The political question of human rights. Dissent by judge Raúl Zaffaroni in OC-26/20

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1. *Introduction*

International Courts are often challenged by accusations that they overstep their mandates due to engagement with political questions; this issue is further made complex when cases involve human rights. This article discusses Judge Zaffaroni's dissent in Advisory Opinion OC-26/20, first presenting his concern for the alleged controversial scope of the advisory opinion, then marking a trend towards increased resort to courts (including the ICJ) in cases involving Venezuela, as well as instrumentalization of human rights within polarized political debates on Venezuela, followed by a review of the risk of humanitarian intervention, and finally evaluating the puzzle of how courts approach political questions related to human rights.

2. *The risk of misappropriation of Advisory Opinions*

Judge Zaffaroni's introductory statement to his dissent in Advisory Opinion OC-26/20 declares that he believes that Colombia presented the request for an advisory opinion to address the concrete case of Venezuela's withdrawal of recognition of jurisdiction of the Inter-American Court of Human Rights. He noted that direct references were made to Venezuela in the public hearing and that no other state within the region was pursuing such measures at the time. He reminds the Court of the principle that its advisory function should not be utilized to provide a parallel process for concrete cases that pertain to the contentious process.

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Article 64 of the American Convention on Human Rights sets forth the scope of jurisdiction of the Court as pertaining its advisory function:

> '1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.
> 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.'

Judge Zaffaroni explained that a state or OAS institutional actors may seek the Court's advisory opinion as pertaining the interpretation of a legal text before taking a legislative action or whether to maintain regulations or change an action in order to avoid a status of illegality. In short, he noted that 'the exercise of the advisory function of the Court should have the objective of prevention violations of the American Convention on Human Rights, that is, avoiding violations and eventual contentious cases that may result from them.'[1] He states that the current request for the advisory opinion is not likely able to prevent human rights violations in Colombia, since it has not indicated that it intends to withdraw from the jurisdiction of the court, nor are other states seeking to take such action. Furthermore, he opines that the advisory powers of the Court are insufficient to prevent any future international illegal action taken by Venezuela, given that Colombia can only take preventive measures through the collective guarantee mechanisms that are political in nature and alien to the Court.[2] This may suggest that the OAS Permanent Council, the OAS Secretary-General, the OAS General Assembly, the Lima Group, the UN Security Council and other actors are more appropriate institutions to address the situation in Venezuela.

Nevertheless, Judge Zaffaroni expresses deep concern for polarization among the states within the region on the situation in Venezuela, evidenced by acrimonious statements by state officials, diplomats, and international actors (including the most powerful interests) at the highest

[1] Para 3.
[2] Para 5.

level. In his view, the request for the advisory opinion addresses the most serious controversial international conflict within the continent. He warns that although the request for the Advisory Opinion is cloaked in technical, legal terms, it common knowledge that all law is politics (as judicial decisions are acts of power), but that not all politics is law. He notes the degree of virulence of the Venezuelan context is such that it overwhelms the potential political impact of any legal discourse and that it manifests itself as an inter-state conflict. Judge Zaffaroni believes that the field of international human rights does not have the aim of resolving inter-state conflicts, that is the domain of public international law and international affairs. He alarmed that the Opinion of the Court may be wielded as an armament within stark international political confrontations between powerful actors.

3. *Law & politics in cases involving Venezuela and the legitimacy of Courts*

This concern is similar to that held by ICJ Judge Bennouna in his dissent in the Question of Jurisdiction case Arbitral Award of 3 October 1899 *Guyana v Venezuela (18 December 2020)* in which the ICJ majority found jurisdiction to determine the validity of the 1899 Arbitral Award and definitively settle the boundary dispute between Guyana and Venezuela. Venezuela contested the jurisdiction of the ICJ and refused to participate in judicial proceedings, indicating that it preferred to resolve the dispute by way of political negotiation.[3] The boundary dispute extends to the maritime field, which underscores the interest of global oil companies that are planning to invest over 53 billion USD in the Stabroek block, where the Venezuelan Navy intercepted two vessels conducting seismic operations on behalf of the ExxonMobil company in 2018, forcing it to suspend its activities.[4] Judge Bennouna explained how taking on the political case would have a negative impact on the legitimacy of the Court:

[3] Letter from Jorge Arrezea addressed to President of the ICJ Judge Yusef (24 July 2020) <www.icj-cij.org/public/files/case-related/171/171-20200724-OTH-01-00-EN.pdf>.

[4] 'ExxonMobil to dominate deepwater Stabroek block offshore Guyana Spending', Offshore (14 February 2020) <www.offshore-mag.com>; G Chetwind, 'Opinion: Venezuela Ramps up Pressure over Guyana after ICJ Ruling, Upstream Online' (11 January 2021) <www.upstreamonline.com>; 'Venezuelan Navy Confronts Exxon Oil

> 'The Court should have been all the more attentive in examining its jurisdiction and in interpreting the Geneva Agreement, as this is a dispute with a high political and emotional impact, concerning as it does the validity of the Arbitral Award of 3 October 1899 regarding the boundary between Venezuela and Guyana, from a time when the latter was still a colony of the United Kingdom. In my view, it is only through a rigorous interpretation of the consent of the Parties to its jurisdiction that the Court will enhance its own credibility and the trust it enjoys among States parties to the Statute' (para 13).

Similarly the dissent by ICJ Judge Gevorgian indicates disquiet with the ICJ's engagement in the inter-state dispute:

> '28. The dangers of the Court's approach are well illustrated by its ultimate conclusion that the Court has jurisdiction over the question concerning the "definitive settlement of the land boundary dispute" between Guyana and Venezuela. This would be a decision of potentially enormous significance for the Parties, and thus the fact that the Court bases its finding of jurisdiction to make this decision upon an instrument that contains no compromissory clause and does not even mention the Court is cause for concern.
> 29. Rather than basing itself upon an unequivocal, indisputable indication of Venezuela's consent, as its jurisprudence requires, the Court goes looking for reasons to exercise jurisdiction, relying in particular on the presumed intentions of the Parties and upon a series of statements that are, at best, of ambiguous meaning. The Court ignores language in the text of the Geneva Agreement that squarely contradicts its position and is unable to point to any express statement evidencing either consent to this Court's jurisdiction or an acknowledgment that the Secretary-General's choice of the means of settlement is legally binding. In my view, this approach is wrong and undermines the fundamental principle of consent by the parties to the jurisdiction of the Court.[5]

Ship in Guyana Border Dispute' Reuters (23 December 2018) <www.reuters.com/article/us-guyana-venezuela-oil/venezuela-navy-confronts-exxon-oil-ship-in-guyana-border-dispute-idUSKCN1OM0BK>; and 'ExxonMobil halts Guyana Work on Venezuela Brush' Argus (24 December 2018) <www.argusmedia.com/en/news/1817202-exxonmobil-halts-guyana-work-on-venezuela-brush>.

[5] Futhermore, ICJ Judge Tomka issued a declaration which noted the need for participation by Venezuela in order for the Court to be able to successfully fulfill the mandate of peaceful settlement of the dispute: '7. It is important for the Parties to understand that, should the 1899Arbitral Award be declared null and void by the Court, as argued by Venezuela, the Court will be in need of further submissions, in the form of evidence and arguments, about the course of the land boundary, in order for it to fully resolve the

At the same time, there has been an escalation in recourse to courts by Maduro's regime, Guaido's representatives, and other state actors. For example, one may consider the involvement of courts after a UN Security Council Meeting on 10 April 2019 in which Venezuela called upon the UK to explain the failure of the Bank of England to release its holdings of 1 billion USD Venezuelan gold bullion to the Maduro regime to which the UK representative retorted that the Bank of England was independent and not subject to instruction by the UK government.[6] The UK Court of Appeals found itself addressing a case in which the Bank of England was requested to release its holdings of Venezuelan gold by both the Maduro regime and Guiado's representatives, requiring the Court to examine to what extent the UK government engaged in actions confirming continued recognition of Maduro as the *de facto* head of state of Venezuela in spite of its *de jure* support of Guiado.[7] Adding fuel to fire, the US Department of Justice indicted the Maduro regime with engaging in narco-terrorism and corruption.[8] The increased involvement of courts addressing the Venezuelan context is evidence of both the politicization of law and of the complexity of legal issues within political contexts.

4. *Human rights within political debates*

Judge Zaffaroni's concern for the Inter-American Court of Human Rights' potential role in highly political 'lawfare' appears to be based on the trend of political debates within OAS Permanent Council, the UN Security Council, and other international fora that base their discussions

"controversy". Without these submissions, the Court will not be in a position to determine the course of the disputed boundary between the two countries. In such event, the Secretary-General of the United Nations may be called upon once again to exercise his authority under Article IV, paragraph2, of the Geneva Agreement to choose another of the means of settlement provided in Article 33 of the Charter of the United Nations.'

[6] UN Security Council Meeting on the Situation in the Bolivarian Republic of Venezuela UN Doc S/PV.8506 (10 April 2019).

[7] *The 'Maduro Board' of the Central Bank of Venezuela v 'Guaidó Board' of the Central Bank of Venezuela*, UK Court of Appeal (Civil Division) judgment (5 October 2020) [2020] EWCA Civ 1249.

[8] M Spetalnick, SN Lynch, 'U.S. indicts Venezuela's Maduro, a Political Foe, for 'Narco-Terrorism' Reuter (26 March 2020) <www.reuters.com/article/us-usa-venezuela-maduro/u-s-indicts-venezuelas-maduro-a-political-foe-for-narco-terrorism-idUSKBN21D2A6>.

on an introduction in which a report on the situation of human rights is presented, in particular Venezuela.[9] In August 2019, the OAS Permanent Council passed a Resolution on the Human Rights Situation in Venezuela which 'strongly condemns the grave and systematic violations of human rights in Venezuela, including the use of torture, illegal and arbitrary detentions, extrajudicial executions, forced disappearances and the denial of the most basic rights and necessities, especially those related to health, food and education.'[10] The resolution was passed with 21 votes in favor (Argentina, The Bahamas, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, United States, Guatemala, Guyana, Haiti, Honduras, Jamaica, Panama, Paraguay, Peru, Dominican Republic, Saint Lucia and Venezuela), 3 votes against (Dominica, Nicaragua and Saint Vincent and the Grenadines), 7 abstentions (Barbados, Belize, Bolivia, Mexico, Saint Kitts and Nevis, Suriname and Trinidad and Tobago) and 3 countries absent (Antigua and Barbuda, Grenada and Uruguay). It calls for an independent investigation to pursue accountability measures for the human rights violations. The Inter-American Court of Human Rights majority view in the Advisory Opinion calls for OAS member states 'to cooperate to achieve investigation and judgment of severe human rights violations and thereby eradicate impunity', thereby promoting the application of human rights procedures.[11] The Lima Group called for the evidence of human rights violations in the UN report on the situation in Venezuela be used by the ICC to investigate the Maduro regime.[12] This

[9] On Venezuela, within the UN: see Statement by Under-Secretary Rosemary Di Carlo to the UN Security Council Open Debate on the Situation in Venezuela (26 January 2019) <https://dppa.un.org/en/security-council-open-debate-situation-venezuela-under-secretary-general-rosemary-dicarlo> and <https://news.un.org/en/story/2019/01/1031382>; 'UN Political Chief calls for Dialogue to Ease Tensions in Venezuela, Security Council Divided over Path to End Crisis' UN News (26 January 2019) <www.ohchr.org/Documents/Countries/VE/A_HRC_44_20_AdvanceUneditedVersion.pdf>; UN Human Rights Council, Report of the UN High Commissioner for Human Rights, 'Human Rights in the Bolivarian Republic of Venezuela' UN Doc A/HRC/41/18 (9 October 2019) <https://undocs.org/en/A/HRC/41/18>.

[10] OAS Permanent Council, Resolution on the Human Rights Situation in Venezuela CP/RES. 1133 (2244/19) (28 August 2019).

[11] Para 173.

[12] E Szklarz, 'Lima Group Requests Using Human Rights Violations as Evidence in International Criminal Court' Dialogo (8 December 2020) <https://dialogo-americas.com/articles/lima-group-requests-using-human-rights-violations-as-evidence-in-international-criminal-court/>. The Lima Group is composed of Argentina, Brazil,

was supported by the OAS Secretary-General, Luis Almagro, who published a report criticizing the ICC prosecutor for failing to open an investigation on crimes against humanity in Venezuela.[13]

It is notable that the Lima Group is opposed to the use of humanitarian intervention to remove Maduro from power. The UN Security Council debate on Venezuela in April 2019 was polarized, as some members (led by the US) called for humanitarian assistance to assist the Venezuelan people, while the Venezuelan government (supported by Russia) warned of the guise of humanitarian intervention in violation of state sovereignty.[14] In 2020, the OAS Permanent Council rejected the Parliamentary Elections held in Venezuela as fraudulent.[15]

5. *The risk of humanitarian intervention*

Judge Zaffaroni signals the unique situation within the region as some states have recognized the claims of Guiado over that of Maduro and there has been a significant risk of armed intervention. He suggests that the Advisory Opinion of the Court risks being misapplied to justify humanitarian intervention or a 'just war', as human rights is subjected to 'techniques of neutralization of values' to discredit objections to the use

Canada, Chile, Colombia, Costa Rica, Guatemala, Honduras, Mexico, Panama, Paraguay, St. Lucia, and Peru.

[13] OAS, 'Fostering Impunity, The Impact of the Failure of the Prosecutor of the International Criminal Court to Open an Investigation into the possible commission of crimes against humanity in Venezuela' OEA/Ser.D/XV.23 (2 December 2020) <www.oas.org/documents/eng/press/Crimes-Against-Humanity-in-Venezuela-II-ENG.pdf>; and OAS, 'Report of the General Secretariat of the Organization of American States and the Panel of Independent Experts on the Commission of Possible Crimes Against Humanity in Venezuela' OEA/Ser.D/XV.19 (29 May 2018) <www.oas.org/documents/eng/press/Informe-Panel-Independiente-Venezuela-EN.pdf>.

[14] UN Meeting Coverage and Press Release SC/13771 'Briefers Paint Dire Picture of Venezuela, Describing Worsening Situation there as Unparalled in Latin America's Modern History' (10 April 2019) <www.un.org/press/en/2019/sc13771.doc.htm>.

[15] Resolution Rejection of the Parliamentary Elections Held on December 6 in Venezuela (Adopted by the Permanent Council at its virtual special meeting held on 9 December 2020) OEA/Ser.G CP/RES. 1164 (2309/20) rev. 1 (10 December 2020) and Recent Illegitimate Supreme Court Decisions in the Bolivarian Republic of Venezuela CP/RES. 1156 (2291/20).

of force and subject to propaganda manipulations.[16] He does not refer to modern cases, instead invoking the 1864 War of the Triple Alliance in which Argentina, Brazil, and Uruguay decimated Paraguay's population to demonstrate the devasting irony of severe violence pursued in the name of humanitarianism or liberation. However, one need only recall that in 2008 Colombia invoked human rights to justify its targeted killing of the FARC leader Raul Reyes in Ecuador, (thereby presenting an early version of 'unable and unwilling' to prevent terrorism exception to sovereignty used to legitimize violation of territorial integrity in an expanded interpretation of self-defense) within the debate in the OAS Permanent Council. Hence, there is recent empirical support for Zaffaroni's cautionary perspective.[17]

6. *Political question v human rights*

Zaffaroni warns that '. . .(W)hen the judges fall into the trap of taking charge of a conflict of a pure political nature, as they cannot finally resolve it, the discredit for the lack of a solution falls on them and, in that manner, pure politics - always impious - is responsible for holding them accountable to national or international public opinion and avoiding its own responsibility.'[18] This view hints at possible concern that the Court is perhaps seeking to appear strong in reaction to Venezuela's denouncement of the jurisdiction of the Court. The strategy to address a case based exactly on the Venezuelan context, cannot be hidden by the majority's drafting of a tight, technical overview of human rights accountability relating to other sources of law beyond the American Convention. Zaffaroni is concerned that this decision will backfire and negatively impact the legitimacy of the Court even more than Venezuela's original resistance in the form of denouncement of the American Convention in

[16] He cites GM Sykes, D Matza, 'Techniques of Neutralization: A Theory of Delinquency' (1957) 22 American Sociological Rev 664-670 as well as Goebbles' nine principles of propaganda.

[17] See C Bailliet, 'The "Unrule" of Law: Unintended Consequences of Applying the Responsibility to Prevent to Counterterrorism, A Case Study of Colombia's Raid in Ecuador', in C Bailliet (ed), *Security: A Multidisciplinary Normative Approach* (Brill 2009).

[18] Para 28.

2012. Judge Zaffaroni calls for reflection on the circumscribed mandate of the Court:

> 'Judging and punishing human rights violations is the function of this Court, as well as preventing them, always insofar as possible and within its competence. But at the level of social reality – which is what international *Humanist* law is connected to as it develops its doctrine and jurisprudence – the jurisdiction of this Court, like that of any judge and tribunal in the world, must admit the existence limits to its "imperium", that is, to recognize what it can solve and enforce and control, to distinguish it from what – although it decides – it will not be able to enforce or whose consequences it will not be able to control, no matter how many warnings that in as far as they are formulated, because it is not in their hands to do so, since they belong to the realm of "pure" politics. Jurisdictional decisions that sought to resolve conflicts of a purely political nature and, therefore, did not take into account the limits of their "imperium", which clearly escaped the control of its political effects, have too often been fatal in history, being enough to recall the consequences of "Dred Scott v. Sandford" (60 US 393) of 1856.'[19]

Zaffaroni cites the Dred Scott decision of the US Supreme Court that denied African Americans citizenship according to the Constitution. Yet, this is an example of a court rejecting activist emancipation as the Court surveyed the legislation of the different states and found that African Americans were not granted citizenship in most of them. This resulted in divisive national debate leading to the Civil War and eventual adoption of the 14th Amendment to the Constitution, granting African Americans citizenship rights. Dred Scott is considered to be the most illegitimate decision ever made by the Court because of Court's failure to act in an enlightened manner in defense of human dignity. The US Supreme Court managed to restore its legitimacy when it declared racial segregation in schools to be unconstitutional in Brown v. Board of Education, 347 U.S. 483 (1954), thereby demonstrating the Court's capacity to actively emancipate a marginalized group from majoritarian oppression. In other words, the Supreme Court restored its clout by actively resolving a political-legal case. Hence, Zaffaroni's use of the example is problematic.

[19] Para 30.

An additional point is that the Court's decision to confirm the existing human rights obligations of states that have denounced the jurisdiction of the court does not negatively impact the OAS Secretary-General, Permanent Council, and General Assembly interests in seeking a peaceful resolution to the situation in Venezuela. The fact that the Advisory Opinion restates the fact that government actors may be held accountable before international criminal court or a human rights committee for severe human rights violations amounting to international crimes according to other human rights sources beyond the American Convention appears to be a straight-forward normative consultation and is not adding anything novel to the debate already promoted within the OAS Permanent Council and General Assembly, Lima Group, or UN Security Council. Indeed, Venezuela self-referred its situation to the International Criminal Court, alleging that US sanctions against Venezuela amounted to crimes against humanity, given the humanitarian situation.[20] Furthermore, it is likely that the majority of the Court believes there is little risk precisely because Venezuela has already denounced the American Convention and the jurisdiction of the Court, hence it has little incentive to show deference. The majority may be inclined to determine there is little risk of backlash as well as scant evidence of the Maduro regime improving the human rights situation in Venezuela. On the contrary, the Court appears to be seeking to support the process of political resolution of the Venezuelan situation precisely through the exercise of the advisory opinion which underscores the principle of universal human rights accountability.

However, Zaffaroni concludes that the Court does not have the scope of authority to resolve the most) significant international conflict within the region and risks that its legal advisory opinion may be manipulated for use within the battle for power. Judge Zaffaroni summarizes his analysis:

> '(a) (T)he questions that are addressed to this Court refer to the particular case of the separation of the State of Venezuela from the continental system; (b) the consultation does not respond to the preventive objective that enables the advisory jurisdiction of the Court in accordance with

[20] G Nia, R Diamanti, 'How to hold Venezuela's Maduro Accountable for Human Rights Abuses' Just Security (28 April 2020) <www.justsecurity.org/69877/how-to-hold-venezuelas-maduro-accountable-for-human-rights-abuses/>.

> Article 64 of the American Convention; (c) the separation of the State of Venezuela from the system is part of the largest conflict that arises today in regional international politics between States; (d) even if it is drafted in accordance with the law and issued with the most prudent warnings, it will inevitably be read in a functional way by any of the contesting actors in the international political struggle; (e) given the magnitude and virulence of the conflict, there is a serious danger that what was prudently warned and legally stated by this Court could be manipulated and distorted to legitimize eventual acts of violence; (f) the magnitude of the political conflict with respect to the State of Venezuela makes it clear that it is a clear case of pure international politics, with respect to which the Court lacks the practice of "imperium" to control the political consequences of any perverse employment and biased of this Opinion".[21]

This dissent advocates avoidance of political cases, thereby underscoring the difficult balance the Court has to manage when exercising its advisory opinion.[22] Nevertheless, the majority of the Court's reasoning is tightly constrained to focus on normative consultation, rendering Zaffaroni's disquietude largely moot. The primary aim of the Advisory Opinion is not to resolve the situation in Venezuela, but rather to confirm legal standards of accountability within human rights in the context of denouncement of the Convention, hence its contribution is that of legal clarification. Similar to the ICJ in the Advisory Opinion in *The Wall* case, the Inter-American Court of Human Rights narrowly examines a legal issue pursuant to legal reasoning, irrespective of the background of a delicate political context.[23] A point of reflection is raised by Judge Pazmiño Freire who provided a critique in his partial dissent that the Inter-American Court of Human Rights had drafted an Advisory Opinion which was too narrow on account of its alleged failure to fully analyze the principle of representative and participatory democracy as part of the Inter-American Public Order.[24] However, had the Majority concentrated on this issue, it would have changed the character of the Opinion by addressing

[21] Para 32.

[22] C Bailliet, 'The Strategic Prudence of the Inter-American Court of Human Rights-Rejection of Requests for an Advisory Opinion' (2018) 15 Brazilian J Intl L 255-277.

[23] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 para 41.

[24] The Majority addresses this principle in para 72.

the most politically sensitive debate relating to the Venezuelan context. The Court appears to recognize that its output is limited to the substantiation of human rights rules rather than explicit restoration of peace and justice within the region, however the Majority suggests that its corroboration of the relevance of human rights (substance and procedures) and its support of diplomacy offer support to this larger aim.[25] Another point of concern is that the Majority's encouragement of OAS member states to pursue investigation and prosecution of human rights abuses to combat impunity within the State as well as to pursue diplomatic endeavors to have the State return to the Inter-American system appears to concretely relate to the situation of Venezuela, giving some weight to Zaffaroni's objection, but at the same time discounting it as it seeks not impede political negotiation (similar to the ICJ's position in The Wall Case).

7. *Conclusion*

Judge Zaffaroni's dissent underscores the complexity facing international tribunals at present. The challenge for courts is to remain both relevant and legitimate in an age of political instability. Thus far, engagement by the international community with the conundrums presented by the regression of human rights and democracy within the region has varied from stalwart to delicate approaches. Specifically, the Court benefits from nuanced assessments of the function of its advisory opinions as well as their impact. The remaining conundrum is what options remain when neither the legal nor political processes are able to provide solutions to protracted humanitarian crises?

[25] Para 174.