Chapter 5: Legal nature and effects of advisory opinions

Much has already been written about the legal nature and effects of advisory opinions, especially in relation to the PCIJ and ICJ, but also in relation to the IACtHR.[961] In general international law, the question whether such opinions are binding or not and which other kinds of effects they can have seems relatively settled, since the ICJ has continuously stated that its opinions are not legally binding, and today's literature treats them quite unanimously as non-binding – albeit authoritative – statements of the law.[962]

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961 See especially: Hudson, *The Permanent Court of International Justice: 1920–1942: A Treatise* (n 115) p. 455 et seq; Goodrich, '*The Nature of the Advisory Opinions of the Permanent Court of International Justice*' (n 153) p. 738–758; Charles de Visscher, '*Les avis consultatifs de la Cour Permanente de Justice Internationale*' (1929) 26 Recueil des Cours, 23–51; Démètre Negulesco, '*L'Evolution de la Procedure des Avis consultatifs de la Cour Permanente de Justice Internationale*' (1936) 57 Recueil des Cours, 64–80; Salo Engel, *'La Force obligatoire des Avis Consultatifs de la Court Permanente de Justice Internationale'* (1936) 17 Revue de Droit International et de Legislation Comparee, 768–800; Edvard Hambro, '*The Authority of the Advisory Opinions of the International Court of Justice*' (1954) 3 International and Comparative Law Quarterly, 2, 21–22; Pratap, p. 227–234; Keith (n 67) p. 195–222; Aljaghoub (n 63) p. 116–121; Kolb (n 65) p. 1094–1102; Guevara Palacios (n 12) p. 285–363; Roa (n 13) p. 96–100; Pedro Nikken, 'La Función Consultiva de la Corte Interamericana' in Antônio A. Cançado Trindade (ed), *Memoria del Seminario El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI, Vol. I* (2nd edn IACtHR, 2003), 161, 176; Juan Hitters, *'¿Son vinculantes los pronunciamientos de la Comisión y de la Corte Interamericana de Derechos Humanos? (control de contitucionalidad y convencionalidad)'* (2008) 10 Revista Iberoamericana de Derecho Procesal Constitucional, 131–156; Zelada (n 262) p. 29–33.

962 ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, I.C.J. Reports 1950, p. 65, 71; *Judgments of the Administrative Tribunal of the International Labour Organisation upon complaints made against the United Nations Educational Scientific and Cultural Organisation*, Advisory Opinion of 23 October 1956, I.C.J. Reports 1956, p. 77, 84; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations,* Advisory Opinion of 15 December 1989, I.C.J. Reports 1989, p. 177, 188f, para. 31; Reiterating its statement in the *Peace Treaties* opinion: ICJ, *Western Sahara*, Advisory Opinion of 16 October 1975, I.C.J. Reports 1975, p. 12, 25 para. 31*;* ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004 p. 136, 156 para. 47; Shaw, *Rosenne's Law and Practice of the International Court 1920–2015, Vol.*

However, with regard to the IACtHR, the picture is not as clear. Whereas the Court in its early years followed the same approach as the ICJ, its position has changed over the years and since the adoption of OC-21/14 it demands that states also perform the conventionality control on the basis of its advisory opinions.[963] Hence, at least the majority of the Court has pushed for a higher degree of bindingness of the advisory opinions. Therefore, the question of the legal nature and effects of advisory opinions merits further exploration.

The term "legal nature and effects" is used in order to approach the question as broadly and unprejudiced as possible, given that both nature and effects were or still are controversial, and that both definitions are mutually dependent. Especially at the beginning of the League era, when advisory opinions where not yet known in international law, it was not even settled whether the Court would exercise jurisdiction, and hence a judicial function, in issuing advisory opinions or whether the advisory opinions were rather only political recommendations.[964]

Thus, the term "legal nature" refers to the very basic definition of what an advisory opinion actually is under international law today. It also encompasses the question of legal bindingness.

The term "effects" is more expansive. It does not stop at the question of bindingness but also addresses other obligations or consequences advisory opinions may imply. At least at the outset, the term "effects" cannot be clearly limited to "legal effects", since especially in the early debates on the legal nature and effects of advisory opinions, the opinion's factual effects have always been used to draw conclusions on the question of the opinion's legal effects and *vice versa*. Yet, when this chapter turns to today's discussion of the legal nature and effects of the advisory opinions

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III: Procedure (n 463) p. 1768; Gerald G. Fitzmaurice, *'The Law and Procedure of the International Court of Justice: International Organizations and Tribunals'* (1952) 29 British Yearbook of International Law, 1, 54; Aljaghoub (n 63) p. 119; Karin Oellers-Frahm, *'Lawmaking Through Advisory Opinions'* (2011) 12 German Law Journal, 1033, 1047; d'Argent, 'Art. 65' (n 73) mn. 48; Teresa F. Mayr and Jelka Mayr-Sing, *'Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law'* (2016) 76 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 425, 429 *et seq*. See also the description on the ICJ's website: https://www.icj-cij.org/en/advisory-jurisdiction.

963 OC-21/14 (n 320) para. 31. As to the development of the Court's position see *infra*: Chapter 5, Section B.III.

964 See *supra*: Chapter 2, Section A and B.V.

of the IACtHR, the focus will lie on the determination of the opinions' *legal* effects under international law. While some important domestic court decisions are examined in order to determine the advisory opinions' legal effects, it would have gone beyond the scope of this work to also analyze all the factual effects – that is the actual impact – of the IACtHR's advisory opinions as this would have required a closer look at all the different national jurisdictions and the advisory opinions' reception in the various states.[965]

Before the debate on the legal nature and effects of the IACtHR's advisory opinions is examined, this chapter seeks to recapitulate the discourse and state of research as to the legal nature and effects of advisory opinions in general international law in order to show the parallels and to highlight the unique aspects of the legal discourse in the inter-American context.

The subsequent analysis of the older and more recent views expressed with regard to the advisory opinions of the IACtHR starts with an introduction into the Court's doctrine of conventionality control as a necessary prerequisite for the following discussion of the legal effects of the Court's advisory opinions.

A. Legal nature and effects of advisory opinions under general public international law

As was shown above, the concept of advisory opinions, as incorporated in the ACHR, was derived from international law and not from any specific national law experience.[966] Therefore, the assessment of the legal nature and effects of advisory opinions rendered by other former or contemporary international courts is important for the evaluation of the IACtHR' advisory opinions, as such an assessment may indicate how the Convention's drafters conceived the legal nature and effects of the future Court's advisory opinions.

965 As to existing works on the advisory opinions' reception in the domestic orders see *infra*: (n 1225).

966 See *supra*: Chapter 2, Section B. and C.

I. Permanent Court of International Justice

As mentioned above, during the times of the League of Nations, it was at first disputed whether the PCIJ should as a court of law and justice be at all allowed to issue advisory opinions.[967] When the Court then, notwithstanding these general reservations towards its advisory function, started to render advisory opinions, and when it did so as a full Court in a judicial procedure that resembled very much that of contentious proceedings[968], it became accepted that the advisory opinions were different from mere legal advice by a counsellor.[969] They were considered authoritative statements of the law by a court, and therefore of judicial character. What is more, it also became apparent, that the advisory opinions rendered by the PCIJ were highly respected and normally adhered to not only by the League's organs but also by states.[970] The success of the advisory function of the new international court, highlighted both by the number and frequency of the advisory opinions rendered and by their practical effects, triggered a new debate that no longer hinged on the judicial character of the opinions, but instead on their legal force.

Although nearly all authorities were unanimous on the formal legal non-bindingness of the opinions, there was disagreement as to the extent to which this formal legal non-bindingness was at all important in light of their immense practical effects, and whether this formal legal non-bindingness was not completely outweighed by the high moral bindingness and the actual practical effects of the opinions.

967 See *supra*: Chapter 2, Section B.V.

968 Already the first Rules of Court of the PCIJ of 1922 provided for a regulated advisory procedure and deliberations by the full Court. See: PCIJ, *Rules of Court*, adopted on 24 March 1922, Series D No. 1, Articles 71ff.

969 See as to the differentiation between the role of purely advising committees or persons and the advisory function of the Court and the resulting higher authority of opinions from a Court the discussion in the first Committee to the Assembly of the League of Nations in: (1928) 65 LNOJ, Special Supplement, p.46, Mr. Politis at p. 47 and Mr. Limburg at p. 52; For the retrospective view see also ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Dissenting Opinion of Judge Winiarski, I.C.J. Reports 1950, p. 89.

970 Marika G. Samson and Douglas Guilfoyle, 'The Permanent Court of International Justice and the 'Invention' of International Advisory Jurisdiction' in Christian J. Tams and Malgosia Fitzmaurice (eds), *Legacies of the Permanent Court of Justice* (Martinus Nijhoff Publishers, 2013) p. 41, 53–57; Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 330–341.

On the one hand there were authorities stressing the formal, strictly legal point of view. The most vocal and prominent representative of this opinion was the later judge of the PCIJ, Hudson. Throughout the years, commenting on the advisory function of the PCIJ, Hudson reiterated in more or less similar words:

> *"An advisory opinion given by the Court is what it purports to be. It is advisory. It is not in any sense a judgment […], nor is it a decision […]. Hence it is not in any way binding upon any State, even upon a State which is especially interested in the dispute or question to which the opinion relates. Though such a State may have submitted written or oral statements to the Court […], such statements possessed only the character of information; the State presenting them did not […] thereby subject itself to an exercise of the jurisdiction by the Court. The Court itself is therefore without power to impose obligations on any State by the conclusions stated in an advisory opinion […]. Nor is the body which had requested the opinion legally bound to accept those conclusions; the Council or the Assembly will not proceed illegally if it opposes the opinion given […]. Though the authority of the Court is not to be lightly disregarded, it gives to the Court's opinion only a moral value."*[971]

He further remarked that neither the assimilation of the advisory to the contentious procedure, nor the reception accorded to the opinions, and not even the fact that none of the Court's opinions had been ignored by the Council of the League was able to change the advisory opinion's legal character.[972]

It was not only held that the opinions had only "moral force", but furthermore that they did not constitute *res judicata* and that they had "no value as precedents".[973] Hudson only reluctantly acknowledged that the Court itself, in the *Eastern Carelia* case, had contradicted such a view of

971 Hudson, *The Permanent Court of International Justice: 1920–1942: A Treatise* (n 115) p. 455f.

972 Hudson, *The Permanent Court of International Justice: 1920–1942: A Treatise* (n 115) p. 456f.

973 Read (n 77) p. 193; Hudson, *The Permanent Court of International Justice: 1920–1942: A Treatise* (n 115) p. 456.

its advisory opinions by finding that giving an opinion would have been "substantially equivalent to deciding the dispute between the parties".[974]

This formal view on the merely advisory and moral force of the opinions was backed by the intentions of the drafters of the Covenant. A note by the British delegation, who had been mainly responsible for the insertion of the future Court's advisory function into Article 14, stated:

> *"[…] but of course the opinion of the Court will have no force or effect unless confirmed by the Report of the Council or Assembly. It therefore in no way introduces the principle of obligatory arbitration."*[975]

Furthermore, it was underscored that the requesting organs also had to take into account other factors than just the legal aspects of a conflict, as the request for an advisory opinion did not liberate them from the ultimate responsibility they bore for the cases that were submitted to them.[976] Moreover, the assumption that the opinions were obligatory would ultimately lead to a multiplication of difficulties.[977]

On the other hand there were authorities, first and foremost Judge de Visscher, who in contrast to Hudson and the other authorities just cited, put more emphasis on the *de facto* legal force of the opinions than on their theoretic non-bindingness. De Visscher held that

> *"[…] within the limits of the legal questions it has put to the Court, the Council is necessarily bound by the Court's opinion. It is to close one's eyes to reality to persist in asserting that an opinion of the Court is no more binding on the Council than a consultation of a committee of jurists or a*

974 PCIJ, *Status of Eastern Carelia*, Advisory Opinion of 23 July 1923, Series B No. 5, p. 7, 29; Hudson, *The Permanent Court of International Justice: 1920–1942: A Treatise* (n 115) p. 456.

975 Miller, *Drafting of the Covenant, Vol. I* (n 136) p. 416. Already in the first draft article providing for an advisory function of the future court, contained in the British Draft Convention of 20 January 1919 it was stated that "Where the Conference or the Council finds that the dispute can with advantage be submitted to a court of international law, or that any particular question involved in the dispute can with advantage be referred to a court of international law, it may submit the dispute or the particular question accordingly, and may formulate the questions for decision, and may give such directions as to procedure as it may think desirable. ***In such case, the decision of the Court shall have no force or effect unless it is confirmed by the Report of the Conference or Council.***" [Emphasis added]. See: Miller, *Drafting of the Covenant, Vol. II* (n 135) and also Beg (n 78) p. 17.

976 Engel (n 961) p. 800.

977 Engel (n 961) p. 800.

> *report drawn up by a commission of experts. Nothing is more futile than trying to maintain a theoretical position against the evidence of constant and, as we shall see, perfectly reasoned practice.*"[978]

Thus, de Visscher went so far as to hold the Council of the League in fact bound by the advisory opinions issued by the PCIJ. Outside the legal scope determined by the Court's opinions, the political organs remained free to act how they thought it was appropriate, but within the limits interpreted by the Court there was no possibility for the Council to ignore or to even deviate from what the Court had stated.[979]

Judge Sánchez de Bustamante y Sirven did not go as far as de Visscher, but he, too, stressed that it was practically impossible for the Council or the Assembly of the League not to follow an advisory opinion of the Court that they themselves had requested.[980] That the majority of the Court itself tended to take the practical view of de Visscher was not only demonstrated by its attitude in the *Eastern Carelia* case outlined above, but also by a report formulated by a Committee composed of the three judges Loder, Moore and Anzilotti on the matter of the inclusion of national judges *ad hoc* in advisory proceedings. The report contained the following passage:

> "*The Court, […] assimilated its advisory procedure to its contentious procedure; and the results have abundantly justified its action. Such prestige as the Court today enjoys as a judicial tribunal is largely due to the amount of its advisory business and the judicial way in which it has dealt with such business. In reality, here there are in fact contending parties, the difference between contentious cases and advisory cases is only nominal. The main difference is the way in which the case comes before the Court, and even this difference may virtually disappear, as it did in the Tunisian case.* ***So the view that advisory opinions are not binding is more theoretical than real.***"[981]

978 de Visscher (n 961) p. 46. [translated from French by the author].

979 de Visscher (n 961) p. 26.

980 Antonio Sánchez de Bustamante y Sirven, *El Tribunal Permanente de Justicia Internacional* (Editorial Reus, 1925) p. 242 para. 251.

981 Report of the Committee appointed on 2 September 1927 contained in PCIJ, Series E No. 4, Fourth Annual Report of the Permanent Court of International Justice (June 15th, 1927 – June 15th, 1928), p. 76. [Emphasis added]. In continuation of that Report the Court decided to insert in Article 71 a new paragraph 2 allowing the application of Article 31 of the Statute when a question posed in an advisory request related to an existing dispute between two or more States. Based on the

The legal force and practical effects, as well as the ensuing consequences of such advisory opinions were also the subject of controversial debates in the first Committee to the Assembly of the League of Nations. The Norwegian representative observed that the Court's opinions had "no binding force from the legal point of view" and the representative from the Netherlands held that "it would be perfectly possible" for the Council, against its hitherto existing practice, not to follow the opinion of the Court.[982]

Yet, the Greek representative pointed out that "the distinction between law and fact [had to be] observed", that the Court "owing to a rather too complete assimilation of the procedure followed in advisory matters to that followed in contentious matters [...] had come to invest its advisory opinions with their indirectly binding moral force", and that owing to the similarity of the procedures the Court's opinions were "in point of fact, equivalent to a judgment" which ultimately meant that they were "binding".[983]

The respect for the *de facto* legal bindingness or at least very high moral force of the Court's advisory opinions in the League era went so far that some authorities claimed that the decision to request an opinion of the Court had to be taken with the consent of the parties potentially affected by the opinion as these states would otherwise be subjected under the compulsory jurisdiction of the Court against their will.[984]

Contrary to Judge Hudson[985], Judge Negulesco held that the assimilation of the advisory to the contentious procedure, including the procedural rights of interested states, had increased the opinion's authority[986]

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new amended rule, judges *ad hoc* were appointed in six advisory proceedings. For further information see Pratap (n 113) p. 30, 203 *et seq*.

982 (1928) 65 LNOJ, Special Supplement, p. 46, 52 (Mr. Castberg and Mr. Limburg).

983 (1928) 65 LNOJ, Special Supplement, p. 46–47 (Mr. Politis).

984 (1928) 65 LNOJ, Special Supplement, p. 47, 48; Arnold D. McNair, '*The Council's Request for an advisory Opinion from the Permanent Court of International Justice*' (1926) 7 British Yearbook of International Law, 1, 13; Goodrich, '*The Nature of the Advisory Opinions of the Permanent Court of International Justice*' (n 153) p. 754, 758.

985 Hudson, *The Permanent Court of International Justice: 1920–1942: A Treatise* (n 115) p. 455f.

986 On this see as well Goodrich, '*The Nature of the Advisory Opinions of the Permanent Court of International Justice*' (n 153) p. 744.

and "rendered illusory the non-obligatory character of the advisory opinions".[987]

In sum, all the circumstances taken together – the assimilation of the advisory to the contentious procedure, the high percentage of requests relating to an existing dispute, the attempt to gain an unanimous vote in the Council before submitting a request to the Court, and finally the high approval and enforcement rate of the advisory opinions of the PCIJ – lead to the conclusion that with regard to the League era, the prediction already made in 1920 by a member of the Advisory Committee of Jurists "that in practice both [judgments and advisory opinions] would have the same force"[988] was proven accurate.

II. International Court of Justice

The constituent provisions on which the exercise of advisory jurisdiction by the ICJ is based are very similar to those of its predecessor. Hence, one could have assumed that the ICJ would continue to follow the approach of its predecessor of assimilating, at least as far as possible, the advisory to the contentious function, which had led to a very high respect for the PCIJ's advisory opinions.

Accordingly, in the *Peace Treaties* case, several judges pointed out in their separate and dissenting opinions that the case was similar to the *Eastern Carelia* case and therefore should have been treated in the same way.[989] Following the line of argument of de Visscher during the League era, they argued that the difference between advisory opinions and judgments "should not be overestimated" and that advisory opinions too had undeniable effects on states, which is why the Court could not deal with requests relating to a concrete dispute pending between two states without

987 Negulesco (n 961) p. 80. Translated from the original French statement "Toutes les garanties judiciaires qui s'offrent aux Etats intéressés conduisent à *rendre illusoire le caractère non obligatoire de l'avis consultatif*" [emphasis added].

988 PCIJ, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, 16 June – 24 July 1920, p. 225, Mr. de Lapradelle.

989 ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, Dissenting Opinion of Judge Zoričić, I.C.J. Reports 1950, p. 98, 103; Dissenting Opinion of Judge Krylov, I.C.J. Reports 1950, p. 105, 109; Separate Opinion of Judge Azevedo, I.C.J. Reports 1950, p. 79, 87, 88; Dissenting Opinion of Judge Winiarski, I.C.J. Reports 1950, p. 89, 90–91.

that states' consent.[990] This would lead to an introduction of "compulsory jurisdiction through the indirect channel of advisory opinions".[991]

The majority of the Court, however, took a different point of view and held in the *Peace Treaties* case:

> *"[t]he consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such,* ***it has no binding force****."*[992]

In light of this disagreement within the Court, it was remarked that while "[t]he Court wrote a prologue for the future, the minority wrote an epilogue for the past."[993] In fact, whereas the ICJ continued to follow the advisory practice established by its predecessor in many respects, the use of the advisory function still markedly changed during the UN era compared to that of the League era.

While individual judges have, as shown, certainly pointed to the significant practical effects advisory opinions can have[994], the ICJ as a whole has always taken a formalistic approach and has laid more emphasis on the non-binding character of its opinions than its predecessor.[995] Disregarding the actual practical effects the opinions have, or at least had during the League era, the ICJ only underlined their formal non-obligatory character.

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990 ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, Dissenting Opinion of Judge Krylov, I.C.J. Reports 1950, p. 105, 106.

991 ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, Dissenting Opinion of Judge Winiarski, I.C.J. Reports 1950, p. 89.

992 ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, I.C.J. Reports 1950, p. 65, 71, [emphasis added].

993 Leo Gross, '*The International Court of Justice and the United Nations*' (1967) 120 Recueil des Cours, 313, 416.

994 See in addition to the separate and dissenting opinions in the Peace Treaties case cited in n 989 also: ICJ, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, Dissenting Opinion of Judge Koretsky, I.C.J. Reports 1962, p. 253, 254 and Dissenting Opinion of Judge Moreno Quintana, I.C.J. Reports 1962, p. 239, 240;

995 ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, I.C.J. Reports 1950, p. 65, 71. See also the similar statement in ICJ, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations,* Advisory Opinion of 15 December 1989, I.C.J. Reports 1989, p. 177, 188f, para. 31.

With regard to advisory opinions concerning treaties, the contracting parties of which have agreed to accept the opinions of the Court under that treaty as binding, the Court has made clear that "[s]uch effect of the Opinion goes beyond the scope attributed by the Charter and by the Statute of the Court to an Advisory Opinion".[996] Hence, although the Court accepts that states may, for themselves, decide to regard opinions as binding, it treats these so-called 'compulsive' or 'binding' opinions as any other advisory opinion. In the *ILO Administrative Tribunal* opinion, it accordingly stated that "the fact that the Opinion of the Court is accepted as binding provides no reason why the Request for an Opinion should not be complied with".[997] This highlights the Court's view that even if a requested advisory opinion will affect the interests of a state, that state's consent will not be decisive for the Court's decision of whether to comply with the request or not, as the advisory opinion is pursuant to the Court's Statute not legally binding.

The view of the Court as to the legal nature and effects of its opinions is also highlighted by a statement made in the *South West Africa* cases with regard to the opinions of its predecessor. The Court noted that "[the Council] could of course ask for an advisory opinion of the Permanent Court but that opinion would not have binding force, and the Mandatory could continue to turn a deaf ear to the Council's admonitions."[998] This statement confirms the Court's different perception as to what the judges of the PCIJ maintained in their report of 1927.[999]

It is unclear whether this formalistic approach was taken based on the actual conviction of the majority of the judges that the Court's Statute and Rules so demanded, or whether this approach was knowingly chosen in order to be able to justify the answering of requests that were submitted to the Court without the consent of the states mainly concerned.

Next to the emphasis on the non-binding character, it was also the closer integration of the ICJ into the UN, compared to the relation of the PCIJ

996 ICJ, *Judgments of the Administrative Tribunal of the International Labour Organisation upon complaints made against the United Nations Educational Scientific and Cultural Organisation*, Advisory Opinion of 23 October 1956, I.C.J. Reports 1956, p. 77, 84.

997 *Ibid.*

998 ICJ, *South West Africa Cases (Ethiopia* v. *South Africa; Liberia* v. *South Africa),* Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports 1962, p. 319, 337.

999 See the text cited above and the corresponding n (981).

to the League of Nations, which contributed to the shift in the advisory practice. Being a UN organ itself, the ICJ was able to establish a new line of reasoning regarding the primary purpose of advisory opinions, which limited its discretion not to comply with advisory opinion requests. In the *Peace Treaties* opinion, the ICJ highlighted that the advisory opinions' primary purpose was to provide guidance to the requesting UN organs, and that the consent of states was thus not required as they were not directly addressed by the opinions.[1000]

Even more rigorously, the Court has since the *ILO Administrative Tribunal* opinion consistently held that only "compelling reasons" may lead the Court to refuse to give an opinion and thereby to refuse to help another UN organ or specialized agency to exercise its functions.[1001] At least since the *Chagos* opinion, however, it has been difficult to imagine what these "compelling reasons" might be.[1002] The Court has time and again found a way to justify why there were no compelling reasons in that particular case, and that it was only providing guidance to the General Assembly in order to help it to discharge its functions and that therefore the principle of consensual jurisdiction was not circumvented.[1003]

1000 *Cf.*: ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, I.C.J. Reports 1950, p. 65, 71.

1001 ICJ, *Judgments of the Administrative Tribunal of the International Labour Organisation upon complaints made against the United Nations Educational Scientific and Cultural Organisation*, Advisory Opinion of 23 October 1956, I.C.J. Reports 1956, p. 77, 86; ICJ, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, p. 151, 155; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, p. 136, 156, para. 44.

1002 ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, I.C.J. Reports 2019, p. 95.

1003 *Cf.*: ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, para. 85, citing para. 33 its 1975 *Western Sahara* advisory opinion. There, the ICJ had defined, that there would be a compelling reason if "to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent". The fact that the Court in *Chagos* did not held this requirement to be given despite the underlying bilateral border and sovereignty dispute between the United Kingdom and Mauritius led Judge Donoghue state in her dissenting opinion, that the "incantation" of the compelling reasons was "hollow". She found that the Court had "decided the very issues that Mauritius ha[d] sought to adjudicate, as to which the United Kingdom ha[d] refused to give its consent". See: *ICJ, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion of 25 February*

The fact that the Court ceased further assimilating the advisory to the contentious procedure but rather tried to, in the words of Judge Azevedo, "build a wall between the contentious and the advisory functions"[1004] is also highlighted by the use of judges *ad hoc* in the advisory proceedings. Whereas the PCIJ had held it to be necessary to change its Rules of Procedure in order to allow for such use, and whereas the current Rules of Procedure still provide for such possibility, the ICJ has only once allowed a state to appoint a judge *ad hoc*, and in recent proceedings states have apparently stopped trying to request such an appointment.[1005]

But it is not only that the Court has slightly changed its approach in advisory proceedings, it is also the UN organs' use of their right to make requests which differs from that of the organs of the League of Nations. While the Council of the League had always tried to submit requests by a unanimous vote, since 1946 several requests by UN organs have been adopted by simple majority votes which themselves did not even reflect more than 50 per cent of the Organization's membership.[1006]

2019, Dissenting Opinion of Judge Donoghue, I.C.J. Reports 2019, p. 261, 265–266 paras. 19, 21.

1004 ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, Separate Opinion of Judge Azevedo, I.C.J. Reports 1950, p. 79, 88.

1005 The PCIJ allowed judges *ad hoc* in several advisory proceedings, for more details see: Shaw, *Rosenne's Law and Practice of the International Court 1920–2015, Vol. III: Procedure* (n 463) p. 1728–1733. Before the ICJ, the matter of *ad hoc* judges was only raised in two advisory proceedings. In the *Namibia* opinion, South Africa's claim for a judge *ad hoc* was rejected by the Court in the Order of 29 January 1971, I.C.J. Reports 1971, p. 12, a decision which was criticized in several separate and dissenting opinions and also discussed by Judge Eduardo Jiménez de Aréchaga in *'Judges ad hoc in Advisory Proceedings'*, (1971) 31 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 697–711.
In the *Western Sahara* proceedings both Morocco and Mauritania requested the appointment of a judge *ad hoc*. The first request was granted, the second rejected. See: ICJ, *Western Sahara*, Order of 22 May 1975, I.C.J. Reports 1975, p. 6 *et. seq*.
In the *Wall* opinion Judge Owada remarked in his Separate Opinion that in his eyes Israel would have been allowed to appoint a judge *ad hoc* but that no claim had been made in this respect. See: ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion of 9 July 2004, Separate Opinion of Judge Owada, I.C.J. Reports 2004, 260, 266f para. 19. Also in the *Chagos* case, apparently neither the United Kingdom nor Mauritius asked for the appointment of a judge *ad hoc*.

1006 As to the very few exceptions in which the decision to request an advisory opinion of the PCIJ was not taken unanimously by the Council of the League see Pomerance, *The Advisory Function of the International Court in the League and U.N.*

This shift in the advisory practice by the ICJ and the UN organs, the refusal "to look behind the formal position" e.g. as regards requests adopted only by a "technical majority vote"[1007] and the lesser willingness of the Court to take account of state interests in advisory proceedings, and to therefore treat procedures relating to a pending dispute differently from requests not relating to such highly political questions, has led to some advisory opinions that have not been effective or in the eyes of some, have even been harmful.[1008]

While the respect for the Court's opinions within the international community has remained high, and the requesting organs have always welcomed the ICJ's advisory opinions and tried to adhere to them[1009], indi-

Eras (n 113) p. 219. As to the practice by the UN organs see Shaw, *Rosenne's Law and Practice of the International Court 1920–2015, Vol. II: Jurisdiction* (n 941) p. 1042f. As examples Shaw names the two requests of the World Health Organization and the General Assembly's request on the legality of the threat or use of nuclear weapons as well as the request leading to the Kosovo advisory opinion. Furthermore, one could also name the so far only request for an advisory opinion made by the Security Council which led to the *Namibia* Advisory Opinion of 21 June 1971. The according Security Council Resolution 284 was adopted by only 12 votes. The three abstentions included two permanent members of the Security Council. See: SC Res. 284 (1970) adopted at the 1550th meeting on 29 July 1970. *Cf.*: d'Argent, 'Art. 65' (n 73) mn. 12.

1007 Shaw, *Rosenne's Law and Practice of the International Court 1920–2015, Vol. II: Jurisdiction* (n 941) p. 1042.

1008 Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 365–369. In her eyes, the *South West Africa (Status)* and the *Expenses* advisory opinion of the ICJ were not only ineffective but detrimental to solving the underlying dispute. See also Shaw, *Rosenne's Law and Practice of the International Court 1920–2015, Vol. III: Procedure* (n 463) p. 1767 stating that "Several advisory opinions of undoubted legal strength have been quietly put aside when seen to have prejudiced the eventual solution of the problem".

1009 Usually, the General Assembly adopts a resolution welcoming the Court's advisory opinion. See for instance: UNGA, *Advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, adopted on 22 May 2019, UN Doc. A/RES/73/295; UNGA, *Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law*, adopted on 9 September 2010, UN Doc. A/RES/64/298; UNGA, *Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem*, adopted on 20 July 2004, UN Doc. A/RES/ES-10/15. In light of the repeated use of the same formulations in the GA Resolutions, Rosenne remarked, that they were not only political but also an indication of an emergent *opinio juris*. See: Shaw, *Rosenne's Law and Practice of the International Court 1920–2015, Vol. I:*

vidual states have reacted differently than during the League era, showing ignorance and reluctance to comply with international law as outlaid by the Court's opinions.[1010]

Hence, while the advisory opinions have still helped to clarify the state of the law in abstract terms, some of them, as for example the *Certain Expenses*, the *South West Africa (Status)*, the *Wall* and the *Chagos* opinions did not lead to the actual solution of the disputes underlying the requests.[1011]

The Court and the United Nations (n 151) p. 311 and also Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 371.

1010 *Cf.*: Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 365, 369; Jonathan Charney, 'Disputes Implicating the Institutional Credibility of the Court: problems of Non-Appearance, Non-Participation, and Non-Performance' in Lori F. Damrosch (ed), *The International Court of Justice at a Crossroads* (Transnational Publishers, 1987) p. 288, 298; Pomerance did however also note that the formal legal non-bindingness of advisory opinions was not "the crucial factor" for the lack of practical enforcement by states but that the compliance with the law stated in advisory opinions depended as in the case of binding judgments on the general "state's willingness to acquiesce in an adverse judicial ruling [...]." See Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 371. Notably, in contrast to today, in the League era, many requests for advisory opinions were referred to the PCIJ with the consent of the interested states which of course increased the chance of compliance from the outset. *Cf.*: Samson and Guilfoyle (n 970) p. 56, 65.

1011 ICJ, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, p. 151; International Status of South-West Africa, Advisory Opinion of 11 July 1950, I.C.J. Reports 1950, p. 128; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, p. 136; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, I.C.J. Reports 2019, p. 95; *cf.*: Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 367. As concerns the *Chagos* opinion it still remains to be seen, whether the United Kingdom will finally change its position. While Mauritius tries to use the *Chagos* opinion in its favor and while the ITLOS Special Chamber in a remarkable decision held that said opinion has "***legal effect***" and that "the United Kingdom's continued claim to sovereignty over the Chagos Archipelago is contrary to" the determinations made by the ICJ in the *Chagos* opinion, the underlying problem remains as of today unsolved as the United Kingdom continues to refuse to hand the disputed territory over to Mauritius. See as to this: ITLOS, *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean*, Preliminary Objections, Judgment of 28 January 2021, para. 246 [emphasis added]; Sarah Thin, '*The Curious Case of the 'Legal Effect' of ICJ Advisory Opinions in the Mauritius/Maldives Maritime Boundary Dispute*', EJIL:Talk!, 5 February 2021, available at: https://www.ejiltalk.org/the-curious-case-of-the-legal-effect-of-icj-advisory-opinions-in-the-mauritius-maldives

This in turn has also changed the perception of the advisory opinions. One could say that the Court has, in a way, disenchanted them. This is due to the fact that the high, if not legal then at least moral, force attributed to the opinions of the PCIJ was not only derived from the judicial procedure and the Court's convincing reasoning, but also from the fact that they indeed helped to settle disputes.[1012]

The advisory opinions of the ICJ are of course still regarded and respected as highly authoritative statements of the law[1013] and in the context of crisis, it is often suggested that an advisory opinion of the Court should be requested in order to obtain more legal clarity.[1014] Furthermore, it is still held, that "the practical difference between the binding force of a judgment [...] and the authoritative nature of an advisory opinion [...] is not significant" and that the UN organs are in so far bound by the Court's interpretations made in an advisory opinion as they are bound to

-maritime-boundary-dispute/; '*UN court rules UK has no sovereignty over Chagos islands*', BBC News, 28 January 2021, available at:https://www.bbc.com/news/world-africa-55848126.

1012 Samson and Guilfoyle (n 970) p. 56–57, 65; as to the reception of the advisory opinions of the PCIJ see in detail: Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 330–341.

1013 d'Argent, 'Art. 65' (n 73) mn. 49; Shaw, *Rosenne's Law and Practice of the International Court 1920–2015, Vol. III: Procedure* (n 463) p.1768 – 1771; Kolb (n 65) pp. 1094–1100; Aljaghoub (n 63) p. 155; Hugh Thirlway, *'Advisory Opinions'*, in Max Planck Encyclopedias of International Law (last updated April 2006), para. 1, available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e4?prd=EPIL; Oellers-Frahm (n 962) p. 1050–1052.

1014 For example it has been proposed to request an advisory opinion of the ICJ on the matter of migration: Achilles Skordas, *'The Missing Link in Migration Governance: An Advisory Opinion by the International Court of Justice'*, EJIL:Talk!, 11 May 2018, available at: https://www.ejiltalk.org/the-missing-link-in-migration-governance-an-advisory-opinion-by-the-international-court-of-justice/. Furthermore, before the General Assembly in 2023 indeed transmitted a request on obligations of states in respect of climate change to the ICJ, there where several proposals in that direction: Annalisa Savaresi *et al.*, '*Beyond COP26: Time for an Advisory Opinion on Climate Change?*', EJIL:Talk!, 17 December 2021, available at: https://www.ejiltalk.org/beyond-cop26-time-for-an-advisory-opinion-on-climate-change/; Michael B. Gerrard, '*Taking Climate Change to the International Court of Justice: Legal and Procedural Issues*', Climate Law Blog, 29 September 2021, available at: http://blogs.law.columbia.edu/climatechange/2021/09/29/taking-climate-change-to-the-international-court-of-justice-legal-and-procedural-issues/.

apply international law in the context of their actions.[1015] Yet, it nevertheless seems that the legal discourse today turns less on the question whether advisory proceedings should be further assimilated to contentious ones, presupposing that the opinions are in fact as binding as judgments as was the case in the League era. In contrast, the discussion rather turns on the question whether the Court and the UN organs should once again show more consideration for the interests of the relevant states in order to again increase the advisory opinion's effectiveness.

In order to prevent an impairment of the ICJ's authority and to maintain the high practical effects advisory opinions used to have, it has been proposed that the Court should make more use of its discretionary power to reject requests, and to look more closely at the motivation of the requesting organs and at the likelihood the final opinion will be complied with by the states most concerned.[1016]

The contrary view, however, takes the position that "the possibility of non-compliance is no reason for not exercising jurisdiction" and that "the issue of implementation does not affect the authority of the Court's opinions."[1017]

If it is not for the Court to act strategically, and to exercise judicial restraint, then one can still argue that the requesting organs should exercise

1015 Shaw, *Rosenne's Law and Practice of the International Court 1920–2015, Vol. III: Procedure* (n 463) p. 1702; Kolb (n 65) p. 1097–1099 with further references; In contrast to that view it has also been held that "Advisory opinions are not even binding in the negative sense" and that consequently "[a]ction contrary to the law found to exist in an opinion does not constitute a violation of international law". As to this opinion see: Oellers-Frahm (n 962) p. 1047.

1016 Derek Bowett, 'The Court's role in relation to international organizations' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (CUP, 1996) pp. 181–192. Raising the question and at least suggesting that she tends to affirm it: Michla Pomerance, 'The Advisory Role of the International Court of Justice and its 'Judicial' Character: Past and Future Prisms' in Sam Muller *et al.* (eds), *The International Court of Justice: Its Future Role after Fifty Years* (Martinus Nijhoff Publishers, 1997) p. 271, 318; Julie Calidonio Schmid, *'Advisory Opinions on Human Rights: Moving beyond a phyrric Victory'* (2006) 16 Duke Journal of Comparative & International Law, 415, 453, 455.

1017 Aljaghoub (n 63) p. 224; Malcolm N. Shaw, 'The Security Council and the International Court of Justice: Judicial Drift and Judicial Function' in Sam Muller *et al.* (eds), *The International Court of Justice: Its Future Role after Fifty Years* (Martinus Nijhoff Publishers, 1997) p. 219, 248–249; Keith (n 67) p. 232–233.

restraint, and request only opinions that are likely to be really useful in practice.[1018]

On the other hand, it should be for the organs themselves to decide with regard to which legal question they want to seek guidance from the Court, and one can find any clarification of the law useful or even "a form of implementation" whether the law so interpreted is thereafter complied with by states or not.[1019]

All in all, the shift in the advisory practice during the UN era, and the resulting change in the perception of the legal nature and effects of the opinions, shows that a broad interpretation of a court's advisory jurisdiction and a restrictive interpretation of its discretion to reject requests does not always go along well with an increase of the opinions' effectiveness and implementation rate.

III. Intermediate conclusion

The use of the advisory function during the UN era, and with it also the perception of the advisory opinion's legal nature and effects, has changed as compared to the League era, although the constituent provisions regulating the advisory function of the ICJ very much resemble those of its predecessor.

Given that many advisory proceedings in the League era dealt with actual inter-state disputes, both the PCIJ and the requesting League organs treated them very much like contentious cases. Not least, the decision to request an advisory opinion of the PCIJ was mostly taken unanimously by the Council of the League, which from the outset increased the likelihood of compliance with the final advisory opinion by the states concerned. This assimilation of the advisory to the contentious procedure, as well as the huge practical effects of the advisory opinions, led to the fact that the opinion's legal effects were, despite their formal non-bindingness, largely equated with the effects of judgments.

In contrast to its predecessor, the ICJ has continuously followed a more formalistic approach, and has abstained from treating advisory proceedings as if the result could be as binding as a judgment, and therefore impair the

1018 Pomerance, 'The Advisory Role of the International Court of Justice and its 'Judicial' Character: Past and Future Prisms' (n 1016) p. 320; Pratap (n 113) p. 270.

1019 Keith (n 67) p. 232; Shaw (n 1017) p. 249; Aljaghoub (n 63) p. 224, 227.

principle of consensual jurisdiction. At the same time, most decisions to request an advisory opinion of the ICJ were taken by the General Assembly only with a majority vote. This shift in the advisory practice has on the one hand allowed the Court to deal with matters that would not have come before it if a unanimous vote had been required for the request, or if the Court had rejected requests more easily on the grounds that the request would circumvent the principle of consensual jurisdiction. On the other hand, this changed use of the advisory function has led to some advisory opinions that remained practically ineffective, as the relevant states were unwilling to comply with the law as clarified by the ICJ.

The conclusions that can be drawn from this review of the advisory practice of PCIJ and ICJ, as well as its perception in literature, are twofold. First, two different ways by which one can look at the legal nature and effects of advisory opinions have become apparent. Both ways are not necessarily mutually exclusive. Rather, one needs to take both into account in order to get the full picture of the legal potential of advisory opinions.

To begin with, there is the formal or also positivistic point of view. According to that view, the legal nature and the ensuing legal effects of advisory opinions are to be derived from the relevant provisions in the constituent treaty and court statute. With regard to PCIJ and ICJ, it would appear that according to that view, the legal nature of the advisory opinions has remained the same under the UN Charter as under the Covenant of the League, given that the provisions regulating the advisory function of PCIJ and ICJ essentially remained the same. Article 59 ICJ Statute is not applicable to advisory opinions, and they do not produce any effects of *res judicata*. If one takes such a formal point of view, a court can also deal with requests the subject matter of which concerns states that have not consented to the advisory proceeding, given that the advisory opinions do not entail any legal obligations.

However, next to this formal point of view, there is also a more comprehensive or substantive way to look at the legal nature and effects of advisory opinions.[1020] Pursuant to this view, it is not enough to describe the legal effect of advisory opinions solely in the negative, as compared to that of judgments. Rather, other factors than just the formal legal nature as derived from the relevant provisions need to be taken into account. Only thereby

1020 As to the differentiation between a substantive and formal approach towards the legal effects of advisory opinions see also: Shaw, *Rosenne's Law and Practice of the International Court 1920–2015, Vol. III: Procedure* (n 463) p. 1767–1771.

can the legal value of advisory opinions and their potential to develop the law, to be complied with by states, and thus to produce actual practical effects, be adequately grasped and evaluated. These other factors are *inter alia* the legitimizing effect of the judicial proceeding, the authority and prestige of the court, the persuasiveness of the court's reasoning, the question whether it issues the opinion unanimously, and lastly the reception of the opinion not only by the requesting organ but also by other international law actors.[1021] Pursuant to that view, the difference between the nominal legal bindingness of a judgment and the authoritative nature of an advisory opinion is not so significant.[1022] The actual effect of any court ruling, whether formally binding or not, rather depends on many other factors.

This leads to the second conclusion that can be drawn from the above review, namely that any court with an advisory function as well as the requesting organs need to decide how they want to define and use the function depending on whether as many opinions as possible clarifying the law in the abstract are desired, or whether it is held to be more important that the few opinions given will be as effective as possible despite their formal legally non-binding character.

The approach followed by the ICJ and the UN organs has the advantage that it allows the issuance of opinions on questions relating to disputes that will probably never be treated in a contentious case, as at least one of the states involved has not consented to the Court's jurisdiction. This approach can be regarded as more progressive than that pursued by the PCIJ and the League organs, because the reduced consideration of unanimity and consent requirements, as well as other sovereignty interests, leads to more issues being subject to international regulation and dispute settlement and broadens the scope of possible matters to be dealt with in advisory opinions.

However, the side effect of such a broad understanding of the advisory function and the restrictive use of the court's discretion to reject requests, is that some of the opinions rendered will only have minimal practical effects. Although the authority of an advisory opinion does by far not only depend on the subsequent compliance by states and international organizations

1021 *Cf.*: Hambro (n 961) p. 21–22.

1022 *Cf.*: Shaw, *Rosenne's Law and Practice of the International Court 1920–2015, Vol. III: Procedure* (n 463) p. 1770.

with the law stated therein[1023], the authority of a court might nevertheless become impaired in the long run if none of its advisory opinions produces any practical effects.[1024]

On the other hand, a restrictive approach, as pursued by the PCIJ and the League organs, might in fact contradict the intention of the drafters if they had conceived of the advisory opinions only as a non-binding advice. Moreover, a more restrictive approach might foreclose to some extent the benefits that an advisory jurisdiction entails in contrast to a contentious jurisdiction, the exercise of which is dependent on the states' explicit subjection to it.

After having thus recapitulated the discourse on the legal nature and effects of advisory opinions rendered by the PCIJ and ICJ which has also highlighted how a court's conception of its advisory opinions may influence its practice of answering or declining requests, and moreover the reception and practical effects of its advisory opinions, the following second part of this chapter will examine how the discourse on the same question has developed in the inter-American context, and how the IACtHR's position as to the legal nature and effects of its advisory opinions has changed over the years.

B. Legal nature and effects of the advisory opinions of the IACtHR

At first glance, the discussion on the legal nature and effects of the advisory opinions of the IACtHR seems to be the same as the one in general international law concerning the legal nature and effects of the advisory opinions rendered by the PCIJ and later the ICJ.

Just like in the international debate, there are also authors in the inter-American discussion arguing for a legally binding effect of the opinions and others that attribute to them only a high moral force for constituting authoritative interpretations of the law rendered by the IACtHR, which

1023 *Cf.*: von Bogdandy and Venzke, *In Whose Name?: A Public Law Theory of International Adjudication* (n 19) p. 10 using the *Nicaragua* case of the ICJ as an example showing that the authority that a court decision gains does not only depend on whether it is complied with by the parties to that case.

1024 *Cf.*: Pomerance, 'The Advisory Role of the International Court of Justice and its 'Judicial' Character: Past and Future Prisms' (n 1016) p. 318–319; Samson and Guilfoyle (n 970) p. 65.

sees itself as "the ultimate interpreter"[1025] of the ACHR. Given furthermore that the concept of the IACtHR's advisory function was, as shown above, derived from general international law, and as the Court in its first advisory opinions very closely followed the advisory practice of the ICJ, one might think that no closer examination of the particular legal nature and effects of the IACtHR's advisory opinions was required, because they obviously had to be the same as those of the opinions rendered by the ICJ. However, on closer inspection, some differences between the advisory function as performed by the ICJ on the one hand and by the IACtHR on the other become apparent which are relevant for the determination of the IACtHR opinion's legal nature and effects.

First of all, the advisory opinions of the IACtHR cannot only be requested by OAS organs but also by states. This in turn also means that the OAS member states are also the direct addressees of the opinions, whereas the ICJ's opinions are not directly provided to states, but only to the requesting UN organ or specialized agency.

Secondly, the IACtHR is, though not an OAS organ, still an integral element of the inter-American human rights system, which today provides for a much higher degree of legal integration than is to be found at the international level among the UN member states.

Thirdly, whereas the opinions given by the ICJ concern many different international law questions, but mostly the interpretation of international treaties or customary international law that in most national legal systems do not have a special rank in the hierarchy of norms, the advisory opinions of the IACtHR center mainly on the interpretation of the ACHR, which by now enjoys constitutional rank in several contracting states or is of preferential application when it contains more favorable rights than the constitution.[1026]

1025 IACtHR, *Case of Almonacid-Arellano et al v. Chile*, Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 154, para. 124, *Case of La Cantuta v. Peru*, Judgment of 29 November 2006 (Merits, Reparations, and Costs), Series C No. 162, para. 173; OC-20/09 (n 925) para. 18.

1026 See: Constitution of Argentina, Article 75 (22); Constitution of Bolivia, Article 256 (generally human rights treaties have the same rank as laws, but if they contain more favorable rights than the Constitution, they enjoy preferential application); Constitution of the Dominican Republic, Article 74 (3); Constitution of Ecuador, Articles 424, 426; Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 9 May 1995, No. 2313–95, Exp. 0421-S-90, p. 6, para. 6; *idem*, *Sentencia de fondo* of 5 September 2000, No. 07818, Exp. 99–007428–0007-CO; Constitution of Colombia, Articles 93 and 94; Constitution of

Fourthly, in relation to the total number of member states, more OAS member states have recognized the contentious jurisdiction of the IACtHR, than UN member states have accepted the compulsory jurisdiction of the ICJ. This is relevant because states that have recognized the Court's contentious jurisdiction face a greater risk of being held responsible for a violation of international law if they have not complied with the law as previously outlined by the Court in an advisory opinion.

Fifthly, the special characteristic of the IACtHR's advisory function, namely that the Court's advisory jurisdiction *ratione personae* does not only include contracting states and those who have also accepted the Court's contentious jurisdiction, but all other OAS member states that are not contracting parties of the ACHR, raises specific questions which do not arise in such form in relation to the advisory function of the ICJ.

Lastly, the inclusion of the IACtHR's advisory opinions in the *material controlante*[1027] in the context of the Court's doctrine of conventionality control, which has been constantly further developed in recent years, raises the question whether the opinions' inclusion in the process of conventionality control leads to, or increases, a possible binding effect of the advisory opinions.

All these differences confirm that the opinions expressed regarding the legal nature and effects of advisory opinions in general international law cannot be applied *mutatis mutandis* to the advisory opinions of the IACtHR without considering the special characteristics of the incorpora-

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Guatemala, Article 46; Constitution of Mexico, Article 1(2) (*pro homine* principle) Constitution of Peru, final provisions, 4th stipulation and Constitutional Tribunal of Peru, Judgment of 24 April 2006, Exp. No. 047–2004/AI/TC; For further information on how international human rights treaties were given constitutional rank either through a constitutional reform or through the jurisprudence of the respective constitutional court see: Manuel E. Góngora-Mera, *Inter-American Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication* (IIDH, 2011) p. 160, 177; Manuel E. Góngora-Mera, 'The Block of Constitutionality as Doctrinal Pivot of a *Ius Commune*' in Armin von Bogdandy *et al.* (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (OUP, 2017) p. 235, 238f.

1027 OC-23/17 (n 4) para. 28; IACtHR, *Case of Cabrera García y Montiel Flores v. Mexico*, Judgment of 26 November 2010 (Preliminary Objection, Merits, Reparations and Costs), Series C No 220, Concurring Opinion of Ad hoc Judge Eduardo Ferrer Mac-Gregor Poisot, para. 49. As to the expression see: Néstor P. Sagüés, *'Las opinions consultivas de la Corte Interamericana de Derechos Humanos en el control de convencionalidad'* (2015) 50 Revista IUS ET VERITAS, 292.

tion of such a function into a regional and constantly developing human rights system.

Hence, it is worth examining the discussion on the question of the advisory opinions' legal nature and effects as it has developed over the years at the regional inter-American level.

In order to enter this investigation, it is appropriate to start examining how the advisory opinions' legal nature and effects were conceived by the relevant constituent legal instruments.

I. Legal nature and effects of the advisory opinions as conceived by the constituent instruments

Neither Article 64 nor any other provision on the IACtHR's advisory function explicitly regulates the opinions' legal nature and effects. However, an interpretation of the central provision of Article 64, including its context and drafting history, may shed light on how the legal nature and effects of the Court's advisory opinions were conceived when the Convention was adopted.

First of all, the term "advisory opinion", used in both the Court's Statute and in the Court's Rules of Procedure, and shortened to "opinions" in Article 64[1028], indicates that the Court's opinions were thought to be "advisory" and not "obligatory", i.e. legally binding. This is supported by the fact that the term was already known from the work of other international courts, and that, as shown above, the common perception of the advisory opinions at the international level at the relevant time was that they only constitute authoritative statements of the law, but that they are not as such legally binding.[1029]

Furthermore, a look at the provisions regulating the advisory functions of other international courts shows that the absence of a definition of the legal nature and effects of advisory opinions is rather the rule, and that the provisions on the IACtHR's advisory function are thus no exception in this regard. In contrast to this rule, Article 218 (11) TFEU, which in like

1028 As analyzed *supra* in Chapter 2, Section C.V., earlier drafts of Article 64 ACHR had contained the full term "advisory opinion" and it was only editorial reasons that led to the fact that the final Article 64 does not contain the full term "advisory opinion".

1029 See *supra*: Chapter 5, Section A.II. on the analysis of the legal nature and effects of the ICJ.

manner was already contained in Article 228 of the 1957 Treaty establishing the European Economic Community (Treaty of Rome), specifies that no agreement may enter into force in light of a negative opinion issued by the ECJ. This explicit mentioning of a binding effect might indicate that the term "opinion" is usually not associated with a binding effect unless it is explicitly stated as such. Today, only Article 5 of the Additional Protocol No. 16 to the ECHR deviates from this pattern as it expressly specifies that "[a]dvisory opinions shall not be binding".

Another fact that might explain why the legal nature and effects of advisory opinions have in most legal texts not explicitly been defined, is that the advisory function of courts has typically been defined in distinction to the contentious function. The systemic distinction drawn between binding judgments and non-binding advisory opinions is particularly visible in Articles 46 and 47 ECHR. While Article 46 ECHR under the headline "[b]inding force and execution of judgments" concludes the section on judgments, the provisions on advisory opinions are placed thereafter, confirming that the bindingness of judgments dealt with in Article 46 ECHR is not applicable to the concept of advisory opinions.

In the ACHR, this distinction is at first glance not as visible, but a closer examination reveals that the exercise of the two jurisdictional functions is also in the inter-American system clearly separated. Article 64, the legal basis for the IACtHR's advisory function, is placed without separate headlines together with Articles 61–63 in one section of the ACHR called "Jurisdiction and Functions". In particular, Article 62[1030], which in its first paragraph states that states parties may at any time declare to recognize as binding "the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention", could have been formulated more clearly, and did in fact lead to confusion at first.

In the OC-3/83 proceedings, Guatemala contended that in particular Article 62 (3) stating that "[t]he jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction" would also apply to advisory proceedings.[1031] Yet, the Court convincingly held that Article 62 (3)

1030 As to the full text of Article 62 see *supra*: (n 214).
1031 OC-3/83 (n 245) paras. 30, 35.

used the words "case" and "cases" only in their technical sense, and that it was thus only applicable to contentious proceedings.[1032]

This result is also confirmed by Article 2 of the Court's Statute.[1033] While said provision, by using the word "jurisdiction", highlights that the giving of advisory opinions also constitutes a judicial task, it establishes that Articles 61–63 are only applicable to the Court's contentious jurisdiction, and that the Court's advisory jurisdiction is only governed by Article 64.

Hence, also in the inter-American system, the advisory function has been defined in contrast to the contentious function, which consequently suggests that advisory opinions were not thought to be legally binding like judgments in contentious cases.

Had the drafters and contracting parties also intended the Court's advisory opinions to be binding – and as there are no parties, possibly binding on all OAS member states – they would have clarified that the exercise of the Court's advisory jurisdiction also requires the previous and explicit acceptance of the Court's jurisdiction. This is because otherwise all OAS member states would have become *ipso facto* subject to the Court's – in that scenario binding – advisory jurisdiction. It makes however no sense that the drafters only required such a declaration of acceptance of the Court's jurisdiction regarding the Court's contentious jurisdiction, but not regarding its advisory jurisdiction, if the latter had indeed been held to produce binding effects, too.[1034]

Not only with regard to the Court's jurisdiction pursuant to Article 62, but also with regard to the Commission's competence to receive inter-state communications in terms of Article 45[1035], the drafters and contracting parties opted for an optional, and not for a compulsory nature of the

1032 OC-3/83 (n 245) paras. 34–35.

1033 Article 2 of the Court's Statute states:
"Article 2. Jurisdiction
The Court shall exercise adjudicatory and advisory jurisdiction:
1. Its adjudicatory jurisdiction shall be governed by the provisions of Articles 61, 62 and 63 of the Convention, and
2. Its advisory jurisdiction shall be governed by the provisions of Article 64 of the Convention."

1034 *Cf.*: Eduardo Vio Grossi, *'El control de convencionalidad y la Corte Interamericana de Derechos Humanos'* (2018) 24 Anuario de Derecho Constitucional Latinoamericano, 311, 322–323.

1035 As to the full text of Article 45 see *supra*: (n 215).

inter-state complaint mechanism.[1036] In light of the discussions on these two provisions during the drafting process, it can be assumed that any proposal for a legally binding effect of the advisory opinions, without any possibility to opt out of the Court's advisory jurisdiction, would have found no majority among states. On the contrary, the fact that Article 64 was further broadened at the 1969 Specialized Inter-American Conference and then adopted without any further discussion[1037], supports the assumption that the drafters did not want to attribute to the final advisory opinions a stronger legal effect than that which was commonly attributed to the advisory opinions of the ICJ. For if a legally binding effect of the opinions had been considered, there would certainly have been controversial discussions about it.

In sum, a textual, systemic, and historical interpretation leads to the conclusion that the Court's advisory opinions were not thought to be legally binding, or at least not in the same sense as judgments in contentious cases. In any event, such a legally binding effect would have been difficult to devise, given that advisory proceedings normally lack defined parties and a specific dispute that could be finally decided.

Taking this starting point into account, any further discussion on the specific legal nature and effects that advisory opinions of the IACtHR might nevertheless have, thus depends on whether one considers the framework of the constituent provisions to be conclusive, so that any assumption of specific binding effects of advisory opinions would contradict the Convention, or whether instead, one thinks that the framework leaves space for doctrinal approaches attributing binding legal effects to the advisory opinions that are somehow different from the binding effects of judgments.

Before the discussion on the legal nature and effects of the IACtHR entertained by both, the Court and by legal academics, is thoroughly analyzed, the Court's doctrine of conventionality control will be explained. The different positions on the legal nature and effects of the advisory opinions, and especially their development over time, cannot be properly understood without having a basic knowledge and understanding of the

1036 OAS, Actas y Documentos, Conferencia Especializada Interamericana sobre Derechos Humanos, 7–22 November 1969, San José, Costa Rica, OEA/Ser.K/XVI/1.2, p. 339, 345; Hennebel and Tigroudja, *The American Convention on Human Rights: A Commentary* (n 203) Article 45 and Article 62, p. 1040–1043 and p. 1280–1282.

1037 See on this already *supra*, Chapter 2, Section C.V.

doctrine that has shaped the Court's work and its reception in academia and practice so significantly in the past years.

II. Introduction to the Court's doctrine of conventionality control

The emergence and consolidation of the doctrine of conventionality marks a turning point in the discourse on the legal nature and effects of the Court's advisory opinions.

In short, the doctrine of conventionality control requires "every public authority" of the contracting states of the ACHR to interpret the rules of domestic law "in accordance with the Inter-American *Corpus Juris*", and to refrain from applying those domestic laws that cannot be interpreted accordingly.[1038] The leading case for the establishment of this doctrine is the 2006 case of *Almonacid-Arellano v. Chile*.[1039] Yet, the theoretical basis for the creation of the doctrine had already been laid in the years before.[1040] In the following sections, the doctrine's origins, its legal basis and its jurisprudential development since the *Almonacid* judgment shall be briefly explained.[1041]

1. Origins and foundation of the doctrine

The doctrine of conventionality control is traced back to, and is said to have originated from, separate opinions of former Judge García Ramírez.[1042]

1038 González-Domínguez (n 328) p. 13.

1039 *Case of Almonacid-Arellano et al v. Chile* (n 1025) para. 124; González-Domínguez (n 328) p. 14.

1040 *Cf.*: González-Domínguez (n 328) p. 6.

1041 While there is much literature and many different interpretations of the conventionality control doctrine, this section mainly draws on the Court's interpretation as developed in its jurisprudence and as depicted *inter alia* by: González-Domínguez (n 328) in particular pp. 13–62; Eduardo Ferrer Mac-Gregor Poisot, 'The Conventionality Control as a Core Mechanism of the *Ius Constitutionale Commune*' in Armin von Bogdandy *et al.* (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (OUP, 2017) p. 321, 327–336; IACtHR, *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 7: Control de Convencionalidad*, available at: https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo7.pdf.

1042 Ferrer Mac-Gregor Poisot, 'The Conventionality Control as a Core Mechanism of the *Ius Constitutionale Commune*' (n 1041) p. 321, 327. Vasel (n 179) p. 160.

Indeed, it was García Ramírez who first used and coined the expression "*control de convencionalidad*" in several separate opinions.[1043] Although what he meant when speaking of "*control de convencionalidad*" at the time still differed from the concept that the Court was later supposed to establish under this name, García Ramírez' thoughts paved the way for the creation of the doctrine.

García Ramírez used the term "*control de convencionalidad*" when he compared the role of the IACtHR with that of national constitutional courts that perform a constitutionality control.[1044] Hence, when he used the term, he focused on a task that the IACtHR itself was supposed to perform in order to determine whether the act of a state was compatible with the ACHR or not. He did not yet focus on an obligation of domestic courts or other public authorities at the national level.

More important than the framing of the term was probably García Ramírez' understanding of the limits of the capacity of a regional human rights court and the ensuing necessity that the states parties to the system play an active role and implement the Court's decisions in order to allow the system to function efficiently. In his separate concurring opinion in the case of *Tibi v Ecuador* he held:

> *"Just as a constitutional court could not [...] bring before it all cases in which the constitutionality of acts and legal standards is questioned, an international human rights court does not have the aspiration – and has*

1043 IACtHR, *Case of Myrna Mack Chang v. Guatemala*, Judgment of 25 November 2003 (Merits, Reparations and Costs), Series C No. 101, Reasoned Concurring Opinion of Judge Sergio García Ramírez, para. 27; *Case of Tibi v. Ecuador*, Judgment of 7 September 2004 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 114, Separate Concurring Opinion of Judge Sergio García Ramírez, para. 3; *Case of López Álvarez v. Honduras*, Judgment of 1 February 2006 (Merits, Reparations and Costs), Series C No. 141, Concurring Opinion of Judge Sergio García Ramírez, para. 30; *Case of Vargas Areco v. Paraguay*, Judgment of 26 September 2006 (Merits, Reparations and Costs), Series C No. 155, Separate Opinion of Judge Sergio García Ramírez, para. 6. While Sergio García Ramírez in the original Spanish versions uniformly used the expression "*control de convencionalidad*", in the English versions the term was not immediately settled. In *Myrna Mack Chang v. Guatemala*, the English text speaks of "treaty control" and in *Vargas Areco v. Paraguay* of "control of compliance" while in *Case of López Álvarez v. Honduras* the term was literally translated as "control of conventionality".

1044 *Case of Myrna Mack Chang v. Guatemala* (n 1043), Reasoned Concurring Opinion of Judge Sergio García Ramírez, para. 27; and more clearly and vigorously: *Case of Tibi v. Ecuador* (n 1043), Separate Concurring Opinion of Judge Sergio García Ramírez, para. 3.

> *it even less so than the national body – of solving a large number of contentious cases that reproduce violations previously brought before it, and on whose essential themes it has already issued judgments […].*
> *It would be impossible, […] for it to receive a large number of contentious cases on identical or very similar facts, to reiterate, again and again, the criteria set forth in previous contentious cases.* ***We must insist that the States themselves, guarantors of the inter-American human rights system, are at the same time essential components of this system, in which they participate through a political and juridical will that is the best guaranty of the true effectiveness*** *of the international system for protection of human rights, based on the effectiveness of the domestic system for protection of those rights.*
> *[…]* ***[T]he rulings of the Court must be reflected,*** *[…] in domestic Law […][,] in domestic legislation, in domestic jurisdictional criteria, in specific programs in this field, and in the daily actions of the State regarding human rights; they must, ultimately,* ***be reflected in the national experience as a whole****."*[1045]

García Ramírez' separate opinion in *Myrna Mack Chang*, as well as an earlier article, disclose that his argumentation was actually based on a traditional international law perspective, namely that "[f]or the effects of the American Convention and of the exercise of the contentious jurisdiction of the Inter-American Court, the State is considered integrally, as a whole."[1046] Further, as the state was internationally responsible as a whole, the Court could not bind a specific state organ. Yet, at the same time, he already assumed that if it followed from the federal clause enshrined in Article 28[1047], and arguably also from Article 27 VCLT, that the federal structure of

1045 *Case of Tibi v. Ecuador* (n 1043), Separate Concurring Opinion of Judge Sergio García Ramírez, paras. 4–6 [emphasis added].

1046 *Case of Myrna Mack Chang v. Guatemala* (n 1043), Reasoned Concurring Opinion of Judge Sergio García Ramírez, para. 27; *cf.*: Sergio García Ramírez, '*El Futuro del Sistema Interamericano de Protección de los Derechos Humanos*' (2001) 101 Boletín Mexicano de Derecho Comparado, 653, 664.

1047 Article 28 of the Convention states:
"Article 28. Federal Clause
1. Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.
2. With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that

a state must not prevent that state from fulfilling its treaty obligations under international law, this had to be even more true as regards the separation of powers within a state.[1048]

Put otherwise, he was concerned that the responsibility of the state as a whole on the international level should not lead to some kind of "immunity" of some sectors of the state, but found that all of them were bound to enforce the Convention.[1049]

This look at the individual organs of the state and their respective responsibilities for the effective implementation and enforcement of the Convention then becomes even more clear in the above cited statement in García Ramírez' separate opinion in the *Tibi case*[1050], and is to be considered as one fundamental component of the later doctrine of conventionality control. It might be thus said that García Ramírez' views "opened the door for arguing the direct effect of the Convention on State authorities".[1051]

Apart from García Ramírez' doctrinal influence, other earlier developments in the Court's jurisprudence, in which not least former Judge Cançado Trindade had a large share, were also decisive for the emergence of the doctrine of conventionality control.[1052] Similar to García Ramírez, Cançado Trindade had already in 1997 stressed that not only the state's governments but all branches of a state were bound by the Convention, and that Article 2 required states to harmonize their domestic laws with the Convention.[1053]

He furthermore argued that Article 1 (1) through which "[t]he State Parties to [the] Convention undertake to respect the rights and freedoms

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the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.
3. Whenever two or more States Parties agree to form a federation or other type of association, they shall take care that the resulting federal or other compact contains the provisions necessary for continuing and rendering effective the standards of this Convention in the new state that is organized."

1048 García Ramírez, *'El Futuro del Sistema Interamericano de Protección de los Derechos Humanos'* (n 1046) p. 664. *cf.*: González-Domínguez (n 328) p. 47–48.

1049 García Ramírez, *'El Futuro del Sistema Interamericano de Protección de los Derechos Humanos'* (n 1046) p. 664; *cf.*: González-Domínguez (n 328) p. 47–48.

1050 *Case of Tibi v. Ecuador* (n 1043), Separate Concurring Opinion of Judge Sergio García Ramírez, para. 6.

1051 González-Domínguez (n 328) p. 47.

1052 *Cf.*: González-Domínguez (n 328) p. 45, 49–52.

1053 IACtHR, *Case of Caballero-Delgado and Santana v Colombia*, Judgment of 29 January 1997 (Reparations and Costs), Series C No. 31, Dissenting Opinion of Judge Antônio Augusto Cançado Trindade, paras. 6–10.

recognized [therein]", and Article 2, which requires the contracting states to adopt "legislative or other measures" when "the exercise of any of the rights and freedoms referred to in Article 1 is not already ensured", were "ineluctably intertwined".[1054]

While the Court had attached great legal force to Article 1 (1) as from its first contentious case of *Velásquez Rodríguez*, Article 2 was initially understood to play only a "marginal role in the Convention" by a majority of the judges.[1055] This changed when the Court under Cançado Trindade's presidency in the case *Súarez Rosero v Ecuador* began to use Article 2 to review the compatibility of domestic laws with the Convention *in abstracto*, that is, it maintained that the mere existence of a law that is *per se* incompatible with the Convention constitutes a breach of the treaty, irrespective of the concrete enforcement of the law.[1056]

In the case of "*The last Temptation of Christ*" the Court then cited an advisory opinion of the PCIJ in order to corroborate its finding that

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1054 *Case of Caballero-Delgado and Santana v Colombia* (n 1053), Dissenting Opinion of Judge Antônio Augusto Cançado Trindade, paras. 6–9. Articles 1 and 2 of the Convention state:
"Article 1. Obligation to Respect Rights
1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
2. For the purposes of this Convention, "person" means every human being.
Article 2. Domestic Legal Effects
Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

1055 OC-7/86 (n 325) Separate Opinion of Judge Rodolfo E. Piza Escalante, para. 27; IACtHR, *Case of Velásquez Rodríguez v Honduras*, Judgment of 29 July 1988 (Merits), Series C. No 4, paras. 164ff.; *cf.*: González-Domínguez (n 328) p. 20, 22; Laurence Burgorgue-Larsen, 'The Right to *ad intra* Enforcement of the Convention' in Laurence Burgorgue-Larsen and Amaya Úbeda de Torres (eds), *The Inter-American Court of Human Rights: Case Law and Commentary* (OUP, 2011) p. 253 mn. 11.08.

1056 IACtHR, *Case of Súarez Rosero v Ecuador*, Judgment of 12 November 1997 (Merits), Series C No. 35, para. 98; González-Domínguez (n 328) p. 27. As to Cançado Trindade's reasoning for this abstract review see also: IACtHR, *Case of El Amparo v Venezuela*, Judgment of 14 September 1996 (Reparations and Costs), Series C No. 28, Dissenting Opinion of Judge Antônio Augusto Cançado Trindade, para. 3.

customary international law obliges states to modify their domestic law in order to "ensure the proper compliance with the obligations it has assumed" under an international treaty.[1057] On the basis of Article 2 the Court therefore began to consistently review whether states had taken such measures and whether those measures were effective.[1058]

It was this shift in the use of Article 2 that formed the basis of the subsequent jurisprudence on amnesty laws that led from the *Barrios Altos* case to the *Almonacid* case, in which the doctrine of conventionality control was established for the first time.[1059]

In the famous *Barrios Altos* judgment, the Court did not only declare the Peruvian Amnesty Laws to be incompatible with the Convention and held Peru to be internationally responsible for breaching Articles 1 (1) and 2 by promulgating and applying the amnesty laws, but it went one step further, and declared the laws to lack any legal effect, hence, to be void *ab initio*.[1060]

From there it was only one further step to find in the subsequent case of *Almonacid*, which again dealt with amnesty laws, that if the legislative power of a state fails to harmonize the domestic law with the Convention as required by Article 2, it lies with the judiciary to refrain from enforcing laws that are incompatible with the Convention.[1061] Hence, the domestic judges need to exercise a sort of "conventionality control".[1062] As the *Almonacid* judgment put it:

> *"The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in*

1057 IACtHR, *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al) v Chile*, Judgment of 5 February 2001 (Merits, Reparations and Costs), Series C No. 73, para. 87, referring to: PCIJ, *Exchange of Greek and Turkish Populations*, Advisory Opinion of 21 February 1925, Series B No. 10, p. 20.

1058 *Cf.* instead of all: *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al) v Chile* (n 1057), paras. 83–90; *Case of Súarez Rosero v Ecuador* (n 1056), paras. 93ff.; *Case of Castillo Petruzzi et al v Peru*, Judgment of 30 May 1999 (Merits, Reparations and Costs), Series C No. 52, para. 207.

1059 See Burgorgue-Larsen, 'The Right to *ad intra* Enforcement of the Convention' (n 1055) mn 11.04ff; González-Domínguez (n 328) p. 26.

1060 *Case of Barrios Altos v Peru* (n 328), para. 44; *Case of Barrios Altos v Peru*, Judgment of 3 September 2001 (Interpretation of the Judgment of the Merits), Series C No. 83, para. 18; González-Domínguez (n 328) p. 30; as to the general effects, the Court attributed to this ruling in the Barrios Altos case see also: *Case of La Cantuta v. Peru* (n 1025), para. 189.

1061 *Case of Almonacid-Arellano et al v. Chile* (n 1025) para. 123.

1062 *Case of Almonacid-Arellano et al v. Chile* (n 1025) para. 124.

> *force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention*"[1063]

2. Legal basis of the doctrine

As has already become clear in the preceding paragraph on the origin of the doctrine, there does not exist any provision in the Convention which explicitly mentions the concept of conventionality control. Rather, the doctrine constitutes a "progressive and innovative interpretation"[1064] of a combination of various provisions of the Convention and international law principles.

First of all, it is based on Articles 1 (1) and 2 that oblige states to ensure to all persons subject to their jurisdiction the free and full enjoyment of the rights and freedoms enshrined in the Convention, and to harmonize their domestic laws in order to give effect to such rights. The innovative and dynamic interpretation lies in the fact that the Court pierces the veil of the state, that is, it does not see the state as a monolithic entity to be obliged by those provisions, but holds that all state authorities, especially the judiciary, are directly bound by the Convention's provisions, and calls upon them to enforce said provisions. Moreover, the Court found itself to be competent to review this enforcement, whereby it focuses especially on the effectiveness of the enforcement measures taken by states. Thus, the Court controls whether the "other measures" in terms of Article 2 that a state has taken were the right ones to give effect to the "rights or freedoms" recognized in the Convention.

1063 *Case of Almonacid-Arellano et al v. Chile* (n 1025) para. 124.
1064 González-Domínguez (n 328) p. 68.

In addition to Articles 1 (1) and 2, Judge Ferrer Mac-Gregor Poisot, who has been one of the most vocal drivers of the further development of the doctrine in the recent years, names Article 29 of the Convention, together with Articles 26 and 27 VCLT, as legal foundations of the doctrine.[1065] Article 29 prescribes that no provision contained in the Convention may be interpreted so as to restrict other pre-existing rights and freedoms which are derived from other legal sources.[1066] In particular Article 29 lit. b, which is understood to establish the *pro persona* or *pro homine* principle requiring all state authorities to always apply among different applicable provisions and interpretations those which are the most favorable to the individual, plays an important role in the Court's jurisprudence.[1067]

Furthermore, the conventionality control can be seen as a very consistent implementation of the principles of good faith, *effet utile*, *pacta sunt servanda* and the prohibition to invoke one's domestic laws in order to justify the non-compliance with an international treaty as established by Article 27 VCLT.[1068] Regarding Article 27 VCLT it has however been correctly

1065 Ferrer Mac-Gregor Poisot, 'The Conventionality Control as a Core Mechanism of the *Ius Constitutionale Commune*' (n 1041) p. 331–332.

1066 The full text of Article 29 of the Convention states:
"Article 29. Restrictions Regarding Interpretation
No provision of this Convention shall be interpreted as:
a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."

1067 OC-5/85 (n 363) para. 52; Eduardo Ferrer Mac-Gregor Poisot, *'Symposium: The Constitutionalization of International Law in Latin America: Conventionality Control: The new Doctrine of the Inter-American Court of Human Rights'* (2015–2016) 109 American Journal of International Law Unbound, 93, 96; González-Domínguez (n 328) p. 70; on the use of the *pro persona* principle see as well: Alejandro Rodiles, 'The Law and Politics of the *Pro Persona* Principle in Latin America' in Helmut P. Aust and Geord Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP, 2016) pp. 153–174 with further references.

1068 *Case of Almonacid-Arellano et al v. Chile* (n 1025) para. 125; In his Concurring Opinion attached to the cited *Almonacid* Judgment Antônio Augusto Cançado Trindade referred to what he had already held years before in his Dissenting

remarked that this provision had so far only been conceived of as a rule of international state responsibility, and actually never been intended to regulate the hierarchy between international treaties and domestic law, or to grant international treaties a direct effect in domestic law.[1069] Therefore, Article 27 VCLT alone can hardly serve as a legal basis for the doctrine of conventionality control. Only the idea underlying Article 27 VCLT might, when read in conjunction with the other named norms and principles, and if progressively interpreted, be understood to support the obligation to perform a conventionality control.

Ferrer Mac-Gregor Poisot moreover invoked Article 68 (1) as legal basis for the doctrine of conventionality control.[1070] However, while Article 68 (1), which prescribes that states must "comply with the judgment of the Court in any case to which they are parties", of course binds states to comply with the decisions the Court renders against them, the provision actually manifests the classical assumption that the Court's judgments are only binding *inter partes*.[1071] Therefore, it appears to be unsound to invoke said provision as a legal basis of the conventionality control, given that it is part of the doctrine to demand state authorities not only to enforce the judgments rendered against their own state, but also to take general account of the Court's jurisprudence and to adjust the domestic law accordingly.

More convincing is Ferrer Mac-Gregor's further assertion that the doctrine is also supported by Article 25 of the Convention, securing the right

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Opinion in the *Case of Caballero-Delgado* where he had already connected the duties arising under Article 1 (1) and Article 2 with the general principles of *pacta sunt servanda* and *effet utile*; see: *Case of Almonacid-Arellano et al v. Chile* (n 1025), Concurring Opinion of Judge Antônio Augusto Cançado Trindade, para. 25; Ferrer Mac-Gregor Poisot, 'The Conventionality Control as a Core Mechanism of the *Ius Constitutionale Commune*' (n 1041) p. 332; Ferrer Mac-Gregor Poisot, *'Symposium: The Constitutionalization of International Law in Latin America: Conventionality Control: The new Doctrine of the Inter-American Court of Human Rights'* (n 1067) p. 96.

1069 Fuentes Torrijo (n 327) p. 483, 489ff with further references as to the drafting of Art. 27 VCLT. See as well: Binder (n 328 p. 1203, 1216; Jorge Contesse, *'The final word? Constitutional dialogue and the Inter-American Court of Human Rights'* (2017) 15 I•CON, p. 414, 418–419; Dulitzky (n 262) p. 63.

1070 Ferrer Mac-Gregor Poisot, 'The Conventionality Control as a Core Mechanism of the *Ius Constitutionale Commune*' (n 1041) p. 332.

1071 *Cf.*: Raffaela Kunz, *Richter über internationale Gerichte* (Springer, 2020) p. 56; Juan A. Tello Mendoza, *'La doctrina del Control de Convencionalidad. Un pretendido cambio de paradigma en la región americana'* (2019) 37 Agenda Internacional, p. 159, 164.

to judicial protection.[1072] The importance of Article 25 and the right to effective judicial protection becomes evident when one recalls that the doctrine of conventionality control was established in the context of the jurisprudence against amnesty laws, the very basis of which it was to obstruct legal processing, including that of the most serious crimes, and to deny the victims an effective judicial remedy. A good faith interpretation of said provision might at least support the idea that domestic judges should refrain from enforcing laws that are manifestly incompatible with international human rights law. However, Article 25 as such does also not establish that the Convention prevails over domestic laws.[1073]

Irrespective of the original legal foundation, after more than 15 years since the establishment of the doctrine, one might argue that by now the performance of conventionality control by states constitutes a subsequent practice by the state parties of the Convention in the application of the treaty in terms of Article 31 (3) lit. b VCLT. However, even though various state organs have by now referred to the doctrine of conventionality control, and have also carried out some kind of conventionality control, the states' practice does not fully comply with the doctrine as postulated by the Court, and, moreover, the practice differs from state to state, and is not even with regard to specific domestic courts consistent.[1074] Hence, to date there does not seem to be a "common understanding [...] which the

1072 *Cf.*: Ferrer Mac-Gregor Poisot, 'The Conventionality Control as a Core Mechanism of the *Ius Constitutionale Commune*' (n 1041) p. 332. As to the role Article 25 played together with Articles 1.1 and 8 in Judge Cançado Trindade's concept of an effective right to access to justice which may have also contributed to the emergence of the doctrine of conventionality control see: González-Domínguez (n 328) p. 49–52.

1073 Dulitzky (n 262) p. 63.

1074 Juan A. Tello Mendoza, *El Control de Convencionalidad: Situación en algunos Estados Americanos* (Leyer, 2016) p. 169–182; *idem*, *El Control de Convencionalidad según la Corte Interamericana de Derechos Humanos y su difícil articulación con la noción del Estado Constitucional de Derecho* (Universitat de Barcelona, 2021), pp. 123–143; Karla I. Quintana Osuna, *El Control de Convencionalidad: Un Estudio del Derecho Interamericano de los Derechos Humanos y del Derecho Mexicano. Retos y Perspectivas* (Universidad Nacional Autónoma de México, 2017), p. 96–123, 247 final reflection No. 5; Alejandro Chehtman, *'International Law and Constitutional Law in Latin America'* (July 2018), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3207795 1–19 describing the alternating positions of the apex courts in several states regarding the normative force of the IACtHR's jurisprudence within their jurisdiction. The examples of Colombia and Peru mentioned *infra* in Chapter 5, Section B, IV.2.b) and cc) also exemplarily show that even courts that have once accepted the obligation to perform a conventionality

parties are aware of and accept" which according to the ILC is required for accepting an "agreement of the parties" in terms of Article 31 (3) lit. b VCLT.[1075]

The state practice relating to the conventionality control can of course still be taken into account as supplementary means of interpretation under Article 32 VCLT.[1076] Yet, such practice does not possess the same weight for the purpose of interpretation as subsequent practice in terms of Article 31 (3) lit. b VCLT, and as concerns the state practice relating to the doctrine of conventionality control, this weight is even further lowered in light of the lacking clarity and consistency of the relevant state practice.[1077]

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control, sometimes change their position or simply refrain from carrying out a conventionality control.

1075 *Cf.*: ILC, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries*, adopted at the seventieth session of the ILC in 2018, conclusion 10 (1), p. 75.
In light of the many still diverging understandings of the doctrine of conventionality control, and its neither uniform nor consistent implementation within the states, the claim that a regional customary rule was emerging, according to which all resolutions of the IACtHR were accepted to be binding, appears so far even more difficult to justify than a subsequent practice in terms of Article 31 (3) lit. b VCLT. This is because the contracting states that comply with the doctrine of conventionality control, and consequently also with the decisions of the IACtHR, are supposed to be acting under the ACHR and not in the believe that they are bound by, or contributing to the emergence of a new rule of customary international law. See: Juan A. Tello Mendoza, *El Control de Convencionalidad según la Corte Interamericana de Derechos Humanos y su difícil articulación con la noción del Estado Constitucional de Derecho* (Universitat de Barcelona, 2021), pp. 123–143 referring to and criticizing the claim of an emerging rule of customary international law made by Xiomara L. Romero Pérez, *Vinculación de las resoluciones judiciales de la Corte Interamericana* (Universidad Externado de Colombia, 2011) and see as well: ILC, *Report of the International Law Commission*, Sixty-eighth session, 2 May – 10 July and 4 July – 12 August 2016, UN Doc. A/71/10, p. 98, commentary to conclusion 9, para. 4; ICJ, *North Sea Continental Shelf (Germany v. Denmark and Germany v. the Netherlands)*, Judgment of 20 February 1969, I.C.J. Reports 1969, p. 3, 43, para. 76.

1076 ILC, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries*, adopted at the seventieth session of the ILC in 2018, commentary to conclusion 3, p. 27 para. 12; commentary to conclusion 4, p. 33, para. 23; Oliver Dörr, 'Article 31' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn Springer, 2018), mn 90 and *idem* 'Article 32' mn. 26.

1077 ILC, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries*, adopted at the seventieth

3. Jurisprudential development of the doctrine

Since the doctrine's establishment in the case of *Almonacid Arellano and Others v. Chile*, it has constantly been further developed by the Court.

a) Case of Aguado-Alfaro: *Ex officio* exercise within the spheres of competence

Only two months after the *Almonacid* decision, the Court confirmed this new doctrine in the cases *Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru* and *La Cantuta v. Peru*.[1078] While the Court in *La Cantuta*[1079], which like *Barrios Altos* and *Almonacid* concerned amnesty laws, simply reiterated what it had held in *Almonacid*, the decision in the *Aguado-Alfaro* case introduced two important doctrinal clarifications.[1080]

First, the Court found that the conventionality control should be exercised *ex officio* by the judiciary.[1081] Second, it added that the conventionality control should "evidently [be only exercised] in the context of [the judges'] respective spheres of competence and the corresponding procedural regulations."[1082] This latter clarification was intended to address the fact that there exist many different models of judicial review in the region.[1083] For instance, in countries in which judicial review is concentrated at the state's constitutional court, judges of lower authority courts cannot independently declare a domestic law to be void by simply referring to the IACtHR's jurisprudence. Yet, the clarification made in the *Aguado-Alfaro* case nevertheless

session of the ILC in 2018, commentary to conclusion 3, p. 27 para. 12; conclusion 9 and commentary thereto, p. 74, para. 12.

1078 *Case of La Cantuta v. Peru* (n 1025), paras. 173ff; IACtHR, *Case of Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru*, Judgment of 24 November 2006 (Preliminary Objections, Reparations and Costs), Series C No. 158, para. 128.

1079 *Case of La Cantuta v. Peru* (n 1025), paras. 173ff.

1080 *Cf.*: Ferrer Mac-Gregor Poisot, 'The Conventionality Control as a Core Mechanism of the *Ius Constitutionale Commune*' (n 1041) p. 327.

1081 *Case of Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru* (n 1078) para. 128.

1082 *Case of Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru* (n 1078) para. 128.

1083 Contesse, '*The final word? Constitutional dialogue and the Inter-American Court of Human Rights*' (n 1069) p. 419–420; Karlos Castilla Juárez, '*¿Control interno o difuso de convencionalidad? – Una mejor idea: la garantía de tratados*' (2013) 13 Anuario Mexicano de Derecho Internacional, p. 51, 70–71.

failed to prevent further criticism to the effect that the doctrine forces national judges to exceed their competences under national law, and that it takes no account of the distribution of power in national legal systems.[1084] To date, it continues to be discussed how the doctrine shall be correctly implemented by states.[1085]

b) Case of Boyce *et al.*: Conventionality control includes constitutional norms

One year later, in the case of *Boyce et al. v. Barbados*, the Court made it clear that all norms pertaining to the domestic legal system, including the constitution, had to be included in the conventionality control.[1086] It ascertained that the Barbadian courts had only controlled the constitutionality of the domestic provisions in dispute, and had failed to also control the conventionality of said provisions.[1087] Given this failure to undertake a proper conventionality control, the Court found a violation of Articles 2 and 1(1) of the Convention in relation to Articles 4 (1) and (2) and 25 of the Convention.[1088] The latter Articles were affected in this case because the provision of the Barbadian domestic law that was held to be incompatible with the Convention had provided for a mandatory death penalty in case of a murder conviction.[1089]

c) Case of Radilla Pacheco: Duty of consistent interpretation

A further concretization of the doctrine's content followed in the case of *Radilla Pacheco v. Mexico*. While the earlier cases of *Almonacid* and

1084 Álvaro Paúl, '*The Emergence of a More Conventional Reading of the Conventionality Control Doctrine*' (2019) 49 Revue Générale de Droit, p. 275, 285; Contesse, '*The final word? Constitutional dialogue and the Inter-American Court of Human Rights*' (n 1069) p. 414, 420–421.

1085 See instead of all Paúl (n 1084) p. 275–302 with further references.

1086 IACtHR, *Case of Boyce et al. v. Barbados*, Judgment of 20 November 2007 (Preliminary Objection, Reparations and Costs), Series C No. 169, paras. 75–80: *cf.*: González-Domínguez (n 328) p. 54–55.

1087 *Case of Boyce et al. v. Barbados* (n 1086) paras. 77–78.

1088 *Case of Boyce et al. v. Barbados* (n 1086) paras. 80, 138 no 2.

1089 *Case of Boyce et al. v. Barbados* (n 1086) para. 71 on Section 2 of the Offences Against the Person Act of Barbados.

Aguado-Alfaro had focused on the obligation not to enforce laws that are contrary to the Convention, and while the case of *Heliodoro Portugal v. Panama*[1090] had dealt with a state's failure to enact laws that secure the effective implementation of obligations arising under international human rights treaties, in *Radilla Pacheco* the Court highlighted the importance of interpreting domestic law consistently with the ACHR and the Court's jurisprudence.[1091] The Court held that Article 13 of the Political Constitution of the United Mexican States could be interpreted in harmony with the Convention and that it was consequently not necessary to modify the text of the norm.[1092] Notably, in *Radilla Pacheco*, the undertaking of a conventionality control, and hence the consistent interpretation of domestic law with a state's international treaty obligations, was for the first time incorporated in the judgment's part on measures of satisfaction and guarantees of non-repetition.[1093] This illustrates that at least since *Radilla Pacheco*, the conventionality control was also understood "as a way to prevent future human rights violations".[1094]

d) Case of Cabrera García and Montiel Flores: Extension on all state authorities

After the *Radilla Pacheco* case, the Court in a next step further broadened the circle of domestic authorities that are required to carry out the conven-

1090 IACtHR, *Heliodoro Portugal v. Panama*, Judgment of 12 August 2008 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 186, see in particular paras. 176–207.

1091 IACtHR, *Case of Radilla Pacheco v. Mexico*, Judgment of 23 November 2009 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 209 paras. 338–341; González-Domínguez (n 328) p. 56–57; Ferrer Mac-Gregor Poisot, 'The Conventionality Control as a Core Mechanism of the *Ius Constitutionale Commune*' (n 1041) p. 329.

1092 *Case of Radilla Pacheco v. Mexico* (n 1091) paras. 340–341.

1093 *Case of Radilla Pacheco v. Mexico* (n 1091) paras. 355ff; see also: González-Domínguez (n 328) p. 57.

1094 González-Domínguez (n 328) p. 57. Later, in the *Case of Rochac Hernández*, one measure of guarantees of non-repetition the respondent state El Salvador was ordered to implement consisted in the implementation of a permanent human rights program in order to teach its police, judges, prosecutors, judges, military and other state officials among other topics in the doctrine of conventionality control, see: IACtHR, *Case of Rochac Hernández et al. v. El Salvador*, Judgment of 14 October 2014 (Merits, reparations and Costs), Series C No. 285 para. 244.

tionality control.[1095] Whereas it had until then focused on the judiciary, the Court in the case of *Cabrera García and Montiel Flores v. Mexico* for the first time extended the obligation to perform the conventionality control to "all [state] institutions".[1096] This was confirmed in the *Gelman* case[1097], and particularly clearly expressed in the case of *the Santo Domingo Massacre*, where the Court stated that "*all the authorities and organs* of a State Party to the Convention have the obligation to ensure 'control of conformity with the Convention'".[1098]

In fact, this extension of the obligation to perform the conventionality control on all state authorities can be seen as the consistent implementation of an idea that was already present in the *Velásquez Rodriguez* case, and later also in the separate opinions of Judge García Ramírez, namely that the compliance with the duty to fulfill, enshrined in Articles 1 (1) and 2, required the action of all branches of the state.[1099] However, García Ramírez himself, who was no longer judge at this time, criticized this extension of the doctrine, as the performance of a conventionality control differed from mere compliance with the treaty and as not all state authorities were trained to exercise such control.[1100]

e) Extension of the control on all human rights treaties

In further decisions, the Court moreover clarified that the parameter of control consisted not only of the Convention, but that it encompassed

1095 González-Domínguez (n 328) p. 58.

1096 *Case of Cabrera García and Montiel Flores v. Mexico* (n 1027) para. 225; See also: González-Domínguez (n 328) p. 58; Ferrer Mac-Gregor Poisot, 'The Conventionality Control as a Core Mechanism of the *Ius Constitutionale Commune*' (n 1041) p. 329.

1097 IACtHR, *Case of Gelman v. Uruguay* (n 371), para. 193.

1098 IACtHR, *Case of the Santo Domingo Massacre v. Colombia*, Judgment of 30 November 2012 (Preliminary Objections, Merits and Reparations), Series C No. 259, para. 142. [Emphasis added].

1099 González-Domínguez (n 328) p. 58; *Case of Velásquez Rodríguez v Honduras* (n 1055), para. 175; *Case of Myrna Mack Chang v. Guatemala* (n 1043), Reasoned Concurring Opinion of Judge Sergio García Ramírez, para. 27; *Case of Tibi v. Ecuador* (n 1043), Separate Concurring Opinion of Judge Sergio García Ramírez, para. 6.

1100 Sergio García Ramírez, '*The Relationship between Inter-American Jurisdiction and States (National Systems): Some Pertinent Questions*', (2015) 5 Notre Dame Journal of International and Comparative Law, 115, 143–148, 150.

the whole inter-American *corpus juris* as eventually interpreted by the IACtHR.[1101] Now, the formula of the Court stated that the state authorities were "obliged to monitor *ex officio* that domestic law [was] in accordance with the human rights treaties to which the State is a Party […]".[1102] Like other specifications of the doctrine of conventionality control, this idea that the control shall not only include the Convention, but for example also its additional protocols and other inter-American human rights treaties, can already be found in earlier separate opinions.[1103]

f) Gelman case: Conventionality control and the binding effects of the Court's decisions

The establishment of an obligation for national authorities to control whether national legal acts where consistent with inter-American human rights law, as interpreted by the IACtHR, raised the important question as to the binding force of the Court's decisions, in particular whether they have an *erga omnes* effect on states that have not been party to the respective contentious case.[1104] This issue was addressed by the Court in the Order monitoring the compliance with the judgment rendered in the *Gelman* case.[1105]

1101 IACtHR, *Case of the Río Negro Massacres v. Guatemala*, Judgment of 4 September 2012 (Preliminary Objection, Merits, Reparations and Costs), Series C No. 250, para. 262; IACtHR, *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, Judgment of 20 November 2012 (Merits, Reparations and Costs), Series C No. 253, para. 330. For the Court's understanding of the term "corpus juris" see: OC-16/99 (n 227) para. 115.

1102 Case of *the Río Negro Massacres v. Guatemala* (n 1101) para. 262; and similarly: *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala* (n 1101) para. 330; *cf.*: IACtHR, *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 7* (n 1041) p. 16–17.

1103 *Case of Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru* (n 1078), Separate Opinion of Judge Sergio García Ramírez, para. 2; *Case of Cabrera García and Montiel Flores v. Mexico* (n 1027), Separate Opinion of Judge ad hoc Eduardo Ferrer Mac-Gregor Poisot, paras. 44–52.

1104 *Cf.*: Ferrer Mac-Gregor Poisot, 'The Conventionality Control as a Core Mechanism of the *Ius Constitutionale Commune*' (n 1041) p. 329.

1105 IACtHR, *Case of Gelman v. Uruguay*, Order of the Court of 20 March 2013 (Monitoring Compliance with Judgment), paras. 59–90. See also the further explanations in the relating Separate Opinion of Judge Eduardo Ferrer-Mac-Gregor Poisot, there in particular paras. 22–70.

The Court held that two different manifestations of the obligation to perform a conventionality control could be identified, depending on whether a state itself had been party to a case or not.[1106] Firstly, it determined that judgments have a *res judicata* effect *inter partes*.[1107] In these cases, in the eyes of the Court, the conventionality control "plays an important role in ensuring compliance with or the implementation of a particular judgment […]".[1108]

While the *res judicata* effect and the bindingness of judgments on the parties in a contentious case is provided for in Articles 67 and 68 (1) and undisputed, the second manifestation of the states' obligation to exercise a conventionality control is more noteworthy, as it is not to be found *expressive verbis* in the Convention. The Court held that states not party to a certain case were also indirectly bound by the Court's decision, as they were not only bound by the Convention but were also required to take the Court's jurisprudence into account.[1109] Hence, from the obligation to perform the conventionality control follows, in the eyes of the Court, that its decisions have an *erga omnes* effect.

In essence, the Court distinguishes between two different degrees of bindingness depending on whether a state has been a party to a case or not.[1110] The first degree means that a decision has the effect of *res judicata* on the states party to the proceeding.[1111] These states are absolutely bound to comply with the whole judgment.[1112] The second degree means that a decision of the Court has a *res interpretata* effect on all other states parties

1106 *Case of Gelman v. Uruguay* (n 1105) paras. 67ff; González-Domínguez (n 328) p. 59; Ferrer Mac-Gregor Poisot, 'The Conventionality Control as a Core Mechanism of the *Ius Constitutionale Commune*' (n 1041) p. 329.

1107 *Case of Gelman v. Uruguay* (n 1105) para. 68; as to the terminology see also paras. 67ff of the Separate Opinion of Judge Eduardo Ferrer-Mac-Gregor Poisot, attached to that Order.

1108 *Case of Gelman v. Uruguay* (n 1105) para. 73.

1109 *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer-Mac-Gregor Poisot, paras. 43, 80; Ferrer Mac-Gregor Poisot, 'The Conventionality Control as a Core Mechanism of the *Ius Constitutionale Commune*' (n 1041) p. 329.

1110 *Case of Gelman v. Uruguay* (n 1105) para. 67 and paras. 67ff of the Separate Opinion of Judge Eduardo Ferrer-Mac-Gregor Poisot attached to that Order. See as well: Kunz, *Richter über internationale Gerichte* (n 1071) p. 56–58.

1111 *Case of Gelman v. Uruguay* (n 1105) para. 68 and paras. 67–68 of the Separate Opinion of Judge Eduardo Ferrer-Mac-Gregor Poisot.

1112 *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer-Mac-Gregor Poisot, paras. 68–72.

to the Convention although they were not party to the proceeding.[1113] These states are also bound by the Court's findings in the sense that they have to consider them when exercising a conventionality control, and in that they may only depart from its interpretations of the Convention if this is more favorable to the individuals.[1114]

g) OC-21/14: Inclusion of advisory opinions in the *material controlante*

While the development of the doctrine of conventionality control by the Court, and the parallel academic discussion of it, has continued since the order monitoring compliance with the judgment in the *Gelman* case, only one of these further developments shall be mentioned here as it is decisive for the central question of this chapter.[1115]

This development concerns the inclusion of the Court's advisory opinions in the *material controlante* of the conventionality control. Starting with advisory opinion OC-21/14 the Court has consistently held that its advisory opinions serve as a preventive conventionality control, and that the state organs carrying out the conventionality control must do so also on the basis of the Court's interpretations made in the exercise of its advisory jurisdiction.[1116]

1113 *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer-Mac-Gregor Poisot, paras. 67, 69.

1114 *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer-Mac-Gregor Poisot, paras. 69, 72; Kunz, *Richter über internationale Gerichte* (n 1071) p. 58.

1115 Another clarification of the doctrine was made in the Case of *Liakat Ali Alibux v. Surinam* where the Court held that the "Convention does not impose a specific model" of how the conventionality control shall be conducted by states. See: IACtHR, Case of *Liakat Ali Alibux v. Surinam*, Judgment of 30 January 2014 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 276, para. 124. As to the various evolutionary steps of the doctrine see also IACtHR, *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 7* (n 1041) p. 10–20. Another aspect of the conventionality control which is not discussed right here, but plays a role *infra* in the discussion about the understanding of *res interpretata* (Chapter 5, Section B.IV.3.) is its relation to the principle of subsidiarity or complementarity. On this see *inter alia*: *Case of the Santo Domingo Massacre v. Colombia* (n 1098) para. 142; *Case of Andrade Salmón v. Bolivia*, Judgment of 1 December 2016 (Merits, Reparations and Costs), Series C No. 330, para. 93; González-Domínguez (n 328) in particular p. 177–234.

1116 OC-21/14 (n 320) para. 31; *Entitlement of legal entities to hold rights under the inter-American Human Rights system (interpretation and scope of Article 1.2, in*

4. Summary and conclusion

On the whole, one may summarize the content of the doctrine of conventionality control, as currently understood by the Court, as follows: All state authorities, including the judiciary, the executive and the legislative branch of a state party must exercise *ex officio*, but only within their respective competences and the corresponding procedural law, a conventionality control in order to ensure the effective enforcement of the Convention and the inter-American *corpus juris*, as interpreted by the IACtHR.

This requires that domestic law be interpreted and applied in accordance with international human rights treaties and the Court's jurisprudence, and that all those domestic laws that cannot be interpreted in line with the Convention and the inter-American *corpus juris* shall not be enforced. Besides, in certain situations, the doctrine of conventionality control even requires the enactment of new domestic legislation, including possible constitutional amendments.

The Court's jurisprudence relevant for the conventionality control encompasses not only its judgments delivered in contentious cases but also all its other interpretations contained in, for example, orders indicating provisional measures, orders monitoring the compliance with judgments, decisions on the interpretation of judgments, and last but not least advisory opinions.[1117]

One major consequence of the doctrine of conventionality control is that the IACtHR has, more clearly than other courts, taken the position that its decisions also have, beyond the binding force on the parties of a specific case, an *erga omnes* effect on all contracting parties, or in case of its advisory opinions, maybe even on all OAS member states.[1118]

Since the doctrine's establishment, it has sparked a huge academic debate, the different points of view ranging from enthusiasm to constructive

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relation to Articles 1.1., 8, 11.2, 13, 16, 21, 24, 25, 29, 30, 44, 46 y 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, Series A No. 22 (26 February 2016), para. 26; OC-23/17 (n 4) para. 28; OC-24/17 (n 1) para. 26; OC-25/18 (n 227) para. 58.

1117 *Case of Cabrera García and Montiel Flores v. Mexico* (n 1027), Separate Opinion of Judge *ad hoc* Eduardo Ferrer Mac-Gregor Poisot, para. 49; Kunz, *Richter über internationale Gerichte* (n 1071) p. 56.

1118 *Cf.*: Kunz, *Richter über internationale Gerichte* (n 1071) p. 56.

suggestions for improvement to fundamental rejection.[1119] In particular, the doctrine's legal foundation and the partially inconsistent development of the doctrine by the Court have been criticized.[1120] What is more, the implications the whole doctrine actually has on states, and on the relationship between international law and domestic law, and moreover the way in which the Court should interact with the contracting states, are also still controversial.[1121]

III. Evolving position of the Court regarding the legal nature and effects of its advisory opinions

1. Early years

As discussed above, the ICJ has, in the words of Rosenne, determined the effects of its advisory opinions only in the negative by stating what they are not.[1122] Put otherwise, the ICJ has only pronounced on the formal legal nature of its advisory opinions. It has always only defined it in contrast to that of judgments, but it has not taken any stance on the peculiar legal effects of advisory opinions. The ICJ chose this approach despite the fact

1119 For an overview of the different opinions held regarding the doctrine of conventionality control see: Laurence Burgorgue-Larsen, 'Chronicle of a Fashionable Theory in Latin America – Decoding the Doctrinal Discourse on Conventionality Control', in: Yves Haeck *et al.* (eds), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia, 2015) p. 647, 663–675. Different approaches to the doctrine are furthermore outlined by: Paúl (n 1084) p. 275–302.

1120 See *e.g.*: Fuentes Torrijo (n 327) p. 483, 487–491; Binder (n 328) p.1203, 1214–1218; Contesse, *'The final word? Constitutional dialogue and the Inter-American Court of Human Rights'* (n 1069) p. 417–422; Castilla Juárez, *'¿Control interno o difuso de convencionalidad? – Una mejor idea: la garantía de tratados'* (n 1083) p. 51–97; idem., *'Control de convencionalidad interamericano: Una propuesta de orden ante diez años de incertidumbre'* (2016) 64 Revista IIDH, p. 87–125; Paúl (n 1084) p. 292–293; Dulitzky (n 262) p. 63.

1121 Dulitzky (n 262) p. 45–93; Contesse, *'The final word? Constitutional dialogue and the Inter-American Court of Human Rights'* (n 1069) p. 414–435; Paolo Carozza and Pablo González, *'The final word? Constitutional dialogue and the Inter-American Court of Human Rights: A reply to Jorge Contesse'* (2017) 15 I•CON, 436–442; Víctor Bazán, *'Control de Convencionalidad, Aperturas dialógicas e Influencias jurisdiccionales recíprocas'* (2011) 18 Revista Europea de Derechos Fundamentales, 63–103; Paúl (n 1084) p. 275–302.

1122 See *supra*: Chapter 5, Section A.II. and Shaw, *Rosenne's Law and Practice of the International Court 1920–2015, Vol. III: Procedure* (n 463) p. 1767.

that the experiences of its predecessor made it clear that a formal negative definition of what advisory opinions were not, did not adequately describe their legal effects and consequences.

In its early years, the IACtHR chose a similar approach. In light of its extraordinarily broad advisory jurisdiction for a regional Court, the IACtHR was, in its very first advisory opinion, confronted with the question what kind of legal effects its opinions could have on third states not parties to the system, and hence without standing before the Court. While the Court did not categorically reject the argument that such effects might exist, it avoided providing a more elaborate answer on this by stating that "less weight need be given" to these "anticipated effects" because of the "advisory character" and because the advisory opinions would, like "those of other international tribunals [...] *lack the same binding force* that attaches to decisions in contentious cases".[1123]

Apart from this statement, which had been provoked by concerns about the possibility of conflicting interpretations of international human rights treaties originating from the Court and UN treaty bodies, which had been voiced during the public hearing, the Court did not further specify the legal effects of its advisory opinions. Instead, like the ICJ to whose advisory opinions the Court directly referred, in its first advisory opinions, the Court mainly focused on defining the object and purpose of its broad advisory function. When it referred to the legal nature of its advisory opinions, it did so in order to distinguish them from judgments in contentious cases. For instance, it explained that the acceptance of the Court's jurisdiction by a state supposedly affected by an advisory opinion was not necessary, since:

> *"...[T]he Convention, by permitting Member States and OAS organs to seek advisory opinions, creates a parallel system to that provided for under Article 62 and offers an alternate judicial method of a consultative nature, which is designed to assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process."*[1124]

1123 OC-1/82 (n 42) para. 51; OC-3/83 (n 245) para. 32 [emphasis added].
1124 OC-3/83 (n 245) para. 43; OC-5/85 (n 363) para. 21.

The need to distinguish between advisory opinions and judgments, and the ICJ-like approach to defining the legal effects of the first only in the negative sense[1125] is also highlighted by this statement:

> *"…[A] State against which proceedings have been instituted in the Commission may prefer not to have the petition adjudicated by the Court under its contentious jurisdiction, in order thus to evade the effect of the Court's judgments which are binding, final and enforceable under Articles 63, 67 and 68 of the Convention. A State, confronted with a Commission finding that it violated the Convention, may therefore try, by means of a subsequent request for an advisory opinion, to challenge the legal soundness of the Commission's conclusions without risking the consequences of a judgment. […][T]he resulting advisory opinion of the Court would lack the effect that a judgment of the Court has […]."*[1126]

Despite the main focus on the distinction between the two functions and the negative definition of the advisory opinions' legal effects, the citations also show that, in its initial phase, the Court shared the understanding predominant in international law. That is, that advisory opinions constitute authoritative interpretations of the law, that they are not themselves binding, and that they may only serve as auxiliary means to determine the law. This position held by the Court was, at the time, also supported in *amicus briefs* which it received.[1127] The fact that the Court also adopted common expressions from the literature on the advisory function of the PCIJ and ICJ is highlighted *inter alia* by this statement:

> *"It is thus readily apparent that the Court has competence to render an* ***authoritative interpretation*** *of all provisions of the Convention, including those relating to its entry into force, and that the Court is the most appropriate body to do so."*[1128]

1125 On this see also Roa (n 13) p. 99.

1126 OC-5/85 (n 363) para. 22.

1127 *Amicus Curiae* brief of the Inter-American Institute of Human Rights containing a report of Héctor Gros Espiell, OC-1/82 proceedings, 16 September 1982, available at: http://hrlibrary.umn.edu/iachr/B/1-esp-13.html, para. 8; *Amicus Curiae* brief of the International Human Rights Law Group and the Washington Office on Latin America, OC-3/83 proceedings, 15 July 1983, p. 10–11; *Amicus Curiae* brief of the Lawyers Committee for International Human Rights and Americas Watch Committee, OC-3/83 proceedings, 18 July 1983, p. 20.

1128 OC-2/82 (n 231) para. 13 [emphasis added].

Although the Court recognized that its advisory opinions could affect the interests of states, and although it was held that advisory opinion could in practice be as effective as judgments[1129], the Court did not assume that they could produce any binding legal effect. Consequently, it found that the possibility to be heard in the proceedings was enough to protect the interests of states, and that neither their express consent nor a preliminary decision on jurisdictional objections was required:

> *"The Court recognizes, of course, that a State's interest might be affected in one way or another by an interpretation rendered in an advisory opinion. For example, an advisory opinion might either weaken or strengthen a State's legal position in a current or future controversy. The legitimate interests of a State in the outcome of an advisory opinion proceeding are adequately protected, however, by the opportunity accorded it under the Rules of Procedure of the Court to participate fully in those proceedings […]."*[1130]

2. Acknowledgment of "undeniable legal effects"

Following this initial phase, the Court then rendered several advisory opinions in which it did not refer to the legal nature and effects of its opinions at all. It was only in its advisory opinion OC-15/97, when the Court had to decide whether it continued to have jurisdiction after Chile had withdrawn its request, that the Court for the first time stated that its advisory opinions had "undeniable legal effects".[1131]

It is not only noteworthy that the Court added the attribution "legal" to effects, but also that the Court's main argument to further proceed with the request was that "the State or organ requesting an advisory opinion of the Court is not the only one with a legitimate interest in the outcome of the procedure."[1132]

In its Order of 14 April 1997, which preceded the final advisory opinion OC-15/97, the Court expressed even more clearly that it held its advisory opinions to have effects on all OAS member states by stating that:

1129 OC-3/83 (n 245) para. 24; Thomas Buergenthal, *'The Inter-American Court of Human Rights'* (n 260) p. 244.
1130 OC-3/83 (n 245) para. 24.
1131 OC-15/97 (n 300) para. 26. On the OC-15/97 see as well *supra*: Chapter 4, Section C.II.1. b) bb).
1132 OC-15/97 (n 300) para. 26.

> *"the state making the request is not acting exclusively in its own interest as the opinion rendered could have effects for all OAS member states".*[1133]

Both statements, when taken together, confirm that the Court already at this time actively tried to maximize the impact of its decisions, including its advisory opinions.[1134] Although the Court did not yet explicitly mention the notion of *res interpretata* as in its latest advisory opinions, the statement in the Order and the term "legal effects" reveal, that the Court already tended to acknowledge an *erga omnes* effect of its advisory opinions that was comparable to the effect of *res interpretata*. At least, it openly acknowledged that advisory opinions have *legal* effects and are thus not only of "moral" or "scientific" value.

What is more, the cited statements suggest that the Court held that not only the final advisory opinion has an *erga omnes* effect on all OAS member states, but that the request was already made in the interest of all OAS member states. Put otherwise, once a request is submitted to the Court, the thereby expressed interest in the Court's clarification of the law may immediately be "communitized".[1135]

In the following years, the Court consistently reiterated the finding that its advisory opinions possess "undeniable legal effects".[1136] In advisory opinion OC-18/03 it added that these effects also applied vis-à-vis OAS member states that were not party to the Convention by noting that:

> *"[…] [E]verything indicated in [that] Advisory Opinion applies to the OAS Member States that have signed either the OAS Charter, the American Declaration, or the Universal Declaration, or have ratified the International Covenant on Civil and Political Rights, regardless of whether or not they have ratified the American Convention or any of its optional protocols."*[1137]

1133 IACtHR, Order of 14 April 1997, *Solicitud de Opinión Consultiva OC-15*, p. 3, considerando 2 [available only in Spanish, translation by the author].

1134 As to other tools employed by the Court to magnify the impact of its decisions see Soley Echeverría, 'The Transformative Dimension of Inter-American Jurisprudence' (n 54) p. 337, esp. 340 *et seq* speaking of collective/transformative effects aimed at by the Court.

1135 On the question how the Court should cope when the requesting entity withdraws its request, see already *supra*: Chapter 3, Section A.IV.

1136 OC-16/99 (n 227) para. 48; OC-17/02 (n 253) para. 33; OC-18/03 (n 227) para. 63; IACtHR, *Order of 10 May 2005, Solicitud de Opinión Consultiva presentada por la República de Costa Rica* [available only in Spanish], considerando 8.

1137 OC-18/03 (n 227) para. 60.

Two years later, in its Order of 24 June 2005 rejecting a request made by the Commission, the Court found that any interpretation made by the Court of provisions of the Convention – whether contained in a judgment, in an order indicating provisional measures or in an advisory opinion – constituted a guide also for states that were not parties to the case or direct addressees of the provisional measures.[1138] This leads to the conclusion that the Court by then had adopted the view that all its interpretations of the Convention had a certain *erga omnes* effect, no matter in which kind of procedure they were made.

3. Inclusion of advisory opinions in the doctrine of conventionality control

A further, if not systematic and substantial, then at least linguistic, development in the position of the Court on the legal effects of its advisory opinions can be observed as from OC-20/09 onwards.

Advisory opinion OC-20/09 seems to fall into an intermediate phase. On the one hand it was the first advisory opinion the Court rendered after the introduction of its new doctrine of conventionality control, and the Court remarked in clear reference to its judgment in *Almonacid Arellano* that it was the "ultimate interpreter of the American Convention".[1139] Furthermore, as in the short and relatively insignificant OC-19/05, the Court no longer used the expression "undeniable legal effects".

On the other hand, the Court had not yet taken a position on the role of its advisory opinions in the context of the doctrine of conventionality control, and stated in OC-20/09 that "it is evident that this Court is competent to make, with *full authority*, interpretations regarding all provisions of the Convention".[1140] This statement does not preclude the finding that the advisory opinions can also have concrete legal effects that go beyond that of a merely non-binding piece of authoritative advice, and the Court has reiterated this statement also in more recent advisory opinions in order

1138 IACtHR, Order of 24 June 2005, *Solicitud de Opinión Consultiva presentada por la Comisión Interamerican de Derechos Humanos*, considerando 13 [available only in Spanish].

1139 OC-20/09 (n 925) para. 18; *Case of Almonacid-Arellano et al v. Chile* (n 1025) para. 124.

1140 OC-20/09 (n 925) para. 18 The English version of OC-20/09 states "all provisions of the Court" but it must be considered that the Spanish version as cited in the text is the correct one. [Emphasis added].

to stress that it is competent to interpret *the whole* Convention.[1141] Yet, in OC-20/09, and in absence of remarks to the doctrine of conventionality control which the Court only included in later advisory opinions, the statement still sounded a bit reminiscent of the traditional position held in the early years.

In the following advisory opinions however, it became increasingly clear, what role the Court today attributes to its advisory opinions in the context of the conventionality control, and what kind of effects it holds to emanate from this.

In OC-21/14 the Court clarified, and since then has constantly reiterated that the various state organs of contracting states[1142] must also perform the conventionality control on the basis of the interpretations provided by the Court in the exercise of its advisory function.[1143] Furthermore, the Court has since OC-21/14 constantly stressed that its advisory opinions serve as a preventive protection measure.[1144] In OC-22/16 it stated explicitly that they serve as "a *preventive control of conventionality*".[1145]

Moreover since OC-21/14, the Court has also taken up the notion of "*norma convencional interpretada*", which it had already hinted at in the above cited Order of 24 June 2005.[1146] This leads to the conclusion that the Court holds that its advisory opinions produce the effect of *res interpretata*.[1147]

1141 See for example OC-27/21 (n 347), para. 23 and OC-29/22 (n 275), para. 17.

1142 In advisory opinions, the Court normally only names the ACHR in this context. However, as noted *supra* in Chapter 5, Section B.II.3.e), the Court has extended its doctrine of conventionality control onto other human rights treaties. Hence, should the Court interpret another human rights treaty, like for example the Convention of Belém do Pará, in an advisory opinion, the doctrine would apply to all OAS member states that are party to that treaty.

1143 OC-21/14 (n 320) para. 31; OC-23/17 (n 4) para. 28; OC-24/17 (n 1) para. 26; OC-25/18 (n 227) para. 58; as in many parts, the wording in the Spanish original versions of the respective advisory opinions is also at this point more precise, that is, closer to the common professional termini.

1144 OC-21/14 (n 320) para. 31; OC-23/17 (n 4) para. 29; OC-24/17 (n 1) para. 27; OC-25/18 (n 227) para. 30.

1145 OC-22/16 (n 1116) para. 26 [emphasis added].

1146 OC-21/14 (n 320) para. 31; OC-23/17 (n 4) para. 29; OC-24/17 (n 1) para. 27; OC-25/18 (n 227) para. 59; as in many parts, the wording in the Spanish original versions of the respective advisory opinions is more precise, that is closer to the common professional termini.

1147 As to the effect of *res interpretata* see below Chapter 5, Section B.VI.

Form the Court's point of view, the extension of the doctrine of conventionality control onto advisory opinions, and the finding that its advisory opinions produce *res interpretata*, seems to imply that at least the contracting states[1148] should act – if not *ad hoc*, then gradually – on the basis of an advisory opinion, and adapt their domestic law if it is not compatible with the law as expounded in the Court's advisory opinion.

This is highlighted by statements made in OC-24/17. There, the Court acknowledged that it might be difficult for some states to immediately accept and implement the right to marriage for same-sex couples.[1149] Nevertheless, "the Court urge[d] those States to promote, in good faith, the legislative, administrative and judicial reforms required to adapt their domestic laws, and internal interpretations and practice."[1150] At the same time, it held that those states were, irrespective of their existing domestic law and the necessary time for legislative reforms, already obliged to respect the right to non-discrimination, which meant that they had to guarantee same-sex couples the same rights that are derived from marriage even if they had not yet formally given them the right to marry.[1151]

Despite the clarification of the advisory opinions' role in the conventionality control and the repeated mentioning of the notion of *res interpretata*, statements by individual judges reveal that there are still slightly diverging views on the concrete legal consequences of the conventionality control and the type of obligation that goes along with the effect of *res interpretata*. While former Judge Vio Grossi always stressed that advisory opinions are not binding and that they are expressions of the Court's moral and intellectual authority, Judge Ferrer Mac-Gregor Poisot only differentiates between different degrees of bindingness produced by *res judicata* on the one hand and *res interpretata* on the other.[1152]

1148 As to the question whether the advisory opinions have different legal effects on OAS member states that are not party to the Convention, and the Court's unclear position on this, see *infra*: Chapter 5, Section B.IV.3.e).

1149 OC-24/17 (n 1) para. 226.

1150 OC-24/17 (n 1) para. 226.

1151 OC-24/17 (n 1) para. 227.

1152 OC-24/17 (n 1), Separate Opinion of Judge Eduardo Vio Grossi, paras. 149–150; *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, paras. 59, 67 and *Case of Cabrera García and Montiel Flores v. Mexico* (n 1027), Concurring Opinion of *Ad hoc* Judge Eduardo Ferrer Mac-Gregor Poisot, para. 49.

Lastly, while the preceding paragraphs have shown a development in the Court's position as to the legal effects its advisory opinions have on OAS member states, the Court still accepts, as in its first advisory opinion, that its advisory opinions cannot in any way determine the obligations of third states that do not form part of the inter-American human rights system.[1153] The Court only highlights that its advisory opinions contribute to the general development of international law.[1154]

4. Evaluation and intermediate conclusion

By analyzing the wording used by the Court in its advisory opinions and orders, it has been shown how the Court's position regarding the legal nature and effects of its advisory opinions has gradually changed over the years. While it initially shared the predominant view in international law that advisory opinions constitute non-binding, yet authoritative interpretations of the law, today it tends to attach greater authority to its opinions. However, as will be further discussed below[1155], it still remains unclear, what exactly follows from the advisory opinion's inclusion in the doctrine of conventionality control and the finding that they produce *res interpretata*. While the Court in its publications describes the extension of the doctrine of conventionality control[1156], it has never officially recognized that its position on the legal nature and effects of its advisory opinions has changed over the years. This makes it more difficult to explain what caused the gradual shift in the Court's position.

What is striking is that both, OC-15/97 and OC-21/14, which each marked a new phase, were rendered after some years in which no advisory procedure had been pending before the Court. During these years of break, the composition of the Court changed partly in the case of OC-15/97, and almost completely in the case of OC-21/14.

The OC-15/97 proceedings were the first advisory procedure in which former Judge Cançado Trindade participated. It has already been noted above, how his conception of Article 2 and of the right to access to justice

1153 OC-25/18 (n 227) para. 32.
1154 OC-25/18 (n 227) para. 32.
1155 See *infra*: Chapter 5, Section B.IV.3.
1156 See e.g. IACtHR, *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 7: Control de Convencionalidad*, San José, Costa Rica, 2021, p. 16–17.

influenced the emergence of the doctrine of conventionality control.[1157] His concurring opinion attached to OC-15/97 documents how his refusal to give the will of states under today's international law the same importance as it enjoyed in the beginning of the 20th century, his emphasis of the *Kompetenz-Kompetenz* of the Court, and his consideration that the exercise of the advisory function is part of the *ordre public*, most likely contributed to the decision to render OC-15/17 although Chile had withdrawn its advisory opinion request.[1158]

The need to justify this decision then led to the explanation that the requesting state was not the only state "with a legitimate interest in the outcome" of an advisory proceeding, given that advisory opinions had "undeniable legal effects".[1159] Hence, it appears that there was no conscious decision of the Court to introduce exactly this formulation to strengthen the legal effects of its advisory opinions, but rather that this formulation reflects the generally bolder understanding the Court had gained of its role by then, and the Court's aspiration to attach the greatest possible effectiveness to its interpretations in the interest of effective human rights protection.[1160]

Similarly, the new development introduced by OC-21/14 was not triggered by the substantive issue of this particular advisory proceeding, but constituted instead a logical step in the further development of the doctrine of conventionality control, which had been consolidated in the foregoing years in which no advisory proceeding had been pending. OC-21/14 was also the first advisory opinion with the participation of Judge Ferrer Mac-Gregor Poisot, who had already held some years before, as Judge *ad hoc*, that the jurisprudence relevant for the conventionality control should encompass any interpretation made by the Court, and hence also interpretations made in advisory opinions.[1161]

In light of the foregoing, the evolution of the Court's position regarding the legal effects of its advisory opinions should not be seen as an isolated

1157 See *supra*: Chapter 5, Section B.II.1. and II.2. n 1072 and González-Domínguez (n 328) p. 49–52.

1158 *Cf.*: OC-15/97 (n 300) Concurring Opinion of Judge Antônio A. Cançado Trindade, in particular paras. 4–9, 22, 26, 41 [*Only available in Spanish*].

1159 OC-15/97 (n 300) para. 26.

1160 As to the development of the Court and its "transformative aspirations" see Soley Echeverría, *The Transformation of the Americas* (n 19) p. 246 and Chapter 5.

1161 *Case of Cabrera García and Montiel Flores v. Mexico* (n 1027), Separate Opinion of Judge *ad hoc* Eduardo Ferrer Mac-Gregor Poisot, para. 49.

process in the exercise of its advisory function. Rather, it can only be explained in the context of the general development of the Court's jurisprudence, the way it conceives its role and authority, and not least the influence of some significant judges.

IV. Positions on the legal nature and effects of the Court's advisory opinions

After having analyzed the constituent instruments of the Court's advisory function and the evolving position of the Court regarding the legal nature and effects of its advisory opinions, this section provides an overview and discusses the views expressed on this question by academics, by former and current judges of the Court, and – as regards a possible legally binding effect – also by some domestic courts.

1. Authoritative interpretation

Comparable to the discussion on the advisory opinions of PCIJ and ICJ, the first view that can be identified in the discussion on the legal effects of the IACtHR's advisory opinions are authors who assume that the advisory opinions are authoritative interpretations of the law. Most of these authors explicitly reject that the advisory opinions have any formally legally binding effect.[1162] As the developing position of the Court has of course also influenced the positions taken by academics, the respective statements have to be seen in their temporal context.

1162 Vio Grossi (n 1034) p. 322; Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 37; Vargas Carreño (n 180) p. 140–141; Dunshee de Abranches (n 38) p. 104, 106; Miguel Rábago Dorbecker, 'El Avance de los Derechos Humanos en las Opiniones Consultivas de la Corte Interamericana de Derechos Humanos' in Manuel Becerra Ramírez (ed), *La Corte Interamericana de Derechos Humanos a veinticinco Años de su Funcionamiento* (UNAM, Instituto de Investigaciones Jurídicas, 2007) p. 223, 226; Buergenthal, *'New Upload - Remembering the Early Years of the Inter-American Court of Human Rights'* (n 20) p. 268; Fix-Zamudio (n 423) p. 192; Alfredo M. Vítolo, *'El Valor de las Opiniones Consultivas de la Corte Interamericana de Derechos Humanos a la Luz de las OC-21/14 y OC-23/17 (El "Canto del Tero" u "Otro Ladrillo más en la Pared de la Doctrina del 'Control de Convencionalidad'")* 2020 (1) Revista Jurídica Austral, 187, 210.

a) Views held before the advisory opinions' inclusion in the doctrine of conventionality control

It was primarily the first commentators of the Court's work in its early years who seemed to adopt the predominant view in international law and the related language without questioning whether the advisory opinions of the IACtHR could have a different legal nature or effect than those of the ICJ.[1163] Comparable to the international discourse on advisory opinions, they defined the effects of advisory opinions in contrast to that of judgments, and highlighted that the advisory opinions, while not being binding, nevertheless carry the authority of the Court which has been established as the competent institution to interpret the Convention and other human rights treaties.[1164] They further specified that advisory opinions exert "moral" or "moral and scientific" authority.[1165] These adjectives on the one hand underline the authority of the advisory opinions and thereby support the idea that they can have major practical effects. In order to highlight the latter, it has also been stressed that the advisory opinions are not only of "purely academic value".[1166]

On the other hand, these adjectives are used in order to distinguish the advisory opinion's effects from truly legal effects.

Sometimes, the legal non-bindingness and the general abstract character of advisory opinions has been seen as an advantage of advisory proceedings, as they were less confrontational than contentious proceedings, and states were therefore more willing to participate.[1167] Moreover, it has been held that advisory opinions can "be more influential and authoritative than a judgment in a contentious case" despite their legal non-bindingness as they "affect[…] the general interpretation of international law for all States"

1163 Dunshee de Abranches (n 38) p. 104; Vargas Carreño (n 180) p. 140–141; Ventura Robles and Zovatto (n 11) p. 32; Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court* (n 41) p. 18. Until today this view is held by Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 37.

1164 Hitters (n 961) p. 149; Vargas Carreño (n 180) p. 140–141; Fix-Zamudio (n 423) p. 192.

1165 Dunshee de Abranches (n 38) p. 104; Hitters (n 961) p. 149; Fix-Zamudio (n 423) p. 192.

1166 Vargas Carreño (n 180) p. 141. [Translation by the author].

1167 Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 37 also citing an address by Judge Thomas Buergenthal.

and as they "lend themselves more readily than contentious cases to the articulation of general principles."[1168]

b) Contemporary voices

More interesting than the preceding statements, made mostly in the 1980s and 1990s, is how authors nowadays, in light of the evolved position of the Court, argue that the advisory opinions constitute authoritative but legally non-binding interpretations of the law.

Vio Grossi, who served as judge at the IACtHR from 2010 until the end of 2021, apparently held that the current position of the Court was compatible with the traditional understanding of the legal nature and effects of advisory opinions. In 2018, in a paper on the conventionality control he rejected the position that the advisory opinions are binding, but argued that:

> *"[…] this does not mean that the Court's advisory opinions are not particularly relevant. In fact, their importance lies precisely in the fact that, on the basis of its moral and intellectual authority, the Court, through them, exercises a control of preventive conventionality, that is, it indicates to the States that have recognized its contentious jurisdiction that, if they do not adjust their conduct to the interpretation that it makes of the Convention, they risk that, by submitting a case to its knowledge and resolution that has to do with such procedure, it will declare the international responsibility of the respective state. And to the other States, it provides guidance for the full and complete respect of the human rights they have committed to respect, either because they are part of the Convention or because they are part of other international legal instruments."*[1169]

While Vio Grossi stressed the preventive function of the conventionality control exercised by the Court, he neither addressed the effects that a consequent implementation of the conventionality control by the national

1168 Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 37; Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court* (n 41) p. 18.

1169 Vio Grossi (n 1034) p. 323 [translation by the author]. Sadly, former Judge Vio Grossi passed away in December 2022. However, having served at the Court until recently, he remains a contemporary voice in the debate on the legal effects of the Court's advisory opinions in the context of the conventionality control doctrine.

authorities entails, nor mentioned the effect of *res interpretata*, which the Court has attached to its opinions since OC-21/14. Whereas he described the "warning" or "guiding" effect of advisory opinions, he made no mention of "legal effects", but instead used attributes such as "moral" and "intellectual". Consistent with the traditional view, Vio Grossi held that the advisory opinions can only be binding if states bilaterally agree or assign such effect to them in their domestic law.[1170] Domestic judges who uphold the traditional view that advisory opinions are not legally binding, but have only a guiding effect, often refer to these statements of former Judge Vio Grossi.[1171]

In sum, Vio Grossi basically stayed in the categories of either "binding" in the sense of "binding as judgments" or "non-binding". Although Vio Grossi gave the impression that the traditional concept of advisory opinions was reconcilable with the current position of the Court under its conventionality control doctrine, it seems that his understanding did not necessarily correspond to the predominant understanding in the Court.[1172]

In contrast to Vio Grossi, the Argentinian lawyer and law professor Vítolo holds the current position of the Court to be incompatible with the Convention.[1173] While Vítolo himself remains with the traditional view that the advisory opinions constitute authoritative interpretations of the law and that they as such have to be seen as soft law and as auxiliary source of law, he rejects the latest development in the Court's jurisprudence as an *ultra vires* act.[1174] He holds that the effect of "*res interpretata*", of which judges like Ferrer Mac-Gregor Poisot speak in relation to the Court's advisory opinions, means that the Court nowadays attaches the same binding effects to advisory opinions as to judgments, and that the Court's approach taken

1170 Vio Grossi (n 1034) p. 322 fn. 31; on this position see also: Vargas Carreño (n 180) p. 141.

1171 Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 8 August 2018, No. 12782–2018, Exp. 15–013971–0007-CO, Dissenting vote of Judge Castillo Víquez, Separate vote of Judge Salazar Alvarado and Judge Hernández Gutiérrez; Constitutional Tribunal of Peru, Judgment 676/2020 of 3 November 2020, case no. 01739–2018-PA/TC, vote of Judge Blume Fortini, para. 9, vote of Sardón de Taboada.

1172 As to the current view of the Court on the legal effects of its advisory opinions see *supra*: Chapter 5, Section B.III.3. and on the view of other current judges *infra*: Chapter 5, Section B.IV.3.

1173 Vítolo, *'El Valor de las Opiniones Consultivas de la Corte Interamericana de Derechos Humanos a la Luz de las OC-21/14 y OC-23/17* (n 1162) p. 200–212.

1174 *Ibid.*

since OC-21/14 was untenable.[1175] In order to support his view he uses the common arguments presented above, which confirm that the Convention's drafters clearly distinguished between the Court's advisory function including the opinions' effects on the one hand, and the Court's contentious function on the other.

Furthermore, Vítolo cites among others the former judges of the Court, Pedro Nikken, Abreu Burrelli and Medina Quiroga as authorities in support of his view.[1176] Yet, a closer look at their writings shows that their positions are not as one-sided as Vítolo's article might suggest, but that they, while holding the advisory opinions to constitute authoritative interpretations of the law, still leave room for further clarifications of the precise legal effects of advisory opinions. Thus, in contrast to Vítolo, they might not have been categorically opposed to the position that the opinions produce an *erga omnes* effect of *res interpretata*.

For instance, Abreu Burelli not only remarked that advisory opinions do not have the same binding effect as judgments, but at the same time held that they generate *opinio juris* and establish criteria for the future understanding of norms.[1177] Likewise, Medina Quiroga underlined that states should pay attention to the Court's advisory opinions, as they would probably be used to decide future cases and thus directly affect them.[1178]

In particular Pedro Nikken cannot be clearly assigned to the group that describes the legal nature of the advisory opinions only classically, i.e. in distinction to that of judgments as a non-binding but authoritative interpretation, without further analyzing the legal effects of the advisory opinions. This is because Nikken, instead of speaking of an authoritative interpretation, stated that the opinions constitute "*authentic interpretations*" and he did not only say that they constituted auxiliary sources of the law but held furthermore that they had the same effect as judgments have

1175 Vítolo, *'El Valor de las Opiniones Consultivas de la Corte Interamericana de Derechos Humanos a la Luz de las OC-21/14 y OC-23/17* (n 1162) p. 200–201.

1176 Vítolo, *'El Valor de las Opiniones Consultivas de la Corte Interamericana de Derechos Humanos a la Luz de las OC-21/14 y OC-23/17* (n 1162) p. 205.

1177 Alirio Abreu Burelli, 'Jurisprudencia de la Corte Interamericana de Derechos Humanos' in La Corte Interamericana de Derechos Humanos (ed), *La Corte Interamericana: Un Cuarto de Siglo: 1979–2004*, 87, 104.

1178 Cecilia Medina Quiroga, 'Las Obligaciones de los Estados bajo la Convención Americana de Derchos Humanos' in La Corte Interamericana de Derechos Humanos (ed), *La Corte Interamericana: Un Cuarto de Siglo: 1979–2004*, 207, 224; see as well: Vítolo, *'El Valor de las Opiniones Consultivas de la Corte Interamericana de Derechos Humanos a la Luz de las OC-21/14 y OC-23/17* (n 1162) p. 192.

for states that are not parties to the case.[1179] Thus, while he rejected a direct bindingness of advisory opinions, he nevertheless held that not only judgments but also advisory opinions had a certain *erga omnes* effect.

This example reveals how close the various positions, which are often presented as completely contrary opinions, are in fact to each other, and that not all authors who have held the advisory opinions to constitute authoritative interpretations of the law would necessarily reject the idea that the advisory opinions might also have legal and not only moral or scientific effects.

c) Evaluation and intermediate conclusion

In the early years of the Court, the view that the advisory opinions of the Court constitute authoritative interpretations of the law was the predominant view. Today, the term is still used to describe the legal nature and effects of advisory opinions, but authors have to further clarify whether this view is held to be consistent with the Court's view that the advisory opinions produce the *erga omnes partes* effect of *res interpretata*, or whether the term is used in order to oppose the position of the Court.

Generally, one must note that the authors who have held that advisory opinions of the IACtHR constitute authoritative interpretations of the law have correctly observed that the advisory opinions are not any kind of legal advice, and not only of "purely academic value"[1180] but that they carry the authority of the Court, which sees itself today as the "ultimate interpreter of the American Convention".[1181] The authority of the advisory opinions derives from the prestige of the Court, the judicial reputation of the judges, and the legal procedure followed in advisory proceedings – which very much resembles that of contentious proceedings.[1182] What is more, the Court employs the same means of legal interpretation as in contentious proceedings. Further factors influencing the authority of the Court's interpretations, and thus the value of its advisory opinions, are for instance the quality of the Court's legal reasoning, and whether the opinion is rendered

1179 Nikken (n 961) p. 176 [translation from Spanish by the author].
1180 Vargas Carreño (n 180) p. 141. [Translation by the author].
1181 Instead of all see: OC-23/17 (n 4) para. 16.
1182 Vargas Carreño (n 180) p. 141 [Translation by the author]; *cf.* with regard to the ICJ: d'Argent, 'Art. 65' (n 73) mn. 49; Pratap (n 113) p. 230–232.

unanimously or whether individual judges have attached convincing dissenting opinions to it.[1183] One can thus conclude that the advisory opinions, without any doubt, constitute authoritative interpretations of the law.[1184]

The interesting question is, however, what is motivating the term "authoritative interpretation", and what other attributes are added to the term. Some authors have combined the term with the attributes "moral", "intellectual" or "scientific" in order to highlight the lack of any legal effect. Others have used it primarily to distinguish the advisory opinions from judgments rendered in contentious proceedings, and to simultaneously stress the opinions' legal relevance. This latter usage of the term does not necessarily exclude the idea that advisory opinions may also have *legal* effects, given that legal effects do not have to be equated with bindingness and the effect of *res judicata* known from judgments. Rather, it leaves room to further define the legal effects that may emanate from advisory opinions.

Put otherwise, the decisive question is not whether the advisory opinions constitute authoritative interpretations or not, but whether adjectives like "moral" or "intellectual" are the correct attributes. That is, whether the value of the authoritative interpretation is limited to political or moral effects alone, or whether it is not also accompanied by legal effects.

From the start, the advisory function was conceived as a jurisdictional function which is exercised by the Court by means of judicial techniques.[1185] As with the advisory practice of the ICJ, the focus has been ever since on the abstract interpretation and clarification of legal norms rather than on providing advice to political organs on how to best react in a certain situation. Although requests are sometimes triggered by specific disputes, the Court's advisory opinions are given in abstract legal terms, having the main purpose of providing guidance, and helping the states and OAS organs to act lawfully in compliance with international human rights law. Hence, while the Court's advisory opinions certainly also produce moral and scientific authority, that description of the advisory opinions' effects falls short of their real effects.

At this point, it can thus be concluded that the advisory opinions of the Court constitute authoritative interpretations of the law, but that this

1183 *Cf.*: Hambro (n 961) p. 21–22; Aljaghoub (n 63) p. 119–120; Hernández Castaño (n 888) p. 52, 53, 100.

1184 *Cf.*: Guevara Palacios (n 12) p. 329.

1185 *Cf.*: Statute of the Inter-American Court of Human Rights, Article 2; Piza Escalante (n 39) p. 156, 160; Gros Espiell, 'El Procedimiento contencioso ante la Corte Interamericana de Derechos Humanos' (n 36) p. 70.

description alone does not suffice to define the effects that emanate from them. Moreover, the effects of advisory opinions should not be reduced to "moral" or "scientific", but should be expressed in legal terms.

2. Attribution of legal bindingness

Next to the view that the advisory opinions constitute authoritative but non-binding interpretations of the law, it has also been held that they are legally binding. In contrast to the related discussion on the advisory opinions of PCIJ and ICJ, in the inter-American context this view has gained more prominence over the years.

a) Academics holding the advisory opinions to be binding

Even though the following list of authors might not be complete, it nevertheless provides a good overview of the different reasons that have been given over the years for concluding that the advisory opinions are legally binding.[1186]

aa) Faúndez Ledesma

Even before the Court introduced its doctrine of conventionality control, international law professor and lawyer Héctor Faúndez Ledesma argued that the Court's advisory opinions were not only authoritative interpretations of the law, but as such also binding on the states parties to the

1186 Relying on the early pronouncements of the Court, according to which its advisory opinions do not have the same binding effect as its judgments, the Argentinian law professors Germán J. Bidart Campos and Susana Albanese hold that there are different nuances of bindingness depending on whether the Court issues judgments or advisory opinions. This finding is however not further explained by them wherefore this position cannot be further outlined here. See: Germán J. Bidart Campos and Susana Albanese, *Derecho Internacional, Derechos Humanos y Derecho Comunitario* (Ediar, 1998), p. 33. For the position of further Latin American lawyers and in particular, constitutionalists see also: Guevara Palacios (n 12) p. 339–346.

Convention, respectively the state requesting an advisory opinion under Article 64 (2).[1187]

First of all, Faúndez Ledesma criticized that the Court did not differentiate between the legal effects of advisory opinions issued under Article 64 (1) and those issued under Article 64 (2).[1188] In his eyes, opinions issued under Article 64 (1) had to be called "*dictámenes*" and not "opinions" as Article 64 (1) did not use the latter term.[1189] Such "*dictámenes*" in terms of Article 64 (1) were final and binding as they emanated from the organ entrusted with the authoritative interpretation of the Convention.[1190]

While opinions issued under Article 64 (2) could be called "advisory opinions", these opinions were also binding on the requesting state at minimum, if the latter was a state party to the Convention.[1191] This was because all contracting states had accepted, under Article 33[1192], the Court's competence to ensure compliance with the commitments undertaken in the Convention, and to define the scope of these commitments through their authoritative interpretation.[1193] Furthermore, the contracting states were obliged to fulfill their obligations under the Convention in good faith.[1194] Should an OAS member state, not yet party to the Convention, request an advisory opinion, it would be obliged to adjust its legislation to the Convention as interpreted by the Court in the earlier advisory opinion as soon as it ratifies the treaty.[1195]

Faúndez Ledesma held that the exercise of the Court's advisory function was comparable to that of a constitutional court, and according to him it was important to note that the Convention had intended only the Commission to be a consultative organ, while the Court had been designed to be

1187 Faúndez Ledesma (n 26) p. 989–994.
1188 Faúndez Ledesma (n 26) p. 898.
1189 Faúndez Ledesma (n 26) p. 989, 992.
1190 Faúndez Ledesma (n 26) p. 991–992.
1191 Faúndez Ledesma (n 26) p. 992.
1192 Article 33 of the Convention states:
"Article 33
The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention:
a. the Inter-American Commission on Human Rights, referred to as "The Commission;" and
b. the Inter-American Court of Human Rights, referred to as "The Court.""
1193 Faúndez Ledesma (n 26) p. 992.
1194 Faúndez Ledesma (n 26) p. 992.
1195 Faúndez Ledesma (n 26) p. 992–993.

the judicial organ of the system.[1196] Although the advisory opinions did not have the same characteristics as judgments, they nevertheless carried not only the Court's authority, but also a binding legal effect derived from the Convention which the states parties could not escape from.[1197] Therefore, the Court's "*dictámenes*" or advisory opinions were more comparable to the "*dictámenes*" of the European Court of Justice than to the advisory opinions of the ICJ.[1198]

Overall, the author held it was paradoxical that while the states took the advisory opinions quite seriously, it was the Court itself that had diminished the legal value of its advisory opinions by stating in OC-3/83 that it "fulfills a consultative function" which lacks "the same binding force that attaches to decisions in contentious cases".[1199] According to Faúndez Ledesma, such understanding deprived the Convention of all its *effet utile*.[1200]

As demonstrated in Chapter 2, Faúndez Ledesma's critique of the term "advisory opinion" is misplaced against the backdrop of the international law origin of the Court's advisory jurisdiction and the drafting history of Article 64.[1201] Based on the same reasoning, his finding that opinions given under Article 64 (1) had different effects than opinions given under Article 64 (2) is not convincing. Even though the idea that opinions rendered under Article 64 (2) do concern the state that requested them on its own domestic law may have some merit, there is no hint in the drafting history that the opinions rendered under the second paragraph were supposed to have different effects than those rendered under the first paragraph of Article 64. To the contrary, both paragraphs are part of one and the same article and advisory concept.

Furthermore, Faúndez Ledesma's reasoning that the opinions were binding on the requesting state if the latter was a party to the Convention,

1196 Faúndez Ledesma (n 26) p. 991–992.
1197 Faúndez Ledesma (n 26) p. 992.
1198 Faúndez Ledesma (n 26) p. 992. It is assumed that Faúndez Ledesma referred to the opinions that the European Court of Justice can issue under what is today Article 218 (11) TFEU. Until the entry into force of the TFEU it was Article 300 (6) (and before that Article 228 (6)) Treaty establishing the European Communities. While the English version uses the term "opinion" as well as in the ACHR, the Spanish version of the TFEU speaks of "dictámenes", thus using a different expression than in the ACHR or in the Spanish version of the United Nations Charter.
1199 Faúndez Ledesma (n 26) p. 989–993 citing OC-3/83 (n 245) para. 32.
1200 Faúindez Ledesma (n 26) p. 993.
1201 See *supra*: Chapter 2, Section C.V.

because as such it had accepted the Court's competence in terms of Article 33, is circular. This is because Article 33 does no more than to name the Commission and the Court as competent organs under the Convention, while their specific competences are defined in other articles of the Convention.[1202] Hence, Article 33 provides the Court with no competence beyond what is regulated in Article 64, and, as shown above[1203], a textual, systematic and historical interpretation of Article 64 actually argues against a binding effect of the advisory opinions, but at the very least against a binding effect that would be comparable to that of judgments.

Moreover, Faúndez Ledesma fails to explain why Article 62[1204] requires the explicit acceptance of the Court's jurisdiction only for contentious cases, and why Article 68 only refers to the compliance and enforcement of judgments. This would make little sense if advisory opinions were also considered to be binding.

When the author suggests that the Court as a judicial organ could not fulfill a consultative role, he apparently disregards the international law origin of the advisory function and the ensuing academic debate on the international plane that had already proven that an advisory function is compatible with the judicial role of courts. Moreover, his criticism that the Court had, in its first advisory opinions, deprived the opinions of their *effet utile*, does not take into account that the Convention as a whole might have proven less effective, if the states had agreed that the Court could give binding opinions without their explicit consent, as they then might have not ratified the Convention in the first place.

Faúndez Ledesma's argument that the advisory opinions of the IACtHR were more comparable to the "*dictámenes*" of the Court of Justice of the European Union than to the advisory opinions of the ICJ has no basis in the text of the Convention, let alone in the drafting history. At least the current version of Article 218 (11) TFEU, to which the author seems to refer, provides unequivocally that the EU organs are bound by the opinion of the Court – something that Article 64 clearly does not. Besides, while the *travaux préparatoires* of the ACHR make references to the ICJ and the ECtHR, there is no mention of the CJEU's predecessor.

1202 As to the full text of Article 33 see *supra* (n 1192).

1203 *Supra*: Chapter 5, Section B.I.

1204 As to the text of Article 62 see *supra* (n 214) and on how it has been interpreted by the Court see *supra*: Chapter 5, Section B.I.

In fact, the approach the Court is pursuing today under its doctrine of conventionality control is in part reminiscent of that of a supranational court like the CJEU.[1205] Yet, when Faúndez Ledesma raised his argument for the first time, there was actually no basis for this other than the teleological desire of maximal effects for the advisory opinions to generate a maximum of human rights protection – a goal that is not necessarily achieved by the demand for a binding effect of advisory opinions.

All in all, it can be assumed that Faúndez Ledesma agrees more with the current approach of the Court compared to the statements made by the early Court in its first advisory opinions. Given that he also stated that the binding effect could not be the same as that of judgments, but that the effect was rather general[1206], he might also agree with the view that the opinions have an *erga omnes* effect and produce *res interpretata*.[1207] Faúndez Ledesma's main point – that the opinions shall be taken seriously by the OAS member states – is absolutely right and some of his observations were indeed visionary, but his judicial reasoning for a binding effect of the Court's advisory opinions is not convincing.

bb) Salvioli

Professor and human rights lawyer Fabián Salvioli held also that the advisory opinions of the IACtHR are binding, even before the Court had established its doctrine of conventionality control.[1208] Salvioli basically supported the argumentation of Faúndez Ledesma.[1209] In addition, he argued that a *pro persona* interpretation of the Convention had to lead to the conclusion that all decisions and resolutions taken by the IACtHR were "obligatory and binding" for all OAS member states.[1210] Thus, similar to

1205 For comparisons between the IACtHR and the CJEU see also: Hentrei (n 262) p. 225–240, 290.

1206 Faúndez Ledesma (n 26) pp. 992, 994.

1207 As to the view, that the advisory opinions of the Court have an *erga omnes* effect and produce *res interpretata* see *supra*: Chapter 5, Section B.III.3. and *infra*: Chapter 5, Section B.IV.3.

1208 Fabián Salvioli, *'La competencia consultiva de la Corte Interamericana de Derechos Humanos: marco legal y desarollo jurisprudencial'* available at: http://www.derechoshumanos.unlp.edu.ar/assets/files/documentos/la-competencia-consultiva-de-la-corte-interamericana-de-derechos-humanos-marco-legal-y-desarrollo--2.pdf.

1209 Salvioli (n 1208).

1210 Salvioli (n 1208).

Faúndez Ledesma, his point of view is mainly based on a teleological interpretation of the Convention. Unfortunately, he did neither explain in more detail how the result that the opinions are binding can be reconciled with a textual and systematic interpretation of Article 64, nor how the binding effect of the opinions shall be different from that of judgments. It remains unclear which parts of an advisory opinion shall in fact be binding on whom, and whether the author holds that a "breach of an advisory opinion" automatically constitutes a violation of international law.

cc) Roa

In the most recent general treatise on the Court's advisory function, the opinion of the author Jorge Ernesto Roa on the legal nature and effects of the Court's advisory opinions remains ambiguous. At first Roa states that neither the Convention, the Rules of the Court, nor the advisory practice itself would clearly support the thesis of binding effects of advisory opinions, and criticizes the Court for its omission to clarify said effects.[1211] Furthermore, he remarks that only the Court could make a final decision on the legal effects of its advisory opinions, which is why he himself wanted to refrain from defining the effects the advisory opinions should have in his opinion.[1212]

In a later section of his book, Roa however welcomes the new turn of the Court's approach as from the adoption of advisory opinion OC-21/14 onwards, and states that bringing the advisory opinions within the scope of the conventionality control would lead to a higher degree of bindingness – both vertically in relation to the member states and horizontally vis-à-vis the Court itself.[1213] He welcomes this development because the "bindingness of the advisory doctrine [would] certainly lead to a greater protection of human rights in the Latin American field" and holds that the Court should abandon the distinction between the binding force of judgments on the one hand and that of advisory opinions on the other hand.[1214]

Given that the author at first found that the Convention and the Rules of the Court actually did *not* provide for such a binding force, the conclusion that such a development would definitely lead to better human rights

1211 Roa (n 13) pp. 96–100.
1212 Roa (n 13) p. 99.
1213 Roa (n 13) p. 136–141.
1214 Roa (n 13) p. 141. [Translated from Spanish by the author].

protection is surprising, as it overlooks the possible negative side effects such an ultimate clarification by the Court might have. It could lead to further backlash reactions or even to withdrawals from states from the whole human rights system. In any event, Roa does not provide for a clear legal argument the Court could use to explain why its advisory opinions have the same binding force as judgments, after the Court had maintained the contrary for so many years before.

dd) Zelada

In a recent paper, international law professor and lawyer Carlos Zelada rejects the standpoint of Faúndez Ledesma and Salvioli as well as that of Roa.[1215] In his view, neither the advisory opinions themselves are binding, nor does their inclusion in the conventionality control result in them having a *de jure* binding effect.[1216] Nevertheless, he reaches the conclusion that they become *de facto* binding through the conventionality control.[1217] He holds that the Court could at any time return to its older jurisprudence, that is, excluding the advisory opinions from the conventionality control, which would leave them with their earlier diminished effect.[1218] But as long as the Court upholds the approach introduced in OC-21/14, he argues that they attain *de facto* bindingness through the "external mechanism"[1219] of conventionality control.

b) Domestic courts holding the advisory opinions to be binding (at least within their country)

Next to academics there are also several domestic courts which have held that the advisory opinions of the IACtHR are legally binding. As will be seen, their reasoning varies. Examined and presented here are decisions from Costa Rica, Ecuador and Peru. In all the three states, there have recently been proceedings in the aftermath of OC-24/17 in which domestic courts had to take a stance on the normative value the advisory opinion has

1215 Zelada (n 262) p. 95, 99.
1216 Zelada (n 262) p. 99.
1217 Zelada (n 262) p. 99–100.
1218 Zelada (n 262) p. 99–100.
1219 Zelada (n 262) p. 100.

within their state. Apart from this, the Costa Rican *Sala Constitucional* was the first domestic court – and is still the most prominent example – to hold that advisory opinions are binding on Costa Rica, at least if the state has been the requesting state.

There may be more states in which domestic courts have held the advisory opinions of the IACtHR to be legally binding. For example, the Colombian Constitutional Court in 1996 once held that Article 93 of the Colombian Constitution required it to follow the interpretations established by the IACtHR in both, contentious cases and in advisory opinions.[1220] However, this decision is no longer valid, as the same Court has changed its position several times since then, and since 2014 has held that the jurisprudence of the IACtHR is of interpretive relevance, but not necessarily binding, unless certain criteria are fulfilled, among them that the jurisprudence of the IACtHR must be "uniform and reiterated".[1221]

This example is paradigmatic for the difficulty to correctly grasp the position of the domestic jurisprudence regarding the legal effects of the advisory opinions of the IACtHR. It is often unstable, and not always uniform as far as the different courts of a state are concerned[1222], and sometimes it is not clear whether statements on the normative value of the IACtHR's jurisprudence include its advisory opinions or only refer to its judgments rendered in contentious cases.[1223]

1220 Constitutional Court of Colombia, Judgment C-408/96 of 4 September 1996 para. 24.

1221 Constitutional Court of Colombia, Judgment C-500/14 of 16 July 2014 and Judgment C-327/16 of 22 June 2016; Chehtman, *'International Law and Constitutional Law in Latin America'* (n 1074) p. 7–10.

1222 See *infra*: Chapter 5, Section B.IV.2.b), cc) the example of Peru.

1223 For example, the Mexican Supreme Court has several times slightly changed its position on the normative value of the jurisprudence of the IACtHR but mostly without referring explicitly to the normative value of the advisory opinions. In the Contradicción de Tesis 293/2011 of 3 September 2013 and Tesis P./J. 21/2014 (10a.) the Mexican Supreme Court held that the jurisprudence of the IACtHR was binding for Mexican judges when it was more favorable to the individual, irrespective of whether Mexico had been a party to the case. Although the Supreme Court has referred to the "parties" and to "litigiation" one could argue that "jurisprudence" includes also advisory opinions. However, according to the opinion of the 8th Circuit Court of the first Mexican region, this line of jurisprudence is not applicable to advisory opinions of the IACtHR. The latter were not binding but had only a guiding effect. Anyway, the Supreme Court also held that restrictions to human rights contained in the Constitution prevail over human rights contained in the ACHR. Thus, the whole question of the hierarchy of legal provisions and of the normative value of the jurisprudence of the IACtHR, including its advisory

One explanation for this somewhat erratic domestic jurisprudence is that there are several political factors that sometimes lead national courts to be willing to give great importance to pronouncements of the IACtHR, and at other times lead national courts to feel pressured to distance themselves from findings of the IACtHR.[1224] It would require a separate, more extensive investigation of how the contracting states and the other OAS member states receive the advisory opinions of the IACtHR, which normative value the domestic jurisprudence attaches to them, and what the different motives are to either follow or disregard the interpretations of the IACtHR.[1225] Such an investigation would have gone beyond the scope of this work, in particular since it requires more direct access to all these states and their respective judicial systems.

Nevertheless, even if the following list of domestic courts which have held that the advisory opinions of the IACtHR are binding might not be complete, the following decisions are the most prominent and clearest

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opinions, does not seem to be finally settled. See: Supreme Court of Mexico, Contradicción de Tesis 293/2011 of 3 September 2013, p. 65–66; *idem*, Tesis P./J. 21/2014 (10a.) of 25 April 2014; Octavo Tribunal Colegiado de Circuito del Centro Auxiliar de la Primera Región, Amparo directo 346/2016, 22 September 2016, p. 9; *idem*, Opiniones Consultivas de la Corte Interamericana de derechos Humanos. Implicaciones de su carácter orientador para los jueces mexicanos, tesis aislada (I Región)80.1 CS (10a.), published on 28 April 2017; On the Mexican jurisprudence in this regard see also: Chehtman, *'International Law and Constitutional Law in Latin America'* (n 1074) p. 10–13.

1224 Alejandro Chehtman, *'The relationship between domestic and international courts: the need to incorporate judicial politics into the analysis'*, 8 June 2020, EJIL:Talk!, available at: https://www.ejiltalk.org/the-relationship-between-domestic-and-international-courts-the-need-to-incorporate-judicial-politics-into-the-analysis/; *Idem*, *'International Law and Constitutional Law in Latin America'* (n 1074) p. 13–19. *Cf.*: as well the different reasons why some European states have recognized the jurisprudential authority of the ECtHR mentioned by Besson (n 951) p. 125, 143. Raffaela Kunz has argued that the willingness of domestic courts to follow the jurisprudence of a regional human rights court, even if domestic law stands actually in the way, also depends on the gravity of the human rights violation and the fact whether it is still ongoing. See Raffaela Kunz, *'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts'* (2020) 30 (4) European Journal of International Law, 1129, 1146–1148.

1225 The existing analysis of Guevara Palacios (n 12) p. 369–465 is quite extensive and helpful, but nevertheless not complete and also no longer completely up to date. Other works, like that of Alejandro Chehtman or Juan A. Tello Mendoza, examining the domestic jurisprudence on the conventionality control and on the position domestic courts take towards the IACtHR have so far not particularly focused on the reception of the Court's advisory opinions.

on the matter existing at the moment, and they illustrate possible legal arguments for why national courts may consider the opinions to be legally binding on them.[1226]

Apart from the domestic courts in Costa Rica, Ecuador and Peru, there are definitely more domestic courts from other countries that have referred to the Court's advisory opinions in their jurisprudence. Many use them as legal arguments and recognize their legal relevance and guiding effect, however without holding them to be legally binding.[1227] What this divided picture in the domestic jurisprudence means for the general legal value of the Court's advisory opinions will be discussed below in the evaluation of this subsection.

aa) Costa Rica

The Costa Rican *Sala Constitucional* dealt already in 1995 with the legal effects of advisory opinions of the IACtHR and concluded that Costa Rica was bound by such opinions at least in case it had itself requested the opinion.[1228]

Ten years after the IACtHR had in OC-5/85 found that the Organic Law of the Association of Journalists of Costa Rica was incompatible with the freedom of thought and expression as enshrined in Article 13, a Costa Rican sport moderator and commentator who had on the basis of the still existing domestic law been held to have illegally exercised his profession, brought an *acción de inconstitucionalidad* before the Constitutional Chamber. In its

1226 The decisions presented in the following were identified through the study of secondary literature and an inquiry among befriended researchers from several Latin American countries on domestic jurisprudence relating to advisory opinions. The domestic jurisprudence of the states has not systematically been examined. Yet, decisions holding the advisory opinions of the IACtHR to be legally binding, have normally been so sensational that it is to be assumed that the identified decisions are the clearest existing decisions on the matter.

1227 For example, the Supreme Court of Argentina has often referred to advisory opinions of the IACtHR. See Guevara Palacios (n 12) pp. 385–455 who has analyzed the reception of the advisory opinions of the IACtHR by domestic high courts from several contracting states and also Hennebel and Tigroudja, *The American Convention on Human Rights: A Commentary* (n 203) Article 64, p. 1366–1367 for further references.

1228 Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 9 May 1995, No. 2313–95, Exp. 0421-S-90.

decision, the *Sala Constitucional* asserted that it was "inexplicable" that ten years after the unambiguous advisory opinion of the IACtHR, the law that had been found to be incompatible with Article 13 had still remained in force without any changes.[1229]

Furthermore, the *Sala Constitucional* convincingly held that the total ignorance of an advisory opinion by a state that had itself initiated the advisory procedure would in the end "make a mockery of any normative purpose not only of the Convention, but also of the body it sets up for its application and interpretation".[1230] Consequently, the thesis of a mere "moral value" of the advisory opinions was only applicable to those states that did not participate in the respective advisory procedure.[1231] Costa Rica as the requesting state was however bound by OC-5/85, and was obliged to suspend or modify its domestic law that still required a compulsory membership for all journalists in the national Association of Journalists.[1232]

Less convincing is, however, the normative argumentation of the *Sala Constitucional* leading to this very conclusion. The chamber argued that Costa Rica had become a "party" in terms of Article 68 (1) to the advisory procedure, maintaining that the IACtHR itself had in its OC-3/83 extended the binding character of its decisions to its advisory opinions.[1233] A look at the IACtHR's reasoning in its OC-3/83 reveals, however, that the Court in that opinion had actually asserted the exact opposite. In fact, it had clearly differentiated between the binding force of judgments based on Article 68 (1) explaining that Article 68 and the other provisions governing contentious cases were not applicable to advisory proceedings. It had held that in these provisions, the word "cases" was used in a technical sense, thus only referring to contentious cases and that advisory opinions "lack[ed] the same binding force that attaches to decisions in contentious cases".[1234]

1229 Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 9 May 1995, No. 2313–95, Exp. 0421-S-90, p. 6, para. 6.

1230 Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 9 May 1995, No. 2313–95, Exp. 0421-S-90, p. 7, para. 7 [translation by the author].

1231 *Ibid.*

1232 *Ibid.*

1233 Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 9 May 1995, No. 2313–95, Exp. 0421-S-90, p. 6, para. 6. Interestingly, the Costa Rican Judge Piza Escalante participated both in OC-3/83 and OC-5/85 and later as constitutional judge in the decision of 9 May 1995.

1234 OC-3/83 (n 245) paras. 32–35.

Given this background, the finding by the Constitutional Chamber that Costa Rica had become a "party" to the advisory opinion by requesting it, and by participating in the procedure, is technically incorrect. Moreover, the phrase in which the Chamber stated that "it seems that the Court did not want to give its opinions the same force as judgments"[1235] appears odd as the Chamber seemed to assume that the IACtHR could decide for itself what kind of binding effect its advisory opinions possess, irrespective of how the advisory function had been conceived by the Convention's drafters and by the states parties adopting it.

There is, however, a further line of argumentation by the *Sala Constitucional* which is noteworthy. Long before the introduction of the doctrine of conventionality control, the 1995 decision under consideration here argued that the IACtHR was the natural interpreter of the Convention and that as such all its interpretations, irrespective of whether they were made in a judgment, or in an advisory opinion, produced an effect of *res interpretata*, and did not just possess an ethical or scientific value.[1236]

Moreover, the *Sala Constitucional* reiterated its earlier jurisprudence that pursuant to Article 48 of the Costa Rican Constitution, international human rights instruments binding on Costa Rica prevailed over the Constitution in so far as they grant and guarantee rights more favorable to the individual than the Constitution itself.[1237]

After this noteworthy decision of 1995, the Costa Rican *Sala Constitucional* repeatedly held that the advisory opinions of the IACtHR had "full value" in the country and were binding on the Costa Rican state as they concerned human rights.[1238] The findings of the *Sala Constitucional* on the

1235 Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 9 May 1995, No. 2313–95, Exp. 0421-S-90, p. 7, para. 7.

1236 *Ibid*.

1237 Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 9 May 1995, No. 2313–95, Exp. 0421-S-90, p. 6, para. 6.

1238 Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 9 February 2007, No. 2007001682, Exp. 07–001145–0007-CO, considerando V; *idem*, *Acción de Inconstitucionalidad* of 7 March 2007, No. 2007–03043, Exp. 05–015208–0007-CO, considerando V; *idem*, *Acción de Inconstitucionalidad* of 27 March 2007, No. 2007–004267, Exp. 07–003891–0007-CO, considerando V.

legal bindingness of advisory opinion on the requesting states were also corroborated by the High Court of Criminal Cassation of San José.[1239]

Recently however, the position taken since 1995 has come under question within the Costa Rican *Sala Constitucional*. The separate votes attached to the judgments rendered by the *Sala Constitucional* after the publication of the disputed OC-24/17 evince that at least a minority of the Chamber no longer supports the thesis of the binding effect of the Court's advisory opinions, or at least the binding effect for the requesting state.[1240] The majority decision is also more cautiously redacted than earlier ones. While it refers to the 1995 decision, and while it follows OC-24/17 in that it holds the prohibition of marriage between persons of the same sex to be unconstitutional and urges the Costa Rican state to regulate within a place of 18 months the relationships between same-sex couples accordingly, it no longer uses the words "full value" and "binding" as in earlier decisions.[1241]

Only one judge in her separate vote explicitly stated that Costa Rica was bound by advisory opinion OC-24/17 to immediately recognize the right to same sex marriage.[1242] She bases her argument not only on the 1995 pre-

1239 Tribunal Superior de Casación Penal de San José, Judgment of 27 May 1996, No. 00219–00, Exp. 94–000299–008-PE, paras. 18–20, cited by Guevara Palacios (n 12) p. 404–405.

1240 Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 8 August 2018, No. 12782–2018, Exp. 15–013971–0007-CO, Dissenting vote of Judge Castillo Víquez, Separate vote of Judge Salazar Alvarado and Judge Hernández Gutiérrez; Note of Judge Hernández Gutiérrez; *idem*, *Acción de Inconstitucionalidad* of 8 August 2008, No. 2018012783, Exp. 13–013032–0007-CO, Dissenting vote of Judge Castillo Víquez; Note of Judge Hernández Gutiérrez; Separate vote of Judge Salazar Alvarado, Judge Araya García and Judge Hernández Gutiérrez.

1241 Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 8 August 2018, No. 12782–2018, Exp. 15–013971–0007-CO, considerandos IX-XI. Notably, the *Asamblea Legislativa* of Costa Rica did not regulate the rights of same-sex couples within the 18-month period set by the Constitutional Chamber. Thus, the same-sex marriage became legal on the basis of the judgment, after the 18 months had elapsed. See: '*Matrimonio igualitario se hace realidad en Costa Rica*', Ministry of Foreign Affairs and Worship of Costa Rica, 26 May 2020, available at: https://rree.go.cr/?sec=servicios&cat=prensa&cont=593&id=5543; '*El matrimonio igualitario ya es legal en Costa Rica*', DW, 26 May 2020, available at: https://www.dw.com/es/el-matrimonio-igualitario-ya-es-legal-en-costa-rica/a-53567435.

1242 Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 8 August 2018, No. 12782–2018, Exp. 15–013971–0007-CO, Separate vote of Judge Hernández López. In the meantime, Ms. Hernández López has been elected and appointed as judge to the IACtHR.

cedent, but also on Article 27 of the headquarters agreement between the Republic of Costa Rica and the Court, according to which all decisions of the Court and its President shall have the "same enforceable and executory force as those issued by Costa Rican courts".[1243] In any event, she held, that the inclusion of the advisory opinions in the conventionality control leads to a binding effect of the Court's advisory opinions, in particular when it comes to the requesting state.[1244]

The divided opinions present in the *Sala Constitucional*, with several judges underlining the guiding, but "not necessarily binding"[1245], effect of the advisory opinion, shows that while the IACtHR itself nowadays tends to favor a higher degree of bindingness for its advisory opinions, the Costa Rican *Sala Constitucional*, in a kind of counter reaction, tends towards the opposite direction.

Notably, the Costa Rican *Tribunal Supremo de Elecciones* had, a few months before the more cautious decision of the *Sala Constitutional*, still argued with the 1995 decision and the international-law friendly legal order of Costa Rica, and on this basis held that Costa Rica was bound by advisory opinion OC-24/17.[1246] Consequently, it had recommended administrative and legal measures for the implementation of OC-24/17.[1247]

1243 Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 8 August 2018, No. 12782–2018, Exp. 15–013971–0007-CO, Separate vote of Judge Hernández López. See also: Convenio entre el gobierno de la República de Costa Rica y la Corte Interamericana de Derechos Humanos, signed on 10 September 1981 in San José, Costa Rica.

1244 Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 8 August 2018, No. 12782–2018, Exp. 15–013971–0007-CO, Separate vote of Judge Hernández López.

1245 Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 8 August 2018, No. 12782–2018, Exp. 15–013971–0007-CO, Separate vote of Judge Salazar Alvarado and Judge Hernández Gutiérrez.

1246 Tribunal Supremo de Elecciones, Report of 14 May 2018, Acta N.º 49–2018.

1247 Tribunal Supremo de Elecciones, Report of 14 May 2018, Acta N.º 49–2018.

bb) Ecuador

For several years, the Constitutional Court of Ecuador frequently referred to advisory opinions of the IACtHR, noting that it was necessary to consider them.[1248]

In the context of OC-24/17 the Ecuadorian Constitutional Court went one step further, and held that the advisory opinions of the IACtHR are of "direct, immediate and preferential application [in Ecuador] as long as their content is more favorable to the effective exercise and protection of the rights recognized".[1249] The Ecuadorian Constitutional Court held that the IACtHR is the competent interpreter of the Convention and that its advisory opinions form, due to Article 424 of the Ecuadorian Constitution, part of the so-called "block of constitutionality".[1250] Since the ACHR, as interpreted by the IACtHR in OC-24/17, contained more favorable rights than the Ecuadorian Constitution, the interpretation made by the IACtHR had to prevail. Consequently, Ecuador had to allow and recognize the marriage of same-sex couples in line with OC-24/17 even though the Ecuadorian Constitution, the Civil Code and another domestic law defined marriage explicitly as union between a man and a woman.[1251] The Constitutional Court further held that the Ecuadorian Constitution and the Convention, as interpreted by the IACtHR, did not contradict each other, but that the

1248 Constitutional Court of Ecuador, Judgment N° 003–14-SIN-CC of 17 September 2014, p. 59; *idem*; Decision 0038–07-TC of 5 March 2008, considerando 9; *idem*, Judgment N° 0005-TC of 26 September 2006, considerando 19 cited by Guevara Palacios (n 12) p. 435; Daniela Salazar Marín *et. al*, '*La fuerza vinculante de las Opiniones Consultivas de la Corte Interamericana de Derechos Humanos a la luz del derecho y la justicia constitucional en Ecuador*' (July-December 2019) 32 Foro Revista de Derecho, 123, 132.

1249 Constitutional Court of Ecuador, Judgment 184–18-SEP-CC of 29 May 2018, case No. 1692–12-EP, p. 58f.[Translation from Spanish by the author].

1250 Constitutional Court of Ecuador, Judgment 184–18-SEP-CC of 29 May 2018, case No. 1692–12-EP, p. 58; Constitutional Court of Ecuador, Judgment 11–18-CN/19 of 12 June 2019, case No. 11–18-CN, paras. 281, 300. As to the notion of "block of constitutionality" and its manifestations in Latin America see: Góngora-Mera, *Inter-American Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication* (n 1026) p. 161–198; *idem*, 'The Block of Constitutionality as Doctrinal Pivot of a *Ius Commune*' (n 1026) p. 235–253.

1251 Constitutional Court of Ecuador, Judgment 10–18-CN/19 of 12 June 2019, case No. 10–18-CN, para. 98.

Constitution was complemented by the international human rights instruments.[1252]

However, like the decision of the *Sala Constitucional* of Costa Rica, the decisions of the Ecuadorian Constitutional Court were not unanimous either.[1253] In a dissenting opinion, four judges rejected the binding effect of the advisory opinions, and held that same-sex marriage could not be introduced by an interpretation of the Constitution that was in line with the Convention, but only by way of a constitutional amendment to be adopted by the Ecuadorian parliament.[1254]

cc) Peru

The example of Peru illustrates very well the difficulty – described at the beginning of this subsection – of grasping and clearly assigning the case law of the national courts of a state to one of the views held with regard to the legal nature and effects of advisory opinions of the IACtHR.

On the one hand, the Peruvian Constitutional Tribunal has recognized the obligation to perform a conventionality control, and in 2007 it has held that both, the IACtHR's judgments as well as its advisory opinions, are binding on the State of Peru, and form part of its national legal order based on Article 55 of the Peruvian Constitution.[1255]

Following this line of jurisprudence, the Superior Court of Justice of Lima in 2019, in a case of a lesbian couple that had married in the United States, performed a conventionality control and held the jurisprudence of the IACtHR, including its interpretations made in OC-24/17, to be binding

1252 Constitutional Court of Ecuador, Judgment 11–18-CN/19 of 12 June 2019, case No. 11–18-CN, paras. 211, 300.

1253 Constitutional Court of Ecuador, Judgment 184–18-SEP-CC of 29 May 2018, case No. 1692–12-EP, p. 105; Constitutional Court of Ecuador, Judgment 10–18-CN/19 of 12 June 2019, case No. 10–18-CN, p. 29; Constitutional Court of Ecuador, Judgment 11–18-CN/19 of 12 June 2019, case No. 11–18-CN, p. 62.

1254 Constitutional Court of Ecuador, Judgment 10–18-CN/19 of 12 June 2019, case no. 10–18-CN, Dissenting Opinion of Judge Hernán Salgado Pesantes, supported by Judges Carmen Corral Ponce, Enrique Herrería Bonnet and Tersa Nuques Martínez, paras. 7, 67–95.

1255 Constitutional Tribunal of Peru, Resolution of 19 June 2007, 00007–2007-PI/TC, para. 41. As to the implementation of the conventionality control in Peru see: Tello Mendoza, *El Control de Convencionalidad: Situación en algunos Estados Americanos* (n 1074) p. 155–163.

on Peru.[1256] Consequently, it ordered the civil registry of Lima to refrain from enforcing Article 234 of the Peruvian Civil Code, which defines marriage as the union between a man and a woman, and to recognize and register the marriage of the lesbian couple.[1257]

However, when confronted with a similar case of a gay couple that had married in Mexico, the Peruvian Constitutional Tribunal in 2020 upheld the decision of the National Identity and Civil Registry, which had declined to recognize the marriage of the gay couple in Peru.[1258] The majority of the constitutional judges referred to the separate opinion of Judge Vio Grossi, attached to OC-24/17, in which the latter had stated that the Court's advisory opinions were not binding.[1259] They held that the advisory opinion, if at all, was only binding on the requesting state of Costa Rica, and that the recognition of a same sex marriage was not compatible with the Peruvian Constitution or with the Civil Code.[1260]

The three dissenting judges objected and held that the marriage of the gay couple had to be recognized in Peru.[1261] They warned that Peru would be condemned, should the case reach the IACtHR.[1262] At least one of the dissenting judges held the advisory opinions of the IACtHR explicitly to be binding, while the other two held that the advisory opinions contained im-

1256 Supreme Court of Justice of Lima, Eleventh Constitutional Court, Judgment of 22 March 2019, Exp. 10776–2017, paras. 44–45.

1257 Supreme Court of Justice of Lima, Eleventh Constitutional Court, Judgment of 22 March 2019, Exp. 10776–2017, parte resolutiva.

1258 Constitutional Tribunal of Peru, Judgment 676/2020 of 3 November 2020, case no. 01739–2018-PA/TC.

1259 Constitutional Tribunal of Peru, Judgment 676/2020 of 3 November 2020, case no. 01739–2018-PA/TC, vote of Judge Blume Fortini, para. 9, vote of Sardón de Taboada.

1260 Constitutional Tribunal of Peru, Judgment 676/2020 of 3 November 2020, case no. 01739–2018-PA/TC, vote of Judge Ferrero Costa, vote of Judge Blume Fortini, vote of Judge Sardón de Taboada; *cf.* Dissenting Vote of Judges Ledesma Narváez and Ramos Núñez, para. 117.

1261 Constitutional Tribunal of Peru, Judgment 676/2020 of 3 November 2020, case no. 01739–2018-PA/TC, Dissenting Vote of Judges Ledesma Narváez and Ramos Núñez and Dissenting Vote of Judge Espinosa-Saldaña Barrera.

1262 Constitutional Tribunal of Peru, Judgment 676/2020 of 3 November 2020, case no. 01739–2018-PA/TC, Dissenting Vote of Judge Espinosa-Saldaña Barrera, para. 67, Dissenting Vote of Judges Ledesma Narváez and Ramos Núñez, para. 118.

portant parameters that had to be taken into account by the Constitutional Tribunal.[1263]

Hence, in addition to Colombia[1264], Peru provides another example of the domestic jurisprudence being often neither constant nor uniform. In light of the 2020 decision of the Constitutional Tribunal, it looks like the position that the IACtHR's advisory opinions are binding on Peru does no longer constitute the majority position within the country's Constitutional Tribunal.

c. Evaluation and intermediate conclusion

The preceding section has shown that authors and domestic courts have, at different times and with different reasons, come to the conclusion that the advisory opinions of the IACtHR are legally binding.

At first, it was only individual authors and domestic courts that argued for a legal bindingness of the advisory opinions, but since the IACtHR has held that its advisory opinions shall be included in the conventionality control, and in particular since the controversial OC-24/17, the view that advisory opinions are legally binding has become more popular.

However, in light of the above assessment of the constituent basis of the Court's advisory function, and for reasons that will be pointed out in more detail in the following discussion on the meaning of *res interpretata*, it remains preferable to abstain from using the term "bindingness" in relation to advisory opinions.

First of all, it has been shown that the interpretation of Article 64 made by Faúndez Ledesma, and supported by Salvioli is not convincing. Although a teleological and *pro persona* interpretation of the Convention is generally supported[1265], such an interpretation alone does not support the conclusion that the advisory opinions are legally binding in a formal sense.

When authors like Roa and Zelada nowadays argue that the advisory opinions are not per se legally binding, but become either *de jure* or *de*

1263 Constitutional Tribunal of Peru, Judgment 676/2020 of 3 November 2020, case no. 01739–2018-PA/TC, Dissenting Vote of Judge Espinosa-Saldaña Barrera, para. 63, Dissenting Vote of Judges Ledesma Narváez and Ramos Núñez, paras. 117–119.

1264 See *supra*: Chapter 5, Section B.IV.2.b), *inter alia* n 1221.

1265 This thesis supports the view that in particular human rights treaties should be interpreted in a dynamic way, and in light of the *pro persona* principle. However, the *pro persona* principle must not be used in such a way that it overrides all other rules of treaty interpretation. As to a critical view on the more extensive

facto binding because of the doctrine of conventionality control, this view comes close to those authors who hold that the advisory opinions produce *res interpretata*, and speak in this context of an indirect bindingness.

However, although the observation that the conventionality control increases the value and impact of the Court's advisory opinions is correct, the conventionality control alone does not change the legal nature of the advisory opinions. As concerns the notion "*de facto*", it is held that it complicates the understanding of the actual legal effects of advisory opinions more than it clarifies it. Lastly, the term "bindingness" is generally closely related to judgments and the effect of *res judicata*, and thus implies that the advisory opinions could be enforced, and that no deviation was permissible.

In contrast to the authors presented in this section, the examined decisions of domestic courts have not only been based on an interpretation of Article 64 or the position of the IACtHR, but have also argued on the basis of provisions of national constitutional law, which assign international human rights instruments a supra-constitutional rank if they contain more favorable rights than the domestic law. Therefore, one has to be careful about what can be inferred from these decisions regarding the general normative value of the advisory opinions of the IACtHR.

If a decision to recognize the advisory opinions of the IACtHR as binding is based on domestic law, this decision is of course only binding for that state and says little, if anything, about the legal value the advisory opinions have under international law. Nevertheless, such a decision may inspire other states to adopt a similar provision or to interpret their domestic law in the same way. This could then, step by step, lead to the formation of a regional custom, provided that these states then also act in the believe that they are under international law required to interpret their domestic law that way, and not, *vice versa*, that they have adopted these domestic provisions precisely in order to amend the existing rules under international law.

If a decision is not only based on domestic law, but also on the interpretation of the ACHR, and on the Court's doctrine of conventionality control, such a decision may constitute subsequent practice in terms of Article 31 (3) lit. b or Article 32 VCLT. However, as indicated above[1266], the interpretive value of subsequent practice depends among other factors on its clarity,

understanding of the *pro persona* principle supported by several courts in Latin America see: Rodiles (n 1067) in particular p. 161–163, 171.

1266 See *supra*: Chapter 5, Section B.II.2. and ILC, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with*

consistency and breadth, which is why single court decisions carry only little weight when it is still unclear whether the state as a whole will adopt the view of its judiciary, and even less clear, whether the other state parties agree with that interpretation.

As outlined, all of the above-presented decisions have combined the interpretation of domestic law provisions with arguments of international law.

As far as the 1995 decision of the Costa Rican *Sala Constitucional* is concerned, it was presumably not only the interpretation of Article 48 of the Costa Rican Constitution that was decisive for classifying the advisory opinions as binding on the state, but also the noticeably embarrassing fact for the *Sala Constitucional* that Costa Rica had still not changed its legislation ten years after OC-5/85 had found this legislation to be incompatible with the ACHR.[1267]

What is more, it may have played a role that Piza Escalante, who was the first president of the IACtHR and had also participated in the OC-5/95 proceedings, formed part of the bench of the *Sala Constitucional* in the 1995 decision. As noted above, the actual normative argumentation of the *Sala Constitucional* that Costa Rica had become a "party" to the advisory proceeding was not convincing.

Nevertheless, the Costa Rican jurisprudence has, in contrast to that of other states, been remarkably consistent since that precedence. The normative reasoning established by the *Sala Constitucional* in 1995 has, however, not been adopted by courts of other states. Furthermore, the cautious formulation of the majority opinion and the critical minority votes attached to the 2018 decision on same-sex marriage show that it is not certain that the Costa Rican judges will always automatically adopt the criteria established by the IACtHR. At least, the decision not to annul with immediate effects the domestic law provision that was in conflict with the jurisprudence of the IACtHR, but to give the *Asamblea Nacional* time to regulate the matter itself, shows a certain resistance to implement the conventionality control as demanded by the IACtHR.

The decisions of the Ecuadorian Constitutional Court and that of the Superior Court of Justice of Lima are in turn examples of an exemplary

commentaries, adopted at the seventieth session of the ILC in 2018, conclusion 9 and commentary thereto, p. 70, 74, para. 12

1267 *Cf.*: Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 9 May 1995, No. 2313–95, Exp. 0421-S-90, p. 6, para. 6.

implementation of the doctrine of conventionality control, given that these courts refused to apply the relevant domestic norms, and instead based their decision on the IACtHR's interpretation contained in OC-24/17. This highlights how this doctrine can increase the effectiveness of advisory opinions. Notably, in both states the constitution facilitates this implementation of the doctrine of conventionality control, stipulating that the rights enshrined in it shall be interpreted in light of international human rights law, or that international human rights treaties shall prevail if they contain more favorable rights than the constitution.[1268] However, the decision of the Peruvian Constitutional Tribunal, which contradicted that of the Superior Court of Justice of Lima, shows that there is no agreement on the understanding and application of the doctrine of conventionality control in Peru.

With respect to the question whether there already exists a subsequent practice of the contracting states in terms of Article 31 (3) lit. b VCLT, which would support the doctrine of conventionality control as stipulated by the Court, the interpretive value and significance of the sensational judgments rendered after the issuance of OC-24/17 is further relativized by the fact that OC-24/17 was more or less completely ignored in another comparable decision of the Chilean Constitutional Tribunal.[1269]

3. *Res interpretata* and *erga omnes partes* effects

It has already been mentioned above that ever since OC-21/14, the Court not only holds that the conventionality control should also be performed on the basis of its interpretations made in advisory opinions, but that it furthermore holds that its advisory opinions produce the effect of "*la norma convencional interpretada*".[1270] This term had already been used by other

1268 Article 55 as well as the fourth final provision of the Constitution of Peru and Article 424 of the Constitution of Ecuador.

1269 Instead of relying on OC-24/17, the Chilean Constitutional Tribunal argued among other reasons with the jurisprudence of the ECtHR when it rejected the claim of a lesbian couple. The Tribunal held that the fact that same-sex couples who have married abroad can only register as civil union in Chile did not violate their rights. The Tribunal held that only the legislator could decide to give same-sex couples the right to marry. The doctrine of conventionality control was not mentioned at all. See: Constitutional Tribunal of Chile, Judgment 7774–2019 of 25 June 2020.

1270 OC-21/14 (n 320) para. 31. Unfortunately, the English version of the opinion, in contrast to the Spanish original, does not use the proper technical terms "conventionality control" and "res interpretata" but instead speaks of "control of conformity with the Convention" and "the interpretation given to a provision

authorities in relation to the Court's advisory opinions years before the Court had adopted this view, and also before Judge Ferrer Mac Gregor first mentioned the term in relation to advisory opinions.[1271] By its supporters, the *erga omnes (partes)* effect of *res interpretata* and the conventionality control doctrine are considered two sides of the same coin.[1272]

Yet, to date – like in the debate on the exact legal consequences of the doctrine of conventionality control – it remains often unclear what is exactly meant when the term "*res interpretata*", or in Spanish, "*la norma interpretada*" is used. Is *res interpretata* understood to have only a guiding effect, does it entail an obligation to *consider* the Court's jurisprudence, or can it even be equated with an obligation to *follow* the Court's jurisprudence?[1273]

Moreover, there is a discrepancy as to whether the effect of *res interpretata* already exists *de lega lata,* or whether it was only desirable *de lege ferenda*. Whereas the concept of *res interpretata* is endorsed by the Court[1274], as noted above[1275], apparently not even all of the (former) judges of the Court associate the same effects with the term "*res interpretata*", and in practice the effect of *res interpretata* is as infrequently recognized

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of the Convention". Especially the latter phrase can easily be read over without noticing the doctrinal concept the Court is referring to.

1271 Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 9 May 1995, No. 2313–95, Exp. 0421-S-90, p. 7, para. 7; Víctor M. Rodríguez Rescia, *La Ejecución de Sentencias de la Corte Interamericana de Derechos Humanos* (Investigaciones Jurídicas, S.A., 1997) p. 59, 63; *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, para. 59 and similarly, albeit without using the notion of "*res interpretata*" explicitly: *Case of Cabrera García and Montiel Flores v. Mexico* (n 1027), Concurring Opinion of *Ad hoc* Judge Eduardo Ferrer Mac-Gregor Poisot, para. 49.

1272 Argelia Queralt Jiménez, 'El efecto de cosa interpretada y la función de armonización de estándares del tribunal Europeo de Derechos Humanos', in Eduardo Ferrer Mac-Gregor Poisot and Rogelio Flores Pantoja (eds), *La Constitución y sus garantías – A 100 años de la Constitución de Querétaro de 1917* (UNAM, 2017) p. 695, 713.

1273 *Cf.* Malarino, 'Acerca de la pretendida Obligatoriedad de la Jurisprudencia de los Órganos Interamericanos de Protección de Derechos Humanos para. los Tribunales Judiciales nacionales' in Christian Steiner (ed), *Sistema Interamericano de Protección de los derechos humanos y derecho penal internacional Vol. II* (Konrad Adenauer Stiftung e.V. 2011) p. 435, 441, not using the term "*res interpretata*" but referring to the conventionality control doctrine and mentioning two possible understandings of the Spanish term "servir de guía" which means "serve as guide".

1274 *Case of Gelman v. Uruguay* (n 1105) paras. 67ff; OC-21/14 (n 320) para. 31.

1275 See *supra*: Chapter 5, Section B.III.3. and Chapter 5, Section B.IV.1.b).

as the conventionality control doctrine has so far been implemented only inconsistently.

Sometimes the position of the Court is supported without providing a further analysis of the precise effects of *res interpretata*.[1276] On the other hand, critics of the Court often do not even mention the concept, but reject anything related to the doctrine of conventionality control, or use different terms when they propose changes in the doctrine of conventionality control – without questioning whether the concept of *res interpretata* could be reconciled with their critique if it was understood less strictly than by supporters such as Judge Ferrer Mac-Gregor Poisot.[1277]

In this section, it shall therefore be more closely examined what is actually to be understood by the term "*res interpretata*", and what the ensuing legal effects are. At first, the differences between *res judicata* and *res interpretata* are pointed out, the legal basis of *res interpretata* is discussed, and it is questioned whether the concept can reasonably be applied to advisory opinions. As the idea of *res interpretata* and its applicability to advisory opinions is principally affirmed, it is then questioned how *res interpretata* is formed and what kind of obligations it entails. At this point, this work not only analyzes the supporters' opinions of *res interpretata*. Rather, the concept is defined in a way that is, according to the view expressed here, not only feasible and justifiable *de lege lata*, but also reconcilable with part of the criticism that has been raised with regard to the Court's approach. Finally, it is asked for whom the *res interpretata* is particularly relevant in light of the asymmetries still prevailing in the inter-American human rights system.

1276 Juan C. Hitters, '*Un Avance en el Control de Convencionalidad. (El Efecto 'erga omnes' de las Sentencias de la Corte Interamericana)*' (2013) 11(2) Estudios Constitucionales, 695–710; Oswaldo Ruiz-Chiriboga, '*The Conventionality Control: Examples of (un)succesful experiences in Latin America*' (2010) 3 Inter-American and European Human Rights Journal, 200, 214–215.

1277 As will be further outlined *infra*, in the inter-American context, the critique of any kind of *erga omnes* effect of the Court's jurisprudence is embedded in the broader debate on the doctrine of conventionality control. See Chapter 5, Section C.IV.3.d) and in particular (n 1326-1330).

a) *Res interpretata* versus *res judicata*

According to Article 67, the judgments of the IACtHR are "final and not subject to appeal" and pursuant to Article 68 (1) the "States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties". Hence, it is undisputed that the judgments of the Court rendered in contentious cases produce the effect of *res judicata*, which is "the effect of a final and unchallengeable judgment"[1278] and that they are binding *inter partes*.

The operative part of a judgment is definitely binding but the *res judicata* effect of a judgment may also extend to the Court's reasoning, at least if it is essential to understanding or even inseparable from the operative part.[1279] The IACtHR went even further and held that "[t]he binding effect of the [j]udgment is not limited to the operative paragraphs, but rather includes all its grounds, reasoning, implications and effects; in other words, the [j]udgment as a whole is binding for the State, including its *ratio decidendi*".[1280]

Apart from this effect of *res judicata inter partes*, the Convention, like the ECHR and the AfrCHPR as well, does not explicitly recognize any *erga omnes* effects of the decisions of the Court.

Yet, if the *inter partes* approach was strictly adhered to, and any kind of *erga omnes* effect of the jurisprudence of a human rights court negated, the regional human rights system would be highly inefficient.[1281] This is because the human rights court would then likely be repeatedly faced with

1278 Chester Brown, 'Art. 59' in Andreas Zimmermann *et al.* (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn OUP, 2019) mn. 30.

1279 PCIJ, *Interpretation of Judgments Nos. 7 and 8 (The Chórzow Factory)*, Judgment of 16 December 1927, Series A, No. 13, p. 20; ICJ, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011, p. 537, 542, para. 23; Andreas Zimmermann and Tobias Thienel, 'Art. 60' in Andreas Zimmermann *et al.* (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn OUP, 2019) mn. 72; William S. Dodge, *'Res Judicata'* in Max Planck Encyclopedias of International Law (last updated January 2006), available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1670?prd=MPIL para. 11.

1280 *Case of Gelman v. Uruguay* (n 1105) para. 102.

1281 Obonye Jonas, '*Res interpretata principle: Giving domestic effect to the judgments on the African Court of Human and Peoples' Rights*' (2020) 20 African Human Rights Law Journal, 736, 739.

very similar claims, and while the court would have to reiterate its findings again and again, the states concerned could still maintain that they were not bound by the earlier similar judgments.[1282]

The ECtHR has thus stated early on that its judgments "serve not only to decide those cases brought before [it] but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention".[1283] It thus recognized that the effect of its judgments extends beyond the parties and the specific case decided.[1284] As explained above, the IACtHR, by establishing its doctrine of conventionality control, went even further than the ECtHR.[1285] By holding that all state authorities of the contracting states have to carry out a conventionality control, and that the decisive parameter is not only the Convention's text, but also the way it has been interpreted by the Court, the IACtHR attributes to its jurisprudence an *erga omnes* effect.[1286]

Once the Court has interpreted a provision of the Convention, this interpretation becomes an integral part of the Convention and participates in the binding authority of the Convention.[1287] *Res interpretata* is thus the consequence of the interpretive authority of the Court and is produced when the Court interprets the text of the Convention or other human rights treaties.[1288] In contrast to *res judicata*, the effect of *res interpretata* is not

1282 *Cf.*: *Case of Tibi v. Ecuador* (n 1043), Separate Concurring Opinion of Judge Sergio García Ramírez, paras. 4–6.

1283 ECtHR, *Case of Ireland v. The United Kingdom*, Judgment of 18 January 1978, Appl. no. 5310//71, para. 154.

1284 See Adam Bodnar, 'Res Interpretata: Legal Effect of the European Court of Human Rights' Judgments for other States Than Those Which Were Party to the Proceedings' in Yves Haeck and Eva Brehms (eds), *Human Rights and Civil Liberties in the 21st Century* (Springer, 2014) p. 223, 227–229 for further references as to how the effect of *res interpretata* is observed by the ECtHR.

1285 *Cf.* Kunz, *Richter über internationale Gerichte* (n 1071) p. 56.

1286 Kunz, *Richter über internationale Gerichte* (n 1071) p. 82.

1287 *Cf.*: Jörg Polakiewicz, *Die Verpflichtung der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte* (Springer, 1993) p. 354; Kunz, *Richter über internationale Gerichte* (n 1071) p. 30, 57; Besson (n 951) p. 129.

1288 *Cf.*: Besson (n 951) p. 132–134, 158. Given that this description of *res interpretata* would admittedly also fit to the term "authoritative interpretation", it has to be noted once more that the different terms and concepts used to describe the legal effects of advisory opinions are not always understood and defined the same way and may to a certain extent definitely overlap. However, as will be shown in the following sections, according to the view taken here, the *erga omnes partes* effect of *res interpretata* differs in so far from an authoritative interpretation, that it entails for all contracting parties the treaty-based obligation to take the Court's in-

limited to the parties of a case but extends *erga omnes* to all contracting parties.[1289] More precisely, one should thus speak of an *erga omnes partes* effect of *res interpretata*.[1290]

As the notion of *res interpretata* has originally been used to describe the effects judgments rendered in contentious cases have on contracting states not party to the respective case, the question arises whether it is at all transferrable to advisory opinions.

b) Legal basis and the applicability of *res interpretata* to advisory opinions

While the Court (since OC-21/14), and other authorities[1291] (already prior to OC-21/14) have stated that advisory opinions produce *res interpretata*, it has also been argued that the doctrine of *res interpretata*, which was originally developed in the European context, could not be analogously applied to the advisory opinions of the IACtHR.[1292] According to that opinion, in the European context, the doctrine was based on Articles 32 (1) and 46 ECHR, and Article 32 (1) ECHR also comprised the advisory function of the ECtHR, while the corresponding articles of the ACHR,

terpretations as standard from which a deviation is only allowed in certain legally justified circumstances. The term authoritative interpretation, on the contrary, does normally not entail such a treaty-based legal obligation. As noted *supra* in Chapter 5, Section B.IV.1., it is often rather used in relation with attributes such as "moral" in order to highlight the lack of a legal obligation. It means that an interpretation carries the authority of the Court and that it may therefore serve as guiding source for the determination of rules of international law. See *infra* in Chapter 5, Section B.IV.3.e) what this difference between the *erga omnes partes* effect of *res interpretata* and that of an authoritative interpretation means with regard to the asymmetries in the inter-American human rights system.

1289 Besson (n 951) p. 129.

1290 Speaking precisely of an *erga omnes partes* effect also helps to clearly distinguish this discussion on the effect of the jurisprudence of human rights courts on contracting states not party to a given case from the *erga omnes* obligations recognized by the ICJ, which states owe to the international community as a whole. As to this necessary distincion and as to the ICJ's recognition of *erga omnes* obligations see: Besson (n 951) p. 131; Obonye (n 1281) p. 736, 741; ICJ, *Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain)*, Judgment of 5 February 1970, I.C.J. Reports 1970, p. 3, 32, para. 33.

1291 *Cf.*: Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 9 May 1995, No. 2313–95, Exp. 0421-S-90, p. 7, para. 7; Rodríguez Rescia (n 1271) p. 59, 63.

1292 Guevara Palacios (n 12) p. 337.

namely Article 62 and 68, would only apply to the Court's contentious jurisdiction.[1293] Therefore, the doctrine was not transferrable to the Court's advisory opinions.[1294]

Whereas it is of course correct that Articles 62 and 68 only relate to the Court's contentious function, that argumentation is misguided from its outset. This is due to the fact that the European doctrine is not based on the cited articles, at least not on Article 46 ECHR. To the contrary, Article 46 ECHR, like Article 68, only refers to the effects of the ECtHR's judgments, and only establishes that the judgments are binding *inter partes*, thus stipulating the classical effect of *res judicata*. Therefore, Article 46 ECHR could actually be used as an argument against an *erga omnes* effect. The supporters of *res interpretata*, however, argue that Article 46 ECHR is not conclusive. They hold that it only regulates the *res judicata inter partes* effect of judgments while it does not preclude the Court's interpretations from producing a different type of legal effect apart from *res judicata inter partes*.[1295]

1293 Guevara Palacios (n 12) p. 337.

1294 Guevara Palacios (n 12) p. 337. Despite this finding, Guevara Palacios' position on the legal effects of the Court's advisory opinions is in fact very similar to the position that they have an *erga omnes partes* effect of *res interpretata*. According to his position that the advisory opinions produce what he calls an "*interpretación constitucional y/o convencional*", the Court's interpretative criteria shall be taken into account and generally be followed by the states. Only in case there exists a more progressive interpretation or one that is more favorable to the individual, the national authorities may deviate from the criteria developed by the Court. The point where his position slightly differs from the explanations of the Court lies in the fact that Guevara Palacios takes the asymmetries of the inter-American human rights system into account and holds that not all interpretations made by the Court in the context of its advisory function have to have the same strong effect on all OAS member states but that it depends on whether the Court interprets norms constituent for the whole system or whether it interprets treaty norms that are not binding on all 35 OAS member states. Only states that are bound by the respective treaty which the Court has interpreted in an advisory opinion have to adopt and follow the Court's interpretations. See: Guevara Palacios (n 12) p. 337–338, 346–367. Although this differentiation is important given the persisting asymmetries (see *infra*: Chapter 5, Section B.IV.3.e)), there is no need to reject the whole concept of *res interpretata* in order to develop a similar position under a different denomination. Therefore, Guevara Palacio's idea of an "*interpretación constitucional y/o convencional*" is not further outlined in this chapter.

1295 *Cf.*: Polakiewicz (n 1287) p. 352 speaking of Article 53 instead of 46 ECHR as the numbering of the articles was still different at that time.

Instead of being based on Articles 32 (1) and 46 ECHR, the *res interpretata* effect is rather deduced from an interpretation of Articles 1, 19 and 32 ECHR.[1296] Furthermore, the general role of the ECtHR, as the competent and final interpreter of the ECHR, as deduced from Articles 19 and 32 ECHR, is in this context more important than the explicit wording of these norms, and this role applies *mutatis mutandis* to the IACtHR in relation to the ACHR.

Accordingly, the *res interpretata* effect of the IACtHR's jurisprudence has also been based on Articles 1 and 2 and on the principle of *effet utile*, and not on Articles 62 and 68.[1297] It has been held that Articles 1 (1) and 2 provide even clearer than the ECHR that the states parties have to undertake measures to ensure the effectiveness of the rights enshrined in the Convention, and that they therefore have to take the Court's jurisprudence into account, given that the Court's jurisdiction comprises all matters relating to the "interpretation or application" of the Convention.[1298]

In light of this, the argument that the doctrine of *res interpretata* could not be applied to the advisory opinions of the IACtHR is not convincing.

On the contrary, if one assumes that the judgments of the IACtHR produce *res interpretata*, and that, more importantly, not the bindingness of the judgments is extended, but that the effect of *res interpretata* follows from the obligation to ensure the effectiveness of the substantive conventional rights[1299], it is only logical to affirm this effect for the Court's advisory opinions as well. For the *res interpretata* is contained in those parts of a judgment that can be generalized, and that do not refer to the assessment of the facts of the individual case.[1300]

As advisory opinions, however, per se mostly contain abstract and generalizable interpretations, the idea that they produce *res interpretata* is all

1296 Kunz, *Richter über internationale Gerichte* (n 1071) p. 30; Besson (n 951) p. 140; Bodnar (n 1284) p. 223, 226; Hans-Joachim Cremer, 'Kapitel 32: Entscheidung und Entscheidungswirkung' in Oliver Dörr *et al.* (eds), *EMRK/GG Konkordanzkommentar* (Band II, 3nd edn Mohr Siebeck, 2022) mn. 147; Anne Peters und Tilmann Altwicker, *Europäische Menschenrechtskonvention* (2nd edn C.H. Beck, 2012) § 37, mn. 18.

1297 *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, paras. 54, 91.

1298 *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, paras. 44, 54. As to the full text of Articles 1 and 2 see *supra* (n 1054).

1299 *Cf.*: Kunz, *Richter über internationale Gerichte* (n 1071) p. 30–31, 57.

1300 Besson (n 951) p. 132, 161.

the more convincing in relation to them than to judgments in contentious cases. Thus, if the IACtHR holds that its judgments produce not only *res judicata* but also *res interpretata*, it is only logical to hold that its advisory opinions contain *res interpretata*, too.[1301]

c) Formation of *res interpretata*

It has already been stated that *res interpretata* is produced when the Court interprets a legal provision, and that this interpretation then becomes an integral part of the Convention.[1302] Yet, in order to be more precise, it needs to be asked whether *res interpretata* is immediately formed by *any* interpretation made by the Court, or whether it is only formed when the Court has confirmed the interpretation at least once in a later judgment or advisory opinion.

As a starting point, *res interpretata* exists in any case in the presence of a well-established jurisprudence.[1303] For instance, already before OC-24/17 the Court had held that states must not discriminate on the basis of sexual orientation, and that Article 17 does not only protect a traditional family model.[1304] Consequently, these interpretations of Article 1 (1) and 17, reiterated in OC-24/17, by now constitute without a doubt *res interpretata*.

1301 That jurisprudential authority or *res interpretata* not only emanates from judgments but also from other court pronouncements is also exemplified by the Human Rights Act 1998 of the United Kingdom which recognizes the obligation to take into account the case-law of the ECtHR and explicitly includes advisory opinions among the sources of jurisprudential authority: Section 2.1. (a) states: (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any (a)judgment, decision, declaration or advisory opinion of the European Court of Human Rights, […] whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen. The Human Rights Act 1998 is available at: https://www.legislation.gov.uk/ukpga/1998/42/section/2; *cf.* also: Bodnar (n 1284) p. 250; Besson (n 951) p. 141.

1302 See *supra* Chapter 5, Section B.IV.3.a) and there (n 1287).

1303 *Cf.*: Kathrin Brunozzi, 'Art. 46' in Jens Meyer-Ladewig *et al.* (eds), *EMRK: Europäische Menschenrechtskonvention* (5th edn Nomos, 2023) mn. 16.

1304 OC-17/02 (n 253) paras. 69, 70; IACtHR, *Case of Atala Riffo and Daughters v. Chile*, Judgment of 24 February 2012 (Merits, Reparations and Costs), Series C No 239, paras. 83–93, 142; *Case of Duque v. Colombia*, Judgment of 26 February 2016 (Preliminary Objections, Merits, Reparations and Costs), Series C No 310, paras. 104–138; OC-21/14 (n 320) para. 272; OC-24/17 (n 1) paras. 178, 197–199.

Yet, the reiteration of an interpretation is not mandatory for the formation of *res interpretata*. As a matter of fact, advisory opinions in particular often deal with questions of interpretation that do not arise so frequently, which is why no contentious case law might develop with regard to these questions. Therefore, an interpretation once provided for in an advisory opinion is likely to persist for a long time without being further developed or overruled.

For example, interpretations of terms contained in Article 64 such as "other treaties" or "domestic laws" are not likely to be questioned in contentious cases, so that these interpretations can only be reconfirmed if a later, similar request for an advisory opinion is made.

The fact that the interpretations of these terms – which the Court established in OC-1/82 and OC-4/84 – are still valid, shows that the Court's jurisprudence is mostly consistent, and that its interpretations therefore do not necessarily have to be reiterated before they can be considered to constitute *res interpretata*.[1305] But the more often an interpretation is confirmed by the Court, all the clearer the presence of *res interpretata* becomes.

In contrast to the formation of *res judicata*, the formation of *res interpretata* does not depend on the fact that the respective interpretation was essential for the final *ratio decidendi* of judgments, or for the final answer to the legal questions as far as advisory opinions are concerned. Rather, an *obiter dictum* that is without relevance for the solution of a concrete case or for the direct answer of an advisory opinion request may also contain an important interpretation of a provision of the Convention, or of another human rights treaty, and thus contribute to the formation of *res interpretata*.[1306]

In sum, as concerns advisory opinions, any interpretation of a certain provision established in an advisory opinion, be it established procedural or material standards, statements as to the legal status of an obligation (e.g. whether it forms part of *ius cogens*), or also as to obligations that are said

1305 *Cf.*: OC-4/84 (n 233), paras. 13–19; OC-1/82 (n 42) first final finding. The finding, that the definition of the term "other treaties" is still valid is true although the Court has in fact extended its advisory jurisdiction *ratione materiae* also on non-binding legal instruments like the American Declaration and the OAS Democratic Charter by holding that their interpretation was necessary in order to be able to interpret the Convention or the OAS Charter. See *supra*: Chapter 3, Section B.III.

1306 *Cf.*: Ezequiel Malarino, 'Acerca de la pretendida Obligatoriedad de la Jurisprudencia de los Órganos Interamericanos de Protección de Derechos Humanos para los Tribunales Judiciales nacionales' (n 1273) p. 435, 454.

to be derived from a Convention right or other provision, are assumed to produce *res interpretata*. This is all the more true if these interpretations and established standards are reiterated in later judgments or advisory opinions.

d) Type of obligations resulting from *res interpretata*

Once it is affirmed that the concept of *res interpretata* is also applicable to advisory opinions, and clarified when *res interpretata* is produced, it needs to be defined what kind of obligations actually follow from the emergence of *res interpretata*.

Despite the early pronouncement of the ECtHR on the *erga omnes* effect of its judgments[1307] and the IACtHR's repeated statements on *res interpretata*, the actual legal obligation that follows from the acceptance of *res interpretata* and an *erga omnes* effect of judgments and advisory opinions is still indeterminate.[1308] This can be explained by the discrepancy between the endorsement of the concept by the Courts and the still reserved reaction by states.[1309] The indeterminacy is also highlighted by the many different termini used and opinions held to date both among states and in academia.

1307 See next to the *Case of Ireland v. The United Kingdom* also ECtHR, *Case of Karner v. Austria*, Judgment of 24 July 2003, Appl. no. 40016/98, para. 26 and see Besson (n 951) p. 139 fn. 27 for further references.
1308 *Cf.*: Besson (n 951) p. 126, 173.
1309 *Cf.*: Besson (n 951) p. 137ff.

In the European context, some only speak of an "orientative effect" [1310] or "factual effects" [1311], or hold the *res interpretata* effect to be something desirable de *lege ferenda*[1312].

Others however derive such an *erga omnes* effect of *res interpretata* from Articles 1, 19 and 32 ECHR and from a teleological interpretation of the ECHR as a whole, and deduce from it an already *de lege lata*

1310 The German Federal Constitutional Court holds that the jurisprudence of the ECtHR has a "factual orientation and guiding function" ("faktische Orientierungs- und Leitfunktion") also in cases in which Germany was not a party to the case. See: German Federal Constitutional Court, Judgment of 4 May 2011 – 2 BvR 2333/08, para. 89 and Judgment of 12 June 2018 – 2 BvR 1738/12, paras. 129ff. With regard to the jurisprudence of the Federal Constitutional Court, it is important to note that the obligation to take the jurisprudence of the ECtHR into account ("Berücksichtigungspflicht"), which the Constitutional Court established in the famous case of "Görgülü", was firstly established with regard to a judgment against Germany, and secondly derived from the German Constitution (Basic Law). See: German Federal Constitutional Court, Decision of 14 October 2004 – 2 BvR 1481/04, paras. 29ff. Thus, while the obligation to take the jurisprudence of the IACtHR into account which is supposed to follow from *res interpretata* as discussed in this Chapter, is derived from an interpretation of the ACHR, and hence held to exist under international law, the "Berücksichtigungspflicht" usually spoken of in the German legal context concerns a constitutional law obligation.

1311 Marten Breuer, 'Art. 46' in Ulrich Karpenstein und Franz Mayer (eds), *EMRK: Konvention zum Schutz der Menschenrechte und Grundfreiheiten* (3rd edn C.H. Beck, 2022) mn. 45; following the words of the German Federal Constitutional Court, Brunozzi and Peters/Altwicker also mention the factual orientative effect ("faktische Orientierungs- und Leitfunktion") but Brunozzi assumes a binding effect on the basis of Article 1 ECHR at least in case of a well-established jurisprudence and Peters/Altwicker leave it open whether there exists also a legal obligation to consider apart from the factual effects. See: Brunozzi (n 1303) mn. 16–17; Peters and Altwicker (n 1296) § 37, mn. 18; Mirjana Lazarova Trajkovska, 'Ways and means to recognize the interpretative authority of judgments against other states', speech of 1–2 October in Skopje, in *Committee on Legal Affairs and Human Rights, Contribution to the Conference on the Principle of Subsidiarity, Skopje, 1–2 October, "Strengthening Subsidiarity: Integrating the Strasbourg Court's Case law into National Law and Judicial Practice*, p. 12, available at: https://assembly.coe.int/committeedocs/2010/20101125_skopje.pdf.

1312 Bodnar (n 1284) p. 255; for further references on this question see also: Elisabeth Lambert, *Les effects des arrêts de la Court européenne des droits de l'homme: Contribution à une approche pluraliste du droit européen des droits de l'homme* (Bruylant, 1999) p. 303ff; Kunz, *Richter über internationale Gerichte* (n 1071) p. 31; Besson (n 951) p. 138, 173ff.

existing obligation to take into account or to consider the judgments of the ECtHR.[1313]

Furthermore, an "*untrue erga omnes*" effect has also been spoken of, given that in fact not the binding force of the judgments is being extended, but that the Court's case law partakes in the bindingness of the interpreted and further developed Convention.[1314] As the actual obligation is therefore not directly derived from the judgments as such, but rather derived from the rights enshrined in the Convention, it was held to be preferable not to speak of an (untrue) *erga omnes* effect, but only of *res interpretata* or of an obligation to consider.[1315]

There exists a similar debate on *res interpretata* and "*de facto erga omnes*" effects with regard to the decisions of the AfrCtHPR, although that Court has not yet positioned itself on a possible *res interpretata* effect of its decisions.[1316]

In the inter-American context, the debate is embedded in the broader discussion on the correct implementation and the precise legal consequences of the conventionality control doctrine.[1317] The Court has distinguished between two different manifestations of how strict the conventionality control has to be exercised, depending on whether a state was a party to a respective proceeding or not.[1318] This statement of the Court was further explained by Judge Ferrer Mac-Gregor Poisot in a detailed separate opinion[1319], which received widespread attention. Therein, Judge Ferrer Mac-Gregor Poisot differentiates between the subjective and the

1313 Polakiewicz (n 1287) p. 347–354; Kunz, *Richter über internationale Gerichte* (n 1071) p. 30–31; Besson (n 951) p. 140, 164ff; Presentation by Mr Pourgourides in *Committee on Legal Affairs and Human Rights, Contribution to the Conference on the Principle of Subsidiarity, Skopje, 1–2 October, "Strengthening Subsidiarity: Integrating the Strasbourg Court's Case law into National Law and Judicial Practice*, p. 2 et seq., available at: https://assembly.coe.int/committeedocs/2010/20101125_skopje.pdf; on the obligation to consider its judgments see also: ECtHR, *Case of Opuz v. Turkey*, Judgment of 9 June 2009, Appl. no. 33401/02, para. 163; Bodnar (n 1284) p. 226–227, 245ff.

1314 Kunz, *Richter über internationale Gerichte* (n 1071) p. 30; see also: Polakiewicz (n 1287) p. 354.

1315 Kunz, *Richter über internationale Gerichte* (n 1071) p. 31 fn. 22.

1316 Obonye (n 1281) p. 736–755, in particular, pp. 748–751 with further references.

1317 As stated above, it has also been held that *res interpretata* and conventionality contol were two sides of the same coin. See: Queralt Jiménez (n 1272) p. 695, 713.

1318 *Case of Gelman v. Uruguay* (n 1105) para. 67–69.

1319 *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot.

objective effectiveness or, in other words, between the direct binding effect *inter partes* and the indirect binding effect *erga omnes* of the decisions of the Court.[1320] Thus, he also speaks in relation to "*res interpretata*" of a binding effect, and the difference between the effect of *res judicata* and *res interpretata* lies in his opinion only in the degree and scope of the binding obligation imposed on the respective states. In an earlier concurring opinion, he had gone even further, stating that "conventional jurisprudence is not simply guidance, but is also mandatory for [national] judges".[1321] Although this statement did not directly refer to advisory opinions, it was nevertheless made with regard to the effect of *res interpretata* – which the Court nowadays holds is also attached to advisory opinions.

When it comes to the actual obligation that follows from *res interpretata*, Judge Ferrer Mac-Gregor holds the standards established by the Court to be the binding minimum standard.[1322] Accordingly, all contracting states have to implement the standards set by the Court in any judgment or advisory opinion, and may only depart from the Court's interpretations and standards if they thereby increase effectiveness, that is to say, if they implement rules that are even more favorable to the individual than the Court's standard.[1323]

While this position seems to be that of the majority of the Court, which is also supported by other authors and domestic courts[1324], the above analysis of the domestic court decisions rendered in the aftermath of OC-24/17 has already shown that this view is also in the inter-American context not

1320 *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, paras. 31–79.

1321 *Case of Cabrera García and Montiel Flores v. Mexico* (n 1027), Concurring Opinion of *Ad hoc* Judge Eduardo Ferrer Mac-Gregor Poisot, para. 79.

1322 *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, paras. 52–55; 72, 94.

1323 *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, para. 72.

1324 Constitutional Court of Ecuador, Judgment 184–18-SEP-CC of 29 May 2018, case No. 1692–12-EP, p. 58; Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 9 May 1995, No. 2313–95, Exp. 0421-S-90, p. 7 para. 7; Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 8 August 2018, No. 12782–2018, Exp. 15–013971–0007-CO, Separate Vote of Judge Hernández López; Hitters, *'Un Avance en el Control de Convencionalidad. (El Efecto 'erga omnes' de las Sentencias de la Corte Interamericana)'* (n 1276); Rodríguez Rescia (n 1271) p. 59, 63.

uncontroversial.[1325] Yet, as stated, the critique is embedded in the broader debate on the doctrine of conventionality control.

Only a few critics mention the concept of *res interpretata*,[1326] and those who do, do not at all question whether the legal consequences of *res interpretata* could be understood less strictly than by the Court. Rather, the critique is framed in different terms. It is mostly directed at the Court's position that the doctrine of conventionality control implies that national courts, and also all other state organs, should accept and follow the Court's jurisprudence.[1327] While critics reject the Court's position, they often refer to former Judge Vio Grossi and especially to his statements that the advisory opinions of the Court are not binding.[1328] Even when the doctrine of conventionality control is principally accepted, any term that would hint to a legal bindingness of the Court's advisory opinions is avoided.[1329] Nevertheless, most critics accept that the Court's jurisprudence, including its advisory opinions, has a "guiding" or "orientating" effect for all contracting states.[1330]

1325 See *supra*: Chapter 5, Section B.IV.2.b).

1326 Vítolo mentions the concept of *res interpretata* explicitly and rejects it, holding that the assumption that the Court's jurisprudence had an *erga omnes* effect of *res interpretata* would violate the principle of democratic legitimacy. Yet, he does not further analyze the concept of *res interpretata* as such, and does not question whether it could be understood differently than by the Judge Ferrer Mac-Gregor-Poisot. See: Alfredo M. Vítolo, *'Una novedosa categoría jurídica: "el querer ser". Acerca del pretendido carácter normativo erga omnes de la jurisprudencia de la Corte Interamericana de Derechos Humanos. Las dos caras del "control de convencionalidad"'* (2013) 18 Pensamiento Constitucional, 357, 373–374.

1327 Vítolo, '*Una novedosa categoría jurídica: "el querer ser"". Acerca del pretendido carácter normativo erga omnes de la jurisprudencia de la Corte Interamericana de Derechos Humanos. Las dos caras del "control de convencionalidad"'* (n 1326) p. 357–380; Malarino, 'Acerca de la pretendida Obligatoriedad de la Jurisprudencia de los Órganos Interamericanos de Protección de Derechos Humanos para los Tribunales Judiciales nacionales' (n 1306) p. 435, 438–439.

1328 Constitutional Tribunal of Peru, Judgment 676/2020 of 3 November 2020, case no. 01739–2018-PA/TC, Vote of Judge Blume Fortini, para. 9, Vote of Sardón de Taboada; Vio Grossi (n 1034) p. 322–323; OC-24/17 (n 1), Separate Opinion of Judge Eduardo Vio Grossi, paras. 149–150.

1329 Vio Grossi (n 1034) p. 322–323; OC-24/17 (n 1), Separate Opinion of Judge Eduardo Vio Grossi, paras. 149–150.

1330 Vio Grossi (n 1034) p. 322–323; Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 8 August 2018, No. 12782–2018, Exp. 15–013971–0007-CO, Dissenting Vote of Judge Castillo Víquez; Dulitzky (n 262) p. 78. See also the position on the orientating effects of the advisory opinions for Mexican judges held by the 8th Circuit Court of the first

This means that these critical views could be reconciled with the concept of *res interpretata* as long as the legal consequences going along with it are not understood as strictly as by the Court. This is because the acceptance of *res interpretata* and of an obligation to consider the Court's jurisprudence does not have to lead to the understanding of Ferrer Mac-Gregor Poisot that states may only deviate from the Court's jurisprudence if they provide for higher protection standards.

Thus, if one wants to accept the concept of *res interpretata*, and try to reconcile it with concerns and critique raised in light of the development of the Court's position instead of discarding it right away, the central question is how the effect of *res interpretata* is actually defined. Can it be equated with an obligation to *follow* the Court's jurisprudence; does it entail at least an obligation to *consider* the Court's jurisprudence or is *res interpretata* understood to have only a guiding effect?[1331]

aa) Arguments against the strict understanding of *res interpretata*

The IACtHR and the supporters of a strict *res interpretata* approach seem to assume that not only is there a legal obligation to consider the Court's jurisprudence, but that it, moreover, goes along with an obligation to actively act.[1332] Thus, in case a state recognizes that its domestic law does not exactly correspond to an interpretation made by the IACtHR in an advisory opinion or in a judgment rendered against another state, the authorities of this state should without undue delay adapt the state's legislation, administration and jurisprudence to new elements of *res interpretata*. Domestic courts should then apply the standards set by the IACtHR except when the domestic laws provide for an even higher protection standard.

Mexican region: Octavo Tribunal Colegiado de Circuito del Centro Auxiliar de la Primera Región, Opiniones Consultivas de la Corte Interamericana de derechos Humanos. Implicaciones de su carácter orientador para los jueces mexicanos, tesis aislada (I Región)80.1 CS (10a.), published on 28 April 2017.

1331 See already *supra*: (n 1273) the reference to Malarino who notes different possible understandings of the term "servir de guía" which means "serve as guide".

1332 Although the Court in OC-24/17 acknowledged that some states would need some time to adapt their domestic law in a way that gives same-sex couples access to marriage, it nevertheless expected them to become active and to overcome the remaining hurdles. See: OC-24/17 (n 1) paras. 226–227.

The application of a higher protection status is of course one legitimate argument to deviate from the Court's established jurisprudence. This is already recognized by Article 29 lit. b.[1333]

Yet, the question arises, whether this can be the only margin states have when dealing with *res interpretata*. For example, there are situations in which two rights or interests are in conflict with each other and in which there is no clear answer which possibility of resolving the conflict of norms ultimately provides the higher protection for the individual.[1334] Rather, a balance has to be struck between conflicting interests and it is sometimes more a political than a legal decision which protected value and interest should prevail under certain circumstances.[1335] It is in these situations, that domestic authorities might have reasonable arguments why they reach a different solution than the Court supposedly would have come to.

This holds especially true if the relevant line of jurisprudence of the IACtHR seems to be outdated in light of social change or new legal developments, or because new scientific studies have shown that it is better to strike a different balance between conflicting rights and interests.[1336]

Furthermore, it may be that the enjoyment of a conventional right is guaranteed in a state through different legal and administrative avenues than proposed by the Court in its jurisprudence. If the state's authorities nevertheless reach the conclusion that the right in question is, under the

1333 As to the exact wording of Article 29 lit. b see *supra*: (n 1066).

1334 One example for such a situation in which the *pro homine* or *pro persona* principle does not provide for a clear answer are cases concerning the right to abortion or the prohibition of *in vitro* fertilization in which rights of the mother may conflict with rights of the unborn embryo. While the Court in the *Case of Artavia Murillo et. al ("In vitro ferilization") v. Costa Rica* declared that Costa Rica had to annul, as soon as possible, the prohibition of *in vitro* fertilization, several domestic courts have departed from the Court's ruling, applying *inter alia* the *pro homine* principle in favor of the unborn embryo. See: IACtHR, *Case of Artavia Murillo et. al ("In vitro ferilization") v. Costa Rica*, Judgment of 28 November 2012 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 257, para. 381; Tello Mendoza, 'El control de convencionalidad y sus disonancias con la democracia constitucional' (n 169) p. 233 with further references to the domestic courts' decisions. The fact that the *pro homine* or *pro persona* principle does not always provide for a clear answer is also noted by Kunz, *Richter über internationale Gerichte* (n 1071) p. 241.

1335 As to further strategic considerations which may play a role when domestic courts have to decide whether to follow the line of the IACtHR or not, see: Chehtman, '*The relationship between domestic and international courts: the need to incorporate judicial politics into the analysis*' (n 1224).

1336 *Cf.*: Dulitzky (n 262) p. 77–79.

existing national laws, as well protected as it would be if the state adopted the approach suggested by the Court, it seems disproportionate to require that state to adopt the exact approach as suggested by the Court.

Finally, the strict *res interpretata* approach – according to which states may only deviate from the Court's jurisprudence if they provide for higher protection standards – may raise questions of democratic legitimacy.[1337] If a change of the domestic jurisprudence or administrative procedure does not suffice to comply with the *res interpretata* produced by the Court, but if instead, a change of domestic laws or even the constitution is required, such a legal reform depends on the necessary democratic majorities which may not be given. Although the Court is right that a state in case of *res judicata* is absolutely bound by the judgment, and thus under an obligation to undertake the necessary legal reforms, it has been held that there may be exceptional circumstances in which it should be justified for a state to disobey a judgment with the force of *res judicata*.[1338]

In the same vein, it has been argued that the hurdles to deviate from *res interpretata* should be lower.[1339] Thus, while the obligation to consider the Court's jurisprudence is of course also directed to the national parliaments, it is hard to argue, that they are under a strict obligation to follow any aspect of the Court's *res interpretata* if there is no democratic majority for it after a substantive debate. Needless to say, a state risks being held accountable by the Court in a later judgment rendered against it if it does not comply with *res interpretata*. Nevertheless, the state should have the opportunity to explain and to convince the Court of its reasons for maintaining or adopting a different approach than that suggested by the Court.

1337 *Cf.*: Vítolo, '*Una novedosa categoría jurídica: "el querer ser"". Acerca del pretendido carácter normativo erga omnes de la jurisprudencia de la Corte Interamericana de Derechos Humanos. Las dos caras del "control de convencionalidad"*' (n 1326) p. 357, 373; Ezequiel Malarino, 'Activismo Judicial, Punitivización y Nacionalización. Tendencias Antidemocráticas y Antiliberales de la Corte Interamericana de Derechos Humanos' in Gisela Elsner (ed), *Sistema Interamericano de Protección de los Derechos Humanos y Derecho Penal Internacional* (Konrad Adenauer Stiftung e.V., 2010) p. 25, 51–53; Tello Mendoza, 'El control de convencionalidad y sus disonancias con la democracia constitucional' (n 169) p. 223–262, in particular p. 230–234 on the Court's problematic understanding of the *pro homine* principle.

1338 Hentrei (n 262) p. 265–268.

1339 Hentrei (n 262) p. 265–268.

bb) Problems of a too lax understanding of *res interpretata*

Having outlined the problems of a strict understanding of *res interpretata*, this subsection will now have a closer look at the alternative understanding, according to which *res interpretata* either does not include any legal, but merely a moral, obligation to consider the Courts jurisprudence, or according to which *res interpretata* entails at best a guiding or orientational effect, which is not more closely defined.[1340]

First of all, *res interpretata* is like *res judicata* a legal concept, which is why its effects should also be described in legal terms and not only with attributions such as "moral", "scientific" or "*de facto*".[1341] A *bona fide* implementation of the Convention requires states to take the Court's jurisprudence into account as the Court is the competent organ established under the Convention to interpret its terms and to secure its enforcement.[1342] Notably, the interpretation by a neutral and competent organ plays a particularly important role with regard to human rights treaties, given that these treaties contain non-reciprocal obligations for states, and are drafted in abstract terms, so that their interpretation is a necessary precondition for their application.[1343]

Furthermore, the Court is right that it lacks the capacity to deal with high numbers of similar cases, and that an effective enforcement of the Convention therefore requires the national states to be the first guardians of the Convention. If *res interpretata* was only understood as a moral obligation, or if the obligation to consider the Court's jurisprudence is not further specified, it is unlikely that the states' authorities will actively act when they have found out that their domestic laws, administration or jurisprudence contradicts the Court's interpretation of the Convention. In that case, the concept of *res interpretata* would be only of very little use as it would neither considerably improve the enforcement of the Convention and appropriate human rights standards, nor reduce the amount of very similar cases that might eventually be brought to the Court.

1340 Vio Grossi (n 1034) p. 322–324. This view mostly overlaps with the traditional view that advisory opinions constitute non-binding, but authoritative interpretations of the law.
1341 *Cf.*: Guevara Palacios (n 12) p. 359; Besson (n 951) p. 158.
1342 *Cf.*: Bodnar (n 1284) p. 226–227, 246.
1343 Besson (n 951) p. 150.

cc) Suggested understanding of *res interpretata*

Against this backdrop, an intermediate course between the view that *res interpretata* has only a guiding effect, and the view that it must always be followed exactly as proposed by the Court except when states want to apply a more favorable standard, seems to be preferable.[1344] Accordingly, the Court's interpretations that have acquired the status of *res interpretata* should not only be considered and taken into account, but be principally respected as the conventional standard. Hence, states should not wait until a similar case is brought against themselves before the Court, but take the interpretations of the Court as a standard and act pre-emptively in order to avoid a ruling against them. This is not only in the interest of an effective enforcement of the Convention and the protection of human rights, but also in the interest of states, as it helps them to improve their rule of law standards and to prevent being required to pay compensation for human rights violations. This principle holds especially true with regard to situations where there exists a well-established jurisprudence of the Court concerning the most fundamental human rights such as e.g. the right to life, to humane treatment and to personal liberty.[1345]

At the same time, the *res interpretata* effect should not be confused with a strict obligation to always apply the Court's criteria exactly as suggested by the Court. There must be space for any state authority that has to apply or to enforce legislation, and especially for the legislative organs, to undertake their own assessment and to find the right solution in the context of the respective national constitutional and legal setting.[1346]

1344 Without referring directly to the concept of *res interpretata*, Kunz' analysis has shown that many domestic courts in practice have indeed taken a kind of "middle-ground position" between strict compliance and mere guidance with regard to the jurisprudence of regional human rights courts. See Kunz, *Richter über internationale Gerichte* (n 1071) p. 167–209; Kunz, *'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts'* (n 1224) p. 1145–1149.

1345 *Cf.*: Kunz, *'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts'* (n 1224) p. 1146ff. and *idem*, *Richter über internationale Gerichte* (n 1071) p. 199ff. noting that domestic courts are in fact more willing to implement orders from the ECtHR or the IACtHR in cases of very severe human rights violations or when the violation is still ongoing.

1346 On the broader topic of democratic iterations and the therefore necessary discursive spaces see *inter alia*: Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (CUP, 2004) p. 176ff; *idem*, *'Democratic Exclusions and Democratic Iterations: Dilemma's of 'Just Membership' and Prospects of Cosmopolitan Federal-*

National parliaments should be guided by the Court's jurisprudence, but, if after an intense debate, there is no democratic majority to adopt the required legal reforms, the state may present the respective arguments before the Court in case of a later contentious proceeding. Of course, arguments that are based on a lack of resources, on a lack of willingness to reform, or on discrimination will not convince the IACtHR that there is no violation of the Convention despite the reasoned disregard of *res interpretata*.[1347] However, a reasoned legal argumentation that a state has, through decisions of democratically elected organs, struck a different balance between two important constitutional values or legal interests might justify a deviation from the Court's line of jurisprudence.

As concerns domestic courts, after taking the Court's jurisprudence into account, they have to consider whether the Court's criteria are at all applicable to the case pending before them, or whether this case needs to be differentiated. If the Court's criteria are applicable and the domestic judges nevertheless hold a different solution to be indicated, they have to provide good reasons, and justify why they deviate from the IACtHR's line of jurisprudence.[1348] As held above, a deviation may in particular be justified in case of conflicting rights, if the domestic courts hold that the balance between two different rights in question should be struck in a different way than suggested by the IACtHR.[1349] In contrast, the finding that other states

ism' (2007) 6(4) European Journal of Political Theory, 445–462; Hentrei (n 262) p. 125–131 with further references; *cf.*: Armin von Bogdandy, 'Del Paradigma de la Soberanía al Paradigma del Pluralismo. Una nueva Perspectiva (Mirada) de la Relación entre el Derecho Internacional y los Ordenamientos jurídicos nacionales' in Griselda Capaldo et al. (eds), *Internacionalización del Derecho Constitucional, Constitucionalización del Derecho Internacional* (Eudeba, 2012) p. 21, 40.

1347 It should however be noted that a lack of resources may indeed constitute a serious challenge for states, especially as regards the guarantee of economic, social, cultural and environmental rights. *Cf*: The considerations of Judge Sierra Porto in OC-29/22 (n 275), Concurring Opinion of Judge Humberto A. Sierra Porto, para. 13.

1348 *Cf.*: The four steps proposed by Ezequiel Malarino: Malarino, 'Acerca de la pretendida Obligatoriedad de la Jurisprudencia de los Órganos Interamericanos de Protección de Derechos Humanos para los Tribunales Judiciales nacionales' (n 1273) p. 435, 453–455; and see as well: Octavo Tribunal Colegiado de Circuito del Centro Auxiliar de la Primera Región, Opiniones Consultivas de la Corte Interamericana de derechos Humanos. Implicaciones de su carácter orientador para los jueces mexicanos, tesis aislada (I Región)80.1 CS (10a.), published on 28 April 2017.

1349 One typical example of conflicting rights are cases in which fundamental criminal defense rights of the alleged perpetrator conflict with the fight against impunity

have not yet adopted and implemented the Court's standards should not suffice to justify a disregard of *res interpretata* and a deviation from the Court's jurisprudence.

This understanding of the concept of *res interpretata* allows for an effective enforcement of the Convention, while at the same time protecting democratic processes and preventing domestic courts from getting the impression that they are mere "*Erfüllungsgehilfen*" called to enforce the IACtHR's jurisprudence, rather than equal partners in the further development of human rights law.[1350] This way, the domestic authorities could enter into a fruitful dialogue with the IACtHR.[1351] It could of course still happen that the IACtHR finds a violation if it is not convinced by the arguments brought up by the domestic authorities in order to justify a deviation from the Court's precedent, but the IACtHR should be open to the arguments of the domestic authorities. This means it should be ready to acknowledge that the circumstances surrounding the national case justified national authorities in deviating from the *res interpretata* established by the Court, and in some cases the Court might even consider adapting its own line of jurisprudence to the arguments provided by the national authorities, which would then lead to a further development or change of *res interpretata*.

Lastly, this understanding of the legal consequences brought about by the concept of *res interpretata* does not mean that the Court should adopt the margin of appreciation doctrine developed by the ECtHR, as has been demanded both by scholars and states, but so far been rejected by the

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and the interest of the victims in a proper investigation and conviction of the perpetrator. Typically, the *pro homine* principle does not provide for a clear answer in these cases. As to examples in which domestic courts have sometimes struck the same balance as the IACtHR and sometimes not, see Kunz, *'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts'* (n 1224) p. 1147–1148.

1350 In German civil law, an "Erfüllungsgehilfe" is defined as a person who works with the knowledge and intent of the debtor within the latter's scope of duties in the fulfillment of the debtor's obligations. Raffaela Kunz has used the term with regard to the relationship between domestic courts and regional human rights courts. She states that most domestic courts see themselves not as mere "Erfüllungsgehilfen" of the regional court but also as "guardians of their own legal order" and that they therefore do not blindly follow the view taken by the regional court. See: Kunz, *Richter über internationale Gerichte* (n 1071), in particular p. 165, 167.

1351 On the importance of judicial dialogue see *inter alia*: Dulitzky (n 262) p. 76–79; Contesse, *'The final word? Constitutional dialogue and the Inter-American Court of Human Rights'* (n 1069) p. 427–435; Bazán (n 1121) p. 63, 93–95; Hentrei (n 262) in particular pp. 285–288.

Court.[1352] Calls for adopting the margin of appreciation doctrine by Latin American states have sometimes just been poorly disguised pleas for a more restrained Court and a more cautious human rights jurisprudence.[1353] The IACtHR does not have to give in to these calls. However, as proposed, national authorities and especially domestic courts should be encouraged to come up with their own legal arguments and solutions, and should be allowed to justify why they hold another legal standard or solution to be more suitable in a specific case and in the context of the respective legal system.

e) *Res interpretata* and the asymmetries in the inter-American human rights system

After having outlined the type of legal obligation that follows from *res interpretata* according to the view suggested here, it still needs to be clarified *who* is actually bound to consider the Court's jurisprudence and either comply with its interpretative standards, or provide for a sound justification for deviating from the Court's *res interpretata*. This question is not pertinent in human rights systems like the European in which any member state of the Council of Europe is simultaneously bound by the ECHR. Yet, in light of the asymmetries still persisting in the inter-American human rights system, the question becomes especially relevant in the context of the Court's advisory jurisdiction, as all OAS member states may request advis-

1352 The Court has referred to the margin of appreciation only in very rare occasions and has neither developed any other constant theory on deference. See: Hentrei (n 262) in particular pp. 268–279; Pablo Contreras, *'National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between the Jurisprudence of the European and the Inter-American Court of Human Rights'* (2012) 11 Northwestern Journal of International Human Rights, 28, 55–67 with further references; Maria-Louiza Deftou, *'Fostering the Rule of Law in the Americas: Is There any Room for Judicial Dialogue between the IACtHR and National Courts?'* (2020) 38(1) Nordic Journal of Human Rights, 78–95.

1353 See for example the joint declaration of the governments of Argentina, Brazil, Chile, Colombia and Paraguay of 11 April 2019: 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?fbclid=IwAR24ZiaqFhGvQniznEnL3SX2MMu7litqud8-p2CBo98cnMNleC_6OdHg&ccm_paging_p=164.

ory opinions of the Court, while only part of them have ratified the ACHR, and even fewer have accepted the Court's contentious jurisdiction.[1354]

The Court holds that its advisory opinions cannot only be requested by any OAS member state, but that its advisory opinions also *vice versa* address and have "legal relevance" for all OAS member states.[1355] While the Court's doctrine of conventionality control is limited to the contracting states, the Court is apparently of the opinion that the *erga omnes* effect of *res interpretata* in the context of its advisory function extends to a certain extent to all OAS member states. As noted above, it held already in OC-18/03 that "everything indicated" in its advisory opinions applied to all OAS member states.[1356] Since OC-21/14 it has then repeatedly stated that

> *"the interpretation given to a provision of the Convention through an advisory opinion provides all the organs of the Member States of the OAS, including those that are not parties to the Convention but that have undertaken to respect human rights under the Charter of the OAS (Article 3(l)) and the Inter-American Democratic Charter (Articles 3, 7, 8 and 9) with a source that by its very nature, also contributes, especially in a preventive manner, to achieving the effective respect and guarantee of human rights [and that can in particular] provide guidance […]."*[1357]

While the Court here refers to the notion of *res interpretata* in relation to all OAS member states, it is noteworthy that the Court has mostly separated this paragraph from the paragraph in which it addresses the inclusion of the advisory opinions in the doctrine of conventionality control.[1358] This, and the further fact that the Court only speaks of a guiding effect when it refers to all OAS member states, might indicate that it holds that the effect of *res interpretata* is with regard to states that are not party to the Convention, not as strong as with regard to contracting states for which the

1354 The fact that the Court's advisory jurisdiction extends to all OAS member states is for Guevara Palacios another reason to hold the *res interpretata* concept inapplicable to the IACtHR's advisory opinions. See Guevara Palacios (n 12) p. 537.

1355 OC-24/17 (n 1) para. 28.

1356 See *supra*: Chapter 5, Section B.III.2. and OC-18/03 (n 227) para. 60.

1357 OC-21/14 (n 320), para., 31; OC-24/17 (n 1), para. 27.

1358 In the following advisory opinions the paragraph on the advisory opinions' inclusion in the doctrine of conventionality control was separated from that on the guiding effect which the Court's *res interpretata* has on all OAS member states: OC-23/17 (n 4) paras. 28–29; OC-24/17 (n 1) paras. 26–27; OC-25/18 (n 227) para. 58–59.

res interpretata – according to the Court's position outlined in the *Gelman* case – establishes, as outlined above, a binding minimum standard from which they may only depart if they apply a standard that is more favorable to the individual.[1359]

Yet, in OC-26/20 the Court not only recalled its statement made since OC-21/14, but noted in the merits part of the opinion that its interpretations of the Convention "necessarily transcend[ed] the Convention" and that they also constituted "parameters for the effective fulfilment of the human rights obligations set forth [...] in the OAS Charter, the American Declaration and other treaties and instruments."[1360] This was particularly evident with regard to the Court's interpretive criteria established in advisory opinions because these opinions had "legal effects" for all OAS member states.[1361]

These statements imply that the Court holds that also OAS member states that are not party to the Convention need to consider the Court's interpretations made of the Convention in the context of an advisory opinion in order to be able to fulfill the human rights obligations following from the OAS Charter and the American Declaration.[1362] In light of this, it seems

1359 This difference has also been noted by Vítolo, *'El Valor de las Opiniones Consultivas de la Corte Interamericana de Derechos Humanos a la Luz de las OC-21/14 y OC-23/17* (n 1162) p. 201. As to the Court's understanding of the *res interpretata* effect with regard to contracting states and in the context of the conventionality control see *Case of Gelman v. Uruguay* (n 1105) para. 67–69. *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, paras. 31–79 and *supra*: Chapter 5, Section B.IV.3.d).

1360 OC-26/20 (n 24) paras. 91, 93.

1361 OC-26/20 (n 24) para. 92.

1362 The Spanish version of OC-26/20 (n 24) para. 93 implies this stronger than the English version. The Court derives human rights obligations for example from Articles 3 lit. l, 34 and 45 OAS Charter. In OC-10/89 (n 348) para. 45, the Court held that the American Declaration of the Rights and Duties of Man, which had originally been adopted by the 9th International American Conference as a legally non-binding declaration, defined the "human rights referred to in the Charter" and that it was therefore a "source of international obligations" for the OAS member states. Also the Commission and other authors hold that the American Declaration has acquired legally binding force. See: Written observations of Uruguay, OC-10/89 proceedings, 14 June 1988, available at: http://hrlibrary.umn.edu/iachr/B/10-esp-5.html; Jorge A. Quindimil López, *'El estatus jurídico de la Declaración Americana de los Derechos y Deberes del Hombre'* (2019 Edición Especial) 13 Revista Electrónica Iberoamericana, 1–15; Florabel Quispe Remón, *'La importancia de la Declaración Americana de los Derechos y Deberes del Hombre en el Sistema Interamericano y la interpretación que de ella realiza la Corte Interamer-*

that the Court draws, if at all, only a minimal distinction between the *res interpretata* effect its advisory opinions have on contracting states on the one hand, and on the other OAS member states on the other hand.

In contrast to this rather unclear position of the Court, another view has distinguished more precisely between the legal effects the Court's advisory opinions have on the states parties to the Convention and on the other OAS member states.[1363] While advisory opinions in which the Court interprets provisions applicable to all OAS member states, like e.g. the OAS Charter or the American Declaration, were relevant for all OAS member states, only states that are parties to the ACHR or the other human rights treaties that the Court may interpret were required to follow the Court's interpretations made of those treaties.[1364]

This distinction according to the treaty provision which the Court interprets seems plausible, but in light of the above outlined understanding of the concept of *res interpretata*, it still requires an according specification.

Although the terms "*res interpretata*" and "*erga omnes (partes)* effect" are often used interchangeably, the asymmetries still persisting in the inter-American human rights system highlight that it is worth being precise and differentiating between *res interpretata* on the one hand, and the ensuing *erga omnes (partes)* effects on the other. *Res interpretata* is first and foremost the tangible product generated by the Court's interpretation. The *erga omnes (partes)* effect however addresses whomever this interpretive authority or *res interpretata* becomes relevant for. Put otherwise, *res interpretata* is what has *ratione materiae* been created by the Court's interpretations, and the *erga omnes (partes)* effect addresses who is *ratione personae* bound by the obligations arising from the concept of *res interpretata*.

While the Court is right that all OAS member states *may* of course consider the *res interpretata* created in its advisory opinions, and while its human rights interpretations *may* of course also provide guidance to all those states, the precise *erga omnes* effect of *res interpretata* as determined

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icana' (2019 Edición Especial) 13 Revista Electrónica Iberoamericana, 1, 23; Grace Nacimiento, *Die Amerikanische Deklaration der Rechte und Pflichten des Menschen* (Springer, 1995) p. 172–175; *cf*: the critical view of Christina M. Cerna, 'Reflections on the normative status of the American Declaration of the Rights and Duties of Man', available at: https://www.corteidh.or.cr/tablas/r31598.pdf.

1363 Guevara Palacios (n 12) p. 338, 355. As to a short summary of his view see already *supra*: (n 1294).

1364 Guevara Palacios (n 12) p. 354, 355.

above can only apply to states that are bound by the treaty provision which the Court has interpreted.

With regard to the Convention as the main treaty interpreted by the Court, this is due to the fact that, as outlined above, the legal basis for the acceptance of an *erga omnes* effect of *res interpretata* is to be found in Articles 1 and 2 and in a *bona fide* interpretation of the Convention. Only vis-à-vis states which have acceded to the Convention under which the Court has been established, can an obligation to take the Court's jurisprudence into account, and to generally follow the Court's interpretations be established. Thus, the precise *erga omnes* effect of *res interpretata*, is limited to the contracting states, and it is more appropriate to speak of an *erga omnes partes* effect.

Res interpretata has the greatest relevance for those contracting states that have also accepted the Court's contentious jurisdiction, as it is these states that risk being held responsible for a violation of the Convention if they have not properly taken into account the Court's jurisprudence.

For the OAS member states that are not party to the Convention, or to other international human rights instruments eventually interpreted by the Court, the advisory opinions remain authoritative interpretations that may serve as a source for the determination of rules of international law, but as long as a state is not bound by a treaty provision, it cannot be urged to respect it unless the norm and its interpretation have also become part of customary international law.

Although this precise delimitation of the *erga omnes partes* effect of *res interpretata* is important, the Court is in so far right as that the practical relevance of the distinction between contracting states and other OAS member states is diminished by the fact that all OAS member states are bound by the OAS Charter and subject to the mandate of the Commission. As the Commission is likely to also apply the Court's interpretative standards as far as possible to the American Declaration, which is by the Court and other authorities[1365] considered to be binding, all OAS member states are well-advised to take the Court's interpretations into account, even if they are not party to the ACHR. This is all the more true since the OAS Charter also obliges all member states to respect fundamental human rights.

1365 See *supra*: (n 1362).

Finally, the question remains in how far the effect of *res interpretata* can be said to apply to the OAS organs. As noted above, the concept of *res interpretata* has originally been developed in the context of the discussion of the effects judicial decisions have on states not party to a specific case[1366], and it has just been found that the precise *erga omnes partes* effect of *res interpretata* only applies to contracting states and not to the other OAS member states. Yet, the OAS organs are also not themselves parties to the human rights treaties interpreted by the Court as these treaties are normally only open for signature and ratification to states.[1367]

The Court has held that "everything indicated" in advisory opinions "also has legal relevance [...] for the OAS organs whose sphere of competence relates to the matter that is the subject of the request."[1368] With regard to the Commission, the Court has stated, that the Commission has to rely on the legal criteria that can be derived from the Court's jurisprudence when it performs its work.[1369]

In this regard it is noteworthy that in contrast to the advisory opinions of the ICJ, which may only be requested by organs or specialized agencies of the United Nations, and which sometimes deal with specific administrative issues of that organization[1370], the advisory opinions of the IACtHR nor-

1366 See *supra*: Chapter 5, Section C.IV.3.a).

1367 See e.g. Article 74 (1) of the Convention. Article 74 states:
"Article 74
1. This Convention shall be open for signature and ratification by or adherence of any member state of the Organization of American States.
2. Ratification of or adherence to this Convention shall be made by the deposit of an instrument of ratification or adherence with the General Secretariat of the Organization of American States. As soon as eleven states have deposited their instruments of ratification or adherence, the Convention shall enter into force. With respect to any state that ratifies or adheres thereafter, the Convention shall enter into force on the date of the deposit of its instrument of ratification or adherence.
3. The Secretary General shall inform all member states of the Organization of the entry into force of the Convention."

1368 OC-23/17 (n 4) para. 30, OC-21/14 (n 320) para. 32.

1369 OC-26/20 (n 24) para. 93. The wording of the Spanish version of that paragraph is stronger than that of the English one.

1370 See e.g. ICJ, *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion of 20 July 1982, I.C.J. Reports 1982, p. 325; ICJ, *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, Advisory Opinion of 13 July 1954, I.C.J. Reports 1954, p. 47; ICJ, *Judgment No. 2867 of the Administrative Tribunal of the International Labor Organization upon a Complaint Files against the International Fund for Agricultural Development*, Advisory Opinion of 1 February 2012, I.C.J. Reports 2012, p. 10.

mally concern the obligations of states rather than the work of most of the OAS organs. Only the IACHR, which is next to the Court the second competent organ established under the Convention, is the major exception.

An interpretation of the Convention based on the principles of effectiveness and good faith requires that the Commission and the Court work hand in hand. Thus, the Court is right that the Commission has to take the Court's jurisprudence into account in order to fulfill its tasks under the Convention.[1371] The regular requests for advisory opinions submitted by the Commission also show that it does so, and that it considers the Court's advisory opinions very useful for its work. Consequently, one can reasonably argue that the Commission too must consider the *res interpretata* created by the Court in advisory opinions, that it has to take the Court's interpretations as standard when performing its tasks under the Convention, and that it has to provide reasons should it want to depart from them.

As concerns the other OAS organs, the advisory opinions provide relevant legal guidance to them when they are confronted with issues relating to human rights.[1372] As the Court is the judicial institution of the inter-American human rights system established by the OAS, its advisory opinions are of particular high authority for the organs of that organization.

f) Evaluation and intermediate conclusion

Describing the effect of *res interpretata* is challenging because the concept is, like the exact legal consequences of the doctrine of conventionality control, still controversial and indeterminate. While it has been endorsed by human rights courts, there is not yet a consistent state practice on it, and in academia it is either ignored or rejected, or it remains unclear whether it is considered to apply *de lega lata* or only to be implemented *de lege ferenda*. Especially the literature on the IACtHR mostly focuses on the doctrine of conventionality control, and proposals to correct this doctrine have rather

1371 *Cf.*: OC-26/20 (n 24) para. 93.

1372 Regarding the General Assembly of the OAS, Article 54 OAS Charter provides in the end that *"[T]he General Assembly shall exercise its powers in accordance with the provisions of the Charter and of the other inter-American treaties"*. Thus, as concerns the interpretation of the inter-American human rights treaties and the provisions of the Charter relating to human rights, the General Assembly should be guided by the interpretations made by the Court of these treaties. Given that many OAS organs are made up of states or states representatives, the members of these organs should take account of the Court's advisory opinions anyway.

invented different terms and concepts instead of taking up and defining the idea of *res interpretata*.

The rejection may partly be explained by the fact that the *erga omnes partes* effect of *res interpretata* is, like the whole doctrine of conventionality control, sometimes equated with an *erga omnes* bindingness of the whole jurisprudence of the IACtHR. The fact that the Court allows states to deviate from its jurisprudence if they provide for a higher protection standard does not change this impression and the resulting rejection, given firstly that the *pro homine* principle does not always provide for a clear answer, and secondly, given that this approach excludes other possible legitimate reasons to deviate from the Court's jurisprudence, and thus does not encourage a fruitful dialogue between the Court and the states.

However, like there are different possible understandings of the doctrine of conventionality control[1373], the concept of *res interpretata* does not have to be understood in such a strict and narrow way either.

The analysis undertaken in this section started from the observation that the human rights system would be highly inefficient if any *erga omnes* effect of the Court's jurisprudence was negated. Moreover, the interpretative work of courts is particularly relevant in the field of human rights treaties, as the latter contain non-reciprocal obligations, and as the human rights are drafted in abstract terms and are subject to an evolutive or dynamic interpretation.[1374] Therefore, the obligation to ensure the effective enjoyment of the rights enshrined in the Convention, which is stipulated by Articles 1 (1) and 2, requires that the contracting states take the jurisprudence of the Court into account. In other words, Articles 1 (1) and 2, as well as a *bona fide* interpretation of the Convention provide a sound legal basis to hold that states are already *de lege lata* obliged to consider the jurisprudence of the Court.

As *res interpretata* is, as explained above, however not only contained in the Court's judgments, this obligation to consider the interpretations of the Court also applies to the Court's advisory opinions. The obligation to consider the Court's interpretations may also require contracting states to adapt their laws, administrative practice or jurisprudence to the jurisprudence

1373 See for instance González-Domínguez (n 328) p. 177–234 who rejects the "integration model" proposed by Dulitzky (n 262) and instead interprets "the doctrine of conventionality control in light of the principle of subsidiarity". See also Hentrei (n 262) p. 221f. who argues in favor of a principle of complementarity and holds that "conventionality control and discursive spaces are two sides of the same coin".

1374 Besson (n 951) p. 150.

of the Court. For a mere obligation to consider the Court's interpretative standards without any further practical steps being derived from it would be meaningless.

At the same time, the obligation to *consider* the Courts jurisprudence cannot be equated with an obligation to always *follow* the Court's interpretation in any aspect. This is because the legal basis for the *erga omnes partes* effect of *res interpretata* and the entailed obligation to consider the Court's jurisprudence is not the same as that of *res judicata* and the *inter partes* bindingness of the Court. Given that the effect of *res interpretata* cannot be derived from Articles 67 and 68, but follows instead from the substantive conventional rights as such, it is not the bindingness of the Court's decisions that is extended on all contracting states.

Further, while the Court may be the "ultimate interpreter"[1375] of the Convention when it comes to deciding whether a conventional right has been violated in a specific case, the Court is not the sole interpreter of the Convention. According to the principle of subsidiarity, it is first of all the states that have to interpret and apply the Convention. If states were under an obligation not only to consider, but also to always follow the Court's jurisprudence, without any possibility to provide a legal justification to deviate from the Court's jurisprudence, there would be no jurisprudential dialogue, and no corrective to new and possibly controversial lines of the Court's jurisprudence.

The fact that the hurdles to justify a deviation from *res interpretata* must be lower than the hurdle to justify a deviation from *res judicata* is also highlighted by the different *rationale* behind the two types of legal effects. The effect of *res judicata* ensures legal security and *Rechtsfrieden*. While the effect of *res interpretata* also provides for legal stability and a greater effectiveness of the Convention, legal interpretations are always subject to change and further legal debate. This however requires fruitful and also controversial dialogue. Without the latter, the Court's jurisprudence risks becoming too rigid.

A stricter understanding, namely one that equates the effect of *res interpretata* with a binding obligation to adopt and enforce any interpretation of the Court contained in advisory opinions, would also contradict the above outlined systematic of the Convention that requires the explicit recognition of the Court's jurisdiction only with regard to its contentious jurisdiction.

1375 See instead of all: OC-23/17 (n 4) para. 16.

Moreover, it has been pointed out above that such a strict understanding of the *erga omnes partes* effect of *res interpretata*, which equates it with legal bindingness and an obligation to follow, is also problematic in terms of democracy and the separation of powers.

If the concept of *res interpretata* is, however, understood and applied as suggested, it provides an important tool to increase the effective implementation of the Convention without simply subordinating the organs of the states to the Court and curtailing their powers too much, and without relieving them of their responsibility to also participate in the interpretation and implementation of the Convention. According to the suggested understanding, the Court's interpretations are seen as the standard, but it is at the same time acknowledged that there may exist reasonable justifications for states to choose a different approach to guarantee the respective human right in question, provided that the enjoyment of the right remains to be principally ensured. For example, there may be effective administrative fines or other administrative measures instead of criminal sanctions in place, or the respective national context requires that the balance between two conflicting rights be struck differently than suggested by the Court. It is the justification and argumentation that matters, and that may lead to a fruitful dialogue with the IACtHR about how to best protect human rights in the given legal setting. Thereby, domestic courts are not mere "*Erfüllungsgehilfen*" of the Court but may contribute to the further development of *res interpretata* and the understanding of conventional rights.[1376]

Finally, it has been clarified, that the *erga omnes partes* effect of *res interpretata* as determined above applies only to the contracting states, while the other OAS member states may of course also be guided by the Court's advisory opinions, as they definitely constitute authoritative interpretations of the law. As concerns the OAS organs, the Commission has to take the Court's interpretations into account in order to fulfill its tasks under the Convention, and the other OAS organs too should be guided by the interpretations made in advisory opinions when confronted with human rights issues that the Court has addressed in its advisory opinions.

1376 As to the term "Erfüllungsgehilfe" see *supra*: (n 1350).

C. Final summary and conclusion

The analysis of the legal discourse on the legal nature and effects of the advisory opinions of the PCIJ and ICJ has highlighted that this discourse has always oscillated between a formalistic and a more substantive view on the effects of advisory opinions.

The formalistic approach relies on the formal distinction between binding judgments and non-binding advisory opinions, which is established by the underlying statute and rules of procedure. It allows the rendering of advisory opinions that can be regarded as disguised contentious cases by stressing that the principle of consensual jurisdiction is not violated in the proceeding given the non-binding nature of the advisory opinion.

The more substantive view looks at the actual practical effects advisory opinions may have, rather than on the theoretic legal non-bindingness. In the League era, this view has led to greater consideration being given to the will of the states concerned in the proceedings.

For both courts, the relationship of the advisory to the contentious function and the respect for the court's limited jurisdiction has been decisive for the advisory practice and the view on the legal effects of the advisory opinions.

Before the corresponding legal discourse on the legal nature and effects of the advisory opinions of the IACtHR was analyzed, several decisive differences between the setting of the IACtHR in the inter-American human rights system and its advisory jurisdiction on the one hand, and the advisory function of the ICJ in the UN system on the other hand, were pointed out. It was indicated that these differences might lead to the finding that the advisory opinions of the IACtHR have different effects on states than those of the ICJ, although the concept of the Court's advisory function had originally been adopted from the older international court.[1377]

In fact, the analysis has shown a remarkable development in the discourse from the beginning of the Court's functioning until today. This development has gone along with the consolidation of the Court, its growing awareness of itself as a transformative Court, and the resulting use of legal tools to maximize the impact of its work.[1378]

1377 See *supra*: Chapter 5, Section B.

1378 The doctrine of conventionality control which has been introduced in this chapter is one of these legal tools. As to the Court's development and its aspiration to be a transformative court, that is to bring about change in the Americas, see

While the Court itself, and most commentators in the beginning, shared the view that the advisory opinions constitute authoritative but non-binding interpretations of the law, which is also the predominant view held with regard to the advisory opinions of the ICJ, the Court's position evolved over the years and finally shifted after the establishment of its doctrine of conventionality control.

Initially, the Court adopted the formalistic approach of the ICJ, and defined the effects of its advisory opinions only in the negative in contrast to that of judgments. In contrast, the Court's current position differs from both, that of the ICJ and that of the former PCIJ. While the fact that the Court today attaches stronger legal effects to its advisory opinions than at the beginning, might initially be reminiscent of the League era, the consequences are different.

For the fact that the Court holds that its advisory opinions produce *res interpretata* does not lead it to show greater consideration for sovereignty interests and the will of states in the proceeding, as the PCIJ had done. On the contrary, the IACtHR is driven by a *pro-homine* approach and understanding of international law. It places the individual at the center and obliges states to also take its interpretations of human rights law as a preventive measure into account when they are contained in an abstract advisory opinion, and not only when they have directly been held to be responsible for a violation of the Convention.

The perception of the legal nature and effects of the advisory opinions of the IACtHR in academia and the domestic jurisprudence has changed according to the development of the Court's position. Although many different opinions still exist, the position that the advisory opinions are legally binding has become more popular since their inclusion in the doctrine of conventionality control, which is highlighted by the finding of the Ecuadorian Constitutional Court that the interpretations made by the Court complement the text of the Ecuadorian Constitution.[1379]

In the course of the above examination, it has been affirmed that the advisory opinions of the IACtHR of course constitute authoritative interpretations of the law. At the same time, it has been held that this finding alone does not suffice to determine the effects emanating from them. The view

Soley Echeverría, *The Transformation of the Americas* (n 19) p. 273–311 and Soley Echeverría, 'The Transformative Dimension of Inter-American Jurisprudence' (n 54) p. 338 – 348.

1379 As to this finding of the Ecuadorian Constitutional Court see *supra*: Chapter 5, Section B.IV.2.b)bb).

that the advisory opinions have only moral or scientific effects has been rejected because they constitute the result of a legal assessment undertaken by a Court of law in a judicial proceeding and with the means of legal interpretation. In contrast, the fact that the Court's advisory opinions constitute authoritative interpretations of the law does not necessarily exclude the further finding that advisory opinions may also have further legal effects, even though these legal effects differ from the binding effect of *res judicata* which judgments have on the parties of a case.

In the further course of the examination, it has been shown that authors and domestic courts have over the years provided different reasonings for the view that the Court's advisory opinions are legally binding. The analysis of the constituent instruments of the advisory function has, however, demonstrated that the advisory opinions were actually not supposed to produce legally binding effects, at least not like judgments do on the parties of a case. Furthermore, arguments that a teleological interpretation would lead to the assumption that the advisory opinions are legally binding, or the idea that they are more comparable with preliminary rulings of the ECJ than with advisory opinions of the ICJ, have been rejected.

Since the establishment of the doctrine of conventionality control and its extension onto advisory opinions, it has been held that the advisory opinions thereby become *de jure* or *de facto* binding.[1380] Parts of the Court have held the Court's jurisprudence to be mandatory, too, and have in relation to *res interpretata* spoken of "indirect bindingness".[1381]

However, be it with regard to the effect of the doctrine of conventionality control, or be it with regard to the concept of *res interpretata*, it is preferable not to speak of "bindingness" in the context of advisory opinions. While advisory opinions certainly produce legal effects, the use of the term "binding" causes confusion and unnecessary rejection, given that the term is originally connected with judgments and the effect of *res judicata*. Furthermore, it gives the wrong impression that advisory opinions could

1380 See e.g. *supra* in Chapter 5, Section C.IV.2.a)cc) and dd) the opinions of Roa and Zelada.

1381 *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer-Mac-Gregor Poisot, paras. 43, 70 and also former Judge Sergio García Ramírez has used the term "binding" in relation to advisory opinions, thereby clarifying that he used the term in the "broadest understanding". See: García Ramírez, '*The Relationship between Inter-American Jurisdiction and States (National Systems): Some Pertinent Questions*', (2015) 5 Notre Dame Journal of International and Comparative Law, 115, 136.

be executed and implemented as a whole within any domestic legal system, and that national decision-makers and courts had no margin at all for their own considerations and the weighing up of conflicting interests.

In the above discussion of the *erga omnes partes* effect of *res interpretata*, it has been argued that *de lege lata* an obligation for states parties already exists to consider the Courts jurisprudence – including its advisory opinions – even though this is not yet consistently implemented in practice.

However, recognizing that the advisory opinions produce *res interpretata*, and that this entails an obligation for states to take them into account, does not mean that they are binding in the strict sense of the word. In advisory proceedings, there are no clear parties and they normally do not contain explicit orders that could be enforced. *Res interpretata* rather means that the Court's interpretations partake in the general bindingness of the Convention.[1382]

Whereas the Court's interpretations are thus to be regarded as the standard, the Court is not the sole interpreter of the Convention, and interpretations are always subject to possible changes, which is why a constructive legal discourse between the Court and the states should exist. The effect of *res interpretata* and the ensuing obligation to consider the Court's jurisprudence should not be equated with an obligation to always automatically follow the Courts jurisprudence. Rather, states may have legitimate reasons for justifying a deviation of the Court's line of jurisprudence.

This may not only be the case if they invoke the *pro homine* principle. Reasons grounded in their democratic and legal system may also justify a slightly different interpretation and implementation of conventional rights than suggested by the IACtHR. In particular, domestic courts need to question whether the line of the Court provides the best solution in the specific case and legal setting they are confronted with, or whether the balancing of all interests at stake leads to a different finding. If so, they have to explain and justify this deviation so that the IACtHR can, in a possible later contentious case, retrace and review the decision of the domestic court.

The term "bindingness" should only be used in relation to the advisory opinions of the Court, if this effect is explicitly recognized by a national law or the domestic jurisprudence of a state. In these cases, it needs to be clear that the bindingness is prescribed by domestic law and not derived

1382 See *supra*: Chapter 5, Section B.IV.3.a), in particular (n 1287) and also Section B.IV.3.c).

from international law, which is why this effect cannot be generalized with regard to the other OAS member states. This situation is comparable to the so-called 'compulsive' opinions of the ICJ, when states have in a treaty agreed to accept the terms of a possible future advisory opinion of the ICJ relating to that very treaty as binding. While states are free to agree on such an effect, such a bilateral or multilateral agreement does not change the general legal nature of advisory opinions. The same applies *mutatis mutandis* when an OAS member state decides to recognize the advisory opinions of the IACtHR, or at least those opinions that the state itself requested, to be binding within its domestic legal order.

Having affirmed that the advisory opinions of the IACtHR have an *erga omnes partes* effect of *res interpretata* on the contracting states, the precise legal effect an advisory opinion has within a state then also depends on how the contracting state has implemented the doctrine of conventionality control, and how the obligation to take the Court's jurisprudence into account is fulfilled. This depends as well on the rank that the respective domestic law allocates to the Convention and other international human rights treaties.

A further examination of the legal nature and effects of the Court's advisory opinions must thus look even more thoroughly than was possible in this work, at the reception of the advisory opinions within the contracting states and their respective legal system.

In conclusion, the discussion on the legal effects of the Court's advisory opinions can be embedded in the broader discussion on *res interpretata* and the *erga omnes partes* effects that judgments generate for third states not parties to a case. Thereby, it also becomes part of the more general debate on the correct implementation of the conventionality control doctrine, on the relation between the IACtHR and domestic courts, the principle of subsidiarity, and the relation between regional human rights law and domestic law.

Even if one does not share the view that the advisory opinions of the IACtHR produce an *erga omnes partes* effect of *res interpretata*, and the understanding of this concept suggested here, any determination of the legal nature and effects of the Court's advisory opinions should not end at the point where it is determined that the text, systematic, and drafting history of the Convention show that, unlike judgments, advisory opinions were not conceived to be legally binding. For this formalistic view that describes advisory opinions only in contrast to judgments fails to explain the effects advisory opinions actually have. This was already highlighted by

the discussion on the legal nature and effects of advisory opinions of the PCIJ.

On the contrary, even if one maintains the traditional position that the advisory opinions of the IACtHR are "only" authoritative interpretations of the law, one needs to take into account that there may be other factors contributing to the authority of the advisory opinions of the IACtHR than, for example, to the authority of advisory opinions of the ICJ. One of these factors is the embeddedness of the IACtHR in a regional human rights system and the growing legal integration of that system.

The development of the Court and the creation of its doctrine of conventionality control was not a one-way process.[1383] Since the beginning of the Court's functioning, two parallel processes have taken place – one at the national and one at the regional level. The political landscape in the region has changed significantly, and more and more states have granted the Convention and other human rights treaties a higher rank in their national legal systems, either by way of constitutional reforms or through their supreme or constitutional jurisprudence.[1384] This incorporation of international treaties into domestic law also affects the importance of the interpretations of these treaties made by the Court in its advisory opinions.

At the same time, the regional human rights system has consolidated, and the Court has interpreted and performed its role with increasing self-confidence. Even though the Court, as concerns its advisory jurisdiction, could not follow the direct example of another human rights court, given the extremely limited advisory practice of the ECtHR, the Court's bold interpretations and judicial doctrines known from its contentious jurisdiction did not stop at its advisory function either.[1385] As outlined above, since OC-21/14 the Court has held that the conventionality control must also be performed on the basis of the Court's interpretations made in the context of its advisory function.[1386]

These two processes lead to the fact that although the concept behind Article 64 and the Court's advisory jurisdiction remains the same as that

1383 *Cf.*: Ferrer Mac-Gregor Poisot, 'The Conventionality Control as a Core Mechanism of the *Ius Constitutionale Commune*' (n 1041) p. 321–327 explaining the creation of the doctrine of conventionality control "in the context of the internationalization of constitutional law".

1384 See *supra*: (n 1026).

1385 As to the Court's development and examples of its bold interpretations see: Soley Echeverría, *The Transformation of the Americas* (n 19) p. 273–311.

1386 See *supra*: Chapter 5, Section B.II.3.g) and Section B.III.3.

known from the ICJ, the advisory opinions of the IACtHR can have a greater and more direct impact within the OAS member states, which are, in contrast to the UN system also direct addressees of the advisory opinions, along with the OAS organs.

This difference becomes particularly visible in advisory proceedings that touch on delicate questions of constitutional law, like the definition of family and the question who may marry who. While advisory opinions of the ICJ may also be highly political and controversial, they mostly center on questions of general international law, and in the great majority of states will not lead to debates on domestic laws, individual claims and the change or non-application of certain domestic legislation or even the constitution. No matter how important the advisory opinions of the ICJ are for the clarity and development of international law, they are not directly directed at the states, but only at the UN organs, and there is no international treaty the ICJ could interpret that would play such a central role in the internal legal order of the UN member states as the ACHR does in the legal order of the contracting states.

Another side effect of the stronger integration within the regional system is that at least most states that have ratified the ACHR have also recognized the contentious jurisdiction of the IACtHR. Hence, these states have to fear being held responsible in a contentious case if they have not complied with the interpretations made by the Court in an earlier advisory opinion. In contrast, states affected by advisory opinions of the ICJ, such as Israel by the *Wall* opinion or the United Kingdom by the *Chagos* opinion[1387], have often either not recognized the compulsory jurisdiction of the ICJ, or have withdrawn their declaration once made under Article 36 (2) ICJ Statute, or have formulated their declaration in very narrow terms. Therefore, states affected by an advisory opinion of the ICJ do not often need to fear that a subsequent contentious case will be brought against them if they ignore the advisory opinion.

Not all advisory opinions of the IACtHR produce as heated debates in the midst of American societies like OC-24/17 did, but the fact that this advisory opinion led domestic courts to change the interpretation of a country's civil code, and even that of the constitution, despite its unam-

1387 See: ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004 p. 136 and ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, I.C.J. Reports 2019 p. 95.

biguous wording[1388], shows that the subject matter of a request, and the rank the interpreted norms are given in the domestic legal systems, may increase the direct impact of the advisory opinions of the IACtHR.

Finally, the fact that the decisions on how to react to, and to follow the Court's interpretations made in an advisory opinion, are today no longer only made on the political level (as was for example still the case in 1983, when Guatemala decided to stop the execution of death penalties issued by certain courts of special jurisdiction), but in national courts and administrations on the basis of domestic laws, highlights the inaccuracy of attributing only moral or scientific effects to the advisory opinions of the IACtHR.

1388 On this see *supra*: Chapter 5, Section B.IV.2.b)bb).