

INTER-AMERICAN COURT OF HUMAN RIGHTS

ADVISORY OPINION OC-26/20

OF NOVEMBER 9, 2020

REQUESTED BY THE REPUBLIC OF COLOMBIA

**THE OBLIGATIONS IN MATTERS OF HUMAN RIGHTS OF A STATE THAT HAS
DENOUNCED THE AMERICAN CONVENTION ON HUMAN RIGHTS AND THE
CHARTER OF THE ORGANIZATION OF AMERICAN STATES**

OFFICIAL SUMMARY ISSUED BY THE INTER-AMERICAN COURT

On November 9, 2020, the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”) issued an Advisory Opinion in response to a request submitted by the Republic of Colombia regarding “the human rights obligations of a State that denounces the American Convention on Human Rights and seeks to withdraw from the Organization of American States.”

In order to exercise its consultative role more effectively, the Court found it pertinent to reformulate the questions raised by Colombia, based on the legal provisions submitted for consultation and within the scope of with its advisory jurisdiction, in the following terms:

Taking into account the four unnumbered paragraphs in the recitals of Resolution XXX of the Ninth International Conference of American States, through which the American Declaration was adopted and the six unnumbered paragraphs of its preamble; paragraphs one to five, unnumbered of the Preamble, and Articles 3(l), 17, 45, 53, 106 and 143 of the OAS Charter, together with the five unnumbered paragraphs of the Preamble, and Articles 1, 2, 27, 29, 30, 31, 32, 33 to 65 and 78 and of the American Convention:

What are the international human rights obligations of a Member State of the Organization of American States that has denounced the American Convention on Human Rights?

If a State that is not a party to the American Convention denounces the Charter of the Organization of American States, what are the effects of that denunciation and withdrawal on the international human rights obligations to which the first question refers?

What international human rights obligations do Member States of the Organization of American States have with respect to the States of the Americas that have denounced the American Convention on Human Rights and the Charter of the Organization of American States?

I. The international human rights obligations of a Member State of the Organization of American States that has denounced the American Convention on Human Rights

First of all, the Court addressed the rules of general international public law related to the denunciation of treaties and explained to the specificity of human rights treaties. In this regard, the Court determined that, as a general rule, the denunciation of an international treaty must be consistent with the terms and conditions established in the actual text of the treaty. The Court emphasized that the denunciation of the American Convention on Human Rights represents a backward step in the level of inter-American protection of human rights and in the effort to promote the universal application of the inter-American system.

Bearing in mind the object and purpose of human rights treaties, the Court considered that, from a reading of the relevant provisions of the Convention, and having regard to the serious nature of a decision of that magnitude, it was essential to offer a clear interpretation of the procedural guidelines for making a denunciation and its effects on international obligations. The Court also made some additional observations regarding the collective guarantee mechanisms, as essential safeguards associated with the structure of a democratic State against sudden or abrupt denunciations that are contrary to the general law principle of acting in good faith. This is based on the understanding that the holders of the rights recognized in the American Convention, who would be left unprotected by the inter-American judicial protection, are in an asymmetrical position in relation to the power of the State. Accordingly, the Court sought to support the community of American States and the competent OAS organs in ensuring, collectively and peacefully, the effectiveness of the American Convention and of the inter-American system of protection of human rights.

In the case of the American Convention on Human Rights, Article 78 allows for the possibility of denunciation and establishes two procedural requirements that must be met for a State to validly denounce the Convention in its entirety, namely: (i) at least five years' membership from the date of the treaty's entry into force and (ii) notification, submitted one year in advance, to the OAS Secretary General who, as custodian of the treaty, must inform the other States Parties. In this regard, the Court emphasized that the State's intention to denounce the treaty cannot be presumed or inferred from domestic acts; the denunciation must be made expressly and formally through the procedure established at the international level.

The Court also pointed out that the American Convention does not expressly establish the procedures required under a State's domestic law for its denunciation. However, in those countries where the domestic procedure for denouncing treaties is regulated by the Constitution, the Court noted a marked tendency to require the participation and approval of the legislative branch. In this sense, the Court emphasized that, regardless of the different domestic procedures for denouncing treaties in the region, the denunciation of a human rights treaty - particularly one that establishes a jurisdictional system for the protection of human rights, such as the American Convention - must be subject to a pluralistic, public and transparent debate within the State, 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. Furthermore, the Court considered it pertinent to have recourse to the principle of parallelism of forms, which implies that if a State has established a constitutional procedure for assuming international obligations it would be appropriate to follow a similar procedure when it seeks to extricate itself from those obligations, in order to guarantee such public debate.

The Court also confirmed that the American Convention cannot be denounced with immediate effect. Under Article 78(1), a transition period of one year is established, during which the States Parties to the Convention have a duty to make known their observations or objections, in a timely manner and within the institutional framework of the OAS, in order to safeguard the effective protection of human rights and the democratic principle. The aim is to prevent a State from using denunciation as a bad-faith attempt to sidestep its international human rights

commitments, reduce or curtail the effective protection of such rights, weaken access to the international judicial mechanism, and deprive the people of the complementary protection afforded by the inter-American system.

In this regard, the Court stressed the need to apply more rigorous scrutiny to denunciations if they are made in situations or circumstances that appear to be especially serious and that could undermine democratic stability, security and peace in the hemisphere, resulting in widespread impairment of human rights, such as: (1) a disagreement with a decision made by a protection body and motivated by a manifest intention to breach the international commitments adopted therein; (2) in a scenario in which guarantees have been suspended indefinitely or which threatens the core of non-derogable rights; (3) in a context of serious, massive or systematic human rights violations; (4) in a context of progressive erosion of democratic institutions; (5) if there has been any disturbance or a manifest, irregular or unconstitutional rupture of the democratic order, and/or (6) in the event of an armed conflict.

As to the effects of denouncing the American Convention, the Court pointed out that the main effect of a final denunciation of the American Convention, as a human rights treaty, is to deprive the persons under the jurisdiction of the State concerned of multiple levels of protection. More specifically, it deprives them of the opportunity to have recourse to international judicial bodies such as the Inter-American Court to claim a complementary level of judicial protection of their rights. However, the Court considered that certain international human rights obligations remain in effect for Member States of the OAS.

In particular, the Court determined that, when a Member State of the OAS denounces the American Convention on Human Rights, its international human rights obligations stand as follows: (1) Convention-based obligations remain intact during the period of transition to full denunciation; (2) definitive denunciation of the American Convention produces no retroactive effects; (3) the validity of the obligations established through ratification of other inter-American human rights treaties remains in place; (4) definitive denunciation of the American Convention does not invalidate the domestic efficacy of principles derived from Convention-based precepts interpreted as a standard for the prevention of human rights violations; (5) obligations associated with the minimum threshold of protection through the OAS Charter and the American Declaration remain under the supervision of the Inter-American Commission; and (6) customary norms, those derived from general principles of international law and those pertaining to *jus cogens* continue to bind the State by virtue of general international law.

II. The effects on the international human rights obligations of a Member State of the OAS that is not a party to the American Convention and has denounced the Charter of the Organization of American States

The OAS Charter may be denounced in accordance with Article 143, which establishes: (1) the requirement to inform the General Secretariat in writing of the decision to denounce the treaty, and the latter's obligation, as custodian of the treaty, to communicate the denunciation to all other Member States; (2) a two-year transition period, and (3) the effects derived from the entry into force of the denunciation. On this last point, the article establishes, on the one hand, that the Charter shall cease to be in force with respect to the denouncing State and, on the other, that the denouncing State "shall cease to belong to the Organization after it has fulfilled the obligations arising from the present Charter." The Court interpreted this provision to mean that the denunciation becomes effective after the transition period has elapsed, at which point the Charter ceases to apply, although certain obligations arising from it remain.

With regard to the previous point, the Court considered that the phrase "obligations arising from the present Charter," established in Article 143 of that instrument, is comprehensive,

and that its wording does not limit compliance to a specific type of obligation. In interpreting this clause, the Court had recourse to the interpretative methods applied to international treaties, as well as the preparatory work of the OAS Charter, and concluded that human rights obligations include the "obligations arising" from the OAS Charter, pursuant to Article 143. Specifically, the Court considered that these commitments encompass those arising from the commission of an internationally wrongful act and that were acquired through the mechanisms and procedures for the international protection of human rights of the inter-American system. This includes compliance with reparations ordered by the Inter-American Court under the *pacta sunt servanda* principle, as well as best efforts to comply with the recommendations issued by the Inter-American Commission.

In the second place, the Court analyzed the effects of denunciation of and withdrawal from the OAS Charter on a State's international human rights obligations. In this regard, the Court warned that a State's denunciation of the OAS Charter and its withdrawal from the Organization would leave the individuals under its jurisdiction entirely unprotected by the regional organs of international protection. Furthermore, the Court recalled that the OAS Charter cannot be denounced with immediate effect. Article 143 establishes a two-year transition period, during which the other Member States of the OAS, as collective guarantors of its efficacy in relation to the observance of human rights, have an opportunity to express any observations or objections deemed pertinent, in a timely manner and through institutional channels, regarding denunciations that do not withstand scrutiny in light of the democratic principle and that undermine the inter-American public interest, so that the collective guarantee is activated.

In conclusion, the Court determined that, when a Member State of the Organization of American States denounces the Charter, its international human rights obligations stand as follows: (1) human rights obligations derived from the OAS Charter remain unaltered during the period of transition to full denunciation; (2) definitive denunciation of the OAS Charter produces no retroactive effects; (3) the duty to abide by obligations derived from decisions by the human rights protection bodies of the inter-American system remains in force until compliance is final; (4) the duty to abide by inter-American human rights treaties ratified and not denounced under their own procedures remains in effect; (5) customary norms, those derived from general principles of law and those pertaining to *jus cogens* continue to bind the State under general international law and, moreover, the duty to abide by the obligations inherent in the United Nations Charter remains in effect.

III. The notion of collective guarantee underlying the inter-American system

The Court explained that the notion of collective guarantee translates into a general duty of protection required of States Parties to the American Convention and the OAS Charter, as well as the American Declaration, to ensure the effectiveness of those instruments, as a rule of an *erga omnes partes* nature. The Court emphasized that human rights standards, both Convention-based and those derived from the OAS Charter and the American Declaration, reflect shared values and common interests that are considered important and, therefore, benefit from collective application. The notion of collective guarantee is also consistent with the consolidation of cooperation, solidarity and good neighborliness among the States in the American continent. Furthermore, the Court observed that, given the nature of human rights treaties, their object and purpose, and the asymmetrical relationship between the individual and the State, the collective guarantee also ensures that persons under the jurisdiction of the denouncing State are not deprived of a minimum threshold of protection of their human rights.

Finally, the notion of collective guarantee is considered to be of direct interest to each Member State of the OAS, and to all the States as a whole, and is activated through the Organization's

political organs. This mandates the implementation of various institutional and peaceful mechanisms for taking swift, collective action to address possible denunciations of the American Convention and/or of the OAS Charter in situations in which democratic stability, peace and security may be affected and lead to human rights violations.

The Court also stressed the importance that, when the Inter-American Court, by virtue of its powers to oversee compliance with its judgments and to order provisional measures, informs the OAS General Assembly of any case of non-compliance with its decisions, pursuant to Article 65 of the American Convention, a mechanism or system composed of States Parties to the Convention be established to promote due observance of and compliance with the Court's decisions, especially the reparations ordered in favor of the victims of human rights violations.

Lastly, in relation to denunciations of the American Convention and/or of the OAS Charter, the Court explained that the collective guarantee implies a duty by the States to act jointly and cooperatively to protect the rights and freedoms which they have undertaken to uphold internationally through their membership of the regional Organization and, in particular, (1) to present in a timely manner their observations or objections regarding denunciations that do not withstand scrutiny in light of the democratic principle and that undermine the inter-American public interest; (2) ensure that the denouncing State does not consider itself disengaged from the OAS until it has complied with the human rights obligations acquired through various protection mechanisms within the framework of their respective competencies and, in particular, those related to compliance with the reparations ordered by the Inter-American Court until the conclusion of the proceedings; (3) cooperate with each other to put an end to impunity by investigating and prosecuting serious human rights violations; (4) grant international protection, in accordance with commitments arising from international human rights law, international humanitarian law and refugee law, by admitting potential asylum seekers to the territory, guaranteeing their right to seek and receive asylum, and respecting the principle of *non-refoulement*, among other rights, until a lasting solution is achieved; and (5) engage in bilateral and multilateral diplomatic efforts, and peacefully exercise their good offices so that those States that have withdrawn from the OAS may rejoin the regional system. All this without prejudice to universal or other types of forums or mechanisms that may prosper.

The full text of this Advisory Opinion is available at the following link: https://www.corteidh.or.cr/docs/opiniones/seriea_26_esp.pdf

Judge L. Patricio Pazmiño Freire informed the Court of his partially dissenting opinion. Judge E. Raúl Zaffaroni advised the Court of his separate dissenting opinion.