Chapter 2: Origins of the advisory function of the IACtHR

Before international courts were bestowed with advisory jurisdictions, there already existed some experience with advisory functions of courts at the national level. The IACtHR was not the first international court to be endowed with an advisory function, but it was the first regional human rights court to be bestowed with an exceptionally broad advisory function. By having a short, yet by no means exhaustive, look at the history of advisory opinions at the national and international level, this chapter seeks to shed light on where the ideas for Article 64 came from and why the IACtHR was given such a broad advisory function.

First, the general characteristics of advisory opinions are roughly outlined (A.). Thereafter, the historical development of advisory opinions at the national and international level is briefly delineated by shedding light on the practice developed in some domestic jurisdictions and the drafting history of the world courts PCIJ and ICJ (B.). On this basis, the concrete genesis of Article 64 is examined (C.).

A. Advisory opinions in general

Under contemporary international law, an advisory opinion is commonly understood as an "authoritative but non-binding explanation of a question or issue"[63] or "judicial statement [...] on legal questions"[64] issued by an international court upon the request of an entity entitled to request it "with a view to clarifying a legal question for that body's benefit"[65]. In contrast to the historical practice in some domestic jurisdictions, advisory opinions

63 Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 37; Mahasen M. Aljaghoub, *The Advisory Function of the International Court of Justice 1946–2005* (Springer, 2006) p. 12.

64 Karin Oellers-Frahm, 'Article 96 UN Charter', in Andreas Zimmermann *et al.* (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn OUP, 2012) mn 1.

65 Robert Kolb, *The International Court of Justice* (Bloomsbury Publishing, 2014) p. 1019f. with a further reference to Salmon (ed), *Dictionnaire de droit international public* (Bruylant, 2001) 116.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:57
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

are today issued by international courts as a whole, and not separately by individual judges.[66] Therefore, the task of issuing advisory opinions is no longer seen as extra-judicial.[67] While it was sometimes negated or questioned whether courts exercise jurisdiction when they issue advisory opinions, it has also been held that the Latin expression "*iuris dictio*" could be translated as "to say what the law is".[68] This would suggest that courts also exercise jurisdiction when they issue advisory opinions given that this translation fits very well to the object and purpose of advisory opinions.

Historically, there have been many reservations towards judges and courts providing advice to the executive, and today similar concerns are sometimes raised as objections to the admissibility and propriety of a new request.[69] Nevertheless, since the establishment of the PCIJ, the power

66 As to the historical practice and earlier understanding of advisory opinions in national jurisdictions see Ellingwood, Albert R., *Departmental Coöperation in State Government* (The Macmillan Company, 1918). See there on p. 253 in particular the following definition: "As generally understood, the advisory opinion is an opinion rendered by the highest judicial officers in the state, acting as individuals and not in a judicial capacity, in response to a request for information as to the state of the law or counsel as to the constitutionality of proposed action, coming from the legislative or executive branches of the government. The form in which its usefulness appears varies with the question asked."

67 With regard to the historical British tradition of advisory opinions, Jay noted that the judges were acting in "an individual, albeit 'official capacity'" and that the opinions were "extra-judicial decisions rendered by the judges apart from any ongoing case." See: Stewart Jay, *Most Humble Servants: The Advisory Role of Early Judges* (Yale University Press, 1997) p. 3, 4. With regard to the PCIJ it was still highly controversial whether it was appropriate for a court of law to give advisory opinions. Keith notes, that the drafters of the Covenant of the League of Nations were throughout "concerned to ensure that the jurisdiction they were conferring was a judicial function". See Kenneth J. Keith, *The Extent of the Advisory Jurisdiction of the International Court of Justice* (A.W,Sijthoff/Leyden, 1971) p. 21.

68 See Carlos Ruiz Miguel, "La Función Consultiva en el Sistema Interamericano de Derechos Humanos: ¿Crísalida de una Jurisdicción Supra-Constitucional?" in IACtHR (ed), *Liber Amicorum Héctor Fix-Zamudio*, Vol. II. (IACtHR, 1998) p. 1345, 1346–1348 who distinguishes between consultation and jurisdiction and Jorge Contesse, '*The Rule of Advice in International Human Rights Law*' (2021) 115(3) American Journal of International Law, 367, 370 who affirms that issuing advisory opinions is an exercise of jurisdiction. In contrast to the translation given by Jorge Contesse, the Latin expression "*iuris dictio*" can however also be understood as "proclaiming the law" in the sense of creating or dispensing justice through the act of speaking, which in turn would not fit so well to the advisory function.

69 The arguments and objections raised against advisory opinions will be mentioned in the next section, and also in Chapter 4, Section C. on the Court's discretion to reject requests for advisory opinions. For an overview over the typical arguments raised

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:57
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

to render advisory opinions has been conferred on many different international courts and the advisory function of courts has become "widely accepted in [i]nternational [l]aw".[70] It is normally provided for in the constitutive treaty or statute of the respective court and the advisory jurisdiction is designed to complement the court's contentious jurisdiction.[71]

In contrast to contentious proceedings, there are no parties in advisory proceedings, and thus no formal charges against any other entity.[72] In advisory proceedings the courts are not called to determine facts but to explain what the law is. In contrast to judgments, advisory opinions are commonly understood to be non-binding, not producing any *res judicata* effect, and the courts cannot order any reparations or sanctions in an advisory opinion.[73]

However, as will be discussed in more detail in chapter five, the exact legal effect of advisory opinions has, in most instances, been disputed and has in the past years become a matter of debate with regard to the IACtHR. Irrespective of whether they are considered binding or not, advisory opinions have not only proven helpful for the requesting entity but have often contributed to the general clarification and development of international law.[74] Furthermore, they may be considered as an "alternative non-confrontational means to resolve international disputes".[75]

---

against the "utility and propriety" of advisory opinions see also: Erica de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, 2004) p. 28–29.

70 Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 38; Aljaghoub (n 63) p. 14. For an overview over the advisory functions of other international courts see Chapter 3, Section D.

71 Aljaghoub (n 63) p. 12; Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 37.

72 Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 37.

73 d'Argent, 'Art. 65', in Andreas Zimmermann *et al.* (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn OUP, 2019) mn. 48, 50; Kolb (n 65) p. 1021; Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 37.

74 d'Argent, 'Art. 65' (n. 73) mn. 53; Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court* (n 41) p. 2; Aljaghoub (n 63) p. 155ff.

75 Aljaghoub (n 63) p. 14; Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 38; Similarly, Rüdiger Wolfrum, 'Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes?' in Wolfrum/Gätzschmann (eds), *"International Dispute Settlement: Room for Innovations?"* p. 35, 63.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:57
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

B. Historical development of advisory opinions

One question that immediately arises with regard to the advisory function of the IACtHR is why all OAS member states are allowed to request advisory opinions, whereas such an extension of standing to states was in the end always rejected when the advisory functions of the PCIJ and ICJ were being drafted. The following analysis therefore examines to what extent experiences with advisory functions at the domestic level might have influenced the drafting and conception of advisory functions of international courts, and whether domestic legal traditions might have favored the decision to bestow the IACtHR with such a broad advisory jurisdiction.

Furthermore, a look at the historical advisory practice of judges and courts in some countries is interesting, because it shows that most objections and concerns raised in advisory proceedings before the IACtHR are not new but apparently inherent in this type of procedure. Being aware of how these concerns have influenced the design and limitation of advisory jurisdictions is relevant for the later discussion on when the IACtHR should decline to answer requests for advisory opinions.[76]

I. England

Probably the longest, and best documented, history of advisory opinions pertains to Great Britain.[77] It is recorded that the King of England sought advice from judges in the twelfth century.[78] At that time, formal separation of powers was not yet known.[79] Rather, all sovereign powers of the state lay with the Crown.[80] Judges were seen as royal officials and assistants.[81] The kings and queens sought their advice both in his or her judicial and executive capacity.[82] Furthermore, the judges also advised the House of

76 On this see *infra*: Chapter 4, Section C.
77 *Cf.*: Horace E. Read, *'Advisory Opinions in International Justice'* (1925) 3(4) Canadian Bar Review, 186, 191.
78 Ellingwood (n 66) p. 1; Mirza Anwer Beg, *The Attitude of the United Nations Members towards the Use of Advisory Opinion Procedure 1945–1963* (Columbia University, 1965) p. 8; Aljaghoub (n 63) p. 14.
79 Ellingwood (n 66) p. 1.
80 Ellingwood (n 66) p. 1.
81 Jay (n 67) p. 10, 14.
82 Ellingwood (n 66) p. 2, Beg (n 78) p. 8–9; Aljaghoub (n 63) p. 14.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:57
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

Lords both in its judicial as well as in its legislative capacity e.g. on matters concerning pending legislation.[83] Also the Privy Council, a permanent royal council whose main function was to advise the king or the queen, could consult the judges extra-judicially on difficult legal questions.[84] Parliamentary acts in fact enjoined "that lords of the Council should in no wise decide legal questions without the aid of justices."[85] For some time, the Privy Council was divested of its judicial powers, but in the eighteenth and nineteenth century many of its members were judges or former judges whose expertise was highly appreciated.[86] Therefore, a Judicial Committee of the Privy Council was created in 1833.[87] The Parliament provided that "it shall be lawful for His Majesty to refer to the said judicial committee for hearing and consideration any such matters whatsoever as His Majesty shall think fit, and such Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon in manner aforesaid."[88] While the practice of the Crown to refer questions to the judges declined, the monarch has been able to obtain reliable legal advice from the Judicial Committee of the Privy Council since 1833.[89]

The practice of the House of Lords to consult the judges only declined at the end of the nineteenth century when the House was transformed into a court of appeal composed of professionally trained judges, which rendered the seeking of external judicial advice unnecessary.[90] However, at the beginning of the twentieth century, the Judicial Committee was still of the opinion that the House of Lords continued to possess in its legislative capacity the "right to ask the judges what the law is in order to better inform itself how, if at all, the law should be altered."[91]

Some features that can be observed in the historical advisory practice in England, and later in the United Kingdom, are striking as they resemble

83 Ellingwood (n 66) p. 2, Beg (n 78) p. 12; Jay (n 67) p. 13.
84 Ellingwood (n 66) p. 4–5; Beg (n 78) p. 8.
85 James F. Baldwin, *The Kings Council in England during the Middle Ages* (Clarendon Press, 1913) p. 301; Beg (n 78) p. 8; Ellingwood (n 66) p. 5.
86 Ellingwood (n 66) p. 5; Beg (n 78) p. 8.
87 Beg (n 78) p. 9.
88 See Ellingwood (n 66) p. 5 and Beg (n 78) p. 9 for further references.
89 Ellingwood (n 66) p. 16–17; Jay (n 67) p. 48; Beg (n 78) p. 10. As to matters referred by the Crown to the Judicial Committee of the Privy Council in the late 19th and early 20th century see: Manley O. Hudson, '*The Advisory Opinions of the Permanent Court of International Justice*' (1925) 10 International Conciliation, 321, 360 *et. seq*.
90 Jay (n 67) p. 47; Beg (n 78) p. 11; Ellingwood (n 66) p. 23.
91 Beg (n 78) p. 12; Ellingwood (n 66) p. 30.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:57
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

recurring objections and doubts raised with regard to the advisory practice of international courts today. For one, while it was generally considered mandatory for the judges to reply to the Majesty or the House of Lords, it is documented that throughout the centuries, judges from time to time were unwilling and sometimes even declined to give advice, especially with regard to questions that could later arise before them in a contentious case at court.[92] Secondly, there was a discussion as to whether the House of Lords could also ask abstract questions of law that did not refer to any particular case or whether these were mere speculations.[93] Thirdly, requests for advisory opinions were at the time often highly political and the risk that advisory opinions might be misused as political instruments always existed.[94] Furthermore, the opinions given by the judges were, like today, mostly not considered binding to the monarch or the House of Lords, but they were nevertheless generally followed.[95] In the further course of this work, it will be shown how the IACtHR copes with similar questions when exercising its advisory function.[96]

II. United States of America

The British legal traditions had an immense influence on the development of the American legal system.[97] Hence, it comes as no surprise, that judges in the colonies and later in various American states, were also asked to give advisory opinions.[98] In some states, this occurred without an express legislative authorization.[99] In other states, the advisory function was enshrined

92 Jay (n 67) p. 13, 17, 21. Jay cites e.g. on p. 17 from a reply of judges to King Charles I from 1629 in which they "desire[d] to be spared to give any answer to a particular case which might peranduetur come before them judicially". See also: Beg (n 78) p. 12; Ellingwood (n 66) p. 8–12, 16, 27–28. On p. 9 Ellingwood writes that judges objected to give an opinion on a matter that was likely to come before them in a judicial case already in 1485.

93 Ellingwood (n 66) p. 29.

94 Jay (n 67) p. 17–18, 48; Ellingwood (n 66) p. 10.

95 Ellingwood (n 66) p. 14, 22–24; Jonathan D. Persky, '*Ghosts That Slay: A Contemporary Look at State Advisory Opinions*" (2005) 37 Connecticut Law Review, 1155, 1162.

96 See in particular Chapter 4, Section C and Chapter 5, Section B.III.

97 Jay (n 67) p. 56; Ellingwood (n 66) p. 31–32.

98 Jay (n 67) p. 52; Ellingwood (n 66) p. 30–33.

99 Ellingwood (n 66) p. 55–78; Manley O. Hudson, *'Advisory Opinions of National and International Courts'* (1923–1924) 37(8) Harvard Law Review, 970, 977; Hudson, '*The Advisory Opinions of the Permanent Court of International Justice*' (n 89) p. 360 et seq.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:57
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

in the constitution or in statutes.[100] The first constitution to provide both the legislative and the executive with a right to "require the opinions of the justices of the Supreme Judicial Court" was the Massachusetts Constitutional Convention of 1780.[101] The relevant provision, which is still in force, is clearly influenced by the British advisory practice. It establishes a duty of the judges to give their opinions, but at the same time restricts it to "important questions of law, and upon solemn occasions".[102] Several other state constitutions later included provisions which where modelled thereafter.[103] Also, when the United States Constitution was drafted, there was a proposal to include a provision identical to that of the constitution of Massachusetts, except that the opinions should be provided by the court and not by the justices.[104] However, this proposal did not succeed.[105]

President Washington at first nevertheless assumed that he could consult the judges of the US Supreme Court.[106] He approached the judges in 1790 and 1793.[107] While some sources state that the judges declined to respond

100 For an overview see: Hudson, *'The Advisory Opinions of the Permanent Court of International Justice'* (n 89) p. 360 et seq; Ellingwood (n 66) p. 30–78; Persky (n 95) p. 1155, 1166–1169.

101 Massachusetts Constitution, Chapter III, article II originally stated: "Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the supreme judicial court upon important questions of law, and upon solemn occasions"; by Amendment 85 in 1964 the right to request an advisory opinion was expanded so that both the governor and the council can act alone. For the current text see: https://malegislature.gov/laws/constitution. See also: Ellingwood (n 66) p. 30; Beg (n 78) p. 14; Reuben Goodman, *'Chapter 10: Advisory Opinions'* (1964) Annual Survey of Massachusetts Law, Vol. 1964, Article 13, p. 95.

102 Beg (n 78) p. 14; Ellingwood (n 66) p. 31.

103 Examples are the New Hampshire Constitution of 1784, the Maine Constitution of 1820 and the Rhode Island Constitution of 1842. For further details see: Ellingwood (n 66) p. 39–41; Beg (n 78) p. 14–15.

104 Ellingwood (n 66) p. 57; Beg (n 78) p. 13; Hudson, *'The Advisory Opinions of the Permanent Court of International Justice'* (n 89) p. 352.

105 Hudson, *'The Advisory Opinions of the Permanent Court of International Justice'* (n 89) p. 352.

106 Ellingwood (n 66) p. 57; Beg (n 78) p. 13; Hudson, *'Advisory Opinions of National and International Courts'* (n 99) p. 970, 975. See also Robert P. Dahlquist, *'Advisory Opinions, Extrajudicial Activity and Judicial Advocacy: A Historical Perspective'* (1983) 14(1) Southwestern University Law Review, p. 45, 50–53, 59.

107 Beg (n 78) p. 13; Hudson, *'Advisory Opinions of National and International Courts'* (n 99) p. 970, 975.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:57
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

both times[108], it is more likely that they responded in 1790 and that the well-known precedent against advisory opinions of 1793, which has since then never been overruled by the US Supreme Court, was rather an "abrupt turnabout" from a previously "common practice" for judges to advise the government.[109] In 1793, Secretary of State Thomas Jefferson, had asked the judges on behalf of President Washington to appear before the Cabinet and to advise it on 29 questions regarding America's rights and obligations as a neutral party in the ongoing war between the European colonial, and especially maritime, powers that had been sparked by the turmoil of the French Revolution, and which also affected American ships and ports.[110] Referring to the separation of powers envisaged by the Constitution and the fact that its Article II sec. 2 limited the President's right to request opinions of the principal officers in each *executive* department, the judges kindly refused to answer the questions of the Cabinet.[111] Today, it is disputed whether it was in fact constitutional concerns, or rather more political motivations coupled with the sheer number and complexity of the questions, that led

108 Beg (n 78) p. 13; Hudson, *'Advisory Opinions of National and International Courts'* (n 99) p. 970, 975.

109 Dahlquist, (n 106) p. 45, 50–53 providing the texts of the written communication between President Washington and the justices; Mel A. Topf, *'The Jurisprudence of the Advisory Opinion Process in Rhode Island'* (1997) 2 Roger Williams University Law Review, 207, 212. See also the corroborating finding by the US Supreme Court in *Alabama v. Arizona*, 291 U.S. 286, 291 (1934) where the Court held: "This Court may not be called on to give advisory opinions or to pronounce declaratory judgments".

110 Jay (n 67) p. 1, 117, 136.

111 The decisive sentences of the judge's reply stated: "The Lines of Separation drawn by the Constitution between the three Departments of Government – their being certain Respects checks on each other – and our being Judges of a court in the last Resort – are Considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to; especially as the Power given by the Constitution to the President of calling on the Heads of Departments for opinions, seems to have been purposely as well as expressly limited to *executive* Departments. We exceedingly regret every Event that may cause Embarrassment to your administration; but we derive Consolation from the Reflection, that your Judgment will discern what is Right, and that your usual Prudence, Decision and Firmness will surmount every obstacle to the Preservation of the Rights, Peace, and Dignity of the united States." The only a bit longer letter is fully reprinted in Jay (n 67) p. 179.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:57
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

the Supreme Court judges to refuse to answer President Washington's questions.[112]

Since then, some states of the US have repealed their advisory practice and a general skepticism towards advisory opinions shared by some US representatives has also influenced the drafting of the later advisory function of the PCIJ and ICJ.[113] However, in other states of the US the advisory practice still exists and is apparently not regarded to be per se incompatible with representative democracy and the separation of powers doctrine.[114]

112 *Cf.*: Jay (n 67) p. 169–170 and Persky (n 95) p. 1155, 1165 highlighting the judge's political considerations and motivations and James B. Thayer *Legal Essays* (Boston Book Company, 1908) p. 54 speculating that the judges might have decided otherwise if the questions had been "brief and easily answered". Also Dahlquist considers that some of the judges might have been willing to answer if the request had been more informal, see Dahlquist (n 106) p. 62. For the opposite opinion see Robert J. Jr. Pushaw, '*Why the Supreme Court never gets any "Dear John" Letters: Advisory Opinions in Historical Perspective* (1998) 87 The Georgetown Law Journal, 473, 491 believing that the judges arguments should be taken at face value and that their decision was truly determined by constitutional thoughts regardless of the political setting.

113 *Cf.*: Persky (n 95) p. 1155, 1170; Hudson, *'Advisory Opinions of National and International Courts'* (n 99) p. 970, 978; Read (n 77) p. 193; PCIJ, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, 16 June – 24 July 1920, p. 584; Michla Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (Johns Hopkins University Press, 1973) p. 14 fn. 39; Russell, Ruth B. and Muther, Jeannette E., *A History of the United Nations Charter: The Role of the United States 1940–1945* (The Brookings Institution, 1958) p. 873 stating that advisory opinions were viewed by the US American state officials "primarily as an adjunct to the settlement of disputes and, at that time, political settlement within the Organization was contemplated as a function of the Security Council only"; see also Dharma Pratap, *The Advisory Jurisdiction of the International Court* (Clarendon Press, 1972) p. 40.

114 *Cf.*: Persky (n 95) p. 1155, 1233; Ellingwood (n 66) p. 170; on the positive and negative implications of state court advisory opinions and their use in practice see also: Lucas Moench, '*State Court Advisory Opinions: Implications for Legislative Power and Prerogatives*' (2017) 97 Boston University Law Review p. 2243–2301.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:57
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

III. Canada and India

Besides the United States, courts in other former British colonies like Canada[115] and India[116] were also bestowed with advisory powers. Unlike the US Supreme Court, both the Canadian and the Indian Supreme Court issue advisory opinions until today.

In Canada advisory opinions or the so-called reference jurisdiction play an important role in constitutional law and are both known at the federal and at the provincial level.[117]

In India, advisory opinions were for the first time provided for by the Government of India Act of 1935.[118] Under the current Constitution of India, the President may under Article 143 consult the Supreme Court on questions of law or fact that are of public importance.[119]

IV. Latin American states

Whereas two North American OAS member states, the United States and Canada, had thus mixed experiences with advisory opinions issued by national courts, it is for the further course of this work of special interest whether Latin American states were also familiar with advisory functions of courts before advisory opinions became known in international law. This might firstly shed light on the question whether the advisory function of the IACtHR was modelled after that of international courts or whether it also had national prototypes. Secondly, it might explain the willingness of the

115 The Supreme and Exchequer Court Act, SC 1875, c 11; Ellingwood (n 66) p. 79 et seq.; Manley O. Hudson, *The Permanent Court of International Justice: 1920–1942: A Treatise* (Macmillan Company, 1943) p. 485; James L. Huffmann and MardiLyn Saathoff, *Advisory Opinions and Canadian Constitutional Development: The Supreme Court's Reference Jurisdiction* (1990) 74 Minnesota Law Review, p. 1251–1336. Next to the Supreme Court also some of the Canadian provinces' High Courts were endowed with an advisory competence.

116 Government of India Act 1935, Art. 213; The Constitution of India, Art. 143; Pratap (n 113) p. 263–266; William D. Popkin, '*Advisory Opinions in India*' (1962) Articles by Maurer Faculty p. 401–434.

117 Huffmann and Saathoff (n 115), p. 1251, 1253; de Wet (n 69) p. 25–26; Hudson, '*The Advisory Opinions of the Permanent Court of International Justice*' (n 89) p. 357–360; Read (n 77) p. 193.

118 Government of India Act 1935, Art. 213, in force since 1937; Popkin (n 116) p. 402.

119 The Constitution of India, Art. 143; de Wet (n 69) p. 25.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:57
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

Latin American states to bestow the IACtHR with such a broad advisory jurisdiction, as will be depicted in more detail below.

A look at the constitutions of Latin American states in force when the drafting of the Covenant of the League of Nations[120] began, and before the drafting of the ACHR had started, reveals a different kind of advisory role of courts than in the states with an Anglo-American legal tradition. There are in particular three types of provisions found in several historical Latin American constitutions which are regularly mentioned in relation to advisory functions of national courts, as they provide for some kind of consultation of courts.[121]

First, in some states the judiciary had the right to initiate law reforms[122] or the Supreme Court had to be heard when new draft laws were debated, especially when concerning judicial matters.[123] In this case it seems that the opinions issued, or statements made by the courts were not binding on the legislative organs.

Apart from that, several states seem to have adopted a modified version of Article 90 of the Colombian Constitution of 1886, providing that in case of a controversy between the other bodies involved in the legislative process about the constitutionality of a proposed law, the final decision shall lie with the Supreme Court.[124] Under these provisions, not only the Supreme

120 The Covenant of the League of Nations (adopted 28 April 1919, entered into force 10 January 1920) LNOJ February 1920, p. 3 (Covenant).

121 *Cf.*: Hudson, *'The Advisory Opinions of the Permanent Court of International Justice'* (n 89) p. 360 et seq; Hudson, *The Permanent Court of International Justice: 1920–1942: A Treatise* (n 115) p. 485; Ruiz Miguel (n 68) p. 1349–1350; Ellingwood (n 66) p. 94–95.

122 See e.g.: El Salvador, Constitution of 1886, Art. 71; Honduras, Constitution of 1904, Art. 76; Nicaragua, Constitution of 10 November 1911, Art. 91; Peru, Constitution of 1920, Art. 101 (4); ; Federal Republic of Central America, Political Constitution of 9 September 1921, Art. 87 (3); Ecuador, Constitution of 1929, Art. 53.

123 Colombia, Constitution of 1886, Art. 84; Nicaragua, Constitution of 10 November 1911, Art. 99, 131; Honduras, Constitution of 1904, Art. 83; Constitution of 1924, Art. 105; Federal Republic of Central America, Political Constitution of 9 September 1921, Art. 96; similar also the Constitution of Uruguay of 1952, Art. 240.

124 Colombia, Constitution of 1886, Art. 90; Panamá, Constitution of 1904, Art. 105, Constitution of 1941, Art. 97; Costa Rica, Constitution of 1917, Art. 84; Ecuador, Constitution of 1929, Art. 67; Honduras, Constitution of 1924, Art. 102; Honduras, Constitution of 1936, Art. 108.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:57
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

Courts had to be heard, but the other legislative organs were bound by the vote of the judges.[125]

Thirdly, it is often spoken of "*consulta*", hence of "consultation", with regard to preliminary ruling procedures which are comparable to the "*cuestión de inconstitucionalidad*" known from Spanish constitutional law or the German "*Vorlageverfahren*" / "*konkrete Normenkontrolle*".[126] Yet, although this is also a kind of consultation, it has little in common with the typical advisory opinion procedure known from the British legal tradition as the consultation is made by lower judges to the Supreme Court and as the decision made by the latter is moreover binding on the lower court.[127]

The first two types of provisions are similar to the Anglo-American tradition of advisory opinions as regards the advisory role that judges have exercised towards the legislature in the Anglo-American tradition.[128] However, all three types of provisions differ from the Anglo-American advisory practice in that the situations in which the judges have to be consulted are determined by law and are not subject to the free decision of the requesting body. Individual judges are not required to issue separate extra-judicial opinions, but it is instead a legally determined task of the Supreme Courts as a whole to be involved in the legislative process. Thus, questions as to the discretion of judges to decline certain requests for advisory opinions which are common in the Anglo-American advisory practice will normally not arise.

Moreover, as regards the second and third type of provisions, the Court's opinions – or rather decisions – are normally binding on the other constitutional organs.

Apart from the courts' involvement in the enactment of laws, and their task to decide on the constitutionality of both, draft laws and already enacted laws, there is no provision in the historical Latin American constitutions known to the author that would have provided the President or other body of the executive with a right to request the opinion of judges on general questions of law not related to a specific law proposal,

125 Colombia, Constitution of 1886, Art. 90; Panamá, Constitution of 1904, Art. 105, Constitution of 1941, Art. 97; Costa Rica, Constitution of 1917, Art. 84; Ecuador, Constitution of 1929, Art. 67.

126 *Cf.*: Ruiz Miguel (n 68) p. 1350; See, Panamá, Constitution of 1941, Art. 188 (2); Costa Rica, Constitution of 1949, Art. 10 lit. b and Ley de Jurisdicción Constitucional N° 7135, Arts. 102–108.

127 Ruiz Miguel (n 68) p. 1350.

128 *Cf.*: Ellingwood (n 66) p. 244.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:57
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

as is known from the Anglo-American advisory tradition. Whether this different legal tradition in Latin American states may explain their mostly liberal attitude towards bestowing international courts with an advisory jurisdiction or their decision to endow the IACtHR with such a broad advisory function is speculative. But being used to courts having a formal role in the legislative process and not being limited to deciding specific cases and controversies may explain why Latin American states were less reserved towards bestowing international courts with advisory functions and towards seeing the issuance of advisory opinions not as extra-judicial but as appropriate judicial task.

What is more, the familiarity with constitutional review procedures may have favored the adoption of a norm such as Article 64(2) authorizing OAS member states to request the IACtHR to give advice on the compatibility of national laws with the Convention and other human rights instruments.

V. Permanent Court of International Justice

In light of the manifold experience of national courts in several countries, it was held that it was in fact no "great innovation"[129] that the PCIJ had been granted an advisory function which by other commentators had been observed as a "novelty"[130] for an international court. Although the drafting history of Article 14 of the Covenant of the League of Nations, which constituted the jurisdictional basis for the Court's advisory opinions, does not prove a direct connection between one of the national provisions on advisory opinions and Article 14 of the Covenant, it is to be assumed that the drafters of Article 14 had such domestic examples and the respective national experiences in mind when they drafted the Covenant of the League of Nations.[131]

129 Hudson, '*The Advisory Opinions of the Permanent Court of International Justice*' (n 89) p. 351; Hudson, '*Advisory Opinions of National and International Courts*' (n 99) p. 985 referring to the statement of the then registrar of the PCIJ, Mr. Hammarsköld.

130 Åke Hammarskjöld, '*The early work of the Permanent Court of International Justice*' (1922–1923) 36 Harvard Law Review, 704, 715.

131 Hudson, *The Permanent Court of International Justice: 1920–1942: A Treatise* (n 115) p. 485; Pratap (n 113) p. 2; Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 9. In contrast to the American lawyers and state representatives who were obviously prejudiced by the objections to advisory opinions prevailing in their national federal legal system, the early proposal for a "Gutachtenfunktion" for a future international court made by the Austrian

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:57
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

Before the establishment of the PCIJ, at the international level only technical bodies had been endowed with some kind of advisory function, but these bodies did not function like a court of justice.[132] The historical Central American Court of Justice which came into existence before the PCIJ did not render advisory opinions despite being endowed with a broad and very progressive jurisdiction.[133] Under Articles I and IV of the 1907 Convention for the Establishment of a Central American Court of Justice, states could submit "all controversies or questions" or "international questions" to the Court, but these "questions" were apparently only understood as contentious questions pending between at least two states.[134]

---

international lawyer, Heinrich Lammasch, in 1918 had nothing in common with the articles 139–140 of the 1920 Austrian Constitution that Hudson understood to provide for "advisory opinions". While the Austrian Constitutional Court could, according to these articles, declare laws or regulations to be illegal or unconstitutional, Lammasch's proposal for a "constitution" of a world organization envisaged a function according to which the proposed international court was allowed to give an expert opinion on questions of international law posed by a (member) state of the organization. The only thing, these two concepts might have had in common was, that both procedures were abstract ones, not involving two contradicting parties. *Cf.*: Heinrich Lammasch, *Der Völkerbund zur Bewahrung des Friedens: Entwurf eines Staatsvertrages mit Begründung* (2nd edn W. Trösch, 1919), p. 13, Art. 12; Hudson, *'The Advisory Opinions of the Permanent Court of International Justice'* (n 89) p. 351.

132 See for instance: Art. 15 of the Treaty concerning the Formation of a General Postal Union, Bern, 9 October 1874, 147 CTS 136; Art. 12 of the South American Postal Convention, Montevideo, 2 February 1911, 213 CTS 43; Art. 34 of the Convention relating to the Regulation of Aerial Navigation, 13 October 1919, 11 LNTS 173; *cf.*: Hudson, *The Permanent Court of International Justice: 1920–1942: A Treatise* (n 115) p. 484–485 with further references and details and also Pratap (n 113) p. 1, 2 and Pierre d'Argent, 'Art. 96 UN Charter', in Andreas Zimmermann *et al.* (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn OUP, 2019) mn 4.

133 Especially progressive was that the Court had jurisdiction to decide controversies between governments and individuals. The Court functioned however only from 1907 until 1918. For further information on the Court see: Manley O. Hudson, '*The Central American Court of Justice*' (1932) 26(4) American Journal of International Law, 759–786; Sasha Maldonado Jordison, '*The Central American Court of Justice: Yesterday, Today and Tomorrow?'* (2009) 25 Connecticut Journal of International Law, 183–242; Charles Ripley, '*The Central American Court of Justice (1907–1918): Rethinking the Word's first Court*', (Jan.-Jun. 2018) 19(1) Diálogos Revista Electrónica, 47–68.

134 Convention for the Establishment of a Central American Court of Justice, 20 December 1907, reproduced in The American Journal of International Law, Jan-Apr. 1908, Vol. 2 (1/2), pp. 231-243.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:57
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

The assumption that the different domestic experiences and prejudices towards advisory opinions influenced the genesis of the PCIJ's advisory function is supported by the fact that proposals to entrust the future court with an advisory jurisdiction were made among others by the British delegation, while objections towards an advisory function of the PCIJ were especially raised by representatives of the United States.[135] *Inter alia*, the American delegation member, Mr. David Hunter Miller, did at first fear that a provision providing for an advisory jurisdiction might permit the Council or Assembly of the League to "compel arbitration".[136] With regard to a later draft of Article 14 of the Covenant stating *"the Court shall be competent to […] advise upon any legal questions referred to it by the Executive Council or by the Body of Delegates*", Miller was afraid that the Court might be construed as "the legal advisor of the Council and of the Assembly, a duty

---

Article I of the 1907 Convention stated:
"The High Contracting Parties agree by the present Convention to constitute and maintain a permanent tribunal which shall be called the "Central American Court of Justice," to which they bind themselves to submit ***all controversies or questions*** *which may arise among them, of whatsoever nature and no matter what their origin may be, in case the respective Departments of Foreign Affairs should not have been able to reach an understanding."*
Article IV of said Convention read:
"The Court can likewise take cognizance of the ***international questions*** *which by special agreement any one of the Central American Governments and a foreign Governments may have determined to submit to it."* [Emphasis both times added]
As to cases decided by the historical Central American Court of Justice see: Ripley (n 133). As to the modern Central American Court of Justice reestablished in the 1990s see: http://portal.ccj.org.ni/ccj/normativa/.

135 Next to British proposals also early French and Italian drafts and the draft of Colonel House would have allowed for the submission of questions by League organs to the PCIJ. The latter shows together with the publications of Manley O. Hudson that there were also US Americans in support of an advisory function. As to the early drafts see David H. Miller, *Drafting of the Covenant, Vol. II* (G. P. Putnam's Sons, 1928) p. 8 (Draft of Colonel House, 16 July 1918, Art. 10) p. 111 (British Draft Convention, 20 January 1919, Chapter II para. 7) p. 239 (Draft adopted by the French Ministerial Commission for the League of Nations of 8 June 1918, para. 5) p. 250, 252 (Draft Scheme for the Constitution of the Society of Nations submitted by the Italian Delegation, 3 February 1919, Art. 14, 22). See as well: Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 6–7, 14 fn. 39; Pratap (n 113) p. 3–6, 14; Beg (n 78) p. 17–21; Read (n 77) p. 193.

136 David H. Miller, *Drafting of the Covenant, Vol. I* (G. P. Putnam's Sons, 1928) p. 290; Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 7; Pratap (n 113) p. 4.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:57
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

which its function of rendering advisory opinions did not involve".[137] Later, he welcomed the substitution of the term "to advise" by the expression "give an advisory opinion" as this would make it clearer that the function ought to be exercised as a judicial one.[138] It is likely that the term "advisory opinion" was in the end adopted due to the American familiarity with the term.[139]

During the discussions on whether and how to regulate the PCIJ's advisory function in the Court's Statute, former US Secretary of State, Mr. Elihu Root, criticized that the Court was supposed to have the "right to give an advisory opinion with reference to an existing dispute" as "this was a violation of all judicial principles".[140] In contrast to this, Argentina proposed an extension of the advisory function to the extent that next to the Council and the Assembly of the League, governments of the member states of the League should be allowed to request advisory opinions of the Court, too.[141] Later, such standing to request advisory opinions was given to states in the inter-American human rights system. At the international level, the Argentinian proposal was however rejected, as it was held that such a provision would have extended the Court's powers beyond what had been foreseen by Article 14 of the Covenant.[142] Moreover, it was feared that such an extension might indirectly lead to the introduction of compulsory

137 Miller, *Drafting of the Covenant, Vol. I* (n 136) p. 391–392; p. 391–392; Pratap (n 113) p. 4; Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 8.

138 Miller, *Drafting of the Covenant, Vol. I* (n 136) p. 406; Pratap (n 113) p. 5; Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 8.

139 Hudson, *'The Advisory Opinions of the Permanent Court of International Justice'* (n 89) p. 351; Pratap (n 113) p. 5.

140 PCIJ, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, 16 June – 24 July 1920, p. 584; Pratap (n 113) p. 7; Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 14 fn. 39.

141 'Amendments proposed by the Argentine Delegation to the Draft Scheme of the Advisory Committee of Jurists for the Institution of a Permanent Court of International Justice, as modified by the Council of the League of Nations', in: League of Nations, PCIJ, Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant, 1921, p. 65, 68.

142 'Amendments proposed by the Argentine Delegation to the Draft Scheme of the Advisory Committee of Jurists for the Institution of a Permanent Court of International Justice, as modified by the Council of the League of Nations', in: League of Nations, PCIJ, Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant, 1921, p. 211; Pomerance, *The*

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

jurisdiction on the basis of unilateral applications.[143] After controversial discussions on how to regulate the advisory procedure which revealed great uncertainties regarding the proper role of the Court's advisory jurisdiction, in particular in relation to its contentious jurisdiction, it was decided to delete the draft provision altogether so that the original Statute of the PCIJ did not contain any provision on advisory opinions.[144]

The discussion then continued inside the Court when it was about to draft its Rules of Procedure.[145] The American Judge John Bassett Moore insisted that the giving of opinions was "not an appropriate function of a Court of Justice" and "at variance with the fundamental design of [the Court]" and that such opinions "would tend not only to obscure but also to change the character of the Court [...] and diminish the opportunities for the exercise by the Court of its judicial functions".[146] Therefore, "there should be no special regulation concerning the advisory opinions."[147] However, the majority of the Court did not share this view, and in the end the Court adopted rules which "affirm[ed] the judicial character of the advisory

Advisory Function of the International Court in the League and U.N. Eras (n 113) p. 13, fn. 35; Pratap (n 113) p. 8.

143 'Amendments proposed by the Argentine Delegation to the Draft Scheme of the Advisory Committee of Jurists for the Institution of a Permanent Court of International Justice, as modified by the Council of the League of Nations', in: League of Nations, PCIJ, Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant, 1921, p. 156, 211; Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 13, fn. 35; Pratap (n 113) p. 8.

144 'Amendments proposed by the Argentine Delegation to the Draft Scheme of the Advisory Committee of Jurists for the Institution of a Permanent Court of International Justice, as modified by the Council of the League of Nations', in: League of Nations, PCIJ, Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant, 1921, p. 156, 211; Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 10, Pratap (n 113) p. 9.

145 Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 14.

146 John B. Moore, 'The question of advisory opinions', Memorandum of 18 February 1922, in: PCIJ, Acts and Documents concerning the Organisation of the Court, Preparation of the Rules of the Court, Series D No. 2, p. 383, 397–398; Hudson, *'The Advisory Opinions of the Permanent Court of International Justice'* (n 89) p. 334; Pratap (n 113) p. 11–12; Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 14–15.

147 John B. Moore, 'The question of advisory opinions', Memorandum of 18 February 1922, in: PCIJ, *Acts and Documents concerning the Organisation of the Court, Preparation of the Rules of the Court*, Series D No. 2, p. 383, 398.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

function".[148] Proposals that the Court should be able to give secret advice to the Council of the League were rejected.[149] To the contrary, requests for advisory opinions had to be made public, the final opinions had to be published and the advisory opinions had to be given by the full Court which further enhanced their judicial value.[150]

Thereafter, the PCIJ's rules were several times slightly adapted to the developing advisory practice of the PCIJ which showed the tendency to ever further assimilate the advisory procedure to that followed in contentious cases.[151]

Despite the many uncertainties and doubts that existed at the beginning with regard to the advisory function of the PCIJ, the advisory practice of the PCIJ was regarded as very successful overall.[152] It had proven to be a judicial function that differed in many regards from the advisory practice known from domestic courts.[153]

Judge Manley O. Hudson, who had warned his American colleagues at the beginning of the 1920s that "a political shibboleth, built upon an

148 See Articles 71–74 of the PCIJ's Rules of Court, adopted on 24 March 1922, Series D No. 1; Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 14–15; Aljaghoub (n 63) p. 21.

149 See the proposal of Judge Anzilotti which was opposed by Judges Moore and Finlay in: PCIJ, Acts and Documents concerning the Organisation of the Court, Preparation of the Rules of the Court, Series D No. 2, p. 160; Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 15; Pratap (n 113) p. 13.

150 *Cf.*: Articles 71, 73, 74 of the PCIJ's Rules of Court, adopted on 24 March 1922, Series D No. 1; Hudson, *'The Advisory Opinions of the Permanent Court of International Justice'* (n 89) p. 335; 41; Hudson, *'Advisory Opinions of National and International Courts'* (n 99) p. 1000–1001.

151 Pratap (n 113) p. 15; Malcolm N. Shaw, *Rosenne's Law and Practice of the International Court 1920–2015, Vol. I: The Court and the United Nations* (5th edn Martinus Nijhoff Publishers, 2016) p. 280–283; d'Argent, 'Art. 96 UN Charter' (n 132) mn 10.

152 Shaw, *Rosenne's Law and Practice of the International Court 1920–2015, Vol. I: The Court and the United Nations* (n 151) p. 280–285; Beg (n 78) p. 37; Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 40–42; Manley O. Hudson, *International Tribunals: Past and Future* (Carnegie Endowment for International Peace and Brookings Institution, 1944) p. 81 highlighting that the main reason why the advisory function of the PCIJ was held to be successful, was that it had helped to settle disputes in many cases which would have hardly been brought before the Court in a contentious case.

153 Leeland M Goodrich, *'The Nature of the Advisory Opinions of the Permanent Court of International Justice'* (1938) 32 American Journal of International Law, 738, 755–756; Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 9, 40–41; Aljaghoub (n 63) p. 22.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

American conception of separation of powers, should not be permitted to wreck a sound experiment launched in a world which is but slowly emerging from the bankruptcy of the war" and that the Court should be given time to experiment with its new advisory function, was later on pleased how the Court's advisory function had developed.[154] He held that its "importance [...] [had] been very generally appreciated" and pointed out that in "1938 an Inter-American Committee of Experts [had] recommended that a similar function be entrusted to a proposed Inter-American Court of International Justice".[155] Although this proposed Inter-American Court of International Justice never came into existence, the recommendation of the expert committee is an indication that the PCIJ's advisory function was seen as successful in the Americas, too.

VI. International Court of Justice

When the Inter-Allied Committee discussed the establishment of a new International Court for the post-Second-World-War-era, the already known objections were raised again. It was argued that giving advisory opinions was "incompatible with the true function of a court of law", that such a function might be misused for the settlement of political rather than legal issues, that it might strengthen a tendency to avoid the final and binding settlement of disputes, and that the Court might use the opinions for too general statements on the law which were unrelated to facts.[156] Despite these concerns, the arguments in favor of an advisory function prevailed, so that the Committee recommended that the advisory jurisdiction should not only be retained but also enlarged.[157] It was not only pointed out that any future General International Organization would need "authoritative legal advice on points affecting [its] Constitution", but also that various countries

154 Hudson, *'Advisory Opinions of National and International Courts'* (n 99) p. 1000–1001.

155 Hudson, *International Tribunals: Past and Future* (n 152) p. 81.

156 *Cf.*: United Nations, *'Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice'* (Jan. 1945) 39(1) Supplement Official Documents, American Journal of International Law, 1, para. 65; d'Argent, 'Art. 96 UN Charter' (n 132) mn 13; Shaw, *Rosenne's Law and Practice of the International Court 1920–2015, Vol. I: The Court and the United Nations* (n 151) p. 285.

157 United Nations, *'Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice'* (n 156) p. 20–21, paras. 66–67.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

provided in their domestic legal systems for procedures through which courts rendered opinions, or clarified the state of the law, or the rights and obligations of applicants, and that this had proven to be beneficial.[158]

Interestingly, the Inter-Allied Committee even found it desirable that two or more states acting in concert were to be allowed to directly apply for an advisory opinion of the future court as long as it was secured that any third state interested in the matter had the right to intervene.[159] Only requests from individual states should be inadmissible, as no state should be allowed to "impose a species of compulsory jurisdiction on the rest of the world", and since it was in case of such requests not guaranteed that the Court would be presented with an agreed set of facts.[160]

While the later Dumbarton Oaks proposals provided only for a right of the Security Council to ask for advisory opinions, the final Article 96 UN Charter adopted at the San Francisco Conference entitles not only the Security Council but also the General Assembly and other organs and agencies authorized by the General Assembly to refer advisory requests to the Court.[161] However, like the proposal made by Argentina during the

158 United Nations, '*Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice*' (n 156) p. 20–21, paras. 66–67.

159 United Nations, '*Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice*' (n 156) p. 21, 23, paras. 68, 74–75.

160 United Nations, '*Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice*' (n 156) p. 22 para. 71; Shaw, *Rosenne's Law and Practice of the International Court 1920–2015, Vol. I: The Court and the United Nations* (n 151) p. 286.

161 China's proposal that the right to request advisory opinions should be extended also to the General Assembly was adopted without any objection; see UNCIO, *Vol. XIV: United Nations Committee of Jurists*, p. 177–179. The Venezuelan proposal to enable also other international organizations and individual states to refer a request to the Court was supported among others by the United Kingdom; see UNCIO, *Vol. XIV: United Nations Committee of Jurists*, p. 178–180. In its written proposals the United Kingdom however limited the right to two states acting together on the basis of an agreement, thus preventing unilateral requests from one state only; see UNCIO, *Vol. XIV: United Nations Committee of Jurists*, p. 319. The idea to extend the right to request advisory opinions to international organizations generally was rejected by the Washington Committee of Jurists and the idea to extend the right to states not put to vote; see UNCIO, *Vol. XIV: United Nations Committee of Jurists*, p. 183, 850. When the questions were raised again at the San Francisco Conference, both the idea, to allow two states to ask the Court together for an advisory opinion and the idea to extend the right to intergovernmental organizations dependent on the United Nations were rejected; see UNCIO, *Vol. XIII: Commission IV Judicial Organization*, p. 234–235; the United Kingdom succeeded however with its proposal to extend the right to make requests also to those organs and agencies that would

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

drafting of the Covenant[162], similar proposals suggesting a right for states to submit requests for advisory opinions made by Venezuela, the United Kingdom and Belgium at the drafting stage of the UN Charter were again rejected.[163] Besides Venezuela, other Latin American states not only supported the standing of the General Assembly to request advisory opinions, but would have also liked if the standing had been extended to states.[164] With regard to the advisory practice of the ICJ, it has furthermore been observed, that the Latin American bloc has "de-emphasize[d] the element of consent as a condition for the requesting of advisory opinions" and that its members have in general "favored requesting the Court's opinions".[165]

VII. Intermediate conclusion

In sum, it can be stated that there already existed a long history of advisory opinions by judges and courts in various national states before the PCIJ was the first court at the international level to be entrusted with an advisory

---

be so authorized by the General Assembly limiting the right on questions "of a constitutional or judicial character arising within the scope of their activity", see UNCIO, *Vol. IX: Commission II General Assembly*, p. 358–359; see in general on the drafting process also: Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 27 et seq; Pratap (n 113) p. 40 et seq; Leeland M. Goodrich *et. al.* (eds), *Charter of the United Nations: Commentary and Documents* (3rd edn Columbia University Press, 1969) p. 560; Russell and Muther (n 113) p. 874, 891.

162 See *supra*: n 141.

163 In contrast to the proposals made by Venezuela and the United Kingdom which are outlined in the penultimate footnote, Belgium suggested a more specific right for states to initiate advisory procedures. According to the Belgian proposal, states should have had the right to ask the Court whether a solution proposed by the Security Council for the settlement of a dispute respected its independence and vital rights; see UNCIO, *Vol. III: Dumbarton Oaks Proposals Comments and Proposed Amendments*, p. 332–333; UNCIO, *Vol. XIV: United Nations Committee of Jurists*, p. 446; Pratap (n 113) p. 41; Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 28 et seq also referring to other proposals which were discussed at San Francisco but finally not approved.

164 See *inter alia*: UNCIO, *Vol. XIII: Commission IV Judicial Organization*, Proposed Draft of Article 65 and 66 submitted by the Delegation of Venezuela, Doc. 283, IV/1/23, p. 496; UNCIO, *Vol. XII: Commission III Security Council*, Summary Report of Seventh Meeting of Committee III/2, Doc. 433, III/2/15, p. 50 (Statement by the Delegate of Colombia); Beg (n 78) p. 52, 60 with further references on the positions of Venezuela, Guatemala, Colombia and Mexico regarding the standing of the General Assembly and states to request advisory opinions.

165 Beg (n 78) p. 112, 194, 259.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

function. Although several Latin American states also had procedures by which courts were involved in the enactment of laws, or were consulted to determine the state of the law, it was in particular the Anglo-American legal tradition which had a strong impact on how the advisory function was conceived and confined at the international level.

As will be illustrated in more detail below[166], today there exist various international courts endowed with the most varied advisory functions. The drafters of the respective conventions and court statutes could build on the early experiences of the PCIJ and the ICJ and adapt the function to the respective court's purposes.

Whereas the strongest argument against advisory opinions on the national level has been that they would contradict the principle of separation of powers, advisory opinions on the international level were mostly opposed on the ground that they would undermine or circumvent the principle of consensual jurisdiction. Due to the organization of the international order, the principle of separation of powers has for a long time not been pertinent in relation to the work of international courts. As will be shown in the further course of this work, it has however started to become relevant with regard to the advisory function of the IACtHR.[167] Although the IACtHR is still no supranational or regional constitutional court, it claims that, pursuant to the doctrine of conventionality control,[168] any national legislator or other state official must act in conformity with the ACHR as interpreted by the IACtHR not least in its advisory opinions. This in turn restricts the power of the domestic state powers and raises questions as to the democratic legitimacy of the Court.[169] Moreover, as regards human rights protection, the national and international sphere have generally become ever more intertwined. Against this backdrop, the concerns and critiques raised throughout the centuries with respect to advisory opinions in the respective domestic legal orders and on the international level need

166 See Chapter 3, in particular Section D.IV.

167 See in particular *infra*: Chapter 4, Section C.III.

168 As to an introduction to this doctrine see *infra*: Chapter 5, Section B.II.

169 As to the problematic implications the doctrine of conventionality control has on the constitutional democracy see for example: Juan A. Tello Mendoza, 'El control de convencionalidad y sus disonancias con la democracia constitucional' in Núria Saura-Freixes (ed), *Derechos Humanos, Derecho Constitucional y Derecho Internacional: Sinergias Contemporáneas. Human Rights, Constituonal Law and International Law: Contemporary Synergies* (Centro de Estudios Políticos y Constitucionales, 2021) pp. 223–262.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

to be kept in mind through the course of this work, and it will be asked to what extent the IACtHR addresses these concerns in its advisory practice.

C. Genesis of Article 64 ACHR

The genesis of Article 64 cannot be told without shedding some light on the long development process of the inter-American human rights system, but the following section shall nevertheless mainly focus on what is directly relevant for the adoption of Article 64.[170]

I. The idea to create a binding American Human Rights Convention

The idea to adopt a binding Human Rights Convention under which a Human Rights Court should be established was already discussed during the 9th International American Conference held from 30 March to 2 May of 1948 in Bogotá.[171] Yet, while that Conference approved the OAS Charter and managed to adopt the American Declaration of the Rights and Duties of Man several months before the Universal Declaration of Human Rights was adopted by the United Nation's General Assembly, it should take several further steps and many more years until the project of a binding American Human Rights Convention could finally be realized.[172]

170 More information on the long and varied history of the emergence and formation of the inter-American human rights system is to be found in: Héctor Gros Espiell, *La Convención Americana y la Convención Europea de Derechos Humanos: Análisis Comparativo* (Editorial Jurídica de Chile, 1991); Juliane Kokott, *Das interamerikanische System zum Schutz der Menschenrechte* (Springer, 1986); Seifert (n 27); Tom Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox'* (1997) 19(3) Human Rights Quarterly, 510–546; Soley Echeverría, *The Transformation of the Americas* (n 19).

171 Following an initiative of the Brazilian government, the 9th International American Conference adopted Resolution XXXI titled "Inter-American Court to protect the Rights of Man" recommending the Inter-American Juridical Committee to prepare a "draft Statute providing for the creation and functioning of an Inter-American Court to guarantee the rights of man". See the full text of the resolution in: OAS, Novena Conferencia Internacional Americana, Actas y Documentos, Vol. VI, Bogotá, 30 March 1948 – 2 May 1948, p. 302, 303.

172 The American Declaration of the Rights and Duties of Man was adopted by the 9th International American Conference which ended on 2 May 1948 (see OAS, Novena Conferencia Internacional Americana, Actas y Documentos, Vol. VI, Bogotá, 30

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

Next to the American Declaration, the 9th Conference had also, following an initiative of the Brazilian government, adopted Resolution XXXI, titled "Inter-American Court to protect the Rights of Man", recommending the Inter-American Juridical Committee to prepare a "draft Statute providing for the creation and functioning of an Inter-American Court to guarantee the rights of man".[173] However, said Juridical Committee, in a report published 1949, held it to be premature to elaborate such a draft Statute, mainly because such a step would imply a radical transformation of the national constitutional systems.[174] Instead, given that the Declaration of the year before had not created any binding obligations, the Committee held that it was first necessary to agree in a contractual and binding form on the substantive rights.[175]

The next time the topic of an Inter-American Human Rights Court was brought up was on the occasion of the 10th International American Conference held 1954 in Caracas.[176] Via resolution XXIX, it was agreed that the OAS Council should continue to study the subject and to analyze the possibility of establishing an Inter-American Court for the protection of human rights and that the topic should be considered at the next conference.[177]

The Fifth Meeting of Consultation of Ministers of Foreign Affairs held 1959 in Santiago de Chile constituted a more fruitful encounter. It was then that the ministers held "the climate in [the] hemisphere [to be] favorable to the conclusion of a convention"[178] and therefore commissioned the Inter-American Council of Jurists to prepare a first draft of a Human Rights Convention and of a convention creating a human rights court and other organs adequate for the observance of human rights. At the same time, the second part of this resolution VIII provided for the creation of

March 1948 – 2 May 1948, p. 247). The Universal Declaration of Human Rights was adopted by the UN General Assembly on 10 December 1948 through Resolution 217 A(III).

173 OAS, Novena Conferencia Internacional Americana, Actas y Documentos, Vol. VI, Bogotá, 30 March 1948 – 2 May 1948, p. 302, 303.

174 Daniel Zovatto, 'Antecedentes de la Creación de la Corte Interamericana de Derechos Humanos' in Daniel Zovatto (ed), *La Corte Interamericana de Derechos Humanos: Estudios y Documentos* (IIDD, 1985) p. 212–213; Ragone (n 48) p. 280.

175 Zovatto (n 174) p. 212–213; Ragone (n 48) p. 280.

176 Zovatto (n 174) p. 212–213; Ragone (n 48) p. 280 fn 4.

177 Zovatto (n 174) p. 213.

178 OAS, Final Act of the Fifth Meeting of Consultation of Ministers of Foreign Affairs (Santiago de Chile, 12–18 August 1959), Res. VIII, declaratory part.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

the Inter-American Human Rights Commission[179], paving the way for the later two-stage protection system consisting of the Commission and the Court.[180]

II. Draft of the Inter-American Council of Jurists

The Inter-American Council of Jurists prepared the requested draft of a Human Rights Convention just about one month after the Foreign Ministers' meeting at their Fourth Meeting held from 24 August to 9 September 1959 in Santiago de Chile.[181] Starting on the basis of a text prepared by the Uruguayan delegation, the jurists also took the ECHR, the early drafts of the later UN Covenants[182] and, with respect to the organization of the court, the ICJ Statute into account.[183] Content-wise, the draft provided for

179 OAS, Final Act of the Fifth Meeting of Consultation of Ministers of Foreign Affairs (Santiago de Chile, 12–18 August 1959), Res. VIII, part II; It is one of the peculiarities of the emergence of the Inter-American Human Rights System that the IACHR was created on the basis of a mere resolution of a Meeting of Foreign Ministers. Only through the 1967 Protocol of Buenos Aires was the IACHR formally recognized as organ of the OAS; see: Protocol of Amendment to the Charter of the Organization of American States "Protocol of Buenos Aires", 27. February 1967, entry into force 27. February 1970; on the formation and work of the IACHR see also: Seifert (n 27) p. 52 et seq; Kokott (n 170); Faúndez Ledesma (n 26) p. 34–51; Farer (n 170); Johann J. Vasel, *Regionaler Menschenrechtsschutz als Emanzipationsprozess: Grundlagen, Strukturen und Eigenarten des europäischen und interamerikanischen Menschenrechtsschutzsystems* (Duncker & Humblot, 2017) p. 114–119.

180 Zovatto (n 174) p. 214; Edmundo Vargas Carreño, 'La Corte Interamericana de Derechos Humanos' in Francisco Orrego Vicuña and Jeannette Irigoin Barrenne (eds), *Perspectivas del Derecho Internacional Contemporaneo: Experiencias y visión de América Latina, Vol. II: La Solución Pacífica de Controversias* (Instituto de Estudios Internacionales Universidad de Chile, 1981) p. 129.

181 Zovatto (n 174) p. 214.

182 See *infra* (n 193).

183 Inter-American Yearbook on Human Rights 1968, p. 71; Dunshee de Abranches (n 38) p. 79, 83; Zovatto (n 174) p. 215; Vargas Carreño (n 180) p. 129. Some provisions of the draft have nearly the same wording as the Spanish version of the ICJ Statute, e.g.: draft Article 67 and Article 13 ICJ Statute, draft Article 68 and Article 21 para. 1 ICJ Statute, also draft Article 70 para. 3 is very similar to Article 22 para. 1 ICJ Statute. Draft Article 75 that was also still contained in Article 67 of the later Chilean draft, as well as in Article 80 of the later Uruguayan draft and Article 46 of the Commission's draft but unfortunately not included in the final ACHR is totally consistent with Article 36 para. 6 ICJ Statute. Vargas Carreño (n 180) p. 142, presumes that it was an inadvertent omission not to include such a provision in the final Convention.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

a substantial part containing civil and political rights, as well as economic, social and cultural rights, and for an institutional part envisaging a Human Rights Commission and a Court. However, it did not provide for any advisory function. Notably, the second additional protocol to the ECHR, through which the advisory function was introduced into the European human rights system, had not yet been adopted at that time either.[184]

The draft was supposed to be transmitted to the governments and to be further discussed at the Eleventh Inter-American Conference. Yet, as that Conference never took place, it took until 1965 for the draft to be further studied by the Second Special Inter-American Conference, which was held in Rio de Janeiro in 1965.[185]

III. Chilean draft convention

In addition to this first draft prepared by the Inter-American Council of Jurists, the 1965 Conference considered two further drafts prepared by the governments of Chile and Uruguay.[186] While the Uruguayan draft did not mention any advisory function, the Chilean one was the first to envisage an advisory competence for the future court.[187] Articles 64 and 66 of the Chilean draft stated:

"Article 64 (72)

1. *The Court shall have compulsory jurisdiction to hear all matters concerning the interpretation and application of the provisions of this Convention*

184 Council of Europe, *Protocol No. 2 to the Convention for the protection of human rights and fundamental freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions*, Strasbourg 1963, entry into force on 21 September 1970.

185 Zovatto (n 174) p. 220.

186 These were the only two states that had prepared own drafts.

187 This is often overseen. For example Ventura Robles and Zovatto (n 11) p. 35; Roa (n 13) p. 29 or also para. 17 of the report of Héctor Gros Espiell contained in the *amicus curiae* brief of the Instituto Interamericano de Derechos Humanos in the occasion of the request for the first advisory opinion (http://hrlibrary.umn.edu/iachr/B/1-esp-13.html) and even the Court itself in OC-1/82 (n 42) para. 17 referred to Article 53 of the later draft project of the IACHR as first precursor of the final article 64 ACHR. In contrast, Zovatto (n 174) p. 222; Guevara Palacios (n 12) p. 97 and the OAS General Secretariat in its *amicus curiae* brief concerning the request for the first advisory opinion (http://hrlibrary.umn.edu/iachr/B/1-esp-9.html) also regard Article 64 of the Chilean draft as first precursor of the final Article 64 ACHR.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

referred to in the second paragraph of Article 51, and that any of the States Parties or the Commission submit to it.

2. *It shall also have competence to give* ***advisory opinions on legal questions concerning the interpretation of this convention."***[188]

"Article 66 (74)

1. *Legal proceedings may be brought before the Court by the Commission, by the Contracting State of which the person, association or co-operation concerned is a national, by the Contracting State which brought the matter before the Commission, or by the Contracting State against which the complaint or petition is directed.*
2. ***Advisory opinions*** *may be requested by the* ***Commission****, by any* ***Contracting State****, and by the* ***Council of the Organization of American States."***[189]

188 Proyecto de Convención sobre Derechos Humanos presentado por el Gobierno de Chile, contained in: Inter-American Yearbook on Human Rights 1968, p. 275, 294 [translation from Spanish by the author and emphasis added].The numbers in brackets in the headline refer to the numeration of the preceding draft of the Council of Jurists. The original Spanish text stated:
"Artículo 64 (72)
1. La Corte tendrá competencia obligatoria para conocer de todos los asuntos relativos a la interpretación y aplicación de las disposiciones de la presente convención mencionadas en el número segundo del artículo 51, y que algunos de los Estados Parte o la Comisión le sometan.
2. Tendrá además competencia para dar ***opiniones consultivas sobre cuestiones jurídicas concernientes a la interpretación de esta convención****."*
"Artículo 66 (74)
1. El procedimiento judicial podrá promoverse ante la Corte por la Comisión, por el Estado Contratante del cual es nacional la persona, asociación o cooperación interesada, por el Estado Contratante que planteó el asunto ante la Comisión o por el Estado Contratante en contra de quien se dirigió el reclamo o petición.
2. ***Las opiniones consultivas*** *podrán serle solicitadas por* ***la Comisión****, por cualquiera de los* ***Estados Contratantes*** *y por el* ***Consejo de la Organización de los Estados Americanos****."*

189 Ibid. [Again translation from Spanish by the author and emphasis added].

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

The draft, in its introductory Memoria Justificativa, stated that the Chilean government, due to the importance and urgency of the topic, had wished to accelerate the elaboration process of the future ACHR and had, therefore, charged a group of experts with updating, completing and amending the earlier draft of the Inter-American Council of Jurists. Unfortunately, no further information on this honorable group of experts who first envisaged an advisory function for the future Inter-American Court is detectable.

Asked about this group of experts, Professor Edmundo Vargas Carreño, who at that time started working in the Chilean Foreign Ministry, doubted that such a group had existed, but said that he remembered Raúl Bazán Davila copying the Statute of the International Court of Justice. If this anecdote was true, it would mean firstly that the advisory function of the IACtHR stands in the tradition of that of the former PCIJ and the ICJ, and thus adds to the Convention in addition to the provisions of human rights law a component of general international law on dispute resolution. Secondly, it would mean that a man[190], who later as Chilean ambassador to the United Nations defended the military regime of Augusto Pinochet before the General Assembly and the Security Council and promoted the regime's 'human rights policy' among European governments, had an impact on the inclusion of a broad advisory function in the ACHR, probably being unaware of the effects that this function would have.

In fact, the introductory Memoria Justificativa indirectly suggests that it was not just the ICJ Statute being copied, but also that the second additional protocol to the ECHR, adopted in May 1963 and containing provisions for a very restricted advisory jurisdiction of the ECtHR, may have been conducive to the inclusion of an advisory function into the Chilean draft, and later into the ACHR. This is because, according to the introductory Memoria Justificativa, the Chilean draft project had included all the advances achieved in the foregoing years in the protection of human

190 Raúl Bazán Dávila (1913–2007) was a Chilean attorney, diplomat, ambassador and special advisor to the Chilean Foreign Ministry. See for further information: 'Raúl Bazán Dávila, abogado y diplomático', available at: http://jaimebazan.blogspot.com/2007/08/ral-bazn-dvila-abogado-y-diplomtico.html and at: http://www.genealogiachilenaenred.cl/gcr/IndividualPage.aspx?Id=I59827; http://www.bibliotecanacionaldigital.gob.cl/bnd/628/w3-article-287928.html *'Quién fue Raúl Bazán, el autor del polémico informe que ingrime Péru para intentar desvirtuar el tratado de 1952'*, La Segunda, 5 December 2012, available at: http://www.lasegunda.com/Noticias/Politica/2012/12/803352/quien-fue-raul-bazan-el-autor-del-polemico-informe-que-esgrime-peru-para-intentar-desvirtuar-el-tratado-de-1952.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

rights, including not only the studies of the United Nations but also the application of the ECHR and its additional protocols.[191] The wording of draft Article 64 and the limitation of requests on "legal questions concerning the interpretation of the convention" which is reminiscent of Article 1 (1) of the second protocol to the ECHR also corroborates this suggestion.

However, while it must be presumed that the Chilean drafters were familiar with the European provisions and inspired by such, they deliberately decided that the future Inter-American Court should have a much broader advisory function than its European counterpart. The advisory function of the ECtHR was, pursuant to Article 1 (2), (3) of the second protocol to the ECHR, restricted to purely administrative questions that could not come up in contentious proceedings and, furthermore, any request required a two-thirds majority of the Committee of Ministers.

In contrast, the Chilean draft did not contain any other limitation than that on "legal questions" which had to concern the "interpretation of the convention". What is more, already this first draft also included next to the Commission and the OAS Council the contracting parties as entities entitled to request advisory opinions from the Court. Hence, as concerns standing to request advisory opinions, the Chilean draft was already broader than the ICJ's advisory jurisdiction enshrined in Article 96 UN Charter and Articles 65 *et seq*. ICJ Statute.

IV. Draft of the Inter-American Commission on Human Rights

Contrary to the acceleration of the drafting process the Chilean delegation had aimed for when submitting its complete draft, the Second Special Inter-American Conference of 1965 did not yet decide on a final Convention, but upheld the plan to later convene another Inter-American Specialized Conference. Accordingly, the Second Special Inter-American Conference of 1965 adopted Resolution XXIV[192] ordering the Council of the OAS to first send the three existing drafts (Inter-American Council of Jurists, Chilean and Uruguayan) to the IACHR, and to subsequently prepare an updated draft within one year, with due consideration of the views received of the IACHR and any other organ advisable to hear. The draft was supposed

191 Inter-American Yearbook on Human Rights 1968, p. 276.

192 Resolution XXIV contained in the Inter-American Yearbook on Human Rights 1968, p. 69–73.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

to be sent to the governments allowing them to make comments, and after a three-month period of comments, an Inter-American Specialized Conference should be convened that should approve the final convention.

The year after the Second Special Inter-American Conference of 1965, the two United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights were adopted.[193] This provoked among the OAS organs and its member states a debate on whether the project of a regional human rights convention should be continued and if so, whether such a convention should be autonomous or only complementary to the two international covenants. Out of the twelve states that responded to the question of the Council of the OAS, ten were in favor of pursuing the project of an own American Human Rights Convention. The IACHR – and especially its appointed rapporteur for that subject, Dr. Carlos Dunshee de Abranches, – also supported the adoption of a regional convention, arguing that it was perfectly possible for a regional convention to coexist with the international covenants, and that such a regional convention should be autonomous, as it would otherwise depend on the entry into force of the international covenants and on the ratification of the latter by the American states.[194] The IACHR furthermore held that the Council of the Organization could, "in accordance with Resolution XXIV of the Second Special Inter-American Conference [...] assign to the Commission the preparation of [a] revised draft", a suggestion which was approved by the OAS Council at its meeting on 12 June 1968.[195]

While the amendments suggested by the IACHR to the earlier draft of the Inter-American Council of Jurists until that point had not contained any hint to an advisory function of the future court, showing that the idea of the Chilean draft could have easily been lost again, the "Draft Inter-American Convention on the Protection of Human Rights" then prepared by the IACHR in 1968 did in its Article 53 provide for an advisory function stating:

193 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (UN Covenants).

194 *Cf.*: Inter-American Yearbook on Human Rights 1968, p. 171 *et seq.*, esp. p. 207; Zovatto (n 174) p. 227. Venezuela, Costa-Rica, Mexico, Chile, Uruguay, Colombia, Guatemala and Ecuador replied positively, only Argentina and Brazil deemed it unadvisable to proceed with the regional project in light of the adoption of the international covenants.

195 Inter-American Yearbook on Human Rights 1968, p. 91.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

> *"Article 53*
>
> *The General Assembly, the Permanent Council, and the Commission may consult the Court concerning the interpretation of this Convention or of other treaties concerning the protection of human rights in the American States; and the States Parties may consult the Court concerning the compatibility of any of their domestic laws with the aforesaid international instruments."*[196]

The *travaux préparatoires* indicate that the Commission had decided to include a separate provision establishing the consultative jurisdiction of the future Court.[197] Compared to the earlier Chilean draft, the Commission's draft Article 53 extended the jurisdiction *ratione materiae* to the interpretation of "other treaties concerning the protection of human rights in the American States." Notably, the official Spanish version of the text at that time still used the singular form "otro Tratado concerniente a la protección de los derechos humanos en los Estados Americanos."[198]

The inclusion of the notion "other treaties" might be explained against the backdrop of the United Nations Covenants adopted shortly before and the aim to avoid contradictions between international and regional human rights law. The rapporteur Dr. Carlos Dunshee Abranches, in the comparative study of the United Nations Covenants and the draft Inter-American Conventions on Human Rights had not only remarked that the "future Inter-American Convention [...] should be [...] complete, independent and [...] autonomous, but [also] compatible, coordinated and as much in agreement as possible with the Covenants of the United Nations".[199] Later, when the Court in its first advisory proceeding was asked to interpret the term

196 The original Spanish text stated:
"Artículo 53
La Asamblea General, el Consejo Permanente y la Comisión podrán consultar a la Corte acerca de la interpretación de esta Convención o de otro Tratado concerniente a la protección de los derechos humanos en los Estados Americanos; y los Estados Partes, acerca de la compatibilidad entre alguna de sus leyes internas y dichos instrumentos internacionales."
See for both the English and Spanish text: Inter-American Yearbook on Human Rights 1968, p. 412–413.

197 Inter-American Yearbook on Human Rights 1968, p. 145.

198 When the text of the final Article 64 was adopted at the Specialized Inter-American Conference of 1969, also the Spanish version used the plural "otros tratados concernientes". See on this extension OC-1/82 (n 42) para. 17.

199 Inter-American Yearbook on Human Rights 1968, p. 169, 207 para. 88.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

"other treaties" it held that "[t]he preparatory work of the Convention [...] demonstrates a tendency to conform the regional system to the universal one [...]".[200]

As to the jurisdiction *ratione personae* envisaged in draft Article 53, the preparatory works point out that "it should be noted that in this article the power to consult the court is granted only to the General Assembly, the Permanent Council, and the Inter-American Commission on Human Rights itself".[201] This limitation on certain OAS organs is similar to the advisory function of the ICJ pursuant to Article 96 UN Charter. But the draft also already conferred a right to consult the court on states. However, this was still limited to states parties only and did not include all OAS member states as the final version of Article 64 would later do. Besides, the right was more restrictive than envisaged by the Chilean draft, as it was limited to questions concerning the compatibility of domestic laws with the international human rights instruments and thus similar to the provision which is today contained in Article 64 (2). It this regard, the Commission's draft and later also Article 64 (2) seems to be inspired by preliminary ruling procedures which were known from several national jurisdictions in Latin American states.

V. 1969 Specialized Inter-American Conference

On 2 October 1968 the Preliminary Draft Convention prepared by the IACHR was adopted by the OAS Council as the working document for the Specialized Inter-American Conference to be held in 1969 in San José.[202] Before the Conference, the draft was sent to the member states requesting comments, observations and possible amendments from their side.

Only the observations made by the United States, the Dominican Republic and Guatemala referred directly to the advisory function as envisaged in the Preliminary Draft Convention of the IACHR.

200 OC-1/82 (n 42) para. 47.

201 Preparation of the Preliminary Draft Convention by the Inter-American Commission on Human Rights, contained in: Inter-American Yearbook on Human Rights 1968, p. 93, 147.

202 Resolución aprobada por el consejo de la organización de los estados Americanos en la sesión celebrada el 2 de octubre de 1968, contained in: 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. 12.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

While Article 53 of the Preliminary Draft Convention was formulated from the perspective of the organs entitled to "consult" the court, and not from the perspective of what the court may do, the United States and the Dominican Republic suggested that the wording of draft Article 53 should be slightly changed in order to "strengthen the independence and dignity of the Court".[203] Similar to the wording of Article 1 of the second additional protocol to the ECHR, the competences of the Court should be stressed more by placing them at the beginning of the provision. According to the proposal of the United States Article 53 should read as follows:

> *"Article 53. Advisory Opinions*
>
> *The Court may, at the request of the General Assembly, the Permanent Council, or the Commission, give advisory opinions concerning the interpretation of this Convention or of other treaties concerning the protection of human rights in the American States; and the Court may, at the request of a State Party, give advisory opinions concerning the compatibility of any of its domestic law with the above mentioned international instruments."*[204]

---

203 OAS, Draft Inter-American Convention on Protection of Human Rights and Observations and Comments of the American Governments, Working Document prepared by the Secretariat of the Inter-American Commission on Human Rights, OEA/Ser.K/XVI/1.1 (English), Doc. 13, 22 September 1969, p. 104. The Dominican Republic apparently adopted the proposal and the reasoning of the United States. See its proposal in Spanish in 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. 84; see also Ludovic Hennebel and Hélène Tigroudja, *The American Convention on Human Rights: A Commentary* (OUP, 2022) Article 64, p. 1355.

204 OAS, Draft Inter-American Convention on Protection of Human Rights and Observations and Comments of the American Governments, Working Document prepared by the Secretariat of the Inter-American Commission on Human Rights, OEA/Ser.K/XVI/1.1 (English), Doc. 13, 22 September 1969, p. 104. The proposal of the Dominican Republic was very similar to that of the United States of America. It stated:
"Article 53. Advisory Opinions
The General Assembly, the Permanent Council and the Commission may consult the Court on the interpretation of this Convention or of other treaties concerning the protection of human rights in the American States; and the Court may, at the request of a State Party, give advisory opinions on the compatibility between any domestic law and the aforementioned international instruments."
Translation from Spanish by the author. The original Spanish text stated:
"Artículo 53. Opiniones Consultivas

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

As can be seen, that draft would have contained the expression "advisory opinions" as the Chilean draft had notably already done before. The final version of Article 64 follows the draft of the United States and of the Dominican Republic in so far as that Article 64 (2) is edited from the Courts' perspective stressing its competence. Only the expression "advisory opinions" has been shortened to "opinions".

In light of this drafting history of Article 64, the critique[205] that the designation "opiniones consultivas" (used in common parlance and in Title III of the Court's Rules of Procedure) had been inaccurately taken from the UN Charter and the ICJ Statute because this designation was nowhere to be found in the actual text of the ACHR is not convincing. The drafts of Chile, the United States, and the Dominican Republic instead show that the fact, that the expression "advisory opinions" was not included as such in the final text of the ACHR has only editorial reasons. The final version of Article 64 simply followed the draft of the Commission in that the editorial emphasis of Article 64 (1) was laid on the applicant's right to "consult" the Court rather than on the Court's competence to give advisory opinions.[206] However, this and the fact that Article 64 (2) only contains the shorter term "opinions", does not mean that the states parties when drafting the respective article thought to introduce a completely new concept of consultations. On the contrary, the reference to the advisory function of the ECtHR provided for in the second additional protocol to the ECHR, and also the expression "consultative jurisdiction" contained in the comments of the Commission on its Preliminary Draft Convention[207] rather support

La Asamblea General, el Consejo Permanente y la Comisión podrán consultar a la Corte acerca de la interpretación de esta Convención o de otros tratados concerniente a la protección de los derechos humanos en los Estados americanos; y la Corte, a solicitud de un Estado Parte, podrá dar opiniones consultivas acerca de la compatibilidad entre cualquiera de las leyes internas y los mencionados instrumentos internacionales."

See the Dominican Republic's observations in 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. 50–91, 84.

205 Faúndez Ledesma (n 26) p. 989.

206 Guevara Palacios (n 12) p. 98.

207 Preparation of the Preliminary Draft Convention by the Inter-American Commission on Human Rights, contained in: Inter-American Yearbook on Human Rights 1968, p. 93, 145. As to the reference to the second additional protocol to the ECHR see OAS, Draft Inter-American Convention on Protection of Human Rights and Observations and Comments of the American Governments, Working Document prepared by the Secretariat of the Inter-American Commission on Human Rights,

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

that the drafters of the ACHR had the concepts of "advisory opinions", which already existed at the international level, in mind when elaborating the Convention. This in turn refutes the mentioned critique.

The Dominican Republic made a further proposal with regard to the advisory jurisdiction of the future Court. It suggested to insert an additional Article 54, pursuant to which both judgments and advisory opinions had to be reasoned, and that the judges were in both cases allowed to issue separate opinions.[208] The final Article 66 only states that judgments shall be reasoned, and may be issued with accompanying individual opinions, but the Dominican Republic's idea that this also should be true for advisory proceedings is affirmed by Article 75 of the Court's Rules of Procedure.

Guatemala suggested that all councils of the OAS and not only the Permanent Council should be entitled to consult the court for an advisory opinion.[209] The final version of the provision on the Court's advisory function, which was elaborated by the working group of the Commission II during the Second Specialized Conference in San José implements this proposal from Guatemala by providing an even broader circle of organs with standing to request advisory opinions. It states:

"Article 64

1. *The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.*

OEA/Ser.K/XVI/1.1 (English), Doc. 13, 22 September 1969, p. 104; 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. 84 and Inter-American Yearbook on Human Rights 1968, p. 276.

208 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. 85.

209 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. 119.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments."[210]

It is striking that the right of all OAS member states to consult the Court was not only introduced to the provision, but placed directly at the beginning of it. The wish of the United States and of the Dominican Republic to underline the competence of the Court is only regarded in Article 64 (2). In contrast to the first Chilean proposal, all OAS member states shall have standing and not only the contracting parties. While the states have an absolute right to consult the Court, the organ's right of consultation is now, contrary to the former draft Article 53, limited to questions arising "within their spheres of competence", which constitutes a clear analogy to the formulation of Article 96 (2) UN Charter.

Unfortunately, the *travaux préparatoires* do not disclose the discussions or motives of the working group that led to this final extension. Robert Redington, rapporteur of the Commission II, explains in his report not more than what is already clear from the wording of the final text, namely that the right to formulate requests regarding the interpretation of the Convention and other treaties was extended to all organs enumerated in the OAS Charter and to all member states as well.[211]

Against the backdrop of the drafting of the Covenant of the League of Nations and the UN Charter, during which an extension of standing

210 See today's text of the ACHR and for the final Spanish text also: 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. 497. In Spanish Article 64 states:
"Artículo 64
1. Los Estados miembros de la Organización podrán consultar a la Corte acerca de la interpretación de esta Convención o de otros tratados concernientes a la protección de los derechos humanos en los Estados americanos. Asimismo, podrán consultarla, en lo que les compete, los órganos enumerados en el capítulo X de la Carta de la Organización de los Estados Americanos, reformada por el Protocolo de Buenos Aires.
2. La Corte, a solicitud de un Estado miembro de la Organización, podrá darle opiniones acerca de la compatibilidad entre cualquiera de sus leyes internas y los mencionados instrumentos internacionales."

211 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. 377. At this point the provision was still envisaged as Article 65. It became Article 64 when the former draft Article 27 was deleted during the second plenary session, see *ibid.* pp. 448, 453, *cf.* also Guevara Palacios (n 12) p. 99.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

in advisory proceedings to states was both times rejected because of the fear that it might lead to a circumvention of the consensual contentious jurisdiction[212], it would have been highly interesting to know whether any related concerns had been raised at the Specialized Inter-American Conference as well. In particular, as concerns the extension of standing to states that are not even party to the ACHR, one would have expected a controversial discussion as to the consequences such a broad advisory jurisdiction *ratione personae* could have for the overall role and functioning of the Court. Yet, the fact that the final Article 64 was approved in its extended form without any further discussion or observation during the third plenary session on 21 November 1969 indicates that such a broad advisory jurisdiction was apparently not conceived of as problematic, but supported by all delegations.[213] This is especially surprising in light of the discussions concerning the drafting of the Court's contentious jurisdiction pursuant to Article 62[214], and the Commission's competence to receive inter-state communications in terms of Article 45[215]. With regard to both, the drafters and contracting parties opted for an optional, and not for a

212 *Cf. supra*: Chapter 2, Section B.V. and VI.

213 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. 457.

214 Article 62 of the Convention states:
"Article 62
1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.
2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.
3. The 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, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

215 Article 45 of the Convention states:
"Article 45
1. Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

compulsory solution.[216] Against this backdrop, it seems very strange that when Article 64 was extended, it was apparently not recognized that the combination of an optional jurisdiction in contentious cases, and a very broad advisory jurisdiction providing standing to single states, increases the likelihood of advisory opinion requests which *de facto* constitute disguised contentious cases and circumvent the consensual jurisdiction requirement.

In its first advisory opinion, the Court itself interpreted this drafting history in its favor holding that the "preparatory work of the Convention indicates that this treaty sought to define the advisory jurisdiction of the Court in the broadest terms possible".[217] It at least appears to be sure, that the drafters decided to entrust the Court with a broader advisory function than the ECtHR had been bestowed with by the second additional protocol to the ECHR. Apart from that, it seems that the decision for such a broad advisory function, especially with regard to the *ratione personae* jurisdiction, was taken with relatively little consideration.

VI. Rejection of an optional advisory jurisdiction in the draft Statute

After the entry into force of the Convention, the first group of judges elected by the General Assembly of the OAS in 1979 began to draft the Statute of the Court.[218] Their final draft provided not only for a broader optional contentious jurisdiction, but also in draft Article 4 for the following optional advisory jurisdiction:

---

2. Communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the aforementioned competence of the Commission. The Commission shall not admit any communication against a State Party that has not made such a declaration.
3. A declaration concerning recognition of competence may be made to be valid for an indefinite time, for a specified period, or for a specific case.
4. Declarations shall be deposited with the General Secretariat of the Organization of American States, which shall transmit copies thereof to the member states of that Organization."

216 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.

217 OC-1/82 (n 42) para. 17.

218 As to this see: Ventura Robles (n 30) p. 177–206.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

"Article 4 of the draft Statute (optional advisory jurisdiction)

1. *At the request of the General Assembly or the Permanent Council of the O.A.S., the Court may give advisory opinions on any matter in addition to those provided for in Article 64 of the Convention.*
2. *The Court shall not entertain the request if it concludes that to do so would be incompatible with its nature as a human rights court."*[219]

If this provision had been approved by the General Assembly, the Court's advisory jurisdiction *ratione materiae* would have been much wider than already provided for by Article 64 with regard to requests submitted by the General Assembly or the Permanent Council. However, neither the article providing for the optional contentious jurisdiction of the Court nor this draft Article 4 were approved by the General Assembly. According to the Court's first Deputy Secretary and later judge Manuel Ventura, the General Assembly's decision to define the Court as an institution commissioned to apply the Convention, and not as an OAS organ, had predetermined that the Court's Statute could not extend the Court's jurisdiction beyond the scope provided for in the Convention.[220] Correspondingly, the Court's Statute as adopted by the General Assembly provides in Article 2 only that the Court's advisory jurisdiction shall be governed by Article 64. In any case, as neither the General Assembly nor the Permanent Council have ever requested any advisory opinion of the Court, it remains doubtful whether they would have used this wider optional advisory jurisdiction of the Court at all.

219 The full text of the draft Statute adopted by the judges in the first period of ordinary sessions of the Court on 14 September 1979 is reprinted in: Ventura Robles (n 30) p. 177–206.Translation of Article 4 from Spanish by the author. The Spanish original text stated:
"Artículo 4: (jurisdicción opcional consultiva)
A solicitud de la Asamblea General o del Consejo Permanente de la O.E.A., la Corte puede dar opiniones consultivas sobre cualquier asunto en adición a los previstos en el artículo 64 de la Convención.
La Corte no atendrá la solicitud si llegare a la conclusión de que hacerlo sería incompatible con la naturaleza como tribunal de derechos humanos."

220 Ventura Robles (n 30) p. 183.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

VII. Concluding summary

After a lengthy process of ideas, proposals and drafting stages, the IACtHR, as established after the entry into force of the ACHR, was bestowed with a broad advisory jurisdiction, which was at that time singular in international law. Unfortunately, the *travaux préparatoires* do not disclose any further discussion on Article 64. The exact reason why the Court was given such a broad advisory jurisdiction, especially as concerns the standing of states, thus remains unclear. While it is possible that experiences from national law have favored a positive attitude towards an advisory function of the future court and while especially Article 64 (2) might have been inspired by national law provisions granting supreme or constitutional courts an advisory role or the right to judicial review, there is no concrete evidence for this in the *travaux préparatoires*.

In general, the drafting history rather indicates that the Court's advisory function was modelled after the advisory jurisdictions of other international courts, first and foremost that of the ICJ. That Article 64, and consequently also the Court's advisory practice, was inspired by Article 96 UN Charter and Article 65 ICJ Statute is also reflected in the corresponding articles in the Court's Rules of Procedure. The preceding analysis has however shown that the advisory function of PCIJ and ICJ was more influenced by the Anglo-American legal tradition than by similar functions exercised by domestic courts in Latin American states.

The fact that at the 1969 Specialized Inter-American Conference Article 64 was further broadened in scope and then adopted without any further discussion indicates that the state's representatives apparently did not share the concerns and reservations towards an advisory function of a court of law which had in other contexts always been raised. However, possible positive experiences at the national level are not the only plausible explanation for this attitude. It is also conceivable that the OAS member states did not expect the future court to be very effective and therefore did not think about the further effects of a broad advisory function.[221] Perhaps the

221 *Cf.*: Felipe Gónzalez Morales, *'Surgimiento y desarollo del sistema interamericano de derechos humanos en un contexto de régimenes autoritarios (1960–1990)'* (2007) 46 Revista IIDH, 124, 130 noting that some states participating at the conference probably did not intend to ratify the Convention at all or that they conceived clauses in human rights documents more as "declarations of good intent" than as truly operative obligations. On this see also Soley Echeverría, *The Transformation of the Americas* (n 19) p. 97, 102–104.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

fact that states are named first as entitled parties in Article 64 (1) can be explained by the fact that the states wanted to have as many opportunities as possible for themselves to request an advisory opinion from the Court, but did not consider that an advisory opinion requested by one state could then also have legal effects for other states and might impact the legal discourse in the whole region. If this was true, the impact of such a broad advisory function was underestimated by the OAS member states.

The following chapters do not retell the entire history of the Court's advisory practice, but they will nevertheless shed more light on how the Court filled the text of Article 64 with life and how the IACtHR's advisory jurisdiction evolved into the unique function it is known as today.

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb

https://doi.org/10.5771/9783748919803-43, am 28.07.2024, 09:20:58
Open Access – (cc) BY – https://www.nomos-elibrary.de/agb