

Introduction

Reasons and motivation to deal with the advisory function of the IACtHR

In 2018, the presidential elections in Costa Rica were immensely impacted by the publication of advisory opinion OC-24/17 on gender identity, and equality and non-discrimination of same-sex couples¹. The advisory opinion OC-24/17 which had been requested by the incumbent government of Costa Rica and in which the Court clarified that homosexual couples should enjoy the same rights as heterosexual couples and should also have the right to marry, was published in the midst of the election campaign. By rejecting the Inter-American Court of Human Rights (IACtHR) and its advisory opinion, Fabricio Alvarado Muñoz, the presidential candidate from the conservative National Restoration Party, gained surprising momentum in the polls. The National Restoration Party had used to be a small party, but this time its evangelist leader Alvarado Muñoz managed to win the first electoral round. Alvarado Muñoz had threatened to denounce the American Convention on Human Rights (ACHR) should he become President.² This would have been fatal given that Costa Rica was not only the first state to ratify the Convention, but that the Court has its seat in its capital San José. Luckily, Carlos Alvarado Quesada, presidential candidate from the Citizen's Action Party, managed to win liberal voters and especially the youth with a pro-gay marriage campaign on social media, and

1 *Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(l), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights)*, Advisory Opinion OC-24/17, Series A No. 24 (24 November 2017)

2 'Fabricio Alvarado dispuesto a salirse de la Corte IDH para que no le 'impongan' agenda LGBTI', *Elmundo.cr*, 11 January 2018, available at: <https://www.elmundo.cr/costa-rica/fabricio-alvarado-dispuesto-salirse-la-corte-idh-no-le-impongan-agenda-lg-tbi/>; 'Las ideas de Fabricio Alvarado sobre la Corte IDH, puestas a prueba', *Semanario Universidad*, 3 February 2018, available at: <https://semanariouniversidad.com/pais/ideas-fabricio-alvarado-sobre-corte-idh-puestas-a-prueba/>.

thereby ultimately won the decisive second electoral round with 60,6 % of the votes over Alvarado Muñoz who obtained 39,4 % of the votes.³

It was intriguing that an advisory opinion, an instrument which is under traditional international law understood to be non-binding, had such an impact on the national politics in a state.

At the same time, advisory opinion OC-23/17 on the environment and human rights⁴, which had been published shortly after OC-24/17, attracted widespread international attention because it contained many progressive ideas and findings. Among other things, the Court had held that nature might have an own legal personality, and that the right to a healthy environment was not only protected by Article 11 of the Protocol of San Salvador⁵, but that the right was through Article 26 ACHR⁶ also protected by the Convention as such. Furthermore, the Court combined established principles from international environmental law with the effective-control test which the European Court of Human Rights (ECtHR) has developed in matters

³ See Tribunal Supremo de Elecciones, *Computo de votos y declaratorias de elección 2018*, p. 20, available at: https://www.tse.go.cr/pdf/elecciones/computovotos_febrero_abril_2018.pdf. For further references see *infra*: Chapter 4, Section H.

⁴ *The environment and human rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights of life and to personal integrity: Interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-23/17, Series A No. 23 (15 November 2017).

⁵ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 17 November 1988, entered into force 16 November 1999) OAS Treaty Series No. 69 (Protocol of San Salvador).

⁶ In the following work, articles without any further indication are those of the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR, Convention). Article 26 ACHR states:

‘Article 26. Progressive Development’

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

Despite the provisions’ open and indeterminate text, since the 2017 judgment in the case of *Lagos del Campo*, the Court holds that economic, social cultural and environmental rights are directly justiciable under Article 26. As to this new approach to Article 26 and the controversial debate on it see: IACtHR, *Case of Lagos del Campo v. Peru*, Judgment of 31 August 2017 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 340, paras. 141ff. and *infra*: Chapter 6, Section B and (n 1397) for further references.

of extraterritorial jurisdiction in order to answer the question when a state is responsible for human rights violations suffered by people in other states due to transboundary environmental damage.⁷

The variety and timeliness of the topics the Court deals with in advisory opinions as well as the manner in which it does so, is fascinating. While the objections raised in advisory proceedings before the International Court of Justice (ICJ) are similar to the objections raised in advisory proceedings before the IACtHR, there are decisive differences between the scope of the Court's advisory jurisdiction and that of the ICJ. Whereas proposals to provide states with a right to request advisory opinions of the World Court had always been rejected at the international level⁸, the IACtHR may not only answer requests from organs of the Organization of American States (OAS), but also requests from any OAS member state, irrespective of whether that state has ratified the ACHR. Today, other Courts like the African Court on Human and Peoples' Rights (AfrCtHPR) also have theoretically a very broad advisory jurisdiction. However, the IACtHR is still the only human rights court that is frequently consulted, and that has thus managed to establish a very rich advisory practice. To date, the IACtHR has rendered 29 advisory opinions⁹ and thus two more than the ICJ. Notably, in a shorter period of time.¹⁰

Despite the frequency, the huge impact of the Court's advisory opinions, and the many interesting legal features of the Court's advisory function, not much literature exists on the topic, and hardly any in English.

While several monographies on the advisory function of the ICJ and its predecessor exist, literature on the advisory function of other courts is

7 OC-23/17 (n 4); Verena Kahl, 'Ökologische Revolution am Interamerikanischen Gerichtshof für Menschenrechte' (2019) 2 Zeitschrift für Europäisches Umwelt und Planungsrecht, 1, 11.

8 See on this *infra*: Chapter 2, Sections BV and VI.

9 Notably, OC-12/91 was not rendered on the merits and should therefore actually be counted as case of a rejected advisory opinion request. Yet, also as concerns the ICJ its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, of 8 July 1996, I.C.J. Reports 1996, p. 66 was counted, although the ICJ declined to answer the request of the WHO in that proceeding. The IACtHR has, in addition to OC-12/91, rejected five other requests for advisory opinions which were not counted above, as they were delivered as orders of rejection. On this see *infra*: Chapter 4, Section C.I. and the charts in Chapter 4, Section I. on the average length of advisory proceedings.

10 While the ICJ held its inaugural public sitting in 1946, the IACtHR was not officially inaugurated until 1979. See *infra* Chapter 1.

scarce. Concerning the advisory function of the IACtHR there are, apart from several articles and short introductions to the Court's procedural law, only the basic but somewhat dated work of Ventura Robles and Zovatto¹¹ and the two monographies of Guevara Palacios¹² and Roa,¹³ which while newer, still do not fully exhaust the topic. All the three monographies are only published in Spanish and, moreover, are mainly written from an inter-American perspective. Guevara Palacios draws some comparisons with the ICJ, but overall, he focuses more on the reception and impact the Court's advisory opinions have in Latin American states than on the broader question whether it is at all advisable to provide an international human rights court with such a broad advisory jurisdiction. While it has often been pointed out that the advisory jurisdiction of the IACtHR was extraordinary in international law, it had not yet been further examined which consequences it has if a jurisdictional function known from an international court with general jurisdiction is given to a human rights court which is embedded in an increasingly closely integrated regional human rights system.

What is more, when the existing books were published, it was not yet fully foreseeable which consequences the inclusion of the Court's advisory opinions in the Court's doctrine of conventionality control¹⁴ would have.

The topic thus provided plenty of potential for new legal investigation. In 2019, even more new requests for advisory opinions were filed with the Court than ever before. Among them were two politically very explosive requests from Colombia, which were directly related to current political conflicts in the region.¹⁵ While the Court decided to grant the advisory opinions in these cases, in the preceding years it had rejected two other

11 Manuel E. Ventura Robles and Daniel Zovatto, *La Función Consultiva de la Corte Interamericana de Derechos Humanos: Naturaleza y Principios 1982-1987* (Editorial Civitas, 1989).

12 Augusto Guevara Palacios, *Los Dictámenes Consultivos de la Corte Interamericana de Derechos Humanos: Interpretación constitucional y convencional* (Bosch Editor / IIDH, 2012).

13 Jorge E. Roa, *La función consultiva de la Corte Interamericana de Derechos Humanos* (Universidad Externado de Colombia, 2015).

14 As to this doctrine see *infra*: Chapter 5, Section B.II.

15 Colombia, *Request for an Advisory Opinion on obligations in matters of human rights of a states that has denounced the American Convention on Human Rights, and attempts to withdraw from the OAS*, 3 May 2019 and Colombia, *Request for an Advisory Opinion on the figure of indefinite presidential re-election in the context of the Inter-American system of human rights*, 21 October 2019.

politically sensitive requests related to ongoing impeachment proceedings in the region.¹⁶

At the moment of publication of this work, there are again three interesting requests for advisory opinions pending before the Court. This underlines the continued relevance to deal with the Court's advisory function from an academic point of view.

Purpose and idea of the book

The work has two main aims. Given the lack of English literature on the advisory function of the IACtHR, one aim of this book is to introduce this unique advisory function to a broader, non-Spanish-speaking audience that is not yet very familiar with the IACtHR. Therefore, the book starts with a brief general introduction of the Court, its relation to the OAS, and its position in the inter-American human rights system. Furthermore, at the beginning of Chapter 5, which deals with the legal nature and effects of the Court's advisory opinion, the development and the basic features of the Court's doctrine of conventionality control are once more summarized, as a basic knowledge of the Court's doctrine is indispensable for understanding the current debate on the legal effects of the Court's advisory opinions.

Apart from making the Court's advisory function known to a broader international audience, the book of course also intends to update and complement the existing Spanish literature. It aims to find practical answers to questions that have arisen in the context of the Court's advisory practice. For example, the Court has been criticized for not consistently applying its criteria for rejecting requests for advisory opinions, but to date there has been no in-depth academic study of this issue.

Studying the advisory function of the IACtHR, it becomes apparent that while having been modelled after the advisory function of the ICJ, the advisory function of the IACtHR, today – both because of the Court's practice and because of the different setting of an advisory function being exercised by a regional human rights court – has unique characteristics and a relevance in the inter-American human rights system that is not comparable to that of advisory functions of other international courts. If one is only familiar with the advisory function of the ICJ and then reads Article 64¹⁷ and assumes that the advisory function of the IACtHR was

¹⁶ As to these requests and their rejection see *infra*: Chapter 4, Section C.I.5 and 6.

¹⁷ As to the full English and Spanish text of Article 64 of the ACHR which provides the legal basis for the Court's advisory function see *infra*: Chapter 2, Section C.V.

directly comparable to that of the ICJ, one would probably be surprised by, or only frown at, aspects of the current discussions on the effects of the Court's advisory function. Likewise, and *vice versa*, if one is familiar with the current work of the IACtHR and trying to develop a position in the discussion on the legal effects of the Court's advisory opinions, it might be helpful to recall how the advisory function was originally conceived.

Therefore, this book on the one hand wants to recall the international law origins of the Court's advisory function, and point out that the basic differentiation between contentious and advisory jurisdiction is still relevant. On the other hand, it shows what distinguishes the advisory function of the IACtHR from the advisory function of other international courts, partly from the beginning and partly only through the practice of the IACtHR that has developed over the years. Taking these differences into account is *inter alia* important for the determination of the legal effects of the advisory opinions of the IACtHR.

Apart from taking a position on the legal effects of the Court's advisory opinions, the work points out how the Court could increase the transparency and consistency of its decisions to decline requests for advisory opinions.

Lastly, the book discusses several proposals how the Court's advisory function could be improved and further developed.

Methodology

The advisory function of the IACtHR is approached from a doctrinal and in part also comparative international law perspective. In many parts, the advisory function of the IACtHR is compared to those of other international courts, especially that of the ICJ. This serves to show both similarities and differences as concerns the advisory jurisdiction, the advisory procedure, and the legal effects of the advisory opinions of the IACtHR on the one hand, and that of the ICJ and other international courts on the other hand.

First of all, the secondary literature available on the advisory function of the IACtHR and that of the ICJ has been studied. What is more, historical documents, not least the *travaux préparatoires* of the ACHR have been examined.

The most important sources for the analysis undertaken in this work are, however, of course the advisory opinions themselves and the Court's practice manifested therein. Moreover, all written observations made by OAS organs, states and civil society which are available on the Court's website and in the archives of the Court have been examined in order to find out

which objections have been brought forward in advisory proceedings, and how high the public interest in the proceedings has been.

When it comes to the interpretation of Article 64 and other relevant provisions and the evaluation of the legal interpretation undertaken by other scholars, the methods of treaty interpretation as enshrined in Articles 31 *et. seq.* VCLT¹⁸ are employed.

Finally, the book is informed by the more recent general research on the functions and roles of international courts as well as discussions and works on transformative constitutionalism and the emergence of an *ius constitutionale commune* in Latin America.¹⁹ However, given that this work has been conceived as a foundational work on the advisory function of the IACtHR, one of its main objectives being to make this function known and understood to a wider international readership, the advisory function and the Court's advisory practice are primarily described and analyzed from a doctrinal and especially procedural law perspective. An interdisciplinary analysis of the Court's advisory function under more specific research questions, e.g. regarding the legitimacy, effectiveness or transformative impact of the advisory function of the IACtHR would have gone beyond the scope of this work. But this book may serve as a basis for further research related to these questions.

Guide to the chapters

The **first chapter** provides a brief overview of the Court and its place in the inter-American human rights system. It looks in particular at the relationship between the Court and the OAS, and the interaction between

18 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

19 The book draws for example on Armin von Bogdandy and Ingo Venzke, *In Whose Name?: A Public Law Theory of International Adjudication* (OUP, 2014); Armin von Bogdandy *et al.* (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (OUP, 2017); Ximena Soley Echeverría, *The Transformation of the Americas: The Rise of Human Rights in the Inter-American System* (Johann-Wolfgang Goethe Universität, 2021). The question whether an *ius constitutionale commune* has emerged in Latin America is not object of this work, but events and presentations in the context of the research project of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg focusing on this question have influenced the author's view of the legal context in which the IACtHR is operating. As to the research project see: <https://www.mpil.de/en/pub/research/areas/comparative-public-law/ius-constitutionale-commune.cfm>.

the IACtHR and the Court. It thus provides an introduction for readers who are not yet familiar with the Court.

The **second chapter** explores the historical origins of the Court's advisory function and seeks to explain why the IACtHR, of all other international courts, was endowed with such an exceptionally broad advisory jurisdiction by the standards of the time. First, the general concept of advisory opinions is introduced. Then, it is traced how this concept has been transferred from origins in national jurisdictions to international courts. It is particularly interesting to see which kind of objections and reservations there have always been about judges and courts providing legal advice to political organs and entities, and how these objections and reservations have slightly changed as regards the advisory function of international courts compared to the advisory function of domestic judges or courts. Finally, and most importantly, the genesis of Article 64 which is the legal basis for the IACtHR's advisory function, is examined step by step.

The **third chapter** provides a detailed account of the scope of the Court's advisory jurisdiction both *ratione personae* and *ratione materiae*. Proposals on how the Court's advisory jurisdiction *ratione personae* could be further extended are discussed. Furthermore, the question to what extent the Court may determine and eventually broaden the scope of requests for advisory opinions is explored. A comparison between the advisory jurisdiction of the IACtHR and that of other international Courts reveals that the Court is no longer the only one which may answer requests from states and that there is a trend towards providing international courts, especially those set up by a regional system of economic integration, with a preliminary ruling procedure.

Chapter four analyzes the admissibility requirements in advisory proceedings and the advisory procedure followed by the IACtHR. One major focus of the whole work lies on the question when the Court should reject a request for an advisory opinion and which criteria it should employ in order to reach this decision. So far, this question is understudied, although the Court has in contrast to the ICJ already rejected several requests based on its discretion. An interests- and values-based approach is suggested, which would result in the Court's balancing decision becoming more transparent. Apart from the Court's discretion to reject requests, the average length and the level of participation in advisory proceedings are depicted. Finally, common proposals how the advisory procedure could be further improved are discussed. Among them is the idea of establishing a preliminary ruling procedure in the inter-American human rights system.

Chapter five describes and analyzes the debate on the legal nature and effects of the Court's advisory opinions. It starts by recapitulating the similar debate led by academics with regard to the advisory opinions of the former Permanent Court of International Justice (PCIJ) and the ICJ, and shows why the answer found on the international level might not be one-to-one transferable to the IACtHR as a regional human rights court. A short summary of the development of the Court's doctrine of conventionality control is provided before the views on the legal nature and effects of the Court's advisory opinions are outlined and evaluated. It is concluded that the advisory opinions of the IACtHR produce *res interpretata* which implies, at least for the states parties to the Convention, that they have to take the advisory opinions into account like judgments rendered against another state, and that they have to provide for a sound legal justification if they want to deviate from the line of jurisprudence established by the IACtHR. Given the close interconnectedness between international human rights law and the states' domestic law, and the fact that most states parties have also accepted the Court's contentious jurisdiction, the advisory opinions of the IACtHR may have a more direct impact within the political and legal system of the OAS member states than advisory opinions rendered by the ICJ.

Finally, **chapter six** summarizes the main findings and conclusions of the thesis. This provides a picture of the development and current status of the advisory function, and also of ways in which it can be further developed and used in the future in order to contribute to an effective human rights protection.

