

SYMPOSIUM ON THE CONTOURS AND LIMITS OF ADVISORY OPINIONS
COMPLIANCE WITH ADVISORY OPINIONS IN THE INTER-AMERICAN HUMAN
RIGHTS SYSTEM

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In this essay, we analyze how different actors contribute to compliance with the advisory jurisdiction of the Inter-American human rights system. The essay briefly reviews the discussion around the binding force of, and compliance with, advisory opinions. It then analyzes how the holdings in advisory opinions issued by the Inter-American Court of Human Rights (IACtHR or Court) over the last forty years have had a notable impact on states and how different interstate actors, including the executive, the legislature, the national judiciary, and local regulatory bodies, ensure compliance.

The Nature of the Court's Advisory Jurisdiction and Its Fundamental Goals

The IACtHR has an advisory (also known as consultative) function under the American Convention on Human Rights available to the states parties and to organs of the Organization of American States (OAS).¹ This advisory jurisdiction serves a dual purpose: on the one hand, it facilitates the interpretation and understanding of the content and scope of the international instruments of the Inter-American system; and on the other, it allows for consultations on the compatibility of municipal law instruments and measures with the Convention.

Advisory jurisdiction may be exercised subject to certain admissibility and standing limitations. For interpretation of the Convention or other treaties, only OAS bodies referred to in Chapter X of the OAS Charter may formulate a request for an advisory opinion regarding their treaty-based powers and purposes. For an opinion on the compatibility of domestic laws, only member states of the OAS may submit a request for an advisory opinion to the IACtHR.²

When acting pursuant to its advisory jurisdiction, the Court must interpret the Convention starting from what the requesting party has submitted as a single or multiple legal questions and deliver a reasoned opinion. Accordingly, the IACtHR has indicated that its advisory function is of a multilateral and non-litigious nature.³ It should be added—also in the words of the IACtHR—that, by allowing member states and OAS bodies to

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¹ [American Convention on Human Rights](#), Art. 64, Nov. 22, 1969; [IACtHR Rules](#), Arts. 70–75.

² Walter Arévalo Ramírez & Andrés Rousset, *Inter-American Commission on Human Rights (LACHR) and Inter-American Court of Human Rights (IACtHR)*, in [OXFORD BIBLIOGRAPHIES IN INTERNATIONAL LAW](#) (Anthony Carty ed., 2021).

³ Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights), [Advisory Opinion OC-15/97](#) (Ser. A) No. 15, at 25–26 (IACtHR Nov. 14, 1997).

request advisory opinions, the Convention “creates a parallel way to the contentious jurisdiction (Article 62 ACHR) and offers an alternative judicial, non-contentious method of an advisory nature, aimed at helping States and bodies to comply with and apply human rights treaties, without subjecting them to the formalism and system of sanctions that characterizes the contentious process.”⁴

Fundamentally, advisory opinions are resolutions of the IACtHR whose purpose is to interpret a particular legal issue, with *erga omnes* effects, and whose binding nature does not derive from a conventional norm,⁵ but rather from the Court’s authority as the final interpreter of the Convention.⁶ In forty-one years, the IACtHR has accepted twenty-nine requests for an advisory opinion, answering a total of ninety-nine legal questions, and rejecting only five requests.

Actors that Ensure Compliance

The primary role with respect to compliance with decisions of international human rights protection bodies is normally assumed to fall almost exclusively on domestic courts. But this is not necessarily always the case. It is possible to identify three types of state actors committed to compliance with advisory opinions at the international level, within the state and through domestic law. These are: (1) the state itself, when acting as a promoter of a particular advisory opinion request, a role that requires internal and international support; (2) the local judiciary, when deciding cases or establishing national standards; and (3) the legislature and public administration.

The State as a Strategic Litigation Actor Seeking International and Internal Effect for Advisory Opinions

Strategic litigation, which aims to protect human rights through the use of innovative court strategies and creative applications, is not exclusive to victims or civil society organizations. Before the IACtHR, states generate and facilitate new debates regarding the scope of human rights through requesting advisory opinions. It is usually the government’s prerogative to formulate a request to the IACtHR, aiming either to ensure that the Court develops a concept that allows the state to promote public policies (or to guide its internal behavior), or produces an opinion in line with its own interpretation of international obligations or interests.

Advisory opinion No. 21 on the rights and guarantees of children in the context of migration and/or in need of international protection constitutes an important example. This was the first time in the history of the IACtHR that four states (Argentina, Uruguay, Brazil, and Paraguay) requested the Court to adopt criteria on the legal treatment of minors in the context of migration. A passage from the request explains the states’ role as promoters of internal legal change and developers of public policy: “These standards and principles shall not only contribute to setting a minimum floor for the fundamental rights to be recognized by the States, but will also form a parameter or conceptual framework that will serve as an unavoidable reference to modify and revise laws and public policies on this matter.”⁷

⁴ Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), [Advisory Opinion OC-3/83](#) (Ser. A) No. 3, at 43 (IACtHR Sept. 8, 1983).

⁵ “Furthermore, while an advisory opinion of the Court does not have the binding character of a judgment in a contentious case, it does have undeniable legal effect.” [Advisory Opinion OC-15/97](#), *supra* note 3, para. 26.

⁶ The Inter-American Court has said that it has, by virtue of being the “ultimate interpreter of the American Convention,” competence to issue, with full authority, interpretations of all the provisions of the Convention, including those of a procedural nature (*cf.* Article 55 of the American Convention on Human Rights, [Advisory Opinion OC-20/09](#) (Ser. A) No. 20, para. 18 (IACtHR Sept. 29, 2009); Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, [Advisory Opinion OC-21/14](#) (Ser. A) No. 21, para. 19 (Aug. 19, 2014)).

⁷ [Advisory Opinion OC-21/14](#), *supra* note 6.

Currently, a request for an advisory opinion filed jointly by Colombia and Chile in January 2023 regarding states' obligations to respond to the climate emergency within the framework of international human rights law is under review by the IACtHR. In their request, emphasis is placed on asking the Court a series of questions, "that allow guidance towards solutions based on human rights, with an intersectional perspective."⁸

Requests for advisory opinions also seek to determine criteria that would assist in resolving issues debated in domestic law, whereby the state requires an international legal clarification to mediate in a domestic conflict between national organs. In this role, the state itself is the principal promotor of compliance. An example of this is Ruling 2313-95 of the Supreme Court of Costa Rica, declaring invalid Article 22 of Law No. 4420, which required journalists to be part of a professional association with regulatory powers. The invalidation of the law was based on Advisory opinion No. 5. on compulsory membership in an association prescribed by law for the practice of journalism. By requesting the opinion, Costa Rica aimed to obtain a pronouncement from the IACtHR to resolve once and for all this issue, which had given rise to controversy between the judiciary and the legislative.⁹

Out of the twenty-nine advisory opinions issued by the IACtHR, twenty-one have been requested by states parties (evidencing a scarcity of requests from OAS bodies). States have requested that the Court pronounce on fundamental issues such as migrants, children's rights, and the environment, among others. This means that states actively participate in the development of international standards, in line with the holding of the IACtHR according to which advisory opinions are "a service that the Court is able to provide to all members of the Inter-American system with the purpose of contributing to the fulfillment of their international commitments on human rights."¹⁰ Considering that only three advisory opinion requests by states are related to procedural issues in the course of international litigation, the practice also shows the clear preference of states to use advisory opinions to obtain answers that they can utilize (and promote compliance with) when facing internal legal debates.

The Local Judiciary's Role in Ensuring Compliance with Advisory Opinions

In practice, advisory opinions in the Inter-American system contribute to judicial expansion of human rights protections and the strengthening of treaty obligations. The advisory jurisdiction has given the IACtHR the opportunity to pronounce on core human rights issues on which there has not been any contentious litigation. This was the case of Advisory opinion No. 17 on the legal status and rights of the child, Advisory opinion No. 23 on the environment,¹¹ and the rights of vulnerable groups adjusted to present-day conditions that had not been considered at the time of the negotiation and signing of the American Convention (such as Advisory opinion No. 24 on gender equality, Advisory opinion No. 18 on migrants, or Advisory opinion No. 29 regarding persons deprived of liberty).¹² The clarifications

⁸ [Request for an Advisory Opinion Submitted by Chile and Colombia Before the Inter-American Court of Human Rights](#) (IACtHR Jan. 9, 2023).

⁹ Leonard R. Sussman, *The Mandatory Licensing of Journalists: The Decision of the Inter-American Court of Human Rights*, 7 J. MEDIA L. & PRAC. 82 (1986).

¹⁰ The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, [Advisory Opinion OC-16/99](#) (Ser. A), No. 16, para. 64 (IACtHR Oct. 1, 1999).

¹¹ Ricardo Abello-Galvis & Walter Arévalo Ramírez, *Inter-American Court of Human Rights Advisory Opinion OC-23/17: Jurisdictional, Procedural and Substantive Implications of Human Rights Duties in the Context of Environmental Protection*, 28 REV. EUR. COMP & INT'L ENVTL. L. 217 (2019).

¹² 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(1), 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](#) (Ser. A) No. 24 (IACtHR of Nov. 24, 2017); Juridical Condition and Rights of the Undocumented Migrants, [Advisory Opinion OC-18/03](#) (Ser. A) No. 18 (IACtHR Sept. 17, 2003).

and progressive interpretations contained in these advisory opinions have become fundamental for the daily work of domestic courts, which have come to play an essential role in their domestic implementation.

Since 2004, the Inter-American Court has repeatedly held that:

when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. . . . In other words, the Judiciary must exercise a sort of “conventionality control” between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights.¹³

This conventionality control includes compatibility with the Convention, the IACtHR’s rulings in the exercise of its contentious jurisdiction, and also “the considerations of the Court in the exercise of its noncontentious or advisory jurisdiction.”¹⁴

Under this exercise of conventionality control, several national constitutional tribunals and supreme courts in Latin America have enforced and ensured compliance with the content of the IACtHR’s advisory opinions. For example, the Bolivian Constitutional Court in Judgment 019/2003 ruled on the restrictive interpretation of limitations of fundamental rights based on the criteria developed by Advisory opinion No. 6 requested by Uruguay, where it held that the term “laws” in Article 30 of the Convention should be understood only as legislative bills. Similarly, the Bolivian Constitutional Court noted in Judgment 0061/2010-R that the right to consular assistance is part of due process, invoking Advisory opinion No. 16 on the right to information on consular assistance in the framework of the guarantees of the due process of law and Advisory opinion No. 18 on legal condition and rights of the undocumented migrants, both originally requested by Mexico.¹⁵ The judgment of Argentinian Supreme Court in the *Ekmejdjian v. Sofovich* case held that the right to reply or correction (which was not regulated in Argentine law) had to be recognized and enforced by domestic law and tribunals, by applying Advisory opinion No. 7 on enforceability of the right to reply or correction.¹⁶

In Colombia, the Constitutional Court routinely cites advisory opinions both in judicial review cases and also in judgments regarding individual petitions for the protection of human rights (*acción de tutela*). In Judgment C-731/05 under judicial review, the Colombian Constitutional Court invalidated several sections of Law 820/2003 regarding housing since the law restricted several rights of the defendant in civil procedures, invoking Advisory opinion No. 8 on due process. The Court stated that:

The extensive references that this Court has allowed itself to make of Advisory opinion OC-8/87 of the IACtHR is just a small sample of the importance and scope of the approaches of this International Court regarding the effective guarantee of the right to due process, something that complements and deepens what is established in the Colombian constitutional order and contributes to reinforcing the task that the Constitutional Court has been constantly carrying out in this sense.¹⁷

¹³ Case of Almonacid Arellano et al. v. Chile, [Preliminary Objections, Merits, Reparations and Costs, Judgment](#) (Ser. C) No. 154, at 124 (IACtHR Sept. 26, 2006).

¹⁴ Differentiated Approaches with Respect to Certain Groups of Persons in Detention (Interpretation and Scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and Other Human Rights Instruments), [Advisory Opinion OC-29/22](#) (Ser. A) No. 29, para. 30 (IACtHR May 30, 2022).

¹⁵ [Advisory Opinion OC-18/03](#), *supra* note 12.

¹⁶ Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights), [Advisory Opinion OC-7/85](#) (Ser. A) No. 7 (IACtHR Aug. 29, 1986).

¹⁷ [Colombia Judgment C-731/05](#) (Constitutional Ct.) (Colom.).

In Judgment T-006/20, a decision on an individual petition, the Constitutional Court revoked the rulings of municipal judges that denied human rights protection to a migrant child due to the absence of nationality, and ordered the Registry Office to grant Colombian nationality to the child within a period of twenty-four hours, invoking the criteria set in Advisory opinion No. 21 that clarified the obligations of states parties regarding childhood statelessness.

These cases all illustrate how the national high courts not only ensure compliance with advisory opinions by implementing standards in judicial review cases, but also by controlling and nullifying judgments of low-level courts that deviate from the Inter-American system legal rulings.

Legislatures and the Public Administration: Framing Regulations That Implement Advisory Opinions

Advisory opinions function as a guideline for the elaboration of public policies that must comply with the human rights standards developed by the IACtHR and serve to prevent future violations of the Convention. In this regard, national parliaments and regulators as part of the public administration often consider the criteria developed in advisory opinions for the development of regulations and legal bills that allow those criteria to be applied domestically. Notably, this approach usually is taken without consideration of whether the advisory opinion was requested by their own state or not.

For example, the Argentine public administration issued Decree 476/2021 on recognition of self-perceived gender identity (and rectification of public records) as a result of Advisory opinion No. 24 on gender identity, equality, and non-discrimination of same-sex couples, originally requested by Costa Rica in 2017. In Costa Rica, approval of same-sex marriage was also achieved as a result of the same advisory opinion.¹⁸ In this case, the legislative procedure on the matter had its origin in a ruling by the Supreme Court of Costa Rica and its Constitutional Chamber, that aimed to implement what was decided by the IACtHR in the Costa Rican internal regulatory framework, by ordering (with a peremptory deadline) the legislature to adapt the local Family Code to the advisory opinion.

More recently, a legislative change against indefinite reelection originated from a set of recommendations by the OAS electoral mission for the 2024 municipal elections in Costa Rica. The Legislative Assembly of Costa Rica modified Article 14 of Law 7794/1998 (Municipal Code) to limit indefinite re-election of mayors, reforming the law to allow a maximum term of two consecutive periods, pursuant to the criteria set by Advisory opinion No. 28 on presidential reelection without term limits in the context of the Inter-American human rights system, requested in 2021 by Colombia.

Conclusion

The implementation of advisory opinions by diverse actors has two important features. First, there is greater willingness to comply with advisory opinions than with contested opinions, because advisory opinions are promoted as interpretative guidelines and do not require specific reparation measures to be taken by the state as a consequence of a declaratory judgment of responsibility. This “distance” from a specific dispute allows for greater fluidity in the content of the opinion in the internal decision making of diverse agents within the states. Second, the state actors mentioned above are not obliged to explain that a rule is a direct consequence of an advisory opinion. This “silent influence” may be due in large part to a conscious decision by these actors not to express themselves on the legal value of these opinions in their decisions, avoiding discursive legal resistance from opposing actors.

¹⁸ [Advisory Opinion OC-24/17](#), *supra* note 12.