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The Rule of Advice in International Human Rights Law

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Abstract

Advisory jurisdiction is a ubiquitous feature of international human rights adjudication. Yet the attention of legal scholars is almost entirely devoted to contentious jurisdiction. This Article aims to fill that gap in the literature. By introducing two models of advisory jurisdiction, and analyzing the example of the Inter-American Court of Human Rights—the world's most active international advice-giver—the Article shows how international human rights courts may utilize advisory proceedings to influence state conduct, in a mechanism the Article calls "ruling through advice." The Article also shows how human rights courts may attempt to guide states and national courts by means of an "anticipatory adjudication" mechanism. Using the Inter-American Court's groundbreaking advisory opinion on same-sex marriage as a case study, the Article argues that, despite the domestic implementation of its opinion, the Court misused its advisory powers, putting the regional human rights system at risk. The insights that both the conceptual model and the case study offer contribute to a broader conversation about international courts' advisory role.

I. Introduction

In August 2019, the prime minister of Mauritius, a small island in the Indian Ocean, proudly unveiled the country's latest postal stamps and souvenirs, depicting The Peace Palace, the seat of the International Court of Justice, in The Netherlands, located some six thousand miles away. The Mauritian leader did so to commemorate the Court's advisory opinion on the decolonization of the Chagos Archipelago, a region under dispute between Mauritius and the United Kingdom, which the Court had issued in February of 2019.[1] In

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[1] Government of the Republic of Mauritius Press Release, Prime Minister Launches First Day Cover, Stamps and Souvenir Sheet on ICJ Advisory Opinion on Decolonisation (Aug. 23, 2019), at http://www.govmu.org/

its advisory opinion, the International Court of Justice (ICJ) found that by excluding the Chagos Archipelago from the territory of Mauritius, the United Kingdom had failed to lawfully complete the process of decolonization upon Mauritius's accession to independence in 1968, and ordered the United Kingdom to complete the process "as rapidly as possible."[2]

The legal issue of decolonization is arguably one of the most important themes of international law in the past sixty years. Thus, the Court's ruling—although non-binding—was of great consequence: a few months after the release of the opinion, the UN General Assembly adopted a resolution condemning the United Kingdom's unlawful occupation of the island,[3] and two years later, in January 2021, the International Tribunal for the Law of the Sea (ITLOS) issued a judgment with a critical finding: the legal determinations made by the ICJ in advisory proceedings "do have legal effect."[4]

Advisory jurisdiction is also a prominent feature of human rights courts' adjudication. In 2018, the European Court of Human Rights issued its first advisory opinion, requested by the French court of cassation, "concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother."[5] Around the same time, the Inter-American Court of Human Rights broke ground by issuing an advisory opinion finding that same-sex marriage is a fundamental right under international law, making it the first international tribunal to reach this conclusion.[6] Human rights advocates praised the ruling, which became the main topic of a dramatic presidential election in Costa Rica, with one candidate gaining considerable traction —and a win in the first round of the election—after promising to withdraw from the Court's jurisdiction if elected. In further response to the opinion, conservative governments in South America launched an unprecedented attack against the inter-American human rights system, denouncing the Court's intrusive case law and demanding that the Court grant states a

English/News/Pages/Prime-Minister-launches-first-day-cover,-stamps-and-souvenir-sheet-on-ICJ-Advisory-Opinion-on-Decolonisation.aspx.

[2] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion 2019, ICJ Rep. 95, 139 (Feb. 25).

[3] *See* Advisory Opinion of the International Court of Justice on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, UN Doc. A/73/295 (May 22, 2019), *at* https://undocs.org/en/A/RES/73/295.

[4] Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives), Case No. 28, Preliminary Objections, Judgment, para. 205 (ITLOS Jan. 28, 2021) [hereinafter *Mauritius v. Maldives*].

[5] Case Concerning the Recognition in Domestic Law of a Legal Parent-Child Relationship Between a Child Born Through a Gestational Surrogacy Arrangement Abroad and the Intended Mother, Advisory Opinion (Eur. Ct. Hum. Rts. Apr. 10, 2019). In May 2020, the Court delivered its second advisory opinion under the newly established advisory power, on "the use of the 'blanket reference' or 'legislation by reference' technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the offence and the amended criminal law." *See* Case Concerning the Use of the "Blanket Reference" or "Legislation by Reference" Technique in the Definition of an Offence and the Standards of Comparison Between the Criminal Law in Force at the Time of the Offence and the Amended Criminal Law, Advisory Opinion (Eur. Ct. Hum. Rts. May 29, 2020).

[6] State Obligations Concerning Change of Name, Gender Identity, and Rights Derived 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, Inter-Am. Ct. H.R., (ser. A) No. 24 (Nov. 24, 2017) [hereinafter *State Obligations* Advisory Opinion].

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"margin of appreciation"—an attack that was put aside only when major political crises erupted in the region and some leaders lost their reelections.[7]

These developments suggest that the advisory role of international courts might be in the process of becoming a consequential mechanism of international adjudication—and, by implication, a source of friction among states and regional and international bodies. Therefore, advisory jurisdiction should be of concern to scholars who study international courts. But commentators seem to focus largely, if not exclusively, on international courts' *contentious* jurisdiction.[8] Their preoccupation is not unreasonable: we should worry about decisions that are binding upon states, that is, decisions that are expected to change state conduct. Yet, in international law, a binding contentious decision is not in practice very different from a non-binding advisory opinion, as in neither case can the international court ultimately "enforce" its ruling against a respondent state. Despite this, and despite both the ubiquity of advisory jurisdiction and the role it increasingly plays in international adjudication, legal scholars have given little attention to the advisory practice of international courts.

This Article begins to fill the gap. To do so, it analyzes the advisory jurisdiction of the Inter-American Court of Human Rights, with a particular focus on the 2018 *Same-Sex Marriage* advisory opinion. The Inter-American Court's advisory role is of interest for at least three reasons: first, the Court is one of the world's most active tribunals rendering advisory rulings.[9] Second, more than the *number* of advisory opinions that the Court has issued, the *way* it resorts to advisory jurisdiction makes its practice worthy of examination. As the case study on same-sex marriage shows, the Inter-American Court seems to understand advisory opinions as quasi-binding rulings, and national courts may in fact treat the Court's advice as binding. The Court, in this sense, rules through advice, making advisory jurisdiction a type of human rights adjudication that deserves close scrutiny. Third, at a more general level, the study of the Court's advisory role sheds new light on the interactions between international human rights courts and states. Today, as states push back against international courts through an array of mechanisms—from the articulation of deference doctrines to the enactment of statements aiming to counter international human rights bodies, to budgetary cuts—legal scholarship can provide the tools for international courts to respond. By examining an international court's *non*-contentious powers, the Article makes a novel contribution to the larger field of international adjudication.

The Article proceeds as follows. Part II distinguishes between contentious and advisory jurisdiction and discusses two models of advisory jurisdiction. Under the first model, called

[7] *See* Statement from the Governments of Argentina, Brazil, Chile, Colombia and Paraguay, Submitted to the Inter-American Commission on Human Rights (Apr. 11, 2019), *at* https://www.mre.gov.py/index.php/noticias-de-embajadas-y-consulados/gobiernos-de-argentina-brasil-chile-colombia-y-paraguay-se-manifiestan-sobre-el-sistema-interamericano-de-derechos-humanos (available in Spanish).

[8] In her study on the proliferation of international courts, Karen Alter covers more than 37,000 decisions. However, as she notes, the study tends to exclude advisory opinions to focus instead "on international courts' rulings that are defined by treaties as being binding in the legal sense." *See* KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS 131 (2014).

[9] As of April 2021, the Inter-American Court of Human Rights has issued twenty-six advisory opinions; the International Court of Justice, twenty-eight; the African Court on Human and Peoples' Rights, twelve; the International Tribunal for Law of the Sea, two; the European Free Trade Association Court (which is really a transnational court, as it has only three member states), twenty-six; and the European Court of Human Rights, two. Considering that the ICJ issued its first advisory in 1948 and has been in operation since 1946, the Inter-American Court—which began work in 1978—is the most active international court exercising advisory jurisdiction today.

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"ruling through advice," a judicial advice-giver attempts to decide a case, despite not having enforcement mechanisms at hand. The second model, called "anticipatory adjudication," makes the advice-giver a legal guide on issues that require clarification, and provides some indirect implementation mechanisms for the advice-giver's findings. Part III introduces the notion of "judicial modulation," which helps us to determine which of the two models may work better in different advisory contexts. Through judicial modulation, human rights courts must consider both institutional and contextual factors that determine when and how to use their advisory powers. Part IV examines advisory jurisdiction in the specific context of the inter-American human rights system. It describes the evolution of the Inter-American Court's advisory powers, and shows the Court's notorious willingness to use its advisory jurisdiction. This Part analyzes the 2018 advisory opinion on same-sex marriage and gender identity as a case study: first, it focuses on the Court's groundbreaking findings; and second, on a radical dissenting opinion that challenges the foundations of the Court's advisory model. The Article then examines both the implementation by national courts of the Inter-American Court's opinion, and the reaction that the opinion caused in some states, which prompted them to launch an unprecedented attack against both the Inter-American Court and the Inter-American Commission on Human Rights—the two bodies that make up the Americas' human rights regime. Against the backdrop of this groundbreaking opinion, the Article revisits the modulating factors to show how the Inter-American Court failed to properly distinguish what it was being asked to do. Part V explains how the Court's practice shows promising ways to correct such failure, and Part VI concludes.

II. Two Advisory Models

Judicial power to advise is intriguing. The notion of "jurisdiction" seems automatically connected to courts' adjudicative function, that is, the power to decide legal disputes between disagreeing parties, order remedies, and, depending on the jurisdiction, set precedents. The fact that a judicial decision is final and enforceable against an unwilling party is what makes law an effective instrument for the organization of social life. This begs the question, do courts exercise jurisdiction when they issue non-binding, *advisory* opinions? Presumably they do; "jurisdiction" comes from the Latin expression *iuris dictio*—to say "what the law is." In advisory proceedings, courts may especially do so—to state the law—whereas courts in contentious proceedings do so normally after finding and establishing the facts of the matter. The judicial power to advise, despite lack of enforcement, is very much an exercise of jurisdiction.[10] Yet, such power has certain features that render them unique and different from contentious or compulsory jurisdiction.

This Part conceptually distinguishes between contentious and advisory jurisdiction, and then introduces two models of advisory jurisdiction. Contentious jurisdiction is the area that occupies most scholarly attention on international courts. As international law becomes more legalized—and judicialized, for that matter—it is unsurprising that commentators look to international courts' work as genuine adjudicators, that is, as organs that seek to resolve

[10] *But see* Muskrat v. United States, 219 U.S. 346 (1911), in which the U.S. Supreme Court declared that advisory opinions are not an exercise of judicial power under the U.S. Constitution.

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disputes and influence states conduct.[11] The key principle that governs contentious adjudication is consent: states may not be brought before an international court unless they have consented. Therefore, states have significant margin to decide if and when to enter into international dispute mechanisms: if states anticipate that a judicial outcome will favor their position, they will presumably agree to such mechanism; if they believe the judicialization of a dispute may affect their interests, they may reject the proceedings, or simply choose to ignore an unfavorable ruling. Courts, acting under contentious or compulsory jurisdiction, must treat states, therefore, with particular care, in the basic yet radical sense that courts deal with sovereign equals which set up the existing international legal processes pursuant to which courts exist.

Advisory jurisdiction operates in a different way. Under advisory proceedings, states do not "buy into" the different decision-making processes, not at least in the way states do when confronted with contentious proceedings. A state may protest against an advisory opinion and the process whereby an international court renders it without significantly affecting the opinion itself. That is not the case with contentious proceedings: if a state does not consent to the dispute mechanism, then the court will normally be unable to render a judgment. Similarly, and related to this, the way in which courts deal with states' equal sovereignty may require more complex methods of engagement: in an advisory proceeding, since a state may be brought to it without its consent, an international court must engage with that state—and all other interested parties, really—in ways that may demand greater care from courts. The next Part introduces the notion of "judicial modulation," to address some of the ways in which courts can do so, particularly in the advisory context.

Advisory jurisdiction is not only different from contentious jurisdiction. Within the realm of advisory jurisdiction, it is possible to identity different ways in which courts may exercise their advisory role. I propose two conceptual models of advisory jurisdiction: under the first model, which I call "ruling through advice," courts *decide* on issues that are submitted to them. Because issues are addressed under a court's advisory role, no remedies are ordered. However, the opinion is still a *legal* opinion, given by a court *of law*; and, as such, it is difficult to distinguish it from an actual court judgment. In the practice of the ICJ, for example, it is common for commentators to refer to advisory opinions as "cases." Under this model, such label is not entirely inaccurate.

Under the second model of advisory jurisdiction, which I call "anticipatory adjudication"—and which may coexist with the "ruling through advice" model—courts do not use their advisory powers to decide disputes, but to anticipate and try to preventively resolve conflict. Here, the judicial advice-giver does not seek to put an end to a legal controversy, at least not directly; the advice-giver does not *decide*, but instead provides answers than can illustrate and assist others that must ultimately make a legal determination. Often, the features of these two models may not be neatly differentiated. But considering how several factors of the advisory role of courts play out can help us better understand and assess specific practices of advisory jurisdiction—in the present study, the advisory role of human rights courts—and draw lessons to the practice of advisory jurisdiction of international courts more generally.

[11] In human rights adjudication, scholars also tend to focus more on contentious judgments, leaving other mechanisms of state accountability largely unattended. One such mechanism is friendly settlements, which exist in all human rights regimes, and pose both theoretical and practical challenges. *See* Jorge Contesse, *Settling Human Rights Violations*, 60 HARV. INT'L L.J. 317 (2019).

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In order to conceptualize the two models of advisory practice, I consider three different factors: (1) the implementation mechanisms of an opinion; (2) the opinion's specificity; and (3) the opinion's value to the applicant.

A. Ruling Through Advice

Under this model, the advisory role of a court may not be distinguishable from a court's contentious role. For example, a century ago, the Covenant of the League of Nations authorized the Permanent Court of International Justice to advise "upon any *dispute or question* referred to it by the Council or by the Assembly."[12] Commentators have noted that the Permanent Court adopted a policy of "assimilation" between contentious and advisory jurisdiction, as the Court was busy handling interstate disputes through its advisory practice.[13] When the International Court of Justice replaced the Permanent Court in 1946, the ICJ largely kept the former court's regulations.[14] However, the ICJ regulatory framework replaced the "dispute or question" formula with a seemingly narrower one: the UN Charter allows the ICJ to give advice only on a "legal question."[15] This "radical change," in the words of an ICJ judge writing separately in the Court's first advisory opinion, sought to prevent the ICJ from "settl[ing] genuine disputes by a strange and indirect method, a sort of travesty of contentious procedure."[16] Advisory and contentious proceedings should thus be separated by "a wall."[17] According to ICJ scholars, the change referred above made the ICJ "ignore and isolate the quasi-contentious elements involved in advisory opinions,"[18] and sought to limit the ICJ's advisory role to addressing "UN organizational matters," not interstate disputes.[19]

[12] Covenant of the League of Nations, Art. 14, Apr. 28, 1919 (emphasis added). The Draft Covenant had a slight but significant difference: originally proposed by Great Britain, the Draft stated that the Court would also have the power "*to advise* upon any dispute or question referred to it by the Council or by the Body of Delegates" (emphasis added). As one commentator notes, "the substitution of the expression 'give an advisory opinion' for the word 'advise' was made to indicate that 'the function to be exercised [was] a judicial one.'" *See* Takane Sugihara, *The Advisory Function of the International Court of Justice*, 18 JAPANESE ANN. INT'L L. 23, 25 (1974) (quoting D.H. MILLER, THE DRAFTING OF THE COVENANT (1969)).

[13] *See* MICHLA POMERANCE, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT IN THE LEAGUE AND UN ERAS (1973); Sugihara, *supra* note 12, at 25.

[14] The informal Inter-Allied Committee, established in London in 1943 to examine the establishment or reestablishment of an international court after the war, published a report in February 1944, expressly recommending "that the new court should retain an advisory jurisdiction." *See* ICJ, History of the International Court of Justice, *at* https://www.icj-cij.org/en/history; Statute of the International Court of Justice, ch. 4 (Arts. 65–68), Apr. 18, 1946 [hereinafter ICJ Statute]. *See* MAHASEN MOHAMMAD ALJAGHOUB, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT OF JUSTICE 1946–2005 (2006).

[15] UN Charter, Art. 96(a) ("The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on *any legal question*."); ICJ Statute, *supra* note 14, Art. 65(1): "The Court may give an advisory opinion *on any legal question* at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request" (emphasis added).

[16] *See* Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion, 1948 ICJ Rep. 57 (May 28) (ind. op., Azevedo, M.).

[17] *See* Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, 1950 ICJ Rep. 65 (March 30) (ind. op., Azevedo, M.).

[18] Michla Pomerance has argued that the ICJ viewed requests for advisory opinions "in a strictly formalistic light as matters concerning solely the requesting organ of and the Court." Michla Pomerance, *The Admission of Judges Ad-Hoc in Advisory Proceedings*, 67 AJIL 446, 462 (1973).

[19] Sugihara, *supra* note 12, at 47.

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But the most recent advisory practice of the ICJ provides a different, and more complex, picture of advisory jurisdiction. The ICJ does not only use its advisory powers to deal with organizational matters—something that to be sure still occupies part of the Court's advisory docket.[20] The World Court also, and perhaps increasingly, seems willing to engage with issues that could very well be addressed under the Court's contentious jurisdiction. By this I mean that the types of questions that reach the Court are not ones that *could not* be addressed in contentious proceedings. Of course, a state may wish to obtain an actual judgment by the ICJ, but the state may be unable to do that for a number of reasons: other states may not consent to a contentious proceeding, or the matter may be one that the ICJ might not see as convenient to address through a binding judgment.

Consider some of the Court's consequential advisory opinions issued in the past decades: on the legality of the threat or use of nuclear weapons,[21] the construction of a wall in Palestine,[22] and on the separation of the Chagos Archipelago from Mauritius.[23] With the exception of the controversial *Nuclear Weapons* opinion, in which the Court found that the threat or use of nuclear weapons is neither authorized nor prohibited by international law—a remarkable instance of *non-liquet*—in other cases the Court has arrived at actual legal findings with significant legal and political implications, findings that go beyond what could be understood as merely "opining" on a particular matter. For instance, in the *Wall* opinion, the Court found that Israel's construction of the wall violated international law, ordered Israel to stop construction of the wall, dismantle what had been so far built, and make reparations to the Palestinians for all damages caused by the construction of the wall.[24] Such a finding was bound to cause controversy, as the subject is one of the most complex matters for international peace and security, but also because the controversy was—and still is—an actual dispute, not just a "legal question" put before the ICJ.[25] The opinion was issued against Israel's objections, which in a contentious proceeding would have proved definitive, as the case could not have moved forward. In the advisory case, however, litigants and applicants could strategically use the proceedings to avoid the issue of consent. Similarly, in the context of nuclear weapons, litigants could mobilize resources and actors in an advisory context because they could expect that the ICJ would not be ready to *rule* on the subject. Such fear may have proved to be well-founded when the ICJ rejected an actual contentious case on the legality of nuclear weapons, in 2016.[26]

[20] *See, e.g.*, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 ICJ Rep. 62 (Apr. 29); Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization Upon a Complaint Filed Against the International Fund for Agricultural Development, Advisory Opinion, 2012 ICJ Rep. 10 (Feb. 1).

[21] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226 (July 8).

[22] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 136 (July 9) [hereinafter *Wall* Advisory Opinion].

[23] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 ICJ Rep. 95 (Feb. 25) [hereinafter *Chagos* Advisory Opinion].

[24] *Wall* Advisory Opinion, *supra* note 22, paras. 114b–37.

[25] *See, e.g.*, Michla Pomerance, *The ICJ's Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial*, 99 AJIL 26 (2005).

[26] In 2016, the ICJ rejected the case brought by the Marshall Islands against several nuclear powers—including India, Pakistan, and the United Kingdom—on jurisdictional grounds, that is, without even considering the case's merits. *See* Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), 2016 ICJ Rep. 255 (Oct. 5).

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In the 2019 *Chagos* opinion, the ICJ found that the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968. The Court declared that the United Kingdom's continued administration of the Chagos Archipelago constitutes nothing less than "a wrongful act,"[27] and declared that the UK has an obligation to bring its administration of the Chagos Archipelago to an end "as rapidly as possible."[28] The Court's robust finding was surprising, because it "concerned a bilateral sovereignty dispute which the United Kingdom had not agreed to have resolved by judicial decision."[29] On this point, the case of Kosovo's unilateral declaration of independence was fresh in the eyes of ICJ observers.[30] As Marko Milanović notes, the Court bypassed a sensible matter of interstate dispute—the question of sovereignty— "by labeling the advisory proceedings as being about *decolonization*, an issue in which the [UN General Assembly] has a longstanding interest."[31] In the *Kosovo* opinion, the Court limited its finding to holding that Kosovo's declaration did not violate international law, but avoided any further observations on Kosovo's status and its potential recognition by third states—a conclusion that has caused scholars to debate on the soundness of the ICJ's restrictive approach.[32]

In these cases, the ICJ shows a transit from the Permanent Court of International Justice's (PCIJ) "principle of assimilation" between contentious and advisory proceedings, to a strict separation between the two, to again a blurred usage of advisory jurisdiction as a mechanism to actually *rule*, and not just *opine*, on legal matters. To do this, the ICJ—or any court exercising advisory jurisdiction—may need to delve into complex factual inquiries, just like in contentious proceedings. In order to do that, the court will need the participation, and hence the consent, of states and any other actors engaged in the proceedings to provide factual information to the court. For this reason, a participant's absence from the proceedings can have detrimental effects on the value and quality of a court's opinion.[33] In the ICJ's *Wall* opinion, for example, Israel's refusal to participate led Judge Thomas Buergenthal to vote against the Court exercising jurisdiction, because, in his view, "the Court did not have before it the requisite factual bases for its sweeping findings."[34]

Let us consider the ways in which the factors listed above play out in these advisory contexts. First, the opinions' *implementation mechanisms* vary of course, depending on which organ has requested the opinion and is therefore expected to implement the Court's findings.

[27] *Id.*, para. 177.

[28] *Id.*, para. 178.

[29] Stephen Allen, *The* Chagos *Advisory Opinion and the Decolonization of Mauritius*, ASIL INSIGHTS (Apr. 15, 2019).

[30] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 ICJ Rep. 403 (July 22).

[31] Marko Milanović, *ICJ Delivers* Chagos *Advisory Opinion, UK Loses Badly*, EJIL:*TALK*! (Feb. 25, 2019) (emphasis in original).

[32] *See* Hurst Hannum, *The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?*, 24 LEIDEN J. INT'L L. 155, 159 (2011); Harold Hongju Koh, *Reflections on the Law and Politics of the* Kosovo *Case*, *in* THE LAW AND POLITICS OF THE *KOSOVO* ADVISORY OPINION 350 (Marko Milanović & Michael Wood eds., 2015).

[33] In the only instance where the PCIJ refused to give an advisory opinion—the *Eastern Carelia* case—the Court declined due to Soviet Russia's lack of consent. But, as some argue, today's world may not be like "the world of 1923, when the Permanent Court deferred to the absence of consent by a state affected by the issuance of an advisory opinion to reject a request by the League Council to pronounce on the status of Eastern Carelia." *See* Richard A. Falk, *Toward Authoritativeness: The ICJ Ruling on Israel's Security Wall*, 99 AJIL 42, 46 (2005).

[34] *Wall* Advisory Opinion, *supra* note 22, para. 1 (sep. op., Buergenthal, J.).

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Second, and related to the first factor, the opinions have specific *remedies*, even though they should not be technically considered as such. The Court does not give orders as it would in a contentious proceeding, yet it does make statements that could well fall under a contentious proceeding conclusion: declaring that the construction of a wall is illegal and that must be dismantled; or that a state is committing a wrongful act by failing to complete a process of decolonization. Of course, unlike compulsory findings, the Court does not set fixed deadlines to act. However, in connection with the implementation mechanisms, it sends the issue back to the requesting actor so that *they* find legal, political, and diplomatic avenues to materialize the findings.

A recent example is found in ITLOS's judgment in the *Mauritius v. Maldives* case, handed down in January 2021.[35] To justify its decision to exercise jurisdiction, the ITLOS resorted to the ICJ's advisory opinion in the *Chagos* case, and declared that an ICJ advisory opinion "cannot be disregarded simply because [it] is not binding."[36] As I show below, the ITLOS's conclusion significantly resembles the way in which the Inter-American Court of Human Rights treats its own advisory opinions, that is, as pronouncements that "do have legal effect."[37]

Finally, when issuing these opinions, the advice-giver cannot force the applicant or another party to act in any specific way. This does not mean that the opinion's force is of less value—as noted, it is a court that is ultimately giving an opinion, not a political organ, not an international lawyer. The opinion, although not binding, and not being directed to specific conduct, can still be highly authoritative. In these instances, the ICJ—or whichever court is ruling through advice—exercises its *auctoritas*. As such, a very well-reasoned opinion may even have greater impact on the court's constituencies than a poorly reasoned or controversial contentious judgment.

B. Anticipatory Adjudication

Ruling through advice is not the only way in which courts may exercise advisory jurisdiction. Advisory jurisdiction, especially, although not exclusively, when courts must address legal questions in non-fact-intensive cases, may also serve as a device to help guide states and individuals to *anticipate* conflict.

If we compare how the three factors identified above play out in this model of advisory jurisdiction, we may observe some differences with the "ruling through advice" model.

[35] *Mauritius v. Maldives*, *supra* note 4.

[36] *Id.*, para. 205.

[37] *Id.* In 1997, the Inter-American Court of Human Rights declared that its advisory opinions have "undeniable legal effects," although it did not explain what those effects were. *See* Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights) Advisory Opinion OC-15/97, Inter-Am. Ct. H.R. (ser. A) No. 15, para. 26 (Nov. 14, 1997). Starting in 2014, the Inter-American Court of Human Rights consistently declares that its advisory opinions have "legal relevance" for all state parties, whether or not states have taken part in the advisory proceedings—and even if they are not parties to the American Convention on Human Rights, the regional treaty that gives jurisdiction to the Court. *See* Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, para. 32 (Aug. 19, 2014); Entitlement of Legal Entities to Hold Rights Under the Inter-American Human Rights System (Interpretation and Scope of Article 1(2), in Relation to Articles 1(2), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of the American Convention on Human Rights, as Well as of Article 8(1)(A) and (B) of the Protocol of San Salvador), Advisory Opinion OC-22/16, Inter-Am. Ct. H.R. (ser. A) No. 22, para. 25 (Feb. 26, 2016) [hereinafter Advisory Opinion OC-22/16]; *State Obligations* Advisory Opinion, *supra* note 6.

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First, a court that exercises advisory jurisdiction in an anticipatory manner resorts to existing *legal*—not diplomatic or political—mechanisms to implement its decision. Such mechanisms may not exist within the court's immediate competences, and the court may therefore have to engage with other actors—i.e., national courts—to fully implement what it has decided. Because the guidance offered by the advice-giver takes place under existing legal proceedings, any declarations that the court may make, even if not considered to be remedial orders, which belong to contentious jurisdiction, will nonetheless have consequential legal effects. Determining how significant the effects are will depend on the specific type of an advice-giver, the nature of the question, and the particular judicial doctrines that the advice-giver espouses—for example, whether it shows more or less deference toward national actors.

For the reasons identified above, the two other factors also play out differently under this anticipatory model of advice. The advice given by the court does not depend only or mostly on the soundness of the court's reasoning. Of course, the quality of a judicial opinion will always depend on the court's reasoning; but in these instances, because the implementation mechanisms are inherently juridical, the court's advice is ultimately an expression of the court's power to guide conduct—not just the court's authority. In this case, the court exercises its *potestas*. If the opinion is not well-reasoned, scholars will likely spend their energy criticizing it; but any criticism will be wholly independent from the immediate legal relevance of the opinion. Finally, because the determination is made through a juridical process, the court may give more specific guidance to whoever requests the court's advice. Thus, the applicant may better delineate future conduct. In this sense, under this model the applicant anticipates a potential adjudicatory moment that may or may not come in the future.

The notion of anticipatory adjudication has not gone unnoticed. Writing in the context of domestic law, Samuel Bray has coined the term "preventive adjudication" to refer to a category of cases where courts do not command the parties to do something, but limit themselves to declare the law.[38] According to Bray, under preventive adjudication a plaintiff seeks an opinion that is not accompanied by a remedial order commanding action by the parties. In such cases, the party seeks the court's attention to avoid future harm and to resolve indeterminacy.[39] Bray's theory can offer insights for the examination of the advisory role of human rights courts—even though human rights courts do not deal with private law categories, such as "harm," "plaintiff," or juridical bivalence, which occupy Bray's attention.[40]

In the context of international law, the notion of preventive adjudication was very much in the minds of early twentieth century lawyers who debated the creation of a world court.[41]

[38] Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275 (2010).

[39] *Id.* at 1280.

[40] As Bray acknowledges, his theory is "focused primarily on private law." *Id.* at 1332.

[41] Those jurists had a distinctive understanding of the preventive function of advisory jurisdiction. For example, drawing from observations of the medical profession—which along its practice into more than relieving suffering, to devote its energy to *preventive* medicine as well—Manley Hudson argued that the legal profession should also look at preventive adjudication, and not just focus on "handling conflicts between opposing individuals or groups after they have already come into clash." Manley Hudson, *Advisory Opinions of National and International Courts*, 37 HARV. L. REV. 970, 971 (1924). Hudson expressed frustration with the idea "that the judicial branch of the legal profession must necessarily confine itself to ripened conflicts." *Id.* at 972. Similarly, commentators wrote about courts as "the guardians and advisers of those who respect the law," referring to judicial pronouncements that were not intended to *remedy* a situation, but to help individuals or groups who sought judicial guidance—referred to as a man's "legal right to know what his rights were." *See* Edson R. Sunderland, *A Modern Evolution in Remedial Rights: The Declaratory Judgment*, 16 MICH. L. REV. 69, 77 (1917).

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More contemporaneously, two European courts provide insights as to the anticipatory function of advisory jurisdiction: the Court of Justice of the European Union, through the use of its preliminary reference procedure, and the European Court of Human Rights, through its newly established advisory jurisdiction.

Pursuant to the Treaty on the Functioning of the European Union, a national court may seek guidance from the Court of Justice of the EU, whenever a national court "makes a determination that EU law is relevant to the case, and the national court asks the [CJEU] for an interpretation of EU law."[42] According to the European Union, the preliminary reference procedure has become "an institutionalized mechanism of dialogue between the Court of Justice of the European Union and national courts."[43] Scholars believe that the mechanism has "legally integrated Europe,"[44] in ways in which domestic courts favor EU law and the processes of integration.[45] Preliminary references are not technically advisory proceedings; they are part, and are triggered because of, *contentious* proceedings lodged before national courts. For this reason, a decision by the CJEU under a preliminary reference procedure is technically binding upon the requesting party. And the determination that the Court makes under this mechanism does not depend solely or even mostly on the Court's reasoning; that is, unlike the ICJ acting as a judicial advisor, the CJEU has *potestas*, not only *auctoritas*. A national court that looks for the Court's opinion must follow the Court's pronouncement, and the order will usually be specific because the national court that seeks guidance has an actual case to adjudicate before it—hence the reason why the national court sought the opinion of the CJEU in the first place.

One could counterargue that the CJEU, under the preliminary reference procedure, is really ruling through its advice—in the sense that the Court is deciding. But, as explained, the Court must resort to a national court to implement its opinion, and therefore is not deciding. Also, the decision to implement the Court's opinion—if implemented—lies with states: through the adoption of an international treaty, *states* are the ones who have decided to institute such mechanism. This is different from instances in which courts themselves attempt to rule through advice in contexts in which states—the "masters of the treaties"—have not contemplated to give courts such powers. As I show below, the Inter-American Court of Human Rights' advisory role provides an excellent example of this institutional discrepancy.[46]

III. Advice and Judicial Modulation

Having established two models of advice-giving, I now turn to an examination of how courts *should* exercise their advisory roles. To determine whether advice-giving courts should

[42] Clifford J. Carrubba & Lacey Murrah, *Legal Integration and Use of the Preliminary Ruling Process in the European Union*, 59 Int'l Org. 399, 400 (2005). Article 267 of the Treaty on the Functioning of the European Union states: "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union . . . ."

[43] *See* Preliminary Reference Procedure (July 6, 2017), *at* https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)608628; Karen J. Alter, The European Court's Political Power (2009).

[44] Carrubba & Murrah, *supra* note 42, at 401.

[45] Karin Leijon, *National Courts and Preliminary References: Supporting Legal Integration, Protecting National Autonomy or Balancing Conflicting Demands?*, 44 W. Eur. Pol. 510 (2021).

[46] *See* Section IV.A *infra*.

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attempt to decide a matter—that is, to rule through advice—or act as a preventer of potential and future harm—that is, as an anticipatory adjudicator—courts have to pay attention to both contextual and institutional factors. To make this determination, I argue that courts should act as "modulators" of their judicial function, that is, to adjust the intensity of their interaction with their constituents—states, international organizations, individuals, etc. The analysis is radically contingent, meaning that the modulation of the judicial function of an international court can be entirely different from a domestic court; and among international courts, the advisory function of a human rights court may be different as well from the advisory function of an international trade tribunal, the International Tribunal for the Law of the Sea, or the International Court of Justice.

A. The Process of Modulation

When international courts address matters within their spheres of competences they must engage with different and conflicting interests. States are of course the primary actors concerned with a decision by the International Court of Justice; if the Court is dealing with an advisory opinion, the UN General Assembly, the Security Council, or whichever organ that has requested the opinion will also have a primary interest in the outcome. If a human rights court handles an application, states, but also individuals, will be considered key interested parties. In all cases, one can expect courts to keep in mind how the global or regional community engages with the court's pronouncement.[47]

I call "judicial modulation" the process whereby courts engage with states and their other actors and stakeholders in ways that take into account both the receiving end—a state, the UN General Assembly, a human rights petitioner—and the source of the judicial pronouncement, that is, the court itself. To modulate means "to change the quality of [a court's] voice in order to create a particular effect by making it louder, softer, lower, etc."[48] When international courts engage with their constituents and stakeholders, they must inevitably consider different factors that may render their decisions more likely or not to be followed. Courts want to "create a particular effect," which would normally be to influence state conduct. The process of modulation—which, to be sure, is not peculiar to courts' *advisory* jurisdiction, but of all types of jurisdictions—requires a court to engage in a different, arguably smarter, way with its constituents. Borrowing from the Inter-American Court of Human Rights, judicial modulation is a manifestation of "intelligent exercise of judicial discretion."[49]

B. Modulating Factors

When courts modulate their engagement with their constituents and stakeholders, they must consider at least two sets of factors: institutional and contextual. Because these factors

[47] For example, writing about the ICJ's *Kosovo* advisory opinion, André Nollkaemper argues that the assessment of the opinion depends on the Court's "multiple constituencies," that is, "the perspective from which one considers the outcome." André Nollkaemper, *The Court and its Multiple Constituencies: Three Perspectives on the* Kosovo *Advisory Opinion*, *in* THE LAW AND POLITICS OF THE *KOSOVO* ADVISORY OPINION, *supra* note 32, at 219.

[48] *To modulate*, OXFORD ONLINE ENGLISH DICTIONARY, *at* https://www.oxfordlearnersdictionaries.com/definition/english/modulate.

[49] Order of the Inter-American Court of Human Rights: Request for an Advisory Opinion Presented by the Inter-American Commission on Human Rights, para. 11 (Inter-Am. Ct. H.R. May 29, 2018), *available at* https://www.corteidh.or.cr/solicitudoc/sor_01_18_ing.pdf.

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vary among courts, the process of modulation is inherently contingent upon the particular features of specific courts. In this Article, the analysis is specific in two ways: first, I am interested in courts' *advisory* role; second, the analysis concerns the advisory role of *human rights* courts. Therefore, my focus on factors of modulation takes into account the performance of those courts, which could very well vary when applied to other international courts.

1. *Institutional*

The analysis of judicial modulation should start with the basic characteristics of an international court: its competences, functions, and powers. Some courts may have both the power to issue binding, compulsory judgments, and non-binding, advisory opinions; others may not be vested with such powers. For instance, the ICJ's power to render advisory opinions is undoubtedly established in the Court's founding documents; but the advisory powers of other international courts may be less clear. The International Tribunal for the Law of the Sea's power to issue advisory opinions is a good example: the UN Convention on the Law of the Sea gives the Tribunal's Seabed Disputes Chamber the power to issue advisory opinions —which it used for the first time in 2010—but it does not give such power to the Law of the Sea *full* Tribunal, that is, when ITLOS adjudicates other maritime disputes. Such power was explicitly asserted only when the Tribunal first adopted its Rules of Procedure, in 1997.[50]

Some courts may render advisory opinions at the request of only a few designated actors—for example, states or national courts, as is the case of the European Court of Human Rights —while others may allow more actors to request courts' advice—e.g., the Inter-American Court of Human Rights. Similarly, some courts may give ample room for other stakeholders to participate in advisory proceedings, while others may be more restrictive, and limit participation to entities or individuals who can show a clear interest in the outcome of the proceedings.

To conduct this analysis, one should start with basic, founding documents of a specific court, and determine what are the specific powers that court has. In the context of human rights adjudication, all three major human rights courts—in Africa, Europe, and Latin America—have the power to issue advisory opinions. The African Court on Human and People's Rights, for example, can issue advisory opinions at the requests of an ample number of actors, including international organizations and national non-governmental organizations "recognized by the African Union."[51] Thus far, the African Court has only issued—and rejected—advisory opinions requests filed by African organizations. Such a low number of issued opinions could be due to the African Court's restrictive interpretation of standing rules and the African Commission's reluctance to use the advisory mechanism.[52]

[50] *See* Tom Ruys & Anemoon Soete, *"Creeping" Advisory Jurisdiction of International Courts and Tribunals? The Case of the International Tribunal for the Law of the Sea*, 29 LEIDEN J. INT'L L. 155, 156–57 (2016).

[51] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, Art. 4, June 10, 1998: "The Court may give an advisory opinion on any legal question at the request of the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the Economic, Social and Cultural Council (ECOSOCC), the Financial Institutions or any other organ of the Union as may be authorized by the Assembly."

[52] *See* Lilian Chewi, *The Advisory Proceedings of the African Court on Human and People's Rights*, 38 NORDIC J. HUM. RTS. 61, 76 (2020).

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The European Court of Human Rights' power to advise is recent and far more restrictive in terms of its applicants: under Protocol No. 16, which entered into force in August 2018, only national high courts may seek advisory opinions from the European Court.[53] Despite the restrictive approach concerning applicants who can seek advice from the European Court, the institutional framework of the Court's advisory role may render its proceeding more effective, as the Court's advice, though not binding, is directed to national courts that have matters pending before them. This institutional function explains why the Group of Wise Persons to the Committee of Ministers that worked on the adoption of Protocol No. 16 noted that the mechanism was devised to "enhance the Court's *constitutional* role."[54] The close interaction between the Court and national courts gives the European Court's advisory power a uniquely strong position to influence state conduct.

One common feature of all human rights courts is that, unlike the ICJ, their work concerns the interactions between states and individuals. The ICJ deals with states that are sovereign *equals*—a premise that shapes much of the ICJ's jurisdiction, both advisory and contentious. The institutional factors that are relevant to human rights courts, in contrast, must take into consideration the *un*equal relationship between a state and individuals.

2. *Contextual*

To determine how a court should modulate its voice, that is, its engagement with relevant actors, the descriptive analysis of such court's powers and functions is necessary, yet insufficient. The analysis must add a *contextual* discussion, to allow the different actors—especially, though not exclusively, the relevant court—to assess how loud or low it should utter its pronouncements, that is to say, how far it should go with its decisions. The analysis of a court's institutional factors is predominantly legal; the discussion of a court's contextual factors is rather political. Courts must be politically aware of the contexts in which they operate—especially when courts' pronouncements are not technically binding, as is the case of international courts.

Courts use contextual factors to modulate their activity all the time, as when they articulate doctrines of deference and avoidance that allow them to intervene more or less with states' affairs. One prime example is the well-known "political question" doctrine, whereby courts should refrain from deciding matters that fall outside the scope of justiciable claims; instead, it is maintained, such matters should be addressed by the political branches of government.[55] Although the doctrine was developed in the context of U.S. constitutional law, international courts also utilize the doctrine when they want or need to avoid certain issues.[56] These "avoidance techniques" include preventing a case from being heard on its merits, deciding that a

[53] Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, CETS No. 214 (Aug. 1, 2018).

[54] *See* Scott W. Lyons, *Introductory Note to Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms and Advisory Opinion Concerning the Recognition in Domestic Law of a Legal Parent-Child Relationship Between a Child Born Through a Gestational Surrogacy Arrangement Abroad and the Intended Mother (Eur. Ct. H.R.)*, 58 ILM 234, 235 (2019) (emphasis added).

[55] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 184 (1962).

[56] *See* Jed Odermatt, *Patterns of Avoidance: Political Questions Before International Courts*, 14 INT'L J. L. CONTEXT 221 (2018).

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dispute is non-legal in nature or does not exist, or finding a lack of standing. Even if an international court does address the merits of a dispute, it may still avoid the dispute's political sensitivity by resorting to deference doctrines—such as the margin of appreciation—or to forms of judicial minimalism.[57]

The well-known European Court of Human Rights' margin of appreciation doctrine, although part of the Court's contentious jurisdiction, may inform the Court's advisory role.[58] If the Court's judicial practice contributes to a context of higher deference toward national courts, then that attitude may be transferred to other areas of that court's practice. Commentators have in fact noted that the European Court has shown degrees of restraint when using its nascent advisory practice.[59] In fact, Protocol No. 16 was adopted in the context of heated debates about the Court's need to give more deference to states; and thus it is not surprising that the Court will exercise its advisory role under that understanding. The opposite may happen when courts, such as the Inter-American Court of Human Rights, espouse doctrines that are rather intrusive upon national jurisdictions.[60]

Finally, in the context of advisory proceedings, courts' political sensitivity may also mean considering why states seek a court's advice. States may use a human rights court's advisory role to address genuine questions of law, while others may seek advice as a mechanism to affect internal political battles. In the case study below, I show that states have in fact used the Inter-American Court of Human Rights as a mechanism to influence domestic political processes. When the Court has considered such circumstance seriously, it has refused to advise; when it hasn't, the Court has stepped into muddy waters. This is the matter of the following Part.

IV. Same-Sex Marriage as Judicial Advice: A Case Study

In January 2018, the Inter-American Court of Human Rights became the first international tribunal to find that same-sex marriage is a fundamental right under international law.[61] The Court's landmark pronouncement was made in an advisory opinion requested by Costa Rica, and quickly became the main topic of a dramatic presidential election in Costa Rica, with a conservative candidate rising from a slim four percent to a win in the first round of the election, running on the promise to withdraw from the Court's jurisdiction if elected. In parallel, domestic courts have used the Court's opinion to issue critical rulings, actively contributing to the process of legalization of same-sex marriage in the region.[62] In further response to the opinion, in 2019, five South American governments launched an unprecedented attack against the inter-American human rights system.[63] These states

[57] *Id.* at 233.

[58] On the margin of appreciation doctrine, see generally Andrew Legg, The Margin of Appreciation in International Human Rights Law: Deference and Proportionality (2012).

[59] Lyons, *supra* note 54, at 235.

[60] *See* Section IV.A.3 *infra*.

[61] *State Obligations* Advisory Opinion, *supra* note 6.

[62] Despite being traditionally seen as a conservative region, courts in Latin America have played a key role in the promotion of LGBTI rights. In 2013, the Brazilian Justice Council made same-sex marriage legal in the country; in 2016, the Colombian Constitutional Court found that the prohibition of same-sex marriage was unconstitutional. In other places—such as Argentina, Mexico City, and Uruguay—the rights of same-sex couples have been promoted and protected by legislative action since at least 2010.

[63] *See* Statement from the Governments of Argentina, Brazil, Chile, Colombia and Paraguay, *supra* note 7.

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denounced the Court's intrusive case law and demanded that the Court grant states a "margin of appreciation"—an attack that was put aside only when major political crises erupted in the region.

Despite the prevalence and importance of its advisory opinions, the Inter-American Court remains generally understudied in the exercise of its advisory function.[64] Indeed, although advisory opinions seem particularly apt for examination in light of their quasi-legislative nature, the literature on the Court largely favors the examination of the Court's adjudicative powers.[65] More importantly, the Court's maximalist approach to adjudication suggests an aggressive form of advice-giving, one that resembles the early practice of the Permanent Court of International Justice, where the lines between contentious and advisory jurisdiction were not neatly demarcated.[66] This Part discusses how the Inter-American Court expanded its advisory powers, including the adoption of conventionality control, a doctrine that has rendered the Court a sort of regional constitutional court. It then analyzes the Court's same-sex marriage opinion, focusing on the ruling's significant legal and political implications. The Part finishes with a discussion on how the Court failed to use modulating factors; and, as a consequence, acted as a ruler through advice when the case arguably called for an anticipatory model of adjudication.

A. The Inter-American Court's Advisory Practice: From Prudence to Activism

The American Convention on Human Rights[67]—Latin America's primary human rights treaty—establishes the Inter-American Court of Human Rights and gives the Court—which sits in San José, Costa Rica—the power to render judgments in contentious cases and to issue advisory opinions "regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states."[68] The Court may also render such "opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments."[69] Several Organization of American States (OAS) organs are authorized to request said opinions,[70] and the Court has declared that all member states of the Organization—not just those states that have ratified the American Convention—may

[64] Notable exceptions to this tendency are: Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AJIL 1 (1985); Jo M. Pasqualucci, *Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law*, 38 STAN. J. INT'L L. 241 (2002); Julie Calidonio Schmid, *Advisory Opinions on Human Rights: Moving Beyond a Pyrrhic Victory*, 16 DUKE J. COMP. & INT'L L. 415 (2006); Cecilia M. Bailliet, *The Strategic Prudence of the Inter-American Court of Human Rights: Rejection of Requests for an Advisory Opinion*, 15 BRAZILIAN J. INT'L L. 254 (2018); Gonzalo Candia Falcón, *Causales de Inadmisibilidad de Opiniones Consultivas: Reforzando el Carácter Subsidiario del Sistema Interamericano de Derechos Humanos*, 45 REV. CHILENA DERECHO 57 (2018); LAURENCE BURGORGUE-LARSEN & AMAYA ÚBEDA DE TORRES, THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE LAW AND COMMENTARY 75–100 (2011); and JORGE ERNESTO ROA, LA FUNCIÓN CONSULTIVA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS (2015).

[65] *See, e.g.*, THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: IMPACT BEYOND COMPLIANCE (Par Engstrom ed., 2019).

[66] *See* Section II.A *supra*.

[67] American Convention on Human Rights, Nov. 22, 1969, 1144 UNTS 143.

[68] *Id.* Art. 64. The Court also has the power to grant provisional measures, pursuant to Article 63(2) of the American Convention.

[69] *Id.* Art. 64.2.

[70] Member states and "organs listed in Chapter X of the Charter of the Organization of American States" (Art. 64.1).

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request advisory opinions. Significantly, requests may relate both to the interpretation of the rights under the American Convention, but also on the interpretation of *other* human rights treaties.[71] As one commentator notes, the Inter-American Court's advisory jurisdiction is "greater than in other judicial bodies."[72] And, as this Section explains, the Court's practice shows an increasing disposition to render advisory opinions.[73]

In its four decades of existence, the San José Court has rendered twenty-seven advisory opinions—almost the same number of advisory opinions issued by the International Court of Justice, which has been active for almost twice as long.[74] More than the number of opinions, however, what makes the analysis of inter-American advisory jurisdiction of greater interest is the range of themes and, particularly, the Court's depth in its approach to advisory jurisdiction. The matter is of particular importance as international human rights courts are asked to intervene in more and more areas, other international courts—most notably the European Court of Human Rights—are given the power to render advisory opinions, and they all must confront pushback efforts by states and other stakeholders. To use Laurence Helfer's observation, today human rights courts must resort to "survival strategies."[75] Looking beyond the obvious, contentious function of courts—which has been the focus of most scholarly attention—is thus necessary.

1. *Judicial Prudence*

It took almost a decade for the Inter-American Court to hand down a judgment in a contentious case. However, the Court issued no fewer than eight advisory opinions in its first decade of existence.[76] Initially, most requests for an advisory opinion concerned matters of interpretation of the American Convention,[77] the scope of the Court's and the Inter-American Commission's powers,[78] and the compatibility of domestic laws with the

[71] *See* Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion, Inter-Am. Ct. H.R. (ser. A) No. 21, para. 23 (Aug. 19, 2014).

[72] *See* Karin Oellers-Frahm, *Lawmaking Through Advisory Opinions?*, 12 GERMAN L.J. 1033, 1037 (2011).

[73] Not only has the Court rendered a notable number of opinions; there are also several pending requests concerning sensitive political matters. *See* Eleanor Benz, *The Inter-American Court's Advisory Function Continues to Boom – A Few Comments on the Requests Currently Pending*, EJIL:*TALK!* (Nov. 25, 2019).

[74] Admittedly, the number of advisory opinions issued by the Inter-American Court is dramatically small compared to the more than three hundred contentious judgments that the Court has handed down since it decided its first contentious decision, in 1988.

[75] Laurence R. Helfer, *Populism and International Human Rights Law Institutions: A Survival Guide*, *in* HUMAN RIGHTS IN A TIME OF POPULISM: CHALLENGES AND RESPONSES (Gerald L. Neuman ed., 2020).

[76] The first contentious case decided by the Inter-American Court was *Velásquez Rodríguez v. Honduras*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

[77] *See*, *e.g.*, "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (ser. A) No. 1 (Sept. 24, 1982); The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82, Inter-Am. Ct. H.R. (ser. A) No. 2 (Sept. 24, 1982); The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86, Inter-Am. Ct. H.R. (ser. A) No. 6 (May 9, 1986); 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-Am. Ct. H.R. (ser. A) No. 10 (July 14, 1989).

[78] *See* Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90, Inter-Am. Ct. H.R. (ser. A) No. 11 (Aug. 10, 1990); Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights), Advisory Opinion OC-13/93, Inter-Am. Ct. H.R.

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American Convention.[79] In the absence of contentious proceedings, the Inter-American Court used its first decade to lay the doctrinal foundation and political authority for later adjudication of disputes. To that end, the exercise of its advisory jurisdiction was crucial, as it allowed the Court to set the tone for its interactions with states and become comfortable with its role as a regional human rights arbiter.[80]

In its early years, the Court understood contextual factors as relevant constraints upon its power to advise. The Court's fourth advisory opinion—rendered in 1984 at the request of Costa Rica—demonstrated a clear understanding of the Court's position as an *international* human rights tribunal that should refrain from entering domestic politics.[81] Costa Rica had requested the Court's assessment of the compatibility of a proposed constitutional amendment with the American Convention—a request "without precedent," as the Court observed.[82] The Court was conscious about the impact its opinion could have on national politics, and therefore declared that it must "avoid becoming embroiled in domestic political squabbles."[83] Such was the context in which the Court exercised its advisory jurisdiction in the early years, focusing mostly on procedural and institutional issues and consciously staying away from states' judicial politics, showing key political awareness.

2. An International Human Rights Arbiter

In the 1990s, the Court turned most of its energy to contentious judgments. By then, the Court had established its voice and authority as a regional tribunal, and many Latin American states were no longer under authoritarian rule. At the time, national courts started following the Court's lead in the interpretation of fundamental rights, a process that intensified the interaction between international law and domestic courts, and heightened the Court's stature as the ultimate interpreter of fundamental rights in the region.[84] Litigation became a more

(ser. A) No. 13 (July 16, 1993); and Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights), Advisory Opinion OC-15/97, Inter-Am. Ct. H.R. (ser. A) No. 15 (Nov. 14, 1997).

[79] *See* Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3 (Sept. 8, 1983); Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4 (Jan. 19, 1984); Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5 (Nov. 13, 1985); Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9 (Oct. 6, 1987); Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights, Advisory Opinion OC-12/91, Inter-Am. Ct. H.R. (ser. A) No. 12 (Dec. 6, 1991) [hereinafter Advisory Opinion OC-12/91].

[80] Thomas Buergenthal, who served as a judge on the Inter-American Court during that time, comments on the Court's frustration with the Inter-American Commission because of the Commission's unwillingness to submit contentious cases to the Court. In an early advisory opinion, the Court made an explicit statement urging the Commission to utilize the contentious mechanism. *See* Thomas Buergenthal, *Remembering the Early Years of the Inter-American Court of Human Rights*, 37 N.Y.U. J. INT'L. L. & POL. 259, 269–70 (2004–2005).

[81] Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, para. 30 (Jan. 19, 1984).

[82] *Id.*, para. 30.

[83] *Id.*

[84] In the early 1990s, several Latin American countries adopted new constitutions or amended their existing constitutions to enhance states' engagement with international human rights law. *See* Alexandra Huneeus, *Constitutional Lawyers and the Inter-American Court's Varied Authority*, 79 L. & CONTEMP. PROBS. 179 (2016).

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central feature of constitutional politics, both through the increased use of courts as a vehicle for social change and through inter-American human rights case law.

In this context, the Inter-American Court, under the leadership of then President Antônio Cançado Trindade—a Brazilian jurist who is a current member of the International Court of Justice—issued two advisory opinions that solidified the Court's expansive approach to inter-American human rights law.[85] These opinions, combined with the adoption of conventionality control—to which I turn below—are antecedents of the notoriously expansive approach toward advisory jurisdiction that the Court would eventually adopt. Nowhere is this attitude better exemplified than in the 2018 *Same-Sex Marriage* advisory opinion.[86]

In 1999, at the request of Mexico, the Inter-American Court rendered an advisory opinion on the right to consular assistance under Article 36 of the Vienna Convention on Consular Relations.[87] After Mexico filed its request for an opinion in December 1997, two countries—Paraguay and Germany—brought cases against the United States before the International Court of Justice asking the ICJ to decide on the same issue.[88] The Inter-American Court decided to proceed with its advisory opinion despite the fact that the treaty to be interpreted was not a human rights treaty—an argument expressly made by an OAS member state.[89] Also, as mentioned, there were pending cases before the International Court of Justice, which, pursuant to the Vienna Convention Optional Protocol, has jurisdiction over these matters.[90] Because the International Court of Justice was already adjudicating disputes involving the same issue,[91] an advisory opinion issued by the Inter-American Court unnecessarily risked fragmenting international law

[85] As commentators note, "a comprehensive or broad interpretation . . . is typical of the way the [Inter-American] Court sees its advisory activity." *See* BURGORGUE-LARSEN & UBEDA DE TORRES, *supra* note 64, at 101.

[86] *See* Section IV.B *infra*.

[87] The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, Advisory Opinion, Inter-Am. Ct. H.R. (ser. A) No. 16 (Oct. 1, 1999). The request "came about as a result of the bilateral representations that the Government of Mexico had made on behalf of some of its nationals, whom the host State had allegedly not informed of their right to communicate with Mexican consular authorities and who had been sentenced to death in ten states in the United States." *Id.*, para. 2.

[88] The first case was brought in April 1998 by Paraguay, which eventually withdrew its application after the United States executed a Paraguayan national convicted of murder in the state of Virginia. *See* Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), Press Release No. 98/36 (Nov. 11, 1998). The second case was brought by Germany in March 1999. *See* LaGrand Case (Ger. v. U.S.), 2001 ICJ Rep. 466 (June 27).

[89] *See* Calidonio Schmid, *supra* note 64, at 447. In its first advisory opinion, the Inter-American Court addressed its power to interpret "other treaties" in an expansive way, declaring that, "the advisory jurisdiction of the Court can be exercised, in general, with regard to 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 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." *See* "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (ser. A) No. 1, Op. para. 1 (Sept. 24, 1982). In the present request, one of the questions submitted to the Inter-American Court was, however, whether the Vienna Convention on Consular Relations "could be interpreted as containing provisions concerning the protection of human rights in the American States." The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, para. 4.1 (Oct. 1, 1999).

[90] Optional Protocol Concerning the Compulsory Settlement of Disputes, Art. I, Apr. 24, 1963, 21 UST 325, 596 UNTS 487.

[91] Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 ICJ Rep. 12 (Mar. 31).

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with conflicting judicial views.[92] Despite all this, the Inter-American Court decided to move ahead and exercise its advisory jurisdiction, noting that contentious cases filed with the ICJ should not inhibit the Inter-American Court's own advisory function.[93] The first signs of the Court's activist advisory role were showing.[94]

Four years later, also under the leadership of Judge Cançado Trindade, the Court issued a landmark advisory opinion—at the request of Mexico—on the status of undocumented migrants under international law.[95] In *Undocumented Migrants*, the Court found that states have a duty to respect workers' right to equality and non-discrimination despite their undocumented status, and laid out guidelines for the treatment of undocumented workers.[96] The most remarkable passage of the opinion remains the Court's finding that the principle of non-discrimination had attained the status of a *jus cogens* norm.[97] This 2003 opinion marked the first and only time an international tribunal has made such a finding. At the time, some commentators believed that the Court's determination would likely have "broad implications for the future development of international human rights law."[98] But, as others have noted, the Inter-American Court's "declaration of *jus cogens* appears to have little or no practical consequence."[99] To this day, in fact, no other international court—certainly not the International

[92] On fragmentation in international law, see Joost Pauwelyn, *Fragmentation of International Law*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2006).

[93] The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, Advisory Opinion, Inter-Am. Ct. H.R. (ser. A) No. 16, para. 61 (Oct. 1, 1999). Consider Shabtai Rosenne's criticism of the Inter-American Court's attitude: "[A] regional court or tribunal of limited jurisdiction . . . should show the greatest restraint before embarking upon the hazardous and delicate task of interpreting the application of a universal instrument adopted under the auspices of the United Nations, and which itself provides for the jurisdiction of the International Court of Justice." *See* ROSENNE'S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 240 (Terry D. Gill ed., 6th ed. 2003).

[94] Reflecting on the impact of the *Consular Assistance* opinion on international law, Judge Cançado Trindade called the opinion "historical" and "truly pioneering," noting that the Inter-American Court was "the first international tribunal to . . . affirm the existence of an individual right to information on consular assistance in the framework of the guarantees of the due process of law." *See* Antônio Augusto Cançado Trindade, *The Humanization of Consular Law: The Impact of Advisory Opinion No. 16 (1999) of the Inter-American Court of Human Rights on International Case-Law and Practice*, 6 CHINESE J. INT'L L. 1, 8–9 (2007).

[95] Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003).

[96] *Id.*, paras. 88–101, 161–72.

[97] *Id.*, at op. para. 4: "At the current stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens.*" *See* Sarah H. Cleveland, *Legal Status and Rights of Undocumented Workers. Advisory Opinion OC-18/03*, 99 AJIL 460 (2005). *Jus cogens* (or "peremptory") norms are norms that do admit derogation. *See* Vienna Convention on the Law of Treaties, Art. 53, May 23, 1969, 1155 UNTS 331.

[98] Cleveland, *supra* note 97, at 462.

[99] *See* Dinah Shelton, *Sherlock Holmes and the Mystery of* Jus Cogens, *in* NETHERLANDS Y.B. INT'L. L. 44 (Maarten den Heijer & Harmen van der Wilt eds., 2016). In 2019, the United Nations Committee on the Elimination of Racial Discrimination confronted the issue, but limited itself to "*take[] note* that the Inter-American Court of Human Rights has gone further, as it has established that 'the principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens.'" *See* State of Palestine v. Israel, CERD Committee, CERD/C/100/5, para. 3.24 (Dec. 12, 2019) [hereinafter *State of Palestine v. Israel*] (emphasis added). The Committee's decision relies significantly on the notion that human rights treaties belong to a special category of treaties—as their object and purpose "is the common good . . . inspired in superior common values shared by the international community as a whole." *Id.*, paras. 3.25, 3.34. In a dissenting opinion, some Committee members observed that, "[i]n no way can those provisions [on interstate communications procedures] be considered to be peremptory norms of general international law having a *jus cogens* or an *erga omnes* character." *See State of Palestine v. Israel*, para. 14 (ind. op., Bossuyt, Izsák-Ndiaye, Ko, Li & Verdugo Moreno (dissenting)).

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Court of Justice where Judge Cançado Trindade currently sits—has found that the principle of non-discrimination is a *jus cogens* norm.[100] Nor have other international human rights bodies espoused the doctrine.

In the inter-American context, however, these two opinions allowed the Court to use advisory jurisdiction as a vehicle to construe international norms in a remarkably expansive way—both in form, that is, the ways in which international law can reach states, and in substance, that is, the content of a principle of international law. Subsequent advisory opinions—and judgments rendered in contentious proceedings—have followed this attitude. Yet the most significant step to solidify the Inter-American Court's influence upon national courts was yet to be taken.

3. A Constitutional Human Rights Arbiter

By the time the Court issued its *Undocumented Migrants* advisory opinion in 2003, a creeping doctrine of international judicial supremacy—known as "conventionality control"—was surfacing in inter-American human rights law. Pursuant to the doctrine of conventionality control, adopted by the full Court in 2006, domestic judges must directly apply international human rights law, even where it conflicts with domestic law.[101] Domestic judges are directly bound by the American Convention and the Court's interpretation thereof—domestic judges are now considered "inter-American judges."[102] Through the adoption of this doctrine, the Court has become an international *constitutional* court.[103]

The doctrine was a pure judicial creation. Initially fashioned by Judge Sergio García Ramírez in concurring opinions to several judgments by the Inter-American Court, the full Court ultimately adopted García Ramírez's conventionality control doctrine in 2006, in the landmark case *Almonacid Arellano v. Chile*. The Convention's drafters never intended to confer such a power to the Inter-American Court.[104] Nor did it need to, as many Latin American constitutions *already* vest domestic courts with such power by virtue of their own national law.[105]

[100] Judge Cançado Trindade's separate opinions in ICJ pronouncements recurrently address international norms as *jus cogens*. See, for example, his separate opinions in the advisory opinion in *Kosovo* (paras. 212–17), *Separation of the Chagos Archipelago* (Part XII), and, more recently, in the provisional measures adopted in the case of *The Gambia v. Myanmar* (at 75–81).

[101] Almonacid Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 154, para. 124 (Sept. 26, 2006).

[102] Armin von Bogdandy & René Urueña, *International Transformative Constitutionalism in Latin America*, 114 AJIL 403, 416 (2020).

[103] *See* Laurence Burgorgue-Larsen, *La Corte Interamericana de Derechos Humanos como tribunal constitucional*, *in* Ius Constitutionale Commune en América Latina: Rasgos, Potencialidades y Desafíos 421 (Armin von Bogdandy, Héctor Fix-Fierro & Mariela Morales Antoniazzi coords., 2014).

[104] During the discussion of the American Convention, at the San José Conference, in 1969, some delegations formally submitted that domestic constitutions would always have preference over the draft Inter-American treaty. *See* Secretaría General, Organización de los Estados Americanos, Conferencia Especializada Interamericana sobre Derechos Humanos, Actas y Documentos, San José, Costa Rica, OEA/Ser.K/XVI/1.2, at 100 (Nov. 7–22, 1969).

[105] In Latin America, the prevalent theory for the interaction between international law and domestic law is monism: upon ratification of an international human rights treaty, the treaty becomes valid on the national plane without the need for implementing legislation. *See*, *e.g.*, Argentina's Constitution (Art. 75.22); Chile's Constitution (Art. 5); Brazil's Constitution (Art. 5.2); and Ecuador's Constitution (Art. 425). Thus, when domestic courts apply international law, they are simply using all laws that their constitutions demand them to use—both national and international. In the Court's articulation of conventionality control, however, it is the Inter-American Court—not municipal law—that establishes the supremacy of international law over domestic law.

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Therefore, the Inter-American Court's decision to essentially ensure itself this power *as a matter of international law* has been met with skepticism.[106]

Underlying its adoption of conventionality control was the Inter-American Court's wish to bind domestic authorities more firmly, and in particular, judges.[107] By making prior decisions binding on future disputes, the Court sought, on the one hand, to avoid an influx of repetitive cases concerning matters that the Inter-American Court had already addressed in previous decisions.[108] On the other hand, the doctrine seems to promote unity among Latin American judges and the Court itself, as well as uniformity in the realm of human rights law.[109] According to Armin von Bogdandy and René Urueña, conventionality control makes judges—both national and international—members of a "Latin American human rights community,"[110] which holds a conversation that elucidates and interprets the scope and meaning of fundamental rights.[111] With the adoption of conventionality control, "judicial dialogue" rapidly expanded across the region—even though it remains an intriguing notion.[112]

In a 2014 advisory opinion on the rights of children in the context of migration, the Court transferred the conventionality control doctrine from contentious to advisory jurisdiction.[113] In *Rights and Guarantees of Children*, the Court found that domestic authorities must exercise a "control of conformity [of domestic law] with the Convention" even as to "the

[106] *See* Ximena Fuentes Torrijo, *International and Domestic Law: Definitely an Odd Couple*, 77 REV. JUR. U. PUERTO RICO 483 (2008); Jorge Contesse, *The International Authority of the Inter-American Court of Human Rights: A Critique of the Conventionality Control Doctrine*, 22 INT'L J. HUM. RTS. 1168 (2018).

[107] *See* Ariel E. Dulitzky, *An Inter-American Constitutional Court? The Invention of the Conventionality Control by the InterAmerican Court of Human Rights*, 50 TEXAS INT'L L.J. 45 (2015).

[108] The concern was similar to what caused the European Court of Human Rights to adopt the pilot judgment procedure. The Strasbourg court, however, did not set itself as a regional constitutional arbiter with the power to bind all national judges. The way to tackle backlog and consistency issues would not mean issuing guidance to domestic courts in the interpretation of both international *and domestic* law. In this way, the Inter-American Court's adoption of conventionality control resembles the Court of Justice of the European Union's doctrines of supremacy and direct effect. *See* Lize R. Glas, *The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice*, 34 NETH. Q. HUM. RTS. 41 (2017). On the supremacy and direct effect doctrines, see André Nollkaemper, *The Duality of Direct Effect of International Law*, 25 EUR. J. INT'L L. 105 (2014).

[109] García Ramírez uses a sailing metaphor to explain what he sees as a journey into "a common destiny of humankind": the realization of human rights for all and *by all*, not just international justice but also, and perhaps primarily, domestic judges. *See* Sergio García Ramírez, *Relación entre la Jurisdicción Interamericana y los Estados (Sistemas Nacionales): Algunas Cuestiones Relevantes*, 18 ANUARIO IBERO. JUST. CONST. 231, 236–37 (2014).

[110] Von Bogdandy & Urueña, *supra* note 102, at 414–15.

[111] *See* Eduardo Ferrer Mac-Gregor, *What Do We Mean When We Talk About Judicial Dialogue: Reflections of a Judge of the Inter-American Court of Human Rights*, 30 HARV. HUM. RTS. J. 89 (2017); *but see* Jorge Contesse, *The Last Word? Constitutional Dialogue and the Inter-American Court of Human Rights*, 15 INT'L J. CONST. L. 414 (2017).

[112] *See, e.g.*, PAOLA ANDREA ACOSTA ALVARADO, DIÁLOGO JUDICIAL Y CONSTITUCIONALISMO MULTINIVEL: EL CASO INTERAMERICANO (2015); DIÁLOGO JURISPRUDENCIAL EN DERECHOS HUMANOS (Eduardo Ferrer Mac-Gregor & Alfonso Herrera García eds., 2013). For Judge Ferrer Mac-Gregor, conventionality control is both "cause and consequence of judicial dialogue." *See* Eduardo Ferrer Mac-Gregor, *The Conventionality Control as a Core Mechanism of the* Ius Constitutionale Commune, *in* TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW *IUS COMMUNE* 325 (Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flávia Piovesan & Ximena Soley eds., 2017).

[113] Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Inter-Am. Ct. H.R., Advisory Opinion OC-21/14 (Aug. 19, 2014) (requested by the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay, and the Oriental Republic of Uruguay).

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considerations of the Court in exercise of its non-contentious or advisory jurisdiction."[114] With this advisory opinion, the Court cemented its authority as a regional tribunal that not only influences states, but also seeks to bind them; that not only binds them with contentious decisions, but also with its advisory, non-binding jurisdiction. Under the two advisory models identified above, the Inter-American Court established its advisory role essentially as a ruler through advice.

Such was the context in early 2018, when the Inter-American Court handed down its landmark advisory opinion on same-sex marriage and gender identity. Like never before, the opinion quickly generated political contestation, embroiling the Court not only in "domestic political squabbles," as the Court had wisely warned against three decades ago, but also in regional battles on law and morality in the application of international human rights law.[115] The following Section discusses the opinion, reviews its legal and political consequences, and shows how the Court's emphasis on the "ruling through advice" model put the Court—and the entire Latin American human rights system—at risk.

B. The Same-Sex Marriage Advisory Opinion

It is hard to downplay how important—and controversial—the debate over same-sex marriage is in many countries around the world. The same is true for international law. In recent decades, international human rights courts have been asked to address the question of whether there is a right to marry under international law that protects not only heterosexual, but same-sex couples as well. While the European Court of Human Rights has thus far declined to recognize same-sex couples' right to marry, the Inter-American Court has not.[116] Starting with the first case on sexual orientation and gender identity, decided in 2012, the Inter-American Court has rapidly expanded its case law on the subject.[117]

Looking at an area—sexual orientation—that elicits controversy and creates legal and political tensions is, in this sense, a good case for testing how international courts exercise their non-binding, advisory role, and how modulating factors may operate. Also, choosing same-sex marriage as a case study is, as Gerald Rosenberg notes, one of the "prime examples of the successful use of a court-based strategy to produce significant social reform."[118] As I show below, the implications of the Inter-American Court's opinion are felt in multiple areas: from domestic political battles to transnational non-governmental alliances, to judicial implementation of the opinion. All these factors work together—at times, in antagonistic ways—to ultimately bring about social change in ways that, without the advisory proceedings, may simply not have occurred.[119]

[114] *Id.*, para. 31.

[115] *See* Douglas NeJaime & Reva Siegel, *Conscience Wars in the Americas*, 5 LAT. AM. L. REV. 1 (2020).

[116] The European Court of Human Rights has, for its part, so far consistently rejected the finding of a right to same-sex marriage under the European Convention on Human Rights. *See* Schalk and Kopf v. Austria, App. No. 30141/04, Judgment (Eur. Ct. Hum. Rts. June 24, 2010); Hämäläinen v. Finland, App. No. 37359/09, Judgment (Eur. Ct. Hum. Rts. July 16, 2014); Chapin and Charpentier v. France, App. No. 40183/07, Judgment (Eur. Ct. Hum. Rts. June 9, 2016).

[117] *See* Jorge Contesse, *Sexual Orientation and Gender Identity in Inter-American Human Rights Law*, 44 N.C. J. INT'L L. 353 (2019).

[118] GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 6 (2008).

[119] As I explain below, the Inter-American Court's opinion has caused both domestic implementation and transnational backlash at the same time. *See id.* at 425 ("Successful litigation for significant social reform runs the risk of instigating countermobilization.")

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1. *The Court Breaks the Ground*

The 2018 advisory opinion on same-sex marriage was issued in response to a request that Costa Rica had filed in 2016.[120] As in previous requests for advisory opinions, Costa Rica asked the Court for clarification on the compatibility of domestic legislation with the American Convention on Human Rights: in the present proceedings, the state asked the Court to review whether the country's failure to grant the same economic rights to same-sex couples violated the American Convention, and asked the Court for guidelines on appropriate domestic mechanisms that would so guarantee same-sex couples' economic rights.[121] The state's declared concern stemmed from the significant divergence in the regulation of sexual orientation and gender identity matters among OAS states, although it may also be that the Costa Rican government used the proceedings to affect domestic political debates, as members of the Costa Rican Supreme Court argued in subsequent decisions.[122] Considering how consequential the political reaction was to the opinion, this assumption is not unfounded.

Before addressing the questions submitted to the Court, the opinion provided a comprehensive glossary of terms, such as "sex," "gender," "intersexuality," "gender expression," "transgender," "cisgender," "homophobia," and "heteronormativity," among others.[123] Then, the Court offered views on specific same-sex rights issues in an analysis based on the right to equality and non-discrimination, which according to the Court's jurisprudence, "at the current stage of evolution of international . . . has entered the domain of *jus cogens*."[124] The Court further rested on its sexual orientation and gender identity case law and reiterated that these are protected categories under the American Convention on Human Rights.[125]

Turning to the opinion's specific questions, the Court found that the American Convention protects an individual's right to change their name as well as to rectify their image, sex, or gender in public records and identity documents.[126] The Court noted that states can freely choose their own procedures to guarantee this right—whether judicial or administrative—but insisted that such procedures must respect the guidelines set forth by its advisory opinion. Specifically, the Court found that name change procedures must be

[120] *State Obligations* Advisory Opinion, *supra* note 6.

[121] *Id.*, para. 2. Specifically, Costa Rica asked: (1) whether states must "recognize and facilitate the name change of an individual in accordance with his or her gender identity"; (2) whether the lack of administrative procedures for name change in such circumstances could be considered contrary to the American Convention on Human Rights; (3) whether the American Convention requires states to recognize all economic rights that derive from a same-sex relationship; and (4) whether there must be a specific mechanism to govern relationships between persons of the same sex for the state to recognize all the economic rights that derive from that relationship.

[122] *See* Section IV.C.1.i *infra*.

[123] *State Obligations* Advisory Opinion, *supra* note 6, para. 32. The Court observed that it did not espouse the terms but that, "taken from multiple international organic sources, they seem to be the most common on the international plane." The sources the Court refers to go from UN documents to reports by the Inter-American Commission to soft law instruments, such as the Yogyakarta +10 Principles. *Id.*

[124] *Id.*, para. 61.

[125] *Id.*, paras. 68–80.

[126] *Id.*, para. 116. The Court declared that such right stems from general principles concerning the right to a name and the right to identity, as articulated by international human rights law, in particular, the Inter-American Juridical Committee, the UN Human Rights Committee, and the European Court of Human Rights. *Id.*, paras. 107–11.

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"based solely on the free and informed consent of the applicant;"[127] and that to enter name and identity change procedures, applicants should not be required to provide medical, psychological, or other types of certifications—e.g., good conduct or police records—or to undergo hormonal therapy. Finally, the Court opined that name and gender identity change procedures must be "prompt and, insofar as possible, cost-free."[128]

On the questions concerning economic rights, the Court carried out an analysis of the word "family" under the American Convention.[129] The Court used multiple canons of interpretation, such as "the ordinary meaning of the word (literal interpretation), its context (systematic interpretation), its object and purpose (teleological interpretation), as well as the evolutive interpretation of its scope," and an inquiry into "the preparatory works for the Convention."[130] The Court noted the "impossibility of identifying an ordinary meaning for the word 'family," and that the inquiry into the "*immediate* context"—a method for which the Court followed a World Trade Organization decision—is also unhelpful.[131] Thus, it resorted to both the teleological interpretation and the evolutive canon, and found that failure to include same-sex couples in the definition of "family" "would defeat the object and purpose of the Convention."[132] The Court explained that the drafters resorted to open and vague clauses to give the Court "the task of identifying and protecting the scope [of rights] in accordance with the passage of time."[133] Under the Convention, therefore, same-sex couples must enjoy the same rights as heterosexual couples. [134]

The final question submitted to the Court—whether there must be "a legal institution that regulates relationships between persons of the same sex for the state to recognize all the patrimonial rights that derive from that relationship"—[135] deserves special attention. Here, the Court did not use traditional canons of interpretation to answer the questions at hand. Instead of examining the Convention's object and purpose or its evolution, the Court turned to "*relevant* international practice."[136] The formula is misleading. The Court was referring to the decisions of other international organs—such as the European Court of Human Rights

[127] *Id.*, para. 127.

[128] *Id.*, para. 160. The Court did opine that administrative or "notarial" procedures were the most appropriate procedures to comply with the requirements, and expressly stated some of the principles that should govern such procedures when children's interests are at stake. *Id.*, paras. 150–56. Besides considering the principle of progressive autonomy (para. 150) the Court declared that domestic procedures should respect the principle of non-discrimination; the principle of the best interest of the child; the principle of respect for the right to life, survival, and development; and the principle of respect for the child's views in all matters affecting them, in order to ensure their participation (para. 152).

[129] The Convention does not define "family." Two clauses refer, however, to the family, and are used in the Court's analysis: Article 11(2) states: "No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation." Also, Article 17(1) establishes that: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state."

[130] *Id.*, para. 175.

[131] *Id.*, para. 181.

[132] *Id.*, para. 189. Although the issue was never considered during the 1969 San José Conference where the Convention was adopted, the Court justified its finding in the original intent of the drafters, as the drafters "did not presume to know the absolute scope of the fundamental rights and freedoms recognized therein." *Id.*, para. 193.

[133] *Id.*

[134] *Id.*, para. 199.

[135] *Id.*, para. 3.5.

[136] *Id.*, para. 200 (emphasis added).

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and United Nations treaty bodies—but also, and more significantly, to the laws, regulations, and judicial decisions of OAS countries, as well as soft law instruments, such as the Yogyakarta +10 Principles.[137] In other words, the Court's interpretive method was a sort of survey of both international and comparative law.[138] But the Court failed to explain how it determines which "practice" qualifies as "relevant." Instead, it listed various domestic laws and international decisions that aligned with the Court's own views, without justifying its inclusion criteria.[139]

The Court concluded that "the most simple and effective way to ensure the rights derived from the relationship between same-sex couples" is to extend existing institutions—"including marriage"—to those couples.[140] Under the different factors of the two advisory models identified in Part II, the Court's remedy seems particularly specific: the Court did not ask Costa Rica to implement domestic proceedings to consider which could be the best remedies to address the question put before the Court, but ordered the legalization of same-sex marriage. Furthermore, it did so to all OAS member states.

The Court rejected the "lack of consensus" argument, whereby states may have different ways of regulating matters concerning LGBTI groups and therefore an international court should refrain from ruling on the matter. The Court responded by noting that such an approach would perpetuate "the historical and structural discrimination that such minorities have suffered."[141] Religious or philosophical considerations against the recognition of same-sex marriage, the Court noted, are not valid arguments, "because the Court could not use them as an interpretative guide when determining the rights of human being (*sic*)."[142] As mentioned, the Court ended with a call to states—to *all* OAS states, including those that are not parties to the American Convention, and are therefore not subject to the Court's jurisdiction—to adopt measures in the direction of legalizing same-sex marriage. In a critical passage, the Court:

> urges states to promote, in good faith, the legislative, administrative and judicial reforms required to adapt their domestic laws, and internal interpretations and practice . . . [states] are obliged not to violate the provisions that prohibit discriminating against [same-sex couples] and must, consequently, ensure them the same rights derive from marriage in the understanding that this is a transitional situation.[143]

[137] The Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (known as "Yogyakarta +10 Principles") are the result of a civil society coordinated effort to advance principles and norms on LGBTI rights.

[138] The Court surveys the laws and judicial decisions from a number of countries, including Argentina (para. 208), Brazil (para. 209), Canada (para. 213), Chile (para. 210), Colombia (paras. 212 and 215), Ecuador (para. 211), Mexico (para. 206), the United States (para. 213) and Uruguay (para. 207); and opinions by the Human Rights Committee, the Committee on Economic Social and Cultural Rights, the Committee on the Elimination of Discrimination Against Women, and the European Court of Human Rights (para. 204).

[139] On the need to use sound comparative methods to analyze international law cases, see Katerina Linos, *How to Select and Develop International Law Case Studies: Lessons from Comparative Law and Comparative Politics*, 109 AJIL 475 (2015).

[140] *State Obligations* Advisory Opinion, *supra* note 6, para. 218.

[141] *Id.*, para. 219.

[142] *Id.*, para. 223.

[143] *Id.*, paras. 225–26.

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Thus, the Inter-American Court of Human Rights became the first international tribunal to find that states have an obligation under international law to legalize same-sex marriage.[144] In all findings related to name change procedures, the definition of "family," and the duty to recognize all the rights derived from a family relationship between same-sex couples, the Court's opinion was unanimous. However, concerning the opinion's most salient finding —that states must legalize same-sex marriage—there was a dissent, filed by Judge Eduardo Vio Grossi, which is worth examining in detail, as it illustrates some of the problems with the Court's use of a "ruling through advice" model in this particular advisory context.

2. The Cost of Breaking the Ground?

It is no surprise that many opposed the Court's attempts to overreach into the realm of domestic law. Indeed, fervent opposition arose even within the Court itself. Judge Eduardo Vio Grossi—a senior member of the Court—filed an individual vote, mostly dissenting from the Court's approach and, on the specific issue of same-sex marriage, with the Court's outcome. Vio Grossi's vote is significant for at least two reasons. First, it articulates a creeping dissent jurisprudence that challenges the majority not only as to the scope of human rights, but also as to the extent of the Court's powers in determining those rights.[145] Second, Vio Grossi's arguments are based on public international law, interestingly enough a minority perspective in a court dominated by *constitutional* rather than international lawyers. (Vio Grossi himself is a professor of public international law, whereas many of his colleagues are constitutional lawyers.)

Vio Grossi's dissent proceeds in two parts. The first concerns the merits of the opinion and disagrees with the Court's finding that same-sex marriage should be permitted in all member states. The second one develops his views on the relationship between international law and domestic law, and in particular, the Inter-American Court's use of the conventionality control doctrine.[146] Vio Grossi understands the Court's advisory jurisdiction as qualitatively different from its contentious jurisdiction; he also emphasizes the differences between domestic court jurisdiction and international court jurisdiction, a notion that other members of the Court pay increasing attention.[147]

In his vote, Judge Vio Grossi criticizes the Court's opinion as "confusing" (para. 81) and "contradictory" (para. 99), noting that it "included matters that were not raised in the

[144] In June 2018, the Court of Justice of the European Union (CJEU) found that the term "spouse" includes spouses of the same sex even if states are not required to recognize same-sex marriage in their national laws. Relu Adrian Coman and Others v. Romania, C-673/16 (CJEU 2018). The CJEU did *not* find that states have an obligation to legalize same-sex marriage.

[145] *See* Jorge Contesse, *Judicial Interactions and Human Rights Contestations in Latin America*, 12 J. INT'L DISPUTE SETTLEMENT __ (2021).

[146] Vio Grossi's account of conventionality control can be read as a response to his colleague Ferrer Mac-Gregor, who is a strong supporter of the doctrine. *See*, *e.g.*, Eduardo Ferrer Mac-Gregor, *Conventionality Control: The New Doctrine of the Inter-American Court of Human Rights*, 109 AJIL UNBOUND 93 (2015).

[147] For example, in 2018, Judge Humberto Sierra Porto (a former member of the Constitutional Court of Colombia) wrote: "the Inter-American Court is an *international* tribunal and, therefore, it is reasonable to expect that it acts as such." *See* Poblete Vilches and Others v. Chile, Merits, Reparations, and Costs, Inter-Am. Ct. Hum. Rts. (ser. C) No. 349, para. 12 (Mar. 8, 2018) (con. op., Sierra Porto, J.) (emphasis added). On the difference between the Court's *international* and *constitutional* authority, see Contesse, *supra* note 106.

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request" (para. 46).[148] He declares that "the judicial [advisory] function consists in convincing rather than imposing" (para. 154), a norm he believes the Court to have violated here. In his view, the Court oversteps by performing a "normative" function that the Convention exclusively assigns to states, namely, a law-making function (para. 177).[149] Judicially mandating the recognition and protection of unions between same-sex couples is something that the Court ought not do, "especially [through] an advisory opinion" (para. 71).[150]

Arguably, one of Vio Grossi's most serious criticisms—especially, considering that he is an international, not a constitutional, lawyer—is the Court's misuse of the sources of international law. He observes that the Court "prescinds of the application" of the norms on treaty interpretation set forth by the Vienna Convention on the Law of Treaties.[151] In particular, he objects to the Court's failure to refer to the Convention's Preamble and give any "importance to the fact that the states parties agreed to sign the Convention 'in good faith.'"[152] Similarly, he criticizes the absence of any inquiry on states' subsequent practice when inquiring about the treaty's "context," and the majority's questionable methodology of surveying the practice of certain states.[153] Finally, he takes issue with the Court's use of the evolutive interpretation canon, noting that such method "cannot go against clear and explicit terms of the Convention,"[154] and that the Court's reference to opposition to same-sex marriage based on religious grounds is problematic because it may suggest that religious individuals "are opposed to human rights and, consequently, that their opinions can be suppressed."[155]

On the issue of conventionality control in advisory proceedings, Judge Vio Grossi makes an insightful point, as he writes that the doctrine "is of a preventive nature" (para. 61). In other words, unlike contentious cases that are binding and come as a result of states' conduct, advisory opinions, Vio Grossi observes, address abstracts questions of international law which may or may not concern actual, current matters. As explained earlier, this view resembles that of early twentieth-century writers commenting on the potential use of advisory powers by the

[148] These are unusual adjectives to be found in an Inter-American Court's separate opinion. Traditionally, inter-American judges do not engage in legal discussions with their colleagues. Symptomatically, dissenting opinions are not titled "dissenting," but "separate opinions," a showing of the Inter-American Court's ethos as a non-confrontational judicial forum.

[149] In Vio Grossi's words: "[I]n the exercise of its competences, it is not incumbent upon the Court to amend the [American] Convention; thus, its advisory or non-contentious jurisdiction should not seek to exercise the normative function, which is generally expressly conferred on the states . . . ." *State Obligations* Advisory Opinion, *supra* note 6, sep. op., Vio Grossi J., para. 7. *See also* Calidonio Schmid, *supra* note 64, at 415 ("[A]dvisory opinions must encourage, but not compel, states to behave in a certain manner.").

[150] Judge Vio Grossi notes that "it is not appropriate that [the Court] order the adoption of any conduct" (para. 10). Jo Pasqualucci has also argued that, "[a] tribunal does not have the authority under its advisory jurisdiction to order judicial sanctions or impose duties or obligations on any state." Pasqualucci, *supra* note 64, at 246. Former members of the Court have apparently argued in favor of a less rigid separation between the Court's contentious and advisory jurisdictions. *See, e.g.*, THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 220 (1995) ("The mere fact that the Court has made a pronouncement in an advisory opinion rather than in a contentious case does not diminish the legitimacy or authoritative character of the legal principle enunciated by it.")

[151] *State Obligations* Advisory Opinion, *supra* note 6, sep. op., Vio Grossi J., para. 84.

[152] *Id.*, para. 85.

[153] He notes: "The OC-24 itself recognizes that only six of the 23 States Parties to the Convention and eight of the 34 Member States of the OAS have laws on marriage between same-sex couples. At the global level, around 24 of the 193 members of the United Nations include in their laws. . . ." *Id.*, para. 89.

[154] *Id.*, para. 95.

[155] *Id.*, para. 101.

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Permanent Court of International Justice as a "preventive" function.[156] It also points to how, at least concerning the specific question of same-sex marriage, there are tools for the Court to anticipate adjudication, and not necessarily *decide* the issue on behalf of states. Here, Vio Grossi distances himself from the Court's approach whereby it seemingly aims at addressing all and even more issues presented before it. Recognizing a legitimate realm of action for the state, he notes that "international human rights law, does not encompass all the activities of the subjects of international law and, particularly, of the States" (para. 6).[157] The possibility of deference in this instance could come by way of properly understanding the scope of the Court's advice—and, in so doing, by using a preventive model of adjudication, not a ruling through advice mechanism.

C. Legal and Political Aftermath

The Inter-American Court's advisory opinion sparked significant reactions. Some Latin American domestic courts have implemented the opinion, as if the Court had provided legal guidance in a way that would resemble what the European Court of Human Rights has done so far with its advisory role. From this perspective, the same-sex marriage opinion is a judicial success story: the Inter-American Court handed down an opinion that relied on the domestic powers of national courts—a feature of anticipatory adjudication. However, on closer look, the Court did not—could not—engage with states through established legal mechanisms for implementation, which is a feature of anticipatory adjudication. Unlike the European Court, the Inter-American Court's doctrine of judicial supremacy—conventionality control—is self-asserted: the American Convention does not give the Court such power.[158] Therefore, the implementation mechanisms at hand—the first factor to analyze when considering advisory models—in reality show that the Court was not anticipating conflict, in the sense that it could not redirect its findings to a specific court or agency in Costa Rica, but had to rely on courts or other agencies "picking up" the opinion to implement it.

The Court also acted as a ruler through advice by imposing a legal obligation on states through a mechanism that has not been crafted to do so; and, more significantly, in a context of highly divisive politics.[159] As a result, states pushed back in a surprising and aggressive way, and the Court—and the Inter-American Commission too—became exposed once more to the attacks of states. From this perspective, the opinion was a diplomatic and political failure. This Section analyzes the two types of reactions to then discuss in more detail how the Court (mis)used both the institutional and contextual modulating factors at hand.

1. Domestic Implementation

It only took a few months for national courts to use the Inter-American Court's opinion to decide cases on the matter.[160] National courts have different views as to the legal importance

[156] *See* Section II.B *supra*.

[157] Hurst Hannum has similarly observed that, "treating rights as a comprehensive quasi-religious doctrine within which all answers may be found is nonsense." *See* Hurst Hannum, *Reinvigorating Human Rights for the Twenty-First Century*, 16 HUM. RTS. L. REV. 409, 439 (2016).

[158] Fuentes Torrijo, *supra* note 106.

[159] NeJaime & Siegel, *supra* note 115.

[160] In June 2018, the Supreme Court of Chile issued a 3–2 decision which used—albeit in passing—the Inter-American Court's opinion to rule that a trans individual had a right to name change without the need to undergo surgery or hormonal treatment. *See* Supreme Court of Chile, Decision [No identification to protect applicant's

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of the Inter-American Court's *Same-Sex Marriage* advisory opinion, in some instances eliciting domestic pushback. The most significant reactions are found in landmark decisions by the Supreme Court of Costa Rica and the Constitutional Court of Ecuador. The former declared the country's prohibition of same-sex marriage unconstitutional and contrary to the American Convention on Human Rights, deferring the statute's invalidation for eighteen months to allow the Legislative Assembly to take appropriate action.[161] On the other hand, the Ecuadorean decisions interpreted the advisory opinion as an international "instrument" that prevails over domestic law, making same-sex marriage a right under both international and national law.[162]

The decisions by the Costa Rican Supreme Court and the Ecuadorean Constitutional Court illustrate both the possibilities and challenges of the Inter-American Court's advisory opinion on same-sex marriage. First, they show how domestic judges may domesticate the Inter-American Court's case law, as they see themselves as part of a larger human rights community in Latin America.[163] Second, they demonstrate how national courts can "bring about change that was unlikely to materialize through political channels," as Helfer and Voeten have shown in the specific context of LGBTI rights litigation in Europe.[164] Finally, the decisions also highlight the danger of judicial overreach and subsequent tensions with other branches of government—for example, when a court orders the legislative assembly to enact a new statute with judicial-mandated wording. More significantly, the processes of domestic implementation shed light on the Inter-American Court's approach to advisory jurisdiction—one in which the Court seems to *rule*; that is, to decide an issue as if it were adjudicating a dispute rather than providing guidance on the interpretation of international human rights law. Let us look at how these domestic courts implemented what the Inter-American Court decided in its advisory opinion.

identity] (May 29, 2018) (on file with author). Similarly, the Constitutional Chamber of Costa Rica's Constitutional Court requested an opinion from the country's Attorney General's Office on the binding character of the Inter-American Court's advisory opinion. *See* Laura Alvarado, *Costa Rica's Attorney General Confirms Ruling of Inter-American Court Regarding Same Sex Marriage is Binding*, COSTA RICA STAR (May 13, 2018), *at* https://news.co.cr/costa-rica-lgbti-rights-gay-rights-costa-rica-marriage/73000. The attorney general declared that the advisory opinion is binding upon Costa Rican judges. Also, Costa Rica's Supreme Electoral Tribunal announced that individuals may now change their name at will according to their gender identity, in conformity with the Inter-American Court's pronouncement. *See* Laura Alvarado, *Transgender Population in Costa Rica Will Be Able to Choose the Name Shown in Their ID*, COSTA RICA STAR (May 14, 2018), *at* https://news.co.cr/transgender-population-in-costa-rica-will-be-able-to-choose-the-name-shown-in-their-id/73032.

[161] Supreme Court of Costa Rica, Constitutional Chamber, Exp: 15-013971-0007-CO, Decision No. 12782–2018 [no identification of parties to protect applicants' identities], para. IX (Aug. 8, 2018) (Costa Rica), at https://nexuspj.poder-judicial.go.cr/document/sen-1-0007-875801 [hereinafter Decision No. 12782-2018]. The court rested on previous decisions where it has established timeframes for legislative action, as well as examples from other constitutional courts, such as the Austrian Constitutional Court, the Colombian Constitutional Court, the South African Constitutional Court, the Constitutional Court of Taiwan, and the Supreme Courts of Massachusetts and Vermont in the United States. *Id.* at 35–36. On the use of postponed remedies by constitutional courts, see Holning Lau, *Comparative Perspectives on Strategic Remedial Delays*, 91 TULANE L. REV. 259 (2016).

[162] Constitutional Court of Ecuador, Cases No. 10-18-CN and No. 11-18-CN, Same-Sex Marriage (June 12, 2019) (Ecuador).

[163] Von Bogdandy & Urueña, *supra* note 102.

[164] Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77, 79 (2016).

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i. Costa Rica

The *Same-Sex Marriage* advisory opinion came full circle when the Supreme Court of Costa Rica ordered the country's Legislative Assembly to revise Costa Rica's Family Law Code in light of the Inter-American Court's opinion.[165] If the Assembly failed to comply, the order read, the Family Law Code would lose its legal force and same-sex marriage would become legal *ipso jure* in May 2020. The Assembly failed to act, May 2020 came, and Costa Rica became the first Central American country to legalize same-sex marriage.[166]

The Costa Rican court declared that the "dogma of heterosexual marriage" had created an unconstitutional state of affairs—in reference to a doctrine used by several Latin American high courts—affecting multiple areas of social life, beyond the context of marriage.[167] Accordingly, the court called on the Costa Rican Parliament to conduct "a general review of existing laws" and to enact legislation in line with the changes "*required* by the Inter-American Court."[168] The Costa Rican court viewed the issue as a genuine "paradigm shift . . . a cultural and legal transition towards the postulates of the Inter-American Court of Human Rights."[169] In passing, the Costa Rican court held that the Inter-American Court's pronouncement *required* states to adopt domestic measures in line with the finding that all OAS states should legalize same-sex marriage. Without making the point explicitly, the Costa Rican court thus gave binding power to the advisory opinion.[170]

Two judges wrote dissenting opinions. One of them, using a constituent power theory, argued that the people of Costa Rica had decided to restrict marriage to a man and a woman, and that changing such definition was an invalid use of judicial power. The dissent also argued that advisory opinions are not binding upon states—not even upon requesting

[165] Decision No. 12782-2018, *supra* note 161, para. IX.

[166] Harmeet Kaur, *Costa Rica Becomes the First Central American Country to Legalize Same-Sex Marriage*, CNN (May 26, 2020), *at* https://www.cnn.com/2020/05/26/americas/costa-rica-legalizes-same-sex-marriage-trnd/index.html.

[167] On the doctrine of "unconstitutional state of affairs," see Colombian Constitutional Court, Decision T-025 of 2004 (Jan. 22, 2004) (Colom.), *available at* https://www.brookings.edu/wp-content/uploads/2016/07/Colombia_T-025_2004.pdf. On the use of the doctrine by the Brazilian Supreme Court, see Raffaele de Giorgi & Diego de Paiva Vasconcelos, *Os fatos e as Declarações: Reflexões sobre o Estado de Ilegalidade Difusa*, 9 Rev. Direito Práx. 480, 484 (2018). On the use of the doctrine by the Peruvian Constitutional Court, see Renato Vásquez Armas, *La Técnica de Declaración del "Estado de Cosas Inconstitucional": Fundamentos y Análisis de su Aplicación por el Tribunal Constitucional Peruano*, 41 Ius et Veritas 128 (2010), and Edwin Figueroa Gutarra, *Estado de Cosas Inconstitucional y Jueces ¿Relaciones de Exclusión o Complementariedad?*, 11 Ipso Jure 6 (2019).

[168] Decision No. 12782–2018, *supra* note 161, at 34 (emphasis added).

[169] *Id.*, para. VII, second to last paragraph, p. 28.

[170] Alter, *supra* note 44, at 15 ("most people expect signing of a treaty to give rise to a *binding* obligation") (emphasis added). In her concurrence, Judge Hernández López explained that "it is out of discussion that the Inter-American Court's advisory opinions, especially those requested by Costa Rica, are *legally binding*." Decision No. 12782–2018, *supra* note 161, at 40–41 (Hernández López, J., concurring) (emphasis added). Hernández López's argument, however, is peculiar: she noted that, pursuant to the 1983 Headquarters Agreement between the government of Costa Rica and the Inter-American Court of Human Rights, the Supreme Court must give binding force to "*any* resolution" by the Inter-American Court, including advisory opinions. Agreement Between the Government of the Republic of Costa Rica and the Inter-American Court of Human Rights, Art. 27, Sept. 9, 1983, Law No. 6,889, available at https://www.corteidh.or.cr/docs/otros/convenio.pdf (emphasis added). In his separate opinion to the Inter-American Court's advisory opinion on same-sex marriage, Judge Vio Grossi notes that states may "unilaterally assign[] them a binding nature," as the Costa Rican Supreme Court did in its Judgment 0421-90. *State Obligations* Advisory Opinion, *supra* note 6, sep. op., Vio Grossi, J., n. 544.

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states.[171] Under his view, the Supreme Court was reiterating the Inter-American Court's error of using advisory opinions as a matter of binding jurisdiction.

The second dissent dismissed the Inter-American Court's opinion as "succinct and lacking any concrete reasoning,"[172] noting that only the legislature may adjust the norms of marriage to ensure that they "conform with the current demands of social reality."[173] The dissent advanced three main criticisms: first, it highlighted the Inter-American Court's departure from its prior, more cautious case law—specifically, the Court's Advisory Opinion OC-12/91.[174] Second, the dissent criticized the Inter-American Court for issuing an opinion while there were pending submissions on the issues before both the Inter-American Commission—with pending submissions from Costa Rica itself—and the Costa Rican Legislative Assembly.[175] Finally, the dissent criticized the use of advisory proceedings by the Costa Rican executive as "an attempt to use the Inter-American Court's advisory jurisdiction as an instrument for [domestic] political debate."[176] As I discuss below, this is a problem that deserves attention, as other countries, too, have resorted to international adjudication to affect domestic politics.[177]

ii. Ecuador

In a case concerning a woman's claim to register her as the second mother of a child born by her legal same-sex partner, the Ecuadorean Constitutional Court found that the Inter-American Court's same-sex marriage opinion was binding upon domestic courts, pursuant to Ecuador's Supremacy Clause.[178]

The court subsequently reiterated the doctrine in two split decisions (5–4) concerning same-sex marriage, rendered on the same day.[179] In the first case, the constitutional court reiterated that the Inter-American Court's *Same-Sex Marriage* advisory opinion "is *binding*

[171] *State Obligations* Advisory Opinion, *supra* note 6, sep. op., Castillo Víquez, Chief J., at 153.

[172] *State Obligations* Advisory Opinion, *supra* note 6, sep. op., Hernández Gutiérrez, J., at 96.

[173] *Id.* at 100.

[174] In the Inter-American Court's Advisory Opinion 12–91, the Inter-American Court refused Costa Rica's request because, the Court noted, it "could produce, under the guise of an advisory opinion, a determination of contentious matters not yet referred to the Court, without providing the victims with the opportunity to participate in the proceedings." *See* Advisory Opinion OC-12/91, *supra* note 79, para. 28.

[175] *State Obligations* Advisory Opinion, *supra* note 6, sep. op., Hernández Gutiérrez, J., at 95. Judge Hernández Gutiérrez's dissent does not mention two other petitions that were pending before the Inter-American Commission: one filed against Chile in 2012 (available at https://www.vancecenter.org/wp-content/uploads/2019/10/movilh-denuncia.pdf) and another one filed against Mexico in 2014 (available at https://www.vancecenter.org/wp-content/uploads/2019/10/mexico-denuncia.pdf).

[176] *State Obligations* Advisory Opinion, *supra* note 6, sep. op., Hernández Gutiérrez, J., at 97.

[177] *See* Section IV.D *infra*.

[178] Constitutional Court of Ecuador, Decision No. 184-18-SEP-CC, at 58 (May 29, 2018) (Ecuador), *at* http://doc.corteconstitucional.gob.ec:8080/alfresco/d/d/workspace/SpacesStore/bdcf8eb2-6f40-447e-9bdd-4cf152c7b311/1692-12-ep-sen.pdf?guest=true. The court based its finding on Article 424 of the Ecuadorean Constitution, which states: "The Constitution is the supreme law of the land and prevails over any other legal regulatory framework. The standards and acts of public power must be upheld in conformity with the provisions of the Constitution; otherwise, they shall not be legally binding. The Constitution and international human rights treaties ratified by the State that recognize rights that are more favorable than those enshrined in the Constitution shall prevail over any other legal regulatory system or action by public power."

[179] Constitutional Court of Ecuador, Cases No. 10-18-CN and No. 11-19-CN, *supra* note 162.

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as a source of case law,"[180] and concluded that "the American Convention . . . incorporates into the Ecuadorean Constitution the right to marry of same-sex couples, under the understanding that the legislator must institute (that is, regulate and make available to them) the possibility of marriage."[181] Like the Costa Rican court, the Ecuadorean court also ordered the legislature "to wholly revise legislation on marriage in order to include same-sex couples as spouses" (para. 98.3).

Four judges joined a single dissent, arguing that the text of the Ecuadorean Constitution clearly stipulates that marriage is the union between a man and a woman only (para. 9); that there is no ambiguity to be clarified (paras. 12–13); and that the court misinterpreted the binding force and nature of the Inter-American Court's advisory jurisdiction (paras. 67–93). On the latter point, the dissent held that advisory opinions "do not seek to order states to adopt concrete measures . . . but to establish guidelines," so that states can make decisions in line with their human rights obligations (para. 79). The dissent highlighted the Inter-American Court's notion of advisory opinions as a mechanism of "*preventive* control of conventionality" (para. 80; emphasis added),[182] and noted that advisory opinions do not have binding force (para. 85); and, although the Inter-American Court has declared that such opinions have "undeniable legal effects," it is undisputed, the dissent argued, that those effects do not entail binding force.[183]

The second case decided by the Ecuadorean constitutional court regarding same-sex marriage concerned the same provisions of the country's Civil Code and Gender and Identity Act. In that case, the Constitutional Court's plurality found that the Inter-American Court's *interpretation* contained in the advisory opinion was part of domestic law.[184] As such, the Inter-American Court's advisory opinion was "*directly* and *immediately* enforceable [and] prevails over domestic law if such interpretation was more favorable for the exercise and protection of human rights."[185] Resorting to a proportionality analysis, the court declared that the constitutional provision which limited marriage to a man and a woman lacked a valid constitutional aim because it excluded same-sex couples from the right to marry.[186]

The key lesson from these instances of domestic implementation is that in both cases, beyond the split decisions, the Inter-American Court had to rely on friendly national judges, not on inter-American—that is to say, *international*—implementation mechanisms. Even

[180] Constitutional Court of Ecuador, Case No. 10-18-CN, para. 81 (emphasis added).

[181] *Id.*, para. 85.

[182] Advisory Opinion OC-22/16, *supra* note 38, para. 26.

[183] Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights), Advisory Opinion OC-15, Inter-Am. Ct. H.R. (ser. A) No. 15, para. 26 (Nov. 14, 1997). The dissent notes that legal scholars generally agree that such legal effect rests on international courts' "moral" authority (paras. 89–90).

[184] The court also declared that advisory opinions have significant "democratic legitimacy," as the Inter-American Court normally welcomes submissions by any interested party in the result of the advisory proceedings. Case No. 11-18-CN, *supra* note 162, para. 35.

[185] Case No. 184-18-SEP CC, *supra* note 178, at 58, quoted by Case No. 11-18-CN, *supra* note 162, para. 37 (emphasis added).

[186] Case No. 11-18-CN, *supra* note 162, para. 109. Arguably, under the proportionality test, the court's analysis should have stopped with its finding that there is no valid purpose. However, "in order to bolster the most faithful interpretation to the Constitution and demonstrate exhaustively the need for a rights-based interpretation," the court conducted a full proportionality test, inquiring into the measure's suitability, necessity and reasonableness (or "proportionality *stricto sensu*"). On the principle of proportionality, see ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (2002).

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under a robust theory of conventionality control, which would require domestic judges to abide by the Court's opinion, the Ecuadorean and Costa Rican judgments are essentially grounded on constitutional provisions that make international law directly applicable. But for such findings by domestic courts, the Inter-American Court's opinion could well have not been implemented at all—or in significantly different ways. The point here is not to negate the importance of such domestic mechanisms of implementation, but to show that they are contingent on domestic courts' preferences, not on an institutional platform that exists beyond the transitory personnel at a given court.

Finally, as to the third factor that distinguishes the two models of advisory jurisdiction—the opinion's value to the applicant—it is hard to downplay the opinion's significance: the *Same-Sex Marriage* opinion turned a domestic presidential election, which was not supposed to have any surprises, into a referendum on the role of the Inter-American Court of Human Rights in Costa Rica—the country where the Court sits. For the applicant, the opinion was also of value in the sense that it helped push a legislative agenda—on same-sex marriage and family law—that may not have advanced without the Court's intervention.

2. *Transnational Pushback*

As some domestic courts implemented the Inter-American Court's advisory opinion, LGBTI rights advocates and human rights organizations praised the Court's progressive approach to same-sex marriage.[187] The United Nations chief expert on sexual orientation and gender identity called the opinion "historic" and "landmark,"[188] while leading international non-governmental organizations stated that Latin America, a traditionally conservative region, could become a leader in the area of LGBTI rights.[189] In Costa Rica, as explained above, the opinion became the dominant theme in the presidential campaign of Carlos Alvarado Quesada, who proclaimed that "at long last, the recognition of equal marriage in our country" would be a reality.[190]

However, the Court's advisory opinion also sparked an unprecedented pushback, especially from conservative groups now organized in opposition to the Inter-American Court's progressive jurisprudence.[191] Pushback against human rights courts is not surprising, and is part and parcel of how states interact with international courts, generally, and human rights,

[187] *See*, *e.g.*, Elena Abrusci, *The IACtHR Advisory Opinion: One Step Forward or Two Steps Back for LGBTI Rights in Costa Rica?*, EJIL:*Talk!* (Feb. 27, 2018).

[188] OHCHR, Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, Sexual Orientation and Gender Identity: UN Expert Hails Historic Legal Opinion Issued in Americas (Jan. 12, 2018), *at* https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22582&LangID=E.

[189] Daniel Berezowsky Ramirez, *Latin America Could Lead the Way for LGBT Rights in 2018*, Human Rights Watch (Feb. 6, 2018), *at* https://www.hrw.org/news/2018/02/06/latin-america-could-lead-way-lgbt-rights-2018.

[190] AFP, *Inter-American Court Endorses Same-Sex Marriage; Costa Rica Reacts*, Tico Times (Jan. 10, 2018), *at* https://ticotimes.net/2018/01/10/costa-rica-reacts-inter-american-court-ruling-on-same-sex-marriage.

[191] *See* René Urueña, *Evangelicals at the Inter-American Court of Human Rights*, 113 AJIL Unbound 360 (2019). Such jurisprudence, which has always been a feature of the Court's case law, became more salient in 2012, when the Court issued groundbreaking judgments on sexual orientation and reproductive rights. *See* Atala Riffo and Daughters v. Chile, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012); Artavia Murillo v. Costa Rica, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 257 (Nov. 28, 2012).

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in particular.[192] Following the same-sex marriage opinion, Fabricio Alvarado, a Costa Rican evangelical pastor who also ran for president in 2018, rose in the polls from just four percent of the voting population to a victory in the run-off election in the span of only one month. After the Court handed down its opinion, Alvarado seized the opportunity and turned the presidential election into a referendum on LGBTI rights and, ultimately, on Costa Rica's sovereignty vis-à-vis the intrusions of an international court. Although Alvarado eventually lost to the other (and more progressive) candidate, the rhetoric of pulling out of the human rights regime—something that would have been unthinkable just a few years earlier—had permeated the Costa Rican people.

In fact, the defeat of the conservative, anti-human-rights-opinion candidate, made many believe that the judicial impasse was over. But a year later, in April 2019, states' unease with the inter-American human rights bodies surfaced in a shocking way when five South American governments, led by Chile and including Jair Bolsonaro's Brazil, launched a diplomatic and political campaign against both the Court and the Commission, urging them to adopt a more deferential approach in their interactions with states.[193] Specifically, states demanded that both the Commission and the Court respect states' "legitimate realm of autonomy" and "margin of appreciation," as well as to abide to the principle of subsidiarity; to use a "strict application" of the doctrine of sources of international law; and to take into consideration states' "political, economic, and social realities" when ordering reparations.[194]

Once again, the Inter-American human rights system was under attack.[195] This time, however, the countries pushing back were not aligned with—in fact, were opposed to—the Venezuelan-Bolivarian axis that had attacked the inter-American human rights system for years before Venezuela left the system in 2012.[196] This time, the attack did not emanate from a series of regional conferences, but from a silent diplomatic effort led by nations with similarly skeptical views on the role of regional human rights bodies. These countries gave room to a new cohort of religious and conservative organizations that increasingly demand participation in the shaping of inter-American human rights law, and which organized around, and in opposition to, the Court's jurisprudence, which they see as illegitimately progressive.[197] The surge of conservative governments across Latin America and the election of Donald Trump in 2016 bolstered these efforts to contain the so-called "gay lobby" and

[192] *See* Mikael Rask Madsen, Pola Cebulak & Micha Wiebush, *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INT'L J. L. CONTEXT 197 (2018).

[193] *See* Statement from the Governments of Argentina, Brazil, Chile, Colombia and Paraguay, *supra* note 7.

[194] *Id.*

[195] On backlash against the inter-American human rights system, see Ximena Soley & Silvia Steininger, *Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights*, 14 INT'L J. L. CONTEXT 237 (2018); and Jorge Contesse, *Resisting the Inter-American Human Rights System*, 44 YALE J. INT'L L. 179 (2019).

[196] Soley & Steininger, *supra* note 195.

[197] *See* Jorge Contesse & Alexandra Huneeus, *Introduction to Symposium. The American Convention on Human Rights and Its New Interlocutors*, 113 AJIL UNBOUND 351 (2019); Julieta Lemaitre & Rachel Sieder, *The Moderating Influence of International Courts on Social Movements: Evidence from the IVF Case Against Costa Rica*, 19 HEALTH & HUM. RTS. J. 149 (2017). Traditionally, groups lobbying the inter-American system were human rights organizations formed to fight against impunity in the aftermath of the dictatorial regimes of the 1970s and 1980s. *See* Ximena Soley, *The Crucial Role of Human Rights NGOs in the Inter-American System*, 113 AJIL UNBOUND 355 (2019).

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"gender ideology" that was, according to these groups, in full display at the Inter-American Court since at least 2012.[198]

Human rights advocates and legal scholars decried the letter from the five governments.[199] Yet, they seemingly failed to consider *why* these states had suddenly attacked the Inter-American Commission and, particularly, the Court. According to a prominent human rights activist in Latin America, the answer was the *Same-Sex Marriage* advisory opinion.[200] But the answer should not stay at the rather simple level of a charge against a transitory group of powerful and conservative governments that distrust the inter-American human rights regime. As noted above, it would be a mistake to think that the impasse is over, and that the system is no longer under attack. Therefore, it is critical to better understand how the advisory opinion could elicit such response from states. To do that, we shall return to the models of advisory jurisdiction set out in Part II.

D. Modulation Mismatches

In light of the April 2019 attack by five OAS member states, Judge Vio Grossi's concern that the Court overreaching could damage its legitimacy seems well founded. The Court was venturing into highly contested territory,[201] one in which Latin American countries have long been facing heated debates.[202] States and other stakeholders had expressed interest in the opinion: nine countries—Argentina, Bolivia, Brazil, Colombia, Guatemala, Mexico, Panama, and Uruguay—as well as the Inter-American Commission on Human Rights, the UN High Commissioner for Human Rights, national human rights institutions, more than

[198] *See* Diana Cariboni, *Attack the OAS: Inside the Ultra-Conservative War on the Inter-American Human Rights System*, OPEN DEMOCRACY (Dec. 5, 2019), *at* https://www.opendemocracy.net/en/5050/attack-oas-inside-ultra-conservative-war-inter-american-human-rights-system. According to a current member of the Inter-American Commission on Human Rights, the U.S. State Department "said they could not give money to spend on my rapporteurship because we were promoting abortion." In December 2018, nine U.S. senators sent a letter to Secretary of State Mike Pompeo asking that the U.S. government cut funding to the Commission because of the Commission's work on women's reproductive rights. Letter from U.S. Senators to Secretary of State Mike Pompeo (Dec. 21, 2018), *available at* https://www.lankford.senate.gov/imo/media/doc/OAS%20letter%20to%20Sec%20Pompeo.pdf. In March 2019, Pompeo announced that the United States would reduce its contribution to the Organization of American States "to safeguard U.S. taxpayer dollars and protect and respect the sanctity of life for people all around the globe." *See* U.S. Dep't of State Press Release, Sec. of State Michael R. Pompeo Remarks to the Press (Mar. 26, 2019), *at* https://2017-2021.state.gov/remarks-to-the-press-7/index.html.

[199] Human Rights Watch's Director for the Americas sent a letter to all five governments, denouncing the statement as a "grave mistake." *See* Letter from José Miguel Vivanco, HRW Americas Director (Apr. 25, 2019). José Miguel Vivanco, TWITTER (Apr. 25, 2019, 11:04 AM), *at* https://twitter.com/JMVivancoHRW/status/1121429863943016448. The Center for Justice and International Law released a statement with more than two hundred endorsements from NGOs and individuals, *Attacks on the Inter-American Human Rights System Violate the Regional Protection of Human Rights* (May 3, 3019), *available at* https://twitter.com/JMVivancoHRW/status/1121429863943016448; and sixty-three law professors published *Posicionamiento frente a la Declaración sobre el Sistema Interamericano de Derechos Humanos emitida por los gobiernos que encabezan* (May 9, 2019), *available at* https://ibero.mx/files/2019/posicionamiento_cidh_ibero_osidh.pdf.

[200] *See ¿Qué y quién está detrás de la avanzada para limitar el Sistema Interamericano de Derechos Humanos?*, FRANCE24 (June 26, 2019), *available at* https://www.france24.com/es/20190625-limites-sistema-interamericano-ddhh-oea.

[201] *Latin America's Human-Rights Court Moves into Touchy Territory*, ECONOMIST (Feb. 1, 2018), *at* https://www.economist.com/the-americas/2018/02/01/latin-americas-human-rights-court-moves-into-touchy-territory.

[202] *See* Javier Corrales, *The Expansion of LGBT Rights in Latin America and the Backlash*, *in* OXFORD HANDBOOK OF GLOBAL LGBT AND SEXUAL DIVERSITY POLITICS (Michael J. Bosia, Sandra M. McEvoy & Momin Rahman eds., 2019).

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forty non-governmental organizations and human rights law clinics, and twenty-six academics filed written submissions with the Court.[203]

The Court was asked to provide guidance on specific questions of law, many of which were or could be put before national courts. In this sense, the Court was arguably being asked to provide guidance so that domestic courts could better address cases before them—it was being asked, in other words, to act as an anticipatory adjudicator. Yet, the Court ruled through advice, fashioning a *domestic* legal obligation on same-sex marriage by lumping together international treaties, domestic and international judicial decisions, and soft law instruments without properly distinguishing between these different sources—a move that bestows an unprecedented and somewhat unjustified importance to instruments that lack precedential value. Indeed, it was mainly by resorting to soft law principles that the Court was able to find that, under the American Convention on Human Rights, states should make institutions like marriage available to all couples, including same-sex couples. This, the Court said, is "the most simple and effective way" to make the advisory opinion's standards applicable.[204]

Under the principles of judicial modulation outlined above, the Court did not properly consider its institutional powers. As previously explained, since at least the days of Judge Cançado Trindade's presidency, the Inter-American Court has utilized the sources of international law loosely, seeking to expand the body of customary international law and *jus cogens* without offering sufficient explanation as to its interpretive methods—if "methods" is a proper concept at all. The Court's shaky use of the sources of international law, however, is particularly pronounced in the Court's discussion of the original intent of the drafters of the American Convention. Same-sex marriage was unsurprisingly never considered during the San José Conference of 1969.[205] At the time, the predominant view was that family law—the domain of marriage regulations—was not subject to an international human rights treaty. The intention of the San José drafters was to contemplate a rather narrow regulation of family law matters; and one in which marriage was the traditional, Latin American heterosexual marriage.[206]

The Court, however, oblivious to this discussion, seemed determined to use—or misuse—canons of interpretation in order to reach the finding discussed above, a method that commentators had already warned about.[207] Simply arguing that the Convention's original intention was to "protect the rights of human beings" seems far too general and remote to fashion a

[203] *See* Inter-Am. Comm. H.R., Observaciones a la Solicitud de Opinión Consultiva, *at* https://www.corteidh.or.cr/cf/jurisprudencia2/observaciones_oc.cfm?nId_oc=1671.

[204] *State Obligations Advisory Opinion*, *supra* note 6, para. 218.

[205] All draft versions of the project of American Convention contemplated provisions on marriage that refer to "the right of *men and women*" (emphasis added).

[206] At the San José Conference, the delegations of Colombia and the United States submitted a joint amendment to the provision regulating the right to adoption (Article 16(6) of the Draft Convention). Their goal was to ensure that adoption procedures would contemplate measures to protect "the minor, the child's biological parents and the adopting parents." Although the amendment failed, and the text of the Convention ultimately did not include any norms on adoption, the exchange that followed the submission of the proposal is illustrating: the Chilean representative asked the proponents to better explain what their purpose was, "because in his view the text seemed to address matters that belong to family law and adoption, *which are different from human rights issues*." The Panamanian delegate seconded and "urged the U.S. and Colombian delegates to reflect on Chile's observations." The Colombian delegate noted that adoption does have international relevance for the protection of human rights, but his (and the U.S.) position was ultimately defeated. San José Conference, at 229 (emphasis added).

[207] *See* Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 EUR. J. INT'L L. 585, 588 (2010).

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workable legal obligation upon states. To be sure, the fact that the finding was unforeseen in 1969 does not necessarily mean that the Court is wrong—just like the United States Supreme Court, for instance, was not wrong in 2015 when it declared that the U.S. Constitution protects same-sex couples' right to marry, despite the fact that the country's Founding Fathers did not contemplate marriage between individuals of the same sex.[208] It means that the effort the Inter-American Court—or any court—must make to substantiate its claims is greater, especially where its conclusion is so far-reaching,[209] and is not meant to be applicable only to the requesting state of Costa Rica, but to have "legal relevance for *all OAS member states*."[210]

The Court also failed to properly consider the contextual factors of its pronouncement. This is not to say that the Court should have made its opinion *dependent* on the political scenario of Costa Rica. However, being blind to such context was a costly move. There had been signs of state unease for quite some time in the inter-American human rights system; a sweeping decision on a controversial subject was probably not what the Court—and the system—needed. Among the contextual factors that the Court could have considered were the reasons why a state may request an opinion. As commentators note, in the present case, it was "the desire to achieve policy objectives" what prompted the Costa Rican government to seek the Inter-American Court's advice.[211] Taking those elements into consideration does not make the Court surrender to the dynamics of political battles, but could better protect the Court's authority from attacks by unhappy states.

The Court failed to take notice of the landscape in which it was operating when it handed down its same-sex marriage opinion. Yet the Court did so after seeing the response to its opinion: just a few months later, the Court acted in a totally different way, rejecting a request for an advisory opinion on political impeachment—a request that the Court had nonetheless already declared admissible—this time showing political awareness.[212] The request was motivated by the recent number of impeachment proceedings that Latin American legislative bodies were carrying out against sitting presidents.[213] The most notable case was the

[208] Obergefell v. Hodges, 576 U.S. 644 (2015).

[209] The Court found that "the protection of the family relationship of a same-sex couple goes beyond mere patrimonial [economic] rights issues," and must include *all kinds of rights*—civil, political, economic or social. *State Obligations* Advisory Opinion, *supra* note 6, para. 198 (emphasis added).

[210] *Id.*, para. 28 (emphasis added). As Helfer and Voeten note, "*erga omnes* effect of IC rulings is . . . highly contested, both politically and legally." Helfer & Voeten, *supra* note 164, at 78.

[211] Nicolás Carrillo-Santarelli, *The Politics Behind the Latest Advisory Opinions of the Inter-American Court of Human Rights*, INT'L J. CONST. L. BLOG, (Feb. 24, 2018), *at* http://www.iconnectblog.com/2018/02/the-politics-behind-the-latest-advisory-opinions-of-the-inter-american-court-of-human-rights.

[212] Order of the Inter-American Court of Human Rights: Request for an Advisory Opinion Presented by the Inter-American Commission on Human Rights, *supra* note 49. The request for an advisory opinion came from the Inter-American Commission, which asked the Court to advise on whether there should be "judicial control over the impeachment proceeding . . . [as well as over the] result of impeachment proceedings" [*id.*, paras. 2.ii.b.1–2]; to determine the grounds on which the legislature can institute impeachment proceedings against elected presidents [*id.*, para. 2.ii.e]; and the cases in which impeachment proceedings could violate the human rights of the person impeached [*id.*, para. 2.ii.f]; as well as those of the people who voted for her [*id.*, para. 2.ii.g]. In general, the Commission was concerned with "the potential implications of the arbitrary use of this mechanism to the exercise of human rights." *Id.*, at 3.

[213] Inter-Am. Comm. H.R., Request for an Advisory Opinion Submitted before the Inter-American Court of Human Rights, paras. 8-9 (Oct. 13, 2017), *available at* https://www.corteidh.or.cr/docs/solicitudoc/solicitud_13_10_17_eng.pdf.

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impeachment of Brazil's former president Dilma Rousseff, ousted in August 2016 through a controversial proceeding.[214] The Inter-American Commission, whose executive secretary had served as President Rousseff's minister of justice (and who, for that reason, did not participate in these and other proceedings concerning the case)[215] expressed concerns with the use of impeachment proceedings and how they could affect the accused's human rights.

The Court admitted the request, forwarded it to all OAS member states, the OAS secretary general, the president of the OAS Permanent Council, and the president of the Inter-American Juridical Committee, and called all interested stakeholders to submit their views on the application.[216] Five states, dozens of non-governmental organizations, law school clinics, and many individuals submitted their views on the subject, as the advisory proceedings were moving along. However, in May 2018, just a few months after the Inter-American Court had shaken the Latin American legal landscape with its advisory opinion on same-sex marriage, the Court abruptly decided to reject the Inter-American Commission's request for an advisory opinion. The Court's explanation for its late refusal is important for a number of reasons, starting with the obvious fact that it was a notable example of political awareness—or what Cecilia Bailliet calls "strategic prudence."[217]

By rejecting the request, the Court went back to principles of restraint laid down in its initial decades of work, when the Court understood that it should stay away from domestic political battles, and had a clear understanding of its authority as an international tribunal.[218] More importantly, it showed that the Court understands the context in which it operates—and therefore is equipped to decide whether it should rule through advice, as it did in the present case, or anticipate adjudication, as it *should* have.

V. Proposals for Reform

The legitimacy of the Inter-American Court—of any international court, actually—is arguably its most precious asset. Without actual enforcement powers, international courts must rely on the persuasive force of their rulings—even more so when exercising advisory powers. When international courts fail to properly justify a decision, the import and enforcement of that decision may suffer. This is true even where domestic courts are receptive to an international court's decision, but especially so when the ruling is controversial, as in the case of the same-sex marriage decision. The analysis above suggests two avenues for reform that could enhance the possibility of better modulation by the Inter-American Court. I address them separately.

[214] Simon Romero, *Dilma Rousseff Is Ousted as Brazil's President in Impeachment Vote*, N.Y. Times (Aug. 31, 2016), *at* https://www.nytimes.com/2016/09/01/world/americas/brazil-dilma-rousseff-impeached-removed-president.html.

[215] Inter-Am. Comm. H.R. Press Release, IACHR Expresses Concern Over Impeachment of President of Brazil, Press Release No. 126/16 (Sept. 2, 2016), *at* https://www.oas.org/en/iachr/media_center/PReleases/2016/126.asp.

[216] Order of the Inter-American Court of Human Rights: Request for an Advisory Opinion Presented by the Inter-American Commission on Human Rights, *supra* note 49.

[217] Bailliet, *supra* note 64.

[218] *See* Section IV.C.1.i *supra*.

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A. At the Inter-American Level

In order to avoid the lack of consistency, and equip the Court with workable standards for review, the Court should amend its Rules of Procedures and establish admissibility standards to process advisory opinions.[219] In line with what this Court's and other international tribunals have declared, requests for advisory opinions should not be contentious cases in disguise.[220] Such principle can inform the Court's development of more precise standards for admissibility. However, the notion that a country should not request an advisory opinion to obtain a pronouncement that could impact domestic litigation deserves closer scrutiny, particularly, in light of the Court's robust notions of judicial dialogue and the articulation of conventionality control as a form of international judicial supremacy.

Second, in order to cement the Court's advisory role not (only) as a ruling through advice model, the inter-American human rights system could consider ways to allow Latin American apex courts to consult the Inter-American Court on issues that could and do affect domestic litigation. Arguably, the best way to do this would be to explore the adoption of an additional protocol to the American Convention on Human Rights, similar to what the European human rights system did when it adopted Protocol No. 16.[221]

Two counterarguments could be raised at this point. First, it could be argued that states may have few incentives to make such change: if states are questioning the Court's activist decisions, why would they want to give the Court *more* powers? But a potential adoption of a Protocol No. 16 type of jurisdiction could actually *enhance* the power of national courts—and therefore, of states—in ways that would make domestic political processes stronger vis-à-vis the influence of a regional human rights court. More significantly, a reform of the Court's forms of interaction with states could serve as an opportunity to clarify the scope of the Court's advisory powers and its mechanisms of engagement with states. Along these lines, the experience of the Court of Justice of the European Union with preliminary references could be a good model to consider—especially as the Inter-American Court's practice of conventionality review seems closer to that Court's judicial practice than the European Court of Human Rights'.[222]

The second potential counterargument is that giving national courts the power to request an advisory opinion from the Inter-American Court may not address the problems identified in the present study. If anything, such a proposal could simply strengthen the regional constitutional rights dialogue that takes place between the Inter-American Court and national courts. It is true that giving national judges the power to directly access the Inter-

[219] In particular, the amendment should affect Article 73 of the Inter-American Court's Rules of Procedure, which regulates the procedure for the adoption of advisory opinions, and the Court may easily amend.

[220] Relatedly, advisory opinions can also serve as substitute for other international human rights disputes mechanisms. In the context of the inter-American human rights system, I have argued that Latin American states resort to the Inter-American Court's advisory jurisdiction to bring interstate communications in disguise. *See* Jorge Contesse, *Inter-States Cases in Disguise in the Inter-American Human Rights System: Advisory Opinions as Inter-States Disputes*, VÖLKERRECHTSBLOG (Apr. 27, 2021).

[221] Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, CETS No. 214 (Aug. 1, 2018). Under Protocol 16, national courts may seek advisory opinions from the European Court. Commentators note that the goal of Protocol No. 16 is to keep the "interjurisdictional cooperation between the European Court and national judges." *See* Laurence Burgorgue-Larsen, *Le Protocole N° 16: Entre théories et réalités du dialogue judiciaire*, HORS-SÉRIE REVUE QUÉBÉCOISE DE DROIT INTERNATIONAL 219, 220 (2020).

[222] *See* Contesse, *supra* note 106.

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American Court could have significant effect in solidifying the regional regime—not a trivial outcome, it must be said—but it could also rebalance the distribution of power, giving national courts more influence on the Court's handling of legal questions that may come under advisory proceedings. It is important to keep in mind that under an advisory model, particularly one where a court seeks to anticipate conflict by providing legal guidelines, that court is not asked to resolve disputes. Such function, in other words, could be reserved for an international court's contentious function, so that the court's authority is better protected from the inevitable attacks that it will receive because of merely doing its job of holding states to account.

B. Human Rights and International Adjudication Revisited

As noted above, the experience of human rights courts—and international courts, in general—greatly determines the variation in how courts should use their advisory powers. I have explored the practice of the Inter-American Court of Human Rights, but further research should also examine the advisory role of other human rights courts, especially under the advisory models discussed in this Article; and more generally, of other international courts.

For example, the debates leading to the adoption of Protocol No. 16 in the European human rights system show that a core preoccupation among states was the enhancement of the Court's "constitutional role," and the interactions with national courts—once again, the notion of judicial dialogue.[223] The European human rights advisory model is thus predominantly a preventive, "anticipatory adjudication" model: the Court's powers are limited to guiding national courts, which may or may not follow the Court's opinion. But, precisely because the opinion that the Court gives is still a *legal* opinion, the prospect of national courts not following them is of course minimal.

Here, the distinction between contentious and advisory proceedings may be of less import than scholars and courts normally think. Andrew Guzman, for example, has hypothesized that the likelihood of compliance with a court's pronouncement may depend on whether "the tribunal's task is limited to opining on the legality of a particular action," or "determining what the violating party must do to remedy the violation."[224] In the first case, he notes, bindingness "makes no difference," whereas in the second case, "a binding judgment will be more effective than a nonbinding one."[225] Considering the ways in which regional human rights systems fashion the advisory role of courts, Guzman's hypotheses may need significant qualification: the European Court does not need to issue binding advisory opinions because it relies on the undisputed bindingness of domestic courts. In the case of the Inter-American Court of Human Rights, through a *non*-binding opinion, the Inter-American Court has had significant influence upon domestic courts. But, as explained, the Court has also put in peril its own authority by attempting to resolve a case when what it really needed to do was to anticipate potential conflict.

[223] *See* Council of Europe, Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms: Explanatory Report (n/d), *available at* https://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf.

[224] *See* Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171, 192 (2008).

[225] *Id.*

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Finally, if one considers the practice of the ICJ—which, as explained, is significantly different as it deals with sovereign equals—the two advisory models outlined above could also help the World Court articulate its advisory opinions; particularly, as the ICJ seems to engage with "legal questions" that resemble "international disputes." The fact that the ICJ, however, renders its opinions as a way of contributing to the tasks of UN organs, and does not direct remedies to be *applied* by them, may limit the ICJ's advisory role to a ruling through advice model that requires its own rationality, which is, for the reasons stated above, different in nature from the rationality of human rights courts. But the ICJ also "sends" its opinions out to the global community, which may use them in ways that the ICJ might not anticipate—as the ITLOS judgment of January 2021 shows.[226] In any event, analyzing the advisory practice of the World Court as one that blurs the distinction between contentious and advisory jurisdiction should provide insight to both the Court and its commentators. If anything, we may be witnessing an interesting return to the practice of the Court's predecessor, exactly a century ago.

VI. Conclusion

Human rights courts are the focus of significant scholarly attention. But most of that well-deserved attention focuses on contentious jurisdiction, despite the prevalent exercise by human rights courts of their advisory powers. Advisory powers are modeled after the ICJ's (and the PCIJ's) advisory role, yet human rights courts' advisory jurisdiction has taken a life of its own. To understand the contours of human rights advisory powers, it is helpful to differentiate between contentious and advisory proceedings, even if those differences might sometimes be hard to see, and then between different models of advisory jurisdiction. This Article has attempted to contribute to a larger conversation about international human rights adjudication, particularly in a context of resistance toward human rights courts. The case study presented here provides a good example of how a human rights court may confuse its advisory powers, and in so doing, may debilitate its authority, even if the court's findings are followed by domestic courts. The notion that advisory jurisdiction is simply a "non-binding" use of jurisdiction needs significant qualification.

[226] *See* Section II.A *supra*.

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