CHAPTER 12

The Impact on Domestic Law of Climate Change-Related Advisory Opinions: the Experience of the IACtHR and the ITLOS

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Abstract

As advisory opinions clarify States' obligations under international law, it is natural that domestic measures aimed at complying with such obligations need to be re-assessed in light of those advisory opinions, regardless of their non-binding character. This chapter looks to the stance taken by the IACtHR itself on the domestic impact of its opinions and to the case law of domestic courts on this matter, although mindful that States may have changed, or need to change, their domestic laws after, and consequential to, an IACtHR's opinion. In the analysis of the advisory opinions of the ITLOS, this chapter looks very briefly at the adoption of domestic legislation after the rendering of its opinions. This chapter does not assess the experience related to the ICJ's opinions.

Keywords

advisory opinions – compliance – control of conventionality – enforcement – execution – implementation – Inter-American Court of Human Rights – International Tribunal for the Law of the Sea

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1 Introduction

The question underlying this chapter is, 'What happens to a State's domestic law after an international court or tribunal renders an advisory opinion?' It is an odd question at first sight, since international courts and tribunals work within the international legal order (not domestic legal orders), and since advisory opinions do not settle any dispute and, thus, do not require any change in the existing international law. In fact, the purpose of an advisory opinion is to *clarify* the law. However, as authoritativeness stems from the way a court or a tribunal is perceived by society (and not from the nature or bindingness of a judgment or opinion), opinions rendered by international courts and tribunals can contribute to the development of international law in the same manner as a binding judgment.[1] This happens because treaties such as the American Convention on Human Rights (ACHR),[2] the United Nations Convention on the Law of the Sea (UNCLOS),[3] the United Nations Framework Convention on Climate Change (UNFCCC),[4] or the Paris Agreement[5] are not an 'end-game,' using Wessel's nomenclature,[6] but rather require a certain evolutionary reading to withstand the passage of time. What this ultimately implies is that an evolutive reading of States' international obligations may require adjustments at the level of States' domestic legal orders.

This helps explain the upsurge in requests for opinions on States' obligations in relation to climate change before the International Tribunal for the Law of the Sea (ITLOS), the Inter-American Court of Human Rights (IACtHR), and the International Court of Justice (ICJ). These requests seek clarification of States' obligations to mitigate and adapt to climate change under a varied set of rules and principles of international law and ultimately seek to press States to adopt climate policies within their domestic legal order.

Clarifying States' obligations, of course, impacts the fabric of international law. These advisory opinions, once rendered, are likely to be used by applicants

1 Eg Samantha Besson, 'Legal Philosophical Issues of International Adjudication', in Romano, Alter & Shany (eds), *The Oxford Handbook of International Adjudication* (OUP, 2015) 413; Armin von Bogdandy & Ingo Venzke, 'Beyond Dispute: International Institutions as Lawmakers' (2011) 12 *German Law Journal* 979; Alan Boyle & Christine Chinkin, *The Making of International Law* (OUP, 2007) 268.

2 Adopted 22 November 1969, entered into force 18 July 1978, OASTS No 36, 1144 UNTS 123.

3 Adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 3.

4 Adopted 9 May 1992, entered into force 21 March 1994, 1771 UNTS 107.

5 Adopted 12 December 2015, entered into force 4 November 2016, 3156 UNTS 79.

6 Jared Wessel, 'Relational Contract Theory and Treaty Interpretation: End-Game Treaties v. Dynamic Obligations' (2004) 60 *NYU Annual Survey of American Law* 149.

resorting to other courts (international or domestic) and inform the views adopted by these courts.[7] However, this chapter assesses the impact of the advisory opinions on domestic law – ie, on the processes that are adopted at the domestic level subsequently to an opinion (eg, a change in policies, practices, or laws and regulations), as a means to comply with a State's international obligations as clarified thereunder. Compliance, therefore, cannot be assessed with regards to the opinion itself, since advisory opinions do not require any specific tangible State action, but rather with respect to the obligation set out in an international law rule. Complying with these obligations (eg obligations set out in the ACHR, the UNCLOS, the UNFCCC, or the Paris Agreement) requires more than a mere internalization of these treaties. Because the relation between international and domestic law is *not* one of 'two nations; between whom there is no intercourse and no sympathy,'[8] compliance with these treaties requires the adoption of sectorial policies or legislative measures aligning a State's domestic regulatory framework with its international obligations (as clarified over time by international courts and tribunals).[9]

Nonetheless, contrary to the internalization of treaties, the execution of a judgment, or the use of an opinion as an authority by a domestic court, the impact of advisory opinions on domestic law is often, if not always, informal, implied, and unacknowledged – and thus less palpable or detectable.[10] It may be the case, for instance, that a State thought the opinion did not require any change of its domestic law, or that its non-binding nature was an opportunity to preserve the full discretion of a State's constitutional organs. From a methodological angle, the main challenge of this chapter, therefore, is to *find* and *interpret* evidence of State (in)action subsequent to the rendering of an opinion by an international court or tribunal.

In line with Shany,[11] one could look for cases where there is a shift or change in States' behavior subsequent to the rendering of an opinion, even if the link is not openly assumed. However, it is more likely to find indirect signs of such impact on the case law of apex courts, which may be more explicit in their reasoning. Accordingly, in the analysis of the effects of the advisory opinions of the IACtHR, this chapter looks – firstly – to the stance taken by the IACtHR itself

7 See Lea Main-Klingst & Sophie Marjanac (Chapter 11 of this book).

8 Disraeli, *Sybil, or the Two Nations*: 1845 (Routledge 1930) 76.

9 Eg *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Advisory Opinion, 21 May 2024) ITLOS Case No 31, §§265–80 (*COSIS Opinion*).

10 See, more generally, Natalie Klein & Jack McNally, *Compliance with Decisions of the Dispute Settlement Bodies of the UN Convention on the Law of the Sea* (Brill 2023) 22–23.

11 Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (2012) 106 *AJIL* 225.

on the matter and – secondly – to the case law of domestic courts, although mindful that States may have changed, or need to change, their domestic laws after, and consequential to, an IACtHR's opinion (Section 2). In the analysis of the advisory opinions of the ITLOS, this chapter looks very briefly at the adoption of domestic legislation after the rendering of its opinions, since the International Seabed Authority acts as a public repository of national laws and regulations related to deep seabed mining (Section 3). This chapter does not assess the experience related to the ICJ's opinions. Section 4 concludes.

2 The Domestic Law Impact of the Advisory Opinions Rendered by the IACtHR

Article 64 of the ACHR establishes the advisory jurisdiction of the IACtHR, which can take the form of an interpretative[12] or a compatibility consultation.[13] Other courts and tribunals also have an advisory jurisdiction, but the rules on standing, subject-matter jurisdiction, and participatory opportunities make the IACtHR's advisory competence unique.

On the one hand, all Member States of the OAS can submit a request for an interpretative or compatibility consultation,[14] even if they are not parties to the ACHR or have not accepted the IACtHR's contentious jurisdiction. This makes the advisory jurisdiction a mechanism of the entire inter-American human rights system (IAHRS), rather than of the more restricted ACHR regime.[15] On the other hand, requests for an opinion may refer to the 'interpretation of [the ACHR] or of other treaties concerning the protection of human rights in the American States.'[16] Therefore, requests are not limited to the interpretation of the ACHR, but rather include

> any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal

12 ACHR, art 64(1).

13 ACHR, art 64(2).

14 Moreover, the organs listed in current Chapter VIII of the Charter of the OAS can also request an interpretative consultation to the IACtHR.

15 *'Other Treaties' Subject to the Consultative Jurisdiction of the Court* (*art. 64 American Convention on Human Rights*), Advisory Opinion OC-1/82, Inter-American Court of Human Rights Series A No 1 (24 September 1982) §19.

16 ACHR, art 64(1).

> purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto.[17]

This means that the list of treaties that can potentially be brought to the IACtHR's attention, under an advisory proceeding, is broad and non-restrictive, expressing a systemic understanding of human rights' (universal) protection.[18]

In this context, one concern of the IACtHR is the sociological legitimacy of its advisory opinions. To secure such a perception of legitimacy and authoritativeness, the IACtHR provides very broad participatory opportunities in these proceedings.[19] This includes the participation of all Organisation of American States (OAS) Member States – who have a legal right to submit their written observations and participate in public hearings organized as part of the proceedings, not as parties but rather to protect their 'legitimate interests.'[20] Furthermore, the Presidency of the IACtHR may invite any interested (natural or legal) person to participate in the proceedings. Unsurprisingly, civil society has been using this opportunity very liberally. In the advisory proceedings regarding the climate emergency and human rights, there was a record number of participants, ranging from States (including Vanuatu, which is not a Member State of the OAS) to international bodies, organs, or organizations, and passing by infra-State entities and more than 200 briefs from civil society (ie local communities, individuals, NGOs, or academic centers).[21]

The ACHR remains silent regarding the effects of advisory opinions on the consulting States or the rest of State Parties. This silence has given place to divisive debates regarding the bindingness of the opinions among commentators, as well as judges and regulators throughout the region, when deciding if or how to apply them to domestic issues. These debates have even caught the attention of a broader public (ie the media) when interpretations rendered in the opinions were seen as controversial by a government or a group. The

17 '*Other Treaties*' (n 15) 12 first resolutive paragraph; and §21.

18 *Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection* (*interpretation and scope of Articles 5, 22(7) and 22(8), in relation to Article 1(1) of the American Convention on Human Rights*). Advisory Opinion OC-25/18, Inter-American Court of Human Rights Series A No 25 (30 May 2018) §15.

19 *Restrictions to the Death Penalty* (*Arts. 4.2 and 4.4 American Convention on Human Rights*). Advisory Opinion OC-3/83, Inter-American Court of Human Rights Series A No 3 (8 September 1983) §22.

20 ibid §24.

21 IACtHR, 'Observations on the Request for an Advisory Opinion', available here: <https://www.corteidh.or.cr/observaciones_oc_new.cfm?nId_oc=2634&lang=es&lang_oc=es>, accessed 26 July 2024. See also Miriam Cohen (Chapter 8), Harjeevan Narulla & Rohan Nanthakumar (Chapter 10) in this book.

impact of the opinion OC-24/17 on gender identity and equality and non-discrimination with regard to same-sex couples[22] on the legal, social and political agenda of Costa Rica and other ACHR States is a clear example.[23]

The IACtHR pronounced a few times on the effects of its opinions. In its first-ever advisory ruling (1982), it affirmed that opinions 'lack the same binding force that attaches to decisions in contentious cases.'[24] In 1997, it clarified, however, that opinions have 'undeniable legal effects.'[25] In 2014, the IACtHR expressed again about the opinion's effects, explaining them as connected to the 'conventionality control' doctrine, and consequently distinguishing between effects on ACHR States and other OAS States.[26] This explanation dispelled doubts regarding the IACtHR's understanding of its opinions' effects, but it did not fully overcome debates, not among commentators or among judges and regulators.

2.1 *The Effects of the Advisory Opinions on the Legal Order of ACHR State Parties*

As mentioned, in its opinion OC-21/14, the IACtHR explained the advisory opinions' effects as connected to the so-called 'conventionality control' doctrine. Indeed, the IACtHR explained those effects as a further development of its flagship doctrine. This means that, to properly understand the scope of the opinions' effects, we must revisit (at least briefly) the IACtHR's gradual construction of its doctrine.

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22 *Gender Identity, and Equality and Non-Discrimination with respect 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 of Nov 24, 2017. Series A No 24.

23 Luis Manuel Madrigal, 'Por qué la opinión de la Corte IDH es vinculante para Costa Rica y no violenta su soberanía' (elmundo.cr, 9 January 2018), available here: <https://elmundo.cr/costa-rica/la-opinion-la-corte-idh-vinculante-costa-rica-no-violenta-soberania/>, accessed 26 July 2024; David Bolaños Acuña, 'Las Ideas de Fabricio Alvarado Sobre la Corte IDH, Puestas a Prueba (*Semanario Universidad*, 3 February 2018), available here: <https://semanariouniversidad.com/pais/ideas-fabricio-alvarado-sobre-corte-idh-puestas-a-prueba/>, accessed 6 May 2019.

24 '*Other Treaties*' (n 15) §51.

25 *Reports of the Inter-American Commission on Human Rights* (*Art. 51 American Convention on Human Rights*). Advisory Opinion OC-15/97, Inter-American Court of Human Rights Series A No 15 (14 November 1997) §26.

26 *Rights and Guarantees of Children in the Context of Migration and/or Need of International Protection*. Advisory Opinion OC-21/14, Inter-American Court of Human Rights Series A No 14 (19 August 2014).

Based on Articles 1 and 2 of the ACHR, the conventionality control doctrine was introduced by the IACtHR in the case *Almonacid Arellano et al v Chile*, where the IACtHR stated that

> … when a State has ratified an international treaty such as the [ACHR], its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the [ACHR] are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. 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 [ACHR]. To perform this task, *the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the* [*IACtHR*]*, which is the ultimate interpreter of the* [*ACHR*].[27]

Accordingly, the IACtHR established a mandate for domestic judges to conduct a conformity control between the domestic law and the ACHR, considering not only its wording but also the interpretations thereof made by the IACtHR. The IACtHR insisted on this doctrine in the *Case of the Dismissed Congressional Employees*, adding that judges must carry out this control even *ex officio*, although always 'in the context of their respective spheres of competence and the corresponding regulations.'[28] Furthermore, in the case *Cabrera García and Montiel Flores v. Mexico*, the IACtHR clarified that all States' organs (not only judicial ones) must ensure compliance with the ACHR[29] and, in *Gelman v Uruguay* the conventionality control was explicitly defined as a function and task of any public authority – any institution, organ or authority – , and not only the judicial branch.[30]

A further development of the conventionality control was the expansion, both in normative and hermeneutic terms, of the legal substance against which

27 *Almonacid-Arellano et al v Chile* (Preliminary Objections, Merits, Reparations and Costs Judgment). Inter-American Court of Human Rights Series C No 154 (26 September 2006), §124 (emphasis added).

28 *Case of the Dismissed Congressional Employees* (*Aguado Alfaro et al*) *v Peru* (Preliminary Objections, Merits, Reparations and Costs). Inter-American Court of Human Rights Series C No 158 (4 November 2006), §128.

29 *Case of Cabrera García and Montiel Flores v Mexico* (Preliminary Objection, Merits, Reparations and Costs). Inter-American Court of Human Rights Series C No 220 (26 November 2010), §225.

30 *Case of Gelman v Uruguay* (Merits and Reparations). Inter-American Court of Human Rights IACtHR Series C No 221 (24 February 2011), §239.

domestic law shall be contrasted (*material controlante*). On the one side, the IACtHR began to refer not only to the ACHR but also to 'other instruments of similar nature, that comprise the *corpus juris* arising from the human rights conventions to which the State is a party.'[31] On the other side, the IACtHR started to reflect on what kind of interpretations shall integrate this controlling substance: only interpretations delivered in cases in which the State executing the conformity control was a party or also interpretations delivered in other cases (*inter-partes* or *erga omnes* effect)?; and only interpretations made in judgments or also interpretations made in another kind of resolutions and orders? Regarding the first question, the IACtHR observed that, while judgments produce *res judicata* effects on the State parties to the case, they produce *res interpretata* effects on the rest of the ACHR States (*erga omnes*).[32] Regarding the second, in what matters here, the answer was unanimously provided by the IACtHR in its opinion OC-21/14:

> ... the different organs of the State must carry out the corresponding control of conformity with the [ACHR], *based also on the considerations of the Court in exercise of its non-contentious or advisory jurisdiction*, which undeniably shares with its contentious jurisdiction the goal of the inter-American human rights system, which is 'the protection of the fundamental rights of the human being'.[33]

With this extract, which would be continuously repeated in the following advisory rulings, the IACtHR clarified its understanding of the opinions' effects on the States parties to the ACHR. These effects are those of the *res interpretata* (*erga omnes*) and deploy their strength in the exercise of the conventionality control that all the domestic authorities must conduct, by testing the conformity of national orders (norms, acts, omissions, etc) with the human rights *corpus juris*.[34] In other words, interpretations rendered in advisory opinions

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31 *Case of the Dismissed Congressional Employees* (n 28) Separate Opinion of Judge Sergio García Ramírez, §2; *Case of the Massacres of the Río Negro v Guatemala* (Preliminary Objection, Merits, Reparations and Costs). Inter-American Court of Human Rights Series C No 250 (4 September 2012), §262; *Case of Gudiel* Álvarez *et al* (*"Diario Militar"*) *v Guatemala. Merits, Reparations and Costs.* Inter-American Court of Human Rights Series C No 253 (20 November 2012), §330.

32 *Case of Gelman v Uruguay. Monitoring Compliance with Judgment.* Order of the Inter-American Court of Human Rights of Mar 20, 2013, §69.

33 *Rights and Guarantees of Children in the Context of Migration* (n 26) §31 (emphasis added).

34 Sergio García Ramírez, 'The Relationship between Inter-American Jurisdiction and States (National Systems): Some Pertinent Questions' (2015) 5 *Notre Dame Journal of Int'l &*

integrate the legal substance to be used by the authorities of all ACHR States when conducting the conformity control, regardless of whether the State has participated in the advisory proceedings.

This is the stance of the IACtHR on the bindingness of the advisory opinions so far.[35] Opinions are not legally binding if 'binding' means that they produce effects comparable to those of judgments on the State that is party to the case (*res judicata*).[36] However, they can be considered as legally binding or quasi-binding[37] if 'binding' means that they must be followed as part of the controlling legal substance in the exercise of conventionality control. A different question is whether, with this stance, the IACtHR has overreached its authority and/or is illegitimately interpreting the ACHR and/or altering the correct functioning of the IAHRS and whether this could be acceptable or not for the States.[38]

An additional aspect is how domestic courts perceive the advisory opinions' effects. In this regard, the practice of domestic courts is determined by the interplay between the IAHRS and the constitutional order of each country. Even though the practice of courts is all but consistent or constant, there

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Comp Law 115, 136; Eleanor Benz, *The Advisory Function of the Inter-American Court of Human Rights* (Nomos 2023) 388.

35 This stance is aligned with part of the relevant doctrine. See Victor Manuel Rodriguez Rescia, *La Ejecución de Sentencias de la Corte Interamericana de Derechos Humanos* (1st edn, IJSA 1997) 61; Faúndez Ledesma, *El Sistema Interamericano de Protección de los Derechos Humanos: Aspectos institucionales y procesales* (3rd edn, Instituto Interamericano de Derechos Humanos 2004); Pedro Nikken, 'La función consultiva de la Corte Interamericana de Derechos Humanos' (1999) *Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM* 161, 176; Sergio García Ramírez, 'El control judicial interno de convencionalidad' (2011) 28 *Revista del Instituto de Ciencias Jurídicas de Puebla* 123, 138; Augusto Guevara Palacios, *Los Dictámenes Consultivos de la Corte Interamericana de Derechos Humanos: Interpretación Constitucional y Convencional* (JB Bosch Editor 2012).

36 Eduardo Vio Grossi, 'La naturaleza no vinculante de las opiniones consultivas de la Corte interamericana de derechos humanos' (2018) 2(2) *Revista Jurídica Digital UANDES* 200.

37 Jorge Contesse, 'The Rule of Advice in International Human Rights Law' (2021) 115(3) *AJIL* 367, 369.

38 On this note, see eg Ariel Dulitzky, 'An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights' (2015) 50(1) *Texas Int'l Law Journal* 45; Álvaro Paúl Díaz, 'Los enfoques acotados del control de convencionalidad: Las únicas versiones aceptables de esta doctrina' (2019) 87(246) *Revista de Derecho* 49; Karlos Castilla Juárez, '¿Control interno o difuso de convencionalidad? Una mejor idea: la garantía de tratados' (2012) XIII *Anuario Mexicano de Derecho Internacional* 51; Laurence Burgorgue-Larsen, 'Conventionality Control: Inter-American Court of Human Rights (IACtHR)' (*Max Planck Encyclopedias of International Law*, December 2018) <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3634.013.3634/law-mpeipro-e3634> accessed 25 April 2024.

seems to be a discrete majority among high courts of ACHR States in favor of a binding or quasi-binding nature of the IACtHR' case law, including its advisory opinions. A study published in 2012 by Guevara Palacios[39] concluded that this view was common to apex courts of Argentina,[40] Bolivia,[41] Colombia,[42] Costa Rica,[43] and the Dominican Republic.[44] The same recognition took place later on in Ecuador.[45] On the contrary, supreme courts in Venezuela[46] and Guatemala[47] have specifically rejected the opinions' binding effect. Worth mentioning are the stances of high courts in Peru and Mexico. While the Constitutional Court of Peru initially aligned itself with the view of a binding nature of opinions,[48] a 2020 decision related to the OC-24/17 showed that the majority within the Court does not favor this view anymore.[49] In a similar vein, somehow altering a previous stance on the matter,[50] the Mexican Supreme Court decided in a very recent resolution that IACtHR's opinions are not binding for Mexican domestic judges although having 'legal relevance' and 'high interpretative authoritativeness.'[51] Standards contained in those opinions can become binding if used by the IACtHR or the Supreme Court in their judgments.[52] Finally, high courts in Brazil, Chile, and Uruguay have left the issue unsettled.[53]

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39 Guevara Palacios (n 35).

40 Supreme Court of Argentina, Judgment in *Mazzeo, Julio Lilo y otros*, Recurso de casación e inconstitucionalidad. M. 2333. XLII. y otros, 13 Jul 2007, §20.

41 Plurinational Constitutional Court of Bolivia, 2003–06127-12-RAC, Judgment No 0491/2003-R, 15 Apr 2003.

42 Constitutional Court of Colombia, Judgment No T-1319/01, 7 Dec 2001, although the same court held in 2014 that the IACtHR jurisprudence is of interpretative relevance, but not necessarily binding, unless certain criteria are fulfilled, such as that it is uniform and reiterated, Benz (n 34) 375, mentioning Judgments No. C-500/14, 16 Jul 2014 and No C-327/16, 22 Jun 2016.

43 Constitutional Chamber of the Supreme Court of Justice of Costa Rica, Judgment No 2313–95, 9 May 1995.

44 Supreme Court of the Dominican Republic, Resolution No 1920–2003, 13 Nov 2013.

45 Constitutional Court of Ecuador, judgment 184–18-SEP-CC, 29 May 2018, § 58; judgment 10–18-CN/19, 12 Jun 2019, § 81; and judgment 11–18-CN/19, 12 Jun 2019, §§ 23–39.

46 Supreme Tribunal of Venezuela (Constitutional Chamber), 01–0415, Judgment 1942, 15 Jul 2003.

47 Guevara Palacios (n 35) 455, mentioning a judgment of 18 Nov 2009.

48 Constitutional Court of Peru, Judgment No 5854–2005–PA/TC, 8 Nov 2005; and No 2798–04–HC/TC, 9 Dec 2009.

49 Benz (n 34) 383–385, mentioning Judgment No 676/2020, 3 Nov 2020.

50 Supreme Court of Mexico, Contradicción de Tesis 293/2011, 03 Sep 2013; and Tesis jurisprudencial 21/2014 (10a.), 30 Apr 2014.

51 Supreme Court of Mexico, Contradicción de criterios 175/2022, 17 Jun 2024.

52 ibid.

53 Burgorgue-Larsen (n 38).

Unlike judgments, the IACtHR does not monitor compliance with the standards delivered in advisory opinions, and thus, measuring their actual impact in domestic law is a complex task.[54] Changes or rejection of changes in regulations or governmental practices as a response to opinions can be very subtle, undeclared, or go unnoticed. However, with regard to more divisive issues, the chances to record their impact increase. That was the case of the OC-24/17 on non-discrimination against LGBTIQ+ People, which triggered in Costa Rica and Ecuador successful lawsuits and regulatory adjustments in favor of the rights of this community, in particular, the same-sex couples' marriage and the name change of trans people.[55] The question regarding the bindingness of advisory opinions recurrently emerged in social and judicial arenas of both countries (and beyond) after the OC-24/17, with high courts supporting their binding effects.[56]

2.2 *The Effects of Advisory Opinions on OAS States Not Parties to the ACHR*

Authorities of OAS Members that are not parties to the ACHR are also affected by advisory opinions, but in a distinctive manner, since they are not under the mandate of the conventionality control. In its opinion, OC-21/14, the IACtHR mentioned:

> … the interpretation given to a provision of the Convention through an advisory opinion provides all the organs of the Member States of the OAS, including those that are not parties to the Convention but that have undertaken to respect human rights under the Charter of the OAS (…), with a source that, by its very nature, also contributes … to achieving the effective respect and guarantee of human rights.
>
> Given the broad scope of the Court's advisory function (…) everything indicated in this Advisory Opinion also has legal relevance for all the OAS Member States that have adopted the American Declaration, irrespective of whether they have ratified the [ACHR] … [57]

54 Pablo Saavedra Alessandri, 'A Broader Look At the Transformative Impact of the Inter-American Court of Human Rights' Decision', Von Bogdandy et al (ed) *The Impact of the Inter-American Human Rights System: Transformation on the Ground* (OUP 2024) 537, 549.

55 ibid 550–556.

56 Constitutional Court of Ecuador (n 45); Constitutional Chamber of the Supreme Court of Justice of Costa Rica, Judgment No 12782-2018, 8 Aug 2018.

57 *Rights and Guarantees of Children in the Context of Migration* (n 26) §§31–2.

According to IACtHR, opinions provide domestic authorities of these States with legally *relevant* sources and interpretative guides. That relevance is explained by the authoritativeness of the IACtHR – particularly strong when interpreting inter-American treaties (eg the OAS Charter[58] or the American Declaration of the Rights and Duties of Man[59]) – but also by the legitimacy of its advisory jurisdiction that extends to all OAS Member States, and not only ACHR Parties. This is confirmed by the practice of some States, such as Canada or the United States (US), which participate in advisory proceedings in accordance with the rules of procedure.[60]

2.3 *The Foreseeable Impact of the Advisory Opinion on Climate Emergency in Domestic Law*

On 9 January 2023, Chile and Colombia submitted an interpretative consultation to the IACtHR, with the main purpose of clarifying '… the scope of State obligations … in order to respond to the climate emergency within the framework of international human rights law …"[61] A wide range of questions were raised on, for instance, obligations of prevention and guarantee of human rights, differentiated obligations in relation to vulnerable groups and communities, procedural obligations and shared and differentiated responsibilities.

When rendering the opinion, the IACtHR is not constrained by the number or literal wording of the questions and can answer only some or rephrase them in order to provide better assistance in the protection of human rights. As we

58 Charter of the Organization of American States (adopted 39 April 1948, entered into force 13 December 1951) 119 UNTS 3.

59 American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 2 May 1948.

60 Eg the USA participated in *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, Inter-American Court of Human Rights Series A No 1 (14 July 1989), and *Denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the Consequences for State Human Rights Obligations* (*Interpretation and Scope of Articles 1, 2, 27, 29, 30, 31, 32, 33 a 65 and 78 of the American Convention on Human Rights and 3*(*l*)*, 17, 45, 53, 106 and 143 of the Charter of the Organization of American States*). Advisory Opinion OC-26/20, Inter-American Court of Human Rights Series A No 26 (9 November 2020). Canada participated in *Juridical Condition and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03, Inter-American Court of Human Rights Series A No 18 (17 September 2003).

61 Chile and Colombia, 'Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile' (9 Jan 2023), available here: <https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf>, accessed 15 Mar 2024.

write this chapter,[62] the approach to be taken by the IACtHR can only be a matter of speculation. That being said, a consistent, commendable, and probable approach for the IACtHR to be taken is to answer the request by applying to the climate issue the 'environmental obligational framework' that it has been developing, mainly from the OC-23/17[63] onwards, and that was recently employed in the case *Inhabitants from La Oroya v Peru*.[64]

In applying this framework, the IACtHR could explain, for instance, how the *duty to regulate* must apply to climate mitigation and adaptation. If inspired by the recent European Court of Human Rights' (ECtHR) case law,[65] the IACtHR, while interpreting the Paris Agreement, may refer to the duty to establish and quantify clear and ambitious national limits to GHG emissions, perhaps through a carbon budget method.[66] Or maybe the IACtHR could observe that a failure to comply with the established GHG limits can imply, on its own, a human rights violation that needs to be avoided by instituting solid and transparent monitoring (and enforcement) mechanisms applicable to every economic sector, as part of the *duty to supervise and monitor*.[67] Although the European and the Inter-American human rights systems are very different, it is likely that both courts will get to a close and coherent interpretative result.[68] A further example of the application of the 'environmental obligational

62 On 31 July 2024.

63 *Environment and Human Rights* (*State Obligations in relation to the Environment in the context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights*). Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No 23 (15 November 2017); see Maria Antonia Tigre & Natalia Urzola, 'The 2017 Inter-American Court's Advisory Opinion: Changing the Paradigm for International Environmental Law in the Anthropocene' (2021) 12(1) *Journal of Human Rights and the Environment* 24.

64 *Case Inhabitants from La Oroya v Peru* (Merits, Reparations and Costs). Inter-American Court of Human Rights Series C No 511 (27 November 2023). See an illustration of the framework in the Concurring Vote of Judges Ricardo C. Pérez Manrique, Eduardo Ferrer Mac-Gregor Poisot and Rodrigo Mudrovitsch, §33.

65 *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (App no 53600/20) ECtHR [GC] 9 Apr 2024.

66 ibid §§570–572. See Chris Hilson, 'The ECtHR's Klimaseniorinnen Judgment: The Meaning of Carbon Budget within a Wide Margin of Appreciation' (2024) *Climate Law – A Sabin Center Blog*, available here: <https://blogs.law.columbia.edu/climatechange/2024/04/11/the-ecthrs-klimaseniorinnen-judgment-the-meaning-of-carbon-budget-within-a-wide-margin-of-appreciation/>

67 *Environment and Human Rights* (n 63) 60.

68 Armando Rocha & Rômulo Sampaio, 'Climate Change before the European and the Inter-American Courts of Human Rights. Comparing Possible Avenues before Human Rights Bodies' (2023) 32 *RECIEL* 279.

framework' to the climate emergency context would be the development of the *duty to require and approve environmental impact assessments*.[69] The IACtHR should clarify if and how GHG emissions (and climate impacts) must be considered in the assessments and, perhaps, to what extent the discretion of authorities consenting to carbon-intensive activities is restricted. Additionally, the IACtHR, interpreting the Escazú Agreement,[70] could develop the right to *access to justice* by requiring States to guarantee particularly broad standing criteria in climate cases, especially when vulnerable groups are involved.[71]

The IACtHR's interpretations in the future opinion will have to be applied by the domestic authorities – executive, legislative, and judicial – when exercising the control of conventionality. Even though these examples may be qualified as the low-hanging fruit among possible interpretations of States' obligations in the context of climate change, they still imply considerable efforts for many countries of the region that have not developed a strong and clear climate regulatory framework yet. This is the main impact of the advisory opinion: to ask States to assess their national policies in light of the IACtHR's findings and align their national regulatory framework accordingly. In this sense, depending on how far and detailed the opinion will be, it can have a significant disruptive impact on some State Parties to the ACHR. This impact will be reinforced with the use of the opinion in climate litigation cases before national courts.

Some final aspects to be considered when thinking about the foreseeable impact of the opinion on climate emergency in domestic orders are those of the procedural implementation of the quasi-binding interpretations through the doctrine of conventionality. First, contrary to judgments, interpretations rendered in opinions are facts-detached and, thus, of general character. This implies that, in the process of application of the created standard (binomial norm-interpretation) to a concrete case, a margin of appreciation exists for national authorities. This margin will be broader or thinner depending on how clear, precise, and unconditional the standard is. Second, as mentioned, the IACtHR has affirmed that the conventionality control must be exercised 'in the context of [the] respective spheres of competence and corresponding procedural regulations.'[72] There is an ongoing debate regarding what this

69 *Environment and Human Rights* (n 63) 61.

70 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean [*Escazú Agreement*] (adopted 4 March 2018, entered into force 22 April 2021) 3388 UNTS.

71 Gastón Medici-Colombo & Thays Ricarte, 'The Escazú Agreement Contribution to Environmental Justice in Latin America: An Exploratory Empirical Inquiry through the Lens of Climate Litigation' (2024) 16(1) *Journal of Human Rights Practice* 160.

72 *Case of the Dismissed Congressional Employees* (n 28).

means or should mean, and inconsistencies in the IACtHR's case law have been noted.[73] An acceptable view is that of Judge Ferrer Mac-Gregor Poisot, who explained that this should not be interpreted as a restriction to exercise the control but as a way to 'calibrate' its intensity according to the competence of each entity.[74] For instance, domestic courts entitled to exercise a diffuse constitutional control are apt to declare domestic laws void an unconventional, while other entities not entitled to exercise that kind of control should limit themselves, for instance, not to apply the unconventional norm or merely to note the possible unconventionality.[75] Additionally, even for those entities that have broad competences to carry out a strong conventionality control, there are certain rules or good practices to be followed. One of them is that conventionality control must always be applied in the least disruptive manner for the domestic order. For instance, interpretations of domestic provisions in conformity with the conventional order would always be preferred over non-application or derogation of the former.[76] Third and final observation, provisions or interpretations that are more favorable to human rights (from domestic or international law rules) always prevail in accordance with the *pro homine* principle, which is a cardinal principle of the IAHRS.[77] In this sense, Guevara Palacios argues that domestic courts can only detach from interpretations in advisory opinions due to justice reasons and the application of cardinal principles of the IAHRS – *pro homine, progressivity, or non-discrimination* – , and as long as they do so expressly and giving reasons for it.[78]

3 The Domestic Law Impact of the Advisory Opinions Rendered by the ITLOS

Whereas the purpose of human rights treaties is to secure the observance of human rights in jural relations of domestic law, most law of the sea rules are aimed at governing jural relations between States, ie valid at the level of international law. This explains why, contrary to the domestic law impact of rulings

73 Álvaro Paúl, 'The Emergence of a More Conventional Reading of the Conventionality Control Doctrine' (2019) 49 *Revue Générale de Droit* 275.

74 *Case of Cabrera García and Montiel Flores v Mexico* (n 29) Concurring Opinion of Ad Hoc Judge Eduardo Ferrer Mac-Gregor Poisot §§34–41.

75 ibid §35.

76 Néstor Pedro Sagüés, 'Las opiniones consultivas de la Corte Interamericana, en el control de convencionalidad' (2015) 20 *Pensamiento Constitucional* 275, 276, 277.

77 ACHR, art 29.

78 Guevara Palacios (n 35) 465.

and opinions of the IACtHR, the potential impact of the opinions of the ITLOS on domestic litigation is shorter. This also explains why, in the case of the IACtHR, resorting to the case law of domestic courts helps to assess the domestic law impact of its opinions, whereas, in the case of the opinions rendered by the ITLOS, one can look to the adoption of new laws, or the amendment or repeal of existing laws, after (and perhaps consequential to) the rendering of such opinions. The UNCLOS does not clarify the impact of advisory opinions on domestic law – and the ITLOS has not yet been in a position of needing to clarify this impact. As such, this part of the chapter is naturally shorter, as the evidence available is almost non-existent.

So far, the ITLOS has rendered three advisory opinions. The first referred to the deep seabed mining, and namely the responsibilities and obligations of sponsoring States in relation to activities in the Area.[79] The second referred to flag and coastal States' obligations in relation to fishing activities.[80] The third referred to States' obligations under the UNCLOS to mitigate and adapt to climate change.[81] The purpose of this chapter is precisely to assess what the impact of this third opinion on domestic laws can be, considering that the cornerstone of this opinion refers to States' obligation to adopt a proper national regulatory framework aimed at reducing GHG emissions.[82] To that end, this section assesses the very short evidence existing on the domestic impact of the other advisory opinions.

As mentioned before, from a methodology angle, the main difficulty of assessing the impact of advisory opinions in the domestic legal order of States is the lack of data where such impact is openly acknowledged by State authorities. Or, alternatively, data regarding cases where such impact is openly rejected. A good example is the *Sub-Regional Fisheries Commission* (*SRFC*) advisory opinion: despite the core importance of this opinion to the requesting organization and its Member States, there is no tangible evidence that can suggest whether the findings espoused in this opinion were incorporated or rejected by those Member States.

A better example is the impact of the 2011 opinion on the *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*. The International Seabed Authority – which is responsible for

79 *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area* [Advisory Opinion, 1 Feb 2011] ITLOS Case No 17 (*Responsibilities and Obligations of Sponsoring States Opinion*).

80 *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (*SRFC*) [Advisory Opinion, 2 Apr 2015] ITLOS Case No 21.

81 *COSIS Opinion* (n 9).

82 ibid §§265–280.

'organiz[ing] and control[ling] activities in the Area, particularly with a view to administering the resources of the Area'[83] – asked States 'to provide information on, or texts of, relevant national laws, regulations and administrative measures.'[84] Furthermore, it created an open national legislation database.[85] According to the data of this latter, some States adopted domestic acts regarding the exploration for and exploitation of deep seabed minerals, namely Belgium,[86] Cook Islands,[87] Federated States of Micronesia,[88] Fiji,[89] Kiribati,[90] Nauru,[91] Singapore,[92] Tonga,[93] Tuvalu,[94] and the United Kingdom.[95] Others reported to the International Seabed Authority that they had prior legislation or that they were reviewing their own laws and regulations, whilst the majority of States did not reply to the International Seabed Authority.

This could suggest that the ITLOS' advisory opinion was inconsequential in terms of domestic law impact, but the fact is that those States that adopted new laws on the exploration for or exploitation of deep seabed minerals beyond national spatial jurisdiction, or that amended prior legislation, showed an impressive alignment in terms with the findings of the ITLOS in that advisory opinion – even though they do not mention it explicitly. Looking at the timelines, it is unlikely that a national act adopted after the ITLOS' advisory opinion was not to some extent influenced by this opinion, but the lack of an

83 UNCLOS, art 157(1).

84 Doc No ISBA/17/C/20, §3.

85 Available here: <https://www.isa.org.jm/national-legislation-database/>

86 Law No 2013/11348, of Aug 17, 2013, available here: <https://www.isa.org.jm/wp-content/uploads/2022/05/Belgium-2-Aug.pdf>

87 Seabed Minerals Act (Act No 5 of 2019), available here: <https://static1.squarespace.com/static/5cca30fab2cf793ec6d94096/t/5d3f683993ea3f0001b7379c/1564436729995/Seabed+Minerals+Act+2019>

88 Seabed Resources Act (Public Law No 20–102), available here: <https://www.cfsm.gov.fm/ifile/20%20congress/LAWS/PUBLIC_LAW_20-102.pdf>

89 International Seabed Mineral Management Decree (Decree No 21 of 2013), available here: <https://www.isa.org.jm/wp-content/uploads/2022/05/Fiji2013.pdf>

90 Seabed Minerals Act (Act No 1 of 2017), available here: <https://faolex.fao.org/docs/pdf/kir177489.pdf>

91 International Seabed Minerals Act (Act No 26 of 2015), available here: <https://www.isa.org.jm/wp-content/uploads/2022/05/Nauru_ISM.pdf>

92 Act No 6 of 2015, available here: <https://www.isa.org.jm/wp-content/uploads/2022/05/Singapore.pdf>

93 Seabed Minerals Act (Act No 10 of 2014), available here: <https://www.isa.org.jm/wp-content/uploads/2022/05/Tonga-2014.pdf>

94 Seabed Minerals Act (Act No 14 of 2014), available here: <https://www.isa.org.jm/wp-content/uploads/2022/05/Tuvalu-2014.pdf>

95 Deep Sea Mining Act of 1981, as amended by the Deep Sea Mining Act of 2014, available here: <https://faolex.fao.org/docs/pdf/uk150471.pdf>

explicit, open, and formal acknowledgment does not allow any safe conclusion in this regard.

Furthermore, the *notes verbales* sent by other States Parties display a certain States' aspiration, although implied, to comply with all international rules and standards, such as those clarified in the ITLOS' advisory opinion, perhaps because the topic itself (the exploration for and exploitation of resources in the international seabed Area) is primarily regulated by the UNCLOS. With regards to other States Parties, it is not possible to interpret their silence.

Although the *COSIS Opinion* aims to assist the requesting body only,[96] it is likely to impact the climate policies of all States, since the opinion is an authoritative pronouncement from a law of the sea specialized court that unveils what States' obligations to mitigate climate change under the UNCLOS are.[97] Although international courts cannot replace States, they are 'purveyors of legitimacy' that 'help us understand what needs to be done, or what is being done inadequately or not at all.'[98] In this sense, an opinion rendered by the ITLOS that clarifies what State action needs to be adopted pursuant to the UNCLOS is likely to pressure all States to adopt more stringent mitigation policies. Moreover, the *COSIS Opinion* can be used, domestically, as a justification for the adoption of more politically divisive measures,[99] since States can shield themselves in the court pronouncement in order to adopt more ambitious mitigation efforts (and thus outsource guilt to the ITLOS).[100] Accordingly, one can expect that the *COSIS Opinion*, together with the opinions eventually rendered by the IACtHR and the ICJ, may be openly and formally invoked in domestic decision-making processes prior to the adoption of climate change-related policies, laws, and regulations, as well as in judicial processes before domestic courts.

4 Conclusion

As advisory opinions seek to clarify the existing States' obligations under international law, they can impact States' domestic laws. That can result from the

96 *COSIS Opinion* (n 9) §§107–108.

97 See Guerreiro Teixeira & Galvão Teles (Chapter 2 in this book).

98 Philippe Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' (2016) 28 *Journal of Environmental Law* 19, 24.

99 Armando Rocha, 'Suing States: The Role of Courts in Promoting States' Responsibility for Climate Change', in Garcia & Cortês (eds), *Blue Planet Law – The Ecology of our Economic and Technological World* (Springer, 2023) 99, 101–102.

100 ibid 102.

simple fact that complying with an international obligation requires the adoption of specific legislation and policies at the level of domestic law.

This impact is clearer in the case of advisory opinions of the IACtHR clarifying human rights obligations owed by States to individuals under their jurisdictions and legal order. To that end, States may bear negative and positive obligations to put in place and maintain a proper regulatory framework aimed at securing the protection of such human rights and freedoms. More subtle, but equally real, are the impacts on domestic orders of advisory opinions that clarify obligations in State-to-State jural relations that involve the adoption of domestic norms. A good example is the advisory opinion rendered by the ITLOS regarding States' obligations to mitigate and adapt to climate change under the UNCLOS. As the ITLOS referred in this opinion, to perform the obligations listed in Part XII of the UNCLOS, namely those related to the prevention, reduction, and control of GHG emissions, and those aimed at preserving and restoring the marine environment, require more of the adoption of a national legislative framework.[101]

Nonetheless, when adopting a national legislative act, States do not openly or expressly acknowledge the upstream influence of an advisory opinion from an international court. The influence, therefore, is often visible – but also implied, informal, and unacknowledged. A good case study is the ITLOS' advisory opinion on the responsibilities and obligations of sponsoring States with respect to the activities in the Area. As this is an activity primarily regulated by the UNCLOS, it is just natural that domestic laws will be adopted in line with, or at least aware of, the ITLOS' advisory opinion. Few States have flagged to the International Seabed Authority the adoption of new laws, or the amendment of existing laws, subsequent to the rendering of that opinion, but all of these latter States aligned their national legislation with the findings of the ITLOS, although they do not acknowledge it openly. The same can be said with regard to the ACHR and the opinions of the IACtHR, which hold a *res interpretata* effect. This means that States also need to align their domestic laws with the findings of the IACtHR. However, with regard to these opinions, adjustments to (or rejection to amend) regulations or governmental practices as a response to them can go unnoticed, making the measurement of their actual impact a very complex task. Still, and particularly in politically charged issues, because domestic courts have a mandate to control the conventionality of national statutory norms, it is easier to find signs of such impact, namely when a domestic

101 ibid §§265–280.

court renders a national rule incompatible with the ACHR as interpreted by the IACtHR in one of its opinions.

Being climate change a 'politically charged issue' suggests that the trio of advisory opinions requested to the ITLOS, the IACtHR, and the ICJ will be invoked more frequently, openly, and formally before courts, but also by political bodies who may be reluctant to adopt more ambitious climate policies as a result of their sensitivity among the electorate. As such, it is unclear to what extent these opinions will shape States' domestic legislation, but it seems fair to assume that they will be used as a catalyst for the adoption of policies and legislation at the domestic level.