Chapter 6: Present and future of the Court's advisory function

A. Present

Since its inception, the IACtHR has undergone a remarkable development, and with it its advisory function. Whereas initially it was the advisory function that allowed the Court to get functioning in the first place, when the Commission was still reluctant to refer contentious cases to the Court, nowadays the handling of contentious cases is at the center of the Court's work.

Today, the IACtHR is also no longer the only international court with an advisory jurisdiction that is both *rationae personae* and *ratione materiae* very broad. There are several other international courts before which states have standing in advisory proceedings, and there is a trend to establish preliminary ruling procedures so that domestic courts can also directly approach the international court.[1389]

Despite these developments, the advisory function of the IACtHR remains very relevant to the work of the Court and unique in international law. This is not only because the Court's advisory function is still more frequently used than that of other international courts, but also due to the topics and the way the Court is dealing with them, and due to the effect this may have in the OAS member states.

The Court has interpreted its advisory jurisdiction *ratione materiae* so broadly that it can interpret any treaty containing a provision which somehow concerns the protection of human rights. Furthermore, the Court not only interprets treaties, but also refers to other international law instruments such as the American Declaration or the Inter-American Democratic Charter. This broad interpretation of its advisory jurisdiction *ratione materiae* allows for advisory opinions covering an almost unlimited range of topics such as the right to information on consular assistance, the autonomy of trade unions and the question of presidential reelections without term limits.

The advisory procedure has been increasingly opened to civil society. Depending on the topic, the Court has received more than 80 briefs from

1389 See *supra*: Chapter 3, Section D, in particular the table in Section D.IV.

agencies, NGOs, academic institutions, and individuals. This possibility for everyone to participate in advisory proceedings allows the Court to get a broad picture of the subject matter of the proceedings and the possible political implications. On this basis, the Court can then prepare the advisory opinions. Although strong participation from civil society increases the democratic legitimacy of the final advisory opinions, at the same time it holds the risk that the arguments from states and OAS organs will be outnumbered.[1390] As the Court, however, ultimately still depends on the acceptance of states, the Court should also be interested in a rising level of participation of states. In this regard, it is very pleasing to see that the Court received written observations from ten states in the recent OC-29/22 proceedings, which is more than ever before.[1391] As concerns Argentina, even two different ministries participated in this advisory procedure.[1392]

Whereas in the early years states had occasionally filed requests for advisory opinions to signal their commitment to democracy and human rights, for example after the end of a military dictatorship[1393], more recently the advisory function has increasingly been used by states to obtain advisory opinions that might be a helpful argument in an inter-state conflict. Against this background, the Court's practice of rejecting certain requests for advisory opinions has been thoroughly examined in this work.

The analysis has shown that in a two-stage regional human rights system there exist many more constellations that could be regarded as disguised contentious case, than only the one constellation where a request relates to a dispute between two states. It has been demonstrated that the rejection criteria established by the Court are not precise enough to allow for a schematic application, and that the Court is therefore correct not to regard them as insurmountable limitations. The incoherent and therefore unpredictable application of the rejection criteria nevertheless appears problematic. Given that it is, however, impossible to define criteria that would provide for a clear answer whether a request should better be rejected or not in any possible case, and given that the existing criteria are not entirely unsuitable, the values and interests the existing criteria are

1390 See *supra*: Chapter 4, Section F.
1391 See *supra*: *Figure 1* in Chapter 4, Section E.
1392 As to the submissions in the OC-29/22 proceedings see: https://www.corteidh.or.cr/observaciones_oc_new.cfm?lang=es&lang_oc=es&nId_oc=2224.
1393 See Soley Echeverría, *The Transformation of the Americas* (n 19) p. 219 naming OC-9/87 (n 366) requested by Uruguay as example.

actually intended to protect have been highlighted. It has been proposed that instead of operating with categorical criteria, the Court should focus more on explaining better why the arguments for providing a requested advisory opinion in a certain case outweigh the risks related to it, although the situation of that case might be similar to one in which the Court had decided to reject the request.[1394]

This proposed interests- and values-based approach could reduce the critique that the Court's practice is incoherent, and it would make the Court's balancing decision more transparent. Addressing the raised concerns more thoroughly would assure those who are afraid that the issuance of a requested advisory opinion will interfere with their rights or interests that the Court is aware of what is at stake.

Finally, if the Court decides that the public interest in obtaining the requested advisory opinion outweighs the concerns that go along with it, the way in which the Court reframes and answers the questions can still be decisive in preventing a possible abuse of the opinion. The Court has already shown this in several proceedings.[1395]

The establishment of the Court's doctrine of conventionality control has not only caused a debate about the effects of judgments and the general relationship between international and national law, but also about the effects of the Court's advisory opinions.

This work outlined why it is at all worth discussing the legal nature and effects of the advisory opinions of the IACtHR, although this matter is no longer much debated in general international law. It then analyzed how the Court's own position on the legal effects of its advisory opinions has gradually changed over time. The analysis of the various positions held on the legal effects of the advisory opinions has revealed that any argumentation that only sticks to the strict distinction between binding like judgments or legally non-binding falls too short, and that the finding that the advisory opinions constitute authoritative interpretations of the law alone does not suffice to explain and define the specific effects emanating from them.

Even though there is still a huge discrepancy between the position of the Court and the practice of states on all questions relating to the doctrine of conventionality control, it has been affirmed that the concept of *res interpretata* can be applied to the advisory opinions of the IACtHR, and

1394 On the Court's practice of rejecting requests and the proposed interests- and values-based approach see *supra*: Chapter 4, Section C.

1395 See for instance: OC-23/17 (n 4) and OC-25/18 (n 227).

that it is justifiable to hold that the states parties are already *de lege lata* under an obligation to consider the interpretations the IACtHR establishes in advisory opinions.

However, it has also been shown that the obligation to consider the advisory opinions as part of the Court's jurisprudence cannot be equated with an obligation to automatically follow and adapt all national legislation and administration to what the Court has outlined in an advisory opinion. Democratically legitimized state authorities must be able to undertake their own assessment and find the right solution in the context of the respective national constitutional and legal setting. Yet, if they decide to deviate from the Court's line of jurisprudence, they have to provide a reasonable justification for it, and they risk later being held responsible for having violated the Convention if the Court is not satisfied with this justification.

Overall, the close interrelation between human rights law and constitutional law, and the growing regional integration in the Americas, permit that advisory opinions of the IACtHR may have a more direct and bigger impact within states than advisory opinions of the ICJ commonly have. This increases the responsibility of the IACtHR to be aware of the democratic processes and of the finely balanced interplay of the various powers within the states.

B. Future

For some years at the beginning of the 2000s, there were fewer advisory proceedings, but in the past years there have been more advisory proceedings than ever before. Whether this trend will continue is not reliably predictable. But given that the Court has entertained even very politically sensitive requests for advisory opinions, it is likely that states will continue to use the Court's advisory function as a strategic tool in their foreign politics, as Colombia in particular has tried to do in the past years. Rather unlikely is, however, that states other than Costa Rica will suddenly start filing requests in terms of Article 64 (2), although it is in particular this type of advisory proceeding that has a strong potential to trigger significant legal reforms in the state parties. As concerns the IACHR, it is likely that it will continue to use the advisory function to obtain clarifications and to advance the development of human rights law in specific fields, e.g. the rights of certain minority groups.

While the path towards considering economic, social, cultural and environmental rights to be directly justiciable under Article 26, which the Court has pursued since the 2017 *Lagos del Campo* decision[1396], is highly controversial[1397], it must be stressed that the Court's advisory function offers an alternative and less problematic way to further specify the content of these economic, social, cultural and environmental rights. Unlike the Court's contentious jurisdiction, which is basically limited to the Convention and Articles 8(1) lit. a and 13 of the Protocol of San Salvador, the Court's advisory jurisdiction *ratione materiae* is broader and encompasses the whole Protocol of San Salvador, as well as possible other human rights instruments in which economic, social, cultural and environmental rights are stipulated. Thus, although an interpretation of the economic, social, cultural and environmental rights as contained in the Protocol of San Salvador by way of an advisory opinion does not entail the direct justiciability of these rights, as does the Court's current approach to Article 26, such a use of the Court's advisory function still provides for a good avenue to obtain clarifications of the content of these rights.[1398]

1396 *Case of Lagos del Campo v. Peru* (n 6).

1397 See: *Case of Lagos del Campo v. Peru* (n 6), Partially Dissenting Opinion of Judge Eduardo Vio Grossi and Partially Dissenting Opinion of Judge Humberto A. Sierra Porto; Juana M. Ibáñez Rivas, 'La justiciabilidad directa de los derechos económicos, sociales, culturales y ambientales. Génesis de la innovadora jurisprudencia interamericana' in Mariela Morales Antoniazzi *et al.* (eds*), Interamericanización de los DESCA: El Caso Cuscul Pivaral de la Corte IDH* (Max Planck Institute for Comparative Public Law and International Law *et al.*, 2020), 51–94; Lucas Sánchez, *'Der IAGMR und WSK-Rechte: Eine wegweisende Rechtsprechungsänderung'*, Völkerrechtsblog, 20 August 2018, available at: https://voelkerrechtsblog.org/de/der-iagmr-und-wsk-rechte/; Eleanor Benz and Verena Kahl, *'Das Urteil im Fall Lhaka Honhat: Die Ausweitung der direkten Justiziabilität von Desca und die unerfüllte Hoffnung der Konkretisierung des Rechts auf eine gesunde Umwelt'* (2021) 59(2) Archiv des Völkerrechts, 199–226 with further references.

1398 Notably, the Court has rather used its latest advisory opinions to extend its controversial jurisprudence on Article 26, although it was not necessary to recur to this provision in order to answer the respective advisory opinion requests. This has been criticized by Judges Sierra Porto and Vio Grossi. See: OC-27/21 (n 347), Concurring Opinion of Judge Eduardo Vio Grossi and Concurring Opinion of Judge Humberto A. Sierra Porto [both only available in Spanish], and OC-29/22 (n 275), Concurring Opinion of Judge Humberto A. Sierra Porto.

This is highlighted by the latest requests concerning the climate emergency[1399] and the content and scope of care as a human right[1400]. In the first, the Court is asked by Chile and Colombia to interpret among other rights the right to a healthy environment which will allow the Court to follow up and deepen its elaborations made in OC-23/17 regarding the interrelationship between the environment and human rights.[1401] In the second request, Argentina enumerated almost all articles of the Protocol of San Salvador in the list of norms to be interpreted by the Court.[1402]

It has been pointed out that the creation of a preliminary ruling procedure through which domestic courts could directly refer questions to the IACtHR would be a decisive advancement of the Court's advisory function. This applies not least against the backdrop of the Court's doctrine of conventionality control. A direct avenue of domestic courts to the IACtHR could fundamentally change the dynamic and interaction between the regional court and its domestic counterparts. However, it has also been outlined that an additional procedure would require an increase in personal and financial resources of the Court. Furthermore, the design of the procedure would have to ensure that national courts do not feel disempowered in relation to the IACtHR, but rather are encouraged to cooperate with the IACtHR on an equal footing.

Overall, the advisory function is, and will remain an important instrument that is likely to continue to shape the work of the IACtHR significantly in the future. While contentious cases normally only reach the Court after having been pending for many years before the Commission, the advisory function enables the Court to deal with current issues, and thus to contribute to important ongoing legal debates. By clarifying and contributing to the progressive development of the law, advisory opinions may help to prevent future human rights violations.

Just as the topics of the advisory opinions always reflect the human rights situation prevailing in the Americas at the time, the design of the

1399 Colombia and Chile, *Request for an Advisory Opinion on the Climate Emergency and Human Rights*, 9 January 2023.

1400 Argentina, *Request for an Advisory Opinion on the content and scope of care as a human right, and its interrelationship with other rights*, 20 January 2023.

1401 Colombia and Chile, *Request for an Advisory Opinion on the Climate Emergency and Human Rights*, 9 January 2023, p. 6, 8; OC-23/17 (n 4) in particular paras. 56–63.

1402 Argentina, *Request for an Advisory Opinion on the content and scope of care as a human right, and its interrelationship with other rights*, 20 January 2023, p. 3.

advisory procedure can, and should also be regularly scrutinized, and if necessary, further developed. The procedure should be adapted to the level of integration in the region, and to other new developments so that the advisory function can always contribute in the best possible way to the effective protection of human rights.