Chapter 3: Advisory jurisdiction

After having described how Article 64 came into existence, this chapter will take a closer look at the precise scope of the Court's advisory jurisdiction, both *ratione personae* (A.) and *materiae* (B.) Proposals to further broaden the number of entities allowed to request advisory opinions of the Court are examined at the end of the first section, including the question whether it would be desirable for the Court to have advisory jurisdiction *proprio motu*. Furthermore, it is questioned to what degree the Court is allowed to determine and thereby broaden the material scope of requests for advisory opinions (C.).

At the end of this chapter, it will be examined whether the Court's finding made in its first advisory opinion that its advisory jurisdiction conferred on it by Article 64 was "more extensive than that enjoyed by any international tribunal in existence today" holds true, not least in comparison with newer courts like the AfrCtHPR that were established after the IACtHR (D.).[222]

What's certain is that the Court was the first *Human Rights Court* that was given an ample advisory jurisdiction and, what is more, has actively made use of it. Furthermore, and irrespective of the international comparison, the Court's advisory jurisdiction is, both *ratione personae* and *ratione materiae* broader than its own contentious jurisdiction.

Noteworthy is moreover, that the Court's advisory jurisdiction is mandatory, meaning that its acceptance does not need to be declared separately by the member states as is the case with respect to the Court's contentious jurisdiction.

A. Jurisdiction ratione personae (standing)

Pursuant to Article 64 there are two groups of entities which are entitled to request advisory opinions from the Court. First, all OAS member states have standing before the Court, notably both under Article 64 (1) and

222 OC-1/82 (n 42) para. 14.

Article 64 (2). Second, the organs listed in Chapter VIII[223] of the OAS Charter do have standing under Article 64 (1).

I. OAS member states

While some provisions of the Convention only address the "State Parties" to the Convention, Article 64 is one of the provisions referring to "the member states of the Organization". Thereby, Article 64 indicates that the right to seek advisory opinions extends to all OAS member states, whether or not they have ratified the Convention.

Hence, any state that has ratified the OAS Charter is not only allowed to participate in the advisory proceedings, but is also able to submit a request by its own initiative. This is an important difference to the Court's contentious jurisdiction, which is, under Article 61 *ratione personae* limited to state parties only. It has been remarked that it "is an unusual feature of this multilateral convention that it grants certain rights to States which are not parties to it, and reflects the expectation of its drafters that its complete implementation would take some time, during which non-States parties should be granted a limited access to the Court in order to facilitate their eventual entry into the system."[224] This expectation of the drafters has proven to be true, since today still only 23 of the 35 OAS member states are parties to the Convention, while only 20 of them have also accepted the contentious jurisdiction of the Court in accordance with Article 62.[225]

However, the idea to grant states, not parties to the Convention, a limited access to the Court has not turned out to be used in practice since, to this date, no advisory opinion has ever been requested by a state that was not yet a party to the Convention. Yet, OAS members that are not parties to the Convention have participated in the proceedings otherwise, e.g.

223 Article 64 speaks of Chapter X but what used to be Chapter X became Chapter VIII when the OAS Charter was amended by the Protocol of Cartagena de Indias which entered into force on 16 November 1988.

224 Christina Cerna, *'The Structure and Functioning of the Inter-American Court of Human Rights (1979–1992)'* (1992) 63 British Yearbook of International Law, p. 135, 141 cited in: Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 41.

225 As to the number of OAS member states and contracting states of the ACHR see already *supra*: (n 24) and *infra*: (n 725) and (n 869).

by submitting written observations or participating in hearings before the Court.[226]

Given that all OAS member states have standing to request an advisory opinion, the Court is of the opinion that its advisory opinions are also *vice versa* directed towards all OAS member states and not only to the states parties to the Convention.[227] While the Court held in OC-25/18 that its advisory opinions cannot determine the obligations of third states not belonging to the regional system, even when it interprets treaties to which these third states are also parties, it corroborated that its advisory opinions address all OAS member states.[228] The Court held that it determines, in the context of its advisory function, the obligations of OAS member states vis-à-vis other OAS member states and all persons under their jurisdiction.[229]

This broad jurisdiction *ratione personae* is, as noted, one of the main reasons to qualify the Court as the judicial institution of the OAS, although it is actually only established under the Convention and not explicitly recognized as an OAS organ under the OAS Charter.[230]

In contrast to the standing of OAS organs, the states' right to request advisory opinions is an absolute one[231], meaning that they do not have to prove any special interest in the question referred to the Court. Only as

226 For example, the United States of America submitted written observations and participated in the oral hearing in the OC-10/89, in the OC-16/99 as well as in the recent OC-26/20 proceedings. Canada appeared in the OC-16/99 proceedings as observer in the public hearing and submitted written observations in the OC-18/03 proceedings.

227 *The right to information on consular assistance in the framework of the guarantees of the due process of law,* Advisory Opinion OC-16/99, Series A No. 16 (1 October 1999) para. 65; *Juridical condition and rights of the undocumented migrants,* Advisory Opinion OC-18/03, Series A No. 18 (17 September 2003) paras. 58–66; *The institution of asylum and its recognition as a human right in the Inter-American System of Protection (Interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights)*, Advisory Opinion OC-25/18, Series A No. 25 (30 May 2018) para. 30. As to the different effect the Court's advisory opinions have on contracting states and on the other OAS member states see *infra*: Chapter 5, Section B.IV.3.e).

228 OC-25/18 (n 227) paras. 30–32.

229 OC-25/18 (n 227) paras. 30–32.

230 See *supra*: Chapter 1 and also: OC-1/82 (n 42) para. 19; Guevara Palacios (n 12) p. 100.

231 *The effect of reservations on the entry into force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82, Series A No. 2 (24 September 1982) para. 14.

regards Article 64 (2), the right is limited to questions concerning the state's own domestic law.[232]

Lastly, as clarified by the Court in its fourth advisory opinion, a request must be filed by an entity that is entitled to act and to speak for the requesting state's government on the international plane.[233] This precludes not only legislative and judiciary organs but also individuals and civil society organizations.[234] In the case of OC-4/84, the request had first been filed by a Committee of the Costa Rican Legislative Assembly, and the Court found that it had not become seized with the matter until the Costa Rican Ministers of Foreign Affairs and Justice had formally filed the request in the name of the government.[235] Consequently, if a parliamentary group or national court is interested in filing a request, it cannot do so without the support of the government.[236]

While the formal request must thus still be made by the government, the original initiative may also come from civil society actors. In the case of OC-5/85, the Costa Rican President was asked at a meeting of the Inter-American Press Association to refer the matter of compulsory membership in associations of journalists to the Court under its advisory jurisdiction.[237] The Costa Rican government followed the proposal and referred the matter to the Court a few months after the meeting with the Inter-American Press Association.[238]

Should it happen that a state is (no longer) member of the OAS, but party to the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará) this state (still) has standing to request an advisory opinion of the

232 Faúndez Ledesma (n 26) p. 963.

233 *Proposed amendments to the naturalization provisions of the constitution of Costa Rica,* Advisory Opinion OC-4/84, Series A No. 4 (19 January 1984) para. 11; Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 41.

234 Leiv Marsteintredet, 'The Inter-American Court of Human Rights and the Mobilisation of Parliaments' in Saul *et al.* (eds), *The International Human Rights Judiciary and National Parliaments* (CUP, 2017) p. 254.

235 OC-4/84 (n 233) para. 11.

236 As to persons who are generally considered to have full powers to represent their state see Art. 7 (2) VCLT.

237 Buergenthal, *'New Upload - Remembering the Early Years of the Inter-American Court of Human Rights'* (n 20) p. 268.

238 Buergenthal, *'New Upload - Remembering the Early Years of the Inter-American Court of Human Rights'* (n 20) p. 268. For more information on the background of OC-5/85 see *infra*: Chapter 4, Section C.II.1.b) dd).

Court as Article 11 of that Convention allows all states parties to request an advisory opinion of the Court. Requests filed pursuant to Article 11 Convention of Belém do Pará may *ratione materiae* however only deal with the interpretation of that Convention.

II. OAS organs including the IACHR

Alongside the OAS member states, all OAS organs enumerated in Chapter VIII of the OAS Charter[239] have standing to request advisory opinions of the Court.[240] In addition, Article 11 of the Convention of Belém do Pará also entitles the Inter-American Commission of Women to request advisory opinions on the interpretation of that Convention.

In contrast to Article 96 (2) UN Charter, which requires UN organs and specialized agencies other than the General Assembly or the Security Council to be authorized by the General Assembly before they may request an advisory opinion of the ICJ, Article 64 does not distinguish between the OAS organs. Thus, none of the organs listed in Article 53 OAS Charter needs the approval of another organ before being able to consult the Court.

Striking is, however, the similarity between Article 64 (1) and the formulation found in Article 96 (2) UN Charter restricting the other organs' and specialized agencies' standing to "legal questions arising within the scope of their activities". This means that the standing of OAS organs is not absolute. Article 64 (1) rather requires that the subject matter of the request raised by an OAS organ relates to questions arising within its respective spheres of competence. Thereby, the Convention implements the principle of speciality governing the law of international organizations.[241] Already the PCIJ in its advisory opinion on *German Settlers in Poland* stated that the Court would not be justified to render an advisory opinion requested by

239 As to the changed numbering see *supra*: (n 223).

240 Chapter VIII consists only of one provision, which is Article 53 that numerates the following organs: The General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, the Councils; the Inter-American Juridical Committee, the Inter-American Commission on Human Rights; the General Secretariat, the Specialized Conferences and the Specialized Organizations.

241 *Cf.*: PCIJ, *Jurisdiction of the European Commission of the Danube between Galatz and Braila,* Advisory Opinion of 8 December 1927, Series B No. 14, p. 64; ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, p. 66, 78, para. 25.

the Council of the League if the subject matter of the controversy was not "within the competency of the League".[242] Likewise, the ICJ declined to give the advisory opinion on the *Legality of the Use of Nuclear Weapons* requested by the World Health Organization (WHO), as it held that the request did not relate to "questions arising within the scope of [its] activities" and that it therefore lacked jurisdiction.[243]

Given the similar wording of Article 64 (1) and Article 96 (2) UN Charter, it is not surprising that the Court, when it defined the phrase "within their spheres of competence" as "issues in which such entities have a legitimate institutional interest", used almost the same language as the ICJ had done in the *Western Sahara* advisory opinion.[244] While the definition was already introduced in the Court's second advisory opinion, the origin of the framing became particularly evident when the Court, in its third advisory opinion, expressly referred to the *Western Sahara* Advisory Opinion.[245]

In OC-2/82 the Court went on to hold that "while it is initially for each organ to decide whether the request falls within its spheres of competence, the question is, ultimately, one for this Court to determine by reference to the OAS Charter and the constitutive instrument and legal practice of the particular organ."[246]

Applying this standard to the IACHR the Court held that "given the broad powers relating to the promotion and observance of human rights which Article 112 of the OAS Charter confers on the Commission, the Court observes that, unlike some other OAS organs, the Commission enjoys, as a practical matter, an absolute right to request advisory opinions within the framework of Article 64 (1) of the Convention."[247] This absolute power of the Commission has also been confirmed by a change of the formulation of the Court's Rules of Procedure, which since 1996 exempt

242 PCIJ, *Certain questions relating to settlers of German origin in the territory ceded by Germany to Poland*, Advisory Opinion of 10 September 1923, Series B No. 6, p. 19.

243 ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, p. 66, 84, para. 31.

244 ICJ, *Western Sahara*, Advisory Opinion of 16 October 1975, I.C.J. Reports 1975, p. 12, 27, para. 41; OC-2/82 (n 231) para. 14.

245 *Restrictions to the death penalty (Arts. 4.2 and 4.4 American Convention on Human Rights)* Advisory Opinion OC-3/83, Series A No. 3 (8 September 1983) para. 40; ICJ, *Western Sahara*, Advisory Opinion of 16 October 1975, I.C.J. Reports 1975, p. 12, 27, para. 41; *cf.*: Guevara Palacios (n 12) p. 180.

246 OC-2/82 (n 231) para. 14.

247 OC-2/82 (n 231) para. 16.

the Commission from the obligation to specify how a request relates to its competences.[248]

Pointing to the difference between Article 70 (3) and Article 71 (2) of the current Rules of Procedure[249] it has been argued that the Commission was still obliged to specify how a request relates to its competences when requesting an opinion concerning the interpretation of other treaties than the Convention.[250] However, the practice of the Court rather suggests holding this different formulation of Article 71 (2) of the Rules of Procedure to be a purely editorial inconsistency, because the Court stated that the Commission enjoys an absolute right "within the framework of Article 64 (1)"[251] not limiting this finding to requests concerning the interpretation of the Convention. What is more, the Court did not require any specific explanation as to the Commission's "legitimate institutional interest" when the latter requested an opinion on the juridical condition and human rights of the child, which should include interpretations of the UN Convention on the Rights of the Child and other relevant international instruments.[252] To the contrary, the Court, when stating that the request had been filed in accordance with the requirements set forth in the Rules of Procedure, did not mention any specification of the Commission's sphere of competences.[253]

Be it as it may, given that Article 19 of the Statute of the Inter-American Commission on Human Rights also extends the Commission's power to consult the Court on questions concerning the interpretation of other treat-

248 Compare Art. 49 para. 2 lit. b of the first Rules of Procedure of the IACtHR of 1980 with Art. 59 para. 2 and 3 of the Rules of Procedure as approved by the Court at its XXXIV Regular Session held in September 1996.

249 The current and also the previous versions of the Court's Rules of Procedure can be found on the Court's website: https://www.corteidh.or.cr/reglamento.cfm?lang=en.

250 Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 43.

251 OC-2/82 (n 231) para. 16.

252 Neither in its request from 30 March 2001 nor in its additional written observations did the Commission specify how the matter related to its spheres of competence. With regard to the other international instruments it only noted that both itself and the Court were according to Art. 29 permitted to use them as interpretative guide. See: IACHR, *Solicitud de Opinión Consultiva a ser presentada por la Comisión Interamericana de Derechos Humanos a la Corte: El alcance de las medidas especiales de protección a los niños (artículo 19) con relación a las garantías legales y judiciales establecidas en la Convención*, 30 March 2001; Written observations of the IACHR in the OC-17/02 proceedings, 8 November 2001, para. 7–9. [Both documents are only available in Spanish].

253 *Juridical condition and human rights of the child*, Advisory Opinion OC-17/02, Series A No. 17 (28 August 2002) paras. 17–20.

ies than the Convention, any formal requirement to justify its legitimate interest would not constitute any obstacle to the IACHR.

Taking into account that the OAS General Assembly has a comparably large catalogue of competences, it has been argued that the same reasoning applied to the IACHR would also lead to an absolute right to request advisory opinions for the General Assembly.[254] To date, this has however not become relevant, as the Commission has so far been the only OAS organ that has successfully requested advisory opinions of the Court. The only request made by another organ than the IACHR, namely by the General Secretary of the OAS, was rejected by the Court.[255] In that case, the Court did not scrutinize whether the Secretary General had acted on behalf of, and within the sphere of competence of the General Secretariat, but used its discretion to reject the request on other grounds than a lack of jurisdiction.[256] It remains to be seen whether the Court will examine the standing of the respective requesting organ in future cases with as much scrutiny as the ICJ did with regard to the standing of the WHO.[257]

Former Judge Buergenthal had predicted that other OAS organs than the Commission would soon start filing advisory requests, as they too had to "deal with human rights matters on a more or less regular basis".[258] One possible explanation why this prediction has not materialized is that basically all organs except the Commission, the General Secretariat and the Inter-American Juridical Committee are made up of representatives from all OAS member states, which makes it difficult to agree on a certain matter to be made the subject of an advisory opinion request. For example, Article 59 OAS Charter requires that decisions of the General Assembly are always adopted by an absolute majority, and in some specific cases even by a two-third majority of votes.

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254 *Cf.*: Buergenthal, '*The Advisory Practice of the Inter-American Human Rights Court*' (n 41) p. 1, 4 pointing to the respective articles in the OAS Charter defining the competences of the General Assembly; today esp. Art. 54 OAS Charter.

255 *Cf.*: IACtHR, Order of 23 June 2016, *Solicitud de Opinión Consultiva presentada por el Secretatio General de la Organización de los Estados Americanos* [published only in Spanish].

256 As to the Court's discretion to reject requests for advisory opinions see *infra*: Chapter 4, Section C and as to this specific request of the Secretary General (n 485) and Chapter 4, Section C.I.5.

257 ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, p. 66, 77, para. 22.

258 *Cf.*: Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court* (n 41) p. 5.

Against this backdrop, it is more likely that states will use their own right to consult the Court then to lobby within one of the OAS organs that a request for an advisory opinion be made. This is another difference compared to the advisory jurisdiction of the ICJ where requests formally made by the General Assembly are sometimes *de facto* made in the special interest of single states that by themselves lack standing to request advisory opinions of the ICJ.[259]

III. Entitlement of other additional entities to request advisory opinions?

Since the beginning of the Court's functioning, there have been several proposals how the Court's advisory jurisdiction *ratione personae* could be further extended.

1. National courts

Early on it was suggested that national courts should have standing to request advisory opinions of the Court, as this would enhance the "uniform domestic application of the Convention".[260] Since the establishment of the doctrine of conventionality control[261], this proposal has been renewed given that direct access of domestic courts to the Court could not only facilitate

259 For example, the *Kosovo* and the *Chagos* advisory opinion were *de facto* requested by Serbia and Mauritius respectively. See: ICJ, *Accordance with International Law on the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, I.C.J. Reports 2010, p. 403; ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, I.C.J. Reports 2019 p. 95; James Ker-Lindsay, 'Explaining Serbia's Decision to Go to the ICJ' in Marco Milanovic and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP, 2015) pp. 9–20; Guiseppe Puma, *'Preliminary Questions in the ICJ Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965'* (2019) 79 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 841, 847; Niko Pavlopoulos, *'Chagos (Advisory Opinion)'* in Max Planck Encyclopedias of International Law (last updated March 2021), available at: https://opil.ouplaw.com/view/10.1093/law-epil/9780199231690/law-9780199231690-e2248?rskey=EZP5Ym&result=1&prd=MPIL para. 15.

260 Thomas Buergenthal, *'The Inter-American Court of Human Rights'* (1982) 76 American Journal of International Law, 231, 243.

261 On the development and content of the doctrine of conventionality control see *infra*: Chapter 5, Section B.II.

and increase the efficiency of the conventionality control, but also foster the required judicial dialogue between the regional Court and its national counterparts.[262]

In 1982, Buergenthal held that national courts could use Article 64 (2) to refer matters to the Court.[263] In line with the later finding of the Court that the wording "state" in Article 64 (2) requires that a request be made by an entity which is allowed to represent the state on the international plane[264], Buergenthal however added that national courts needed the approval of their respective government before making a request, and suggested that governments could establish domestic procedures allowing their courts the transmittal of requests or that the Court could conclude agreements with the national governments for such purpose.[265] To the knowledge of the author, this idea has so far not been taken up by any state and there has been no advisory procedure that was originally triggered by a domestic court and then via the government channeled to the IACtHR.

Apart from the solution proposed by Buergenthal and the forwarding of requests from domestic courts by the government, direct access of domestic courts to the IACtHR could only be provided by amending the Convention via an additional protocol.[266] To date, however, no concrete proposal has been made for the adoption of such an additional protocol.

Traditionally, international law has always treated states as one single unit that is, on the international plane, represented by certain represent-

262 Ariel E. Dulitzky, *'An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights'* (2015) 50 Texas International Law Journal, 45, 87–90; Simon Hentrei, *'Complementary Adjudication: Legitimating International Judicial Authority in the Americas'* (Johann-Wolfgang Goethe Universität, 2021) p. 254–256; Carlos J. Zelada *'¿Son vinculantes las opiniones consultivas de la Corte Interamericana de Derechos Humanos?: Una propuesta de refomra para un problema de antaño'* (2020), p. 102ff., available at: https://promsex.org/wp-content/uploads/2020/05/Son-vinculantes-las-opiniones-consultivas-de-la-Corte-IDH.pdf.

263 Thomas Buergenthal, *'The Inter-American Court of Human Rights'* (n 260) p. 243.

264 OC-4/84 (n 233) para. 11.

265 Thomas Buergenthal, *'The Inter-American Court of Human Rights'* (n 260) p. 244; *cf.* also Faúndez Ledesma (n 26) p. 963.

266 *Cf.*: Zelada (n 262) p. 106; Hentrei (n 262) p. 256. Hentrei not only mentions an amendment of the Convention but seems to suggest that also an amendment of the Court's Rules of Procedure might be sufficient. Yet, the mere amendment of the Court's Rules of Procedure does not seem appropriate to provide a viable legal basis for such a decisive procedural innovation. As to the different questions that would have to be addressed in an additional protocol see *infra* Chapter 4, Section J.IV.

atives of the executive branch as determined by the respective domestic law.[267] From this perspective, the extension of standing before the IACtHR to domestic courts would mean an opening of the national states towards an international organization and a regional system. However, matters of human rights protection have long been removed from the *domaine reservé* of states, and since addressing the various individual officials acting within a state is exactly what the Court does under its conventionality control doctrine[268], it appears appropriate that these actors should also have the right to appear before the Court in order to request a clarification of a certain legal issue.[269]

While the governments under the current state of Article 64 have the control over the topics and questions the IACtHR becomes involved with, extending the right to issue requests to domestic courts would imply that the national states might no longer speak with one voice on the international level. An alliance between the Court and the national courts could facilitate a progressive jurisprudence and put governments under pressure to tackle persisting social injustices and to no longer postpone legal reforms. If domestic courts had standing, this could in some cases help to unlock reform gridlocks within states.[270] While providing domestic courts with standing would strengthen the power of courts and also indirectly of individuals, who can pursue their interests through judicial procedures, it would also enhance the power of the IACtHR vis-á-vis national governments and not least, national parliaments.

Irrespective of the possible positive effects just named, such a power shift towards the judiciary raises questions as to the role and democratic legitimacy of courts. Furthermore, an unlimited right of domestic courts to consult the IACtHR at any time on any question falling within its advisory jurisdiction might cause an imbalance, or even disorder, in the national structure of competences and legal procedures at the domestic level. For one, if any domestic court could refer questions to the IACtHR, the national apex courts could be passed over and get the impression that they are disempowered.[271]

267 This is expressed, for example, in Articles 7 and 46 VCLT.

268 As to the details of the doctrine of conventionality control see *infra*: Chapter 5, Section B.II.

269 *Cf.*: Hentrei (n 262) p. 256.

270 Dulitzky (n 262) p. 89.

271 This holds in particular true in states, in which certain powers are concentrated at a constitutional or supreme court.

Second, if national courts could trigger advisory proceedings on any topic irrespective of a case pending before them, they would no longer act as the supervisory authority that normally provides for legal remedies. Instead, the power to initiate an advisory proceeding on any topic would resemble the right to initiate new legislative processes or law reforms that is normally restricted to the legislature, or in some cases also to governments, but not to the judiciary.

In order to avoid this, the standing of domestic courts is in similar existing advisory – or preliminary ruling – procedures normally restricted to interpretative questions that have arisen in a case pending before them.[272] In contrast to a general right of standing, such a restricted right to refer questions relevant for the decision of a specific case prevents national courts from acting *proprio motu*, and from interfering with the right to initiate legal reforms that normally corresponds to the legislative branch. At the same time, such a preliminary ruling procedure would still help to improve and to intensify the dialogue and cooperation between the IACtHR and domestic courts.

Until such a preliminary ruling procedure[273] is eventually created, the practice followed by the Court in OC-28/21 on the question of presidential re-election without term limits, seems to be another reasonable possibility for how domestic courts can already get involved in advisory proceedings. Under a memorandum of understanding between the Court and the Permanent Secretariat of the Ibero-American Judicial Summit, the Court consulted the high courts of the state parties on their jurisprudence relating to the re-election of presidents and other popularly elected officials, and several high and constitutional courts responded.[274] In the OC-29/22 proceedings, the Court repeated this approach, so that it appears that the

272 See for example Article 267 lit. b Treaty on the Functioning of the European Union (TFEU) and Article 1 (2) of additional Protocol No. 16 to the ECHR.

273 On the possible creation of a preliminary ruling procedure before the IACtHR see also *infra* Chapter 3, Section D.IV and Chapter 4, Section J.IV.

274 *Presidential reelection without term limits in the context of the Inter-American Human Rights System (Interpretation and scope of articles 1, 3, 24, and 32 of the American Convention on Human Rights, XX of the American Declaration of the Rights and Duties of Man, 3(d) of the Charter of the Organization of American States and of the Inter-American Democratic Charter)*, Advisory Opinion OC-28/21, Series A No. 28 (7 June 2021) para. 11.

Court intends to establish this exchange with the highest domestic courts in advisory proceedings on a regular basis.[275]

2. National parliaments

According to its doctrine of conventionality control, the Court sees states no longer as a black box or a single unit but holds that its judgments are binding on all state authorities and directly calls on them to carry out a conventionality control within the scope of their respective tasks and competences.[276] Thus, if one argues that national courts should be able to consult the Court in order to increase the efficiency of conventionality control, one could also think of providing organs of the legislative, such as national parliaments or groups of deputies with a right to request an advisory opinion of the Court, e.g. on the compatibility of a draft law with the Convention.

Of course, under the current state of Article 64 (2) states can already request advisory opinions of the Court on draft laws, as the Court held in OC-4/84, and the initiative for such a request may originate in parliament as was seen in the very same advisory proceeding.[277] The fact that the OC-4/84 proceeding has so far remained the only incidence in which a request has originated in parliament and then been officially requested by the government shows, however, that it is not very likely that parliaments will take the initiative, and are furthermore supported by the respective state's government. Especially in presidential systems, where the government may not necessarily be composed of the same parties holding the majority in parliament, it is unlikely, that the presidency will forward advisory opinion requests from parliament. The same holds true for requests coming from opposition groups in parliamentary systems.

Similar to Buergenthal's suggestion with regard to national courts, domestic lawmakers could adopt a law obliging governments to forward re-

275 *Differentiated approaches with respect to certain groups of persons in detention (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments)*, Advisory Opinion OC-29/22, Series A No. 29 (30 May 2022), para. 10.

276 See *infra*: Chapter 5, Section B.II. on the Court's conventionality control doctrine.

277 OC-4/84 (n 233) paras. 11, 28–29. See also *supra*: Chapter 3, Section A.I.

quests for advisory opinions from parliamentary groups.[278] More straightforward than waiting for such national laws to be possibly adopted would be an amendment to the ACHR extending the right to request advisory opinions of the Court to legislative organs and groups such as parliamentary chambers or groups of deputies.

Expanding the standing in advisory proceedings onto legislative organs could help mobilize parliaments for the defense of human rights, and thus facilitate the efficient implementation of the conventionality control doctrine.[279] Given that the Court so far does not much engage with national parliaments, such a step could also improve the relationship between the Court and domestic lawmakers.[280] Furthermore, parliaments would be strengthened vis-à-vis governments which could prove to be beneficial in a region characterized by hyper-presidentialism.[281]

Similar to national jurisdictions in which deputies may consult the constitutional court on the constitutionality of a certain law[282], deputies could consult the Court on the conventionality of a law or particular legal provision. Furthermore, groups of parliament that were lacking the necessary majority for a law reform which they hold to be urgent and mandatory in order to improve the protection of human rights, could consult the Court in order to win an argument for their proposed law reform. This could help firstly to prevent laws that would be incompatible with the Convention from entering into force, and could, secondly, help unlock persisting

278 Marsteintredet (n 234) p. 260; *cf.*: Thomas Buergenthal, '*The Inter-American Court of Human Rights*' (n 260) p. 244.

279 Marsteintredet (n 234) p. 258, 259.

280 *Cf.*: Marsteintredet (n 234) p. 255.

281 Marsteintredet (n 234) p. 258–259.

282 In Costa Rica, Articles 96 and 97 of the *Ley de la Jurisdicción Constitucional* provide both the board of the National Assembly and groups of deputies with the right to request of the *Sala Constitucional* a preventive normative control of constitutionality. In Chile, Art. 93 of the Constitution provides for a mandatory preventive control of constitutionality by the Constitutional Tribunal which is criticized for transforming the latter into a third chamber of parliament and may therefore be abolished in a possible new Constitution. *Cf.*: *'El control preventivo del Tribunal Constitucional: ¿una atribución con sus días contados?'*, La Tercera, 2 December 2020, available at: https://www.latercera.com/reconstitucion/noticia/el-control-preventivo-del-tribunal-constitucional-una-atribucion-con-sus-dias-contados/GCWNNM4Y7NDOTNH4EGWMWBOW2Y/; In Mexico, Art. 105 (2) of the Constitution provides that both members of Parliament and of the Senate may initiate a normative control of constitutionality. In both cases, a quorum of 33 percent of members of the respective legislative chamber is required for planting the request before the Supreme Court of Justice.

blockades for necessary legal reforms at the national level. At the same time the power of the legislative organs would be strengthened vis-à-vis the executive and vis-à-vis the judiciary.

Yet, if legislative organs were given such a right to have direct access to the IACtHR, it might confuse or conflict with the given national legal order. If there is for example a constitutional court that has the exclusive right to control the constitutionality of laws, which in some cases automatically includes the control of conventionality, this court would be passed over if parliamentary groups were given a direct access to the IACtHR. Also, the empowerment of opposition groups could undermine the will of the people as expressed in the last elections, which argues in favor of a certain quorum of at least e.g. ten or twenty deputies in order to prevent individual deputies from gaining too much power. Another risk is that, while a parliamentary initiative for an advisory proceeding might help to unlock a reform gridlock and push an important human rights initiative at the national level, the IACtHR might thereby become a tool in domestic politics.[283] Not without reason did the Court hold that it must be cautious not to become "embroiled in domestic political squabbles" in advisory proceedings that concern legislative proposals.[284]

Therefore, should an additional protocol to the Convention provide for an extension of standing to legislative organs, states would have to check whether such a regulation would fit into their national legal order, or which national structures might have to be changed. Depending on this, they would have to decide whether they want to ratify the protocol or maybe opt out of this particular provision by attaching a reservation to the instrument of ratification. As regards the Court, it would have to be careful when examining the admissibility and propriety of a request coming from a legislative organ, in order to ensure that the advisory proceeding indeed serves the protection of human rights, rather than just the profiling of one party in a domestic political conflict.

3. Non-governmental organizations

Comparable to the advisory jurisdiction of the AfrCtHPR that may receive advisory opinion requests from any African organization recognized by the

283 Marsteintredet (n 234) p. 259.
284 OC-4/84 (n 233) para. 30.

African Union (AU), it has been proposed to extend the IACtHR's advisory jurisdiction *ratione personae* also to non-governmental organizations (NGOs).[285]

In order to prevent such a step from opening the floodgates to the Court, the implementation of a type of preliminary selection process has been suggested.[286] According to this proposal, the organizations should be required to first ask the Court for leave to file a request indicating the respective subject matter, and a panel of judges could then select only those requests that would "raise important or novel questions and contribute to the development of international human rights law".[287]

On the one hand, it is correct that NGOs will only seldom find a government or OAS organ which is willing to transmit their request to the Court as the Costa Rican government did in the case of OC-5/85.[288] Furthermore, it is true that NGOs would probably bring issues of great public interest to the Court that may not be raised by states or OAS organs.[289]

On the other hand, the proposed selection process does not seem suitable to reduce the additional workload decisively enough as would occur if NGOs were given standing in advisory procedures. The number of NGOs has increased immensely in the past decades, while the number of judges and the amount of resources has remained the same, respectively not increased by the same relation. Thus, even if the Court did not accept all requests send by NGOs, the additional workload would still be likely to lead to a prolongation of other contentious or advisory proceedings. What is more, it would be difficult to avoid the Court being accused that the selection process of NGO complaints was unjustified or arbitrary.

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285 Jo M. Pasqualucci, *'Advisory Practice of the Inter-American Court of Huma Rights: Contributing to the Evolution of International Human Rights Law'* (2002) 38 Stanford Journal of International Law, 241, 257–258.

286 Jo M. Pasqualucci, *'Advisory Practice of the Inter-American Court of Huma Rights: Contributing to the Evolution of International Human Rights Law'* (n 285) p. 258.

287 *Ibid.*

288 As to more information on the background of OC-5/85 see *infra*: Chapter 4, Section C.II.1.b) dd); Jo M. Pasqualucci, *'Advisory Practice of the Inter-American Court of Huma Rights: Contributing to the Evolution of International Human Rights Law'* (n 285) p. 258.

289 *Cf.*: Jo M. Pasqualucci, *'Advisory Practice of the Inter-American Court of Huma Rights: Contributing to the Evolution of International Human Rights Law'* (n 285) p. 258; *cf.*: Armin von Bogdandy and Ingo Venzke, *'On the Democratic Legitimation of International Judicial Lawmaking'* (2011) 12 German Law Journal, 1341, 1366.

The practice of the AfrCtHPR also shows that it is difficult to decide which NGO is recognized or not.[290] If one were on the other hand to accept any NGO, it would no longer be guaranteed that they are indeed representing broad public interests.

In recent years, the argument in favor of extending the standing to NGOs also seems to have lost some of its weight. This is because the Commission is nowadays increasingly raising matters in advisory proceedings that are the object of current social debates, or serve the protection of the interests of specific vulnerable groups.[291] Moreover, both OC-23/17 and OC-24/17 show that issues such as the protection of LGBTIQ* rights and the environment do not have to be brought to the Court by NGOs, but that they can emanate from requests made by states too.[292]

Lastly, the possibility to participate actively in advisory proceedings which is currently given to any NGO compensates, at least to a certain extent, for the lack of an own right to initiate an advisory proceeding before the Court.

Hence, while NGOs play an important role in the advisory proceedings of the Court, giving them standing to request advisory opinion in their own right would be likely to cause an overburdening of the Court.

4. Other regional organizations independent of the OAS

Finally, one could consider whether organs from other organizations than the OAS should be allowed to request advisory opinions of the Court. Besides the OAS, the states in southern and central America have founded various different state federations and organizations. Some of them are no

290 See on this *infra*: Chapter 3, Section D.III.

291 See the Commission's request that led to OC-17/02 on the *Juridical Condition and the Rights of the Child* (cited *supra*: n 252), its request that led to OC-27/21 on the *scope of state obligations under the Inter-American System with regard to the guarantee of trade union freedom, its relationship to other rights, and its application from a gender perspective* of 31 July 2019, and its request on *differentiated approaches to persons deprived of liberty* of 25 November 2019 that led to OC-29/22.

292 The *Request for an Advisory Opinion on the Climate Emergency and Human Rights*, made by Colombia and Chile on 9 January 2023 is another example for this, especially because the request originated from a proposal made by the NGO CEJIL. See: '*MERCOSUR recibe iniciativa de opinión consultiva sobre emergencia climática y derechos humanos*', CEJIL, 12 May 2023, available at: https://cejil.org/comunicado-de-prensa/mercosur-acoge-iniciativa-de-opinion-consultiva-sobre-emergencia-climatica-y-derechos-humanos/.

longer active but others like the Mercosur or the Central American Integration System are still functioning.[293] OC-21/14 which was officially requested by Argentina, Uruguay, Paraguay and Brazil was in fact elaborated by the *Instituto de Políticas Públicas en Derechos Humanos* of the Mercosur.[294]

Providing organs of these organizations with an own right to request advisory opinions of the IACtHR could improve the cooperation between the different systems of integration, enhance a uniform interpretation and understanding of matters related to human rights in the region, and at the same time strengthen the role of the Court in the Americas. Given that the Court is an autonomous institution and no official organ of the OAS, one might consider that the Court could conclude its own agreements with these organizations.

On the other hand, the Court is an organ created under the Convention, and it is questionable whether it could broaden its competences without the backup of the contracting states and the OAS Assembly, which has to approve its annual budget. The issue is further complicated by the fact that some regional organizations/federations were founded in clear opposition to the longstanding domination of the OAS by the US.[295] Moreover, most of them have created their own judicial bodies, which could conflict with

293 As to the various regional organization and fora of integration that have been established among Latin American States see for example: Andreas Grimmel and Cord Jakobeit (eds), *Regionale Integration – Erklärungsansätze und Analysen zu den wichtigsten Integrationszusammenschlüssen in der Welt* (Nomos, 2015), Contributions 15–19. By today, Unasur which was once given the greatest chances to succeed, is defunct and has been followed by the new coalition called Prosur. See: '*South America leaders form Prosur to replace defunct Unasur bloc*', DW, 23 March 2019, available at: https://www.dw.com/en/south-america-leaders-form-prosur-to-replace-defunct-unasur-bloc/a-48034988.

294 Instituto de Políticas Públicas en Derechos Humanos, Solicitud *de Opinión Consultiva de los Estados del MERCOSUR sobre los derechos de los niños, niñas y adolescentes migrantes ante la Corte IDH – Resumen Ejecutivo*, available at: http://w2.ucab.edu.ve/tl_files/CDH/Mercosur/Opinion_Consultiva_MERCOSUR_ante_CIDH_Derechos_ninos_migrantes.pdf.

295 *'Re-Thinking the OAS: A Forum*', Americas Quarterly, 3 February 2015, available at: https://www.americasquarterly.org/fulltextarticle/re-thinking-the-oas-a-forum/; '*The Organization of American States*', Council on Foreign Relations, last updated 18 February 2022, available at: https://www.cfr.org/backgrounder/organization-american-states; '*South America leaders form Prosur to replace defunct Unasur bloc*', DW, 23 March 2019, available at: https://www.dw.com/en/south-america-leaders-form-prosur-to-replace-defunct-unasur-bloc/a-48034988; Marsteintredet (n 234) p. 249.

a cooperation with the IACtHR although these judicial bodies are not necessarily competent to rule on specific human rights issues.[296]

In any event, most of the organs of these organizations are again composed of OAS member states[297] so that it does not seem necessary to give the organs of these organizations standing to request advisory opinions of the IACtHR, as their composing states can approach the Court by themselves, which is what has happened in the case of OC-21/14.

IV. Authority to render advisory opinions proprio motu?

As of today, the IACtHR cannot render advisory opinions *proprio motu*. In this respect, its advisory jurisdiction is limited. However, despite the ample jurisdiction *ratione personae* already given, it has been argued that a right of the Court to render advisory opinions on its own motion would "contribute to clarity and consistency in the inter-American human rights system".[298] In support of this argument, it has been remarked that it had also been held that the Court "could be endowed with an ex-officio competence to assess the consistency of reservations" and furthermore, that this would be "in accord with the UN Human Rights Committee statement that it is the responsibility of the Committee to determine the compatibility of a specific reservation with the object and purpose of the International Covenant on Civil and Political Rights."[299]

Yet, the proposal of a competence to assess *ex officio* the consistency of reservations with the Convention cannot be equated with a general right

296 For example, the Central American Integration System has established the *Corte Centroamericana de Justicia*, Mercosur has established the *Tribunal Permanente de Revisión* and the Andean Community has established the *Tribunal de Justicia de la Comunidad Andina*.

297 On the overlap of the OAS and UNASUR see: Detlef Nolte, '*Costs and Benefits of Overlapping Regional Organizations in Latin America: The case of the OAS and UNASUR*' (2018) 60(1) Latin American Politics and Society, 128–153.

298 Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 41. See also Frans Viljoen, *International Human Rights Law in Africa* (2nd edn OUP, 2012) p. 448 who has held with regard to the AfrCtHPR that the option to initiate advisory proceedings *proprio motu* should be explored by the AfrCtHPR if it receives only few cases and requests for advisory opinions.

299 Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 40; Andrés E. Montalvo, '*Reservations to the American Convention on Human Rights: A New Approach*' (2000) 16 American University International Law Review, 269, 271.

of the Court to render advisory opinions on any legal question which the judges might think would need further clarification. Former Judge Cançado Trindade was right in stating that such a competence to render advisory opinions *proprio motu* is to be opposed, as it would transform the Court into an international legislator[300], a role it is not supposed to fulfill.

Furthermore, given the Court's financial restraints and given that additional competences always go along with the expectation that they will be used in a rational way, an additional right to issue advisory opinions on its own would be more of a burden for the Court and exceed its capacity.

What is more, advisory opinions rendered by the Court on its own would lack the legitimacy normally given through the act of filing a request, by which an entity shows its actual interest in the very subject matter of the request.

Finally, one could also argue that a *proprio motu* competence of the Court would interfere with the competences of the Commission, as it could happen that the Court addresses a legal issue the Commission was about to publish a report on, or had deliberately refrained from requesting an opinion of the Court.

Although no one is arguing that the Court has the right to initiate advisory proceedings *proprio motu* under the current state of the Convention, in 1997 a debate as to the limits of the Court's jurisdiction arose when the Republic of Chile decided to withdraw its request for an advisory opinion submitted under Article 64 (1). While the Commission and Judge Pacheco Gomez held that the Court should have abstained from rendering its advisory opinion, as it had lost the basis for its jurisdiction upon the withdrawal of Chile's request, the majority of the Court decided to continue the proceeding notwithstanding.[301]

The Court was of the opinion that once an advisory proceeding was initiated by an entity entitled to make a request under Article 64, it fell to

300 *Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights)*, Advisory Opinion OC-15/97, Series A No. 15 (14 November 1997), Concurring Opinion of Judge Antônio A. Cançado Trindade, para. 37 [Concurring Opinion only available in Spanish].

301 IACHR, Fax to the President of the Court, OC-15/97 proceedings, 25 March 1997; Written observations of the IACHR in the OC-15/97 proceedings, 31 July 1997, paras. 7–14; IACtHR, Order of 14 April 1997, *Solicitud de Opinión Consultiva OC-15*, p. 4; Dissenting Opinion of Judge Maximo Pacheco Gomez to the Order of the Court of 14 April 1997. [All documents only available in Spanish].

the Court alone to decide if it was competent to proceed with it or not.[302] The Court held that once a request was made, the question whether it should answer the request or not was no longer in the unique interest of the requesting state, given that an advisory opinion could have effects on all OAS member states.[303]

Other international courts have acted differently in comparable situations. The PCIJ did not further proceed with a request for an advisory opinion after it had been withdrawn by the Council of the League.[304] Likewise, the AfrCtHPR did not issue an advisory opinion on the merits after Mali had withdrawn its request.[305]

Yet, the IACtHR based its decision to proceed with the request not only on a teleological interpretation and the principle of *effet utile* but on an analogous application of Articles 27 (1), 51 (1), 54 and 63 of the Rules of Procedure in force back then.[306] Article 54 respectively Article 64 under today's Rules of Procedure provides that the Court "[b]earing in mind its responsibility to protect human rights, […] may decide to continue the consideration of a case" even if an applicant has expressed its wish to discontinue with a case, in case the respondent has acquiesced to the claims brought against it, or in case of a friendly settlement.[307]

Given that Article 74 of the Court's Rules of Procedure, which corresponds to Article 63 of the Rules of Procedure in force back in 1997, allows the Court to apply rules of contentious proceedings by analogy in advisory proceedings, the Court had a strong argument to continue with the

302 OC-15/97 (n 300) paras. 23–28.

303 IACtHR, Order of 14 April 1997, *Solicitud de Opinión Consultiva OC-15*, p. 3, considerando 2 [available only in Spanish]; OC-15/97 (n 300) para. 28. See on this also *infra*: Chapter 5, Section B.III.2.

304 Hudson, *The Permanent Court of International Justice: 1920–1942: A Treatise* (n 115) p. 453–454

305 *Cf.*: Frans Viljoen, '*Understanding and overcoming challenges in accessing the African Court on Human and People's rights*' (2018) 67 International Comparative Quarterly, 63, 89; Unfortunately, the documents on Request 1/2011 introduced by Mali are not accessible on the AfrCtHPR's website.

306 The cited provisions correspond to Articles 29 (1), 61, 64 and 74 of the Court's current Rules of Procedure that were adopted in November 2009 and are in force since January 2010.

307 The full text of Article 64 of the Court's Rules of Procedure states:
"Article 64. Continuation of a Case
Bearing in mind its responsibility to protect human rights, the Court may decide to continue the consideration of a case notwithstanding the existence of the conditions indicated in the preceding Articles."

advisory proceeding initiated by Chile.[308] Judge Cançado Trindade held in his concurring opinion that if the Court could continue to investigate contentious cases after the parties had declared their wish to discontinue a case, the same had to apply *a fortiori* in advisory proceedings that did not depend on the consent of affected states.[309]

However, the precedent of 1997 does not mean that the Court will continue to process any request for an advisory opinion which has been withdrawn by the requesting entity. As will be described in more detail below[310], the Court entertains at first an internal *prima facie* admissibility test, and if a request is withdrawn at this stage, that is, before the proceeding has officially been opened, and before the Court could transmit copies of the request to the other OAS member states and OAS organs, it is likely that the Court will respect the withdrawal and not even announce that a request had been made. The decisive question seems to be whether the request has already been published, and whether other states and OAS organs have already submitted written observations before the requesting entity declares to withdraw its request, as had happened in the OC-15/97 proceedings.[311]

In case a request has not yet been published at all, the will of the requesting entity should prevail. If other entities with standing in advisory proceedings have however already submitted written observations, and thereby expressed their interest in the outcome of the proceeding, the Court may decide to continue with the advisory proceeding regardless of the declaration of withdrawal made by the requesting entity. This is because, in that case, the participating states and OAS organs have made the request to a certain extent their own, wherefore the Court does not have to face the accusation of acting *proprio motu* and without legitimacy if it decides to continue the proceeding.

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308 The full text of Article 74 of the Court's Rules of Procedure states:
"Article 74. Application by Analogy
The Court shall apply the provisions of Title II of these Rules to advisory proceedings to the extent that it deems them to be compatible."

309 OC-15/97 (n 300) Concurring Opinion of Judge Antônio A. Cançado Trindade, para. 32 [Concurring Opinion only available in Spanish].

310 See *infra*: Chapter 4, Section B.

311 In the OC-15/97 proceedings Guatemala had submitted written observations before Chile expressed its wish to withdraw its request and also Costa Rica had submitted its observations before Chile had declared its withdrawal not only vis-à-vis the Commission but also vis-à-vis the Court. Thus, it could indeed be argued, that other states had expressed their interest in a reply of the Court to the questions posed by Chile. On this see OC-15/97 (n 300) paras. 10–16, 26.

B. Jurisdiction ratione materiae

After examining *who* may request an advisory opinion of the Court, it shall be explained with which subject matters the Court may deal with under its advisory jurisdiction.

It has already been stated at the outset of this chapter that the Court's advisory jurisdiction is both, *ratione personae* and *ratione materiae*, broader than its contentious jurisdiction. While the Court in the latter may only deal with possible violations of the Convention itself, its advisory jurisdiction ranges from requests on "the interpretation of [the] Convention" [Article 64 (1)] to the interpretation of "other treaties concerning the protection of human rights in the American States" [Article 64 (1)] and to the control of the "compatibility of […] domestic laws with [either the Convention or] the aforesaid other international instruments" [Article 64 (2)].

The Court held that its finding "that it is precisely its advisory jurisdiction which gives the Court a special place not only within the framework of the Convention but also within the system as a whole", was not only supported by the fact that all OAS member states had standing to request advisory opinions, but also by the extension of its substantial advisory jurisdiction onto other international treaties than the Convention.[312]

The following analysis of how the Court has interpreted its advisory jurisdiction under Article 64 will show that its broad jurisdiction *ratione materiae* not only allows all OAS member states to have their respective uncertainties with respect to human rights matters clarified, but that it also allows the Court to influence the interpretation of treaties whose application is not limited to the region. This increases the potential of the Court's advisory opinions to have an impact on the development of public international law in general, meaning also outside the region.

I. Article 64 (1): "The interpretation of…"

Comparable to other provisions containing the basis for an advisory jurisdiction like Article 96 UN Charter, Article 191 UNCLOS[313], Article 47 (1)

312 OC-1/82 (n 42) para. 19.

313 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

ECHR or Article 4 (1) AfrCHPR Protocol[314], which refer to the terms "legal questions" or "legal matter", the term "interpretation" in Article 64 (1) can be understood as a reminder of the proper function and competences given to the Court as a court of law.

In advisory opinions the Court is not called upon to decide factual disputes. Rather, it is supposed to interpret the ACHR and "other treaties concerning the protection of human rights in the American states" on the basis of the given texts. Yet, as holds also true for the ICJ's advisory practice and its understanding of the term "legal question", the term "interpretation" does not mean that advisory proceedings before the IACtHR could not relate to concrete disputes. The Court has, like the ICJ, already given advisory opinions on questions of interpretation that were obviously related to disputes, be it disputes between states or disputes between a state and the Commission.[315]

Nevertheless, the interpretation requirement is a confining parameter. In an advisory opinion, the Court cannot as such decide a dispute, e.g. it cannot determine any means of reparation. Nor is it supposed to determine facts that are disputed between two or more parties to a conflict.

Pursuant to the interpretation requirement, any request must be linked to the application of a certain treaty provision and must be answerable by the means of interpretation. Yet, while earlier opinions of the Court like the first and the sixth advisory opinion[316] were sought to clarify one specific term of a treaty provision, in later requests it has sufficed that the requesting entity indicated that its questions could be remotely linked to one or several treaty provisions. What is more, the Court's answers have become longer and more detailed over the years. The Court obviously understands the term "interpretation" in a comprehensive sense, so that interpretation is not confined to defining the meaning of certain words but more often results in the discussion and explanation of broader principles and concepts.

Nevertheless, in the case of OC-25/18 the Court declined to answer one of the questions posed by Ecuador, as it could not be related to the interpretation of one specific conventional provision.[317] The question had

314 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004).

315 See on this *infra*: Chapter 4, Section C.II.

316 OC-1/82 (n 42); *The word "laws" in Article 30 of the American Convention on Human Rights,* Advisory Opinion OC-6/86, Series A No. 6 (9 May 1986).

317 OC-25/18 (n 227) para. 26.

referred "to certain statements of ethical and legal value such as the laws of humanity, the dictates of public conscience and universal morality" and the Court held that this question did not only fail to comply with the requirement of identifying a specific legal provision to be interpreted, but that is was so vague that it was "impossible to refer it to the interpretation of provisions of specific conventions".[318]

In sum, the term "interpretation" defines the task of the Court, and it may happen that a question is rejected because it cannot be answered by means of judicial interpretation. However, like there is no clear criteria by which "legal" questions could be distinguished from "political" questions[319], the "interpretation" in terms of Article 64 (1) is no real limiting factor of the Court's advisory jurisdiction *ratione materiae* either.

Interpretation may range from the definition of a certain word contained in the Convention to the comprehensive elaboration of matters such as "rights and guarantees of children in the context of migration"[320], or "state obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity"[321].

318 OC-25/18 (n 227) para. 26. The full question "d" of Ecuador had stated: "*Is it possible for a State to adopt a conduct that in practice limits, diminishes, or undermines any form of asylum, arguing that it does not confer validity to certain statements of ethical and legal value such as the laws of humanity, the dictates of public conscience and universal morality, and what should be the consequences of a legal order that would arise from ignorance of these statements?*" See OC-25/18 (n 227) para. 3.

319 The ICJ has repeatedly held that "the fact that a question has political aspects does not suffice to deprive it of its character as a legal question." See: ICJ, *Accordance with International Law on the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, I.C.J. Reports 2010, p. 403, 415, para. 27; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004 p. 136, 155, para. 41; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, p. 226, 234, para. 13. As to the difficulty to distinguish "legal" from "political" questions see also Pomerance (n 113) pp. 296–303.

320 *Rights and guarantees of children in the context of migration and/ or in need of international protection*, Advisory Opinion OC-21/14, Series A No. 21 (19 August 2014).

321 OC-23/17 (n 4).

II. "... this Convention"

The competence to interpret the Convention requires no long explanation. Requests may both ask for an interpretation of a substantive and of a procedural provision of the Convention. The Court held in its second advisory opinion that it is competent "to render an authoritative interpretation of all provisions of the Convention including those relating to its entry into force" and that it was "the most appropriate body to do so" despite the fact that until that point in time "disputes concerning ratification of treaties, their entry into force, reservations attached to them, etc., [had] been dealt with traditionally through consultation between the Secretary General [of the OAS] and the Member States".[322] Furthermore, in OC-3/83, the Court held that the competence to interpret the Convention and other treaties "of necessity encompasses jurisdiction to interpret the reservations attached to those instruments".[323]

Taking Articles 31, 76 and 77 into account, it is persuasive to hold that the additional protocols to the ACHR, namely the Protocol of San Salvador and the Protocol to Abolish the Death Penalty, are also encompassed by the term "Convention"[324], because for the states that have ratified such additional protocols, their content forms part of the Convention's protec-

322 OC-2/82 (n 231) paras. 11, 13.

323 OC-3/83 (n 245) para. 45.

324 The cited provisions of the Convention state:
"Article 31. Recognition of Other Rights
Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention."
"Article 76
1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General.
2. Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification."
"Article 77
1. In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection.
2. Each protocol shall determine the manner of its entry into force and shall be applied only among the States Parties to it."

tion system. In any event, both additional protocols are covered by the term "other treaties concerning the protection of human rights" so that the question whether they are included in the first alternative of Article 64 (1) or not may be left open.

In OC-7/86, the Court noted that the interpretation of the Convention did not include the application of the treaty in the domestic legal system, and that a question seeking guidance on the effect of an article of the Convention within a state would thus fall outside the Court's advisory jurisdiction.[325] The dissenting judges Nikken, Nieto Navia and Buergenthal even held that the Court should have declared the request submitted by Costa Rica to be inadmissible rather than reformulating the question in a way which allowed the Court to avoid interpreting the domestic law of Costa Rica.[326]

Whether the Court would nowadays still take such a reluctant point of view is doubtful.[327] Since it has declared domestic laws to be void and without effect *ab initio*,[328] and has established the doctrine of conventionality control, it is to be assumed that the Court would be more willing to also affirm in the context of its advisory jurisdiction that a provision of the Convention has a self-executing effect within a certain domestic legal order.

In any event, the Court's competence to provide an advisory opinion on the compatibility of a domestic law with the Convention, at minimum, requires the Court to consider different possible interpretations of the domestic law in question.

325 *Enforceability of the right to reply or correction (Arts. 14(1), 1(1) and 2 of the American Convention on Human Rights)* Advisory Opinion OC-7/86, Series A No. 7 (29 August 1986) para. 14.

326 OC-7/86 (n 325) Joint dissenting opinion of Judges Rafael Nieto Navia and Pedro Nikken, paras. 14–16; OC-7/86 (n 325) Dissenting and concurring opinion of Judge Thomas Buergenthal, para. 1.

327 *Cf.*: Ximena Fuentes Torrijo, '*International and Domestic Law: Definitely an Odd Couple*' (2008) 77 (2) Revista Juridica Universidad de Puerto Rico, 483, 485 *et. seq.*

328 *Cf.*: IACtHR, *Case of Barrios Altos v Peru*, Judgment of 14 March 2001 (Merits), Series C No. 75, para. 44; Pablo González-Domínguez, *The Doctrine of Coventionality Control: Between Uniformity and Legal Pluralism in the Inter-American Human Rights System* (Intersentia, 2018) p. 30; Christina Binder, '*The Prohibition of Amnesties by the Inter-American Court of Human Rights*' (2011) 12 German Law Journal, 1203, 1212.

III. "…other treaties concerning the protection of human rights in the American states"

While the term "Convention" is clear, the question what is to be understood by "other treaties concerning the protection of human rights in the American states" is more complex. Indeed, the very fact that the term contained in Article 64 (1) was unclear led to the first request for an advisory opinion that the Court received (1.). After having established a broad definition of the term in OC-1/82, the Court has further softened the restrictive effect of the term in later advisory proceedings (2.).

1. OC-1/82

The very first request for an advisory opinion which the Court received originated in a personal acquaintance between the Peruvian Minister of Justice and the then Peruvian Judge at the Court, Maximo Cisneros Sanchez.[329] The Minister of Justice, Mr. Enrique Elías La Rosa, sensed that a request for an advisory opinion would help the Court to begin functioning, and asked Judge Cisneros Sanchez on the phone whether such a request had to be limited to the interpretation of the Convention, or whether it could refer to another human rights treaty ratified by the state of Peru under the auspices of the United Nations.[330] Cisneros Sanchez replied that this was a very important but controversial question that would merit being dealt with by the whole Court in form of an advisory opinion.[331] Shortly after that phone conversation, Peru submitted the request asking the Court to clarify the meaning of the term "other treaties concerning the protection of human rights in the American states".[332]

In its request, Peru had already outlined three possible answers. According to the requesting state, the term could either comprise "[o]nly treaties adopted within the framework or under the auspices of the inter-American

329 Maximo Cisneros Sanchez, 'Algunos Aspectos de la Jurisdicción Consultiva de la Corte Interamericana de Derechos Humanos' in Daniel Zovatto (ed), *La Corte Interamericana de Derechos Humanos: Estudios y Documentos* (IIDD, 1985) p. 57.
330 Cisneros Sanchez (n 329) p. 57.
331 *Ibid.*
332 *Ibid.*

system" or "treaties concluded solely among the American states" or lastly, "[a]ll treaties in which one or more American states are parties".[333]

The fact that Peru only indicated different possibilities for the interpretation of the term "in the American states" suggests that it considered what was meant by "other treaties concerning the protection of human rights" to be clear.

It is submitted that anyone would have intuitively understood the expression "other treaties concerning the protection of human rights" to the effect that only those treaties are meant that directly aim at the protection of human rights. At the beginning of the final advisory opinion OC-1/82, the Court itself also spoke of "human rights treaties".[334]

In a subsequent paragraph however, it held that neither the requesting government nor the Convention itself distinguished between "treaties whose main purpose is the protection of human rights and those treaties which, though they may have some other principal object, contain provisions regarding human rights, such as, for example, the Charter of the OAS".[335] Thus, the Court equated "treaties *concerning* the protection of human rights" with "treaties *containing provisions* concerning the protection of human rights". Thereby, in just one paragraph and without any further explanation, the Court paved the way for a final answer that was probably even broader than the broadest answer Peru and the other interested parties had ever thought of.

After this unexpected broad interpretation of the term "treaties concerning the protection of human rights" the Court went on to define the phrase "in the American states". It held that "according to the ordinary meaning to be given to the terms of the treaty in their context, the phrase refers to all those States which may ratify or adhere to the Convention, in accordance with its Article 74, *i.e.*, to Member States of the OAS."[336] It was neither necessary that a treaty in terms of Article 64 was an agreement between American states, regional in character, or adopted under the auspices of the inter-American human rights system, nor that the treaty was only open to OAS member states.

After having undertaken an exemplary interpretation in accordance with the customary means of treaty interpretation contained in Articles 31 and

333 OC-1/82 (n 42) para. 8.
334 OC-1/82 (n 42) para. 24.
335 OC-1/82 (n 42) para. 34.
336 OC-1/82 (n 42) para. 35.

32 VCLT, the Court instead concluded "that no good reason exists to hold, in advance and in the abstract that the Court lacks the power to receive a request for, or to issue an advisory opinion about a human rights treaty applicable to an American State merely because non-American States are also parties to the treaty or because the treaty has not been adopted within the framework or under the auspices of the inter-American system".[337] Put otherwise, it suffices that the respective treaty is applicable in one single OAS member state.[338]

The Court argued that the fact that the "narrowly drawn Article 1 of Protocol No. 2" to the ECHR already existed when the ACHR was drafted demonstrated that the Convention's drafters "intended to confer on the Court the most extensive advisory jurisdiction, intentionally departing from the limitations imposed on the European system."[339]

Furthermore, the Court mentioned that the majority of American states had opted for the continuation of the drafting of the ACHR even when the two UN Covenants had been opened for signature, which proved in the eyes of the Court the tendency of the Convention "to conform the regional system to the universal one".[340]

Although there is no explicit statement contained in the *travaux préparatoires* that would prove that the drafters thought of the two UN Covenants when they included the term "other treaties", it seems indeed likely that they wanted the Court to be competent to interpret these international human rights treaties together with the Convention in order to avoid discrepancies between the interpretation of the regional and the universal treaties.

Viewed separately, both the interpretation of the term "treaties concerning the protection of human rights" and the interpretation of the term "American states" are convincing. Especially the conclusion that other human rights treaties like the two UN Covenants should be encompassed appears reasonable. However, in the end, the fact that the Court did interpret both terms separately, and that it also extended the interpretation to treaties that are typically not considered as human rights treaties, produced such a surprisingly broad scope *ratione materiae* that one would not have assumed at a first glance at the overall provision of Article 64 (1).

337 OC-1/82 (n 42) para. 48.
338 *Cf.*: OC-1/82 (n 42) para. 38.
339 OC-1/82 (n 42) para. 46.
340 OC-1/82 (n 42) para. 47.

Submissions which had urged for a restrictive interpretation arguing firstly that "a broad interpretation would authorize the Court to render opinions affecting States which have nothing to do with the Convention or the Court"[341] and might secondly "produce conflicting interpretations"[342] were rejected for various reasons.

With respect to the first argument, the Court found that the mere hypothetic possibility that states not represented before the Court could be affected by advisory opinions was hardly sufficient to argue that the Court in general lacks the power to interpret human rights obligations originating from treaties being concluded outside the inter-American system.[343] Instead, the Court emphasized that it would abstain from issuing an opinion if a request had as its "principal purpose the determination of the scope of, or compliance with, international commitments assumed by States outside the inter-American system".[344]

The second argument was rightly dismissed on the grounds that even if the Court opted for a narrow interpretation of Article 64, conflicting interpretations could still arise, given that the ICJ was in any event competent to interpret treaties that would fall under the scope of Article 64.[345] The Court's final conclusion was thus that

> *"the advisory jurisdiction of the Court can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto".*[346]

This final interpretation resulting from the product of two broad interpretations of the terms "concerning the protection of human rights" and "in the American states" taken together facilitated advisory opinions such as OC-16/99 on the right to consular assistance contained in Article 36 Vienna Convention on Consular Relations, a treaty that has non-American states as

341 OC-1/82 (n 42) para. 49.
342 OC-1/82 (n 42) para. 50.
343 *Cf.*: OC-1/82 (n 42) para. 49.
344 OC-1/82 (n 42) para. 49.
345 OC-1/82 (n 42) para. 50.
346 OC-1/82 (n 42) para. 52.

contracting parties, and that moreover has a principal objective other than the protection of human rights.[347]

2. Interpretation of soft law instruments and references to customary international law

In OC-10/89 the Court was asked by Colombia whether it was, under Article 64, also competent to interpret the American Declaration of the Rights and Duties of Man. The Court found that the Declaration was not a treaty,

347 In the OC-16/99 proceedings, the United States argued that the Vienna Convention on Consular Relations was "neither a human rights treaty nor a treaty 'concerning' the protection of human rights", and that the "fact that a global treaty affords protection or advantages or enhances an individual's possibility of exercising his human rights does not mean that it concerns the protection of human rights and that the Court has therefore competence to interpret it". The Court however affirmed its competence without further ado and found in the merits part of the advisory opinion that "Article 36 of the Vienna Convention on Consular Relations endows a detained foreign national with individual rights" and that the consular communication to which that provision referred indeed concerned the protection of human rights. See: OC-16/99 (n 227) paras. 26, 27, 84–87.
Without referring to advisory opinion OC-16/99 of the IACtHR, the ICJ confirmed that Article 36 (1) of the Vienna Convention on Consular Relations creates individual rights in the case of *LaGrand*. The ICJ, however, held it was not necessary to decide whether the right created by Article 36 (1) Vienna Convention on Consular Relations had assumed "the character of a human right" as Germany had contended. See: ICJ, *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001, I.C.J. Reports 2001, p. 466, 494, para. 77; *cf.*: Hennebel and Tigroudja, *The American Convention on Human Rights: A Commentary* (n 203) Article 64, p. 1359.
Based on the broad interpretation made of the term "other treaties concerning the protection of human rights in the American states" the Court is also competent to interpret provisions of the OAS Charter. While the OAS Charter contains a few provisions referring to fundamental rights of the individual (e.g. Articles 3 lit. l, 34 and 45), it is the constitutive treaty of the OAS and thus no "classical" human rights treaty. Nevertheless, based on the interpretation established in OC-1/82, the Court has also interpreted provisions of the OAS Charter. See for example: OC-26/20 (n 24) paras. 119–146 and *Right to freedom of association, right to collective bargaining and right to strike, and their relation to other rights, with a gender perspective (Interpretation and scope of Articles 13, 15, 16, 24, 25 and 26 in conjunction with Articles 1(1) and 2 of the American Convention on Human Rights, Articles 3, 6, 7 and 8 of the Protocol of San Salvador, Articles 2, 3, 4, 5 and 6 of the Convention Belém do Pará, Articles 34, 44 and 45 of the Charter of the Organization of American States, and Articles II, IV, XIV, XXI and XXII of the American Declaration of Rights and Duties of Man)*, Advisory Opinion OC-27/21, Series A No. 27 (5 May 2021) paras. 47, 201.

but that it nevertheless did not lack legal effects, and that it was competent to render advisory opinions interpreting the American Declaration because the latter contained the fundamental human rights referred to in the OAS Charter.[348] Given that the OAS Charter in turn was a treaty in terms of Article 64 (1), and that the Convention itself in its Preamble also referred to the American Declaration, the Court held it was authorized by Article 64 (1) to interpret the Declaration whenever this was necessary in order to interpret the OAS Charter or the Convention.[349]

In two more recent advisory opinions, the Court also interpreted provisions of the Inter-American Democratic Charter[350], holding that it was an interpretative text of the OAS Charter and the Convention, and that it was therefore competent to interpret it in the context of its advisory function.[351] The Court did not further try to explain in how far the Democratic Charter could be regarded as a human rights treaty in terms of Article 64. In the eyes of the Court, it seems to suffice that there is a relevant connection between the Democratic Charter and the Charter of the OAS and the Convention.

In his dissenting opinion attached to OC-28/21, Judge Pazmiño Freire criticized this and held that the Court had exceeded its competences by directly interpreting provisions of the Democratic Charter.[352] He remarked

348 *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, Series A No. 10 (14 July 1989) paras. 43, 47.

349 OC-10/89 (n 348) paras. 44, 48.

350 The Inter-American Democratic Charter was unanimously adopted in form of a resolution by the OAS General Assembly and signed by the OAS member states on 11 September 2001. The legal status of the document is disputed. While some argue that General Assembly resolutions are not legally binding for the member states and that the Democratic Charter thus constitutes only soft law, others point to the fact, that the resolution was unanimously adopted and hold that the Democratic Charter contains interpretations of the OAS Charter that are binding for all member states. See on this: Timothy D. Rudy, *'A Quick Look at the Inter-American Democratic Charter of the OAS: What is it and is it legal?'* (2005) 33 Syracuse Journal of International Law and Commerce, 237, 240; OAS, Annual Report of the Inter-American Juridical Committee to the General Assembly, OAS/Ser.Q/VI.32, 24 August 2001, p. 29, 32, paras. 5, 32; Antonio F. Pérez, '*Mechanisms for the Protection of Democracy in the Inter-American System and the Competing Lockean and Aristotelian Constitutions*', p. 224–226, 240, available at: http://www.oas.org/es/sla/ddi/docs/publicaciones_digital_XXXIII_curso_derecho_internacional_2006_Antonio_F_Perez.pdf.

351 OC-26/20 (n 24) para. 42; OC-28/21 (n 274) paras. 29–30.

352 OC-28/21 (n 274), Dissenting Opinion of Judge L. Patricio Pazmiño Freire, paras. 9–13.

that the Democratic Charter was firstly not a treaty and secondly an instrument of public international law in application between states not containing provisions specifically aimed at the protection of human rights of individuals.[353]

Principally, these may be reasonable arguments against the Court's competence to interpret the Democratic Charter in the context of its advisory function. However, they disregard the broad interpretation established by the Court since OC-1/82, and the Court's practice to also interpret treaties whose main concern is not the protection of human rights, like the Vienna Convention on Consular Relations.

What is more, Judge Pazmiño's critique comes as a surprise given that he took also part in the earlier OC-26/20, in which the Court had referred to the Democratic Charter once before. In that case, Judge Pazmiño also attached a partly dissenting opinion, in which he notably had not criticized the Court's references to the Democratic Charter. To the contrary, at the time he complained that the Court had omitted a chance to further enrich the concept of the democratic principle and noted that the Democratic Charter had depicted the relationship between human rights and representative democracy.[354] Against this backdrop, his critique brought forward in the context of OC-28/21 appears contradictory and pretextual.

The fact that the notion "other treaties concerning the protection of human rights in the American states" does not constitute any significant limitation to the Court's advisory jurisdiction *ratione materiae* anymore, is finally highlighted by the Court's statements on customary international law made in OC-26/20. In the corresponding request, Colombia had consulted the Court on the obligations of a state that denounces the OAS Charter or the Convention, and had extended its questions also to obligations arising under customary international law.[355] In light of this, the United States underlined in its written observations that the Court was not a "body of general jurisdiction", and that it should "refrain from addressing

353 OC-28/21 (n 274), Dissenting Opinion of Judge L. Patricio Pazmiño Freire, para. 12.

354 OC-26/20 (n 24), Partly Dissenting Opinion of Judge L. Patricio Pazmiño Freire, paras. 1–7.

355 Colombia, *Request for an Advisory Opinion on obligations in matters of human rights of a states that has denounced the American Convention on Human Rights, and attempts to withdraw from the OAS*, 3 May 2019.

customary international law" as this was not covered by its competence under Article 64 (1).[356]

In its final advisory opinion, the Court, however, held that it was "competent to refer to international customary law" as this was one of the "relevant sources" of human rights law which it had to take into account when "exercising its interpretative function" under Article 64.[357] Yet, it is only a fine line between referring to customary international law "as a source of interpretation" on the one hand, and interpretating customary international law on the other.[358] Although the Court did not undertake a thorough analysis of existing rules under customary international law, one might still hold that the Court has crossed this line in OC-20/26. This is because, it not only used customary international law in order to interpret a treaty provision, but referred more generally to the human rights obligations under customary international law that continue to bind a state that has denounced the OAS Charter and the ACHR.[359]

3. Concluding summary

In sum, the Court has first interpreted the term "other treaties concerning the protection of human rights in the American states" very broadly in OC-1/82. Thereafter, it has further decreased the limiting effect of the term by also interpreting legal instruments other than treaties provided that they can be regarded as interpretative texts of the Convention or the OAS Charter, and furthermore, by answering questions that relate to obligations existing under customary international law.

IV. Article 64 (2): Compatibility of domestic laws

Article 64 (2) permits the OAS member states to consult the Court when they have doubts whether any of their domestic laws is compatible with the

356 Written observations of the United States of America, OC-26/20 proceedings, available at: https://www.corteidh.or.cr/sitios/observaciones/oc26/3_estadosunidos.pdf, p. 3.
357 OC-26/20 (n 24) para. 28.
358 *Cf.*: Hennebel and Tigroudja, *The American Convention on Human Rights: A Commentary* (n 203) Article 64, p. 1360.
359 OC-26/20 (n 24) in particular paras. 100–110.

Convention or with any of the other international instruments in terms of Article 64 (1).

The idea behind the norm is slightly reminiscent of preliminary ruling procedures, like for example the preliminary ruling jurisdiction of the Court of Justice of the European Union (CJEU) pursuant to Article 267 TFEU. Yet, while Article 267 TFEU authorizes and partly obliges national courts to refer questions of interpretation to the CJEU, requests under Article 64 (2) may not be made by national courts but only by member states as such, which means that the request must be made by an entity entitled to speak for the whole state on the international plane.[360] Furthermore, requests under Article 64 (2) shall be abstract just like questions under Article 64 (1), while requests under preliminary ruling procedures typically deal with questions of interpretation that have arisen in a contentious case pending before the requesting national court.

What is more, it seems that the original *rationale* of Article 64 (2) has rather been to provide guidance to the requesting governments in order to prevent human rights violations in the respective national legal systems than to achieve an overall consistent interpretation of the Convention. The latter has, however, always been the object and purpose of the European preliminary ruling procedure, given that a consistent interpretation of the law of the European Union (EU) has been considered a necessary prerequisite for the functioning of a common market.[361]

To date, only five requests have been made under Article 64 (2), all of them stemming from Costa Rica. Two[362] of the five have been rejected

360 OC-4/84 (n 233) para. 11. On the theoretical possibility for domestic courts to channel a request through the executive to IACtHR see already *supra*: Chapter 3, Section A.III.1.

361 Pierre Pescatore, *'Das Vorabentscheidungsverfahren nach Art. 177 EWG-Vertrag und die Zusammenarbeit zwischen dem Gerichtshof und den nationalen Gerichten'* (1987) No. 2 Bayrische Verwaltungsblätter, 33, 34.

362 *Compatibility of draft legislation with Article 8(2)(h) of the American Convention on Human Rights*, Advisory Opinion OC-12/91, Series A No. 12 (6 December 1991); IACtHR, Resolution of 10 May 2005, Rejection of a request presented by Costa Rica [published only in Spanish]. The first opinion formally looks like a normal advisory opinion, but the Court declined to answer the request as cases concerning the same provision were pending before the IACHR. Later, the Court has rejected requests via orders/*resoluciones* thus also formally highlighting the rejection.

by the Court, and two[363] of the remaining three were both also based on Article 64 (1).

In the first advisory opinion, based solely on Article 64 (2), the Court's opinion was sought in relation to a proposed amendment of the Costa Rican constitution. The Court was required to consider two preliminary questions and was thereby provided with the opportunity to clarify the scope of Article 64 (2).

First, it determined that the term "domestic laws" must be understood broadly to encompass "all national legislation and legal norms of whatsoever nature, including provisions of the national constitution".[364] Second, it found that requests may also refer to laws that are not yet in force, as any interpretation to the contrary "would unduly limit the advisory function of the Court".[365]

These findings are both persuasive. The first is not really questionable, as a state's constitution from the perspective of international law must also count as "domestic law". The second finding is a bit more controversial as one could, from a strictly textual point of view, also argue that a law that has only been proposed is not yet existent.

However, given the fact that the law enactment procedures may differ from country to country and that, as the Court stated, no government should be forced to promulgate a law that violates the Convention before it can, in a time consuming procedure, obtain an opinion from the Court, any other finding would have either been too complicated or against the Convention's object and purpose. Besides, the threshold to consult the Court on a mere law proposal is supposedly lower, as a state then prevents an embarrassing finding that one of its laws violates human rights and avoids being pressured to change such law, or to declare it void.

Furthermore, the Court retains the option of rejecting a request should the law proposal still be too vague, as it has held that the advisory jurisdiction should not be (mis)used "for purely academic speculation".[366] Another of its rejection criteria, which is particularly relevant with regard to requests

363 *Compulsory membership in an association prescribed by law for the practice of journalism (Arts. 13 and 29 American Convention on Human Rights)* Advisory Opinion OC-5/85, Series A No. 5 (13 November 1985); OC-24/17 (n 1).

364 OC-4/84 (n 233) para. 14.

365 OC-4/84 (n 233) para. 28.

366 *Judicial guarantees in states of emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights)* Advisory Opinion OC-9/87, Series A No. 9 (6 October 1987) para. 16.

under Article 64 (2), is that the Court should "avoid becoming embroiled in domestic political squabbles", meaning that a request sought in order to "affect the outcome of the domestic legal process for narrow partisan political ends" should be rejected.[367]

In theory, the Court has thus struck a balance between facilitating the application of Article 64 (2) through a broad interpretation of its terms and retaining the power to prevent any misuse of the provision by being able to reject improper requests. Yet, as will be analyzed in more detail below, the Court has not always applied its rejection criteria consistently.[368] In the case of OC-24/17, it decided to render the advisory opinion sought by Costa Rica even though the topic was the subject of ongoing national debates, and the impact of the advisory opinion's publication on the presidential election campaign later led to the Court being embroiled in domestic politics and harshly criticized by national politicians.[369]

The fact that, despite the low threshold, there have been so few requests to date under Article 64 (2), and that no other state than Costa Rica has used the provision may be explained by the reluctance of most states and their legislative bodies to involve courts in general, and in particular an international court, in their national law-making processes. For it is precisely the legislative bodies that fundamentally consider themselves legitimized to best represent the will of the people. Some states may also fear involving the Court in national political squabbles, which happened in the case of OC-24/17. In other states, the opposition might be willing to get the Court involved but has no direct access to the Court, and lacks under the constitution the possibility to have a request for an advisory opinion be referred to the Court in San José.

Advisory opinions issued under Article 64 (2) are of the same judicial nature as those rendered under Article 64 (1).[370] Thus, while the Court may

367 OC-4/84 (n 233) para. 29.

368 See on this *infra* Chapter 4, Section C.II.

369 As to the critique of national politicians see: '*Fabricio Alvarado dispuesto a salirse de la Corte IDH para. que no le 'impongan' agenda LGBTI*', Elmundo.cr, 11 January 2018, https://www.elmundo.cr/costa-rica/fabricio-alvarado-dispuesto-salirse-la-corte-idh-no-le-impongan-agenda-lgtbi/; '*Las ideas de Fabricio Alvarado sobre la Corte IDH, puestas a prueba*', Semanario Universidad, 3 February 2018, https://semanariouniversidad.com/pais/ideas-fabricio-alvarado-sobre-corte-idh-puestas-a-prueba/. For more information, as to the background of OC-24/17 see *infra*: Chapter 4, Section C.II.2. and Section H.

370 Notably, Faúndez Ledesma maintains the opposite. See, Faúndez Ledesma (n 26) pp. 989, 991 and also *infra*: Chapter 5, Section B.IV.2.a), aa).

explain why a certain domestic law is incompatible with the Convention, or how it must be interpreted in order to be compatible with a state's international human rights obligations, it cannot declare a domestic law void, nor order the state to reform the respective law via an advisory opinion as it has done in contentious proceedings.[371]

As highlighted by advisory opinions OC-5/95 and OC-24/17, states may combine requests under Article 64 (1) and (2). In the first of these cases, the Court decided to sever the proceedings as the request under Article 64 (2) was supposedly not of interest to all OAS members states.[372] It held two separate public hearings, one concerning the question under Article 64 (2) and another concerning the question under Article 64 (1).[373]

Later, the Rules of Procedure of the Court aligned the procedure of requests under Article 64 (2) further to the one which the Court follows in advisory proceedings under Article 64 (1) based on the reasoning that requests under Article 64 (2) also may be of general public interest.[374] Since the Rules of Procedure adopted in 1991 have entered into force, the Secretary shall transmit copies of all requests for advisory opinions to the OAS member states and the OAS organs, and not only in the case of requests made under Article 64 (1).[375] The public hearing held in the case of

371 *Cf.*: *International responsibility for the promulgation and enforcement of laws in violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94, Series A No. 14 (9 December 1994) para. 22; Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 58. As to contentious cases in which the Court has nullified domestic laws see: IACtHR, *Case of Barrios Altos v Peru* (n 328), para. 44; IACtHR, *Case of Gomes Lund Et Al. ("Guerrilha do Araguaia") v. Brazil*, Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations, and Costs), Series C No. 219, para. 174; IACtHR, *Case of Gelman v. Uruguay*, Judgment of 24 February 2011 (Merits and Reparations), Series C No. 221, para. 312 (11); González-Domínguez (n 328) p. 29–31; Binder (n 328) p. 1203, 1210–1212; Juan Pablo Perez-Leon-Acevedo, '*The Control of the Inter-American Court of Human Rights over amnesty laws and other exemption measures: Legitimacy assessment*' (2020) 33 Leiden Journal of International Law, 667–687.

372 OC-5/85 (n 363) para. 6.

373 OC-5/85 (n 363) paras. 7, 9.

374 Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court* (n 41) p. 16 fn. 65; Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 70–71.

375 See the different formulations in Article 52 of the Rules of Procedure of 1980 compared to Article 54 of the Rules of Procedure of 1991 and Article 73 of the current Rules of Procedure. Both the current and the previous Rules of Procedure

the OC-24/17 was no longer split up into questions under Article 64 (1) and Article 64 (2).

Given that the standing to present requests under Article 64 (2) is reserved for states, it has been argued that OAS organs, and especially the IACHR, may not formulate a request under Article 64 (1) which has at its heart the examination of the compatibility of a domestic law with the Convention.[376] In the proceeding of OC-3/83, this question could have been raised as an objection to the Court's jurisdiction for the first time. Although the Commission's request *prima facie* only asked for an interpretation of Article 4 (2), it was actually questioning the conventionality of Guatemalan laws on the basis of which *Tribunales de Fuero Especial* had been installed, a kind of military court that frequently imposed the death penalty. In this case, however, Guatemala raised a more basic objection to the Court's jurisdiction. It had not yet accepted the Court's jurisdiction and regarded the request of the Commission as a disguised contentious case, meaning as an intent of the Commission to circumvent the requirement that Guatemala declared its consent in terms of Article 62.[377]

Therefore, the question on the interrelation between Article 64 (1) and (2), and whether the more specific Article (2) precludes the Commission or any other OAS organ from addressing aspects that are indirectly linked to a domestic law in a request formulated under Article 64 (1) was only raised at a later point in time.

In November 1993 the IACHR submitted a request to the Court consisting of two questions.[378] The questions themselves hinted neither to a certain country nor to a specific domestic law. But in the explanation of the considerations that gave rise to the request, the Commission referred to the example of a norm in the draft for the new Peruvian Constitution through which the application of the death penalty was supposed to be extended.[379]

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can be found on the Court's website: https://www.corteidh.or.cr/reglamento.cfm?lang=en.

376 *Cf.*: Guevara Palacios (n 12) p. 179.

377 *Cf.*: OC-3/83 (n 245) para. 11; Letter from the Permanent Mission of Guatemala to the Organization of American States to the President of the IACHR, 19 April 1983.

378 IACHR, *Solicitud de Opinion Consultiva*, 8 November 1993 [available only in Spanish]; see OC-14/94 (n 371) para. 1 for the English translation of the two questions.

379 IACHR, *Solicitud de Opinion Consultiva*, 8 November 1993, p. 1 [available only in Spanish].

This constituted, according to the Commission, a violation of Article 4 (2) and (3).[380]

Peru, in a written observation, requested the Court to refuse to render the opinion requested by the ACHR or, alternatively, to declare it inadmissible. It stated:

> *"The IACHR, as a specialized organ of the Organization, invokes the procedure set forth in paragraph 1 of Article 64; however, it encroaches on an area that is reserved exclusively to states whose domestic laws are involved, something contemplated in another provision -paragraph 2 of that same Article 64- [...]*
> *[P]rocedural logic has been distorted in the IACHR's request. That organ of the inter-American system makes express reference to a domestic Peruvian situation and seeks to indirectly question a national law, namely, the new norm contained in Article 140 of the new Constitution of Peru [...][...] To admit the advisory opinion request under these conditions would be to set an unfortunate precedent, in the sense that it would encourage interference in the domestic legislative mechanisms of the Member States of the Organization of American States by an organ that is a part of that system […]*
> *Consequently, the IACHR's request is inadmissible because that body does not have the standing to address the Honorable Court, in view of the fact that the matter at issue is the exclusive concern of the states, as provided in paragraph 2 of Article 64 of the Convention, which is the provision applicable to the instant case. [I]t is evident that the IACHR seeks to obtain indirectly what it is prevented from achieving directly by the aforementioned provision of the Convention."*[381]

The position of Peru could have been supported if Article 64 (2) was a *lex specialis* to Article 64 (1) so that the OAS organs and other states were precluded from making any request relating somehow to a national law of a specific state and its compatibility with the Convention or other human rights treaties. However, it is not convincing that Article 64 (2) was meant to limit the standing of OAS organs under Article 64 (1) in such way as this could obstruct the Commission from carrying out its tasks as efficiently as possible. Accordingly, the Court rejected Peru's objections and

380 *Ibid.*
381 See OC-14/94 (n 371) para. 12.

strengthened in its final opinion the position of the Commission vis-à-vis states.

The Court distinguished between the various questions, which had been raised in an abstract form, and the considerations in which the Commission had explained its motivation to make the request, including the mentioning of Article 140 of the Peruvian draft Constitution.[382] The Court held that the considerations needed to be read in relation to Article 51 (1) and (2) of the Rules of Procedure in force at the time, and the Court's demand that a request must not be based on a purely academic issue, but must instead have a realistic significance.[383] While the Commission was not allowed to seek to have a contentious case decided by the Court in an advisory proceeding, the mere existence of a dispute between the Commission and a government, and the fact that the Commission held a national law to be incompatible with the Convention did not require the Court to decline to issue an advisory opinion.[384] Rather, the advisory jurisdiction of the Court was supposed to support the Commission as far as possible in carrying out its functions which included, according to Article 41, the making of recommendations and the competence to find a domestic law to be in violation of the Convention.[385]

In contrast to Peru, the Court did not understand the request as an intent to have the Peruvian Draft Constitution's compatibility with the Convention tested. Instead, the Court concentrated on the abstract question on the obligations and responsibilities of states and individuals who promulgate or enforce domestic laws that are manifestly in violation of the Convention. By limiting OC-14/94 on the analysis of that abstract question, and by refraining from any comment on the Peruvian Draft Constitution, the Court managed to answer the request without encroaching on the state's exclusive right under Article 64 (2).

What follows from the Court's arguments in OC-14/94 is the conclusion that Article 64 (2) preserves the right to have its own domestic laws evaluated exclusively to states. In other words, requests under Article 64 (1) made by OAS organs or a third state may not ask for the examination of the compatibility with the Convention of a specific domestic law of another state.

382 OC-14/94 (n 371) para. 24.
383 OC-14/94 (n 371) para. 27.
384 OC-14/94 (n 371) para. 27f.
385 OC-14/94 (n 371), para. 25.

At the same time however, Article 64 (2) does not preclude OAS organs or states from being induced by a national law (proposal) of an OAS member state to raise an abstract legal question under Article 64 (1) that indirectly also challenges the conventionality of that specific domestic law (proposal).

Overall, one can state that not only requests under Article 64 (1) may have an impact on the domestic laws of states other than the requesting state, but that *vice versa* requests under Article 64 (2) may also be of interest to other states if they have laws in force that are similar to that of the requesting state.

C. Power to determine and to broaden the scope of requests

The Court possesses the inherent power to determine the scope and meaning of the questions submitted to it. Consequently, the Court has, like the PCIJ and the ICJ, consistently stated that it may "define and clarify and, in certain cases, […] reformulate the questions submitted to it".[386] In its advisory practice the Court has exercised this power in different kinds of ways.

I. Clarification and reduction

In case the questions posed to the Court are not clear, or if they would allow for a very broad answer, it is important that the Court defines and clarifies how it has understood the questions, and on which factual presumptions its advisory opinion is based in order to know in which

386 OC-7/86 (n 325) para. 12; OC-23/17 (n 4) para. 36; OC-25/18 (n 227) para. 55; OC-27/21 (n 347) para. 30; As to the jurisprudence of the PCIJ and ICJ on this point see in particular: PCIJ, *Interpretation of the Greco-Turkish Agreement of December 1st, 1926 (Final Protocol, Article IV)*, Advisory Opinion of 28 August 1928, Series B No. 16, p. 14–16; ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, I.C.J. Reports 1980, p. 73, 88–89 para. 35; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004 p. 136, 153–154, para. 38; ICJ, *Accordance with International Law on the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, I.C.J. Reports 2010, p. 403, 423, para. 50; and for further information d'Argent, 'Art. 65' (n 73) mn. 36–40.

situations the statements and advice given in the opinion should apply. For example, in OC-28/21 the Court inferred that Colombia's questions related to presidential re-elections without term limits in presidential systems, and thus clarified that the considerations made in its advisory opinions were limited to this kind of governmental system.[387]

Furthermore, the Court may be required to reduce the scope of a question or to interpret it in a way that ensures that the answer does not fall outside of its jurisdiction as it has held that it "is called upon to give its answer even though [a] request might contain issues outside the scope of its jurisdiction".[388]

This became relevant in the case of OC-7/86 in which Costa Rica had asked three questions that were conditioned one upon another. The first question allowed for two different interpretations, of which only one was covered by the Court's advisory jurisdiction while the other interpretation would have forced the Court to opine on the application of Article 14 on the right to reply within Costa Rica's domestic legal system.[389] Therefore, the Court decided to concentrate only on the abstract interpretation of Article 14 in relation to Article 1 of the Convention, excluding the dimension of the question that would have forced it to examine the effect of Article 14 within Costa Rica's domestic legal system.

The interpretation thus given to the first question excluded the condition on which Costa Rica's second question was actually based.[390] Nevertheless, the second question, whether Costa Rica was under an obligation to adopt legislative or other measures if the first question was answered in the negative, could be answered in a general and abstract way without a logical tie to the first question. The Court simply affirmed that a state is under Article 2 required to adopt legislative or other measures in order to give effect to the right enshrined in Article 14, if said provision is not yet directly enforceable under the domestic legal system of that state.[391]

In contrast to the Court's majority, three judges, namely Judge Nikken, Judge Nieto Navia and Judge Buergenthal, held the first question to be entirely inadmissible as the government's considerations which gave rise to

387 OC-28/21 (n 274) para. 39.
388 OC-7/86 (n 325) para. 12.
389 *Cf.*: OC-7/86 (n 325) para. 14. *Supra*, in Chapter 3, Section B.II. it has already been noted that it is likely that the Court would answer such a question less reluctantly nowadays.
390 *Cf.*: OC-7/86 (n 325) para. 16.
391 *Cf.*: OC-7/86 (n 325) para. 35 (2B.).

the request had clearly demonstrated that Costa Rica in fact only sought a determination of whether or not the right enshrined in Article 14 was already guaranteed under the Costa Rican laws in force.[392] Consequently, they held that the Court should have rejected the whole request instead of giving the questions another meaning so that they fall within its jurisdiction.[393]

The interpretation given to the questions by the majority of the Court led to an answer that did not provide any real new insight, but at least it was possible to reach this interpretation of the questions by the means of treaty interpretation. Hence, the Court did not exceed its competences in rendering the advisory opinion as it did.

II. Summarizing and expanding

Once the Court is confronted with a whole catalogue of very detailed questions, the Court sometimes not only reformulates but also summarizes the questions into fewer more general and overarching ones.[394] This practice of reformulation and summarizing does not raise any concerns as long as the Court does not thereby broaden the substantial scope of the questions but remains within the limits of what was asked by the requesting entity. It forms part of the Court's judicial autonomy, and is furthermore supported by the principle *jura novit curia*, to decide how to structure the advisory opinion and how the legal issues raised by the questions submitted to it can best be addressed.[395] The Court has also used the reformulation and

392 OC-7/86 (n 325) Joint dissenting opinion of Judges Rafael Nieto Navia and Pedro Nikken, paras. 8–16; OC-7/86 (n 325) Dissenting and concurring opinion of Judge Thomas Buergenthal, para. 1.

393 OC-7/86 (n 325) Joint dissenting opinion of Judges Rafael Nieto Navia and Pedro Nikken, para. 16; OC-7/86 (n 325) Dissenting and concurring opinion of Judge Thomas Buergenthal, para. 1.

394 See for example the questions posed by the IACHR in the *Request for an Advisory Opinion on the scope of state obligations under the Inter-American System with regard to the guarantee of trade union freedom, its relationship to other rights, and its application from a gender perspective*, 31 July 2019, para. 69 and how the Court summarized the questions in its corresponding advisory opinion OC-27/21 (n 347) para. 33.

395 *Cf.:* OC-24/17 (n 1) para. 52. On the relationship between the principle of *ne ultra petita* and *jura novit curia* see: Attila Tanzi, '*Ultra Petita*', Max Planck Encyclopedias of International Law (last updated November 2019), paras. 10–13 available at: https:/

summing up of questions to eliminate factual presumptions contained in them that would have tied the answer of the Court to the specific case or dispute that gave rise to the request.[396]

Although the ICJ for its part has held that it may also "broaden"[397] the questions submitted to it, expanding questions is problematic, since, as discussed above, the Court lacks the competence to initiate advisory proceedings *proprio motu*.[398] If it could, however, arbitrarily broaden the scope of questions put to it, this would basically amount to the exercise of *proprio motu* jurisdiction.

Furthermore, the principle *non ultra petita* is also applicable in advisory proceedings, meaning that the Court may "not go beyond what [it] has been asked" when it renders an advisory opinion.[399] Otherwise, it acts *ultra vires*.[400] While there are no parties in advisory proceedings that must have consented to the Court's jurisdiction in that specific proceeding, "consent remains the basis of jurisdiction" also as regards the Court's advisory function.[401] The consent was collectively expressed by the OAS member states when they adopted the ACHR, and Article 64 as it stands until today limits the Court's jurisdiction to matters it is consulted on.

On the other hand, the ICJ has convincingly argued that "to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions really in issue in questions formulated in a request" and that it consequently "could not discharge the obligation incumbent upon it [...] if, in replying to the request it did not take into consideration all the pertinent legal issues in-

/opil.ouplaw.com/view/10.1093/law-mpeipro/e2239.013.2239/law-mpeipro-e2239?rskey=N0dIwR&result=1&prd=MPIL.

396 OC-25/18 (n 227) paras. 54–57.

397 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004 p. 136, 153–154, para. 38; *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, Advisory Opinion of 1 June 1956, I.C.J. Reports 1956, p. 23, 25–26.

398 See *supra*: Chapter 3, Section A.IV.

399 Hugh Thirlway, *The International Court of Justice* (OUP, 2016) p. 63; d'Argent, 'Art. 65' (n 73) mn. 38.

400 *Cf.*: *Boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy*, Arbitral Award of 21 October 1994, Reports of International Arbitral Awards, Volume XXII, p. 3, 26, para. 77; Tanzi (n 395) para. 7.

401 *Cf.* with regard to the ICJ: Thirlway (n 399) p. 62.

volved in the matter to which the questions are addressed."[402] Based on this, the ICJ held in the *Wall opinion* that the question of the General Assembly as to the "'legal consequences' arising from the construction of the wall […] necessarily encompasses an assessment of whether the construction is or is not in breach of […] international law."[403]

Arguably, the IACtHR has acted even more boldly than that in at least two advisory proceedings in that it reformulated and thereby broadened the scope of the request or by answering the questions very extensively. This raises the question whether these extensions were needed to answer the legal questions "really in issue" in a meaningful way, or whether the Court acted *ultra petita*.

1. OC-23/17

In the request that led to OC-23/17, Colombia posed three specific questions to the Court. The first one was conditioned on four preconditions that limited the question to the extraterritorial jurisdiction of states on areas for which an environmental protection regime and an area of functional jurisdiction has been established under a treaty, such as the area covered by the Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region ('Cartagena Convention').[404]

The Court held the four preconditions to be unnecessarily restrictive. It decided to answer Colombia's first question not only with regard to areas such as the marine environment protected by the Cartagena Convention, but to refer more generally to the extraterritorial jurisdiction in the context of compliance with obligations relating to the environment.[405] The Court held that the questions raised were not only of interest to the states parties to the Cartagena Convention but "important for all the States of the plan-

402 ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, I.C.J. Reports 1980, p. 73, 88–89 para. 35.

403 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004 p. 136, 153–154, para. 39.

404 OC-23/17 (n 4) para. 32. See also the comment by Giovanny Vega-Barbosa and Lorraine Aboagye, Human Rights and the Protection of the Environment: *The Advisory Opinion of the Inter-American Court of Human Rights*, EJIL:Talk!, 26 February 2018, available at: https://www.ejiltalk.org/human-rights-and-the-protection-of-the-environment-the-advisory-opinion-of-the-inter-american-court-of-human-rights/.

405 OC-23/17 (n 4) para. 36.

et".[406] Moreover, given "the relevance of the environment as a whole for the protection of human rights" the Court did "not find it pertinent to restrict its response to the marine environment."[407]

The main reason for this decisive extension of the subject matter of the request was, however, that it allowed the Court to give a more general advisory opinion, detached from the specific dispute between Colombia and Nicaragua over maritime territories in the Caribbean Sea that had given rise to Colombia's request.[408]

Thus, the reformulation was, like in other instances, used to render the final advisory opinion generally applicable, independently from the specific dispute that gave rise to the proceeding. Yet, this time, the reformulation led to a considerable broadening of the opinion's scope both *ratione loci* and *ratione materiae*.

At the same time, the extension of the first question was not arbitrary and it definitely increased the relevance of the advisory opinion. Had the final advisory opinion been limited to areas of functional jurisdiction such as the one established under the Cartagena Convention, academics and human rights organizations would have probably argued afterwards that the Court's findings could also be applied analogously to other environmental areas, but the legal situation would have been unclear.

Hence, one could argue with the words of the ICJ that "a reply to questions of the kind posed […] may, if incomplete, be not only ineffectual but actually misleading as to the legal rules applicable to the matter under consideration […]".[409] Further, bearing in mind its "judicial character" the Court could not have "adequately discharge[ed] the obligation incumbent upon it" in the context of its advisory jurisdiction without approaching the legal issues raised by Colombia in a more comprehensive way.[410]

Yet, this type of argument is prone to be abused as almost any question raises related issues that could be said to be of general and great interest, and which would demand to be addressed as well. This shows how difficult

406 OC-23/17 (n 4) para. 35.
407 OC-23/17 (n 4) para. 35.
408 *Cf.*: OC-23/17 (n 4) paras. 35–36; Kahl (n 7) p. 5. For more information as to the factual background of OC-23/17 see also *infra*: Chapter 4, Section C.II.1.d) aa) (2).
409 *Cf.*: ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, I.C.J. Reports 1980, p. 73, 89 para. 35.
410 *Cf.*: ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, I.C.J. Reports 1980, p. 73, 88–89 para. 35.

it is to strike the right balance between warranted extensions of questions on the one hand, and an arbitrary extension that would lack legitimacy on the other hand.

In order to avoid being accused of acting *ultra petita* and *ultra vires*, it is important that the Court justifies precisely why it holds it necessary to extend the questions posed to another related issue, or why it gives its answers in a more comprehensive way. In the case of OC-23/17, the Court could have explained that it held the answer to Colombia's first question to be the same, irrespective of whether it was restricted to areas of functional jurisdiction under a treaty based environmental protection regime or not. Under this premise, it could have argued that it was pursuant to the principle of *jura novit curia*, and in the interest of legal clarity and legal certainty, advised broadening Colombia's questions and giving a more general and encompassing answer.

2. OC-24/17

In contrast to the other advisory opinions, in OC-24/17 the Court did not expressly reformulate the questions submitted to it by Costa Rica. In the section on jurisdiction and admissibility, it just noted more vaguely than in other opinions, that it was not "restricted to the literal terms" of a request and added the (in this context confusing) remark that it could, also in the context of its advisory function, "suggest the adoption of treaties or other kinds of international norms" in order to help states to comply with their human rights obligations.[411]

Despite the fact that the Court did not explicitly extend the scope of the questions as in OC-23/17, it has been criticized that the Court acted *ultra petita* and *ultra vires* the way it answered the fourth and fifth question of Costa Rica.[412] Costa Rica had explicitly limited these questions to the recognition of patrimonial rights deriving from relationships between persons of the same sex, and it had not included among the norms to be interpreted Article 17, which enshrines rights of the family.

411 OC-24/17 (n 1) para. 25.

412 Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad*, 8 August 2018, No. 12782–2018, Exp. 15–013971–0007-CO, Dissenting vote of Judge Castillo Víquez; Constitutional Tribunal of Peru, Judgment 676/2020 of 3 November 2020, case no. 01739–2018-PA/TC, vote of Judge Ferrero Costa, vote of Judge Sardón de Taboada.

Instead of just approving that the states have to recognize the patrimonial rights of same sex couples, the Court seized the opportunity to determine that states have to protect, under Article 17, the family ties deriving from relationships between same sex couples. It held that states' parties have to recognize not only same sex couples' patrimonial rights, but also all other internationally recognized human rights that are guaranteed to heterosexual couples.[413] What is more, the Court held that the creation of any institution regulating the union of persons of the same sex separately from the union of heterosexual couples was in fact discriminatory, and that states therefore also had to open – be it after lengthy domestic reform processes – the institution of marriage to people of the same sex.[414]

The question is whether these far-reaching explanations were necessary in order to answer the legal questions "really in issue" in a meaningful way.

Concerning the reply to the fourth question, the Court argued in its reasoning that it "finds it necessary to determine whether the emotional ties between same-sex couples can be considered "family" in the terms of the Convention, in order to establish the scope of the applicable international protection."[415] Thus, the Court apparently did not consider it an *obiter dictum* that it also referred to Article 17 and extended its answer to other rights than just patrimonial rights.

As regards however the reply to the fifth question, the Court could have stopped at the point when it found "that States can adopt diverse types of administrative, judicial and legislative measures to ensure the rights of same-sex couples".[416] It was not strictly necessary to continue and add that "in the Court's opinion, there would be no sense in creating an institution that produces the same effects and gives rise to the same rights as marriage, but that is not called marriage except to draw attention to same-sex couples by the use of a label that indicates a stigmatizing difference or that, at the very least, belittles them."[417] Regardless of the accuracy of this finding, it might be said that it was not strictly necessary for answering Costa Rica's question whether a legal institution was required to recognize the patrimonial rights deriving from relationships of same-sex couples.

At the same time, it can be argued that a meaningful answer required the additional explanation that not *any* legal institution was required to recog-

413 *Cf.*: OC-24/17 (n 1) para. 199.
414 *Cf.*: OC-24/17 (n 1) paras. 224–227.
415 OC-24/17 (n 1) para. 175.
416 OC-24/17 (n 1) para. 217.
417 OC-24/17 (n 1) para. 224.

nize the patrimonial rights of same-sex couples, and that the best solution would be to ensure these couples the access to the right of marriage.

Anyway, "the *non ultra petita* rule [...] cannot preclude [a] Court from addressing certain legal points in its reasoning [...] should it deem this necessary or desirable."[418] Thus, as the ICJ has held, no one can preclude the Court from extending its reasoning to matters not strictly needing to be addressed in order to reply to the questions submitted.

It is up to the Court to decide whether the positive effect of guidance such *obiter dicta* may have, and the likelihood to thereby set a relevant precedent, outweigh the decreased legitimacy and the possible backlash caused by the disregard of the *non ultra petita* principle. In the case of OC-24/17 the Court's finding that the rights of same sex couples should not only be somehow formalized, but that they should have the right to marry as heterosexual couples, produced an earthquake in the region which led to both positive consequences and backlash reactions.[419] Without a doubt, this extensive and bold answer caused the advisory opinion to have a greater impact than if the Court had simply answered Costa Rica's question to the effect that states must regulate the relationship of same-sex couples in some way to ensure their patrimonial rights.

3. Extension of the subject matter upon request of amici

Lastly, it remains to be questioned, whether the scope and meaning of what the Court is asked may be broadened through written or oral submissions during the proceeding.

It is hardly scientifically comprehensible and provable, but nevertheless likely that the Court is influenced if it receives up to 90 briefs in which in particular NGOs draw a broad picture of the issues in question and demand a far reaching and bold answer from the Court. Yet, while the requesting entity or another entity with standing in advisory proceedings

418 ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, I.C.J. Reports 2002, p. 3, 19 para. 43.

419 As to the many positive developments in terms of respect for LGBTIQ* rights in the region in the aftermath of advisory opinion OC-24/17 see instead of all: '*Los avances de Costa Rica en materia de matrimonio igualitario deben inspirer la region*', Human Rights Watch, 3 June 2020, available at: https://www.hrw.org/es/news/2020/06/03/los-avances-de-costa-rica-en-materia-de-matrimonio-igualitario-deben-inspirar-la; as to both the positive and the backlash reactions see furthermore: Contesse, '*The Rule of Advice in International Human Rights Law*' (n 68) p. 395–405.

may retroactively ask the Court to take up an additional question or to take a further aspect into consideration, NGOs and private persons are actually excluded from the Court's advisory jurisdiction *ratione personae*. Thus, a pending request cannot be broadened by requests contained in *amicus briefs*. Therefore, it was correct that the Court did not follow the suggestion of the *Comisión Colombiana de Juristas* to address in OC-28/21 not only presidential re-elections without term limits but re-elections of any type.[420]

Nevertheless, the written and oral contributions by *amici* may help the Court in its determination of what is "really in issue" and therefore contribute to the interpretation of the meaning and the determination of the scope of a request.[421]

D. Advisory jurisdiction of the Court in an international comparison

As mentioned at the outset of this chapter, the Court held in OC-1/82 that its advisory jurisdiction is broader than that of any other international tribunal.[422] This point of view has been taken up by many authors[423] without being substantially questioned. In the following, the accuracy of the Court's finding shall therefore be scrutinized by comparing the scope of the Court's advisory jurisdiction with that of other international courts and tribunals. Not least because shedding light on the advisory jurisdiction

420 *Amicus curiae* brief of the Comisión Colombiana de Juristas in the OC-28/21 proceedings, paras. 18, 26, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/21_ccj.pdf; OC-28/21 (n 274) para. 39.

421 *Cf.*: ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, I.C.J. Reports 1980, p. 73, 89 para. 35. As to the important role of *amici* in advisory proceedings before the IACtHR see also *infra*: Chapter 4, Section F.

422 OC-1/82 (n 42) para. 14; and above, introduction to Chapter 3.

423 Ventura Robles and Zovatto (n 11) p. 34; Cisneros Sanchez (n 329) p. 53; Bert B. Jr. Lookwood, '*Advisory Opinions of the Inter-American Court of Human Rights*' (1984) 13 Denver Journal of International Law & Policy, 245, 248; Héctor Fix-Zamudio, 'Notas sobre el Sistema Interamericano de Derechos Humanos' in García Belaunde, Domingo and Fernández Segado, Francisco (eds), *La Jurisdicción Constitucional en Iberoamerica* (Dykinson, 1997) p. 189 para. 93; Máximo Pacheco Gómez, *'La Competencia Consultiva de la Corte Interamericana de Derechos Humanos*', available at: https://archivos.juridicas.unam.mx/www/bjv/libros/5/2454/5.pdf, p. 72; Roa (n 13) contradicts his own statement made on p. 87 according to which the Court is the holder of the broadest advisory competence known in international law with the statement made on p. 92 that the Court's advisory jurisdiction *ratione materiae* was not as broad as that of the ICJ.

and practice of other international courts also helps to better point out the unique characteristics of the advisory function of the IACtHR.

The first two sections will look at those courts that the first judges of the Court could have had in mind when making the cited statement. Then, the comparison is extended to courts which came into existence after the IACtHR had been created.

A delineation of the advisory and related competences of several international courts will show that the IACtHR is no longer the only Court endowed with a broad advisory function. More importantly, the delineation will highlight the increased specialization of today's advisory jurisdictions depending on the respective Court's purpose and tasks, and it shows a certain trend towards the establishment of preliminary ruling procedures. This latter trend is of interest with respect to the possible future development of the IACtHR's jurisdiction as was already indicated above and will be discussed more in detail below.[424]

I. Advisory jurisdiction of the IACtHR compared to the ICJ's advisory jurisdiction

As outlined in the part on the genesis of Article 64, the drafters of the ACHR have been guided by Article 96 UN Charter on which the ICJ's advisory jurisdiction is based. Thus, one of the courts the judges must have had in mind when formulating the first advisory opinion in 1982 and holding that their advisory jurisdiction was more extensive than any other, is the ICJ.

Apart from Article 96 UN Charter, further details of the ICJ's advisory function are regulated in Chapter IV of the ICJ's Statute. Compared to Article 14 of the Covenant of the League of Nations, on which the advisory jurisdiction of the ICJ's predecessor, the PCIJ, was based, Article 96 UN Charter extended the jurisdiction *ratione personae* on other UN organs and specialized agencies authorized by the General Assembly. However, to date states have no standing to request an advisory opinion of the ICJ on their own.[425] In this respect the advisory jurisdiction of the IACtHR is broader.

424 See *supra*: Chapter 3, Section A.III.1. and *infra*: Chapter 4, Section J.IV.

425 As to the considerations in that regard and the drafting process of the UN Charter see *supra*: Chapter 2, Section B.VI.

But as regards the advisory jurisdiction *ratione materiae*, the judges might have been mistaken in finding their own jurisdiction to be the most extensive, since the ICJ may *ratione materiae* issue advisory opinions on "any legal question".[426] It is not limited to the interpretation of treaties concerning the human rights protection in the American States, but may address any question of international law.

Given that the PCIJ was explicitly authorized to render advisory opinions on "any dispute or question", the change in the wording from Article 14 of the Covenant to Article 96 UN Charter was partly seen as an attempt to exclude from the ICJ's advisory jurisdiction other "more political" questions the PCIJ had often dealt with in the context of requests referring to disputes.[427] In light of this changed wording and the fact that most advisory jurisdictions of today's courts are formulated in similar terms to Article 96 UN Charter, it has been remarked that "[t]he expansiveness of the subject matter of the advisory jurisdiction of the Permanent Court of Justice to cover disputes has not been extended to other international tribunals."[428]

However, the "use of the qualifying term 'legal' before 'question' [has not] effected any real limitation in the scope of the advisory function",[429] since the phrase "legal question" is not necessarily more restrictive than the term "any dispute or question" and may, as also shown by the ICJ's case law, include questions arising in the context of a dispute as long as they are phrased in legal terms.[430] While the ICJ's advisory jurisdiction *ratione materiae* is thus not decisively more restrictive than that of its predecessor, it is broader than that of the IACtHR as it is not limited to the field of human rights.

426 See Art. 96 (1) UN Charter and Art. 65 (1) ICJ Statute.

427 ICJ, *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion of 28 May 1948, Individual Opinion of Judge Azevedo, I.C.J. Reports 1948, p. 73–75; ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, Dissenting Opinion of Judge Krylov, I.C.J. Reports 1950, p. 105, 111 and Separate Opinion of Judge Azevedo, I.C.J. Reports 1950, p. 79, 82–83.

428 Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 47.

429 Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 34; see also Keith (n 67) p. 23.

430 Aljaghoub (n 63) p. 57–58. See also Keith (n 67) p. 23, 80–82 arguing that the change between the Covenant and the Charter was not as significant as it may at first glance look like and that the ICJ "is competent to deal with disputes as well as other legal questions". The *Wall opinion* (n 319) and the *Chagos opinion* (n 259) provide two examples of advisory opinions of the ICJ relating to disputes between states.

On the other hand, the ICJ lacks a function comparable to that enjoyed by the IACtHR under Article 64 (2). At least, given that states have no standing to request advisory opinions of the ICJ it is unlikely that the compatibility of a national law with international law will be the central issue in one of its advisory procedures. This aspect demonstrates that it is more informative to analyze the scope of the different advisory functions against the background of the respective court's role than just to ask which advisory jurisdiction is "broader" or "more extensive" than the other.

In terms of quantity the IACtHR has by now passed the former PCIJ, which had rendered 27 advisory opinions. Moreover, the IACtHR has also rendered more advisory opinions than the ICJ, and in a shorter period of time.[431] But whereas the Commission is so far the only OAS organ that has successfully used the Court's advisory function, at the UN level more organs and specialized agencies than just the General Assembly and the Security Council have already requested advisory opinions of the ICJ.[432]

In sum, one cannot say that the advisory jurisdiction of the IACtHR is more extensive than that of the ICJ. The ICJ's advisory jurisdiction *ratione materiae* is still broader than that of the IACtHR as a regional human rights court, although the latter has extended its advisory jurisdiction *ratione materiae* by a very broad understanding of the terms "interpretation" and "other treaties concerning the protection of human rights in the American states".

Nevertheless, the extension of standing to single states has facilitated the requesting of advisory opinions, in particular that of politically sensitive ones. While states at the international level need a majority in the General Assembly for the ICJ to be consulted on a particular issue, for example the legal status of the Chagos Archipelago, member states of the OAS can independently access the Court with any kind of request, and it then depends solely on the Court's assessment of the request's admissibility and propriety whether it will give the opinion as requested or not.

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431 As of today, the ICJ has given 27 advisory opinions including the rejection of the request of the WHO. The IACtHR has given 29 advisory opinions including only one of the six requests that have been rejected. See already *supra* (n 9) and *infra*: Chapter 4, Section C.I. and the charts in Chapter 4, Section I. on the average length of advisory proceedings.

432 For example, the ECOSOC, the UNESCO, the WHO, the IFAD and the IMO have already availed themselves of their power to request advisory opinions of the ICJ. For an overview over these proceedings see: https://www.icj-cij.org/en/organs-agencies-authorized.

II. Advisory jurisdiction of the IACtHR compared to the ECtHR's advisory jurisdiction

At least with regard to the European Court of Human Rights, the only other human rights court in existence at the time, the IACtHR was correct in finding its own advisory jurisdiction to be much more extensive than that of its European counterpart.

The advisory function of the ECtHR was introduced into the system in 1970 when Additional Protocol No. 2 entered into force. The content of said Protocol No. 2 was, with minor changes, inserted in Article 47 *et. seq*. ECHR in 1998, when Additional Protocol No. 11 entered into force.

The thereby established advisory jurisdiction is however very limited, both in terms of standing and in terms of the ECtHR's jurisdiction *ratione materiae*. The Committee of Ministers of the Council of Europe is the only organ entitled to make – by majority vote of its representatives – a request for an advisory opinion of the Court. Neither states nor any other entity has standing to do so. Furthermore, Article 47 ECHR restricts the advisory jurisdiction of the ECtHR to "legal questions concerning the interpretation of the Convention and the Protocols thereto" excluding questions "relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention".[433]

Thus, while the IACtHR is even free to answer requests on treaties other than the ACHR as long as they concern the protection of human rights in the American states, and may moreover examine the compatibility of domestic laws with such international instruments, the ECtHR may not render an advisory opinion on the interpretation of a substantive provision of the ECHR.

Therefore, it is not surprising that it took until 2004 for the ECtHR to be able to issue the first decision on its advisory competence, in which it found itself to lack jurisdiction.[434] To date and apart from this first rejection, the Court has only rendered two advisory opinions under Article 47 ECHR.

433 See Art. 47 para. 1 and 2 ECHR.

434 ECtHR, Decision on the Competence of the Court to give an advisory opinion, 2 June 2004.

The first question which the Court found to be outside its consultative jurisdiction vividly depicts how restrictive Article 47 ECHR is in contrast to Article 64. It concerned the coexistence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States (CIS Convention) and the ECHR. Put more precisely, the Court was asked whether the Human Rights Commission of the Commonwealth of Independent States that was envisaged by the CIS Convention, if set up one day, would be "another procedure of international investigation or settlement for the purposes of Article 35 § 2(b)" ECHR.[435] The ECtHR found that this constituted a question which it might be confronted with in other proceedings instituted in accordance with the Convention, and that it was therefore excluded from its advisory jurisdiction.[436] As it was stated in the *travaux préparatoires* that it was necessary "to ensure that the Court shall never be placed in the difficult position of being required, as the result of a request for its opinion, to make a direct or indirect pronouncement on a legal point with which it might subsequently have to deal as a main consideration in some case brought before it" the mere hypothetical possibility that the same question might come up in a contentious proceeding sufficed for the ECtHR to declare itself incompetent to answer the question via an advisory opinion.[437]

The result of this very restricted advisory function is that the issues advisory opinions may deal with are limited to mere so-called 'housekeeping' issues, as also shown by the two opinions the ECtHR has given on the merits which were both related to the election process of judges.[438]

435 ECtHR, Decision on the Competence of the Court to give an advisory opinion, 2 June 2004, para. 24.

436 ECtHR, Decision on the Competence of the Court to give an advisory opinion, 2 June 2004, paras. 31–35.

437 ECtHR, Decision on the Competence of the Court to give an advisory opinion, 2 June 2004, para. 33.

438 *Cf.*: Tom Ruys and Anemoon Soete, '*Creeping' Advisory Jurisdiction of International Courts and Tribunals? The case of the International Tribunal for the Law of the Sea'* (2016) 29 Leiden Journal of International Law, 155, 163; ECtHR, *Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights*, Grand Chamber, 12 February 2008; ECtHR, *Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights (No. 2)*, Grand Chamber, 22 January 2010.

However, with the still relatively recent entry into force of Additional Protocol No. 16 to the ECHR[439], the competence of the ECtHR to issue advisory opinions has been extended. Similar to the preliminary ruling procedure before the CJEU established under Article 267 TFEU, Additional Protocol No. 16 provides for a right of the highest courts of the contracting parties to seek an advisory opinion from the ECtHR on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto, as long as such questions arise in the context of a case pending before them.

In contrast to the preliminary rulings issued by the CJEU, the advisory opinions shall however, as the name indicates, not be binding. Which national courts are authorized to consult the ECtHR is determined by the respective member state when acceding to Additional Protocol No. 16.

Since the Protocol's entry into force, more states have acceded to it, and the ECtHR has by now already rendered more advisory opinions under Protocol No. 16 than in all the years before under Article 47 ECHR.[440] This shows that the opportunity to approach the ECtHR is well received by the authorized national courts. Although it has been warned that the ECHR system could suffer asymmetries, and that the new mechanism under Protocol No. 16 could disturb the "existing balance between ordinary and Constitutional Courts in fundamental rights adjudication across Europe",[441] the new mechanism has the potential to improve the dialogue and understanding between the ECtHR and the highest national courts, which could help increase the acceptance of the ECtHR's jurisprudence as well as the homogeneity of human rights interpretation across Europe.

439 Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Parliamentary Assembly of the Council of Europe on 28 June 2013 entered into force on 1 August 2018 after France had been the tenth member state that deposited its document of ratification.

440 By today the Protocol has been ratified by: Albania, Andorra, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Estonia, Finland, France, Georgia, Greece, Lithuania, Luxembourg, Montenegro, Netherlands, North Macedonia, Republic of Moldova, Romania, San Marino, Slovak Republic, Slovenia and Ukraine. The current state of rendered advisory opinions and pending requests can be checked here: https://www.echr.coe.int/en/advisory-opinions.

441 Maria Dicosola *et. al.*,*The Prospective Role of Constitutional Courts in the Advisory Opinion Mechanism Before the European Court of Human Rights: A First Comparative Assessment with the European Union and the Inter-American System*' (2015) 16 German Law Journal, 1387, 1425.

Should there be an initiative to extend the standing in advisory proceedings before the IACtHR to national courts, or to introduce via an additional protocol to the ACHR a preliminary ruling procedure, it is worthwhile not only to look at the experiences of the CJEU but also to take into account the impact of the new mechanism before the ECtHR under Protocol No. 16.

III. Advisory jurisdiction of the IACtHR compared to the AfrCtHPR's advisory jurisdiction

The advisory jurisdiction that is – at least on paper – the most similar to that of the IACtHR is that of the AfrCtHPR.[442]

Ratione personae Article 4 AfrCHPR Protocol is even wider than Article 64. Like in the inter-American system, all AU organs and all AU member states, irrespective of whether they have ratified the Protocol, have standing to make requests for advisory opinions. But beyond that, African organizations recognized by the African Union may request advisory opinions, too. Theoretically, this includes non-governmental organizations, but in practice, the AfrCtHPR has interpreted the recognition requirement narrowly and several times found that it lacked personal jurisdiction to render an opinion because the requesting organization was not officially recognized by the AU.[443]

442 According to Article 45 (3) African Charter on Human and Peoples' Rights (adopted 26 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (AfrCHPR) also the AfrComHPR enjoys an advisory competence. States, AU organs and African Organizations recognized by the AU may request an interpretation of any provision of the AfrCHPR. In 2007, the AfrComHPR handed down an advisory opinion on the United Nations Declaration on the Rights of Indigenous Peoples. But this advisory opinion was not based on Article 45 (3) AfrCHPR but on Article 45 (1) lit. a AfrCHPR which allows the AfrComHPR to collect information and to undertake studies and does not require any request. The advisory function of the AfrComHPR shall not be further analyzed in this chapter as the AfrCtHPR is considered to be the counterpart of the IACtHR and not the AfrComHPR.

443 AfrCtHPR, *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP)*, No. 001/2013 of 26 May 2017, para. 52 *et seq*; AfrCtHPR, *Request for Advisory Opinion by l'association africaine de défense des droits de l'homme,* No. 002/2016 of 28 September 2017, para. 32 *et seq*.; AfrCtHPR, *Request for Advisory Opinion by the Centre for Human Rights of the University of Pretoria and the coalition of African Lesbians*, No. 002/2015 of 28 September 2017, para. 54 *et seq*.; AfrCtHPR, *Request for Advisory Opinion by the Centre for Human Rights of the University of Pretoria, the federation of women lawyers, women's legal centre,*

The African Court's advisory jurisdiction *ratione materiae* encompasses "any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission".[444] Article 4 AfrCHPR Protocol does not contain a paragraph similar to Article 64 (2), but questions on the compatibility of a domestic law with the Banjul Charter would arguably also fall under its scope.[445]

The wording "any legal matter relating to the Charter or any other relevant human rights instrument" is already as broad as Article 64 (1) has become through the IACtHR's broad interpretation of the term "other treaties concerning the protection of human rights in the American States". It does not contain any limitation on African human rights treaties, but obviously also includes human rights instruments concluded on the global level.

Yet, as in the interpretation of its advisory jurisdiction *ratione personae*, the AfrCtHPR has so far also been rather cautious and restrained as concerns the application of its broad advisory jurisdiction *ratione materiae*. It has held that "a human rights instrument is identified by its intended purpose" and that mere references to human rights do not suffice to render a protocol a human rights instrument in terms of Article 4 AfrCHPR Protocol .[446] Rather, a human rights instrument has to contain "either an express provision for subjective rights to be enjoyed by individuals or groups; or obligations on State Parties from which the said rights can be derived".[447] Consequently, the AfrCtHPR determined that it was not competent to give an advisory opinion on the Protocol to the Treaty Establishing the African

women advocates research and documentation centre, Zimbabwe women lawyers association, No. 001/2016 of 28 September 2017, para. 49; AfrCtHPR, *Request for Advisory Opinion by Recontre Africaine pour la Defense des Droits de l'homme*, No. 002/2014 of 28 September 2017, para. 35 *et seq.*; see also Viljoen (n 305) 63, 90–91.

444 Art. 4 (1) AfrCHPR Protocol.

445 *Cf.*: Anne Pieter van der Mei, *'The advisory jurisdiction of the African Court on Human and Peoples' Rights'* (2005) 5 African Human Rights Law Journal, 27, 41–42.

446 AfrCtHPR, *Advisory Opinion on Request No. 001/2021 by the Pan African Parliament (PAP) on the application of the principle of regional rotation in the election bureau of the PAP*, 16 July 2021, para. 40, 43.

447 AfrCtHPR, *Advisory Opinion on Request No. 001/2021 by the Pan African Parliament (PAP) on the application of the principle of regional rotation in the election bureau of the PAP*, 16 July 2021, para. 40.

Economic Community Relating to the Pan-African Parliament, although it contained some references to human rights.[448]

In the same vein, the AfrCtHPR rejected twice a request from NGOs that dedicate their work to the fight against impunity in Nigeria and across West Africa.[449] In the context of the case of Omar Al-Bashir, the NGOs had asked the AfrCtHPR whether "the treaty obligation of an African state party to the Rome Statute [...] to cooperate with the [ICC] is superior to the obligation of that state to comply with AU resolutions calling for non-cooperation of its members with the ICC".[450] The AfrCtHPR held the authors of the request had not specified the provisions of the Charter or other human rights instruments whose interpretation was sought and that the issues raised were "rather of general public international law and not of human rights".[451]

448 AfrCtHPR, *Advisory Opinion on Request No. 001/2021 by the Pan African Parliament (PAP) on the application of the principle of regional rotation in the election bureau of the PAP*, 16 July 2021, para. 52.

449 AfrCtHPR, *Order No. 001 of 2014 in the matter of request for advisory opinion by the coalition for the International Criminal Court, the Legal Defence Assistance Project (LEDAP), the Civil Resource Development Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC)*, 5 June 2015, para. 13; AfrCtHPR, *Order No. 001 of 2015 in the matter of request for advisory opinion by the coalition for the International Criminal Court, the Legal Defence Assistance Project (LEDAP), the Civil Resource Development Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC)*, 29 November 2015, para. 18.

450 AfrCtHPR, *Order No. 001 of 2014 in the matter of request for advisory opinion by the coalition for the International Criminal Court, the Legal Defence Assistance Project (LEDAP), the Civil Resource Development Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC)*, 5 June 2015, para. 5; AfrCtHPR, *Order No. 001 of 2015 in the matter of request for advisory opinion by the coalition for the International Criminal Court, the Legal Defence Assistance Project (LEDAP), the Civil Resource Development Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC)*, 29 November 2015, para. 5.

451 AfrCtHPR, *Order No. 001 of 2015 in the matter of request for advisory opinion by the coalition for the International Criminal Court, the Legal Defence Assistance Project (LEDAP), the Civil Resource Development Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC)*, 29 November 2015, para. 18; AfrCtHPR, *Order No. 001 of 2014 in the matter of request for advisory opinion by the coalition for the International Criminal Court, the Legal Defence Assistance Project (LEDAP), the Civil Resource Development Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC)*, 5 June 2015, para. 13.

These examples clearly show that the AfrCtHPR follows a more cautious approach than the IACtHR which has, as shown above, interpreted the term "human rights treaty" as broadly as possible.

A further limiting criterion to the substantive advisory jurisdiction of the AfrCtHPR is the last part of Article 4 (1) AfrCHPR Protocol which precludes the subject matter of a request for an advisory opinion from being related to a matter being examined by the Commission. On this basis, the AfrCtHPR has for example rejected a request from the Pan African Lawyer's Union and the Southern African Litigation Center.[452]

As will be analyzed in more detail below[453], the IACtHR has likewise established the criterion that "a request should not conceal a contentious case or try to obtain a premature ruling on a question or matter that could eventually be submitted to the Court in a contentious case", and it has indeed rejected requests for advisory opinions that were related to petitions pending before the IACHR.[454] However, this criterion is neither explicitly included in Article 64 nor in the Court's Rules of Procedure, and the Court has given advisory opinions despite the fact that related matters were examined by the Commission.[455]

Hence, the AfrCtHPR is less flexible than the IACtHR to disregard pending contentious cases that are related to the issues raised in a request for an advisory opinion. This restriction is likely to reduce the number of advisory opinions rendered on the merits by the AfrCtHPR.

A further decisive difference between the advisory practice of the IACtHR and the AfrCtHPR is that so far no request has been filed by the African Commission on Human and Peoples' Rights (AfrComHPR), while the IACHR now regularly submits strategic requests for advisory opinions to the IACtHR. These regular and strategic requests from the IACHR not only increase the quantity of advisory opinions given by the IACtHR but also broaden the spectrum of topics and increase the overall importance of the IACtHR's advisory function.

452 AfrCtHPR, *Order in the matter of request for Advisory Opinion No. 002/2012 by Pan African Lawyer's Union and Southern African Litigation Center*, 15 March 2013, para. 8.

453 See *infra*: Chapter 4, Section C.

454 IACtHR, Order of 29 May 2018, *Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*, paras. 6–8; OC-12/91 (n 362) paras. 27–28.

455 See *infra*: Chapter 4, Section C.II.1.c).

At the time of writing, the Protocol of the African Court of Justice and Human Rights has not yet entered into force, but according to the Statute of this future merged court, its advisory jurisdiction will be much more restricted than that of the current AfrCtHPR. Pursuant to Article 53 (1) of the Statute of the future merged court, both AU member states and African organizations will lose their standing to issue requests for advisory opinions.[456] The merged court shall be competent to give opinions "on any legal question", but its personal jurisdiction will be limited to requests from the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the Economic, Social and Cultural Council, the Financial Institutions or any other organ of the Union as may be authorized by the Assembly. Article 53 (1) of the future Statute does not even name the African Commission, which is why the standing of the latter will depend on its authorization by the Assembly.

As most requests for advisory opinions filed so far with the AfrCtHPR were lodged by (nongovernmental) organizations, their exclusion from the entities entitled to make requests is likely to render the future court's advisory function irrelevant, at least as concerns the protection of human rights.

Overall, since the establishment of the AfrCtHPR, the IACtHR is no longer the only human rights court endowed with a broad advisory jurisdiction. However, in its advisory practice the AfrCtHPR has been more cautious than the IACtHR, and its advisory jurisdiction has not yet gained the significance it has in the inter-American system. Given that individuals and NGOs have direct access to the AfrCtHPR, the latter could decide contentious cases, although the AfrComHPR has been similarly reluctant to refer cases to the AfrCtHPR, like the IACHR in the beginning.[457] Therefore, in contrast to the IACtHR, the AfrCtHPR in its first years did not depend so much on establishing a broad advisory jurisdiction.[458] In light of its rather restrictive interpretation of its advisory jurisdiction, and the more restricted advisory jurisdiction envisaged for the future African Court of Justice and Human Rights, it is unlikely that advisory opinions will, in the African human rights system, ever gain the relevance they have in the inter-American human rights system.

456 Art. 53 Protocol on the Statute of the African Court of Justice and Human Rights (adopted on 1 July 2008).
457 Viljoen (n 305) 63, 89.
458 Viljoen (n 305) 63, 89.

IV. Overview over the advisory and related jurisdiction of several international courts and the trend towards preliminary ruling procedures

Apart from the ICJ, the IACtHR, the ECtHR and the AfrCtHPR, there exist today many more international courts and tribunals that are bestowed with some kind of advisory jurisdiction.

A more detailed description of all of them would go beyond the scope of this work, but the following table[459] shall – without claiming to be exhaustive – provide an overview, indicating in particular where states also have standing to request advisory opinions, and which courts may also render preliminary rulings on the request of national courts, in addition to or instead of a traditional advisory function.

Without being complete, the table highlights that to have some kind of advisory jurisdiction is very common, actually standard, for international courts and tribunals today. The only tribunal listed which does not have an advisory jurisdiction or a competence to issue preliminary rulings is the European Nuclear Energy tribunal, and this tribunal was already established in 1960. The example of all the other courts and tribunals listed shows that what originated in the jurisdiction of some national courts, and was first tested internationally by the PCIJ, has proved to be an 'export hit' for statutes of international courts and constituting treaties of international organizations.

Today, we find highly specialized advisory jurisdictions, each adapted to the purpose and function of the respective court. Nevertheless, the advisory functions still have many features in common. The wording of most provisions defining the scope of an advisory jurisdiction is very similar and can often be directly traced back to the wording of Article 96 UN Charter, as highlighted for example by Article 191 UNCLOS. Most advisory jurisdictions have in common that requests may only be made by certain organs of an organization, and that they may only address *legal questions*. This shall distinguish the function from contentious proceedings, but does not, in fact, constitute a great hurdle, as many questions arising in contentious cases can be framed in abstract terms of law.

459 The table is partly inspired by the overview provided by Zelada (n 262) p. 29–36.

Court	Classification / International Organization in the framework of which it was founded	In function since:	Competent to issue Advisory Opinions	Do states have standing to request advisory opinions?	Competent to give preliminary rulings upon request of national courts	Treaty provision	Jurisdiction ratione personae (standing)	Jurisdiction ratione materiae
African Court on Human and Peoples' Rights	Regional Human Rights Court established by the Organization of African Unity, now the African Union	2006	Yes	Yes	No	Art. 4 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights	OAU Member States, the OAU, OAU organs, African organizations recognized by the OAU	Any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission
African Court of Justice and Human Rights	Regional Court with integrated human rights jurisprudence	- not yet operative -	Yes	No	No	Art. 53 Protocol of the African Court of Justice and Human Rights	Assembly, Parliament, Executive Council, Peace and Security Council, ECOSOC, financial institutions, or any other organ of the Union authorized by the Assembly	Any legal question not related to an application pending before the African Commission or African Committee of Experts
Benelux Court of Justice	Court of the Benelux countries, founded by The Netherlands, Belgium and Luxemburg	1974	Yes	Yes	Yes	Art. 10 Traité relatif à l'institution et au statut d'une Cour de Justice Benelux Arts. 6-9 Traité relatif à l'institution et au statut d'une Cour de Justice Benelux	The governments of the member states National Courts	Interpretation of the Rules Questions of interpretation of the legal rules arising in pending cases

Court	Classification / International Organization in the framework of which it was founded	In function since:	Competent to issue Advisory Opinions	Do states have standing to request advisory opinions?	Competent to give preliminary rulings upon request of national courts	Treaty provision	Jurisdiction ratione personae (standing)	Jurisdiction ratione materiae
Caribbean Court of Justice	Regional Court, established by the Carribean Community (CARICOM)	2005	Yes	Yes	No	Art. 13 Agreement establishing the Caribbean Court of Justice; Art. 212 revised Treaty of Chaguaramas	Contracting Parties and the Community; Member States parties to a dispute	Requests concerning the interpretation or application of the Treaty
Central American Court of Justice	Regional Court of the Central American Integration System	1994	Yes	Yes	Yes	Art. 22k Statute of the Court Art. 22d, e, Art. 23 of the Statute;	National Judges/ Tribunals Supreme Courts, Organs of the Central American Integration System, States	Questions occurring in a pending case Illustrative requests concerning the interpretation of any treaty or convention, conflicts between treaties or the domestic law
COMESA Court of Justice	Regional Court established under the Treaty Establishing The Common Market For Eastern And Southern Africa	1998	Yes	Yes	No	Art. 32 of the Treaty establishing the Common Market for Eastern and Southern Africa	The Authority, the Council, Member States	Questions of law arising from the provisions of the Treaty affecting the common market

Court	Classification / International Organization in the framework of which it was founded	In function since:	Competent to issue Advisory Opinions	Do states have standing to request advisory opinions?	Competent to give preliminary rulings upon request of national courts	Treaty provision	Jurisdiction ratione personae (standing)	Jurisdiction ratione materiae
Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law in Africa	Regional Court established by the Organization for the Harmonization of Business Law in Africa	1998	Yes	Yes	Yes	Art. 14 Treaty on the Harmonization of Business Law in Africa	Any State Party, the Council of Ministers and national courts	Any issue relating to the uniform interpretation and application of the Treaty, regulations and Uniform Acts; Disputes relating to the application of the Uniform Acts
Court of the Eurasian Economic Union	Regional Court, established by the Eurasian Economic Union	2015	Yes	Yes	No	Arts. 46, 47, 98 Statute of the Court	Member States, EAEU bodies, employees and officials of the EAEU	Clarification of provisions of the Treaty, international treaties within the EAEU and of decisions of EAEU bodies
Court of Justice of the European Union	Court of a regional organization, established first by the European Coal and Steel Communities which later became the European Communities and finally the European Union	1952	No, but competent to issue Preliminary Rulings and binding opinions	Yes, under Art. 218 para. 11 TFEU	Yes, under Art. 267 TFEU	Art. 267 and Art. 218 para. 11 TFEU	National Courts EU member states, the European Parliament, the Council or the Commission	Interpretation of the Treaties, validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union Compatibility of envisaged agreements between the EU and third parties with the Treaties

Court	Classification / International Organization in the framework of which it was founded	In function since:	Competent to issue Advisory Opinions	Do states have standing to request advisory opinions?	Competent to give preliminary rulings upon request of national courts	Treaty provision	Jurisdiction ratione personae (standing)	Jurisdiction ratione materiae
East African Court of Justice	Regional Court of the East African Community	2001	Yes	Yes	No	Art. 36 Treaty for the establishment of the East African Community	Summit, Council, Partner States,	A question of law arising from the treaty which affects the Community
ECOWAS Court	Regional Court established by the Economic Community of West African States	2001	Yes	Yes	No	Art. 10 Protocol on the Community Court of Justice	Authority, Council, Member States, Executive Secretary, any other institution of the Community	Questions of the Treaty
EFTA Court	Regional Court, established by the member states of the European Economic Area (EEA)	1994	Yes (Although the procedure rather resembles a preliminary ruling procedure the Agreement speaks of advisory opinions)	No	Yes	Art. 34 Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice	National courts or tribunals confronted with a question of interpretation concerning the EEA Agreement	Interpretation of the EEA Agreement

Court	Classification / International Organization in the framework of which it was founded	In function since:	Competent to issue Advisory Opinions	Do states have standing to request advisory opinions?	Competent to give preliminary rulings upon request of national courts	Treaty provision	Jurisdiction ratione personae (standing)	Jurisdiction ratione materiae
European Court of Human Rights	Regional Human Rights Court established by the Council of Europe	1959	Yes	No	Yes, under additional Protocol No. 16, but the preliminary rulings are called advisory opinions and are explicitly non-binding	Art. 47 ECHR Art. 1 Protocol No 16	Committee of Ministers High Courts and tribunals of the contracting Parties as designated by them	Legal questions concerning the ECHR and its protocols except questions relating to rights and freedoms defined in Sec. 1 ECHR or any other question the Court could be confronted in other procedures Questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto arising in a concrete case
European Nuclear Energy Tribunal	International tribunal established under the auspices of the Organization for Economic Co-Operation and Development	1960	No	No	No	/	/	/

Court	Classification / International Organization in the framework of which it was founded	In function since:	Competent to issue Advisory Opinions	Do states have standing to request advisory opinions?	Competent to give preliminary rulings upon request of national courts	Treaty provision	Jurisdiction ratione personae (standing)	Jurisdiction ratione materiae
Inter-American Court of Human Rights	Regional Human Rights Court established by OAS member states	1979	Yes	Yes	No	Art. 64 ACHR Conferred jurisdiction: Art. 11 Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women	OAS member states, OAS organs States Parties to the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women and the Inter-American Commission of Women	Interpretation of the ACHR and of other treaties concerning the protection of human rights in the American States; compatibility of domestic laws with the aforesaid international instruments Interpretation of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women
International Court of Justice	World Court, organ of the UN	1946	Yes	No	No	Art. 96 UN Charter, Art. 65-68 Statute of the ICJ	General Assembly, Security Council, other organs of the UN and specialized agencies authorized by the GA	Any legal question / legal questions arising within the scope of their activities
International Tribunal on the Law of the Sea: Seabed Disputes Chamber	Chamber of the ITLOS	1996	Yes	No	No	Art. 191 UNCLOS	Assembly and Council	Legal questions arising within the scope of their activities

Court	Classification / International Organization in the framework of which it was founded	In function since:	Competent to issue Advisory Opinions	Do states have standing to request advisory opinions?	Competent to give preliminary rulings upon request of national courts	Treaty provision	Jurisdiction ratione personae (standing)	Jurisdiction ratione materiae
International Tribunal on the Law of the Sea: full court	International tribunal established under UNCLOS	1996	Yes	Possible, depending on the agreement conferring adv. Jurisdiction to the Tribunal	Possible, depending on the agreement conferring adv. Jurisdiction to the Tribunal	Art. 21 Statute of ITLOS in combination with Art. 138 of the Rules of the Tribunal and any agreement conferring adv. jurisdiction to the Tribunal	Whatever body being authorized by the respective agreement conferring jurisdiction on the Tribunal	Legal question, the agreement conferring jurisdiction must relate to the purposes of UNCLOS and the request must have a sufficient connection to the purposes and principles of the agreement
Permanent Appeals Court (Tribunal Permanente de Revisión)	Mercosur	2004	Yes	Yes but only all states acting jointly	Yes, domestic courts may request non-binding advisory opinions	Mercosur Regulations CMC/DEC.N°37/03; CMC/DEC.N°02/07; CMC/DEC.N° 15/10	States Parties acting jointly, decision-making organs of the Mercosur and national Supreme Courts	Legal questions relating to the interpretation or application of Mercosur Law, as regards Supreme Courts, the questions need to relate to a pending procedure
Permanent Court of International Justice	Predecessor of the ICJ, first permanent court with general jurisdiction	in existence from 1922-1946	Yes	No	No	Art. 14 Covenant of the League of Nations	Council and Assembly of the League of Nations	Any dispute or question

Court	Classification / International Organization in the framework of which it was founded	In function since:	Competent to issue Advisory Opinions	Do states have standing to request advisory opinions?	Competent to give preliminary rulings upon request of national courts	Treaty provision	Jurisdiction ratione personae (standing)	Jurisdiction ratione materiae
SADC	Regional Court, established by the Southern African Development Community	2005, since 2012 suspended	Yes	No	Yes	Art. 16 para. 4 Treaty of the Southern African Development Community, Art. 20 Protocol on Tribunal in the Southern African Development Community Art. 16 of the Protocol on Tribunal in the Southern African Development Community	Summit and Council The courts and tribunals of states	Any matter summit or council refer to the Tribunal Question of interpretation, application or validity in issue
Tribunal of Justice of the Andean Community	Regional Tribunal established by the Andean Community	1984	No	No	Yes	Art. 32-36 Tratado de Creacion del Tribunal de Justicia de la Comunidad Andina, Arts. 121 *et. seq.* of the Statute of the Tribunal	National judges/ courts	Interpretation of provisions forming part of the Community Law, specification of contend and scope of said provisions

The examples of e.g. the AfrCtHPR, the ECOWAS Court and the Caribbean Court of Justice show that the IACtHR is no longer the only court in front of which states have standing to request advisory opinions.

The AfrCtHPR can even answer requests from civil society organizations, although as already noted above, the court has interpreted the requirement that these organizations have to be recognized by the AU quite narrowly.

The Additional Protocols No. 2 and 16 to the ECHR demonstrate exemplarily the development since the 1960s. Some years after the entry into force of the ECHR, the ECtHR was initially bestowed with a very narrow advisory jurisdiction. The new procedure introduced by Additional Protocol No. 16 to the ECHR takes the next step by allowing national courts to request non-binding advisory opinions of the ECtHR.

Some regional (supranational) organizations have already gone further and endowed their court with the power to issue binding opinions, or installed a preliminary ruling procedure that, instead of providing guidance to governments, serves the purpose of a coherent interpretation of community law by domestic courts. Not only the CJEU is very active in issuing preliminary rulings pursuant to Article 267 TFEU, the Tribunal of Justice of the Andean Community has also already issued more than 6000 preliminary rulings that are, pursuant to Article 127 of the Tribunal's Statute, binding on the domestic judges that formulated the request.[460]

As outlined above[461], providing standing to domestic courts via the creation of a preliminary ruling procedure could also result beneficial in the inter-American human rights system. Possible benefits, but also risks, of such a development will be further discussed below.[462]

460 See Art. 127 of the Statute of the Tribunal of Justice of the Andean Community published as Decision 500 in Gaceta Oficial del Acuerdo de Cartagena of 2 June 2001, p. 2. As to the number of decisions made by the Tribunal of Justice of the Andean Community in the different types of proceedings see: https://www.tribunalandino.org.ec/index.php/nosotros/resena/.

461 See *supra*: Chapter 3, Section A.III.1.

462 See *infra*: Chapter 4, Section J.IV.