Viena para llevar a cabo dicha interpretación. La Corte procederá a interpretar el artículo 143 de la Carta en el siguiente orden: (1). Interpretación literal; (2) interpretación teleológica; (3) interpretación contextual y sistemática y (4) métodos complementarios de interpretación'.

[13] It is obvious when looking at the italics added.

trend of the jurisprudence' (*jurisprudencia constante*) consisting of relying on the VCLT– it is necessary to look back at the Inter-American advisory practice. Indeed, it is not the first time that the IACtHR has been asked to give its point of view on a clause whose purpose is not to protect a specific right, but to organize certain procedural aspects of the functioning of the Commission or/and of the Court or/and of the entire system of protection as such. Moreover, since the very first time the Court was seized (in the so-called *Viviana Gallardo* case), Article 61(2) of the ACHR[14] was at the centre of the petition lodged by the proper Government of Costa Rica against its own authorities.[15] Afterwards, the genuine official first advisory opinion which had been published[16], also related to the interpretation of a procedural clause (eg, Article 64 which organized the advisory jurisdiction of the Court as such). In a nutshell, out of the 26 advisory opinions delivered by the IACtHR until today[17] – and setting aside the peculiar request presented in the *Viviane Gallardo* case – nine (9) consultations has been presented to the Court with the purpose of obtaining important insights about procedural clauses: Article 64 on the advisory function of the Court; Articles 74 and 75 concerning the entry into force of the ACHR; Article 46 related to the exhaustion of local remedies; Articles 41-47, 50-51 concerning the exercise of several competences of the IAComHR; Article 55 which concerns the organization of the institution of *ad hoc* judge; and last but not least, Article 78 ACHR and Article 143 concerning withdrawal from the ACHR and the OAS Charter[18].

[14] Here is the content of this clause: 'In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 shall have been completed.'

[15] IACtHR, *Viviana Gallardo and al*, Order of the President of the Court (15 July 1981) Serie A, No 101. The Government of Costa Rica submitted to the IACtHR an application requesting the Court to decide whether, in the case involving the death of Viviana Gallardo and the wounding of Alejandra María Bonilla Leiva and Magaly Salazar Nassar, the national authorities of Costa Rica committed a violation of human rights guaranteed by the Pact of San José. In others words, Costa Rica lodged a petition against its own authorities.

[16] IACtHR, *'Other Treaties' subjected to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)* OC-1/82 (24 September 1982) para 33: 'In interpreting Article 64, the Court will resort to traditional international law methods, relying both on general and supplementary rules of interpretation, which find expression in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.'

[17] March 8th 2021.

[18] In addition to *'Other Treaties'* (n 16) see IACtHR, *The Effect of Reservations on the Entry into force of the American Convention on Human Rights (arts. 74 and 75)* OC-

At this stage, what conclusions are we able to draw after examining those nine requests?

The first bold conclusion is that the mobilisation of the VCLT is, indeed, quite regular (it appears in 5 out of 9 opinions)[19] and, sometimes, the steps the court will follow in order to present its argumentation are presented in a very pedagogical way,[20] exactly as the 26th Advisory Opinion did at paras 41 and 224.

In some opinions, the Court goes beyond the sole presentation of the interpretation rules enshrined in Article 31 and 32. Indeed, it appears that the Court relies on specific other rules of the VCLT for the purpose of the request. For example, in the 10th opinion, the question raised by

2/82 (24 September 1982); IACtHR, *Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention on Human Rights* OC-10/89 (14 July 1989); IACtHR, *Exceptions to the Exhaustion of Domestic Remedies (art. 46§1, 46§2a., 46§2 b. American Convention of Human Rights)* OC-11/90 (10 August 1990); IACtHR, *Certain attributes of the Inter-American Commission on Human Rights (arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights)* OC-13/93 (16 July 1993); IACtHR, *Reports of the Inter-American Commission on Human Rights (art. 51 American Convention on Human Rights)* OC-15/97 (14 November 1997); IACtHR, *Control of due process in the exercise of the Powers of the Inter-American on Human Rights* (*Articles 41 and 44 to 51 of the American Convention on Human Rights*) OC-19/05 (28 November 2005); IACtHR, *Article 55 of the American Convention on Human Rights* OC-20/09 (29 September 2009); *Withdrawal of the American Convention* (n 5).

[19] There is no mention of the VCLT in the 11th, 13th and 19th Advisory Opinion.

[20] *'Other Treaties'* (n 16) para 33: 'In interpreting Article 64, the Court will resort to traditional international law methods, relying both on general and supplementary rules of interpretation, which find expression in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.'; *The Effect of Reservations* (n 18) para 19: 'whether and to what extent Article 75 helps to resolve the question before the Court can be answered only following an analysis of that stipulation as well as relevant provisions of the Convention in their context and in the light of the object and purpose of the Convention (VCLT, art 31), and, where necessary, by reference to its drafting history (VCLT, art 32). Moreover, given the reference in Article 75 to the Vienna Convention, the Court must also examine the relevant provisions of that instrument.'; *Reports of the Inter-American Commission on Human Rights* (n 18) para 29: 'In ruling on the admissibility of the Advisory Opinion, the Court bears in mind the rules of interpretation which it has applied in other cases, in conformity with the relevant provisions of the Vienna Convention of the Law of Treaties'; *Article 55 of the American Convention on Human Rights* (n 18) para 23: 'For the interpretation of this provision [art 55(3)] the Court will use, as it has on numerous occasions, the methods of interpretation of international law provided in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Article 31 integrates different elements that form a general rule of interpretation, which in turn may be supported by the complementary rule enshrined in Article 32 of said instrument'.

the Colombian government was whether the Court's advisory jurisdiction allowed it to interpret the ADHR (bearing in mind that Article 64 ACHR only refers to 'treaty').[21] In such a context, the Court quoted *expressis verbis* Article 2(1)(a) of the VCLT in order to present the definition of a treaty.[22] In the 26th Advisory Opinion, the Court was inclined, if not obliged, given the questions at stake, to do the same. It presented[23] a substantive analysis of Articles 54 and 56 of the VCLT, both clauses related to the termination and suspension of the operation of treaties.[24] In addition, the IACtHR took the opportunity to emphasise the customary aspect of the VCLT which reflects certain 'applicable rules of customary international law'. It took this stand in order to avoid all kinds of contestations given the fact that, first, the VCLT is posterior to the ACHR and, second, that some American States had not ratified it.[25] Once those elements were presented, the Court was able to draw one major conclusion according to which the denunciation of a treaty must be organised in accordance with the terms and conditions laid down in its own provisions[26]. In such a context, Article 78 of the ACHR must very seriously be taken into account, because it is impossible to prohibit a State from denouncing a treaty.[27]

After analysing Articles 54 and 55 of the VCLT, the Court highlighted

[21] Art 64(1) of the Convention authorizes the Court to render advisory opinions 'regarding the interpretation of this Convention or of other *treaties* concerning the protection of human rights in the American states' (italics added).

[22] *'Other Treaties'* (n 16) para 31. The court relied also on the Vienna Convention of 1986 on the Law of Treaties among States and International Organizations or among International Organizations (para 32).

[23] *Withdrawal of the American Convention* (n 5) para 45.

[24] Art 54 is about 'Termination of or withdrawal from a treaty under its provisions or by consent of the parties'; Art 55 is related to 'Reduction of the parties to multilateral treaty below the number necessary for its entry into force'.

[25] *Withdrawal of the American Convention* (n 5) para 46. The entire original version in Spanish is written as follows: 'Si bien la Convención de Viena es posterior a la entrada en vigor de la Convención Americana, y pudiera darse el supuesto de que un Estado Miembro de la OEA no sea parte de la misma, la Corte advierte que es un hecho aceptado que la Convención de Viena refleja determinadas reglas aplicables de derecho internacional cosentudinario, a pesar de no diferenciar entre los tipos de tratados, salvo en su artículo 60 § 3'. In the footnote 43, the Court highlights the fact that 22 States out of 35 have ratified the VCLT. Venezuela is one of the States which have not ratified the VCLT.

[26] ibid para 47.

[27] ibid para 49.

another provision to continue its demonstration, namely: Article 70, which refers to the effects of a denunciation.[28] In doing so, it permitted the Court to emphasize the strong equivalence between Article 78 ACHR and Article 70 VCLT as regards the substantive effects of a denunciation in terms of obligations. The conclusion stated by the Court was that the 'effective denunciation of the Convention does not retroactively release the denouncing State from the responsibilities acquired prior to the denunciation becoming effective'.[29] When it comes to examining the effect of the denunciation of the ACHR[30] on other treaties constituting the Inter-American *corpus juris*, the Court relied on Article 2(1)(a) VCLT regarding the definition of Treaties, and, one more time, on Article 56, in order *to disconnect* the denunciation process: it is one thing to denounce the ACHR, it is another to do the same for treaties making up the Inter-American *corpus juris*. Even though the progressive codification of specific topics triggers a bold picture of the Inter-American landscape in terms of human rights protection, the denunciation of the ACHR does not launch *ipso facto* the denunciation of the others seven treaties, which have their own denunciation provisions.[31] As for the two Protocols (about the death penalty and ESCR) – adopted to complete the list of rights of the ACHR – and which do not have any denunciation clause, the IACtHR considered it appropriate to consequently apply Article 56 VCLT stating that denunciation was not, in principle, possible.[32] The Court, notwithstanding this, left the door open to possible further clarifications in a possible 'concrete case': in sum, a clever way of not binding oneself excessively for the future. At the end of the day, the picture of the effect of the denunciation of the ACHR is clear: 'The denunciation of the Convention does not render ineffective the obligations arising from the ratification of other inter-American human rights treaties in force for the denouncing State.'[33]

[28] ibid para 66.

[29] ibid para 76. The Spanish version is written as follows: 'La denuncia efectiva de la Convención no libera retroactivamente al Estado denunciante de las responsabilidades adquiridas de forma previa a que la denuncia se haga efectiva'.

[30] ibid para 84 The ACHR has been called the 'cornerstone' of the Inter-American System of protection (*piedra fundamental*).

[31] ibid paras 86-87.

[32] ibid para 88.

[33] ibid para 89.

The VCLT appears one more time when Article 43 (Obligations imposed by international law independently of a treaty)[34] and 53 (Treaties conflicting with a peremptory norm of general international law) are used in order to present the overall obligations landscape which States must comply with.[35]

At this stage of our analysis, it is worth noting that the Court's claim is clearly right. The VLCT has been always been present in its practice, specifically the one related to its advisory function. In addition, beyond the specific use of the interpretation rules under Articles 31 and 32, some other provisions concerning specific aspects of the functioning of treaties have been also mobilized. The 26th Advisory Opinion is striking is this regard. It would have been difficult for the Court to do otherwise. From a general and contextual point of view, it is well-known that the entire IAHRS as such (both the Commission and the Court) regularly faces sharp attacks from States. One last example is the Declaration adopted by five Latin American Governments in April 2019 asking the Court to be more sensitive to domestic peculiarities; in order to do so, they argued for an extensive use of the subsidiarity principle and the margin of appreciation doctrine, as well as for a 'strict application' of the doctrine of sources of international law. [36] From a more specific legal perspective, and given the questions at stake in the 26th request, it was inevitable that the VCLT would be used. Denunciation of a treaty is one key aspect, among many others, of a treaty's functioning; the same goes for the withdrawal of the Treaty creating an International Organization. Hence, relying on the VCLT was, at the same time, strategically accurate and technically unavoidable.

That being said, the story doesn't end here. If the VCLT is ever-present in the Court' argumentation, it is always combined with others elements, revealing another picture, not to say narrative. The *pro persona*

[34] Art 43 VCLT: 'The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.'

[35] *Withdrawal of the American Convention* (n 5) paras 100-101. See, in this special issue the analysis on *Jus Cogens.*

[36] <www.emol.com/noticias/Nacional/2019/04/23/945568/Chile-entrega-declaracion-a-la-CIDH-en-la-que-pide-respetar-margen-de-autonomia-para-asegurar-derechos.html>.

principle also appears to be very strong. In addition, the Court puts important emphasis on the specificity of human rights treaties, which reveals some 'axiological principles'.[37] In a nutshell, procedural clauses are not analysed in what would be an axiological *vacuum*; on the contrary, values permeate their interpretation.

3. *The Axiological foundations of the IAHRS*

Beyond the mobilization of the VCLT when the Court comes to analyse each of the questions, related to the interpretation of Article 78 ACHR and 143 of the OAS Charter, it presents the axiological context in which its argumentation must take place. If this presentation is very clear and straightforward in the case of Article 78 ACHR, it is presented in a different way in the case of Article 143 OAS Charter. Let's examine those two lines of argumentation, which, at the end of the day, have the same effect.

The *pro persona* principle is key when the interpretation of Article 78 is at stake. In others words, when answering specifically the question of the withdrawal from the ACHR, the Court – immediately after the VCLT reference in para 41, adds the following sentence:

> 'Likewise, since it is a human rights treaty, the Court must resort to the interpretative guidelines of the system itself. It is in this sense that the American Convention expressly provides certain guidelines for interpretation in its article 29, including the *pro persona* principle. Furthermore, the Court has repeatedly pointed out that human rights treaties are living instruments, whose interpretation has to accompany the evolution of the times and current living conditions'.[38]

[37] *Withdrawal of the American Convention* (n 5) para 56.

[38] ibid para 41. The Spanish version is written as follows: 'Asimismo, al tratarse de un tratado de derechos humanos, la Corte debe recurrir a las pautas interpretativas propias del sistema. Es en este sentido que la Convención Americana prevé expresamente determinadas pautas de interpretación en su artículo 29, entre las que alberga el principio *pro persona*. Además, la Corte ha reiteradamente señalado que los tratados de derechos humanos son instrumentos vivos, cuya interpretación tiene que acompañar la evolución de los tiempos y las condiciones de vida actuales'.

Here, the reader immediately understands that whatever the procedural singularity of the article in question, the *pro persona* approach is maintained. So all the rules enshrined in the VCLT (more specifically Article 70) are *combined* with the specific rules of Article 29 ACHR. They go hand in hand. But such a mixed approach gives, without any doubt, some prevalence to the values (*pro persona* principle) rather than the rules (that of VCLT). Indeed, beyond the classical reference to Article 29, the valorisation of the specificity of human rights treaties allied with the bold emphasis on the object and purpose of the proper ACHR, gives the Court an obvious avenue to put aside some classical aspects of States sovereignty. [39]

In this respect, the statement of the Inter-American Court is part of a very old trend in jurisprudence, which is a classic. The objective nature of human rights – which goes beyond the contractual framework based on the principle of reciprocity was magnified as early as 1951 by the International Court of Justice[40] and, subsequently, confirmed by the case law of numerous human rights bodies.[41] The consequences are adjustments to the classic rules specific to Public International Law in terms of reservations[42], but also of succession and denunciation. The overall argu-

[39] ibid paras 48, 51, 52, 53. See, in this *special issue*, the analysis related to this question of human rights treaties' specificity.

[40] ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (advisory opinion) [1951] ICJ Rec 23: '[i]n such a convention [the 1948 Convention on the Prevention and Punishment of the Crime of Genocide], the Contracting States have no interests of their own: they have only one common interest, that of preserving the higher ends which are the raison d'être of the Convention. As a result, in a convention of this type, one cannot speak of individual advantages or disadvantages of States, nor of an exact contractual balance to be maintained between rights and obligations. Consideration of the higher purposes of the Convention is, by virtue of the common will of the parties, the basis and measure of all the provisions it contains'. See, in the same vein, ICJ, *Questions on the Obligation to Extradite or Prosecute (Belgium v Senegal)* (judgment) [2012] ICJ Rep 449 paras 68-69.

[41] Eur Com HR, *Austria v Italy* (11 January 1961): 'Considering (...) that the obligations undertaken by the Contracting States in the Convention are essentially of an objective character, in that they are intended to protect the fundamental rights of individuals against encroachments by the Contracting States rather than to create subjective and reciprocal rights between them'; IACtHR, *Mapiripán Massacre v Colombia* (15 September 2005) Series C n 134 para 104.

[42] Human Rights bodies have asserted their competence to assess the validity of reservations, as well as to draw the legal consequences of the incompatibility of a reservation

mentation concerning the denunciation of the ACHR is, hence, developed with this very specific lens where its axiological foundation is ever-present. The climax of such an approach is reached when the Court provided its own perception of the substantive effect of the denunciation, putting aside the strict procedural aspect of the issue. Para 58 is, in that regard, characteristic. Instead of staying inside the boundaries of a strict and formal analysis, the Court presented an impressive substantial and political analysis of what a denunciation of a treaty like the ACHR actually means, firstly, for the people (who, suddenly, are no longer protected by such a regional instrument); and, secondly, for the overall 'community of American States':

> 'The denunciation of a human rights treaty, such as the American Convention, represents a *regression* in the level of Inter-American human rights protection and in the pursuit of the much-vaunted universalisation of the Inter-American System. Therefore, taking into account the object and purpose of human rights treaties, the Court considers that, from a reading of the relevant provisions and in view of the *seriousness of a decision of this nature*, it is essential, in addition to clarifying by means of interpretation the procedural parameters of denunciation and its effects on international obligations, to make some additional considerations with regard to *collective guarantee mechanisms as essential safeguards attached to the configuration of a democratic state against untimely denunciation and contrary to the general principle of law of acting in good faith.* This is on the understanding that the holders of the rights recognised in the American Convention, who would be left without the Inter-American judicial protection, are in an asymmetrical position in relation to the power of State. In this way, *the Court intends to help the community of American States* and the *competent bodies of the OAS* to collectively and peacefully ensure the effectiveness of the American Convention and the Inter-American System for the protection of human rights' (italics added).

On the basis of such a revolutionary statement, the Courts involves

with the object and purpose of a treaty, whereas public international law postulates that it is up to the reserving States alone to draw the consequences of the possibly invalid nature of their reservations (eg, to renounce their membership of the treaty, to withdraw their reservation; to modify the reservation in such a way as to remedy the established illegality.)

the institutional stakeholders of the Inter-American System (OAS bodies), but also the American States as such; not just as sovereign and independent States, but rather as part of a group linked by common values, eg, as part of a *community*. The power of this word must not be neglected. It goes beyond the strict and legal aspect of what it means to be a simple *Member State* of an International Organization; it implies *ties and duties*.

Once it had set this analytical framework out, the Court progressively revealed, one by one, the consequential effects of the denunciation of the Convention, while always bearing in mind the axiological basis of the Convention, its object and purpose and, fundamentally, that of the Inter-American System as a whole. At this stage – without being able to cover all the many aspects of the six consequences which the Court identified that would arise in the event of a denunciation of the Convention – it is pivotal to point out the novel nature of States' obligations which the Court identified. Firstly, the Court noted the necessity – after a quite interesting inquiry into domestic constitutional designs[43] – of a 'plural, public and open debate' within a State when launching a denunciation' process (para 64). In others words, while it is not the responsibility of an international Court to have a look at the domestic procedural criteria on such a matter; while the IACtHR recognized that the ACHR does not impose any specific condition concerning the domestic level requirement (para 61), it decided, without hesitation, to develop a domestic qualitative approach as regards a State's will to denounce a human rights treaty. Secondly, it interpreted the one-year notice period of Article 78 as a key time for the others member States to defend and ensure the effectiveness of the 'Inter-American public interest' (*interés public interamericano*). Here, the notion of the *community* of American States presented at para 58 takes on its importance, with the Court affirming at para 71 that:

> 'all States parties are obliged to ensure the integrity and effectiveness of the Convention. This general duty of protection is of direct concern to

[43] From time to time, the IACtHR uses comparative analysis from constitutional Latin-American design in order to point out some common trends among States. It is a way to legitimize, afterwards, its own developments concerning the interpretation of specific rights. Here, it is quite different given the procedural nature of the clauses interpreted. The purpose was to show that a majority of States organizes a public debate within Parliaments when the denunciation of a treaty is at the core of a political discussion.

each State party and to all of them as a whole. This is why Article 78 itself provides for the duty to inform other parties upon receiving a denunciation notification'.

Here, what is striking is the fact that the Court gives a strict and formal information obligation, an axiological aspect, considering it '*a duty of protection*'. Without any doubt, when analysing the overall interpretative substantive path used by the Court, it is quite clear that the effects of the ever-present mobilization of the VCLT are, at the end of the day, quite weak.

The same conclusion can be drawn when examining the effects of the OAS Charter's denunciation (Article 143), although – as noted above – Article 29 and the *pro persona* principle do not appear in this specific issue.[44] In fact, it is quite natural. Here, the Court is not able to organize what we could call the migration *via* an import process of Article 29 ACHR to another treaty such as the OAS Charter. To put it differently, Article 29 is the inevitable and unique specific provision when the proper interpretation of the American Convention is at stake, but it cannot have such a role for the OAS Charter. In this context, how did the axiological approach appear in the reasoning of the Court concerning Article 143?

First, it appeared in the way in which the second question of the Colombian Government was reformulated[45] by the Court itself at paras 117 and 118. It highlighted the fact that the sole 'human rights obligations' must be taken into account when it comes to analysing the effects of the denunciation and withdrawal of the OAS Charter.[46] Second, thanks to the previous statements concerning Article 78 and the overall axiological approach developed, the Court had prepared the ground to analyse the classical rules of interpretation of Articles 31 and 32 with a specific lens.

It was indeed quite easy, if not natural, for it to highlight – when launching the teleological interpretation – the overall *raison d'être* of the

[44] *Withdrawal of the American Convention* (n 5) para 117 ff.

[45] As for the original presentation of the question of the Colombian Government, see (n 8).

[46] *Withdrawal of the American Convention* (n 5) para 118 is clear in that respect: 'it should be reiterated that the Court's interpretation of the OAS Charter and its effects is limited to aspects *concerning human rights obligations*.' The original version in Spanish is written as follows: 'es preciso reiterar que la interpretación que haga la Corte de la Carta de la OEA y de sus efectos se circunscribe a los aspectos concernientes a las obligaciones en materia de derechos humanos'.

Charter, as well as of the entire regional organization which has been reformed several times. This last point appears important when we remind ourselves that the Protocol of Buenos Aires inserted the IACom.HR – created in 1959 – as the 'main body' of the OAS structure. In the same vein, the Court was also quite clear – when mobilizing the contextual and systematic interpretation – to draw on all the provisions of the OAS Charter concerning States' obligations;[47] to quote the ADHR – which refers to customary norms and general principles of international law;[48] to recall the existence of other specialized Inter-American treaties[49], and *last but not least* to mention the Inter-American Democratic Charter (IADC) explaining its powerful link with democracy (without saying a word about its status of soft law).[50]

The importance given to this very important instrument should be underlined as it helps to broaden the notion of 'Inter-American System'.[51] It is in the light of the latter – which is understandably very comprehensive – that the final expression of Article 143 is interpreted. The Court insisted on the links between representative democracy – which is undoubtedly the valued democratic form on the continent (Article 2 IADC)[52] – and respect for human rights, which is at the core of Arts. 3, 7, 8, 9 and 10 of the Inter-American Democratic Charter. The apotheosis of the systemic analysis culminates in the Court's reference to Article 21 of the Charter, the penultimate sentence of which reads as follows: 'The

[47] ibid paras 134-136.

[48] ibid para 137.

[49] ibid para 138.

[50] For a very interesting article discussing all aspects of the IADC, including its status (of non-binding instrument) and its mobilisation by the IACtHR in its case law within its contentious jurisdiction, see. A Salas Cruz, 'La Carta democratica interaméricana y la Corte interamericana de derechos humanos' (2014) Cuestiones Constituticionales 31 (2014).

[51] *Withdrawal of the American Convention* (n 5) para 139.

[52] It is written as follows: 'The effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the member states of the Organization of American States. Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order.'

suspended member state shall continue to fulfill its obligations to the Organization, in particular its human rights obligations'.[53] While a *denunciation* of the OAS Charter is not strictly and legally speaking a *suspension,* the Court opts for their assimilation (without saying so). At the end of the day, is more the spirit of Article 21 IADC which is important for the Court, rather than its content. The mobilization of the IADC is very powerful when we remind ourselves that its Article 1 states that 'the peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it'. Although the Court avoids quoting *expressis verbis* this specific provision of the IADC,[54] its spirit underlines the overall demonstration. The Court could have stopped here, as everything was in place to interpret Article143 in a bold and *pro persona* way. It nevertheless took the time to resort to the historical interpretation provided in Article 32. in order to conclude: 'In sum, the review of the travaux préparatoires confirms that the final wording of Article 143 does not limit the kind of obligations that the denouncing state must fulfil in order to be released from the OAS to the payment of quotas, and may therefore include other obligations arising from the Charter. This confirms that human rights obligations must be considered within the scope of Article 143 of the OAS Charter.'[55]

[53] Art 21 of the IADC is written as follows: 'When the special session of the General Assembly determines that there has been an unconstitutional interruption of the democratic order of a member state, and that diplomatic initiatives have failed, the special session shall take the decision *to suspend said member state* from the exercise of its right to participate in the OAS by an affirmative vote of two thirds of the member states in accordance with the Charter of the OAS. The *suspension* shall take effect immediately. The *suspended member* state shall continue to fulfill its obligations to the Organization, in particular its human rights obligations. Notwithstanding the *suspension* of the member state, the Organization will maintain diplomatic initiatives to restore democracy in that state.' (italics added).

[54] Which is one of the most powerful elements of the text, see C Cerna, 'Democratic legitimacy and respect for human rights: The New Gold Standard' (2015) 108 AJIL Unbound 222.

[55] *Withdrawal of the American Convention* (n 5) para 146. The original version is written as follows: 'En suma, la revisión de los *travaux préparatoires* lleva a confirmar que la redacción final del artículo 143 no limita la clase de obligaciones que debe cumplir el Estado denunciante para quedar desligado de la OEA al pago de las cuotas, por lo que puede incluir otras obligaciones que se desprendan de la Carta. Ello confirma que las obligaciones en materia de derechos humanos deben ser consideradas dentro de lo dispuesto en el artíulo 143 de la Carta de la OEA'.

4. *Conclusion*

To the question presented in the title of this article,[56] the answer is clear: *not really*. Let's explain it.

In appearance, one can argue that there is something special at play when the Court analyses procedural clauses given the complete absence of decompartmentalization, a process often at the centre of sharp doctrinal and judicial criticism, as well as of negative political reaction. This being said, the mobilisation of Article 29 ACHR combined with the specificity of human rights treaties permits the Court to highlight the axiological principles governing the entire Inter-American Human Rights System. Thus, this power of values has a direct effect on the way the very classical rules of interpretation of the VCLT are used. At the end of day, *Nihil Novi.* Individuals are always at the cornerstone of the Court's argumentation, generating some very protective interpretation of both Articles 78 ACHR and 143 OAS Charter.

However, if one particular feature of this advisory opinion should be highlighted, it would be the importance given to the closed relationship between democracy and human rights thanks to the mention of the IADC. After the *pro persona* principle, it is certainly a *pro democratia* principle which is now clearly in action. A brief overview of the changing nature of conflict in the Americas will help to understand this last assertion.

While the history of the continent has been marked by serious international armed conflicts throughout the 20th century, the best known being the one between El Salvador and Honduras in 1969[57] – the beginning of the 21st century has been characterised by a change in the nature of the conflicts. Beyond certain internal armed conflicts that have marked

[56] *Is there something special when the IACtHR comes to interpret 'procedural clauses'?*

[57] In 1969, El Salvador attacked Honduras for territorial expansion (it has been known as the 'football war' or the 'hundred-hour war' (because it lasted four days) and which only led to a peace agreement in 1980. A particularly deadly war ensued, affecting several thousand people: 6,000 dead, 2,000 wounded, hundreds of missing persons and the exodus of nearly 130,000 people, see R Arancibia, 'Los procesos de paz en América Latina: El Salvador y Honduras, un estudio de caso' (2016) Estudios internacionales 133-151. The territorial dispute at the origin of the conflict was only finally resolved on 11 September 1992 by a judgment of the International Court of Justice, *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras; Nicaragua intervening)* [1992] ICJ Rep 351.

and still mark the political and social development of certain states (such as the conflict with the FARC in Colombia), what characterises developments within the continent is much more the protean phenomena of democratic backsliding. In this context, the OAS is committed to preserving the major elements of representative democracy, which is the democratic form it has always valued. Indeed, one of the principles enshrined by the founding States as early as 1948 was that '*the solidarity of the American States and the important objectives they pursue require their political organisation on the basis of the exercise of representative democracy*' (art. 3 d. OAS Charter). Furthermore, as part of the various reforms that the Pan American organisation has undergone, the Protocol of Cartagena adopted in 1985 added among the 'essential objectives' of the Organisation, the fact of '*promoting and consolidating representative democracy within the framework of the principle of non-intervention.*'(Article 2 (b) OAS Charter). Similarly, the Washington Protocol, adopted in 1992, incorporated an Article 9 that regulates the procedure for suspending a member state '*whose democratically constituted government has been removed by force*'. However, Article 9(d) of the Charter specifies that the OAS shall, despite the suspension measure, undertake diplomatic actions with the aim of '*re-establishing the representative democracy of the affected Member State*'. This commitment to representative democracy was recalled and deepened on 11 September 2011 when the states – thanks in particular to Peruvian diplomacy and the skill of Javier Perez Cuellar – unanimously adopted the Inter-American Democratic Charter in the form of a resolution. It was applied on several occasions in the light of serious events in Guatemala, Bolivia, Paraguay, Honduras, Venezuela, Ecuador, Peru, Nicaragua and Venezuela. Honduras was suspended in 2009 (on the basis of Article 21 of the Charter), while the deterioration of the situation in Nicaragua in recent years suggests that the suspension scenario could also be on the way[58].

While a reading of the Inter-American Democratic Charter shows that everything must be done to ensure that political dialogue is constantly maintained, even when a state's right to participate in the Organisation's activities is suspended, practice shows that the OAS was unable

[58] CM Cerna, 'Introductory Note to Resolution on the Situation in Nicaragua (OAS)' (2018) 57 Intl L Materials 1146.

to avoid the worst in Nicaragua and was not able to bring Venezuela back to reason, ie a political dialogue in good faith. As a result, the latter country, after denouncing the American Convention (2012), also denounced its membership of the Pan-American organisation (2017) and plunged into a major crisis, unresolved to this day. However, with this fundamental and imposing opinion, the Inter-American Court intends to strengthen the action of the Pan-American organisation by continuing to impose a number of duties on States that decide to leave the game.