Eleanor Benz

The Advisory Function of the Inter-American Court of Human Rights

Beiträge zum ausländischen öffentlichen Recht und Völkerrecht

Edited by

the Max Planck Society for the Advancement of Science represented by Prof. Dr. Armin von Bogdandy and Prof. Dr. Anne Peters

Volume 329

Eleanor Benz

The Advisory Function of the Inter-American Court of Human Rights



This publication was supported by funds from the Publication Fund for Open Access Monographs of the Federal State of Brandenburg, Germany.

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.d-nb.de

a.t.: Potsdam, Univ., Diss., 2023

ISBN 978-3-7560-1443-9 (Print) 978-3-7489-1980-3 (ePDF)

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978-3-7560-1443-9 (Print) 978-3-7489-1980-3 (ePDF)

Library of Congress Cataloging-in-Publication Data

Benz, Eleanor

The Advisory Function of the Inter-American Court of Human Rights Eleanor Benz

478 pp.

Includes bibliographic references and index.

ISBN 978-3-7560-1443-9 (Print) 978-3-7489-1980-3 (ePDF)

1st Edition 2024

© Eleanor Benz

Published by

Nomos Verlagsgesellschaft mbH & Co. KG Waldseestraße 3–5 | 76530 Baden-Baden

www.nomos.de

Production of the printed version: Nomos Verlagsgesellschaft mbH & Co. KG Waldseestraße 3–5 | 76530 Baden-Baden

ISBN 978-3-7560-1443-9 (Print) ISBN 978-3-7489-1980-3 (ePDF)

DOI https://doi.org/10.5771/9783748919803



This work is licensed under the Creative Commons Attribution
4.0 International License.



Online Version Nomos eLibrary

To my family

Acknowledgments

This work was accepted as dissertation by the Law Faculty of the University of Potsdam in the winter semester 2022/23. For the publication, case law, literature and other sources could be considered until mid-November 2023.

While working on my dissertation I have often looked forward to the moment when I could write the foreword to my work. For one, because this would mean that I have finally completed this endeavor. But even more importantly, because it would allow me to express all my gratitude to the people who accompanied and supported me along the way to my first book.

First of all, I would like to thank my supervisor, Professor Andreas Zimmermann, LL.M. (Harvard) for always supporting me from the idea to choose this topic until the defense of the dissertation and for providing me with the necessary freedom and confidence to complete this work. I always enjoyed working at his chair and am grateful for the interesting and instructive years. The work on international courts and the practical experiences deepened my understanding of international procedural law, which was very valuable for this work.

I also thank Professor Felix Lange, LL.M. (NYU), M.A. for the quick preparation of the second examiner report and his valuable feedback. Furthermore, I thank the directors of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Professor Armin von Bogdandy and Professor Anne Peters, LL.M. (Harvard), for accepting my work into the Institute's book series, *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*.

The Open Access publication was made possible by the Publication Fund for Open Access Monographs of the Federal State of Brandenburg. The print publication was supported by a grant from the Potsdam Graduate School. Besides, I thank the friend's association of the Law Faculty of the University of Potsdam for awarding me the Wolf-Rüdiger-Bub-Preis.

Writing this book would not have been possible without the exchange of thoughts and ideas, the sharing of knowledge and the constructive feedback from many colleagues and friends. I especially thank Ximena Soley for sharing the passion for international law and the inter-American human rights system with me, for encouraging me to start working on this topic and for commenting on draft chapters. Furthermore, I thank Mariela Morales

Antoniazzi for her support and the invitations to *coloquios iberoamericanos* as well as Juan Tello and Alejandro Chehtman for their feedback and comments on draft chapters.

I am grateful to Pablo Saavedra Alessandri for allowing me to undertake a research stay at the Inter-American Court of Human Rights and to everyone I could talk to during my stay in Costa Rica. The conversations and continued contact with many people affiliated with the Court helped me a lot in writing this work while being in Germany.

I also thank Ullrike Schiller and Katarzyna Bednarska as well as all other colleagues and friends from the Law Faculty of the University of Potsdam and all members of the Doktorand*innenrunde for providing the very pleasant working environment in which this work could be written and for all the support over the past few years.

Last but not least, my greatest thanks go to my family to whom I dedicate this work. Unfortunately, my grandma and grandpa from Darmstadt did not live to see me write a doctoral thesis in international law, but it was their example, intellect, and early encouragement that nurtured my inquisitiveness, love for books and languages, and continues to inspire me. My parents always support me, never put any pressure on me and are always there to listen to me and to offer advice when possible. Immanuel and Julia, thanks for always being here and for all your support the past years, not least the technical help with designing the figures in this book. Special thanks go to Henri and Rhea for distracting me in such a kind and joyful way from thoughts related to work.

Potsdam, November 2023

Eleanor Benz

Table of contents

List of figures	
List of abbreviations	19
Introduction	23
Chapter 1: The IACtHR as part of the inter-American human rights system	33
Chapter 2: Origins of the advisory function of the IACtHR	43
A. Advisory opinions in general	43
B. Historical development of advisory opinions	46
I. England	46
II. United States of America	48
III. Canada and India	52
IV. Latin American states	52
V. Permanent Court of International Justice	55
VI. International Court of Justice	61
VII. Intermediate conclusion	63
C. Genesis of Article 64 ACHR	65
I. The idea to create a binding American Human Rights	
Convention	65
II. Draft of the Inter-American Council of Jurists	67
III. Chilean draft convention	68
IV. Draft of the Inter-American Commission on Human Rights	71
V. 1969 Specialized Inter-American Conference	74
VI. Rejection of an optional advisory jurisdiction in the draft	
Statute	80
VII. Concluding summary	82

Chapter 3: Advisory jurisdiction A. Jurisdiction ratione personae (standing)		
		I. OAS member states
II. OAS organs including the IACHR	89	
III. Entitlement of other additional entities to request advisory		
opinions?	93	
1. National courts	93	
2. National parliaments	97	
3. Non-governmental organizations	99	
4. Other regional organizations independent of the OAS	101	
IV. Authority to render advisory opinions proprio motu?	103	
B. Jurisdiction ratione materiae		
I. Article 64 (1): "The interpretation of"	107	
II. " this Convention"	110	
III. "other treaties concerning the protection of human rights		
in the American states"	112	
1. OC-1/82	112	
2. Interpretation of soft law instruments and references to		
customary international law	116	
3. Concluding summary	119	
IV. Article 64 (2): Compatibility of domestic laws	119	
C. Power to determine and to broaden the scope of requests		
I. Clarification and reduction	127	
II. Summarizing and expanding	129	
1. OC-23/17	131	
2. OC-24/17	133	
3. Extension of the subject matter upon request of amici	135	
D. Advisory jurisdiction of the Court in an international		
comparison	136	
I. Advisory jurisdiction of the IACtHR compared to the ICJ's		
advisory jurisdiction	137	
II. Advisory jurisdiction of the IACtHR compared to the		
ECtHR's advisory jurisdiction	140	
III. Advisory jurisdiction of the IACtHR compared to the		
AfrCtHPR's advisory jurisdiction	143	

IV. Overview over the advisory and related jurisdiction	
of several international courts and the trend towards preliminary ruling procedures	148
premimary runing procedures	140
Chapter 4: Admissibility and advisory procedure	159
A. Written admissibility requirements	160
B. Submission and notification of a request	162
C. Discretion of the Court not to answer a request	164
I. Requests for advisory opinions rejected by the Court	169
1. First rejection	169
2. Second rejection	172
3. Third rejection	173
4. Fourth rejection	175
5. Fifth rejection	177
6. Sixth rejection	179
II. Inconsistent application of the Court's criteria in other	
advisory procedures	183
1. Disguised contentious cases, determination of facts	185
a) Requests by the Commission related to a dispute	
with states	187
aa) OC-3/83	187
bb) OC-14/94	190
cc) Intermediate conclusion	191
b) Requests by states relating to a dispute with the	
Commission	192
aa) OC-13/93	192
bb) OC-15/97	194
cc) OC-19/05	195
dd) Combined analysis in light of OC-5/85	197
c) Requests related to petitions pending before the	
Commission	201
aa) OC-16/99	201
bb) OC-23/17	202
cc) OC-24/17	203
dd) OC-28/21	204
ee) Intermediate conclusion	208

Table of contents

d) Requests related to concrete conflicts between states	208
aa) Related proceedings before the ICJ	208
bb) Conflict with a state not party to the OAS	218
cc) Smoldering conflict in the region	221
dd) Intermediate conclusion	232
2. Political debates, controversies and proceedings at the	
national level	233
3. Issues on which the Court has already ruled in its	
jurisprudence	235
4. Abstract speculations without a foreseeable application	
to specific situations	238
III. Suitability of the Court's criteria and the proposal of an	
interests- and values-based approach	239
1. Disguised contentious cases, determination of facts	244
a) Requests by the Commission relating to a dispute	
with states	246
b) Requests by states relating to a dispute with the	
Commission	247
c) Requests by the Commission relating to petitions	2.40
pending before it	248
d) Requests by states relating to petitions pending	240
before the Commission	249
e) Requests related to conflicts between states	250
Political debates, controversies and proceedings at the national level	254
3. Issues on which the Court has already ruled in its	254
jurisprudence	257
4. Abstract speculations without a foreseeable application	237
to specific situations	258
IV. Concluding summary	261
·	266
D. Composition of the Court in advisory proceedings	
E. Written proceedings	273
F. Role of amici	
G. Public hearing	281
H. Delivery and publication of the final advisory opinion	285
I. Average length of the advisory proceedings	289

J.	Proposa	ls to reform the procedure	292
	I. E	xclusion of national judges	292
		eparate decision on jurisdiction and admissibility /	
		reliminary objections	296
	-	ccelerated procedure	299
		reation of a preliminary ruling procedure	300
K.	Conclus	ion	303
Cl	apter 5:	Legal nature and effects of advisory opinions	305
A.	Legal na	ture and effects of advisory opinions under general	
	public ii	nternational law	307
	I. Pe	ermanent Court of International Justice	308
	II. In	ternational Court of Justice	313
	III. In	termediate conclusion	322
В.	Legal na	ature and effects of the advisory opinions of the IACtHR	325
	I. Le	egal nature and effects of the advisory opinions as	
		onceived by the constituent instruments	328
		troduction to the Court's doctrine of conventionality	
		ontrol	332
	1.	Origins and foundation of the doctrine	332
	2.	Legal basis of the doctrine	338
	3.	Jurisprudential development of the doctrine	343
		a) Case of Aguado-Alfaro: <i>Ex officio</i> exercise within the	
		spheres of competence	343
		b) Case of Boyce et al.: Conventionality control	
		includes constitutional norms	344
		c) Case of Radilla Pacheco: Duty of consistent	
		interpretation	344
		d) Case of Cabrera García and Montiel Flores:	
		Extension on all state authorities	345
		e) Extension of the control on all human rights treaties	346
		f) Gelman case: Conventionality control and the	
		binding effects of the Court's decisions	347
		g) OC-21/14: Inclusion of advisory opinions in the	
		material controlante	349
	4.	Summary and conclusion	350

Table of contents

III.	Evolving position of the Court regarding the legal nature				
	an	d e	ffects of its advisory opinions	351	
	1.	Ea	arly years	351	
	2.	Ac	knowledgment of "undeniable legal effects"	354	
			clusion of advisory opinions in the doctrine of		
			nventionality control	356	
	4.	Ev	valuation and intermediate conclusion	359	
IV.	Positions on the legal nature and effects of the Court's				
	advisory opinions				
	1.	Au	athoritative interpretation	361	
		a)	Views held before the advisory opinions' inclusion in		
			the doctrine of conventionality control	362	
		b)	Contemporary voices	363	
		c)	Evaluation and intermediate conclusion	366	
	2.	At	tribution of legal bindingness	368	
		a)	Academics holding the advisory opinions to be		
			binding	368	
			aa) Faúndez Ledesma	368	
			bb) Salvioli	372	
			cc) Roa	373	
			dd) Zelada	374	
		b)	Domestic courts holding the advisory opinions to be		
			binding (at least within their country)	374	
			aa) Costa Rica	377	
			bb) Ecuador	382	
			cc) Peru	383	
		c.	Evaluation and intermediate conclusion	385	
	3.	Re	es interpretata and erga omnes partes effects	388	
		a)	Res interpretata versus res judicata	391	
		b)	Legal basis and the applicability of res interpretata to		
			advisory opinions	393	
		c)	Formation of res interpretata	396	
		d)	Type of obligations resulting from res interpretata	398	
			aa) Arguments against the strict understanding of		
			res interpretata	403	
			bb) Problems of a too lax understanding of <i>res</i>		
			interpretata	406	
			cc) Suggested understanding of res interpretata	407	

e) Res interpretata and the asymmetries in the inter-	
American human rights system	410
f) Evaluation and intermediate conclusion	416
C. Final summary and conclusion	420
Chapter 6: Present and future of the Court's advisory function	429
A. Present	429
B. Future	432
Table of cases and advisory opinions	
Bibliography	451
Table of documents	467

List of figures

Figure 1:	Level of participation in written proceedings	276
Figure 2:	Length of the advisory proceedings in months	291
Figure 3:	Length of the proceedings ending with rejection in months	291

List of abbreviations

ACHR American Convention on Human Rights ('Pact of

San José'); In this work also shortly referred to as

the 'Convention')

AfrCHPR African Charter on Human and Peoples' Rights

('Banjul Charter')

AfrCHPR Protocol Protocol to the African Charter on Human and

Peoples' Rights on the Establishment of an African

Court on Human and People's Rights

AfrComHPR African Commission on Human and People's

Rights

AfrCtHPR African Court on Human and Peoples' Rights

Man

Art. Article

AU African Union

Cf. compare

CJEU Court of Justice of the European Union

CIS Convention Convention on Human Rights and Fundamental

Freedoms of the Commonwealth of Independent

States

COMESA Common Market for Eastern and Southern Africa

Covenant of the League of Nations

CUP Cambridge University Press

ECHR European Convention on Human Rights (Con-

vention for the Protection of Human Rights and

Fundamental Freedoms)

ECOSOC Economic and Social Council of the United Na-

tions

List of abbreviations

ECOWAS Economic Community of West African States

ECtHR European Court of Human Rights
EFTA European Free Trade Association

e.g. for example

et. seq. and the following
EU European Union

HRC Human Rights Committee

IACHR Inter-American Commission on Human Rights

IACtHR Inter-American Court of Human Rights

Ibid. Ibidem / in the same place

Idem. the same

ICJ International Court of Justice

IFAD International Fund for Agricultural Development
IIDH Instituto Interamericano de Derechos Humanos

(Inter-American Institute of Human Rights)

International Tribunal for the Law of the Sea

ILC International Law Commission
 ILO International Labor Organization
 IMO International Maritime Organization

IOM International Organization for Migration

LGBTIQ* People who have identified themselves as lesbian,

gay, bisexual, transgender, intersex, queer, or questioning, or any other kind of sexual identity or sexual orientation other than that of cisgender and

heterosexual

LNOJ League of Nations Official Journal

mn. margin number

NGOs Non-governmental organizations
OAS Organization of American States

OC Opinión Consultiva (Spanish for: Advisory Opin-

ion)

ITLOS

OC-1/82 This abbreviation indicates for example, that this

was the first advisory opinion adopted in the year

1982.

OUP Oxford University Press

Para. Paragraph

PCII Permanent Court of International Justice

Protocol of San Sal-

vador

VCLT

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social

and Cultural Rights

SC United Nations Security Council SCSL Special Court for Sierra Leone

TFEU Treaty on the Functioning of the European Union

UN United Nations

UN Covenants International Covenant on Civil and Political

Rights and International Covenant on Economic,

Social and Cultural Rights

UNCIO United Nations Conference on International Or-

ganization

United Nations Convention on the Law of the Sea **UNCLOS**

UNESCO United Nations Educational, Scientific and

Cultural Organization

UNGA United Nations General Assembly

UNTS **United Nations Treaty Series** US or United States United States of America

Vienna Convention on the Law of Treaties

World Health Organization WHO