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Venezuela's Denunciation of the American Convention on Human Rights

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Introduction

On September 6, 2012, the Government of the Bolivarian Republic of Venezuela ("Venezuela") gave notice of its denunciation of the American Convention on Human Rights ("the American Convention" or "the Convention").^[1] Pursuant to Article 78 of the Convention, the denunciation will take effect one year later, on September 6, 2013. The instrument was received on September 10, 2012, by the Secretary General of the Organization of American States ("OAS"), who regretted Venezuela's decision.^[2] The Convention had previously been denounced only by Trinidad and Tobago.

Venezuela expressly manifested its intention to withdraw from the Inter-American Commission on Human Rights ("Commission") and the Inter-American Court of Human Rights ("Court"). Nonetheless, while it expressly "denounced" its Declaration recognizing the Commission's competence, it did not withdraw its Declaration recognizing the Court's jurisdiction.

Venezuela's denunciation of the Convention has been met with criticism, both internally and internationally. In the domestic context, Asdrubal Aguiar Aranguren, former Judge of the Inter-American Court of Human Rights, is reported to have pointed out that Venezuela's withdrawal from the American Convention is invalid under Venezuelan law as it deprives "persons" of their right to submit requests and complaints to organs established under human rights treaties, enshrined in Article 31 of the Constitution.^[3] At the international level, the United Nations ("UN") High Commissioner of Human Rights, Navi Pillay, has asked Venezuela to reconsider its decision in light of the importance of human rights protection for democracy. In her view, withdrawal from the Convention will deprive Venezuelans of remedies and undermine the protection of human rights by the Inter-American system, which she characterized as one of the most effective systems of human rights protection in

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the world.[4]

This *Insight* analyzes Venezuela's denunciation as well as its implications for Venezuela's obligations under the Convention, the competence of the Commission, and the jurisdiction of the Court.

Content of the Denunciation

In its instrument of denunciation, Venezuela recalled that it had accepted the jurisdiction of the organs constituted by the Convention, namely the Commission and the Court, on August 9, 1977, and June 24, 1981, respectively. However, it stated that the level of protection of human rights under its internal law placed it in a position of "moral and political authority" to oppose the practice of those organs. In its view, the Commission and the Court are engaging in political interventionism and failing to comply with the requirement of exhaustion of local remedies. Venezuela praised the practices of the UN Human Rights Council and stated that it was under a duty, pursuant to Article 131 of the OAS Charter, to assure that its obligations in accordance with the UN Charter were not "violated by the Inter-American System."^[5]

Venezuela asserted that the Court and the Commission are constantly in breach of the Convention, listing specific instances of their allegedly wrongful practice in an Annex, including the purported recognition of the coup d'état of April 11, 2002, by the Commission. Venezuela further stated that the Court could not affect the constitutional order of Member States, as the international protection afforded by the Court is "complementary" to "the internal order of American States."^[6] In this vein, it maintained that the Court's decisions had "affected" the Venezuelan Constitution, as noted by the Constitutional Chamber of the Supreme Court of Justice of Venezuela in its Decision 1572 of 2008,^[7] which held unenforceable a decision of the Inter-American Court of Human Rights and concluded that the Convention is not superior to the Venezuelan Constitution. Venezuela also asserted that the Court lacked jurisdiction to "apply the Convention" or to "'declare' or 'rule' on the responsibility of a State."^[8]

Venezuela underscored its view that the Court is biased against it and has selectively admitted "cases clearly politicized," in breach of the requirement of exhaustion of local remedies under Article 46(1) of the Convention.^[9]

Venezuela concluded that "it is forced to distance itself from the current perverted practices of the Organs of the Inter American System of Human Rights," namely the Commission and the Court, and that, as "the competences, structure and procedure" of these organs "are set out in and by" the Convention, it had to denounce the Convention. Lastly, Venezuela stated that it remains bound by its obligations under the OAS Charter and "other instruments validly ratified" by it to the extent that their provisions are consistent with the "spirit" and "purpose" of, as well as the "reason for," the denunciation.^[10]

Denunciation of the American Convention Under International Law

Denunciation may be defined as an act terminating legal relations established by a treaty between the denouncing party and each of the other parties to it. The denunciation of treaties and its legal consequences are governed by public international law, particularly the law of treaties.^[11]

Although Venezuela is not a party to the 1969 Vienna Convention on the Law of Treaties ("VCLT"),^[12] and, thus, its denunciation is not directly governed by the VCLT,^[13] the applicable rule of customary law of treaties is reflected in VCLT Article 42(2). According to this rule, the parties to a treaty may provide for denunciation of that treaty, and denunciation

may take place pursuant to the applicable treaty provisions.^[14]

Article 78(1) of the Convention provides that “[t]he States Parties may denounce this Convention at the expiration of a five-year period starting from the date of its entry into force” by means of notice of denunciation given one year in advance and addressed to the OAS Secretary-General. As the Convention entered into force with respect to Venezuela on July 18, 1978,^[15] the five-year period referred to in Article 78(1) expired for Venezuela almost three decades ago.

Accordingly, pursuant to Article 78(2) of the Convention, after the denunciation takes effect, Venezuela will remain bound by Convention obligations “with respect to any act that may constitute a violation of those obligations and that has been taken prior to the effective date of denunciation.” The applicability of this rule in relation to the powers of organs constituted by the Convention is analyzed below, in view of their relevant practice.

Legal Consequences Regarding the Competence of the Inter-American Commission on Human Rights

In denouncing the Convention, as noted above, Venezuela also denounced its declaration of August 9, 1977,^[16] recognizing the competence of the Commission in accordance with Article 45(1) of the Convention. The Commission nevertheless remains competent in relation to certain acts of a denouncing state, pursuant to Article 78(2) of the Convention. Specifically, following the denunciation of the Convention by Trinidad and Tobago, the Commission held in its reports in the *Sheldon Roach & Beemal Ramnarace, Arnold Ram Logan, Alladin Mohammed, and Haroon Khan*^[17] cases that Article 78(2) is applicable to the “supervisory mechanisms” set out by the Convention “including those under Chapter VII relating to the jurisdiction, functions and powers of the Inter-American Commission on Human Rights”^[18] and to acts “taken” before the effective date of denunciation “even if the effects of those acts continue or are manifested until after that date.”^[19]

In addition, the Commission has ruled that denunciation of the Convention is without prejudice to the competence of the Commission independently of the Convention, as an organ of the OAS,^[20] particularly on the basis of the Charter of the OAS^[21] and in relation to rights set out in the American Declaration on the Rights and Duties of Man. Accordingly, as Venezuela has not denounced the Charter of the OAS, Venezuela’s statement that it remains bound by its obligations under the Charter only to the extent that the Charter is consistent with its denunciation has no legal consequences. Consequently, the Commission may rely on provisions of the Charter as a legal basis of its competence to supervise Venezuela’s compliance with the Charter.

Legal Consequences Concerning the Jurisdiction of the Inter-American Court of Human Rights

Venezuela recognized the jurisdiction of the Inter-American Court of Human Rights on June 24, 1981, in accordance with Article 62(1) of the Convention.^[22] As noted above, in denouncing the Convention, Venezuela did not expressly withdraw this declaration of recognition of the Court. Hence, as noted in the Court’s 1999 Judgement (Competence) in the *Ivcher-Bronstein v. Peru* case, the Court will cease to have jurisdiction in relation to Venezuela only as a consequence of its denunciation of the entire Convention, once it takes effect. In that case, the Court was considering an attempt by the Government of Peru to withdraw its recognition of the Court’s jurisdiction without denouncing the American Convention. In essence, the Court held that withdrawal of recognition of the Court’s jurisdiction is inadmissible, as only denunciation of the entire treaty is permitted.^[23]

Pursuant to the Court's previous decisions following the denunciation of the Convention by Trinidad and Tobago, the Court will remain competent to hear cases arising out of facts which took place before the "effective date of denunciation." In its 2001 Judgements (Preliminary Objections) in the *Hilaire, Benjamin, and Constantine et al.*^[24] cases, it held that it remains competent in relation to "facts . . . which occurred prior to the entry into force of the denunciation made by the State."^[25] In its 2002 and 2005 judgements (Merits, Reparations, and Costs) in the *Hilaire, Benjamin, Constantine et al.*, and *Caesar*^[26] cases, the Court clarified that "it is fully competent according to the terms of Articles 62(3) and 78(2) of the Convention" in relation to such facts.

Furthermore, in accordance with the American Convention and the Court's jurisprudence, denouncing states remain bound, in relation to breaches of the Convention occurring before the denunciation takes effect, to:

- i) comply with the Court's judgements, pursuant to Article 68(1);^[27]
- ii) adopt provisional measures as ordered or extended by the Court in accordance with Article 63(2);^[28] and
- iii) report on compliance with judgements and with orders of provisional measures.^[29]

Conclusion

The Government of Venezuela may withdraw its denunciation of the American Convention. Indeed, it has been urged to do so, as noted above. Nonetheless, it is unlikely that this course of action will be taken. Venezuela's denunciation of the Convention is one of several instances of the country's denunciation of, or withdrawal from, treaties or international organizations, precluding the operation of mechanisms of dispute settlement that could hold the Venezuelan Government accountable under international law. For instance, most recently, on January 24, 2010, Venezuela denounced the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention").^[30] Previously, on April 22, 2006, it had given notice of its denunciation of the Cartagena Agreement, which established the Andean Community.^[31]

Since 2006, the Inter-American Court of Human Rights has undertaken judicial review of domestic legislation for the purposes of ensuring compliance with Inter-American human rights treaties as construed by the Court. The Court has referred to this form of judicial review as "*control de convencionalidad*."^[32] While the highest courts of some other Member States have rejected this form of judicial review, none of the governments of those Member States has hitherto sought to denounce the American Convention out of disagreement with the Court's decisions. They have expressed their views as to the Court's practice within the framework of the OAS Working Group, which is considering possible reform of the Inter-American System of Human Rights.^[33]

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Endnotes:

[1] American Convention on Human Rights [Pact of San José, Costa Rica], Nov. 22, 1969, 1144 U.N.T.S. 144; Gov't of the Bolivarian Republic of Venezuela, Ministry of the Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, Note 000125, at 9, ¶ 2 (Sept. 6, 2012), *available at* http://www.oas.org/dil/esp/Nota_Republica_Bolivariana_de_Venezuela_al_SG_OEA.PDF ("For the foregoing, on behalf of my Government, I hereby express the sovereign decision of the Bolivarian Republic of Venezuela of denouncing the American Convention on Human Rights, in view of which, pursuant to article 78 thereof, I shall be grateful if you deem the present Note as the Notice of Denunciation so that, from the period established thereby, all its international effects cease, as far as she is concerned, as well as the competence of its organs as to our country, both of the Inter-American Commission of Human Rights and of the Inter-American Court of Human Rights.") (original in Spanish, unofficial translation by the author) [hereinafter Venezuela Note].

[2] Org. of Am. States [OAS], Dep't of Int'l L., <http://www.oas.org/dil/esp/accionesrecientestratados.htm>.

[3] See Theis Reyes, *Constitution Prevents Venezuela's Withdrawal From IACHR Court*, El Universal (Aug. 2, 2012), *available at* <http://www.eluniversal.com/nacional-y-politica/120802/constitution-prevents-venezuelas-withdrawal-from-iachr-court>.

[4] Press Release, Office of High Comm'r for Hum. Rts., High Comm'r for Hum. Rts., Pillay Urges Venezuela to Reconsider Withdrawal From American Convention on Human Rights, *available at* <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12500&LangID=E> (last visited Dec. 21, 2012).

[5] Venezuela Note, *supra* note 1, 1–2.

[6] *Id.* 3–4; *see also* Venezuela, Annex to Note 000125 of 6 September 2012, ¶ A(5) [hereinafter Venezuela, Annex to Note 000125].

[7] Venezuela, Annex to Note 000125, ¶ C (stating that in Decision 1572/2008 of the Constitutional Chamber of the Venezuelan Supreme Court of Justice [*Tribunal Supremo de Justicia*], the Supreme Court of Justice held that the Judgment of 5 August 2008 of the Inter-American Court of Human Rights in the *Apitz Barbera et al.* Case was "unenforceable." In this decision, the Supreme Court of Justice stated that "article 23 of the Constitution does not accord international treaties on human rights a 'supraconstitutional' rank, for which reason, in the event of an antinomy or contradiction between a provision of the Charta Magna and a norm of an international pact, it would be incumbent upon the Judicial Power to determine which one would be applicable, taking into consideration both what is provided for in the abovementioned norm and the case law of the Constitutional Chamber of the Supreme Court of Justice, bearing in mind the content of articles 7, 266.6, 334, 335, 336.1 of the Constitution and in [sic] the Decision No 1077/2000 of the Constitutional Chamber." (original in Spanish, unofficial translation by the author).

[8] Venezuela Note, *supra* note 1, 4.

[9] *Id.* 4–9 (citing as instances of such politicized cases the following claims brought against Venezuela: *Ríos*, *Perozo et al.*, *Allan Brewer Carías*, *Leopoldo López*, *Usón Ramírez*, and *Raúl Díaz Peña*).

[10] *Id.* 8–9.

[11] *See, e.g.*, Marcelo G. Kohen & Sarah Heathcote, *1969 Vienna Convention, Article 42, Validity and Continuance in Force of Treaties*, in *The Vienna Convention on the Law of Treaties: A Commentary* 1015, 1019–20, ¶ 13 (Olivier Corten & Pierre Klein eds., 1st ed. Oxford Univ. Press 2011).

[12] United Nations Office Of Legal Affairs, Treaty Section, Status of the Vienna Convention on the Law of Treaties of 23 May 1969, http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en.

[13] This is in accordance with the rule *pacta sunt servanda qua* custom, codified in Article 26, VCLT, and without prejudice to the application of the VCLT provisions on reservations, pursuant to Article 75 of the American Convention.

[14] The rule that denunciation only takes place in accordance with the provisions of the respective treaty, set out in Article VCLT 42(2), is deemed a rule of customary law of treaties; *see* Gabčíkovo-Nagymaros Project, 1997 I.C.J. 62–63, ¶ 100 (Sept. 25); Kohen & Heathcote, *supra* note 11, 1017–18, ¶¶ 7–8.

[15] United Nations Office Of Legal Affairs, Treaty Section, Status of the American Convention on Human Rights of 22 November 1969, <http://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f10e1>; Org. of Am. States [OAS], Dep't of Int'l L., American Convention on

Human Rights [Pact of San Jose, Costa Rica] (B-32), General Information of the Treaty: B-32, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm#Venezuela.

[16] American Convention on Human Rights [Pact of San José, Costa Rica], Gov't of the Bolivarian Republic of Venezuela, Declaration, 1144 U.N.T.S. 211.

[17] See Sheldon Roach & Beemal Ramnarace v. Trinidad and Tobago, Inter-Am. Comm'n H.R., Report No. 17/02 (Feb. 27, 2002), *available at* http://www.cidh.oas.org/annualrep/2002eng/TT.12346.htm#_ftn5; Arnold Ram Logan v. Trinidad and Tobago, Inter-Am. Comm'n H.R., Report No. 48/02 (Oct. 9, 2002), *available at* http://www.cidh.oas.org/annualrep/2002eng/TT.12355.htm#_ftn4; Alladin Mohammed v. Trinidad and Tobago, Inter-Am. Comm'n H.R., Report No. 50/02 (Oct. 9, 2002), *available at* <https://www.cidh.oas.org/annualrep/2002eng/TT.12401.htm>; Haroon Khan v. Trinidad and Tobago, Inter-Am. Comm'n H.R., Report No. 153/10 (Nov. 1, 2010), *available at* www.cidh.oas.org/annualrep/2010eng/TTAD43-05EN.DOC.

[18] *Sheldon Roach & Beemal Ramnarace*, *supra* note 17, ¶ 28; *Arnold Ram Logan*, *supra* note 17, ¶ 20; *Alladin Mohammed*, *supra* note 17, ¶ 18; *Ivcher-Bronstein v. Peru*, Inter-Am. Ct.H.R., 10, ¶ 37, (Ser. C) No. 54 (1999).

[19] *Sheldon Roach & Beemal Ramnarace*, *supra* note 17, ¶ 28; *Arnold Ram Logan*, *supra* note 17, ¶ 20; *Alladin Mohammed*, *supra* note 17, ¶ 18.

[20] See *Sheldon Roach & Beemal Ramnarace*, *supra* note 17, ¶ 28; *Arnold Ram Logan*, *supra* note 17, ¶ 20; *Alladin Mohammed*, *supra* note 17, ¶ 18; *Haroon Khan*, *supra* note 17, ¶ 24.

[21] OAS Charter arts. 53(e) & 106, Apr. 30, 1948, 119 U.N.T.S. 3 (entered into force Dec. 13, 1951).

[22] OAS, Inter-American Comm'n of Human Rights, B-32: American Convention on Human Rights "Pact of San Jose, Costa Rica," Status, <http://www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm> (last visited Dec. 21, 2012).

[23] *Ivcher-Bronstein*, *supra* note 18, ¶¶ 50-54.

[24] *Hilaire v. Trinidad and Tobago*, Inter-Am Ct. H.R., (Ser. C) No. 80 (2001), http://www.corteidh.or.cr/docs/casos/articulos/Seriec_80_ing.pdf (last visited Dec. 21, 2012); *Benjamin et al. v. Trinidad and Tobago*, Inter-Am Ct. H.R., (Ser. C) No. 81 (2001), http://www.corteidh.or.cr/docs/casos/articulos/Seriec_81_ing.pdf (last visited Dec. 21, 2012); *Constantine et al. v. Trinidad and Tobago*, Inter-Am Ct. H.R., (Ser. C) No. 82 (2001), http://www.corteidh.or.cr/docs/casos/articulos/Seriec_82_ing.pdf (last visited Dec. 21, 2012).

[25] *Hilaire*, *supra* note 24, ¶ 28; *Benjamin et al.*, *supra* note 24, ¶ 22; *Constantine et al.*, *supra* note 24, ¶ 28.

[26] *Hilaire*, *Constantine*, *Benjamin et al. v. Trinidad and Tobago*, Inter-Am Ct. H.R., ¶ 11 (Ser. C) No. 94 (2002), http://www.corteidh.or.cr/docs/casos/articulos/seriec_94_ing.pdf (last visited Dec. 21, 2012); *Caesar v. Trinidad and Tobago*, Inter-Am Ct. H.R., ¶ 11 (Ser. C) No. 123 (2005), http://www.corteidh.or.cr/docs/casos/articulos/seriec_123_esp.pdf (last visited Dec. 21, 2012).

[27] "Article 68. 1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties."

[28] See, e.g., *James et al. v. Trinidad and Tobago*, Inter-Am Ct. H.R., (Ser. E) No. 18 (2009), *available at* www.corteidh.or.cr/docs/medidas/james_se_18_ing1.pdf; *James et al. v. Trinidad and Tobago*, Inter-Am Ct. H.R., (Ser. E) No. 15 (2002), *available at* www.corteidh.or.cr/docs/medidas/james_se_15_ing.pdf.

[29] See, e.g., *Hilaire*, *Constantine*, *Benjamin et al. v. Trinidad and Tobago*, Inter-Am Ct. H.R., Compliance with Judgment, ¶¶ 1–13 (Nov. 27, 2003), *available at* http://www.corteidh.or.cr/docs/supervisiones/hilaire_27_11_03_ing.doc. As for orders of provisional measures, see, e.g., *James et al. v. Trinidad and Tobago*, Inter-Am Ct. H.R., ¶ 15 (Ser. E) No. 16 (2003), *available at* http://www.corteidh.or.cr/docs/medidas/james_se_16.pdf.

[30] Int'l Ctr. for Settlement of Inv. Disputes, List of Contracting States and Other Signatories of the Convention 1, 5 (as of July 25, 2012), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English> (last visited Dec. 21, 2012).

[31] *Secretaría General De La CAN Recibió Comunicación Oficial De Retiro De Venezuela* (*Secretary General Received Official Letter Giving Notice of Venezuela's Withdrawal*), in *Andean*

Community, Sec'y Gen., *available at* <http://www.comunidadandina.org/prensa/notas/np22-4-06a.htm> (last visited Dec. 21, 2012).

[32] *See, e.g.,* Almonacid-Arellano et al. v. Chile, Inter-Am. Ct. H.R., (Ser. C) No. 154 (2006) (the seminal case setting out the “*control de convencionalidad*” doctrine). For instances of rejection of the IACHR “*control de convencionalidad*” doctrine by other Member States’ highest domestic courts, *see, e.g.,* Republic of Colombia, Constitutional Court, Decision C-941/10 (Nov. 24, 2010) (stating, *e.g.,* that the American Convention is not superior to the Colombian Constitution, under Colombian law, and that the Constitutional Court is not a “*juez de convencionalidad*” (namely, a judicial authority conducting “*control de convencionalidad*”) and, therefore, does not exercise “*control de convencionalidad*.”).

[33] *See generally* OAS, Permanent Council, Special Working Group to Reflect on the Workings of the IACHR With a View to Strengthening the IAHRs, *available at* <http://www.oas.org/consejo/workgroups/Reflect%20on%20Ways%20to%20Strengthen.asp> (last visited Dec. 21, 2012).