Eleanor Benz

The Advisory Function of the Inter-American Court of Human Rights

Nomos

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Eleanor Benz

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To my family

Acknowledgments

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While working on my dissertation I have often looked forward to the moment when I could write the foreword to my work. For one, because this would mean that I have finally completed this endeavor. But even more importantly, because it would allow me to express all my gratitude to the people who accompanied and supported me along the way to my first book.

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Potsdam, November 2023 *Eleanor Benz*

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List of abbreviations

ACHR	American Convention on Human Rights ('Pact of San José'); In this work also shortly referred to as the 'Convention')
AfrCHPR	African Charter on Human and Peoples' Rights ('Banjul Charter')
AfrCHPR Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and People's Rights
AfrComHPR	African Commission on Human and People's Rights
AfrCtHPR	African Court on Human and Peoples' Rights
American Declaration	American Declaration of the Rights and Duties of Man
Art.	Article
AU	African Union
Cf.	compare
CJEU	Court of Justice of the European Union
CIS Convention	Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States
COMESA	Common Market for Eastern and Southern Africa
Covenant	Covenant of the League of Nations
CUP	Cambridge University Press
ECHR	European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECOSOC	Economic and Social Council of the United Nations

ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EFTA	European Free Trade Association
e.g.	for example
et. seq.	and the following
EU	European Union
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
Ibid.	Ibidem / in the same place
Idem.	the same
ICJ	International Court of Justice
IFAD	International Fund for Agricultural Development
IIDH	Instituto Interamericano de Derechos Humanos (Inter-American Institute of Human Rights)
ILC	International Law Commission
ILO	International Labor Organization
IMO	International Maritime Organization
IOM	International Organization for Migration
ITLOS	International Tribunal for the Law of the Sea
LGBTIQ*	People who have identified themselves as lesbian, gay, bisexual, transgender, intersex, queer, or questioning, or any other kind of sexual identity or sexual orientation other than that of cisgender and heterosexual
LNOJ	League of Nations Official Journal
mn.	margin number
NGOs	Non-governmental organizations
OAS	Organization of American States
OC	Opinión Consultiva (Spanish for: Advisory Opinion)

OC-1/82	This abbreviation indicates for example, that this was the first advisory opinion adopted in the year 1982.
OUP	Oxford University Press
Para.	Paragraph
PCIJ	Permanent Court of International Justice
Protocol of San Salvador	Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights
SC	United Nations Security Council
SCSL	Special Court for Sierra Leone
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UN Covenants	International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights
UNCIO	United Nations Conference on International Organization
UNCLOS	United Nations Convention on the Law of the Sea
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
US or United States	United States of America
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization

Introduction

Reasons and motivation to deal with the advisory function of the IACtHR

In 2018, the presidential elections in Costa Rica were immensely impacted by the publication of advisory opinion OC-24/17 on gender identity, and equality and non-discrimination of same-sex couples[1]. The advisory opinion OC-24/17 which had been requested by the incumbent government of Costa Rica and in which the Court clarified that homosexual couples should enjoy the same rights as heterosexual couples and should also have the right to marry, was published in the midst of the election campaign. By rejecting the Inter-American Court of Human Rights (IACtHR) and its advisory opinion, Fabricio Alvarado Muñoz, the presidential candidate from the conservative National Restoration Party, gained surprising momentum in the polls. The National Restoration Party had used to be a small party, but this time its evangelist leader Alvarado Muñoz managed to win the first electoral round. Alvarado Muñoz had threatened to denounce the American Convention on Human Rights (ACHR) should he become President.[2] This would have been fatal given that Costa Rica was not only the first state to ratify the Convention, but that the Court has its seat in its capital San José. Luckily, Carlos Alvarado Quesada, presidential candidate from the Citizen's Action Party, managed to win liberal voters and especially the youth with a pro-gay marriage campaign on social media, and

1 *Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights)*, Advisory Opinion OC-24/17, Series A No. 24 (24 November 2017)

2 '*Fabricio Alvarado dispuesto a salirse de la Corte IDH para que no le 'impongan' agenda LGBTI*', Elmundo.cr, 11 January 2018, available at: 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, available at: https://semanariouniversidad.com/pais/ideas-fabricio-alvarado-sobre-corte-idh-puestas-a-prueba/.

thereby ultimately won the decisive second electoral round with 60,6 % of the votes over Alvarado Muñoz who obtained 39,4 % of the votes.[3]

It was intriguing that an advisory opinion, an instrument which is under traditional international law understood to be non-binding, had such an impact on the national politics in a state.

At the same time, advisory opinion OC-23/17 on the environment and human rights[4], which had been published shortly after OC-24/17, attracted widespread international attention because it contained many progressive ideas and findings. Among other things, the Court had held that nature might have an own legal personality, and that the right to a healthy environment was not only protected by Article 11 of the Protocol of San Salvador[5], but that the right was through Article 26 ACHR[6] also protected by the Convention as such. Furthermore, the Court combined established principles from international environmental law with the effective-control test which the European Court of Human Rights (ECtHR) has developed in matters

3 See Tribunal Supremo de Elecciones, *Compúto de votos y declaratorias de elección 2018*, p. 20, available at: https://www.tse.go.cr/pdf/elecciones/computovotos_febrero_abril_2018.pdf. For further references see *infra*: Chapter 4, Section H.

4 *The environment and human rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights of life and to personal integrity: Interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-23/17, Series A No. 23 (15 November 2017).

5 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 17 November 1988, entered into force 16 November 1999) OAS Treaty Series No. 69 (Protocol of San Salvador).

6 In the following work, articles without any further indication are those of the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR, Convention). Article 26 ACHR states:
"Article 26. Progressive Development
The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."
Despite the provisions' open and indeterminate text, since the 2017 judgment in the case of *Lagos del Campo*, the Court holds that economic, social cultural and environmental rights are directly justiciable under Article 26. As to this new approach to Article 26 and the controversial debate on it see: IACtHR, *Case of Lagos del Campo v. Peru*, Judgment of 31 August 2017 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 340, paras. 141ff. and *infra*: Chapter 6, Section B and (n 1397) for further references.

of extraterritorial jurisdiction in order to answer the question when a state is responsible for human rights violations suffered by people in other states due to transboundary environmental damage.[7]

The variety and timeliness of the topics the Court deals with in advisory opinions as well as the manner in which it does so, is fascinating. While the objections raised in advisory proceedings before the International Court of Justice (ICJ) are similar to the objections raised in advisory proceedings before the IACtHR, there are decisive differences between the scope of the Court's advisory jurisdiction and that of the ICJ. Whereas proposals to provide states with a right to request advisory opinions of the World Court had always been rejected at the international level[8], the IACtHR may not only answer requests from organs of the Organization of American States (OAS), but also requests from any OAS member state, irrespective of whether that state has ratified the ACHR. Today, other Courts like the African Court on Human and Peoples' Rights (AfrCtHPR) also have theoretically a very broad advisory jurisdiction. However, the IACtHR is still the only human rights court that is frequently consulted, and that has thus managed to establish a very rich advisory practice. To date, the IACtHR has rendered 29 advisory opinions[9] and thus two more than the ICJ. Notably, in a shorter period of time.[10]

Despite the frequency, the huge impact of the Court's advisory opinions, and the many interesting legal features of the Court's advisory function, not much literature exists on the topic, and hardly any in English.

While several monographies on the advisory function of the ICJ and its predecessor exist, literature on the advisory function of other courts is

7 OC-23/17 (n 4); Verena Kahl, '*Ökologische Revolution am Interamerikanischen Gerichtshof für Menschenrechte*' (2019) 2 Zeitschrift für Europäisches Umwelt und Planungsrecht, 1, 11.

8 See on this *infra*: Chapter 2, Sections B.V and VI.

9 Notably, OC-12/91 was not rendered on the merits and should therefore actually be counted as case of a rejected advisory opinion request. Yet, also as concerns the ICJ its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, of 8 July 1996, I.C.J. Reports 1996, p. 66 was counted, although the ICJ declined to answer the request of the WHO in that proceeding. The IACtHR has, in addition to OC-12/91, rejected five other requests for advisory opinions which were not counted above, as they were delivered as orders of rejection. On this see *infra*: Chapter 4, Section C.I. and the charts in Chapter 4, Section I. on the average length of advisory proceedings.

10 While the ICJ held its inaugural public sitting in 1946, the IACtHR was not officially inaugurated until 1979. See *infra* Chapter 1.

scarce. Concerning the advisory function of the IACtHR there are, apart from several articles and short introductions to the Court's procedural law, only the basic but somewhat dated work of Ventura Robles and Zovatto[11] and the two monographies of Guevara Palacios[12] and Roa,[13] which while newer, still do not fully exhaust the topic. All the three monographies are only published in Spanish and, moreover, are mainly written from an inter-American perspective. Guevara Palacios draws some comparisons with the ICJ, but overall, he focuses more on the reception and impact the Court's advisory opinions have in Latin American states than on the broader question whether it is at all advisable to provide an international human rights court with such a broad advisory jurisdiction. While it has often been pointed out that the advisory jurisdiction of the IACtHR was extraordinary in international law, it had not yet been further examined which consequences it has if a jurisdictional function known from an international court with general jurisdiction is given to a human rights court which is embedded in an increasingly closely integrated regional human rights system.

What is more, when the existing books were published, it was not yet fully foreseeable which consequences the inclusion of the Court's advisory opinions in the Court's doctrine of conventionality control[14] would have.

The topic thus provided plenty of potential for new legal investigation. In 2019, even more new requests for advisory opinions were filed with the Court than ever before. Among them were two politically very explosive requests from Colombia, which were directly related to current political conflicts in the region.[15] While the Court decided to grant the advisory opinions in these cases, in the preceding years it had rejected two other

11 Manuel E. Ventura Robles and Daniel Zovatto, *La Función Consultiva de la Corte Interamericana de Derechos Humanos: Naturaleza y Principios 1982-1987* (Editorial Civitas, 1989).

12 Augusto Guevara Palacios, *Los Dictámenes Consultivos de la Corte Interamericana de Derechos Humanos: Interpretación constitucional y convencional* (Bosch Editor / IIDH, 2012).

13 Jorge E. Roa, *La función consultiva de la Corte Interamericana de Derechos Humanos* (Universidad Externado de Colombia, 2015).

14 As to this doctrine see *infra*: Chapter 5, Section B.II.

15 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 and Colombia, *Request for an Advisory Opinion on the figure of indefinite presidential re-election in the context of the Inter-American system of human rights*, 21 October 2019.

politically sensitive requests related to ongoing impeachment proceedings in the region.[16]

At the moment of publication of this work, there are again three interesting requests for advisory opinions pending before the Court. This underlines the continued relevance to deal with the Court's advisory function from an academic point of view.

Purpose and idea of the book

The work has two main aims. Given the lack of English literature on the advisory function of the IACtHR, one aim of this book is to introduce this unique advisory function to a broader, non-Spanish-speaking audience that is not yet very familiar with the IACtHR. Therefore, the book starts with a brief general introduction of the Court, its relation to the OAS, and its position in the inter-American human rights system. Furthermore, at the beginning of Chapter 5, which deals with the legal nature and effects of the Court's advisory opinion, the development and the basic features of the Court's doctrine of conventionality control are once more summarized, as a basic knowledge of the Court's doctrine is indispensable for understanding the current debate on the legal effects of the Court's advisory opinions.

Apart from making the Court's advisory function known to a broader international audience, the book of course also intends to update and complement the existing Spanish literature. It aims to find practical answers to questions that have arisen in the context of the Court's advisory practice. For example, the Court has been criticized for not consistently applying its criteria for rejecting requests for advisory opinions, but to date there has been no in-depth academic study of this issue.

Studying the advisory function of the IACtHR, it becomes apparent that while having been modelled after the advisory function of the ICJ, the advisory function of the IACtHR, today – both because of the Court's practice and because of the different setting of an advisory function being exercised by a regional human rights court – has unique characteristics and a relevance in the inter-American human rights system that is not comparable to that of advisory functions of other international courts. If one is only familiar with the advisory function of the ICJ and then reads Article 64[17] and assumes that the advisory function of the IACtHR was

16 As to these requests and their rejection see *infra*: Chapter 4, Section C.I.5 and 6.

17 As to the full English and Spanish text of Article 64 of the ACHR which provides the legal basis for the Court's advisory function see *infra*: Chapter 2, Section C.V.

directly comparable to that of the ICJ, one would probably be surprised by, or only frown at, aspects of the current discussions on the effects of the Court's advisory function. Likewise, and *vice versa*, if one is familiar with the current work of the IACtHR and trying to develop a position in the discussion on the legal effects of the Court's advisory opinions, it might be helpful to recall how the advisory function was originally conceived.

Therefore, this book on the one hand wants to recall the international law origins of the Court's advisory function, and point out that the basic differentiation between contentious and advisory jurisdiction is still relevant. On the other hand, it shows what distinguishes the advisory function of the IACtHR from the advisory function of other international courts, partly from the beginning and partly only through the practice of the IACtHR that has developed over the years. Taking these differences into account is *inter alia* important for the determination of the legal effects of the advisory opinions of the IACtHR.

Apart from taking a position on the legal effects of the Court's advisory opinions, the work points out how the Court could increase the transparency and consistency of its decisions to decline requests for advisory opinions.

Lastly, the book discusses several proposals how the Court's advisory function could be improved and further developed.

Methodology

The advisory function of the IACtHR is approached from a doctrinal and in part also comparative international law perspective. In many parts, the advisory function of the IACtHR is compared to those of other international courts, especially that of the ICJ. This serves to show both similarities and differences as concerns the advisory jurisdiction, the advisory procedure, and the legal effects of the advisory opinions of the IACtHR on the one hand, and that of the ICJ and other international courts on the other hand.

First of all, the secondary literature available on the advisory function of the IACtHR and that of the ICJ has been studied. What is more, historical documents, not least the *travaux préparatoires* of the ACHR have been examined.

The most important sources for the analysis undertaken in this work are, however, of course the advisory opinions themselves and the Court's practice manifested therein. Moreover, all written observations made by OAS organs, states and civil society which are available on the Court's website and in the archives of the Court have been examined in order to find out

which objections have been brought forward in advisory proceedings, and how high the public interest in the proceedings has been.

When it comes to the interpretation of Article 64 and other relevant provisions and the evaluation of the legal interpretation undertaken by other scholars, the methods of treaty interpretation as enshrined in Articles 31 *et. seq.* VCLT[18] are employed.

Finally, the book is informed by the more recent general research on the functions and roles of international courts as well as discussions and works on transformative constitutionalism and the emergence of an *ius constitutionale commune* in Latin America.[19] However, given that this work has been conceived as a foundational work on the advisory function of the IACtHR, one of its main objectives being to make this function known and understood to a wider international readership, the advisory function and the Court's advisory practice are primarily described and analyzed from a doctrinal and especially procedural law perspective. An interdisciplinary analysis of the Court's advisory function under more specific research questions, e.g. regarding the legitimacy, effectiveness or transformative impact of the advisory function of the IACtHR would have gone beyond the scope of this work. But this book may serve as a basis for further research related to these questions.

Guide to the chapters

The **first chapter** provides a brief overview of the Court and its place in the inter-American human rights system. It looks in particular at the relationship between the Court and the OAS, and the interaction between

18 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

19 The book draws for example on Armin von Bogdandy and Ingo Venzke, *In Whose Name?: A Public Law Theory of International Adjudication* (OUP, 2014); Armin von Bogdandy *et al.* (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (OUP, 2017); Ximena Soley Echeverría, *The Transformation of the Americas: The Rise of Human Rights in the Inter-American System* (Johann-Wolfgang Goethe Universität, 2021). The question whether an *ius constitutionale commune* has emerged in Latin America is not object of this work, but events and presentations in the context of the research project of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg focusing on this question have influenced the author's view of the legal context in which the IACtHR is operating. As to the research project see: https://www.mpil.de/en/pub/research/areas/comparative-public-law/ius-constitutionale-commune.cfm.

the IACHR and the Court. It thus provides an introduction for readers who are not yet familiar with the Court.

The **second chapter** explores the historical origins of the Court's advisory function and seeks to explain why the IACtHR, of all other international courts, was endowed with such an exceptionally broad advisory jurisdiction by the standards of the time. First, the general concept of advisory opinions is introduced. Then, it is traced how this concept has been transferred from origins in national jurisdictions to international courts. It is particularly interesting to see which kind of objections and reservations there have always been about judges and courts providing legal advice to political organs and entities, and how these objections and reservations have slightly changed as regards the advisory function of international courts compared to the advisory function of domestic judges or courts. Finally, and most importantly, the genesis of Article 64 which is the legal basis for the IACtHR's advisory function, is examined step by step.

The **third chapter** provides a detailed account of the scope of the Court's advisory jurisdiction both *ratione personae* and *ratione materiae*. Proposals on how the Court's advisory jurisdiction *ratione personae* could be further extended are discussed. Furthermore, the question to what extent the Court may determine and eventually broaden the scope of requests for advisory opinions is explored. A comparison between the advisory jurisdiction of the IACtHR and that of other international Courts reveals that the Court is no longer the only one which may answer requests from states and that there is a trend towards providing international courts, especially those set up by a regional system of economic integration, with a preliminary ruling procedure.

Chapter four analyzes the admissibility requirements in advisory proceedings and the advisory procedure followed by the IACtHR. One major focus of the whole work lies on the question when the Court should reject a request for an advisory opinion and which criteria it should employ in order to reach this decision. So far, this question is understudied, although the Court has in contrast to the ICJ already rejected several requests based on its discretion. An interests- and values-based approach is suggested, which would result in the Court's balancing decision becoming more transparent. Apart from the Court's discretion to reject requests, the average length and the level of participation in advisory proceedings are depicted. Finally, common proposals how the advisory procedure could be further improved are discussed. Among them is the idea of establishing a preliminary ruling procedure in the inter-American human rights system.

Chapter five describes and analyzes the debate on the legal nature and effects of the Court's advisory opinions. It starts by recapitulating the similar debate led by academics with regard to the advisory opinions of the former Permanent Court of International Justice (PCIJ) and the ICJ, and shows why the answer found on the international level might not be one-to-one transferable to the IACtHR as a regional human rights court. A short summary of the development of the Court's doctrine of conventionality control is provided before the views on the legal nature and effects of the Court's advisory opinions are outlined and evaluated. It is concluded that the advisory opinions of the IACtHR produce *res interpretata* which implies, at least for the states parties to the Convention, that they have to take the advisory opinions into account like judgments rendered against another state, and that they have to provide for a sound legal justification if they want to deviate from the line of jurisprudence established by the IACtHR. Given the close interconnectedness between international human rights law and the states' domestic law, and the fact that most states parties have also accepted the Court's contentious jurisdiction, the advisory opinions of the IACtHR may have a more direct impact within the political and legal system of the OAS member states than advisory opinions rendered by the ICJ.

Finally, **chapter six** summarizes the main findings and conclusions of the thesis. This provides a picture of the development and current status of the advisory function, and also of ways in which it can be further developed and used in the future in order to contribute to an effective human rights protection.

Chapter 1: The IACtHR as part of the inter-American human rights system

In order to understand the IACtHR's advisory practice and all the specific aspects of its advisory function it is necessary to have a basic understanding of the Court's role and position in the inter-American human rights system. In the first place, the IACtHR is in terms of Article 33 lit. b an organ established under the Convention which was adopted on 22 November 1969, and entered into force on 18 July 1978. The Court has its seat in San José, Costa Rica, and was formally inaugurated on 3 September 1979.[20]

In contrast to the Inter-American Commission on Human Rights (IACHR) which is, according to Article 33 lit. a, the second organ competent to oversee the fulfillment of the Convention and, like the Court, composed of seven members, the Court is not expressly listed as an organ of the OAS in terms of Article 53 OAS Charter. This is explained by the fact that the Commission already existed before the entry into force of the Convention, and that there was later apparently no momentum to change the OAS Charter again in order to incorporate the Court as well.

The OAS Charter, the founding instrument of the OAS, was signed in 1948.[21] The organization dates back to several International Conferences of American States, the first of which was held in 1889, which is why the OAS is also called the "world's oldest regional organization".[22] The purpose of the organization as set out in Article 1 of its Charter is "to achieve [among the member states] an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence." Article 1 of the OAS Charter also explicitly recognizes that the organization is a regional agency in terms

20 Thomas Buergenthal, *'New Upload - Remembering the Early Years of the Inter-American Court of Human Rights'* (2005) 37 New York University Journal of International Law and Politics, 259, 261.

21 Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3 (OAS Charter).

22 See e.g. the organization's self-description on its website: https://www.oas.org/en/about/who_we_are.asp.

of Chapter VIII of the UN Charter[23]. The General Secretariat of the OAS is based in Washington, D.C. At the time of writing, the organization itself still maintains to be composed of "[a]ll 35 independent states of the Americas", but in all likelihood this number will soon be reduced when Nicaragua's denunciation of the OAS Charter takes effect.[24]

23 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945).

24 As to the number of member states and their representatives at the Permanent Mission of the OAS see the organization's website: https://www.oas.org/en/member_states/default.asp. The number of OAS member states has been subject of debates since the Maduro government announced Venezuela's withdrawal from the OAS in April 2017, and since in November 2021, also Nicaragua declared its denunciation of the OAS Charter. Article 143 OAS Charter states that a member state ceases to belong to the OAS two years after the denunciation and "after it has fulfilled the obligations arising from the [...] Charter". Despite the lapse of time, the OAS still counts Venezuela as a member state, because it recognized the re-entry declared by former interim president Juan Guaidó as valid. For more information on the case of Venezuela see *infra*: (n 725). Nicaragua already withdrew the credentials of its official representatives to the OAS, closed the OAS facilities in Managua, and the Permanent Council of the OAS bid farewell to Nicaragua on 8 November 2023. The denunciation is supposed to become finally effective on 19 November 2023. Once the withdrawal has become effective, the OAS will only have 34 member states, or only 33 if one considers the denunciation of Venezuela which had been declared by the Maduro government to be effective as well. For further information on the case of Nicaragua and on the interpretation of Article 143 OAS Charter see: *The obligations in matters of human rights of a state that has denounced the American Convention on Human Rights and the Charter of the Organization of American States (Interpretation and scope of Articles 1, 2, 27, 29, 30, 31, 32, 33 to 65 and 78 of the American Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States)*, Advisory Opinion OC-26/20, Series A No. 26 (9 November 2020) paras 117–161; Alina M. Ripplinger and Florian Kriener, *'Nicaragua's OAS Raid and the Inter-American System'*, Verfassungsblog, 2 Mai 2022, available at: https://verfassungsblog.de/nicaraguas-oas-raid-and-the-inter-american-system/; Alina M. Ripplinger, *'Ante la salida de Nicaragua de la OEA'*, El País Agenda Pública, 1 December 2021, available at: https://agendapublica.elpais.com/noticia/13476/ante-salida-nicaragua-oea; *'Cuenta atras para la salida de Nicaragua de la OEA'*, Despacho 505, 23 September 2023, available at: https://www.despacho505.com/cuenta-atras-salida-de-nicaragua-oea-noviembre/; *'Gobierno de Nicargua ratifica su salida de la OEA y clausura la sede de la organicazión en el país'*, CNN, 24 April 2022, available at: https://cnnespanol.cnn.com/2022/04/24/gobierno-de-nicaragua-ratifica-su-salida-de-la-oea/; *'Nicargua llega a la mitad de su salida de la OEA: la ruta del autoaislamiento'*, Confidencial, 19 November 2022, available at: https://confidencial.digital/especiales/nicaragua-llega-a-la-mitad-de-su-salida-de-la-oea-la-ruta-del-autoaislamiento/; *'Nicaragua se retira formalmente de la OEA'*, Ciudadano.news, 8 November 2023, available at: https://ciudadano.news/internacionales/nicaragua-se-retira-formalmente-de-la-oea.

The IACHR was first created by Resolution VIII adopted by the Fifth Meeting of Consultation of Ministers of Foreign Affairs of the OAS, held 1959 in Santiago de Chile.[25] Later, through the Protocol of Buenos Aires that amended the OAS Charter, the status of the Commission was more formalized by incorporating it into the list of organs under the OAS Charter.[26] Since the entry into force of the Convention, the Commission has a twofold role, serving on the one hand as an OAS organ charged with fostering human rights in all OAS member states, and on the other hand acting as a competent organ under the Convention vis-à-vis the contracting states.[27]

With respect to the Court, the kind of role and status it should be assigned in relation to the OAS was debated. When the text of the ACHR was discussed at the 1969 Specialized Inter-American Conference, the Chilean representative in Commission II held that the Court was an "organism of the OAS".[28] Contrary to this, the Argentinian representative negated that the Court was an organ of the OAS, and held it to be an "organism of the Inter-American System".[29] That there was apparently resistance against recognizing the Court as an official OAS organ in terms of Article 53 OAS Charter is corroborated by the way the General Assembly of the OAS modified the wording of Article 1 of the Statute of the Court before it approved the text that had originally been drafted by the first judges of the Court.[30]

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

26 Protocol of Amendment to the Charter of the Organization of American States "Protocol of Buenos Aires", 27 February 1967, entry into force 27 February 1970, OAS Treaty Series No. 1-A; see also: Héctor Faúndez Ledesma, *El Sistema Interamericano de Protección de los Derechos Humanos: Aspectos institucionales y procesales* (3rd edn. IIDH, 2004) pp. 49-50.

27 For further information on the function and work of the Commission see: Karsten Seifert, *Das interamerikanische System zum Schutz der Menschenrechte und seine Reformierung* (Peter Lang, 2008) p. 54ff.

28 OAS, Actas y Documentos, Conferencia Especializada Interamericana sobre Derechos Humanos, 7–22 November 1969, San José, Costa Rica, OEA/Ser.K/XVI/1.2, p. 359 (Mr. Magnet).

29 OAS, Actas y Documentos, Conferencia Especializada Interamericana sobre Derechos Humanos, 7–22 November 1969, San José, Costa Rica, OEA/Ser.K/XVI/1.2, p. 360 (Mr. Molina Salas).

30 On this see: Manuel E. Ventura Robles, 'El Proyecto de Estatuto de la Corte Interamericana de Derechos Humanos de 1979' in Daniel Zovatto (ed), *La Corte Interamericana de Derechos Humanos: Estudios y Documentos* (IIDD, 1985) p. 177–182.

Article 1 of the judges' draft had stated:

> *"The Inter-American Court of Human Rights is an autonomous judicial institution, a specialized organism of the Organization of American States (OAS) that exercises its functions in accordance with the provisions of the American Convention on Human Rights "Pact of San Jose, Costa Rica" and this Statute."*[31]

In contrast, the final Article 1 of the Statute as adopted by the General Assembly of the OAS reads:

> *"The Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights. The Court exercises its functions in accordance with the provisions of the aforementioned Convention and the present Statute."*[32]

The connection with the OAS was thus deleted from the text and the Court was not recognized as an organism of the OAS, but reduced to an institution established under the Convention. In terms of the OAS Charter, the Court can be qualified as an "other entity" which may, according to Article 53 OAS Charter be established when considered necessary.[33] Accordingly, the OAS refers to the Court as an "autonomous judicial body of the OAS whose purpose it is to apply and interpret the American Convention of Human Rights" and lists the Court on its website among the other "Autonomous and/or Decentralized Organs, Agencies, Entities and Dependencies."[34]

The former Judge Héctor Gros Espiell criticized the formulation "institution" instead of "organ" for being too political and pointed out that

31 Translation from Spanish by the author. As to the original Spanish text see: Manuel E. Ventura Robles, 'El Proyecto de Estatuto de la Corte Interamericana de Derechos Humanos de 1979' in Daniel Zovatto (ed), *La Corte Interamericana de Derechos Humanos: Estudios y Documentos* (IIDD, 1985) p. 180.

32 Statute of the IACtHR, adopted by the General Assembly of the OAS at its Ninth Regular Session held in La Paz Bolivia, October 1979 (Resolution No. 448). The whole text of the Court's Statute is available at: https://www.corteidh.or.cr/estatuto.cfm?lang=en.

33 Ventura Robles (n 30) p. 181.

34 See: http://www.oas.org/en/about/other_organs.asp; In the OAS Program-Budget the Court and other entities are however listed in the category of the Principal and Specialized Organs. See, OAS, Approved Program-Budget 2022, approved by the General Assembly 51 Regular Session in November 2021, AG/RES.2971 (LI-O/21) pp. 11, 47.

Article 92 of the UN Charter recognized the ICJ as the "principal judicial organ" and that neither the ECtHR was referred to as "institution" by the European Convention on Human Rights (ECHR)[35] and the ECtHR's Rules of Court.[36] Likewise, the former Secretary and later Judge Manuel Ventura Robles held that it was still indicated to incorporate the Court in the list of organs of the OAS as determined by Article 53 OAS Charter.[37] Similarly, the former member of the IACHR, Carlos Dunshee de Abranches, classified the Court as a specialized organ of the OAS in terms of Article 53 lit. h OAS Charter.[38]

However, former Judge Rodolfo Piza Escalante noted that an institution was, in contrast to an organ, vested with its own legal personality, and that this legal autonomy had allowed the Court to conclude agreements in its own name, for example with the Costa Rican government over the seat of the Court in San José.[39] Possibly, this greater independence made it also easier for the Court to take a different position than the OAS with regard to the recognition of the former interim President of Venezuela, Juan Guaidó.[40]

Despite the non-recognition as an official OAS organ under the Charter, the Court's ties with the OAS are various, and most authors agree that it is, in particular, the Court's advisory jurisdiction that leads to defining

35 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1951, since then several times amended) 213 UNTS 221 (ECHR).

36 Héctor Gros Espiell, ''El Procedimiento contencioso ante la Corte Interamericana de Derechos Humanos' in Daniel Zovatto (ed), *La Corte Intermamericana de Derechos Humanos: Estudios y Documentos* (IIDD, 1985) p. 68–69.

37 Ventura Robles (n 30) p. 180.

38 Carlos Dunshee de Abranches, '*The Inter-American Court of Human Rights*' (1980–1981) 30 The American University Law Review, 79, 85.

39 Rodolfo E. Piza Escalante, 'La Jurisdicción Contenciosa del tribunal Interamericano de Derechos Humanos' in Daniel Zovatto (ed), *La Corte Interamericana de Derechos Humanos: Estudios y Documentos* (IIDD, 1985) p. 168 fn. 13.

40 '*La OEA reconoce como president interino de Venezuela a Juan Guaidó*', Perfil, 11 January 2019, available at: https://www.perfil.com/noticias/internacional/la-oea-reconoce-como-presidente-interino-de-venezuela-a-juan-guaido.phtml; Statement made by Alexei Julio Estrada, Legal Director of the Court, on the notification of the Chancellery of Venezuela in his presentation on the Legal Value and Impact of the Advisory Opinions available at: https://www.youtube.com/watch?v=kqEvKAEhB0E&t=2349s. On the controversial question of recognition in the case of Venezuela see *infra* (n 725).

the Court not only as an organ of the Convention, but also as a judicial institution of the OAS and the inter-American system in general.[41]

The Court itself held in its first advisory opinion that "the Court is a judicial institution of the inter-American system" and "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".[42] While the historic genesis of Article 64 and the broad advisory jurisdiction of the Court which addresses not only states parties to the Convention but all OAS member states shall be analyzed more in depth in the following chapters, it suffices at this point to shed some light on the other articles contained in the OAS Charter and the Convention which characterize and define the relationship between the Court and the Organization.

First, Articles 106 (2) and 145 OAS Charter which were inserted into the OAS Charter through the 1967 Protocol of Buenos Aires[43] both anticipated the adoption of the Convention and the creation of new organs beside the Commission. Although they do not expressly mention the establishment of a human rights court, it is clear that the drafters already intended the Commission to be complemented by another organ responsible for the protection of human rights.

41 Thomas Buergenthal, '*The Advisory Practice of the Inter-American Human Rights Court*' (1985) 79 American Journal of International Law, 1, 2; Piza Escalante (n 39) p. 157–158; Ventura Robles (n 30) p. 181; Gros Espiell, 'El Procedimiento contencioso ante la Corte Interamericana de Derechos Humanos' (n 36) p. 101–113; Guevara Palacios (n 12) p. 101–113.

42 *"Other treaties" subject to the consultative jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, Advisory Opinion OC-1/82, Series A No. 1 (24 September 1982), para. 19.

43 When the OAS Charter was amended through the 1967 Protocol of Buenos Aires there existed already a draft for the later ACHR, but the Convention had not yet been adopted. The current Articles 106 and 145 were at first inserted as Articles 112 and 150. The numbering was changed through further amendments to the Charter. The articles state:
Article 106 (2) OAS Charter
"An inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of ***other organs responsible for these matters****." [Emphasis added].*
Article 145 OAS Charter
"Until the inter-American convention on human rights, referred to in Chapter XV, enters into force, the present Inter-American Commission on Human Rights shall keep vigilance over the observance of human rights."

There are also several provisions in the ACHR that delineate the relationship between the Court and the OAS.[44] Pursuant to Articles 60 and 72, the OAS General Assembly has to approve the Court's Statute and its budget and under Article 73 it may, at the request of the Court, apply sanctions against members of the Court. Furthermore, Article 53 provides for the election of the judges by the states' parties to the Convention in the OAS General Assembly. Notably, Article 52 states that judges do not have to be nationals of a state party to the ACHR but that they may be nationals from any OAS member state.[45] According to Article 58, the states' parties to the Convention decide in the OAS General Assembly on the seat of the Court. Article 65 provides that also the Court's annual reports shall be submitted to the General Assembly. Lastly, Article 64, on which the following chapters will focus, allows all OAS member states, including those that are not party to the Convention, to request advisory opinions of the Court.

These provisions highlight that the Court is embedded in the inter-American human rights system and the structure of the OAS, irrespective of its non-recognition as an official organ under the Charter.

Compared to the Commission that is explicitly mentioned in the OAS Charter, this status was correctly described as "ambiguous".[46] However, contrary to what former Judge Héctor Gros Espiell's statement suggested, the ECtHR is also not mentioned in the Statute of the Council of Europe, and therefore not a statutory body, but formally only established under the ECHR and considered the Council of Europe's independent international judicial body.[47]

The decisive characteristic of the inter-American human rights system, and one of the main differences between it and the European system are rather the asymmetries in the inter-American human rights system which hold to this day.[48] While all members of the Council of Europe are required

44 On this see also Guevara Palacios (n 12) p. 105.

45 For example, Thomas Buergenthal was nominated by Costa Rica and served as US national as one of the first judges at the Court although the USA have not ratified the ACHR. See Buergenthal, *'New Upload - Remembering the Early Years of the Inter-American Court of Human Rights'* (n 20) p. 260.

46 Ventura Robles (n 30) p. 181.

47 *Cf.*: Council of Europe, Programme and Budget 2022–2025, p. 26.

48 On this see also: Sabrina Ragone, 'The Inter-American System of Human Rights: Essential Features' in Armin von Bogdandy *et al.* (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (OUP, 2017) p. 283–285; Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn CUP, 2013) p. 26–27.

to ratify the ECHR, and while the ECtHR today has compulsory jurisdiction, only 23 of the 35[49] OAS member states are currently parties to the ACHR, and of these only 20 have also accepted the Court's contentious jurisdiction pursuant to Article 62.[50] Thus, what has been more decisive for the Court's functioning than the ambiguous formal status is the reluctant attitude of the OAS and its members towards the Court.

The difference between the role of the ICJ in the UN and the IACtHR in the OAS is evident. The former is according to Article 7 one of the principal organs of the UN with general jurisdiction which fits to the general field of activities and tasks of the UN. In contrast, the IACtHR's jurisdiction is limited to the area of human rights, while the protection and promotion of the latter is only one of many other tasks undertaken by the OAS.

The relationship of the ECtHR to the Council of Europe also appears to be more consolidated than the relationship between the IACtHR and the OAS. The protection of human rights and the rule of law was one of the main focuses of the Council of Europe right from the beginning and under its auspices effective human rights institutions were established relatively quickly.[51] In

49 On the disputed question of the number of OAS member states see *supra*: (n 24) and *infra*: (n 725).

50 Article 32 ECHR; Council of Europe, Honouring of commitments entered into by member states when joining the Council of Europe, Resolution 1031 (1994), para. 9; As to the ratification status of the ACHR see: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm and the Annual Report 2022 of the Court, p. 14–15. While the OAS recognized the re-entry to the Convention declared by Juan Guaidó, the Court is of the opinion that Venezuela's denunciation of the ACHR took effect on 10 September 2013. While the position of the OAS is in this work regarded as authoritative as concerns the number of its own member states, when it comes to the number of contracting states of the ACHR, this works follows the opinion of the Court, and does not count Venezuela as 24th contracting state. The States that have recognized the Court's contentious jurisdiction are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay. The three states that are parties to the ACHR without having accepted the Court's contentious jurisdiction are: Dominica, Grenada and Jamaica. So far, Nicaragua has only denounced the OAS Charta but has not withdrawn from the ACHR so that it will continue to be bound by the ACHR even after the denunciation of the OAS Charta takes effect.

51 Already one year after the creation of the Council of Europe, the ECHR was adopted and nine more years later, in 1959, the ECtHR held its first session. By contrast, after the OAS Charter was adopted in 1948, it took until 1969 for the ACHR to be adopted and ten more years until the Court was effectively established in 1979 and even then eight more years until it could render its first judgement in 1987.

contrast, the OAS's main concern in the beginning was securing the sovereignty of its member states and the principle of non-intervention.[52] Even when the Commission was created, it was by most member states not envisaged to become an active body seeking to effectively protect human rights in the member states, but rather thought to be a "study group" that should do no more than study and promote human rights.[53]

To date, while the protection of human rights is by now considered one of the four main pillars of the OAS, and although the member states "have affirmed their unequivocal commitment to democracy and human rights", both the Commission and the Court have remained chronically underfunded.[54] This impedes in particular a more efficient processing of individual petitions. Except for the President, all the remaining six judges of the Court still only serve on a part-time basis.[55]

Despite these obstacles, both the Commission and the Court have developed their own strategies to maximize their impact in order to achieve the most effective human rights protection that is possible under the given circumstances.[56] In particular, the cooperation between the Court and the Commission has improved significantly. In the beginning, the relationship between the two bodies was unclear and characterized by rivalry and tensions.[57] It took until 1986, seven years after the Court's inauguration, for the

52 Soley Echeverría, *The Transformation of the Americas* (n 19) p. 69–76.

53 Soley Echeverría, *The Transformation of the Americas* (n 19) p. 69–77; José A. Cabranes, '*The Protection of Human Rights by the Organization of American States*' (1968) 62 (4) American Journal of International Law, 889, 894.

54 See the self-description on the OAS webpage: http://www.oas.org/en/about/what_we_do.asp; http://www.oas.org/en/topics/human_rights.asp; Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 24; Ximena Soley Echeverría, 'The Transformative Dimension of Inter-American Jurisprudence' in Armin von Bogdandy *et al.* (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (OUP, 2017) p. 350; Ragone (n 48) p. 299. In 2022 the Court received a total income of US$ 8,458,288.00 of which 59,40 % was provided by the OAS Regular Fund. In comparison, the ECtHR's total income in 2022 amounted to € 74,510,300. See: IACtHR, Annual Report 2022, p. 177; Council of Europe, Programme and Budget 2022–2025, p. 2 table 1.

55 Buergenthal, '*New Upload - Remembering the Early Years of the Inter-American Court of Human Rights*' (n 20) p. 269; Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 25.

56 For an in-depth analysis of why and how the Commission and the Court boldly interpreted their mandates and sought to maximize their impact see: Soley Echeverría, *The Transformation of the Americas* (n 19).

57 Buergenthal, '*New Upload - Remembering the Early Years of the Inter-American Court of Human Rights*' (n 20) p. 269.

Commission to refer the first contentious case to the Court.[58] Yet, throughout the years, both the Commission and the Court have reformed their respective Rules of Procedure several times in order to strengthen the whole system and make it more efficient.[59] Since the 2001 amendments, the Commission's Rules of Procedure provide for an referral to the Court of all cases that are directed against a state that has recognized the Court's jurisdiction, if the Commission holds that the state has not complied with its recommendations, and "unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary".[60]

Today, the Court has decided about 500 contentious cases and usually holds about nine sessions per year, either at its seat in Costa Rica or in another state that has invited the Court.[61] Apart from its contentious and advisory function, the Court also issues provisional measures, monitors the compliance with its judgments and may, within 90 days from the notification of a judgment, be requested by one of the parties to the case to interpret the judgment.

Overall, it can be concluded that the Court is no official organ of the OAS, but an autonomous institution which is embedded in the OAS structure. The Court functions as the judicial institution in the two-tier inter-American human rights system. It sees itself as "the ultimate interpreter of the American Convention"[62], and why and how precisely its advisory function also connects the Court with the OAS member states that have not ratified the Convention will be shown in the following chapters.

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58 On 24 April 1986 the IACHR referred the case of *Velásquez Rodríguez v. Honduras* to the Court which handed down its first judgment on preliminary objections in 1987: IACtHR, *Case of Velásquez Rodríguez v. Honduras*, Judgment of 26 June 1987 (Preliminary Objections), Series C No. 1.

59 Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 18.

60 At first this was provided for in Article 44 (1), today it is contained in Article 45 (1) Rules of Procedure of the IACHR. On the changes introduced by the 2001 amendments to the Commission's Rules of Procedure see: Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (1st edn CUP, 2003) pp. 18–22.

61 *Cf.*: IACtHR, Annual Report 2022, p. 26; All information on the pending cases and the next sessions of the Court are available on the Court's website: https://www.corteidh.or.cr/index.cfm?lang=en.

62 *Cf.*: IACtHR, *Case of Almonacid-Arellano et al v. Chile*, Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 154, para. 124; OC-23/17 (n 4) para. 16.

Chapter 2: Origins of the advisory function of the IACtHR

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

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

A. Advisory opinions in general

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Historical development of advisory opinions

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

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

I. England

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

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

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

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

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

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

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

II. United States of America

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

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

93 Ellingwood (n 66) p. 29.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Canada and India

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

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

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

IV. Latin American states

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

127 Ruiz Miguel (n 68) p. 1350.

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

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

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

V. Permanent Court of International Justice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. International Court of Justice

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. Intermediate conclusion

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

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

162 See *supra*: n 141.

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

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

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

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

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

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

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

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

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

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

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

C. Genesis of Article 64 ACHR

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

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

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

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

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

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

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

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

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

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

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

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

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

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

177 Zovatto (n 174) p. 213.

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

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

II. Draft of the Inter-American Council of Jurists

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

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

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

181 Zovatto (n 174) p. 214.

182 See *infra* (n 193).

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

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

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

III. Chilean draft convention

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

"Article 64 (72)

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

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

185 Zovatto (n 174) p. 220.

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

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

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

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

"Article 66 (74)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Article 53

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

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

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

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

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

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

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

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

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

V. 1969 Specialized Inter-American Conference

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

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

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

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

202 Resolución aprobada por el consejo de la organización de los estados Americanos en la sesión celebrada el 2 de octubre de 1968, contained in: OAS, Actas y Documentos, Conferencia Especializada Interamericana sobre Derechos Humanos, 7–22 November 1969, San José, Costa Rica, OEA/Ser.K/XVI/1.2, p. 12.

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

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

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203 OAS, Draft Inter-American Convention on Protection of Human Rights and Observations and Comments of the American Governments, Working Document prepared by the Secretariat of the Inter-American Commission on Human Rights, OEA/Ser.K/XVI/1.1 (English), Doc. 13, 22 September 1969, p. 104. The Dominican Republic apparently adopted the proposal and the reasoning of the United States. See its proposal in Spanish in OAS, Actas y Documentos, Conferencia Especializada Interamericana sobre Derechos Humanos, 7–22 November 1969, San José, Costa Rica, OEA/Ser.K/XVI/1.2, p. 84; see also Ludovic Hennebel and Hélène Tigroudja, *The American Convention on Human Rights: A Commentary* (OUP, 2022) Article 64, p. 1355.

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

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

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

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

See the Dominican Republic's observations in OAS, Actas y Documentos, Conferencia Especializada Interamericana sobre Derechos Humanos, 7–22 November 1969, San José, Costa Rica, OEA/Ser.K/XVI/1.2, p. 50–91, 84.

205 Faúndez Ledesma (n 26) p. 989.

206 Guevara Palacios (n 12) p. 98.

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

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

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

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

"Article 64

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

OEA/Ser.K/XVI/1.1 (English), Doc. 13, 22 September 1969, p. 104; OAS, Actas y Documentos, Conferencia Especializada Interamericana sobre Derechos Humanos, 7–22 November 1969, San José, Costa Rica, OEA/Ser.K/XVI/1.2, p. 84 and Inter-American Yearbook on Human Rights 1968, p. 276.

208 OAS, Actas y Documentos, Conferencia Especializada Interamericana sobre Derechos Humanos, 7–22 November 1969, San José, Costa Rica, OEA/Ser.K/XVI/1.2, p. 85.

209 OAS, Actas y Documentos, Conferencia Especializada Interamericana sobre Derechos Humanos, 7–22 November 1969, San José, Costa Rica, OEA/Ser.K/XVI/1.2, p. 119.

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

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

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

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

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210 See today's text of the ACHR and for the final Spanish text also: OAS, Actas y Documentos, Conferencia Especializada Interamericana sobre Derechos Humanos, 7–22 November 1969, San José, Costa Rica, OEA/Ser.K/XVI/1.2, p. 497. In Spanish Article 64 states:
"Artículo 64
1. Los Estados miembros de la Organización podrán consultar a la Corte acerca de la interpretación de esta Convención o de otros tratados concernientes a la protección de los derechos humanos en los Estados americanos. Asimismo, podrán consultarla, en lo que les compete, los órganos enumerados en el capítulo X de la Carta de la Organización de los Estados Americanos, reformada por el Protocolo de Buenos Aires.
2. La Corte, a solicitud de un Estado miembro de la Organización, podrá darle opiniones acerca de la compatibilidad entre cualquiera de sus leyes internas y los mencionados instrumentos internacionales."

211 OAS, Actas y Documentos, Conferencia Especializada Interamericana sobre Derechos Humanos, 7–22 November 1969, San José, Costa Rica, OEA/Ser.K/XVI/1.2, p. 377. At this point the provision was still envisaged as Article 65. It became Article 64 when the former draft Article 27 was deleted during the second plenary session, see *ibid*. pp. 448, 453, *cf*. also Guevara Palacios (n 12) p. 99.

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

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

213 OAS, Actas y Documentos, Conferencia Especializada Interamericana sobre Derechos Humanos, 7–22 November 1969, San José, Costa Rica, OEA/Ser.K/XVI/1.2, p. 457.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

220 Ventura Robles (n 30) p. 183.

VII. Concluding summary

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

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

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

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

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

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

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.

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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.

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.

Chapter 4: Admissibility and advisory procedure

After the scope of the Court's advisory jurisdiction has been determined, in this chapter the admissibility requirements and the procedure followed by the Court in advisory proceedings shall be outlined. As will be seen, the Court enjoys a high level of flexibility as concerns both, the determination of the admissibility or rejection of requests for advisory opinions, and the arrangement of the advisory procedure.

The cornerstones of the advisory procedure are regulated in Articles 70–74 of the Court's Rules of Procedure, which were altered several times over the years, adapting the Rules in line with the evolving procedural practice.

To date, the Rules leave the Court lots of leeway to adapt the advisory procedure according to what is adequate in light of the respective request. This means, that even if the Court usually always proceeds in the same way, it is not definitively determined in the Rules of Procedure who is considered an 'interested party' and is therefore invited to submit written observations; whether or not a public hearing is convened; which provisions regulating the contentious procedures are applied by analogy and finally, how the request is published and whether or not it is read out publicly.

The advisory procedure before the ICJ is similarly flexible, and the World Court has described the advisory procedure as "relatively unschematic"[463] but the written rules of the ICJ are still much more detailed than those of the IACtHR. For example, Article 73 of the Court's Rules of Procedure does not contain a provision comparable to Article 66 (4) ICJ Statute which regulates how states and organizations that have made written or oral statements may comment on the statements made by others. Irrespective of the lack of an explicit provision, the IACtHR has sometimes invited the participants of the oral hearing to file further written observations within a given deadline.[464]

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463 ICJ, *Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, p. 16, 26 para. 38; Malcolm N. Shaw, *Rosenne's Law and Practice of the International Court 1920–2015, Vol. III: Procedure* (5th edn Martinus Nijhoff Publishers, 2016) p. 1742.

464 OC-16/99 (n 227) para. 19; OC-17/02 (n 253) para. 14; OC-18/03 (n 227) paras. 41–46.

Furthermore, in the Rules of Procedure of the IACtHR there is no rule comparable to Article 102 (3) Rules of the ICJ, which regulates the appointment of national judges in cases in which a request concerns a legal question pending between two states. Moreover, there is no rule foreseeing a special procedure for urgent requests, as does Article 103 Rules of the ICJ.

In the absence of more detailed procedural rules, much depends therefore on the accustomed practice of the Court, its President and its Secretariat.

Besides its flexibility, the Court's advisory procedure is characterized by its high level of participation and integration. As will be shown in this chapter, the involvement of *amici* in advisory proceedings has immensely increased over the years.

In light of several very politically sensitive requests for advisory opinions in recent years, the major focus of this chapter will, however, lie on the question of how the Court exercises its discretion to reject requests for advisory opinions. In contrast to the ICJ, the IACtHR has already used this discretion several times. Nevertheless, this practice has hardly ever been thoroughly studied and evaluated.[465] Finally, at the end of the chapter, it is discussed how the advisory procedure could be further improved.

A. Written admissibility requirements

A request for an advisory opinion is admissible if it is submitted to the Court by an entity with standing in advisory proceedings, and if it is covered by the Court's advisory jurisdiction *ratione materiae*.[466] Hence, the most important admissibility requirements have already been determined in the chapter on the Court's advisory jurisdiction.

In addition, Article 70 (1) Rules of Procedure states that a request for an advisory opinion shall state with precision the specific questions on which the Court's opinion is sought. Furthermore, Article 70 (2) Rules of Proced-

465 The only ones who have dealt with the IACtHR's practice of rejecting requests for advisory opinions more in depth so far are: Cecilia M. Bailliet, '*The strategic prudence of The Inter-American Court of Human Rights: rejection of requests for an advisory opinion*' (2018) 15 Revista de Direito Internacional, 255–276 and Gonzalo Candia Falcón, '*Causales de Inadmisibilidad de Opiniones Consultivas: Reforzando el Carácter subsidiario del Sistema Intermaericano de Derechos Humanos*' (2018) 45(1) Revista Chilena de Derecho, 57-80.

466 Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 69.

ure provides that the provisions the Court is requested to interpret shall be identified, that the considerations giving rise to the request are explained, and that the names and addresses of the agent or delegate appointed by the requesting entity are given.

If a request is made by an OAS organ other than the Commission, the request shall, pursuant to Article 70 (3) Rules of Procedure, further indicate how it relates to the sphere of competence of said organ. Article 71 (1) Rules of Procedure provides that, if a request refers to other treaties in terms of Article 64 (1), the name of said treaties and the parties thereto shall be specified. Likewise, Article 72 (1) lit. a Rules of Procedure states that if a request refers to the compatibility of domestic laws with the Convention or other treaties, the relevant provisions of the domestic law shall be pointed out and according to Article 72 (2) Rules of Procedure a copy of the domestic laws shall be attached to the request.

In practice, these admissibility requirements are handled quite flexibly by the Court. As already explained above, the fact that questions submitted to the Court are formulated unclearly or are partly inadmissible does not automatically render the entire request inadmissible.[467] Pursuant to its inherent competence to determine the meaning and scope of a request, the Court may clarify and reformulate the questions posed so that they are clear and fall within its substantive jurisdiction.[468]

Besides, the indication of the provisions to be interpreted by the Court is not binding upon the Court. Rather, the Court may, according to the principle of *juris novit curia*, also include in its examination the interpretation of other relevant norms.[469] Lastly, the failure to name an agent can also be fixed in the further course of the proceeding.[470]

Characteristic for the Court's advisory practice is not only that the few written admissibility criteria are flexibly applied by the Court. What is even more decisive is, that all the written admissibility criteria only deal with formal questions. None of the written admissibility criteria contained in

467 See on this inherent power of the Court and its pursuant practice *supra*: Chapter 3, Section C.I. and also Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 70.

468 OC-7/86 (n 325) para. 12; OC-23/17 (n 4) para. 36.

469 For example, the Court interpreted Art. 17 in OC-24/17 although this provision had not been named in Costa Rica's request. Furthermore, in OC-26/20 the Court referred among other provisions to Art. 143 OAS Charter although Colombia had not included this article among the provisions to be interpreted.

470 See OC-9/87 (n 366) para. 5; OC-10/89 (n 348) para. 3; Guevara Palacios (n 12) p. 195.

the Court's Rules of Procedure further specifies what is covered by the Court's advisory jurisdiction *ratione materiae*. Nor does any of them hint at scenarios in which a request should be declared to be inadmissible for being inappropriate.

Consequently, the *prima facie* admissibility test which will be described in the next section is only limited to minor formal questions. At the same time, the huge question of how the Court should determine which requests are inadmissible for falling outside of its advisory jurisdiction or for being inappropriate is not addressed in either the Court's Statue or its Rules of Procedure. Therefore, the rejection criteria which the Court established in its jurisprudence, and the question of how the Court exercises its discretion to decline requests is all the more relevant.

B. Submission and notification of a request

When the Court receives a new request for an advisory opinion, it first of all undertakes an internal *prima facie* admissibility test. If the request is filed by an obviously unauthorized entity or if the questions are not clear, the Secretary of the Court is likely to return the request to the state asking whether the request is supported by the whole government and therefore to be upheld, or whether the entity could clarify or reformulate its request. If the answer is negative, and the request is not upheld, or if it is obviously inappropriate, such a request will probably be rejected via an informal note, without even being considered as pending by the Court, and without being published.

One could argue that this runs against Article 73 (1) of the Rules of Procedure, as this rule urges the Secretary to transmit, upon receipt of a request, copies thereof to the member states and OAS organs. Besides, a publication of any intended request would be desirable in terms of transparency.

Yet, it is also plausible to hold that such an intended request which obviously does not comply with the formal requirements set out in Articles 70–72 Rules of Procedure does not even constitute a request that can be formally received by the Court in terms of Article 73 (1) Rules of Procedure. The Secretary should be able to first ascertain whether the received document is seriously meant to trigger an advisory procedure before transmitting it to the other member states and OAS organs. This helps to protect the integrity of the requesting entity, which may be important in order to assure or to establish trust in the Court.

Lastly, it would be inefficient to notify or even to invite the member states and OAS organs to submit written observations concerning a request that will be rejected anyway. For transparency and research purposes, obviously inadmissible and directly declined requests could be published, if possible, in anonymous form, in the Court's annual report.

In all cases in which the *prima facie* admissibility test is positive, the Secretary notifies the member states and the OAS organs and invites them to file written observations within a deadline fixed by the President.

Under the first Rules of Procedure, the Secretary was not required to notify the OAS member states and organs in case of requests submitted pursuant to Article 64 (2).[471] For example, in the case of OC-4/84, which was filed by Costa Rica only under Article 64 (2), the Secretary of the Court only invited certain juridical institutions from Costa Rica.[472]

However, given that other OAS member states and OAS organs may be as interested in advisory opinions in terms of Article 64 (2) as in requests raised under Article 64 (1), the Rules of Procedure were quickly changed, and since 1991, the Secretary shall also notify requests in terms of Article 64 (2) to all OAS member states and organs.[473]

Pursuant to Article 73 (3) Rules of Procedure, the President may also invite any other interested party to submit written observations. As will be shown below, the inclusion of NGOs and other civil society groups has significantly increased over the years. Today, the President normally instructs the Secretary to invite relevant international organizations, civil society groups and academic institutions to submit written observations within the specified time limit.

Furthermore, the news of a pending request is published on the Court's website, combined with an open invitation that any person interested in the proceeding may submit written observations. Thus, today the circle of organizations and persons informed about a new request for an advisory

471 See Art. 52 of the first Rules of Procedure of the Court from 1980. The current and all 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. *Cf.* also Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 70.

472 OC-4/84 (n 233) para. 4.

473 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.

opinion pending at the Court is much bigger than in the beginning of the Court's functioning.

C. Discretion of the Court not to answer a request

In light of the broad advisory jurisdiction given to the Court, the Court already held in its first advisory opinion that this "broad scope" determined by Article 64 could not mean that there were no other limits to its advisory jurisdiction.[474] Therefore, it went on to define limitations of its advisory function and concluded that the Court "enjoys an important power of appreciation enabling it to weigh the circumstances of each case, bearing in mind the generic limits established by the Convention for the Court's advisory jurisdiction".[475] Should the circumstances of a request justify a decision to decline it, the Court found that it was empowered to reject a request but only via "a duly motivated decision".[476]

This "permissive" character of the advisory function means that even when a request formally falls within the scope of the Court's advisory jurisdiction, as enshrined in Article 64, and moreover fulfills all admissibility criteria set out in the Rules of Procedure, the Court still retains a certain discretion to abstain from answering the request.[477]

In its third advisory opinion, the Court clarified that the decision to reject a request can only be made by the plenum of the full Court and e.g. not alone by the President or by the Permanent Commission.[478]

The fact that the Court's advisory function is facultative can be deduced from the term "may provide" contained in Article 64 (2). Additionally, Article 64 (1) only establishes a right of OAS member states and OAS organs to "consult" the Court, which does not imply that the Court is obliged to give the requested advice. Furthermore, as also highlighted by the Court in its first advisory opinion, the finding that it has the discretion

474 OC-1/82 (n 42) para. 18.
475 OC-1/82 (n 42) para. 29.
476 OC-1/82 (n 42) para. 52 second concluding finding.
477 OC-1/82 (n 42) para. 28. The characterization of the advisory function as "permissive" was directly copied from the ICJ. See ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, I.C.J. Reports p. 65, 72. On the whole see also Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 59 *et seq*.
478 OC-14/94 (n 371) para. 17.

to decline requests is consistent with the jurisprudence and practice of other international courts.[479]

The PCIJ exercised discretion to decline a request for an advisory opinion in the *Eastern Carelia* advisory proceedings.[480] Thereby, it left no doubt that it was certain that it had such discretion – an issue which had been unclear given that the French version of Article 14 of the Covenant used the future tense "*donnera*" and hence did not exactly correspond to the English wording "*may give*".[481] Today, this linguistic ambiguity no longer exists in Article 65 ICJ Statute[482] and the ICJ has consistently stated[483] that it has discretion to decline a request although it has so far never made use of such discretion.[484]

The IACtHR, in contrast, has already declined to fully answer a request for an advisory opinion in six cases to date. In all these cases, the decision was based on the Court's discretion and not on a lack of jurisdiction or on another reason of inadmissibility derived from the Convention or the Court's Rules of Procedure. On one of those occasions, the Court's

479 OC-1/82 (n 42) paras. 27–28.

480 PCIJ, *Status of Eastern Carelia*, Advisory Opinion of 23 July 1923, Series B No. 5 p. 7, 29; see also: ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004 p. 136, 156, para. 44.

481 d'Argent, 'Art. 96 UN Charter' (n 132) mn 6.

482 Today, the French version "*peut donner*" corresponds exactly to the English wording "*may give*".

483 See e.g. 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, 111 para. 54, p. 113 para. 63 *et. seq*.

484 The rejection of the WHO request on nuclear weapons was based on a lack of jurisdiction, not on the further discretion of the ICJ; See 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.

jurisdiction was also doubtful[485] but the Court, contrary to the ICJ[486], did not feel obliged to first establish its jurisdiction before being able to justify its decision to decline the request on the basis of its discretionary power.

Contrary to the final Statute of the Court, as approved by the OAS General Assembly, the draft Statue elaborated by the first judges of the Court contained not only a clause that would have broadened the scope of the Court's advisory jurisdiction even more, but also a clause stating that the Court would refrain from answering requests if it came to the conclusion that providing the opinion as requested would be incompatible with its nature as human rights court.[487]

Whereas this clause was not approved and whereas, as noted above[488], the Court's Rules of Procedure define only formal but no substantive admissibility requirements, the Court has over the years, and with the increasing number of advisory opinions issued, established more and more criteria that may, if verified, lead to the rejection of a request. At the same time, it has emphasized that this list was not exhaustive as it was "for the

485 In the request of the OAS General Secretary on the due process requirements of impeachment the Court only noticed that the Secretary General had missed to specify the provisions whose interpretation he had sought, but that it found it to be convenient to go on and address directly the other reasons that led the Court to decline the request. Apart from the jurisdiction *ratione materiae* that could have been clarified by asking the OAS Secretary General to make subsequent additional submissions, the Court obviously assumed that the jurisdiction *ratione personae* had been given. This is however doubtful as the Secretary General as such is no OAS organ pursuant to Article 53 OAS Charter, but only the head of one, namely the General Secretariat. The Secretary General had referred in his request to Article 20 of the OAS Democratic Charter, but this provision only entitles him to convoke the Permanent Council and not to request an advisory opinion of the Court. Furthermore, if the Secretary General had intended to act on behalf of the General Secretariat as organ with standing in advisory procedures, he had not established in how far the request arose under the sphere of competences of the General Secretariat as is required by Article 64 (1) ACHR and Article 71 (2) Rules of Procedure. See: IACtHR, Order of 23 June 2016, *Solicitud de Opinión Consultiva presentada por el Secretatio General de la Organización de los Estados Americanos*, esp. considerando para. 1 and 5 [published only in Spanish].

486 *Cf.*: 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.

487 Ventura Robles (n 30) p. 183. As to the clause in the draft Statute see *supra*: Chapter 2, Section C.VI.

488 *Supra*: Chapter 4, Section A.

Court to evaluate the pertinence of exercising its advisory function with regard to each specific request".[489]

What is more, in its advisory opinion OC-25/18, the Court also held that the named criteria did not constitute "insurmountable limits" which means that it may still render the requested opinion despite one or more of its established rejection criteria being fulfilled.[490]

Among the criteria that, if fulfilled, may lead to the rejection of a request are the following[491]:

- 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;
- a request should not be used as a mechanism to obtain an indirect ruling on a matter that is in dispute or being litigated at the domestic level;
- a request should not be used as an instrument in a political debate in the domestic sphere;
- a request should not refer, exclusively, to issues on which the Court has already ruled in its jurisprudence;
- a request should not be intended to resolve factual matters;
- and the Court's advisory competence should not, in principle, be used for abstract speculations without a foreseeable application to specific situations that justify the issuing of an advisory opinion.

Despite the non-exhaustive character of these criteria and the Court's persistence on its broad discretion, the Court already stated in its first advisory opinion that this discretion was not "unfettered".[492] Similar to the ICJ, which has consistently held that "as the principal judicial organ of the United Nations" it "should in principle not decline to give an advisory opinion", the Court found that there must be "compelling reasons founded in the conviction that the request exceeds the limits of its advisory jurisdiction under the Convention" in order to allow the Court not to answer a request.[493]

489 IACtHR, Order of 29 May 2018, *Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*, para. 6.

490 OC-25/18 (n 227) para. 46.

491 IACtHR, *Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*, para. 6; OC-25/18 (n 227) paras. 46–47.

492 OC-1/82 (n 42) para. 30.

493 OC-1/82 (n 42) para. 30; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports

There is no fixed point in the course of a proceeding at which the Court has to decide that it will not fully answer a request.[494] This explains why the decisions to reject a request have been issued in different forms and at different stages of the respective proceedings. The first case in which the Court made use of its discretionary power formally appears as a normal advisory opinion, and is also counted and published as such in the Series A of the Court's publications.[495] The later decisions of rejection were, however, all published in form of an order of the Court. Sometimes, those orders were only made after the Court had asked the OAS member states, the OAS organs and any interested party for written observations or *amicus curiae* briefs.[496] By contrast, in other proceedings the requests were rejected quite immediately[497].

Written observations and *amicus briefs* have often contained arguments why the Court should decline to answer the respective advisory opinion request. Notwithstanding, the Court has often decided to render these advisory opinions, and in particular in recent years, it has issued several politically very sensitive advisory opinions. At the same time, it has hardly ever been systematically studied how the Court uses the above-mentioned rejection criteria, and in which situations it indeed makes use of its discretion to reject requests.

Henceforth, light will be shed on the six occasions in which the Court has so far declined to answer a request for an advisory opinion. Thereafter, the application of the Court's rejection criteria in the advisory opinions that were provided on the merits will be examined in order to show possible inconsistencies in the criteria's application. Subsequently, the suitability of the main established rejection criteria is further scrutinized, and it is questioned whether the inclusion of additional admissibility criteria in the Court's Rules of Procedure could help to make the Court's decision more

2004, pp. 136, 156 para. 44; 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, 113 para. 64 *et. seq*.

494 OC-25/18 (n 227) para. 17.

495 See OC-12/91 (n 362).

496 See e.g. the proceedings following the request of the IACHR of 13 October 2017 on impeachment, the request of the IACHR of 20 April 2004 on due process rights of prisoners on death row and the Costa Rican request of 22 February 1991 on Art. 8 lit. h ACHR.

497 See e.g. the request of the IACHR of 29 December 2008 on corporal punishment of children or the request of the OAS General Secretary of 19 May 2016 on impeachment.

predictable, or would instead unduly reduce the Court's ability to weigh all the individual circumstances of the specific advisory opinion request. Finally, an interests- and values-based approach is proposed that would help to make the Court's decision to reject or not an advisory opinion request more comprehensible and transparent.

I. Requests for advisory opinions rejected by the Court

The following analysis of the six cases in which the Court has so far declined to render the requested advisory opinion on the merits will show which circumstances led the Court to these decisions. Moreover, it will be pointed out how the Court established new rejection criteria in some of the decisions.

1. First rejection

The first rejection occurred with regard to a request made by Costa Rica under Article 64 (2) concerning the compatibility of a Costa Rican draft legislation regarding the amendment of the Costa Rican Code of Criminal Procedure and the establishment of a Crimi-nal Court of Appeal with Article 8 (2) lit. h.[498] The Court had jurisdiction since Costa Rica, as an OAS member state, was entitled to request an advisory opinion under Article 64 (2) concerning the compatibility of one of its own national laws with the Convention. Furthermore, the request complied with the formal admissibility requirements as set out in the Court's Rules of Procedure.

The Court also rejected the objections raised by Uruguay, according to which draft legislation could not be the subject matter of an advisory opinion, as only such legal norms could have qualified as "domestic law" in terms of Article 64 (2) that had met the requirements defined by the Court in advisory opinion OC-6/86 on the word "laws" in Article 30.[499] Pursuant to the Court, Article 30 constituted, however, a "very special pro-

498 OC-12/91 (n 362). Article 8 (2) lit. h. ACHR provides: Right to a fair trial […] 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: […] h. the right to appeal a judgment to a higher court.

499 OC-12/91 (n 362) para. 8 *et seq*; OC-6/86 (n 316) para. 38.

vision".[500] Hence, the definition found in advisory opinion OC-6/86 with respect to Article 30 could not be applied analogously to other provisions of the Convention. Rather, the Court upheld its finding made in advisory opinion OC-4/84 that pursuant to Article 64 (2) the Court might in certain circumstances also provide advice on the compatibility of *draft* legislation with the Convention.[501] Accordingly, the Court was actually competent to issue the requested advisory opinion.

In order to understand why the Court nevertheless declined to answer the questions posed by Costa Rica, it is helpful to be aware of the factual background of the request. At the time the request was made, Articles 474 and 475 of the Costa Rican Code of Criminal Procedure did not provide for a right to appeal certain convictions.[502] This limited right to appeal had led to up to nine individual petitions being lodged before the IACHR since 1984, claiming that Costa Rica had violated Article 8 (2) lit. h.

With regard to the first complaint, the Commission had found a violation of Article 8 (2) lit. h and had recommended Costa Rica to adopt the necessary legislative measures to remedy the situation. Since then, the Commission had waited for several years for Costa Rica to comply with the recommendations but Costa Rica had, time and again, asked for further extensions of the deadline in order to enact the necessary changes in the Code of Criminal Procedure.

At one point, Costa Rica argued before the Commission that its Constitutional Court had just found that Article 8 (2) lit. h was self-executing and directly applicable in Costa Rica, and that on this basis, an appeal against all criminal convictions was *ex nunc* possible.[503] Based on this information the Commission decided not to refer the case to the Court.[504]

Meanwhile, the legislative process in Costa Rica had advanced, and by way of its request for an advisory opinion, the government presented the draft legislation to the Court asking to provide advice on whether the planned creation of a new Criminal Court of Appeal was consistent with Article 8 (2) lit. h, and what the Spanish term "delitos" contained in Article 8 (2) encompassed. Against this background, the Court held, that

500 OC-12/91 (n 362) paras. 17–18.
501 OC-12/91 (n 362) paras. 19–22; OC-4/84 (n 233) paras. 28–29.
502 As to the factual background of this rejection see also: Candia Falcón (n 465), p. 67f.
503 IACHR, Letter to the Court providing information on the request of Costa Rica, OC-12/91 proceedings, 30 September 1991, p.4 [only available in Spanish].
504 *Ibid.*

> *"a reply to the questions presented by Costa Rica, could produce, under the guise of an advisory opinion, a determination of contentious matters not yet referred to the Court, without providing the victims with the opportunity to participate in the proceedings. Such a result would distort the Convention system. Contentious proceedings provide, by definition, a venue where matters can be discussed and confronted in a much more direct way than in advisory proceedings. This is an opportunity which cannot be denied to individuals who do not participate in the latter proceedings. Whereas the interests of individuals in contentious proceedings are represented by the Commission, the latter may have different interests to uphold in advisory proceedings.*
> *Although it appears that the draft legislation might correct, as far as concerns the future, the problems that gave rise to the petitions against Costa Rica now before the Commission, a ruling by the Court could in the long run interfere with cases that should be fully processed by the Commission in the manner provided for by the Convention […]."*[505]

Therefore, the Court decided not to render the requested advisory opinion. Accordingly, although the decision was published in the Court's Series A and was numbered as OC-12/91, it has to be considered the first case of rejection based on the Court's discretion.

In between the lines of the decision, one cannot help noting not only a critique against Costa Rica's delayed reaction to the illegal situation but also against the practice of the Commission that had repeatedly granted extensions of the time limit to Costa Rica, and had abstained from referring the situation to the Court. At the beginning of the 1990s, the Commission had still referred only very few cases to the Court. Hence, the Court had an obviously strong interest in strengthening its contentious function, and wanted to avoid the latter being undermined by its advisory function.

Furthermore, the Court noted correctly that the Commission plays a different role in advisory proceedings not necessarily representing the interests of the victims, and that this confirms the finding, that the interests of victims could be disregarded if an advisory proceeding was pursued instead of a contentious one.[506]

505 OC-12/91 (n 362) paras. 28–29.

506 See OC-12/91 (n 362) para. 28. This different role of the Commission was especially true under the procedural rules in force at that time. Then, the Commission acted more clearly as an advocate for the victim in contentious proceedings than today. As to the different, more "objective and impartial" role of the Commission as defender

2. Second rejection

It was not until 2005 that the Court again refused to give an opinion.[507] The underlying situation was slightly similar to the one in 1991. It was again Costa Rica that had requested an opinion under Article 64 (2). This time there were however no cases pending before the IACHR. Rather, there was an internal political dispute taking place in Costa Rica which made the Court fear that its advisory opinion would be used as an argument in the domestic political debate.

The request centered on the conventionality of Article 9 (3) of the Costa Rican *Ley de Personal de la Asamblea Legislativa*[508] which prohibited regular servants of the Legislative Assembly to be related by blood or affinity with other regular servants or members of the parliament. Based on this provision the board of directors of the Legislative Assembly had revoked the appointment of some officials.[509] The affected persons then filed an appeal for reconsideration while the Ombudsman's Office filed an action of unconstitutionality before the Constitutional Chamber of the Supreme Court, requesting the declaration of unconstitutionality of said Article 9 (3) *Ley de Personal de la Asamblea Legislativa* due to its discriminatory nature.[510]

When the advisory request was filed by the Costa Rican government, the reasoned decision of the Constitutional Chamber was not yet published, but it was already known that the majority of the constitutional judges would find the provision to be compatible with the Constitution.[511] In light of this, the government was apparently urged by parts of the Legislative Assembly to bring the matter to the IACtHR. The government justified its request for an advisory opinion by holding that, in light of a minority

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of the "Inter-American public order of human rights" under the current Rules of Procedure see: Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 20.

507 IACtHR, Order of 10 May 2005, *Solicitud de Opinión Consultiva presentada por la República de Costa Rica* [published only in Spanish]

508 Ley No. 4556 of 8 May 1970 (English translation: Law on the Staff of the Legislative Assembly).

509 See for the factual backgrounds of the request: Candia Falcón (n 465) p. 69f.

510 See IACtHR, Order of 10 May 2005, *Solicitud de Opinión Consultiva presentada por la República de Costa Rica* p.1-2 [published only in Spanish]; Candia Falcón (n 465) p. 69f.

511 IACtHR, Order of 10 May 2005, *Solicitud de Opinión Consultiva presentada por la República de Costa Rica* [published only in Spanish]

vote by two judges of the Constitutional Chamber, it was unsure whether the disputed law was consistent with the state's international human rights obligations.[512]

Notably, the government asked the Court to also explain whether its advisory opinion would set aside precedents set by its Constitutional Chamber, which are vested with *erga omnes* character in Costa Rica.[513]

In its order rejecting the request, the Court remarked that it would be indirectly required to revise the finding of the Costa Rican *Sala Constitucional*.[514] In light of the whole factual background it then concluded that giving the advisory opinion as requested could lead to an indirect pronouncement over contentious matters not yet resolved at the national level.[515] As this would undermine the object and purpose of the Court's advisory function, it rejected the request.

With regard to the individuals affected by the respective law, it further held that it would be better if they were to eventually file a complaint before the IACHR than to anticipate the outcome of such possible cases by way of an advisory opinion.[516]

3. Third rejection

In April 2004, the IACHR requested an advisory opinion on the right to challenge a conviction to death. The request was prompted by the fact that after Barbados, Belize and Jamaica, too, were about to enact legislation that would prevent death row inmates from challenging their conviction.[517] The Court did not reject the request immediately but opened the written proceedings and received written observations from states and *amicus curiae*.

Barbados submitted written observations demanding that the Court rejects the request, as it was a disguised contentious case given that the *Boyce*

512 See IACtHR, Order of 10 May 2005, *Solicitud de Opinión Consultiva presentada por la República de Costa Rica*, p. 2 [published only in Spanish].

513 IACtHR, Order of 10 May 2005, *Solicitud de Opinión Consultiva presentada por la República de Costa Rica*, p. 4 [published only in Spanish].

514 IACtHR, Order of 10 May 2005, *Solicitud de Opinión Consultiva presentada por la República de Costa Rica*, considerando 12 [published only in Spanish].

515 IACtHR, Order of 10 May 2005, *Solicitud de Opinión Consultiva presentada por la República de Costa Rica*, p. 9 [published only in Spanish].

516 IACtHR, Order of 10 May 2005, *Solicitud de Opinión Consultiva presentada por la República de Costa Rica*, considerando 13. [published only in Spanish].

517 Bailliet (n 465) p. 268–269.

and Others v. Barbados case then still pending before the Commission concerned the same issues.[518]

Colombia, too, asked the Court not to respond to the request, arguing that the Commission's request was aimed at scrutinizing the compatibility of two countries' domestic legislation with the Convention and the American Declaration although Article 64 (2) allowed only states to request an advisory opinion on the compatibility of domestic legislation with the international human rights instruments.

Both Barbados' and Colombia's objections could have been rejected relatively easily and convincingly. First, although the case of *Boyce et al. v. Barbados* indeed concerned the death penalty in Barbados, it was not explicitly related to the last Constitutional Amendment Act, by which the judicial recourse of prisoners condemned to death was further impeded, and which had provoked the Commission's request.

Second, the Court had already rejected objections similar to that raised by Colombia in an earlier advisory procedure on the grounds that specific examples contained in a request for an advisory opinion only served to enable the Court to better understand the practical meaning of the request, and did not mean that the final advisory opinion would constitute a direct response to those specific examples.[519]

However, the Court in its resolution of 24 June 2005 did not elaborate on the objections raised by Barbados and Colombia. Instead, it based its unanimous rejection order on the novel argument that the answers to the Commission's questions were already deducible from its previous jurisprudence.[520]

Although the argument is understandable for reasons of procedural economy and efficiency, its use in this order is somewhat surprising. First, it would have been possible to find new aspects in the Commission's request on which the Court had not yet pronounced itself. For example, it would have been possible to clarify that a procedure pending before the Commission or the Court itself must always have a suspensive effect under Article 4 (6), even if no provisional measures have been taken.

Second, even if the answers could have already been deduced from the Court's previous jurisprudence, it remains questionable why the Court

518 IACtHR, Order of 24 June 2005, *Solicitud de Opinión Consultiva presentada por la Comisión Interamerican de Derechos Humanos*, para. 11 [Available only in Spanish].

519 *Cf.*: OC-14/94 (n 371) para. 18–28.

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

rejected the request instead of simply responding to it in a short advisory opinion. Given that the Court in its rejection order referred to its previous jurisprudence anyway, it could have done so also in a positive way in a brief advisory opinion reiterating what had already been decided in previous cases. This would not have cost more effort than issuing a rejection order in the way it did. Rejecting the Commission's legitimate request like that can be interpreted as a public snub of the Commission by the Court.

4. Fourth rejection

Both the background of the request and the reasoning of the Court in its fourth rejection order[521], issued on 27 January 2009, are very similar to that of the third rejection order just mentioned. The proceeding originated again in a request from the Commission, and the Court's decision was again adopted unanimously. Only this time, the rejection order was issued within a month without the Court having asked for written observations.

With its request, the Commission had tried to initiate a regional debate on the corporal punishment of children.[522] The IACHR hoped that an advisory opinion of the Court on the topic would have a positive effect on the eradication of corporal punishment of children.[523] The Commission underlined the importance of the issue with the fact that only three OAS member states had banned corporal punishment of children in the private sphere despite the fact that 34 had ratified the United Nations Convention on the Rights of the Child.[524]

The Court justified its refusal to answer the request saying that the answers to the questions raised were already apparent from its earlier jur-

521 IACtHR, Order of 27 January 2009, *Solicitud de Opinión Consultiva presentada por la Comisión Interamerican de Derechos Humanos* [Available only in Spanish].

522 Bailliet (n 465) p. 265.

523 IACtHR, Order of 27 January 2009, *Solicitud de Opinión Consultiva presentada por la Comisión Interamerican de Derechos Humanos*, para. 5 [Available only in Spanish].

524 IACtHR, Order of 27 January 2009, *Solicitud de Opinión Consultiva presentada por la Comisión Interamerican de Derechos Humanos*, para. 4 [Available only in Spanish].

isprudence, *inter alia* from the OC-17/02 on the Juridical Condition and Human Rights of the Child.[525]

An analysis of the earlier jurisprudence of the Court shows, however, that there were still gaps concerning the subject of corporal punishment of children.[526] The Court's earlier decisions were "supportive sources for cases involving corporal punishment of children [but] they [did] not constitute an explicit prohibition of all corporal punishment of children."[527]

It is certain that the Court's pronouncements in previous cases and the advisory opinion on children's rights[528] would have rather supported the argument for the prohibition of corporal punishment than the contrary. In light of this, the question arises why the Court did not want to express itself more clearly on this issue in a short advisory opinion, and it has been criticized that "[b]y not engaging with this issue [...] the Court rendered itself superfluous and thus [did] not take part in the crystallization of a new human rights norm."[529] The exact reason why the Court in 2009 preferred not to become the spearhead of the debate on banning corporal punishment of children remains unknown.

In any case, advisory opinion OC-21/14 on Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, which the Court issued a few years later, and which also deals with issues on which jurisprudence already existed (*inter alia* the OC-17/02 on the Status and Rights of the Child and the OC-18/03 on the Status and Rights of Undocumented Migrants) shows that the existence of related jurisprudence does not always lead to the rejection of a request for an advisory opinion.

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525 IACtHR, Order of 27 January 2009, *Solicitud de Opinión Consultiva presentada por la Comisión Interamerican de Derechos Humanos*, considerando 7 [Available only in Spanish].

526 *Cf.*: Bailliet (n 465) p. 266.

527 Bailliet (n 465) p. 266.

528 IACtHR, *Case of the "Street Children" (Villgrán-Morales et. al.) v. Guatemala*, Judgment of 19 November 1999 (Merits), Series C No. 63; *Case of the Gómez-Paquiyauri Brothers v. Peru*, Judgment of 8 July 2004 (Merits, Reparations and Costs), Series C No. 110; *Case of the Girls Yean and Bosico v. Dominican Republic*, Judgment of 8 September 2005 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 130; OC-17/02 (n 253).

529 Bailliet (n 465) p. 267. Fortunately, thanks to the pressure and persistence of civil society groups progress was made on the matter despite the Court's rejection. By 2016 there were no longer three but ten countries in the region that had banned corporal punishment of children. On this see as well, Bailliet (n 465) p. 266.

5. Fifth rejection

The fifth rejection occurred on 23 June 2016 in response to a request made by the Secretary General of the OAS.[530] Secretary General Luis Almagro's request was obviously motivated by the impeachment of the then Brazilian President Dilma Rousseff. While the request was initially formulated in abstract terms, in the end the OAS Secretary General referred directly to the case of Dilma Rousseff, urging the Court as follows:

> *"It is very important and a matter of absolute urgency, that you can refer to the legality of the causes invoked in order to realize the impeachment of President Dilma Rousseff. Likewise, I would like to have the opinion of the Inter-American Court of Human Rights on possible legal defects that occurred in the session of the Chamber of Deputies that approved the document of the Special Commission, on the linkage of the votes of the deputies to motives unrelated to the denunciation submitted to the Chamber's consideration as well as on the partisan circumstances that inhibited legislators from taking a position in accordance with their own personal convictions."*[531]

Without having invited states and the public to send written observations, the Court rejected the request by means of a unanimous order issued only a little more than a month after it had been received. The Court did not question its jurisdiction *ratione personae*, although the Secretary General by itself is no OAS organ.[532] However, it held that "issuing the advisory opinion in this case could constitute a premature pronouncement on the

530 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].

531 Secretary General of the OAS, *Request for an Advisory Opinion*, 18 May 2016, p. 6 [available only in Spanish, translation by the author].

532 Article 53 lit. f OAS Charter names the whole General Secretariat as organ and not the Secretary General as single person. Of course, the Secretary General could formulate a request in the name of the General Secretariat, but this was not made clear in the request of 2016. In the beginning, the Secretary General rather stated that he was acting in his capacity as Secretary General of the OAS and not that he was acting in the name of the General Secretariat.

subject or matter in question, which could be submitted to it subsequently in the context of a contentious case."[533]

In addition, it held that "an answer to the question posed could imply a pronouncement on a matter that has not yet been resolved at the domestic level."[534] Therefore, it concluded that "the request for an advisory opinion under examination presents one of those situations in which the purpose and content of the advisory function with which this Court has been vested by Article 64 (1) of the American Convention would be distorted."[535]

Lastly, the Court held that Article 20 of the Inter-American Democratic Charter, to which the Secretary General had referred in his request, recognized a power of the Secretary General to act on his own behalf and responsibility according to his own evaluation of the situation and that the matter therefore fell outside the scope of the Court's advisory competence.[536] This latter argument is however not fully convincing, given that the power recognized in Article 20 Inter-American Democratic Charter does not mean that it is an exclusive power, and that the Secretary General may not seek advice from other institutions before taking a decision. Furthermore, it is also the Commission which often seeks advisory opinions from the Court on matters that it is actually competent to decide independently and further develop in its own practice.

Arguably, "the Inter-American Court of Human Rights missed an opportunity to provide supportive guidance to the [office of the Secretary General] during the impeachment crisis which revealed a high level of institutional instability."[537] One may argue that the Court, as an institution affiliated with the OAS, was even under an obligation to assist other OAS organs when requested to render support in a crisis. Accordingly, the Court could have reasoned *mutatis mutandis*, as the ICJ had done in the *Wall* opinion[538], stressing the urgent interest of the OAS in the matter, and its

533 IACtHR, Order of 23 June 2016, *Solicitud de Opinión Consultiva presentada por el Secretatio General de la Organización de los Estados Americanos*, considerando 7 [published only in Spanish, translation by the author].

534 *Ibid.*

535 *Ibid.*

536 IACtHR, Order of 23 June 2016, *Solicitud de Opinión Consultiva presentada por el Secretatio General de la Organización de los Estados Americanos*, considerando 8 [published only in Spanish, translation by the author].

537 Bailliet (n 465) p. 273.

538 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, 156ff., para. 44 and 47.

obligation to assist the political organs as the highest judicial body in the inter-American system.[539]

However, it should be noted that the advisory role of the IACtHR is in this respect somewhat different than that of the ICJ. First, the Court is not formally an organ of the OAS as such, but exercises its functions solely on the basis of the American Convention on Human Rights.

Second, unlike the ICJ, which formally provides its advisory opinions only to UN bodies and not to states, in the inter-American system, states also have the right to request advisory opinions. For this reason, the Court has always taken the position that its advisory opinions are also addressed to everyone, i.e. both to the American states and to the OAS organs.[540]

Finally, one must acknowledge the effect of the advisory opinions' inclusion in the conventionality control. Since the Court is of the opinion that the state parties to the Convention must also exercise the conventionality control on the basis of what the Court indicates in its advisory opinions, which according to some increases the legal effect of the opinions[541], the Court must be even more cautious when deciding which opinions it gives, and which ones it should better decline to render.

In light of this, and noting furthermore that the impeachment process against Dilma Rousseff, to which the request so obviously referred, was not yet completed when the Court received the Secretary General's request, it seems very prudent and in line with its established criteria that the Court rejected the request immediately.

6. Sixth rejection

In contrast to the fifth rejection, the evaluation of the later request by the Commission on the same topic of impeachment processes and the ensuing rejection order of the Court are more complex.[542]

When the IACHR submitted its request for an advisory opinion to the Court in October 2017, the national impeachment process against Dilma Rousseff had already been terminated. In late August 2016, a majority of

539 Bailliet (n 465) p. 273.

540 See instead of all: OC-1/82 (n 42) para. 39; OC-16/99 (n 227) para. 65.

541 On the doctrine of conventionality control and the different opinions as to the legal effects of the Court's advisory opinions see *infra*: Chapter 5.

542 IACtHR, Order of 29 May 2018, *Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*.

the Brazilian Senate had already finally voted for the removal from office of Dilma Rousseff.

What is more, the Commission's request was much more comprehensive than the earlier request of the OAS General Secretary. It referred to the issue of democracy and human rights in the context of impeachment in general, and the questions posed were more abstract than those of the Secretary General in the earlier request.

The Commission informed the Court that at that time, three petitions related to the impeachment of the former Honduran President Manuel Zelaya, the former Paraguayan President Fernando Lugo, and the former Brazilian President Dilma Rousseff were under consideration by the Commission.[543] Nevertheless, the Commission indicated that "the existence of these petitions [...] does not exclude the advisory competence of the Court to rule on this request" given that "the questions it is raising do not refer to any specific matter or State. To the contrary, this request for an Advisory Opinion seeks to go beyond the specificities of particular cases and permit a general approach with very important implications for all the States in the region in relation to human rights and democracy [...]".[544]

It added that "the questions posed [...] cannot be answered by means of the said petitions, because they go far beyond the purpose of petitions."[545]

In fact, in addition to eight abstract questions aimed specifically at the requirements of Articles 8, 9, and 25 in the context of impeachment, the Commission had also formulated general questions asking how "the relationship between the democratic system and the full exercise of human rights" was manifested, and what relationship existed between the American Convention, the American Declaration, and the Inter-American Democratic Charter.[546]

In light of this, it seems that the Court could have provided the requested advisory opinion by at least answering some of the questions without thereby deciding disguised contentious cases.

The fact that the Court initially opened the normal procedure, inviting states, OAS organs, and the public to send written observations, confirms

543 IACHR, *Request for an Advisory Opinion on Democracy and Human Rights in the context of impeachment*, 13 October 2017, paras. 56–60.

544 IACHR, *Request for an Advisory Opinion on Democracy and Human Rights in the context of impeachment*, 13 October 2017, para. 60.

545 *Ibid.*

546 IACHR, *Request for an Advisory Opinion on Democracy and Human Rights in the context of impeachment*, 13 October 2017, p. 14 Question block A.

that it had not yet made up its mind on the request's rejection as had been the case with respect to the previous Secretary General's request.

While the majority of *amicus curiae* either did not express any opinion on the admissibility of the request, or argued for it, the majority of the intervening states[547], as well as a minority of *amici*[548], expressed great concern about the Commission's request and asked the Court to refrain from responding to it.

One example is the very clear position taken by Chile:

> *"The diversity of questions of the IACHR that support the request for an advisory opinion are posed in an apparently abstract manner, so that it seems that it seeks to determine the meaning and scope of certain articles of the Convention and of the American Declaration of the Rights and Duties of Man with regard to impeachment. However, this request cannot be analyzed without taking into account the factual context and, in this sense, rather than an advisory function, the IACtHR would be resolving factual issues, a dimension that the Court has expressly rejected for the giving of an advisory opinion.*
> *[...] the State of Chile respectfully recommends that the Honorable IACtHR declare the request for an advisory opinion on "Democracy and Human Rights in the Context of Impeachment" inadmissible on the grounds that it (a) obliges the Court to rule on matters that have already been the subject of previous pronouncements; (b) forces the Court to establish uniform con-*

547 See the written observations of Argentina, Brazil and Chile, available at: https://www.corteidh.or.cr/observaciones_oc_new.cfm?lang=es&lang_oc=es&nId_oc=1853. The observations of Ecuador and Paraguay were a bit more reserved but expressed as well that the matter of impeachment fell under the sovereign control of the national states. Panama was the only intervening state welcoming the request without any reservations towards its admissibility or propriety.

548 *Amicus curiae* of Jorge E. Roa and Vera Karam de Chueiri, p. 2–9*; Amicus curiae* of Gustavo Arosemena Solórzano and Pablo Cevallos Palomeque, paras. 3–9, 28; The authors of the a*micus curiae* of the Law Faculty of the National University of Cuyo were divided about the question of admissibility of the request, p. 8–13; The a*micus curiae* of the Centro Jurídico de Derechos Humanos concluded that the Court was competent to issue the requested opinion except for question B.8. on the use of impeachment as cover for a coup d'état. All *amici curiae* are available at: https://www.corteidh.or.cr/observaciones_oc_new.cfm?lang=es&lang_oc=es&nId_oc=1853.

stitutional standards on matters on which there is insufficient consensus in the region; and (c) requires the Court to rule on contentious matters."[549]

In the end, it seems that it was mainly two reasons that led the Court to reject the request. First, it had noted that the request was "incompatible with the Court's advisory function, because it refers to factual situations".[550] Responding to the request "would subvert the purposes of the advisory function, 'since the questions it poses do not turn solely on legal issues or treaty interpretation [and …] a response to the request requires that facts in specific cases be determined'".[551] In other words, the Court felt that it was impossible to answer the Commission's questions in the abstract without the opinion being understood as a direct pronouncement on the latest cases of impeachment, despite the fact that the questions themselves were formulated in abstract terms.

In the second place, the decision was motivated by the complexity of the issue, given that the existing rules on impeachment in the various OAS states were very diverse. The Court noted that "by responding to the Inter-American Commission's questions as they are worded – that is, developing abstract considerations on the compatibility of the numerous models of impeachment – it could not sufficiently examine the particularities of the institutional design of the different horizontal control mechanisms that exist in the region. In many cases, these designs are the product of history; they respond to the needs and the constitutional experience of each society and warrant the detailed and contextualized analysis that can only be made in the context of a contentious case to determine their compatibility with the American Convention."[552]

What might have also contributed to the Court acting more restrained were the huge effects its advisory opinion OC-24/17, that had just been published a few months earlier, had had on the political landscape of the region, and especially in Costa Rica.[553]

549 Written observations of Chile, 26 April 2018, available at: http://www.corteidh.or.cr/sitios/observaciones/sor_comi/3_chile.pdf p. 9–10 [translation from Spanish by the author].

550 IACtHR, Order of 29 May 2018, *Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*, considerando 13.

551 *Ibid.*

552 IACtHR, Order of 29 May 2018, *Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*, considerando 17.

553 Contesse, '*The Rule of Advice in International Human Rights Law*' (n 68) p. 404.

The only judge who had voted against the rejection of the advisory request was Judge Patricio Pazmiño. In his dissenting opinion, he lamented that the "Court is foregoing an important opportunity to develop international human rights law [...]."[554] He expressed the view that the situation was similar to those prior to OC-23/17 and OC-24/17, and that in both those cases the Court had decided to continue the processing of the advisory requests.[555] In his view, the Court could have interpreted "which judicial guarantees, as a general and acceptable minimum, are applicable in impeachment proceedings in the hemisphere" without having to examine "domestic laws, constitutional texts or specific cases".[556]

II. Inconsistent application of the Court's criteria in other advisory procedures

Judge Pazmiño's observation in his dissenting opinion points to the fact that, especially in recent years, the Court's treatment of its own rejection criteria has been very flexible, if not inconsistent. After having described the cases in which the Court rejected advisory opinion requests, the analysis in this section will show that several other requests for advisory opinions could have been rejected based on the same criteria that the Court applied in the above outlined cases if these criteria had been applied strictly and consistently.

Even before analyzing concrete examples, the difficulty of a consistent application of the rejection criteria already becomes apparent by an abstract reading and contrasting of them. This is due to the fact that there exists an obvious tension between some of them, as was not only noted in *amicus briefs* but also admitted by the Court itself.[557] In particular, it seems difficult

554 IACtHR, Order of 29 May 2018, *Request for an advisory opinion presented by the Inter-American Commission on Human* Rights, Dissenting Opinion of Judge L. Patricio Pazmiño Freire, para. 2.

555 IACtHR, Order of 29 May 2018, *Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*, Dissenting Opinion of Judge L. Patricio Pazmiño Freire, para. 8.

556 IACtHR, Order of 29 May 2018, *Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*, Dissenting Opinion of Judge L. Patricio Pazmiño Freire, para. 9.

557 *Amicus Curiae* of Jorge E. Roa and Vera Karam de Chueiri, p. 3, 7*; Amicus Curiae* of the Centro Jurídico de Derechos Humanos, p. 18, both available at: https://www.corteidh.or.cr/observaciones_oc_new.cfm?lang=es&lang_oc=es&nId_oc=1853;

to harmonize 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"[558] with the criterion that a request should not "be used for abstract speculations without a foreseeable application to specific situations that justify the issuing of an advisory opinion".[559]

On the one hand, the Court has established that a request should not constitute a disguised contentious case, and on the other hand it has held that its opinions are useful when they are "related to a specific juridical, historical and political context".[560] Furthermore, it has repeatedly stated that "the mere fact that petitions related to the subject matter of the request exist before the Commission is not sufficient for the Court to abstain from responding to the questions submitted to it"[561] which again undermines the criterion that a request should not conceal a contentious case that might be submitted to the Court under its contentious function.[562]

In the following, it shall be analyzed in which situations the Court has rendered a final opinion although one or more of its rejection criteria was arguably met. Rather than to criticize the Court's practice, this analysis aims to point out the difficulty, if not impossibility, of an always hundred percent consistent application of all the rejection criteria the Court has established over the years. Being aware of the broad applicability of some of the criteria, of the variety of constellations in which they may be said to be fulfilled, and of the tensions existing between them, will then enable the examination of the general suitability of the criteria in the next step.

IACtHR, Order of 29 May 2018, *Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*, considerando 8, 11; OC-25/18 (n 227) para. 52; OC-26/20 (n 24) para. 31.

558 See instead of all: IACtHR, Order of 23 June 2016, *Solicitud de Opinión Consultiva presentada por el Secretatio General de la Organización de los Estados Americanos*, considerando 6 [published only in Spanish]; OC-25/18 (n 227) para. 46.

559 See instead of all: OC-24/17 (n 1) para. 20; and also: *Amicus curiae* brief of Jorge E. Roa and Vera Karam de Chueiri, 20 March 2018, available at: http://www.corteidh.or.cr/sitios/observaciones/sor_comi/29_chueiri_roa.pdf.

560 OC-9/87 (n 366) para. 17.

561 OC-23/17 (n 4) paras. 25–26; OC-24/17 (n 1) para. 24.

562 *Cf.*: *Amicus curiae* brief of Jorge E. Roa and Vera Karam de Chueiri, 20 March 2018, available at: www.corteidh.or.cr/sitios/observaciones/sor_comi/29_chueiri_roa.pdf, p. 3.

1. Disguised contentious cases, determination of facts

The criterion that a request for an advisory opinion should not conceal a contentious case, and thus circumvent the Court's contentious jurisdiction, is the one most frequently raised in written observations or in public hearings as an objection to the Court's advisory jurisdiction.[563] More often than not, the Court did not follow the raised objections or concerns but proceeded with the respective request for an advisory opinion nevertheless.

The main reason why the objection, or at least concern, that an advisory request constitutes in fact a disguised contentious case is raised so often in relation to advisory proceedings are the multiple constellations in which this criterion may exist. These multiple constellations arise first from the fact that today there are several other international courts and quasi-judicial bodies operating alongside the IACtHR. Second, the broadness of the Court's advisory jurisdiction and the two tiers of Commission and Court, on which the inter-American human rights system is built, contribute to the many different constellations in which it may be spoken of a disguised contentious case, or that raise at least related concerns as to the propriety of processing an advisory request.

These are not only theoretical constellations, but ones that have already occurred in the context of one or more advisory proceeding before the Court:

563 See *eg.*: Extract from a telex from Guatemala to the Court in the context of the OC-3/83: OC-3/83 (n 245) para. 11; *Amicus curiae* brief of María Elba Martínez, OC-13/93 proceedings, 14 November 1992 [only available in Spanish]; *Amicus curiae* brief of CEJIL *et al*., OC-13/93 proceedings, 16 November 1992, p. 11 [only available in Spanish]; *Amicus Curiae* of CEJIL and Human Rights Watch/Americas in the proceeding of the OC-15/97, p. 9; Written observations of the United States of America, OC-16/99 proceedings, 1 June 1998, p. 5; *Amicus curiae* brief of Yashín Castrillo Fernández, OC-24/17 proceedings, available at: www.corteidh.or.cr/sitios/observaciones/costaricaoc24/21_castrillo_fernandez.pdf; *Amicus curiae* brief of the Law Faculty of the Pontifica Universidad Católica de Chile, OC-24/17 proceedings, 10 February 2017, p. 9 available at: www.corteidh.or.cr/sitios/observaciones/costaricaoc24/40_fac_der_pucc.pdf; In the public hearing in the OC-23/17 proceedings Guatemala raised awareness to the fact that it was important to consider the implication of the request on Nicaragua, but it did not ask the Court to reject the request. The audio files of the public hearing are available at: https://soundcloud.com/corteidh/sets/solicitud-de-opinion-consultiva-presentada-por-el-estado-de-colombia-22-03-2017.

- there may exist a bilateral dispute between two states, of which at least one is an OAS member which requests an advisory opinion of the Court that is at least indirectly related to the dispute;
- there may be a smoldering conflict in the region and a state requests an opinion that points at least indirectly to the conflict or a certain behavior of another state in the region;
- there may be a procedure pending between two states of the region before another international court or judicial body and one of these states requests a related advisory opinion of the Court;
- there may already be cases pending before other international courts or judicial bodies dealing with a certain question and a state that is not involved in these proceedings, but still interested in their outcome, requests an advisory opinion of the Court which deals with more or less the same question;
- the Commission requests an advisory opinion of the Court that originates in a certain law reform or other behavior of one or more states in the region;
- states have a dispute with the Commission or are dissatisfied with its work and refer the matter to the Court via a request for an advisory opinion;
- the Commission requests an opinion of the Court on a matter with which petitions pending before it are already dealing with;
- a state requests an opinion of the Court on a matter that petitions still pending before the Commission are already dealing with, and these petitions are either directed against that same state or another state of the system;
- and finally, a state requests an opinion of the Court on a matter that was already dealt with by the Commission in a procedure that has already been closed without having been transferred to the Court.

Not all of these constellations may, in fact, prove equally delicate or problematic. Thus, the Court's decision not to reject the requests may have been correct in the respective situation. Still, these constellations may trigger concerns that the Court is dealing with a disguised contentious case in the context of its advisory function, and that it may thus be inappropriate to give the opinion as requested. Therefore, it shall be examined how the Court has handled these situations and how it has justified to answer the advisory opinion requests despite the problematic factual background.

a) Requests by the Commission related to a dispute with states

In at least two occasions, the Commission requested an advisory opinion of the Court that was related to a dispute between the Commission and a state.

aa) OC-3/83

The first advisory opinion request that resembled a disguised contentious case was the third request that led to advisory opinion OC-3/83. The request of the Commission originated in a dispute between the Commission and Guatemala over a law decree enacted by the new *de facto* government of General Efrain Rios Montt after his coup d'état. The new law provided for the imposition of the death penalty for some 18 crimes to which it had not been applicable before, and created furthermore Special Military Courts that had begun to order multiple executions on the basis of this new law.[564] In the eyes of the Commission, the extension of the applicability of the death penalty constituted a clear violation of Article 4 (2) irrespective of the reservation Guatemala had made to Article 4 (4).[565]

In fact, the context in which this third advisory opinion request was made was one of the most dramatic of all advisory proceedings the Court has witnessed so far. Despite several efforts of the Commission, and even a plea by the Pope to stop the executions more and more men were killed on orders of the Guatemalan Special Military Courts. In light of the so far fruitless efforts to convince the Rios Montt government, the Commission decided to request an advisory opinion of the Court and urged Guatemala at the same time to suspend any further execution until the Court had given its opinion.

This whole setting indeed resembled more a contentious case and the request for provisional measures than the typical background of an advisory proceeding.[566] The Commission in its request even referred directly to

564 Charles Moyer and David Padilla, *Executions in Guatemala as Decreed by the Courts of Special Jurisdiction in 1982–83: A Case Study*' (1984) 6 Human Rights Quarterly, 507, 509 et seq.

565 IACHR, *Solicitud de Opinion Consultiva presentada por la Comision Interamericana de Derechos Humanos*, 25 April 1983 [available only in Spanish].

566 As to the fact that states saw the Commission as opponent in contentious proceedings that "represented the position of the alleged victims" and how the role of

the ongoing dispute with Guatemala.[567] It thus did not even try to conceal the true motivation for the request behind abstract terms. Guatemala did not name it a "disguised contentious case" in its written observations, but apparently held it to be one, and argued that the Court lacked jurisdiction to render the advisory opinion given that Guatemala had not accepted the Court's jurisdiction under Article 62 (3).[568]

In the public hearing, the representatives of the Commission negated the existence of a disguised contentious case but maintained instead that the dispute with Guatemala had only been referred to the Court as an example of the underlying legal problem of the correct interpretation of Article 4 (2) and Article 4 (4).[569]

The Court in its opinion acknowledged that there existed a dispute between the Commission and Guatemala, and that the opinion would concern Guatemala directly.[570] However, it supported the Commission's position, stating that "the Court [was] not being asked to resolve any disputed factual issue".[571] More importantly, it strengthened the Commission's general procedural position, holding that "[i]n order to discharge fully its obligations, the Commission may find it necessary or appropriate to consult the Court regarding the meaning of certain provisions whether or not at the given moment in time there exists a difference between a government and the Commission concerning an interpretation, which might justify the request for an advisory opinion. If the Commission were to be barred from seeking an advisory opinion merely because one or more governments are involved in a controversy with the Commission over the interpretation of a disputed provision, the Commission would seldom, if ever, be able to avail itself of the Court's advisory jurisdiction."[572]

Referring to the ICJ's *Western Sahara* opinion, the Court furthermore found that the Commission had a "legitimate interest to obtain the opin-

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the Commission has changed over the years see: Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 17–24.

567 IACHR, *Solicitud de Opinion Consultiva presentada por la Comision Interamericana de Derechos Humanos*, 25 April 1983, p. 3 *et seq*. [available only in Spanish].

568 See OC-3/83 (n 245) para. 11.

569 Moyer and Padilla (n 564) p. 516.

570 OC-3/83 (n 245) paras. 30, 39.

571 OC-3/83 (n 245) para. 27.

572 OC-3/83 (n 245) para. 39.

ion",[573] as seeking assistance with the resolution of disputed legal issues "for the purpose of guiding its future actions"[574] fell "within [its] spheres of competence"[575]. Therefore, "the mere fact that there exist[ed] a dispute between the Commission and the Government of Guatemala regarding the meaning of Article 4 of the Convention d[id] not justify the Court to decline to exercise its advisory jurisdiction in the instant proceeding."[576]

Lastly, the Court maintained that although "an advisory opinion might either weaken or strengthen a State's legal position in a current or future controversy [...] [t]he legitimate interests of a State in the outcome of an advisory proceeding are adequately protected, [...] by the opportunity accorded to it under the Rules of Procedure of the Court to participate fully in those proceedings and to make known to the Court its views regarding the legal norms to be interpreted and any jurisdictional objections it might have".[577]

Notably, in the public hearing the representative of Guatemala read out a message of the Guatemalan Foreign Minister announcing that Guatemala "considered the possibility of re-examining and suspending, for the time being, the carrying out of the sentences handed down by the Courts of Special Jurisdiction in which those who have been tried have been sentenced to death."[578] This announcement, and the fact that the government indeed suspended the executions before the Court began its deliberations,[579] is not only one of the biggest success stories in the context of the Court's advisory function, but may have also influenced and finally endorsed the Court's decision to proceed with the request and to render the final opinion. The positive effect of the advisory opinion seems to justify that the Court did not reject the Commission's request, although it very much resembled a contentious case.

573 OC-3/83 (n 245) para. 40; *cf.*: ICJ, *Western Sahara*, Advisory Opinion of 16 October 1975, I.C.J. Reports 1975, p. 12, 27 para. 41.
574 OC-3/83 (n 245) para. 40; *Cf.*: ICJ, *Western Sahara*, Advisory Opinion of 16 October 1975, I.C.J. Reports 1975, p. 12, 27 para. 41.
575 Art. 64 (1); OC-3/83 (n 245) para. 42.
576 OC-3/83 (n 245) para. 39.
577 OC-3/83 (n 245) para. 24.
578 Cited by Moyer and Padilla (n 564) p. 516.
579 Moyer and Padilla (n 564) p. 520; Buergenthal, *'New Upload - Remembering the Early Years of the Inter-American Court of Human Rights'* (n 20) p. 266.

bb) OC-14/94

A situation comparable to that of OC-3/83 occurred in relation to advisory opinion OC-14/94. The OC-14/94 proceedings were again initiated by the Commission and the latter's request originated again in a national law reform that provided for an expansion of cases to which the death penalty was to be applicable.

Peru was about to promulgate a new constitution whose Article 140 allowed the imposition of the death penalty in relation to more crimes than Article 235 of the former constitution from 1979 had done. Again, the Commission did not conceal the background of its request and referred directly to the Peruvian case, even explicitly citing the relevant norms.[580] Like Guatemala ten years before, Peru also did not qualify the request expressly as a "disguised contentious case". Instead, it argued that the request was inadmissible since only states, but not the Commission, had the right under Article 64 (2) to request the Court's opinion on the compatibility of national laws with the Convention.[581]

Furthermore, it held the request to be inappropriate given that it had been made before it was even known whether the new Peruvian constitution would be approved by a national referendum or not.[582] After the public hearing, Peru submitted another letter to the Court asking the Court to rule the request to be inadmissible at least to the extent that it referred directly or indirectly to the laws of Peru.[583]

The Court held that the Commission's questions were of a general nature[584] and that it was consequently "evident that the Commission [was] not here requesting a statement as to the compatibility of that provision of Peru's domestic law with [Article 4 (2)]."[585] Moreover, it found that the requirement in its Rules of Procedure that a request shall identify the

580 IACHR, *Solicitud de Opinion Consultiva*, 8 November 1993, p. 1, 2 [available only in Spanish].

581 Written observations of Peru, OC-14/94 proceedings, 29 December 1993, in particular p. 6–7 [available only in Spanish]. On this see already *supra*: Chapter 3, Section B.IV.

582 Written observations of Peru, OC-14/94 proceedings, 29 December 1993, p. 20 [available only in Spanish].

583 See OC-14/94 (n 371) para. 15.

584 OC-14/94 (n 371) para. 25, as to the wording of the Commission's questions see para. 1.]

585 OC-14/94 (n 371) para. 24.

considerations giving rise to the request was important to be able to rule purely academic requests inadmissible.[586] However, this requirement did not mean that "disguised contentious cases [could] be submitted as requests for advisory opinions" nor that the Court "must analyze and rule on the considerations giving rise to the request".[587] Rather, it held that "it must weigh whether the issue raised relates to the aims of the Convention, as in the instant request."[588] It then repeated its findings made in OC-3/83 cited above. However, in OC-14/94 the Court remarked in addition that "on this occasion, it must limit its response to the questions posed in the request for advisory opinion, without addressing the interpretation of Article 4, paragraphs 2 (*in fine*) and 3 of the Convention which are cited in the cover note and the considerations giving rise to the request [...] [and that it] should not concern itself with the interpretation of Article 140 of the new Constitution of Peru mentioned by the Commission and cited as the reason for its advisory opinion request."[589] Hence, the Court took heed of Peru's alternative submission.

cc) Intermediate conclusion

By answering the two mentioned requests that could have been rejected as disguised contentious cases, the Court has in fact confirmed the right of the Commission to submit requests that are directly linked to a prevailing conflict with a state party. Against this backdrop, one might have thought that the Court would also comply with the Commission's request on democracy and human rights in the context of impeachment, despite the request's obvious relation to the impeachment of the former Brazilian President Dilma Rousseff.[590]

586 OC-14/94 (n 371) para. 27.
587 OC-14/94 (n 371) para. 27.
588 OC-14/94 (n 371) para. 27.
589 OC-14/94 (n 371) para. 29.
590 See *supra*: Chapter 4, Section C.I.6. sixth case of rejection.; IACtHR, Order of 29 May 2018, *Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights.*

b) Requests by states relating to a dispute with the Commission

There have also been some instances in which a dispute with the Commission led the involved states, rather than the Commission, to request an advisory opinion from the Court.

aa) OC-13/93

The request by Argentina and Uruguay that led to OC-13/93 was apparently motivated in decisions the Commission had taken against both states in relation to their respective amnesty laws.

Two *amici* were of the opinion that the Court should reject the request, given that the requesting states had concealed their real motivation by not mentioning the relevant amnesty cases. In their eyes, the request was intended to weaken the conventional system and constituted a disguised contentious case that should have been dealt with in the context of the Court's contentious jurisdiction.[591]

Another *amicus brief* pointed out that if states let pass the three months period provided for in Article 51 (1) without submitting the matter to the Court, this could be understood as a tacit acceptance of the decision taken by the Commission which should not be indirectly undermined thereafter by seeking an abstract advisory opinion on the matter the Commission had previously dealt with.[592]

During the public hearing, the Commission took a similar position. It supported the *amici*'s point of view that the request originated in the cases concerning amnesty laws in which the Commission had held Uruguay and Argentina to be responsible for having violated the Convention.[593] It argued that it would have been more accurate if the states had presented the matter to the Court via a contentious case, whereas the request for an advisory opinion was "confused, imprecise and ambiguous", and "intended to obtain

591 *Amicus curiae* brief of María Elba Martínez, OC-13/93 proceedings, 14 November 1992; *Amicus Curiae* of CEJIL *et al*., OC-13/93 proceedings, 16 November 1992 [both briefs are only available in Spanish].

592 *Amicus curiae* brief of George Rogers *et al*, OC-13/93 proceedings, 9 September 1992, p. 5 [only available in Spanish].

593 IACtHR, *Transcripción de la audiencia pública celebrada en la sede de la Corte sobre la opinión consultiva OC-13 sometida por los gobiernos de la República Argentina y la República Oriental del Urugay*, 1 February 1993, p. 11 [available only in Spanish].

a declaration from the Court stating that the Commission should abstain from examining the compatibility of national laws with the Convention".[594]

The Court's statements on the admissibility of this request were unsatisfactory. Uruguay and Argentina had justified the request, arguing that "[n]one of the standards of interpretation which the Court is being asked to apply in this advisory opinion relates to abstract issues or theoretical hypotheses that might eventually arise in the process of implementing the Convention. They concern concrete cases that have been dealt with by the Commission."[595]

When citing this statement, the Court only briefly reiterated phrases from its earlier jurisprudence without, however, grappling with the actual problematic aspect of the request that had been pointed out by *amici* and the Commission. It only held that the fact that the request did not concern purely academic issues argued in favor of the Court's exercise of its jurisprudence.[596] Further, it added that the Court was "[o]f course [...] not empowered to examine those cases on the merits, because they have not been submitted by the Commission or the interested States."[597]

It then mentioned its rejection of a request in the context of OC-12/91, only to counter this possible objection directly by noting that "[t]he foregoing does not mean the Court cannot render an advisory opinion on the Commission's request on a matter pending before it" and adding a reference to the above cited findings established in OC-3/83.[598]

Finally, it repeated that it was "important that a request for an advisory opinion not be an attempt to distort the Convention system by seeking in disguise the resolution of a contentious case to the detriment of the victims" before noting succinctly that the Court did "not find in the instant request any reason to abstain from considering it".[599]

The reference to OC-3/83 was misleading, given that the crucial point was that OC-13/93 had precisely not been requested by the Commission, but by two states, and that it was not about ensuring that the Commission

594 IACtHR, *Transcripción de la audiencia pública celebrada en la sede de la Corte sobre la opinión consultiva OC-13 sometida por los gobiernos de la República Argentina y la República Oriental del Urugay*, 1 February 1993, p. 13 [translation by the author].

595 *Certain attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights)*, Advisory Opinion OC-13/93, Series A No. 13 (16 July 1993) para. 16 [emphasis added].

596 OC-13/93 (n 595) para. 17.

597 OC-13/93 (n 595) para. 17.

598 OC-13/93 (n 595) paras. 18–19 [emphasis added].

599 OC-13/93 (n 595) paras. 19–20.

could properly exercise its tasks, but that two states rather sought to undermine the Commission's authority. It would have been important to note this different background and to at least deal with the concerns brought forward by *amici* and the Commission in the proceeding. Instead, advisory opinion OC-13/93 provides an example of references to the Court's previous case law that are cited to justify a decision without being considered and applied in a differentiated manner with regard to the specific given situation.

bb) OC-15/97

The factual background that triggered OC-15/97 was similar to that of OC-13/93. Apart from the question whether the Court had jurisdiction after the requesting state, Chile, had withdrawn its request,[600] also the admissibility, or to be more precise, the propriety of the request, was doubtful. The starting point of the request was that the Commission had made changes to its final report in terms of Article 51 in the case of Francisco Martorell Cammarella, who had filed a petition with the Commission after the publication of his book "Impunidad Diplomática" had been prohibited in Chile.[601]

Chile argued that the Commission had no right under Articles 50 and 51 to amend its reports, especially not when they had been designated as "final report", and saw in the amended report an illegitimate third report. In its request that was submitted before the Commission's report on the case had been published[602], Chile therefore asked the Court whether the Commission was permitted to make substantial changes to its "final report" in terms of Article 51, and thus to publish a third report.[603] Further, in case

600 On this issue see *supra*: Chapter 3, Section A.IV.

601 As to the factual background of the request see OC-15/97 (n 300) paras. 1-13 and *Amicus curiae* brief of CEJIL and Human Rights Watch/Americas, OC-15/97 proceedings, 28 August 1997, p. 4-9 [only available in Spanish].

602 The IACHR argued that this fact had shown that Chile had sought to substitute the Commission's decision to publish the amended report which Chile disliked by a decision of the Court finding that the amendment of a final report was inadmissible. See written observations of the IACHR in the OC-15/97 proceedings, 31 July 1997, p. 6 para. 19 [only available in Spanish].

603 Chile, *Request for an Advisory Opinion*, 5 November 1996, p. 1 [available only in Spanish].

the Commission was not allowed to do so, Chile asked which of the reports it should then consider to be binding.[604]

In written observations and in an *amicus brief*, the request was held to be inadmissible for being a disguised contentious case[605], or that the Court lacked the competence "to issue a legal opinion on specific cases that, when they could have been, were not submitted to its [contentious] jurisdiction [...]".[606]

This time, the Court's decision to render the requested opinion despite its relation to the case of Mister Martorell Cammarella was better explained and justified than in OC-13/93. The Court reiterated that it was "not empowered to examine a case which is being dealt with by the Commission"[607] but held that "the case that could have been at the root of this request [...] has been settled"[608] and thus "could not be brought before this Court"[609] anymore. Therefore "any determination that it makes on the merits of the questions asked will not affect the rights of the parties involved."[610]

Lastly, the decision not to refrain from answering the request was backed up by referring to the advisory jurisprudence of the ICJ, holding that the latter had found that the mere fact that a matter was in dispute did not mean that the matter necessarily constituted a disguised contentious case that had to be rejected.[611]

cc) OC-19/05

A third advisory opinion request that was obviously directed against the Commission and seeking to discredit its work, but that was nevertheless not rejected by the Court, was the request by Venezuela that led to

604 Chile, *Request for an Advisory Opinion*, 5 November 1996, p. 2 [available only in Spanish].
605 Written observations of the IACHR in the OC-15/97 proceedings, 31 July 1997, p. 5–6, 19; *Amicus curiae* brief of CEJIL and Human Rights Watch/Americas, OC-15/97 proceedings, 28 August 1997, p. 9. [Both documents only available in Spanish].
606 OC-15/97 (n 300) para. 12 citing of the written observations made by Costa Rica on 17 March 1997.
607 OC-15/97 (n 300) para. 33.
608 OC-15/97 (n 300) para. 38.
609 OC-15/97 (n 300) para. 33.
610 OC-15/97 (n 300) para. 38.
611 OC-15/97 (n 300) para. 40.

OC-19/05[612]. In several reports, the Commission had pointed to the desolate human rights protection in the country, which provoked the Chavez' government at a later point in time to even try to recuse the Commission's Executive Secretary in matters related to Venezuela.[613] Against the backdrop of this strained relationship with the Commission, Venezuela submitted a request for an advisory opinion to the Court, asking whether there existed in the inter-American human rights system an organ that was competent to exercise legal control over the actions of the Commission, and if so, what were the attributions of said organ. The state claimed the request was motivated in the current "state of defenselessness" in which the states found themselves vis-à-vis the Commission.[614]

Notably, no state formulated written observations in this proceeding, and the Court decided not to hold a public hearing. While some *amici* outlined the importance of the topic and saw an opportunity for the Court to provide guidance and to strengthen the Commission[615], others held the request to be inadmissible given its political motivation and the bad intention to discredit the Commission.[616]

In its opinion, the Court examined its competence only briefly and cursorily without addressing the problematic motivation and political background of the request.[617] It held that it was competent to respond to the request, and used the advisory opinion to explain the competences of the Commission, to underline the autonomy and independence of the Com-

612 *Control of due process in the exercise of the powers of the Inter-American Commission on Human Rights (Articles 41 and 44 to 51 of the American Convention on Human Rights)*, Advisory Opinion OC-19/05, Series A No. 19 (28 November 2005).

613 See e.g. IACHR, *IACHR rejects the request to recuse its executive secretary in matters related to Venezuela*, Press Release N° 6/04, 8 March 2004; *Amicus curiae* brief of Luis Peraza Parga in the OC-19/05 proceedings [only available in Spanish].

614 Bolivarian Republic of Venezuela, *Request for an Advisory Opinion*, 12 November 2003 [only available in Spanish, translation by the author].

615 *Amicus curiae* brief of the Clínica Jurídica del Centro de Investigación y Docencia Económicas, OC-19/05 proceedings, 5 April 2005; *Amicus curiae* brief of Carlos Alberto Loria Quiros, OC-19/95 proceedings, 20 November 2005; *Amicus curiae* brief of CEJIL, OC-19/05 proceedings, 4 April 2005, para. 80; *Amicus curiae* brief of Luis Peraza Parga in the in the OC-19/05 proceedings. He also noted the bad intention of the request and that he was surprised that the Court had admitted the request at all. [All four briefs are only available in Spanish].

616 *Amicus curiae* brief of La Clínica de Derechos Humanos del Departamento de Derecho de la Universidad Iberoamericana, Ciudad de México, OC-19/05 proceedings, 1 June 2005, p. 11; Additional *amicus curiae* brief of Luis Peraza Parga, OC-19/05 proceedings, 15 August 2005, p. 10. [Both briefs are only available in Spanish].

617 OC-19/05 (n 612) paras. 15–20.

mission, and to note that itself as Court controlled the due process of laws in the proceedings before the Commission that were submitted to it.

dd) Combined analysis in light of OC-5/85

Overall, in the three mentioned opinions, the Court has strengthened the Commission's position and has defended it against unjustified critique. At the same time, however, the Court did not provide the Commission with a carte blanche. For example, in OC-13/93 the Court concluded that the Commission may not make findings on the merits once it has declared a case to be inadmissible, and in OC-15/97 it found that the Commission may in general not amend its reports.[618] It might be said that the Court's interpretations of Articles 41, 42, 50 and 51 were well-balanced, helped to clarify the Commission's rights and role, and in sum, backed its independence and underlined its important position in the inter-American human rights system. Thus, it appears to have been the right decision not to reject the requests, although they resembled disguised contentious cases.

However, the Court could have been more precise when justifying why it felt competent to render the respective opinions. Instead of repeating standard phrases, it could have addressed the concerns expressed in written observations and *amicus curiae* briefs more directly. Explaining why it held the issuance of an opinion important and appropriate despite the problematic factual backgrounds would have strengthened the Court's reasoning and thereby also its authority.

In particular, the conclusion reached in OC-15/97 that the rights of the parties involved cannot be affected by an advisory opinion once the proceeding before the Commission has been concluded is not completely convincing, especially as of today since the Court has held that its advisory opinions form part of the conventionality control.[619]

But even before the Court had included its advisory opinions in the doctrine of conventionality control, the opinions might nevertheless have had an effect on the parties involved in a case that had been terminated before the Commission. If the Court reaches a different conclusion than the Commission, depending on who had won the case before the Commission, either the state may then feel justified not to implement the findings con-

618 OC-13/93 (n 595) para. 57 finding No. 2; OC-15/97 (n 300) para. 59 finding No. 1.
619 On the doctrine of conventionality control see *infra*: Chapter 5, Section B.II.

tained in the Commission's report, or the individual may feel encouraged to start new proceedings against the state on the basis of the Court's advisory opinion.[620]

What is more, the Court has overlooked, or at least not addressed, the issue that requests like the ones submitted by Uruguay and Argentina or Chile[621] are not only problematic because they may affect rights of the parties that had been involved in the proceeding before the Commission, but because they were intended to undermine the very authority of the Commission. As concerns this latter aspect, it does not matter whether the proceeding before the Commission has already been terminated, because the manner in which an advisory opinion may indirectly impinge on the authority of the Commission, even when the related case before it had already been terminated at the time when the advisory proceeding was initiated, was highlighted by OC-5/85. Indeed, it is surprising that the Court in OC-13/93 and OC-15/97 did not refer to some of its findings made in OC-5/85.

Said advisory opinion was requested by the government of Costa Rica at the insistence of the Inter-American Press Society after Costa Rica had actually won the Schmidt case before the Commission. Mr. Schmidt, a US citizen living in Costa Rica, had filed a petition against Costa Rica with the Commission after he had been sentenced to three months in prison on probation for three years for the illegal exercise of journalism by working for a Costa Rican newspaper without being registered and licensed by the Costa Rican Press Association, in conformity with the Costa Rican Law N° 4420.[622] Notably, Mr. Schmidt himself had alerted the Costa Rican Press Association to the fact that he was practicing journalism without belonging

620 *Cf.*: Roa (n 13) p. 75.

621 In contrast to the other requests, the one by Venezuela was not directly related to a concrete case before the Commission but more directed against the work of the Commission in general. Shortly after the request was made, the Commission published a report on the general human rights situation in the country depicting a deterioration in the rule of law and in the human rights situation. See: IACHR, *Informe sobre la situación de los derechos humanos en Venezuela*, OEA/Ser.L/V/II.118, Doc. 4 rev. 2, 29 December 2003, para. 574f.

622 For the relevant articles of this law at the relevant point of time see OC-5/85 (n 363) para. 82. As to the facts of the Schmidt case and the finding of the Commission see: IACHR, Resolution N° 17/84, Case N° 9178 (Costa Rica), 3 October 1984.

to the association in order to trigger a campaign against the mentioned law.[623]

The Commission had found that the compulsory membership in a Press Association for the practice of journalism, which was not only prescribed by law in Costa Rica but also existed in at least ten other Latin American countries[624], did not violate Article 13 of the Convention.[625]

Like in the cases related to OC-13/93 and OC-15/97, neither the Commission nor Costa Rica had referred the matter to the Court under its contentious jurisdiction. Contrary to Uruguay, Argentina and Chile, Costa Rica had, however, won the proceeding before the Commission and nevertheless gave in to pressure by the Inter-American Press Association to request an advisory opinion from the Court on the matter of compulsory membership in a Press Association for the legal practice of journalism.[626] This different starting point must of course, be taken into account.

It was not without reason, that the Court noted in OC-5/85 that the danger that a state could try to "challenge the soundness of the Commission's conclusions without risking the consequences of a judgment" was not given here as Costa Rica had won the Schmidt case, and would thus not gain any "legal advantage" "by making the request for an advisory opinion with regard to a law that the Commission concluded did not violate the Convention".[627]

Nevertheless, other statements made by the Court in OC-5/85 could have been referred to in OC-13/93 and OC-15/97:

First, it held that the fact that the government had not brought the Schmidt case before the Court "did not divest [it] of the right to seek an advisory opinion from the Court […] with regard to certain legal issues, even though some of them are similar to those dealt with in the Schmidt

623 Buergenthal, *'New Upload - Remembering the Early Years of the Inter-American Court of Human Rights'* (n 20) p. 267.

624 This was maintained by Costa Rica in its request for the advisory opinion, see: Costa Rica, *Request for an Advisory Opinion*, 8 July 1985, p. 3 [available only in Spanish]; *cf.*: OC-5/85 (n 363) para. 14.

625 IACHR, Resolution N° 17/84, Case N° 9178 (Costa Rica), 3 October 1984.

626 The President of Costa Rica had been asked at a meeting of the Inter-American Press Association to bring the matter before the Court in order to test the legality of the Costa Rican law and whether it was compatible with the right of freedom of expression. As to the background of this advisory opinion see: Buergenthal, *'New Upload - Remembering the Early Years of the Inter-American Court of Human Rights'* (n 20) p. 266–269.

627 OC-5/85 (n 363) paras. 22–23.

case."[628] Furthermore, it recalled that Article 64 created a "parallel system [...] which is designed to assist states and organs [...] without subjecting them to the formalism and the sanctions associated with the contentious judicial process."[629] Ultimately, it corroborated "that Costa Rica's failure to refer the Schmidt case to the Court as a contentious case does not make its advisory opinion request inadmissible".[630]

While the Court then used its advisory opinion OC-5/85 to criticize the Commission for neglecting to refer the Schmidt case to the Court[631], in the later contexts of OC-13/93 and OC-15/97, one would have expected the Court to clarify whether its findings made in OC-5/85 with regard to Costa Rica also hold true when a state has lost the proceedings before the Commission and indeed tries to "challenge the legal soundness of the Commission's conclusions without risking the consequences of a judgment"[632] by requesting a related advisory opinion. Unfortunately, the Court failed to juxtapose and to differentiate between these different contexts and to provide more precise and profound reasons for its decision not to reject the requests from Uruguay, Argentina and Chile.

Finally, also with regard to the request from Venezuela, it might have been better to at least address the problematic underlying intention of the request, and to come up with convincing arguments why it was worth answering the request anyway, rather than tacitly disregarding the political intention of the request.

On the other hand, the opinions in which the Court, as already mentioned, overall strengthened the Commission vis-à-vis the states speak for themselves even without explicitly addressing the respective political backgrounds. The Court's cautious and well-balanced findings in its opinions confirm that it had of course been aware of the delicate situations and political motivations of the requesting states. Nevertheless, it would have been desirable to include language in the opinion showing that the Court noticed the situation. The Court could at least have reminded states that requests for advisory opinions should not be sought in order to discredit another OAS organ, and in particular not to delegitimize the findings of the

628 OC-5/85 (n 363) para. 20.
629 OC-5/85 (n 363) para. 21.
630 OC-5/85 (n 363) para. 24.
631 See Buergenthal, *'New Upload - Remembering the Early Years of the Inter-American Court of Human Rights'* (n 20) p. 270 noting that the Commission in response to this within one year referred the first three cases to the Court.
632 OC-5/85 (n 363) para. 22.

Commission by consulting the Court on a matter the very same requesting state had desisted to refer, when possible, to the Court under its contentious jurisdiction.

c) Requests related to petitions pending before the Commission

Apart from the above-mentioned cases, in which the proceedings before the Commission had already been terminated, there were also requests for advisory opinions that were related to individual petitions that were still pending before the Commission. While the Court in the OC-12/91 proceedings[633] declined to answer the request on the merits because of the petitions pending against Costa Rica, in other similar instances the Court decided to give the requested opinion nevertheless.

aa) OC-16/99

In the OC-16/99 proceedings, the Commission informed the Court that two petitions were pending before it that were just like the advisory opinion request from Mexico, related to Article 36 of the Vienna Convention on Consular Relations.[634] However, the Commission argued that the pending cases should not deter the Court from issuing the requested opinion.[635] Notably, one of the alleged victims, Mr. Santana, had already been executed in Texas while his petition was pending before the Commission.[636]

One *amicus curiae* mentioned a third individual case related to Article 36 Vienna Convention on Consular Relations that had been pending before the Commission since 1994.[637] Like the Commission, this *amicus* also asked the Court to render the opinion requested by Mexico and to give full effect to Article 36 Vienna Convention on Consular Relations.

633 See *supra*: Chapter 4, Section C.I.1. first case of rejection.
634 Written observations of the IACHR, OC-16/99 proceedings, 30 April 1998, p. 5 mentioning the cases of Mr. Santana and Mr. Castillo Petruzzi.
635 Written observations of the IACHR, OC-16/99 proceedings, 30 April 1998, p. 6.
636 Written observations of the IACHR, OC-16/99 proceedings, 30 April 1998, p. 5.
637 *Amicus curiae* brief of Sandra Babcock and the Minnesota Advocates for Human Rights, OC-16/99 proceedings, p. 26. As to the there mentioned case of Cesar Fierro see also the final Report issued by the Commission in that case: IACHR, Informe N° 99/03, Case N° 11.331, Merits, 29 December 2003.

In its final advisory opinion, the Court only referred to the cases mentioned by the Commission. As regards the case of Mr. Santana, the Court found that this was an "entirely different [proceeding]" and that the interpretation made by the Court on Article 36 Vienna Convention on Consular Relations could not be taken as a "ruling on the facts of a petition pending before the Commission".[638] As regards the other case named by the Commission, the Court noted that it had in the meantime been transferred to the Court, and that it had already issued a judgment on preliminary objections, holding that it lacked competence to rule on the relevant point in this case.[639]

In contrast to the first case of rejection, that is advisory opinion OC-12/91, in the context of OC-16/99 none of the petitions pending before the Commission was directed against Mexico as being the requesting state. There was therefore no risk that Mexico was seeking to obtain an advisory opinion in order to anticipate and prevent a binding judgment on the same matter against itself. Rather, the petitions were directed against Peru and more importantly, against the United States, that is, the same state against which the request by Mexico was directed if one wanted to classify advisory opinion OC-16/99 as a disguised contentious case.

Unfortunately, the Court did not distinguish the situation given in the context of OC-16/99 from that of the rejected advisory opinion OC-12/91. It thus failed to explain why it had decided to treat Mexico's request differently than the earlier one from Costa Rica, despite the fact that in both cases related individual petitions had been pending.

bb) OC-23/17

In the proceedings leading to advisory opinion OC-23/17, the Commission again informed the Court that it was processing a petition at the admissibility stage that was, like Colombia's advisory opinion request, related to Nicaragua's project to construct a Grand Interoceanic Canal. The Court only briefly held that "the mere fact that petitions exist before the Commission related to the subject matter of the request is not sufficient reason for the Court to abstain from responding to the questions submitted to it".[640]

638 OC-16/99 (n 227) para. 52.
639 OC-16/99 (n 227) para. 51 fn 44.
640 OC-23/17 (n 4) para. 26.

It further added that the Commission had not yet finally admitted the said petition.[641] Like in the case of OC-16/99, the individual petition pending before the Commission was directed against the same state as the request for an advisory opinion, and not against the requesting state itself, and like in the case of OC-16/99 the Court decided to answer the advisory opinion request on the merits.

cc) OC-24/17

In the more recent OC-24/17, the situation was, however, the same as in case of OC-12/91, since at least one of the petitions pending before the Commission and relating to the discrimination of LGBTIQ* was directed against the requesting state Costa Rica. The Court nevertheless decided to provide the requested advisory opinion without distinguishing it from the precedent of the rejected advisory opinion OC-12/91.

The author of the petition, Mr Castrillo Fernández, submitted an *amicus curiae* brief informing the Court about his petition pending before the Commission. He also let the Court know that he had furthermore lodged a complaint of unconstitutionality before the Costa Rican *Sala Constitucional*.[642] He criticized the Costa Rican government for its ambiguity, maintaining that the very same government that was now requesting an advisory opinion from the Court had argued before the Commission that its petition was inadmissible.[643] Citing the Court's findings made in the rejected advisory opinion OC-12/91, Mr Castrillo Fernández urged the Court to reject the request in order to protect his procedural rights in the pending proceedings.[644]

According to another *amicus curiae*, there were two more petitions against Chile and Brazil pending before the Commission that were likewise

641 *Ibid.*.

642 *Amicus curiae* brief of Yashín Castrillo Fernández, OC-24/17 proceedings, available at: www.corteidh.or.cr/sitios/observaciones/costaricaoc24/21_castrillo_fernandez.pdf.

643 *Amicus curiae* brief of Yashín Castrillo Fernández, OC-24/17 proceedings, available at: www.corteidh.or.cr/sitios/observaciones/costaricaoc24/21_castrillo_fernandez.pdf, p. 2,

644 *Amicus curiae* brief of Yashín Castrillo Fernández, OC-24/17 proceedings, available at: www.corteidh.or.cr/sitios/observaciones/costaricaoc24/21_castrillo_fernandez.pdf, p. 3, 6.

dealing with matrimonial rights of LGBTIQ* and the right to a gender reassignment surgery.[645]

The Court mentioned the objection brought forward by Mr Castrillo Fernández, but rejected it very briefly and in a cursory manner. It again just repeated that "the mere fact that petitions related to the subject matter of the request exist before the Commission is not sufficient for the Court to abstain from responding to the questions submitted to it."[646] The unsatisfying briefness of this statement is aggravated by the fact that the Court cited OC-16/99 and OC-18/03 in order to confirm this statement.

While the situation in the context of OC-16/99 was, as shown, at least slightly different compared to that of OC-24/17, and while the Court in OC-16/99 had at least tried to differentiate the pending requests, the reference to advisory opinion OC-18/03 does not fit at all. The constellation in the context of the OC-18/03 was different and problematic for other reasons.[647]

It seems that in advisory opinion OC-18/03 there was no related request pending before the Commission. At least no concerned individual had urged the Court to reject the advisory opinion request and the Court did not mention any pending request either in the passage to which it referred in OC-24/17.

One would have thus expected the Court to differentiate the underlying setting of OC-24/17 from that of OC-12/91, as this was the decisive precedent. The fact that the Court omitted to do so is disappointing and weakens its reasoning on the admissibility of OC-24/17 significantly.

dd) OC-28/21

In the OC-28/21 proceedings, initiated by Colombia concerning the topic of indefinite presidential re-elections, the situation was again similar to that of OC-23/17. The Commission informed the Court that several petitions related to the questions raised by Colombia were pending before it. While three of them were still in the admissibility phase, one was already

645 *Amicus curiae* brief of the Law Faculty of the Pontifica Universidad Católica de Chile, OC-24/17 proceedings, 10 February 2017, available at: www.corteidh.or.cr/sitios/observaciones/costaricaoc24/40_fac_der_pucc.pdf, p. 10.

646 OC-24/17 (n 1) para. 24.

647 See *infra*: Chapter 4, Section C.II.1.d) cc) (1).

considered on the merits.[648] Like in the cases of OC-16/99 and OC-23/17 and contrary to the cases of OC-12/91 and OC-24/17, none of the petitions pending before the Commission was directed against Colombia as the requesting state. Rather, the petitions were directed against Bolivia and Nicaragua, and thus against two of the states whose recent changes in their respective electoral law had triggered Colombia's request for an advisory opinion.

Despite the related petitions pending before it, the Commission urged the Court to render the advisory opinion as requested by Colombia.[649] It argued that the petitions directed against Bolivia concerned violations of passive suffrage rather than the individual right to indefinite re-election, and that the petition directed against Nicaragua mainly concentrated on the right to participate on an equal footing in a presidential election process.[650] Hence, the Commission was of the opinion that the focus of the pending petitions lay on different aspects of electoral processes than the request for an advisory opinion submitted by Colombia.

In contrast, the attorney of the author of the petition directed against Nicaragua requested that the Court declines to answer Colombia's request, as the continuation of the advisory procedure would undermine the procedural rights of his client.[651] Already the fact that the Commission had

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648 Written observations of the IACHR in the OC-28/21 proceedings, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/5_cidh.pdf, para. 10. While the advisory proceeding was pending, one of the petitions even became pending before the Court, see OC-28/21 (n 274), Dissenting opinion of Judge L. Patricio Pazmiño Freire, para. 7.

649 Written observations of the IACHR in the OC-28/21 proceedings, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/5_cidh.pdf, para. 15.

650 Written observations of the IACHR in the OC-28/21 proceedings, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/5_cidh.pdf, paras. 12–13.

651 Written observations of Björn Arp in the OC-28/21 proceedings, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/42_arp.pdf, p. 7. Dr. Björn Arp represents Fabio Gadea Mantilla as attorney before the IACHR. Fabio Gadea Mantilla ran as a candidate in the Nicaraguan presidential elections of 2011 which he lost against Daniel Ortega who then started his third term as president. Actually, according to the Nicaraguan constitution at that time, it was forbidden to run for president a second time in a row, or a third time altogether, but Daniela Ortega had managed to have the relevant articles of the constitution declared inapplicable by the Nicaraguan Supreme Court before the 2011 elections. Later, Ortega changed the constitution so as to allow the indefinite presidential re-election. For more information see: Augustín Grijalva Jiménez and José Luis Castro-Montero, '*La reelección presidencial indefinida en Venezuela, Nicaragua, Ecuador y Bolivia*' (2020) 18 (1) Estudios Constitucionales, 9, 40 *et. seq*.

interrupted the processing of the case of his client in light of the advisory proceeding initiated by Colombia had added to the suffering of his client, who was eagerly waiting for justice.[652] Furthermore, the attorney argued in his written submissions that rendering the advisory opinion would run counter to the principle of procedural efficiency, given that there was already a related individual case pending in the inter-American human rights system.[653] Lastly, he was afraid that all the particularities and differences present in the political systems of the states that had allowed indefinite presidential re-elections, or at least debated about it, did not allow for a general answer via an advisory opinion, but could be better addressed on a case-by-case basis in contentious proceedings.[654]

The Court mentioned the petitions pending before the Commission, but only partly addressed the concerns brought forward by the attorney.[655] Firstly, it repeated its meanwhile consistent finding that the mere existence of related petitions pending before the Commission not sufficed as a reason for the Court to abstain from answering a request for an advisory opinion.[656] In order to corroborate this position, the Court noted that the ICJ had also always rejected objections that claimed that a request for an advisory opinion constituted a disguised contentious case as soon as a related dispute existed.[657] Furthermore, the Court underlined that its advisory function is aimed at assisting states and OAS organs in complying with their international human rights obligations, and that an advisory opinion therefore did not constitute any prejudgment of an eventually related case pending before the Commission.[658]

While it is true that the ICJ has also provided controversial advisory opinions despite objections that the respective proceeding was a disguised contentious case, the Court's reference to the practice of the ICJ is at this point slightly misplaced. It ignores that the ICJ does not act in the interplay with a Commission as a kind of "first instance". As regards proceedings before the ICJ, the criterion of a "disguised contentious case" therefore only

652 Written observations of Björn Arp in the OC-28/21 proceedings, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/42_arp.pdf, p. 3.
653 Written observations of Björn Arp in the OC-28/21 proceedings, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/42_arp.pdf, p. 4.
654 Written observations of Björn Arp in the OC-28/21 proceedings, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/42_arp.pdf, pp. 5–6.
655 OC-28/21 (n 274) paras. 22–25.
656 OC-28/21 (n 274) para. 23.
657 OC-28/21 (n 274) para. 23.
658 OC-28/21 (n 274) para. 24.

intends to protect the state's sovereignty and the principle of consensual jurisdiction. There are, however, no procedural rights of individuals at risk of being undermined.

What is more, the words with which the Court brushed off the raised concerns sound as if objections that a certain advisory proceeding constitutes a disguised contentious case were always unjustified. This, however, contradicts the criterion, that the Court itself established and appears inappropriate, especially in a case, in which the author of a related proceeding personally askes the Court not to continue with the advisory proceeding. A comparison with the advisory function of the AfrCtHPR instead of the ICJ would have shown that the AfrCtHPR is explicitly forbidden from processing requests for advisory opinions which are related to a matter being examined by the Commission.[659]

What is more, the finding that an advisory opinion issued by the Court did not constitute a prejudgment of cases or petitions pending before the Commission is not fully convincing either. Although the Commission and also the Court may deviate from the findings made in an advisory opinion when deciding a later contentious case, the advisory opinion nevertheless sets an authoritative precedent. Though the advisory opinion does not yet provide a final answer to the particular questions of a specific contentious case, it is unlikely that the Commission will find that there exists a right to indefinite presidential re-election protected by the ACHR after the Court has concluded the contrary in OC-28/21.

Moreover, when the Court rejected the Commission's request on impeachment[660] three years before, it had just reiterated that answering the request while related petitions were pending before the Commission might lead to "a premature ruling on matters that could subsequently be submitted to the Court's consideration in the context of a contentious case".[661] In OC-28/21 the Court asserted the opposite, without even trying to distinguish the situation from that of its sixth rejection.[662]

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659 See Article 4(1) AfrCHPR Protocol and *supra*: Chapter 3, Section D.III.

660 See *supra*: Chapter 4 Section C.I.6. on the sixth rejection.

661 IACtHR, Order of 29 May 2018, *Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*, paras. 8, 18.

662 The "insufficient" analysis of the individual cases pending before the Commission, as well as the missing discussion of the Court's own rejection criteria, was also criticized by Judge Pazmiño Freire in his dissenting opinion. See: OC-28/21 (n 274), Dissenting opinion of Judge L. Patricio Pazmiño Freire, paras. 4–8. Given that the case of Fabio Gadea Mantillo v. Nicaragua had been transferred to the Court while

ee) Intermediate conclusion

Whereas the Court has, in case the of OC-12/99 and as regards the Commission's request on impeachment, declined to render the requested advisory opinion *inter alia* because of the fact that related petitions were pending before the Commission, in other instances such related petitions did not prevent the Court from issuing advisory opinions. In these instances, in which the Court decided to render the advisory opinion on the merits, it mostly failed to distinguish the respective case from the precedents in which it had rejected the request. To date, the Court did not provide for any clear rule determining when the existence of related petitions pending before the Commission should lead to a rejection of the request and when not.

d) Requests related to concrete conflicts between states

Next to requests related to disputes between the Commission and states, or to individual petitions pending before the Commission, another category of requests that might be called "disguised contentious case" concerns requests relating to conflicts between two or more states. This category can be further sub-divided. For one, there have been requests related to proceedings before the ICJ. Secondly, there has been a request concerning a conflict with a third state not member of the OAS. Finally, there have been requests that relate to a smoldering conflict in the region, or at least to issues likely to cause further resentment and frictions between states of the region.

aa) Related proceedings before the ICJ

So far there have been two advisory proceedings bearing a certain connection to contentious proceedings before the ICJ.

the advisory proceeding was ongoing, Judge Pazmiño argued, that the Court had been required to analyze especially with regard to that case very thoroughly whether the requested advisory opinion would turn into a premature ruling on the questions raised in that case.

(1) OC-16/99

The Mexican request on rights of individuals detained and sentenced to death in a foreign country under the Vienna Convention on Consular Relations, which led to OC-16/99, concerned partly the same legal questions as the *Breard*[663], the *LaGrand*[664] and the *Avena*[665] cases before the ICJ. The Mexican advisory opinion request was triggered by cases of Mexican nationals sentenced to death in the United States, and all three contentious cases before the ICJ were also directed against the United States. Important to note is however the chronological order, and that neither the *Breard* nor the *LaGrand* case had been initiated by Mexico. These two cases, initiated by Paraguay and Germany respectively, only started to be pending before the ICJ after Mexico had already submitted its request for an advisory opinion to the IACtHR. When Mexico itself brought the *Avena* case before the ICJ, it had already obtained the final advisory opinion from the IACtHR.

One could of course argue that the Mexican request was a disguised contentious case that undermined the principle of consensual jurisdiction, because it related to the cases of several Mexican nationals sentenced to death in the United States, and individual petitions filed by these nationals against the United States could have never reached the Court, given that the United States have not ratified the ACHR. But in light of the chronological order, one could at least not accuse Mexico of seeking an advisory opinion from the IACtHR in order to gain an argument in another proceeding already pending before the ICJ.

Despite this chronological order of events, the United States argued that the Court should at least defer the advisory proceeding until the ICJ had rendered its judgment in the *Breard* case.[666] Later, when Paraguay had decided to discontinue the *Breard* case, the United States informed the Court of the now pending *LaGrand* case brought against it by Germany.[667]

663 For an overview of this case which was discontinued before the ICJ could render a judgment see: https://www.icj-cij.org/case/99.

664 ICJ, *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001, I.C.J. Reports 2001, p. 466.

665 ICJ, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, I.C.J. Reports 2004, p. 12.

666 Written observations of the United States of America, OC-16/99 proceedings, 1 June 1998, p. 4 (p. 5 of the Spanish version).

667 OC-16/99 (n 227) para. 56.

Interestingly, all other states and *amici* that participated in the proceeding either did not raise the issue, or affirmed that the Court should give the opinion as requested and that it should not delay it until the ICJ would have eventually rendered its respective judgment.[668]

In OC-16/99, the Court paid more attention to the issue of proceedings pending before the ICJ than to the issue of individual petitions pending before the Commission. Considering the object and purpose of its advisory function and noting the great interest shown by the many participating states and *amici*, the Court concluded that it was an "autonomous judicial institution".[669] Therefore, it could not "be restrained from exercising its advisory jurisdiction because of contentious cases filed with the [ICJ]".[670] As in OC-3/83, the Court found that "the legitimate interests [of] any member state [...] in the outcome of an advisory proceeding [were] protected by the opportunity [...] to participate fully in those proceedings and to make known to the Court its views on the legal norms to be interpreted".[671]

The Court did not, however, mention the *lis pendens* principle.[672] It referred only to a statement made in its first advisory opinion concerning

668 See e.g. Additional observations of the Mexican Commission on the Defense and Promotion of Human Rights Watch, and the Center for Justice and International Law on the request for an advisory opinion, OC-16 before the Inter-American Court of Human Rights, 18 August 1998, p. 24; *Amicus curiae* brief of the International Human Rights Law Institute of Depaul University College of Law and Macarthur Justice Center, OC-16/99 proceedings, 28 April 1998, p. 1, 8–9, 61; *Amicus curiae* brief of S. Adele Shank and John Quigley, OC-16/99 proceedings, 24 April 1998, p. 15; Written observations of El Salvador, OC-16/99 proceedings, 29 April 1998, esp. para. 8–9; Written observations of Guatemala, OC-16/99 proceedings, 30 April 1998, p. 1–2; Written Observations of Costa Rica, OC-16/99 proceedings, May 1998, p. 2–3; Written observations of Paraguay, OC-16/99 proceedings, p. 1; Written observations of the Dominican Republic, OC-16/99 proceedings, 30 April 1998, p. 4. [The cited observations from the states are only available in Spanish].

669 OC-16/99 (n 227) para. 61.

670 OC-16/99 (n 227) para. 61.

671 OC-16/99 (n 227) para. 61.

672 As to other human rights commissions which have declined the admissibility in light of parallel proceedings before other courts or commissions that were based on related provisions see: Friederike Stumpe, *Parallele Verfahren in der privaten Schiedsgerichtsbarkeit und bei Investitionsschutzstreitigkeiten – Anwendungsmöglichkeiten des lis pendens Prinzips* (Dr. Kovač, 2015) p. 31; as to the lis pendens principle more generally see: Campbell McLachlan, *Lis Pendens in International Litigation* (Hague Academy of International Law, 2009).

the risk of conflicting interpretations.[673] Yet, this statement from its first advisory opinion addressed the issue that the Court's advisory jurisdiction *ratione materiae* generally overlapped e.g. with that of the ICJ, irrespective of whether the Court interpreted Article 64 restrictively or more broadly. It did not address the special case of related proceedings pending before different courts at the same time. However, such a case provokes not only the risk of conflicting interpretations, but also that the parties entertain strategic forum shopping and use one court to outplay another. The Court could have addressed this problematic issue more in depth and could still have upheld its decision. It could have argued convincingly that there was no strict identity of parties, and that Mexico's request for an advisory opinion had been submitted before Paraguay had initiated the proceeding before the ICJ, and that the Court was thus the Court first seized.[674]

(2) OC-23/17

The most recent example of a request relating to proceedings before the ICJ is the request from Colombia that led to OC-23/17. In 2012 the ICJ rendered its judgment in the case of *Territorial and Maritime Dispute* between

673 In OC-1/82 the Court had held: "The other argument that has been advanced is that the extension of the limits of the Court's advisory jurisdiction might produce conflicting interpretations emanating from the Court and from those organs outside the inter-American system that might be called upon also to apply and interpret treaties concluded outside of that system. The Court believes that it is here dealing with one of those arguments which proves too much and which, moreover, is less compelling than it appears at first glance. It proves too much because the possibility of conflicting interpretations is a phenomenon common to all those legal systems that have certain courts which are not hierarchically integrated. Such courts have jurisdiction to apply and, consequently, interpret the same body of law. Here it is, therefore, not unusual to find that on certain occasions courts reach conflicting or at the very least different conclusions in interpreting the same rule of law. On the international law plane, for example, because the advisory jurisdiction of the International Court of Justice extends to any legal question, the UN Security Council or the General Assembly might ask the International Court to render an advisory opinion concerning a treaty which, without any doubt, could also be interpreted by this Court under Article 64 of the Convention. Even a restrictive interpretation of Article 64 would not avoid the possibility that this type of conflict might arise". See: OC-1/82 (n 42) para. 50.

674 On the requirements of the *lis pendens* principle depending on whether a narrow or a broader conception is employed and on the various constellations in which the rule of "the Court first seized" can be applied see: McLachlan (n 672).

Nicaragua and Colombia.[675] While the ICJ affirmed Colombia's sovereignty over some Caribbean islands, the maritime delimitation favored Nicaragua. Colombian press articles held that Colombia had lost about 40 percent of its previously claimed maritime area through the judgment.[676] The then Colombian President Jose Manuel Santos declared the judgment to be inapplicable, and announced an "integral strategy" in order to preserve control over its maritime areas, to protect the environment of the Seaflower marine biosphere reserve which, since the 2012 judgment, partly falls in Nicaragua's exclusive economic zone[677], and above all to curb the "expansionist ambitions" of Nicaragua.[678]

One of the first acts undertaken in the context of this integral strategy was the denouncement of the Pact of Bogotá which had provided for the jurisdiction of the ICJ.[679] However, before the denouncement of the treaty became effective, Nicaragua instituted two further proceedings against Colombia before the ICJ. In the *Alleged Violations* case[680] Nicaragua ac-

675 ICJ, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of 19 November 2012, I.C.J. Reports 2012, p. 624.

676 *'Colombia perdió 40 % de mar pero conservó los cayos de San Andrés'*, Vanguardia, 18 November 2012, available at: https://www.vanguardia.com/colombia/colombia-perdio-40-de-mar-pero-conservo-los-cayos-de-san-andres-ETVL183755; *'Qué gane Nicaragua y qué pierde Colombia con el fallo de la Corte de La Haya'*, infobae, 20 November 2012, available at: https://www.infobae.com/2012/11/20/1061748-que-gana-nicaragua-y-que-pierde-colombia-el-fallo-la-haya/; *'Hace ocho años Colombia perdió 40 % de mar'*, infobae, 19 November 2020, available at: https://www.infobae.com/america/colombia/2020/11/19/hace-ocho-anos-colombia-perdio-40-de-mar/.

677 For this information see *Amicus curiae* brief of Alfredo Ortega Franco, OC-23/17 proceedings, 19 January 2017, p. 2 available at: https://www.corteidh.or.cr/sitios/observaciones/colombiaoc23/43_alfre_orte.pdf.

678 Declaration of the President of Colombia of 17 March 2016, available at: https://www.cancilleria.gov.co/newsroom/news/declaracion-presidente-colombia-juan-manuel-santos-decisiones-corte-internacional.

679 For the official note of denunciation see: http://www.oas.org/juridico/english/sigs/a-42.html. As to Colombia's denunciation and its political and legal effects see also: Rene Urueña, '*Colombia se retira del Pacto de Bogotá: Causas y Efectos*' (2013) Anuario de Derecho Público UDP, 511–547; '*Colombia denuncia Pacto de Bogotá tras fallo de la CIJ'*, DW, 28 November 2012, available at: https://www.dw.com/es/colombia-denuncia-pacto-de-bogot%C3%A1-tras-fallo-de-la-cij/a-16414772.

680 ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Application instituting proceedings filed on 26 November 2013. In its judgment on the merits, the ICJ has found *inter alia* that Colombia has violated Nicaragua's sovereign rights and jurisdiction by interfering with activities of Nicaraguan ships in Nicaragua's exclusive economic zone and by authorizing fishing activities in that zone. See: ICJ, *Alleged Violations of Sovereign Rights and*

cused Colombia of the illegal threat of the use of force, and claimed that Colombia violated Nicaragua's maritime zones, its sovereign rights and jurisdiction as delimited and assured in the 2012 *Territorial and Maritime Dispute* judgment. In its second application, Nicaragua asked the ICJ to determine the maritime boundary between the two countries in the area of the continental shelf beyond 200 nautical miles from the Nicaraguan coast that were not yet determined by the Court in its 2012 judgment.[681]

Only three days before the ICJ rendered its judgments on Preliminary Objections, in which it rejected most of Colombia's objections and decided it had jurisdiction over most of Nicaragua's claims, Colombia submitted its request for an advisory opinion to the IACtHR.[682]

Colombia asked the IACtHR three very detailed questions[683] concerning extraterritorial and environmental obligations under the ACHR, in particular the obligation to undertake environmental impact assessments. Colom-

Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment of 21 April 2022, p. 89, para. 261. Nicaragua's claim that Colombia had violated the prohibition of the use or threat of use of force had already been rejected in the judgment on Preliminary Objections, see ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, Preliminary Objections, Judgment of 17 March 2016, I.C.J. Reports 2016, p. 3, 33, 42 paras. 78, 111 (1) (c).

681 ICJ, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Application instituting proceedings filed on 16 September 2013. In its recent judgment on the merits, the ICJ held that "under customary international law, a State's entitlement to a continental shelf beyond 200 nautical miles […] may not extend within 200 nautical miles from the baselines of another State" and thus rejected all of Nicaragua's claims. See: ICJ, *Questions of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment of 13 July 2023, in particular p. 29, para. 79.

682 Colombia, *Request for an Advisory Opinion presented by the Republic of Colombia concerning the interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights*, 14 March 2016; ICJ, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia),* Preliminary Objections, Judgment of 17 March 2016, I.C.J. Reports 2016, p. 100; ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, Preliminary Objections, Judgment of 17 March 2016, I.C.J. Reports 2016, p. 3.

683 As to the original wording of the questions see Colombia, *Request for an Advisory Opinion presented by the Republic of Colombia concerning the interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights*, 14 March 2016, para. 4 or also OC-23/17 (n 4) para. 3.

bia limited its request expressly to areas of functional jurisdiction such as the one established by the Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region.

Although Colombia did not mention the pending proceedings before the ICJ in its request, and although the request concerned *prima facie* different questions than the delimitation of the maritime border and the use of force, the connection of the request with the ongoing conflict with Nicaragua was obvious. As a matter of fact, two counter claims raised by Colombia in the *Alleged Violations* case highlighted that Colombia had hoped that an advisory opinion of the IACtHR, which would presumably be friendly to human and environmental rights, could help to win the case before the ICJ.[684] Colombia had argued before the ICJ that its first counter-claim was based on "Nicaragua's violation of its duty of due diligence to protect and preserve the marine environment of the Southwestern Carribean Sea", and that its second counter-claim concerned "Nicaragua's violation of its duty of due diligence to protect the right of the inhabitants of the San Andrés Archipelago, in particular the Raizales, to benefit from a healthy, sound and sustainable environment".[685]

Colombia thereby tried to relate the issues claimed by Nicaragua with its own environmental concerns related to Nicaragua's policies that formed the basis of its advisory opinion request. However, on the same day that the IACtHR rendered its advisory opinion, the ICJ held the two above-mentioned Colombian counter-claims to be inadmissible given that they lacked a direct connection, both in fact and in law, to Nicaragua's principal claims.[686]

Even more obvious than the connection to the pending maritime border conflict before the ICJ is the request's relation to Nicaragua's plan to build

684 See: Nicolás Carillo-Santarelli, *The Politics behind the Latest Advisory Opinions of the Inter-American Court of Human Rights, Blog of the International Journal of Constitutional Law*, 24 February 2018, available at: http://www.iconnectblog.com/the-politics-behind-the-latest-advisory-opinions-of-the-inter-american-court-of-human-rights/.

685 ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia),* Counter-Claims, Order of 15 November 2017, I.C.J. Reports 2017, p. 289, 297, para. 26.

686 ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia),* Counter-Claims, Order of 15 November 2017, I.C.J. Reports 2017, p. 289, paras. 34–39.

a new Interoceanic Canal connecting the Caribbean Sea with the Pacific Ocean that would be bigger than the expanded Panama Canal.[687]

Given that President Santos had already, in his 2013 declaration on the "integral strategy", announced that the former would include actions to preserve the environment and other possible actions than the judicial recourse options before the ICJ, the submission of the request for an advisory opinion has to be seen in the context of this larger strategy against Nicaragua and against the implementation of the 2012 ICJ judgment in the case of *Territorial and Maritime Dispute*.[688]

It has been argued that the question the IACtHR would be actually going to solve, if it was to give the opinion as requested, was "under which conditions [...] Nicaragua [had] extra-territorial human rights duties with an environmental content vis-à-vis individuals in Colombian territory".[689] In light of this, the argument went, the request should be rejected as it was furthermore an "attempt to prevent the effectiveness of decisions at the ICJ".[690]

In contrast to this, all written observations and *amicus curiae* briefs submitted to the Court either did not mention the political implications of Colombia's request, or argued nevertheless in favor of rendering the advisory opinion.[691] The World Commission on Environmental Law argued

687 See: Monica Feria-Tinta and Simon C. Milnes, '*The Rise of Environmental Law in International Dispute Resolution: The Inter-American Court of Human Rights Issues a Landmark Advisory Opinion on the Environment and Human Rights*' (2016) 27 (1) Yearbook of Environmental Law, 64, 67; Kahl (n 7) p. 3 with further references to the environmental impact of the canal project.

688 See: Declaration of the President of Colombia of 17 March 2016, available at: https://www.cancilleria.gov.co/newsroom/news/declaracion-presidente-colombia-juan-manuel-santos-decisiones-corte-internacional; Luis Viveros, '*A critical Assessment of Colombia's Request before the IACtHR – and Why it Should Be Rejected*', EJIL:Talk!, 25 October 2016, available at: https://www.ejiltalk.org/a-critical-assessment-of-colombias-advisory-request-before-the-iacthr-and-why-it-should-be-rejected/.

689 Viveros (n 688).

690 Viveros (n 688).

691 See for example *Amicus curiae* brief of Alfredo Ortega Franco, OC-23/17 proceedings, 19 January 2017, available at: https://www.corteidh.or.cr/sitios/observaciones/colombiaoc23/43_alfre_orte.pdf who described the Colombian strategy and political interests behind the request but still held the request to be an important opportunity for the Court to develop environmental law; Panama cited the 2012 ICJ judgment but with no word mentioned any possible political interests of Colombia that could argue against giving the advisory opinion. Rather, it had obviously, like Honduras as well, own interests in the opinion given that it would be as well affected if Nicaragua was about to realize its planned canal construction. *Cf.*: Written

that the argument developed by the PCIJ in the *Eastern Carelia* case had since not been employed, that Colombia's request for an advisory opinion concerned entirely different legal issues than the cases pending before the ICJ, and that everything militated in favor of providing the opinion, not least the need for judicial guidance in times of increasing environmental decline.[692]

Guatemala addressed the issue in the public hearing but it did not ask the Court to reject Colombia's request. It only demanded that the Court "consider, within this request, the possible implication of the State of Nicaragua even though this is not expressly indicated in any part of the document", and that "the interpretation provided in answer to the request should accord with what has been indicated in the course of [the proceedings before the ICJ] between Colombia and Nicaragua."[693]

The Court repeated its finding made in OC-16/99 without addressing the difference that Colombia, in contrast to Mexico, which had not been party to the *Breard* or *LaGrand* case, was the respondent in the proceedings before the ICJ. Furthermore, the Court paid no attention to the fact that

observations of Panama and Honduras in the OC-23/17 proceedings, available at: https://www.corteidh.or.cr/sitios/observaciones/colombiaoc23/3_panama.pdf and https://www.corteidh.or.cr/sitios/observaciones/colombiaoc23/1_honduras.pdf. The Commission only informed the Court of a petition directed against Nicaragua concerning the construction of the planned Interoceanic Canal. The Court did not hold this to be problematic arguing that the petition was still in the admissibility phase and not yet accepted by the Commission. See written observations of the IACHR in the OC-23/17 proceedings, available at: https://www.corteidh.or.cr/sitios/observaciones/colombiaoc23/1_comision.pdf and OC-23/17 (n 4) paras. 25–26; Silvana Insignares Cera *et al.* mentioned the Canal project of Nicaragua but were not aware of the pending petition before the Commission and held the processing of the request therefore appropriate. See their *Amicus curiae* brief here: https://www.corteidh.or.cr/sitios/observaciones/colombiaoc23/6_sil_ins.pdf. The ECCHR did neither mention the proceedings between Colombia and Nicaragua before the ICJ nor Nicaragua's Channel project but only stressed the importance of the observance of human rights and environmental law. *Cf.*: *Amicus curiae* brief of the ECCHR, OC-23/17 proceedings, available at: https://www.corteidh.or.cr/sitios/observaciones/colombiaoc23/22_ecchr.pdf.

692 Written observations of the IUCN World Commission on Environmental Law, OC-23/17 proceedings, 19 January 2017, available at: https://www.corteidh.or.cr/sitios/observaciones/colombiaoc23/40_world_com.pdf, fn. 109.

693 OC-23/17 (n 4) para. 25. The audio files of the public hearing are available at: https://soundcloud.com/corteidh/sets/solicitud-de-opinion-consultiva-presentada-por-el-estado-de-colombia-22-03-2017.

this time the request had been made after the related cases before the ICJ had been initiated.

Interesting was, however, that the Court broadened the scope of the questions posed by Colombia.[694] Instead of restricting its reply to obligations arising under the Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region (Cartagena Convention) the Court decided to refer in general to environmental obligations arising from the obligation to respect and ensure human rights.

It also held that the scope of advisory opinions should not be restricted to specific states, but that they should be of general interest and that "the questions raised in the request go beyond the interests of the State parties of the Cartagena Convention and are important for all the States of the planet."[695]

This statement depicts not only the Court's understanding of itself as an autonomous and high authority of international relevance, but was likely made to rebut the objection that the Court was deciding a disguised contentious case between Colombia and Nicaragua and to avoid acting as Colombia's "puppet".[696] It allowed the Court to formulate its advisory opinion in very general and abstract terms without referring directly to the Caribbean context. Nevertheless, the opinion can of course be applied to the preservation of maritime nature reserves, and mega projects such as the construction of an Interoceanic Canal in general, and Colombia would have certainly tried to use it in the proceedings against Nicaragua had the ICJ not held its respective counter-claims to be inadmissible.

Unfortunately, the Court again did neither address the *lis pendens* principle nor the interests and values it is supposed to protect. This would, however, have been even more strongly indicated than in the OC-16/99, because this time, the Court was only the second court seized, and the parties involved in, or at least indirectly affected by the two proceedings were the same. In light of this factual background, it would have been desirable that the Court not just repeat that it is an "autonomous judicial organ"[697], but that it openly addresses the political implications, and explains why it holds that the potential benefit of issuing the advisory opinion outweighs the risk that its advisory function is abused for purely political purposes.

694 *Cf.*: Carillo-Santarelli (n 684).
695 OC-23/17 (n 4) para. 35.
696 *Cf.*: Carillo-Santarelli (n 684).
697 OC-23/17 (n 4) para. 26.

bb) Conflict with a state not party to the OAS

Whereas Colombia could have initiated an inter-state complaint in terms of Article 45 instead of requesting an advisory opinion, given that both Colombia and Nicaragua have accepted the competence of the Commission and the Court under Articles 45 and 62[698] respectively, the inter-state dispute between Ecuador and the United Kingdom underlying advisory opinion OC-25/18 could have never been brought before the IACtHR in the context of its contentious jurisdiction.

In 2016 the government of Ecuador requested an advisory opinion on the institution of asylum and its recognition as a human right.[699] This request was obviously related to the case of Julian Assange, who was at that time still staying in the Ecuadorian embassy in London. The questions hinted directly to the behavior of the United Kingdom, and thus a state, that is not a member of the OAS, let alone subject to the jurisdiction of the IACtHR.

The matter was addressed in several written observations and *amicus curiae* briefs. But almost none of them was of the opinion that the Court should abstain from answering the request.[700] Most held it to be sufficient if the Court rejected some of the questions, or reformulated them in order to make them more abstract.[701]

698 As to the full text of these two provisions of the Convention see *supra*: (n. 214) and (n. 215).

699 Ecuador, *Request for an Advisory Opinion concerning the scope and purpose of the right of asylum in light of international human rights law, inter-American law and international law*, 18 August 2016, available at: https://www.corteidh.or.cr/observaciones_oc_new.cfm?lang=es&lang_oc=es&nId_oc=1708.

700 The Universidad Autónoma de Baja California argued that the Court should abstain from answering the request as it would otherwise devalue the actual object and purpose of its advisory function and as it would not only interfere in a matter of internal political debate in Ecuador but also pronounce on an issue affecting states that are not party to the regional human rights system. See *Amicus curiae* brief of the Universidad Autónoma de Baja California, OC-25/18 proceedings, 2 May 2017, available at: https://www.corteidh.or.cr/sitios/observaciones/oc25/29_uni_aut_calif.pdf, p. 8–24

701 *Amicus curiae* brief of the University College 'Public International Law Pro Bono project', OC-25/18 proceedings, available at: https://www.corteidh.or.cr/sitios/observaciones/oc25/30_uni_london.pdf, p. 17 suggesting that the Court should reformulate the questions in a way that would allow it to address the important legal concerns without intervening in eminently political matters involving non-American states; *Amicus curiae* brief of the Universidad Centroamericana José Simeón Cañas, OC-25/18 proceedings, 15 March 2017, available at: https://www.corteidh.or.cr/sitios/observaciones/oc25/21_uni_simeon.pdf, p. 6 arguing that the Court

When addressing its competence and the request's admissibility, the Court paid more attention to the political implications of the request than in earlier advisory opinions. It even mentioned the case of Wikileaks' founder Assange expressly.[702] In the end, the Court nevertheless did not find it inappropriate to render the opinion. It reiterated that cases or petitions eventually pending before other international courts or the Commission did not necessarily hinder it from giving an advisory opinion on a related matter.[703] Moreover, the Court held that the illustration of concrete examples in a request did not mean that the Court would rule on these cases.[704] In the eyes of the Court, these concrete examples contained in a request rather assured that its advisory opinion, despite its abstract and strictly judicial interpretations, would still have practical benefits for the protection of human rights.[705] Further, the Court noted that this time, no case related to the request was pending before the Commission[706] – a factor that, as seen above, did not prevent the Court from providing an opinion in other instances either. Overall, the Court held that there was a general interest that the Court took a stand on a legal matter of high significance for

should reformulate the questions; *Amicus curiae* brief of the Universidad EAFIT, OC-25/18 proceedings, 2 May 2017, available at: https://www.corteidh.or.cr/sitios/observaciones/oc25/28_uni_eafit.pdf, p. 2 noting the close connection to the case of Julian Assange but holding the Court competent to render an advisory opinion that interprets Art. 22 (7) in the abstract. This was stressed in its additional observations noting that an abstract pronunciation of the Court would not involve any prejudgment of concrete cases, see Additional Observations of the Universidad EAFIT, OC-25/18 proceedings, 22 September 2017, available at: https://www.corteidh.or.cr/sitios/observaciones/oc25/comp/5_uni_eafit.pdf, p.3; Additional observations of the Universidade do Estado do Rio de Janeiro, OC-25/18 proceedings, 18 September 2017, available at: https://www.corteidh.or.cr/sitios/observaciones/oc25/comp/4_uni_est_rio_jan.pdf, paras. 24, 26, 36 stating that in this case the contentious function of the Court could not be circumvented as the case of Julian Assange could not come under the Court's contentious jurisdiction and that it sufficed for the Court to answer the questions in the abstract or to reformulate them if it felt that they went beyond its jurisdiction; Mexico did not mention the case of Julian Assange but held that question d was inadmissible for being vague and not answerable in legal terms. See Written observations of Mexico, OC-25/18 proceedings, 22 May 2017, available at: https://www.corteidh.or.cr/sitios/observaciones/oc25/5_m%C3%A9xico.pdf, para. 157.

702 OC-25/18 (n 227) para. 48.

703 OC-25/18 (n 227) para. 50.

704 OC-25/18 (n 227) para. 51.

705 OC-25/18 (n 227) paras. 51–52.

706 OC-25/18 (n 227) para. 53.

the region, namely the right to seek and receive asylum, and that this was possible without addressing or ruling on a concrete case that might have been mentioned in the advisory proceeding.[707]

Yet, the Court declared one of Ecuador's questions completely inadmissible from the outset for being vague and not reducible to the interpretation of legal norms.[708] As regards another question of Ecuador, the Court held that it contained two distinguishable aspects, of which only one was admissible.[709] The aspect of the question referring to the legal value and consequences of decisions or rulings of groups or mechanisms belonging to the UN would extend beyond the Court's competence.[710] All remaining questions were summarized by the Court in two shorter questions that focused on legal aspects and omitted the factual premises that had been included in most of Ecuador's questions.[711]

As regards the concern that the opinion would affect a third state, not party to the regional human rights system, the Court stated that its advisory competence did not extend to such states even when it interpreted an international treaty to which they were a party.[712] Further, even if the Court were to make observations concerning third states, this would not mean that it

707 OC-25/18 (n 227) para. 53.

708 OC-25/18 (n 227) para. 26. Question D of Ecuador's request stated: "Is it admissible that a State adopt a conduct that, in practice, restricts, reduces or impairs any form of asylum, arguing that it does not consider valid certain tenets of legal and ethical value such as the principles of humanity, the dictates of the public conscience, and universal morality, and what should be the legal consequences of the disregard for such tenets?", see: Ecuador, *Request for an Advisory Opinion concerning the scope and purpose of the right of asylum in light of international human rights law, inter-American law and international law*, 18 August 2016, available at: https://www.corteidh.or.cr/docs/solicitudoc/solicitud_18_08_16_eng.pdf, para. 58.

709 OC-25/18 (n 227) para. 27. Question G of Ecuador, which can in full length also be found at para. 58 of the above cited request of Ecuador, stated in essence: Is it admissible that the State which has been the subject of a decision or ruling of a multilateral mechanism belonging to the United Nations System in which it is attributed with responsibility for violating the rights established in Articles 5, 7 and 8 of the American Convention, and Articles 7, 9, 10 and 14 of the International Covenant on Civil and Political Rights of a person who has been granted asylum or refuge requests judicial cooperation in criminal matters from the host State without taking into account the said ruling, or its responsibility in the impairment of the rights of the person granted asylum?

710 OC-25/18 (n 227) para. 27.

711 OC-25/18 (n 227) paras. 56–57.

712 OC-25/18 (n 227) para. 30.

was determining the scope of obligations incumbent on them.[713] Whereas the interpretation made in the context of its advisory function would certainly contribute to the development of international law, the Court was only competent to determine the obligations of American states vis-à-vis other OAS member states and individuals subject to its jurisdiction.[714]

Comparable to the reformulation of questions undertaken in OC-23/17, the reduction and reformulation of Ecuador's politically highly charged issues into abstract questions of legal interpretation allowed the Court to render an advisory opinion that is not limited to the questions arising in the specific case of Julian Assange, but that may provide guidance to states confronted with similar situations.[715] The opinion is thus of broader application, and clarifies questions of refugee law, diplomatic asylum and especially non-refoulement that are of general importance irrespective of the specific case of Julian Assange that triggered the request.

cc) Smoldering conflict in the region

Finally, there are several advisory opinions that, although they do not relate to proceedings already pending before other courts or the Commission, are still related to some type of smoldering conflict which might lead to a later contentious case. With regard to the ICJ, requests like these have also been

713 OC-25/18 (n 227) para. 32.

714 OC-25/18 (n 227) para. 32.

715 Notably, Julian Assange did not benefit from the advisory opinion as Ecuador in April 2019 revoked his diplomatic asylum, ended his stay in the embassy and thus allowed the British police to arrest him. While the advisory opinion had been requested by the government of then President Rafael Correa who had granted Julian Assange diplomatic asylum in the embassy in London, the presidency had already shifted to Lenín Moreno when the advisory opinion was finally published. Lenín Moreno had started to renew Ecuador's relations to the United States and took a different stand on the case of Julian Assange. For further information on this shift in the Ecuadorian' politics towards Assange see e.g.: *'How Ecuador's Moreno Is Undoing Correa's Legacy, and Not Just With Assange'*, World Politics Review, 24 April 2019, available at: https://www.worldpoliticsreview.com/trend-lines/27787/how-ecuador-s-moreno-is-undoing-correa-s-legacy-and-not-just-with-assange; '*Wanted for espionage – the hunt for Wikileaks*', Panorama, 13 June 2019, available at: https://daserste.ndr.de/panorama/wikileaks304_page-1.html; '*Why does Ecuador want Assange out of its London embassy?*', The Guardian, 15 May 2018, available at: https://www.theguardian.com/world/2018/may/15/ecuador-julian-assange-why-does-it-want-him-out-london-embassy.

labelled as "political" in order to indicate that they go beyond mere "legal questions" and thus fall outside the court's advisory jurisdiction.[716] While political questions that arise from tensions between states may at the same time constitute legal questions – or in the terms of Article 64 – "questions of interpretation", they nevertheless raise the question whether the advisory function of a regional human rights court is the right avenue to deal with such regional conflicts, which mostly also involve other questions of international law than just those of human rights law.

Whereas many of the Court's early advisory opinions concerned more technical questions like the interpretation of certain words contained in the ACHR, or the functioning of the inter-American human rights system in terms of the relationship between Commission and Court, at least since advisory opinion OC-16/99 many politically sensitive requests have been submitted to the Court. Indeed, most of the more recent requests made by states fall into this category. Whereas the Court apparently held the matter of impeachment to be too politically explosive, and therefore abstained from providing the two advisory opinions on impeachment requested by the OAS Secretary General and the IACHR respectively, the Court in many other instances did not shy away from providing advisory opinions although the requests were related to or triggered by political tensions, or even open conflicts between American states.

716 Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 296 *et seq*. The objection that a request for an advisory opinion concerned a complex political question which could not be answered in a legal proceeding was raised for example in the proceedings leading to the *Namibia* and the *Wall* opinion. Both times, the Court rejected the objections holding that almost any proceeding also touched upon political aspects that were disputed among states but that this did not automatically deprive a question of its legal character. See: ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Pleadings, Oral Arguments, Documents, Vol I, Written Statement of the Government of the Republic of South Africa, p. 441–442; ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, p. 16, 23–24. paras. 27–34; 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, 155–160, in particular paras. 41, 51, 54.

(1) OC-18/03

Mexico's request that led to OC-18/03 was probably a direct reaction to the judgment of the US Supreme Court in the case of *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*.[717] In that case, the US Supreme Court had established that undocumented workers that were laid off for participating in union campaigns had no right to backpay under the U.S. Labor Laws. In its request for an advisory opinion, Mexico did not refer expressly to this judgment that had been rendered approximately two months before Mexico submitted its request. Mexico however explained that it was worried about the incompatibility of laws, practices and interpretations of some states in the region with the OAS human rights system, and noted how often it had to intervene in consular matters of its nationals.[718] Similar to the practice of the United States that triggered the OC-16/99 proceedings, the *Hoffman Plastic Compounds* decision also affected more OAS member states than just the requesting state of Mexico.

The United States informed the Court that it would not send any comments regarding this advisory proceeding.[719] Several *amici* outlined the possible consequences of the *Hoffman Plastic Compounds* decision and referred to it as one example of problematic treatment of undocumented migrant workers.[720] Given that the Court had already held earlier that concrete examples showed the practical significance a requested advisory opinion would have, but did not prevent it from issuing the opinion, the connection of the request to a national court decision was not seen as constituting an impediment to the exercise of the Court's advisory jurisdiction. In its advisory opinion, the Court reiterated some of its standard phrases concerning its competence. Yet, it also indicated that the advisory opinion

717 US Supreme Court, *Hoffman Plastic Compounds, INC. v. National Labor Relations Board*, argued 15 January 2002, decided 27 March 2002.

718 Mexico, *Request for an Advisory Opinion*, 10 May 2002, p. 6–7 [only available in Spanish].

719 *Cf.*: OC-18/03 (n 227) para. 17.

720 *Amicus curiae* brief of the Delgado Law Firm, OC-18/03 proceedings, 12 December 2002; *Amicus curiae* brief of Javier Juárez of the Law Office of Sayre & Chavez, OC-18/03 proceedings, 6 February 2003; Written and oral statements of Harvard Immigration and Refugee Clinic of Greater Boston Legal Services *et. al*; Written and oral statements of Thomas Brill of the Law Office of Sayre & Chavez; Written and oral statements of Labor, Civil Rights and Immigrants' Rights Organizations in the United States of America. For the relevant excerpts of the respective statements see OC-18/03 (n 227) p. 34–54.

should also be taken into account by the United States as "everything indicated in this Advisory Opinion applies to the OAS member States that have signed either the OAS Charter, the American Declaration, or the Universal Declaration, or have ratified the International Covenant on Civil and Political Rights, regardless of whether or not they have ratified the American Convention or any of its optional protocols".[721]

(2) OC-21/14

Another advisory opinion that addressed a significant political issue which is still topical today was advisory opinion OC-21/14 on the rights and guarantees of children in the context of migration. In contrast to the other requests, it was however requested jointly by Paraguay, Argentina, Uruguay, and Brazil and was, as far as may be discerned, not triggered by one specific case but rather by the constant migratory crisis in the American continent.

Further, although the request particularly addressed the migratory practice of the United States vis-à-vis children as being the main destination country for migrants from southern and central America[722], issues related to the treatment of migrant children were also relevant for other states. Therefore, the "disguised addressee" of the request was not as clear as in the OC-16/99 or OC-18/03 proceedings. It is in particular this difference, which distinguishes it from the other examples, and leads to the conclusion that this request can hardly be classified as a disguised contentious case, even though it addressed issues that were not less political than those dealt with in the other above-mentioned examples.

(3) OC-26/20

In the past years, Colombia, especially, has strategically used the Court's advisory function and triggered advisory proceedings that resembled dis-

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

722 *Cf.*: Jorge Contesse, *'Inter-State Cases in Disguise under Inter-American Human Rights Law: Advisory Opinions as Inter-State Disputes'*, Völkerrechtsblog, 27. April 2021, available at: https://voelkerrechtsblog.org/de/inter-state-cases-in-disguise-under-inter-american-human-rights-law/.

guised contentious cases, if one was to extend this category to include smoldering inter-state conflicts in the region.[723]

On 6 May 2019 Colombia submitted a request on the obligations of a state that denounces the ACHR and eventually also the OAS Charter, and on the obligations of the remaining OAS member states if systematic human rights violations occur in the state that has left the regional human rights system.[724] The request referred obviously to the case of Venezuela that had first denounced the ACHR and five years later, declared its withdrawal from the OAS Charter.[725]

723 On this strategic use see as well: Nicolás Carillo-Santarelli, *'The Strategic Use of Advisory Opinion Requests in Colombian-Venezuela Bilateral Relations'*, 25 October 2019, Opinio Juris, available at: http://opiniojuris.org/2019/10/25/the-strategic-use-of-advisory-opinion-requests-in-colombian-venezuela-bilateral-relations/.

724 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.

725 On Venezuela's denunciation of the ACHR on 10 September 2012 see e.g.: Carlos Ayala Corao, '*Inconstitucionalidad de la denuncia de la Convención Americana sobre Derechos Humanos por Venezuela*' (2013) XIX Anuario de Derecho Constitucional Latinoamericano, 43–79; '*Venezuela denounces American Convention on Human Rights as IACHR faces reform*', IJRC, 19 September 2012, available at: https://ijrcenter.org/2012/09/19/venezuela-denounces-american-convention-on-human-rights-as-iachr-faces-reform/; '*Venezuela abandona el Sistema de derechos humanos interamericano*', El País, 10 September 2013, available at: https://elpais.com/internacional/2013/09/10/actualidad/1378780644_769381.html.
In April 2017 the Maduro government announced its withdrawal from the OAS. Whether, and if so, when the withdrawal became effective is disputed.
First, the requirements for a withdrawal from the OAS Charter to become effective are not totally clear given that the decisive Article 143 OAS Charter is open to different interpretations on the effective ceasing of membership in the organization. See on this: Alonso Illueca, '*The Venezuela Crisis at the Organization of American States: between Withdrawal and Suspension*', 29 May 2017, Opinio Juris, available at: http://opiniojuris.org/2017/05/29/the-venezuela-crisis-at-the-organization-of-american-states-between-withdrawal-and-suspension/; '*Venezuela necesitaría dos años y pagar deuda de 8,7 millones para. dejar OEA*', El Nacional, 26 April 2017, available at: https://www.elnacional.com/mundo/venezuela-necesitaria-dos-anos-pagar-deuda-millones-para-dejar-oea_179217/ and Eleanor Benz, *'The Inter-American Court's Advisory Function Continues to Boom – A few comments on the requests currently pending'*, 25 November 2019, EJIL:Talk!, available at: https://www.ejiltalk.org/the-inter-american-courts-advisory-function-continues-to-boom-a-few-comments-on-the-requests-currently-pending/. In OC-26/20 (n 24) paras. 117–161, the Court held, that the term "obligations arising from the present Charter" contained in Article 143 OAS Charter included not only financial obligations but also human rights obligations", and that these obligations once acquired had to be fulfilled even after the lapse of the two-year transition period.

While in some written observations and *amicus curiae* briefs it was argued that the Court was incompetent under Article 64 to interpret customary international law, as requested by Colombia, or that it should abstain from answering the question on other human rights enforcement mechanisms existing outside the inter-American human rights system, Nicaragua was the only participant to hold the whole request to be inadmissible as it would "denature" the Court's advisory function.[726] Nicaragua further accused Colombia of having submitted "factual affirmations disguised as

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Second, the question of the Venezuelan withdrawal becomes even more complicated as Juan Guaidó, the former interim president of Venezuela's opposition, declared both the retroactive re-entry of Venezuela to the ACHR and requested the OAS to leave without effect the declaration of withdrawal from the OAS presented by the Maduro government in 2017. While the OAS recognized Juan Guaidó as legitimate representative of Venezuela and consequently still regards Venezuela as a member of the organization listing also the 2019 renewed ratification of the ACHR, the IACtHR apparently still regards Maduro as President of the country and has recognized that the state's denunciation of the ACHR became effective in 2013. Thus, the question of effective treaty denunciation depends on the political perspective and the recognition of the former interim President. On this see *inter alia*: OAS; General Information on the Treaty B-32, available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm; *'La OEA reconoce como president interino de Venezuela a Juan Guaidó'*, Perfil, 11 January 2019, available at: https://www.perfil.com/noticias/internacional/la-oea-reconoce-como-presidente-interino-de-venezuela-a-juan-guaido.phtml; Statement made by Alexei Julio Estrada, Legal Director of the Court, on the notification of the Chancellery of Venezuela in his presentation on the Legal Value and Impact of the Advisory Opinions, available at: https://www.youtube.com/watch?v=kqEvKAEhB0E&t=2349s; IACtHR, *Case of Mota Abarullo et. al. v. Venezuela*, Judgment of 18 November 2020 (Merits, Reparations and Costs), Series C No. 417, para. 12; Silvia Steininger, *'Don't Leave Me This Way: Regulating Treaty Withdrawal in the Inter-American Human Rights System'*, 5 March 2021, EJIL:Talk!, available at: https://www.ejiltalk.org/dont-leave-me-this-way-regulating-treaty-withdrawal-in-the-inter-american-human-rights-system/.

726 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, 6; *Amicus curiae* brief of the University College London, Public International Law Pro Bono Project, OC-26/20 proceedings, 15 December 2019, available at: https://www.corteidh.or.cr/sitios/observaciones/oc26/29_unicolleg.pdf outlining how the Court could refer to customary international law despite the wording of Article. 64; *Amicus curiae* brief of Fernando Arlettaz, OC-26/20 proceedings, 6 May 2019, available at: https://www.corteidh.or.cr/sitios/observaciones/oc26/35_fernarletta.pdf, p. 4; Written observations of Nicaragua, OC-26/20 proceedings, 11 November 2019, available at: https://www.corteidh.or.cr/sitios/observaciones/oc26/5_nicaragua.pdf, para. 11.

question marks that are intended to maliciously induce the Court to adopt a biased, self-serving and opportunistic criterion".[727]

The Court took a similar approach as in OC-23/17 and OC-25/18. It decided to render the opinion while not directly addressing the Venezuelan context that had triggered Colombia's request. It reiterated that "reference to certain examples serves the purpose of illustrating the potential significance of setting criteria […] without this implying that the Court is issuing a legal ruling on the specific situation raised in these examples."[728] Yet, it added, that it "should not limit itself to an extremely precise factual premise that makes it difficult for the decision to disassociate it from a specific case […]."[729] A "delicate legal assessment [was required] to discern the substantial purpose of the request so that the matter may achieve the aims of widespread validity and relevance to all American States, beyond the reasons that may have originated the petition and beyond the particular facts that gave rise to it, so as to help OAS Member States and organs to fully and effectively discharge their international obligations."[730]

Furthermore, the Court broadened one question so as to disassociate it from the factual premise of a state facing "a situation of serious and systematic human rights violations".[731] At the same time, it limited the scope of this question *ratione temporis* by concentrating on the phase between a state's announcement of its intention to denounce a treaty until the moment when it has fulfilled all requirements and effectively disengaged from that treaty.[732]

Finally, the Court did not consider it "pertinent to rule on obligations arising from the universal system or on mechanisms for the protection of human rights afforded by that system […], since these systems are governed by their own normative framework and mandate and are therefore not admissible."[733]

727 Written observations of Nicaragua, OC-26/20 proceedings, 11 November 2019, available at: https://www.corteidh.or.cr/sitios/observaciones/oc26/5_nicaragua.pdf, para. 7.
728 OC-26/20 (n 24) para. 30.
729 OC-26/20 (n 24) para. 31.
730 OC-26/20 (n 24) para. 31.
731 OC-26/20 (n 24) para. 35.
732 OC-26/20 (n 24) para. 36.
733 OC-26/20 (n 24) para. 37.

In contrast to the other above-mentioned opinions that might have been rejected as disguised contentious cases, in case of OC-26/20 the decision on admissibility was not taken unanimously.

Notably, in his dissenting opinion Judge Zaffaroni established an interesting admissibility criterion. According to him, the object and purpose of the Court's advisory function is to prevent violations of the Convention and eventual contentious cases deriving therefrom.[734] He held that Colombia's request was not intended to prevent any violation of the Convention by the requesting state, nor by any other state party, but was instead sought to obtain an argument in the gravest and most controversial political conflict the region was currently facing.[735] Although the answers given might be applicable to other similar future cases, there was at that moment apparently no other instance than the Venezuelan context in which the answers might become relevant, as neither the requesting nor any other state had indicated its intention to leave the system.[736]

Zaffaroni further held that it was impossible to avoid that the Court's advisory opinion was sooner or later abused as an instrument in a purely political confrontation, or even as "fuel for a 'good war'", no matter how "transparent and sincere [its] intention" and how strictly "technical, prudent and cautious" it was drafted.[737] Solving the Venezuelan question pertained to international politics, and if the judges fell "into the trap of taking charge of a purely political conflict, […] the discredit […]" for not being able to solve it would fall back on them.[738]

In fact, while most of the Court's legal findings made in OC-26/20, such as that a state which withdraws from a treaty remains of course bound by customary human rights law obligations, were self-evident from the outset, the advisory opinion has so far not been able to contribute to the actual solution of the Venezuelan conflict and the related human rights crisis.

734 OC-26/20 (n 24), Dissenting Opinion of Judge E. Raúl Zaffaroni, para. 2. The question whether this is the only object and purpose of the Court's advisory function and whether the criterion of "possible prevention of human rights violations and future contentious cases" is therefore reasonable will be further discussed below. See *infra*: Chapter 4, Section C.IV.

735 OC-26/20 (n 24), Dissenting Opinion of Judge E. Raúl Zaffaroni, paras. 4–6.

736 OC-26/20 (n 24), Dissenting Opinion of Judge E. Raúl Zaffaroni, para. 1. Notably, Nicaragua's announcement to exit the OAS made in November 2021 has proven Zaffaroni's prediction wrong.

737 OC-26/20 (n 24), Dissenting Opinion of Judge E. Raúl Zaffaroni, paras. 10, 24.

738 OC-26/20 (n 24), Dissenting Opinion of Judge E. Raúl Zaffaroni, para. 28.

(4) OC-28/21

Less than half a year after its request on the denouncement of human rights treaties, and just one day after the presidential elections in Bolivia had taken place in which Evo Morales had asked the Bolivians to be re-elected for the fourth time, Colombia submitted another controversial request for an advisory opinion related to "The figure of indefinite presidential re-election in the context of the inter-American system of human rights".[739]

The political dimension of the request and the connection with the Bolivian elections were obvious. Yet, indefinite presidential re-elections were a matter of debate in several states of the region in the years before.[740] The request explicitly mentioned the examples of Nicaragua, Honduras and Bolivia, in which the constitutional benches of the respective Supreme or Constitutional Court had paved the way for indefinite presidential re-election by declaring articles of the respective constitutions inapplicable.[741] Apart from these three states, Venezuela also allows for an indefinite re-election of its president, while Ecuador had in 2018 returned to prohibiting the indefinite presidential re-election.[742] Thus, one could argue that the Colombian request was not a disguised contentious case as it went beyond a bilateral conflict, and instead addressed a matter of huge relevance to the whole region.

Nevertheless, the moment in which it was submitted underlined the fact, that the request was directed against Bolivia in particular. What is more, Colombia's government noted in its request that it did not consider allowing indefinite presidential re-elections in Colombia, but that it was worried because of the multiple interpretations of said instrument by authorities in

739 Colombia, *Request for an Advisory Opinion on the figure of indefinite presidential re-election in the context of the inter-American system of human rights*, 21 October 2019.

740 *Cf.*: Grijalva Jiménez and Luis Castro-Montero (n 651) p. 9; Joaquín A. Mejía R. (ed), '*La reelección presidencial en Centroamérica: ¿Un derecho absoluto?*', available at: https://www.corteidh.or.cr/tablas/r38379.pdf; Written observations of Andres Figueroa Galvis, OC-28/21 proceedings, 18 February 2020, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/41_figalvis.pdf, p. 3.

741 Colombia, *Request for an Advisory Opinion on the figure of indefinite presidential re-election in the context of the Inter-American system of human rights*, 21 October 2019, paras. 25–27.

742 Grijalva Jiménez and Luis Castro-Montero (n 651) p. 9, 18, 35.

other states.[743] This confirms that the request was motivated by foreign policy motives rather than by a genuine interest of Colombia in how presidential elections should be designed in order to be in accordance with the Convention. Thus, the request was not a "client-lawyer" consultation but rather more a "quasicontentious" case.[744]

Despite this open political confrontation and despite the related petitions pending before the Commission which were already mentioned above[745], only a few *amici* argued that the Court should abstain from answering the request.[746] The written observations formulated by the Bolivian interim government that had been installed after the protests in the aftermath of the 2019 presidential elections did not raise any concerns as to the admissibility of the request and argued against indefinite presidential re-elections.[747] Contrary to the OC-26/20 proceedings, not even Nicaragua asked the Court to reject the request, but rather argued on the merits that a restriction of presidential re-election would contradict Article 23.[748]

Like the Court had briefly noted the existence of related pending petitions, it also only briefly mentioned the raised concerns as to the propriety

743 Colombia, *Request for an Advisory Opinion on the figure of indefinite presidential re-election in the context of the Inter-American system of human rights*, 21 October 2019, para. 6.

744 As to this characterization and differentiation between "client-lawyer" and "quasicontentious" requests see: Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 288.

745 See *supra*: Chapter 4, Section C.II.1 c) dd).

746 Written observations of Björn Arp in the OC-28/21 proceedings, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/42_arp.pdf; Written observations of Andres Figueroa Galvis, OC-28/21 proceedings, 18 February 2020, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/41_figalvis.pdf; Written observations of Julián Fernando Montoya, OC-28/21 proceedings, 19 July 2020, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/56_monpipica.pdf; Researchers of the Universidad Federal de Paraná argued that the second question should be rejected as it would require the Court to determine facts and would thus undermine the Court's contentious function, see: Written observations of the Núcleo de Estudios en Sistemas de Derechos Humanos y del Centro de Estudios de la Constitución Universidad Federal de Paraná, OC-28/21 proceedings, 23 July 2020, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/34_unifeparana.pdf.

747 Written observations of Bolivia, OC-28/21 proceedings, 23 July 2020, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/1_bolivia.pdf.

748 Written observations of Nicaragua, OC-28/21 proceedings, 15 April 2020, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/4_nicaragua.pdf.

of rendering the advisory opinion as requested by Colombia.[749] The Court assured firstly, that it would only refer to human rights obligations deriving from international law and would thus not interfere with the sovereign domain of states.[750] Secondly, the Court held that it was appropriate to answer the request in light of the huge general interest and the significance of the matter raised in the request, and that it could do so without referring to one of the specific cases indicated in the request.[751]

Having furthermore noted the objections raised especially as regards the formulation of Colombia's second question, the Court decided to reformulate this second question.[752] In his dissenting opinion, Judge Pazmiño criticized that the Court had thereby not only eliminated the problematic factual presuppositions, but given the question a different "characterization" and introduced "legally indeterminate elements to the analysis".[753]

The second dissenting member of the bench, Judge Zaffaroni compared the situation in Bolivia after the 2019 elections to that in Brazil when Dilma Rousseff had been impeached. Zaffaroni held that Colombia's request should have been rejected like the request of the OAS Secretary on impeachment, as it likewise referred to a "specific and possibly contentious case".[754]

Although the Court did not analyze any of the specific cases in which states of the region had decided to allow for indefinite presidential re-elec-

749 OC-28/21 (n 274) para. 31.
750 OC-28/21 (n 274) para. 32.
751 OC-28/21 (n 274) para. 34.
752 OC-28/21 (n 274) paras. 31, 36–37. Originally, Colombia's second question stated:
"Should a State change or seek to change its legal system to ensure, promote, foster, or prolong a ruler's tenure in power through presidential reelection without term limits, what are the effects of this change with regard to States' obligations to respect and guarantee human rights? Does this change run contrary to the State's international human rights obligations and, in particular, to their obligations to guarantee the effective exercise of the rights to: (a) take part in the conduct of public affairs, directly or through freely chosen representatives; (b) vote and be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and (c) have access, under general conditions of equality, to the public service of his country."
See: OC-28/21 (n 274) para. 3.
The Court reformulated the question as follows:
"Is presidential reelection without term limits compatible with representative democracy in the inter-American human rights protection system?". See: OC-28/21 (n 274) para. 37.
753 OC-28/21 (n 274), Dissenting opinion of Judge Patricio Pazmiño Freire, para. 16.
754 OC-28/21 (n 274), Dissenting opinion of Judge E. Raul Zaffaroni, p. 6.

tions, the final finding of the Court that "[e]nabling presidential reelection without term limits is contrary to the principles of representative democracy and, therefore, to the obligations established in the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man" *de facto* delegitimized the serving governments of Honduras and Nicaragua, as well as the result of the Nicaraguan presidential elections held a few months later.[755]

Irrespective of the reformulation of the second question and the abstract and generalized answer, the Court, by complying with Colombia's request, has in no way signaled that states should abstain from using the Court's advisory function for purely foreign policy motives in the future.

dd) Intermediate conclusion

The foregoing analysis has shown that the Court has rendered several advisory opinions which were triggered by, or at least related to, an inter-state conflict, and which could have thus been considered as disguised contentious cases. Pursuant to the Court's 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, the Court could have declined to issue these opinions. While the Court declined to provide the requested advisory opinions on the matter of impeachment, it rendered OC-26/20 and OC-28/21, which not only also touched upon sensitive matters of national politics and state organization but also had a similarly explosive potential of regional scope as the topic of impeachment.

Overall, it seems that the Court, in situations in which there is an inter-state conflict that could lead to an inter-state complaint in terms of Article 45, is even more reluctant to apply the criterion of a "disguised contentious case" than in situations in which individual petitions are pending before the Commission that are related to the subject matter of a request for an advisory opinion. Rather than rejecting requests that are related to or even clearly triggered by a smoldering conflict in the region, the Court tends to reformulate and summarize the questions posed in order to mitigate the potentially politically explosive force of the requests. Then, the Court formulates the opinions as abstractly and generally as possible in order to

755 OC-28/21 (n 274) para. 149 final finding No. 4.

prevent them from being read as reference to only one specific situation. This strategy has resulted in highly interesting advisory opinions. Yet, as regards requests that are not only political but that lack any trace of a "client-lawyer" consultation, the Court runs the risk that these opinions will only be used as arguments by one party in a political conflict, without having a realistic chance of actually preventing further human rights violations from being committed.

In light of the described recent practice of the Court it is likely that it will be confronted with more such "quasicontentious" requests, the main intention of which is to gain an argument in a regional or bilateral dispute, and not to obtain advice on how to act in conformity with the Convention and to implement the best human rights policy.

2. Political debates, controversies and proceedings at the national level

One reason for the second rejection ever of an advisory opinion request was that the Court held that there were still controversies and proceedings pending at the national level that should not be circumvented by initiating the Court's advisory function.[756] Since then, the Court has repeatedly stated that a request should not "be used as a mechanism to obtain an indirect ruling on a matter that is in dispute or being litigated at the domestic level".[757] There is, however, at least one further example in which an ongoing political debate at the national level did not stop the Court from rendering the requested advisory opinion.

When the Costa Rican government submitted its request for an advisory opinion on gender identity and equality of same-sex couples, there was not only a related case pending against Costa Rica before the IACHR.[758] There were also several complaints of unconstitutionality pending before the Costa Rican *Sala Constitucional*.[759] What is more, the topic was subject of intense political debates for many years, which is confirmed by at least

756 IACtHR, Order of 10 May 2005, *Solicitud de Opinión Consultiva presentada por la República de Costa Rica*, considerando 13. See also *supra*: Chapter 4, Section C.I.2. on the second rejection.

757 IACtHR, Order of 29 May 2018, *Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*, para. 6; OC-25/18 (n 227) para. 46.

758 On this see already *supra*: Chapter 4, Section C.II.1. c) cc).

759 *Cf.*: Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad*, 8 August 2018, No. 12782–2018, Exp. 15–013971–0007-CO; *Amicus curiae* brief of Yashín Castrillo Fernández, OC-24/17 proceedings, available

seven related draft laws pending in different parliamentary commissions.[760] However, the debate seemed to be deadlocked. The legislative reform projects intended to improve the legal situation of LGBTIQ* had either failed or been stalled for years.[761] A planned referendum on the civil partnership of same-sex couples was suspended by the Constitutional Chamber and the complaints of unconstitutionality remained pending for a long time without any progress.[762] What is more, a judge who had practiced the conventionality control and on that basis, recognized a civil partnership of two men, was sanctioned by the *Corte Plena* as his decision conflicted with an order of the *Sala Constitucional* not to apply the pertinent national provision until the *Sala Constitucional* had not yet finally decided on it.[763]

In light of this domestic reform gridlock, the request submitted to the IACtHR was then a strategic move by the executive to circumvent the blockades by the legislative and judiciary branches.[764]

Despite this factual background and its established rejection criterion, the Court did however not even address the issue properly. It mentioned the *amicus curiae* brief of Mr Castrillo Fernández who had urged the Court

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at: www.corteidh.or.cr/sitios/observaciones/costaricaoc24/21_castrillo_fernandez.pdf.

760 Nicolas Boeglin, *La opinión consultiva de la Corte IDH sobre derechos de la comunidad LGBTI en Costa Rica: balance y perspectivas*, 23 January 2018, available at: https://www.pressenza.com/es/2018/01/la-opinion-consultiva-de-la-corte-idh-sobre-derechos-de-la-comunidad-lgbti-en-costa-rica-balance-y-perspectivas/; *'Congreso frena avance de derechos para. personas LGBTI'*, crhoy.com, 18 May 2017, available at: https://www.crhoy.com/nacionales/congreso-frena-avance-de-derechos-para-personas-lgbti/.

761 Boeglin (n 760); *'Congreso frena avance de derechos para. personas LGBTI'*, crhoy.com, 18 May 2017, available at: https://www.crhoy.com/nacionales/congreso-frena-avance-de-derechos-para-personas-lgbti/.

762 Boeglin (n 760); Carolina Amador Garita and Nelson David Rodríguez Mata, *El control de convencionalidad en Costa Rica: propuesta de aplicación por los jueces ordinarios – Análisis comparado desde la perspectiva del derecho internacional público* (Universidad de Costa Rica, 2016) p. 540ff; *'Denuncia penal contra matrimonio gay se encuentra frenada'*, crhoy.com, 11 January 2017, available at: https://www.crhoy.com/nacionales/denuncia-penal-contra-matrimonio-gay-se-encuentra-frenada/.

763 *'Corte Plena sansiona a juez que validó unión de hecho de pareja homosexual'*, La Nación, 26 February 2019, available at: https://www.nacion.com/sucesos/judiciales/corte-plena-sanciona-a-juez-que-valido-union-de/VFTLNNHNUZCPLLVIE4XHYM43QE/story/.

764 On the imbalance between the three powers in Costa Rica and the background of the advisory opinion request see: William Vega-Murillo, Esteban Vargas-Mazas, *'La opinión consultiva OC-24/17 solicitada por Costa Rica: El resultado de una consulta estratégica'* (2017) 66 Revista IIDH, 171–208.

to reject the request among other reasons because of his pending claim of unconstitutionality in Costa Rica.[765] But then the Court only reiterated that requests pending before the Commission would not necessarily lead to a rejection of the related request.[766] It did not address the political debates and judicial proceedings pending at the domestic level at all.

Given the precedent of its rejection order from 2005[767], by which it had declined to be used as a tool in an internal political debate in Costa Rica, it is both surprising and disappointing that the Court deviated from its previous jurisprudence without even mentioning it, let alone explaining or justifying it. Actually, the Court's rejection criterion was perfectly fulfilled as regards Costa Rica's request on gender identity and matrimonial rights of same sex couples. If the Court however had considered that the persisting violation of LGBTIQ* rights and the government's intention to overcome the reform gridlock justified treating the case of OC-24/17 differently than the request rejected in 2005, it would have been important to explain this and to specify its rejection criterion accordingly.

3. Issues on which the Court has already ruled in its jurisprudence

In 2005 and 2009 the Court has, on two occasions, rejected requests for advisory opinions submitted by the Commission because it held that the answers to the questions posed could already be derived from the Court's existing jurisprudence.[768] Since then, one of its reiterated criteria for the rejection of requests is that such requests should not "refer, exclusively, to issues on which the Court has already ruled in its jurisprudence."[769]

However, as already indicated above, on the one hand it would have been possible to discern in both these requests new issues to be addressed or to be explored more in depth, and on the other hand there are examples of advisory opinions that were given although the answers could have already been derived from the Court's existing jurisprudence.

765 OC-24/17 (n 1) para. 23; *Amicus curiae* brief of Yashín Castrillo Fernández, OC-24/17 proceedings, available at: www.corteidh.or.cr/sitios/observaciones/costaricaoc24/21_castrillo_fernandez.pdf.

766 OC-24/17 (n 1) paras. 23–24.

767 See *supra*: Chapter 4, Section C.I.2. second rejection.

768 See *supra*: Chapter 4, Section C.I.3. and 4. on the third and fourth rejection.

769 IACtHR, Order of 29 May 2018, *Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*, para. 6; OC-25/18 (n 227) para. 46.

For example, the requests leading to OC-8/87 and OC-9/87 dealt with very similar questions. In fact, the request by the Commission which led to OC-8/87 was submitted after Uruguay had submitted its request that led to the later OC-9/87. While Uruguay had asked more generally what the judicial guarantees in terms of Article 27 (2) were, and how the relationship between Article 27 (2) and Articles 25 and 8 had to be understood, the Commission asked specifically whether the writ of *habeas corpus*, as protected by Articles 7 (1) and 25 (1), was one of the judicial guarantees within the meaning of Article 27 (2).[770]

Given that both requests were not only thematically closely related but had both been submitted within one month, the Court could have merged both proceedings or it could have answered the first request from Uruguay very thoroughly and then reject the second request from the Commission by referring to its earlier jurisprudence. Yet, at this time the Court had not yet established this rejection criterion and apparently did not find it necessary to do so. Instead, it processed first the Commission's request, which became OC-8/87 and then issued OC-9/87 in which it referred more than ten times to statements and findings made in the preceding OC-9/97.[771]

Another request that was, at least as concerns the factual background, very similar to a pre-existing advisory opinion was OC-14/94. The fact that a state extended the scope of application of the death penalty which had triggered the Commission's request had already been dealt with in OC-3/83. Indicating that the core of the problem was identical with what the Court had already decided in the earlier OC-3/83, Costa Rica found in its written observations in the OC-14/94 proceedings that the answers given by the Court back in 1983 were still valid and applicable.[772] Yet, the questions posed by the Commission at the beginning of the 1990s were more far-reaching in that they already took for granted the illegality of a law extending the applicability of the death penalty, and instead inquired about the effects of such a law and the responsibility of officials and state agents.

770 *Cf.*: Uruguay, *Solicitud del Gobierno de Uruguay*, 17 September 1986, available at: http://hrlibrary.umn.edu/iachr/B/9-esp-1.html; IACHR, *Solicitud de Opinion Consultiva presentada por la Comision Intermamericana de Derechos Humanos*, 10 October 1986, available at: http://hrlibrary.umn.edu/iachr/B/8-esp-1.html.

771 See *Habeas corpus in emergency situations (Arts. 27.2, 25.1 and 7.6 American Convention on Human Rights)* Advisory Opinion OC-8/87, Series A No. 8 (30 January 1987) and OC-9/87 (n 366).

772 Written observations of Costa Rica, OC-14/94 proceedings, 20 December 1993, p. 2 [only available in Spanish].

This difference justified rendering a new advisory opinion which in the end did not copy but complemented the findings previously made in advisory opinion OC-3/83.

There have also been several overlapping advisory opinions on issues related to migration.[773] The findings made in them were not always entirely new but rather reinforced and complemented each other.[774]

Finally, in its request concerning differentiated approaches to persons deprived of liberty that led to the recent OC-29/22, the Commission even provided for a thorough analysis of the Court's existing jurisprudence which showed that the Court had already referred to several aspects that were raised in the Commission's request.[775] Yet, the Commission pointed out that the Court's existing jurisprudence had so far only referred to "matters of an isolated nature".[776] It therefore held that a more "comprehensive interpretation" was necessary which further develops and specifies the jurisprudential standards, as well as the differentiated approach which states should take with regard to certain vulnerable groups.[777] The Court affirmed that the Commission's request raised indeed new questions to which it had not yet referred in its jurisprudence, and consequently used the advisory opinion to further develop and specify its previous jurisprudence on persons deprived of liberty belonging to specific vulnerable groups.[778]

All these examples show that while a request for an advisory opinion may be related to already existing jurisprudence, most of the time it is still slightly different and allows to further explore a topic or to do so from a different perspective. This leads to the assumption that there might have been other considerations in 2005 and 2009 which led the Court to reject the respective requests, and that the criterion of already existing jurisprudence will also in future only be rarely applied again.

773 For example, the OC-18/03 on the rights of undocumented migrants, the OC-21/14 on rights and guarantees of children in the context of migration and the OC-25/18 on the institution of asylum.

774 The OC-21/14 of course often referred to the earlier OC-17/02 on the juridical condition and human rights of the child.

775 IACHR, *Request for an Advisory Opinion on differentiated approaches to persons deprived of liberty*, 25 November 2019, paras. 53–71.

776 IACHR, *Request for an Advisory Opinion on differentiated approaches to persons deprived of liberty*, 25 November 2019, para. 72.

777 IACHR, *Request for an Advisory Opinion on differentiated approaches to persons deprived of liberty*, 25 November 2019, paras. 72–77.

778 OC-29/22 (n 275), in particular para. 23.

4. Abstract speculations without a foreseeable application to specific situations

Although the Court has repeatedly established that requests for advisory opinions should not contain merely abstract speculations without a foreseeable application to specific situations[779], the Court has so far not yet rejected any request on this basis. As mentioned, the Court often rephrases questions[780], or decides not to answer all of them or all aspects of them[781]. It has however never classified an entire request as being merely academic or irrelevant.

Only Judge Jackman held the Commission's request on children's rights which led to OC-17/02 to be inadmissible, as it invited the Court to engage in "purely academic" speculation.[782] In said case, the Commission had asked the Court to provide "general and valid guidelines" on the interplay of Articles 8, 25 and 19 concerning the protection of children.[783] Judge Jackman stated "that a request to provide 'general and valid guidelines' to cover a series of hypotheses that reveal neither public urgency nor juridical complexity is, precisely, an invitation to engage in 'purely academic speculation' of a kind which assuredly 'would weaken the system established by the Convention and would distort the advisory jurisdiction of the Court ".[784] He therefore even declined to participate in the deliberation of the request.

Following this line, one could also argue that the recent request of the Commission – which led to OC-27/21 – asking the Court to "identify and develop the standards that should be complied with and the actions that should be taken under inter-American human rights law" with regard to "achieving trade union freedom in the regional context and, in particular, with regard to its effects on working conditions, gender equality and the use

779 See for example: OC-24/17 (n 1) para. 20.
780 OC-7/86 (n 325) paras. 12–14; OC-23/17 (n 4) para. 36; OC-25/18 (n 227) paras. 56–57; OC-26/20 (n 24) para. 38.
781 OC-14/94 (n 371) para. 29; OC-25/18 (n 227) para. 26.
782 OC-17/02 (n 253), Dissenting Opinion of Judge Oliver Jackman.
783 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 [only available in Spanish, translation by the author].
784 OC-17/02 (n 253), Dissenting Opinion of Judge Oliver Jackman.

of new technologies in the workplace" did constitute a similar invitation to engage in merely academic speculations.[785]

On the other hand, the majority of the judges apparently held the earlier request on children's rights to be practically relevant, and in OC-27/21 nobody questioned the practical relevance of the Commission's questions either. What is more, one can argue that it is a right of the Commission, or even its task, to act strategically and to submit requests for advisory opinions to the Court that are intended to help to progressively develop human rights law in a specific field. While the Commission can of course also set standards through its own work in deciding individual complaints and issuing reports, it is up to the Commission in which areas it feels that an advisory opinion of the Court would be helpful for its further work.

III. Suitability of the Court's criteria and the proposal of an interests- and values-based approach

The preceding section has shown that the Court has not always applied its rejection criteria consistently. Instead, it has rendered advisory opinions although one or more of the criteria that in other cases had led to a rejection had been fulfilled.

This finding raises the question whether the established criteria are suitable at all for deciding when to admit, and when to reject a request, and whether it would not be better to establish new criteria instead. What is more, one could argue that for the sake of clarity and consistency, it would be better to incorporate more admissibility criteria expressly in the Court's Rules of Procedure, instead of relying on criteria that are solely established by case law.

One procedural option would be for example to regulate that a request may not be rejected once the Court has held a public hearing on the matter. This has so far never happened[786] and to regulate it expressly would make sure that a request is definitely going to be answered once a public hearing is being convened on the merits. Thereby, the unpredictability that

785 IACHR, *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.

786 In the case of the OC-12/91 in which the rejection was published in the form of a final opinion, no public hearing had taken place either.

currently exists with regard to the admissibility or rejection of requests for advisory opinions could be reduced at least to a certain extent.

However, as concerns material questions, it is difficult to restrict the broad advisory jurisdiction provided for by Article 64 by adding additional admissibility criteria to the Rules of Procedure. Moreover, it must also be noted that any criteria that is expressly established reduces the ability of the Court to adapt its criteria, and to react to the specific circumstances of a request as it may seem adequate in the respective case. What is more, it is unlikely that the establishing of new admissibility criteria will facilitate, and in the end improve, the decision of the Court, since the consistent application of any new criteria will most certainly prove to be as difficult as the consistent application of the already existing criteria.

The above analysis of how the Court applies its existing rejection criteria has rather more displayed the complexity of the matter by highlighting, for example, the many constellations in which there were good arguments in favor of rendering the requested advisory opinion although one or more rejection criterion was arguably given. In light of this, it seems impossible to formulate precise criteria that would, in any thinkable constellation, allow it to reach a clear, schematic answer for or against the acceptance of a request. The underlying political contexts and interests, as well as considerations of propriety to be taken into account, are simply too complex for that.

Hence, it has to be acknowledged that there is no magic formula that would allow to make the right decision in any possible situation, and that, therefore, the establishment of new criteria does not seem to be the right tool to make the exercise of the Court's discretion, more predictable and understandable.

Instead of exchanging or amending the existing rejection criteria, an interests- and values-based approach to the question of admission or rejection of advisory opinion requests is suggested here. According to this approach, the existing rejection criteria are still relevant, but the underlying interests and values they are intended to protect shall be taken into account more explicitly.

By "interests", the legal interests and legal positions of states and individuals who may be adversely affected by the issuance of an advisory opinion, e.g. through parallel pending proceedings, are meant. The term "values" refers to abstract principles and standards worthy of protection, such as the integrity of the democratic process at the national level, which should not be undermined by advisory proceedings.

According to the suggested approach, the Court is not only required to balance the conflicting interests and values against each other and against the possible advantages of rendering an opinion as requested, but to better explain and to make this balancing process more transparent. The interests- and values-based approach is mainly based on two findings.

First, the above examination has already shown – and it will also be further explained in the following subsections – that the existing rejection criteria are not all completely unsuitable, but that they are actually intended to protect certain interests and values. Most of the criteria are indeed helpful indicators which kind of request might be problematic and should rather be rejected. At the same time, the above examination has shown that they – and in particular the criterion of a "disguised contentious case" – are too broad to be strictly applied. As was demonstrated, there were cases in which one or more criteria were fulfilled but in which the rendering of the opinion still resulted to be the right decision. This is due to the fact that the criteria are not important in themselves, but because of the legitimate interests and values they are supposed to protect. Hence, it is not decisive whether one of the broad rejection criteria is given or not, but whether a legitimate interest or value is indeed likely to be negatively affected if the Court renders the requested opinion.

Second, the Court itself has always held that the application of its rejection criteria cannot be schematic, but that it in the end often requires striking a balance between contradicting values and interests.[787] Thus, the approach suggested here proposes nothing completely new, but builds on the Court's jurisprudence. It intends to provide a frame for what the Court is doing, and to point out, how the Court's exercise of its discretion, and especially the line of its reasoning, and the substantiation of its decisions can be further improved. For while the Court has sometimes described the balancing process in the abstract, it has so far often failed to adequately explain and justify the actual result of the balancing process.

With regard to the balancing of conflicting interests, the Court has for example stated that "the goal is to achieve the difficult balance between the legitimate interests of the party requesting the opinion and the general purpose of the advisory function. […] Ultimately, this calls for the intelligent exercise of judicial discretion to discern the essential purpose of the request

787 OC-1/82 (n 42) para. 31; OC-25/18 (n 227) paras. 46–47; IACtHR, Order of 29 May 2018, *Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*, para. 6.

that could lay claim to general applicability and benefit all the States of the Americas, over and above the reasons that may have originated the request, or the reference to specific facts."[788] Furthermore, it has also held that it "acts in its role as a human rights court" in this process and "proceeds to make a strictly legal analysis of the questions posed".[789] Its opinions should be both of a "practical nature" with a foreseeable application, but at the same time, should not be "limited to an extremely precise factual situation that would make it difficult to disassociate the response from a ruling on a specific case, which would not be in the general interest that a request is intended to serve."[790]

However, despite these abstract descriptions of the balancing process, the Court has not always made transparent and clear enough which considerations were ultimately decisive for it to reach its final decision. Though the Court has held that its rejection criteria are no "insurmountable limits"[791], it has, as shown above, nevertheless used these criteria to justify its orders of rejection. This creates the expectation that it will apply the same criteria in similar cases, too, or that it will, at least, explain why it decides to render an advisory opinion even though one or more criteria are fulfilled that have led to a rejection in a similar case before. The above analysis of the Court's application of its rejection criteria has shown that the Court has not always been able to meet this expectation.

While it is in most cases obvious which motives led the Court to render a requested opinion, the Court's statements on admissibility often raised doubts whether the Court had taken the arguments against rendering the requested advisory opinion seriously enough into account. In some advisory opinions the Court has addressed the concerns raised towards the request and explained – sometimes convincingly and sometimes less convincingly – why it did not consider them to be pertinent or why they should not prevent it from rendering the requested opinion.[792]

788 IACtHR, Order of 29 May 2018, *Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*, paras. 9, 11; OC-25/18 (n 227) para. 47.

789 IACtHR, Order of 29 May 2018, *Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*, para. 10.

790 IACtHR, Order of 29 May 2018, *Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*, paras. 10–11.

791 OC-25/18 (n 227) para. 46.

792 See e.g.: OC-3/83 (n 245) paras. 30–46; OC-5/85 (n 383) paras. 16–28; OC-14/94 (n 371) paras. 16–30; OC-25/18 (n 227) paras. 13–60.

However, in other advisory opinions the Court has hardly addressed the problematic aspects of the respective request at all. It relied on standard phrases instead of addressing the possible negative implications of rendering the opinion, and sometimes failed to distinguish a request from a precedent in which it had, in a similar context, declined to render a request.[793] Sometimes the rejection criteria were mentioned, or the standard phrases repeated without actually applying them to the factual situation underlying the advisory opinion request that was under examination.[794] With regard to these cases, one can only guess why the Court refrained from addressing certain points, and why it decided the way it did.

Applying an interests- and values-based approach requires that the Court not only refer to broad criteria such as "disguised contentious case" and the standard phrases it has established in its jurisprudence, but that it explains which specific interests or values the applied criterion is meant to protect, and whether this is indicated and necessary in the concrete factual situation at hand. If the Court decides to render a requested advisory opinion even though there are interests and values likely to be adversely affected by it, the Court has to explain, why it holds that this risk is outweighed by the potential benefit of the advisory opinion, or why the risk is compensated by the way in which the Court designs the proceeding, and how it formulates and structures the opinion. Even a request that may seem very political and sensitive may lead to a very helpful and effective advisory opinion if the Court succeeds in maintaining a neutral standpoint, and further provided that it formulates the opinion in abstract terms of law.

There may of course be sometimes internal considerations that the Court does not want to share publicly for good reasons. These may for example be that the judges themselves are too divided on a certain matter, or that they fear that the requested advisory opinion will not be respected by the decisive states anyway.[795] However, making its own considerations on the question of admitting or rejecting an advisory opinion request more transparent will generally increase the Court's authority, provided its reasoning

793 See: OC-13/93 (n 595) paras. 13–20; OC-19/05 (n 612) paras. 15–20; OC-23/17 (n 4) paras. 13–31; OC-24/17 (n 1) paras. 13–29; OC-26/20 (n 24) paras. 12–39.

794 See: OC-13/93 (n 595) para. 19; OC-24/17 (n 1) para. 24; OC-18/03 (n 227) paras. 61–66.

795 *Cf.*: Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 297 mentioning similar concerns that may arise in the context of "political" questions.

is convincing.[796] It will also make it more comprehensible why the Court in one case reached a different conclusion than in another, although both cases *prima facie* appear to be very similar. Furthermore, it will show the potentially affected states and individuals that their concerns towards the Court's exercise of its advisory jurisdiction have been taken seriously.

In the following subsections, the actual object and purpose and the underlying interests and values of the main rejection criteria will be more closely examined, and it will be shown in which typical constellations the better arguments normally speak in favor, or against rendering a requested advisory opinion.

1. Disguised contentious cases, determination of facts

The criterion that a request for an advisory opinion should not conceal a contentious case or that it is not intended to determine disputed factual issues is not only the one which is most often raised in advisory proceedings before the IACtHR. It is also well-known from the practice of other national and international courts and tribunals. In England, judges already objected to giving an advisory opinion on a matter that might come before them in a judicial case in the 15th century.[797] The criterion serves to protect the judges' independence and impartiality when they have to decide contentious cases, as well as the integrity of the judicial process in general. With regard to the national level, it may also be said that it protects the separation of powers if it prevents judges from giving advice to the executive or legislative on matters that are already pending, or likely to become pending before courts.

As regards the advisory functions of international courts, the criterion has mainly been brought forward to ensure that the principle of consent as a mandatory requirement for the exercise of the contentious jurisdiction is not circumvented by the exercise of the advisory function. It has been both raised in advisory proceedings before the PCIJ and the ICJ, although the latter has never rejected a request on this basis.[798] As concerns the

796 *Cf.*: von Bogdandy and Venzke, *'On the Democratic Legitimation of International Judicial Lawmaking'* (n 289) p. 1349.

797 Ellingwood (n 66) p. 9 and see also *supra*: Chapter 2, Section B.I.

798 The PCIJ has declined to give the Advisory Opinion on Eastern Carelia holding *inter alia* that the request concerned an actual dispute between Russia and Finland and that answering it would require the determination of facts, see: PCIJ, *Status of*

ECtHR, before the entry into force of Additional Protocol No. 16, the advisory jurisdiction was *ratione materiae* so limited that the problem of disguised contentious cases could hardly ever arise as requests of this type would not have been covered by the ECtHR's advisory jurisdiction anyway. With respect to the AfCtHPR, Rule 82 (3) Rules of Court states that "[t]he subject matter of the request for advisory opinion shall not relate to a Communication pending before the Commission."[799] This is just another expression of the admissibility criterion that a request for an advisory opinion should not conceal a contentious case which is adapted to a two-tiers system of a regional human rights system.

This adaptation points to the fact, that the context in which the IACtHR exercises its advisory function today is more complex than it had been in the times of the PCIJ. Given the Court's role in the regional system, and the existence of many other judicial bodies with overlapping jurisdictions, the criterion is today arguably not only deemed to protect state sovereignty by preventing a circumvention of the contentious function, but is also meant to protect procedural rights of individuals as well as the principle of *lis pendens*, and hence the creation of conflicting rulings and interpretations of the law.

Furthermore, as states also have standing to request advisory opinions of the Court, the rejection criterion may also become relevant to protect the Court's authority from being abused for purely political purposes. Thus, one can argue that the criterion has gained even more importance compared to the League era.

At the same time, the above examination of the Court's inconsistent application of the criterion has already shown that the constellations in which the criterion might be said to be fulfilled are nowadays so numerous that a strict application of the criterion would lead to the rejection of manifold requests for advisory opinions, although these requests could lead to very beneficial advisory opinions. According to the outlined interests- and values-based approach, it therefore needs to be asked in each case whether the application of the criterion is in fact indicated. This in turn depends on whether the interests and values the "disguised contentious case" criterion is deemed to protect would, in the respective constellation, be in fact

Eastern Carelia, Advisory Opinion of 23 July 1923, Series B No. 5, p. 27–28. As to the advisory proceedings before the ICJ in which the "disguised contentious case" or "political question" argument was raised as objection see: Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 296–303.

799 Rules of Court of the AfrCtHPR of 1 September 2020.

negatively affected if the Court renders the requested opinion, and whether the risk of these possible negative effects outweighs the potential benefits of providing the advisory opinion.

a) Requests by the Commission relating to a dispute with states

As outlined above, one possible constellation in which one might argue that the criterion of a "disguised contentious case" is fulfilled, concerns requests by the Commission that were triggered by some form of dispute with one or more states. Regarding this constellation, one has to note that the Commission itself cannot *proprio motu* file a complaint against a state. It can only refer cases to the Court that have been initiated by individuals, NGOs or other states. Therefore, requests submitted by the Commission pose no risk of circumventing the contentious function of the Court as long as they do not concern matters that are already pending before the Commission in the form of individual or inter-state complaints.

In particular, in situations in which a state does not react to earlier recommendations and reports of the Commission, or in which the Commission notices a similar worrying development in more than one state, the request for an advisory opinion from the Court may be a useful tool to either increase the pressure on a specific state or to signal to all concerned states in the region that they should stop or reverse such developments in their human rights policy.

As long as the subject matter of the request falls within the spheres of competence of the Commission, any possible objection from states that the advisory opinion request undermines the principle of state consent, and thus might violate their sovereignty, is unjustified given that the OAS member states recognized long ago that human rights protection is not reserved exclusively to the *domaine reservé* of states.[800]

In this regard, the Court has rightly decided to strengthen the Commission's position by stating that "the mere fact that there exists a dispute between the Commission and a government regarding the meaning – and, now, the application – of a given provision of the Convention 'does not justify the Court to decline to exercise its advisory jurisdiction'."[801]

800 For a discussion of this last point and further references see: Soley Echeverría, *The Transformation of the Americas* (n 19) p. 85-88.

801 OC-14/94 (n 371) para. 28; OC-3/83 (n 245) para. 39.

As a matter of fact, any other approach would immensely limit the strategic tool kit of the Commission. The rejection criterion of "disguised contentious case" should in principle therefore not be applied to requests emanating from the Commission that may be triggered by the behavior of one state, or by concrete factual developments in the region as long as the requests do not relate to any petition already pending before the Commission.

b) Requests by states relating to a dispute with the Commission

The situation is more difficult when it comes to requests emanating from states that are triggered by a conflict with the Commission. Requests like the one from Uruguay and Argentina that led to advisory opinion OC-13/93 should best be prevented by the Commission or the states concerned referring the matter to the Court under its contentious jurisdiction before the three months' period set out by Article 51 expires. Disputes that arise over the solution of individual petitions by the Commission should be dealt with by the Court under its contentious jurisdiction in order to safeguard the procedural rights of all parties involved. Consequently, advisory opinion requests by states that relate to such disputes should in principle be rejected based on the "disguised contentious case" criterion.

Although the cooperation and the relationship between the Commission, the Court and states has generally improved over the years, there may still arise disputes regarding the work of the Commission. This may lead to requests for advisory opinions akin to the one from Venezuela which led to OC-19/05. As states cannot file a complaint against the Commission, the initiation of an advisory proceeding may, next to raising the matter in the General Assembly of the OAS, or other fora, be a sensible tool to solve the dispute. Hence, it may be sensible not to reject requests like that of Venezuela even though they might be related to a specific political dispute. But, of course the Court must, as it did in the proceedings of OC-13/93, OC-15/97 and OC-19/05, be careful not to allow itself to be misused to undermine the authority of the Commission.

c) Requests by the Commission relating to petitions pending before it

Requests submitted by the Commission that relate to petitions already pending before it,[802] are not as problematic as requests from states that are related to pending petitions against them. This is because, in this type of scenario, it appears that the procedure before the Commission is not being circumvented, but that the Commission is instead seeking the advice of the Court to resolve the cases pending before it. Such requests are thus comparable to a preliminary ruling procedure. In these scenarios, an advisory opinion can, similar to a preliminary ruling or a pilot judgment in the European human rights system, very effectively clarify and outline the solution of several related individual cases, and thus ease the burden lasting on the system of individual petitions.

On the other hand, the procedural position of the affected individuals may still be weakened when the subject matter of their individual complaint is dealt with by the Court by way of an advisory opinion before they even had the chance to defend their case before the Commission, and at a possible later stage before the Court. Yet, if the Court's advisory opinion strengthens their position, they may also benefit from it, as the advisory procedure is normally much faster than the two-stage contentious procedure before Commission and Court. Like this, they may obtain an advisory opinion that argues in their favor which they can then use as argument at the domestic level years before their individual complaint is finally processed and decided.

These contradicting arguments show that such requests from the Commission should be thoroughly scrutinized in view of the effects they may have on the individuals involved, but that they do not have to be automatically rejected based on the criterion of "disguised contentious case". However, in any case in which the Court should decide to process such a request, it must be assured that the individuals that have filed the related petitions which are still pending before the Commission are informed about the advisory opinion procedure, and have the right to file written observations and to be able to participate in the public hearing.

While this solution leads to an assimilation of the Court's advisory function to its contentious function, as was also witnessed in the course of

802 See e.g.: IACHR, *Request for an Advisory Opinion on Democracy and Human Rights in the context of impeachment*, 13 October 2017.

the PCIJ's advisory practice[803], it may serve all interests the best. Yet, the Court needs to take all circumstances of the respective case into account and the first priority should of course be to accelerate the processing of individual complaints by both the Commission and the Court, and not to replace this by abstract advisory opinions rendered by the Court on the Commission's request.

d) Requests by states relating to petitions pending before the Commission

More problematic are requests filed by states that relate to individual petitions pending before the Commission, in particular when the petitions are directed against the requesting state. In these cases, the decisive factor should be the intention of the requesting government. Once it is clear that it seeks the advisory opinion in order to prevent its own condemnation in a parallel or subsequent contentious case, the Court should in principle abstain from answering the request as it did in advisory opinion OC-12/91.

Particularly difficult is the decision in cases like that of OC-24/17, in which the intention of the requesting government may be ambivalent. On the one hand, the Costa Rican government appeared before the Commission arguing that the petitions directed against it were inadmissible.[804] On the other hand, it seemed that the advisory opinion was mainly sought to solve a legislative blockade at the domestic level in order to be able to finally end a discriminatory practice, and rather not in order to prevent a later ruling of the Commission against it. In such cases, too, the guiding principle should be that the authors of the petitions pending before the Commission will not suffer any decisive disadvantage if the Court decides to issue the requested advisory opinion. Furthermore, the likelihood that the final advisory opinion will indeed help to lift the reform gridlock within the requesting state may play a role in the Court's evaluation whether to reject the request or not.

In constellations in which the petitions pending before the Commission are directed against another than the requesting state, as was e.g. the case in OC-16/99, the requesting state is presumed to have a genuine interest

803 Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 41–42.

804 *Cf.*: *Amicus curiae* brief of Yashín Castrillo Fernández, OC-24/17 proceedings, available at: www.corteidh.or.cr/sitios/observaciones/costaricaoc24/21_castrillo_fernandez.pdf.

of its own in the matter which argues in favor of rendering the requested advisory opinion. This is all the more true if it is evident that other states besides the requesting state also have a great interest in the Court answering the questions posed. Given that the Court's advisory and contentious function are two parallel systems, and given furthermore that states have a genuine right to request advisory opinions, it would in such cases not be justified to put the Court's advisory function on hold until all possible related individual complaints have been processed under the Court's contentious function. This could substantially limit the efficiency of the Court's advisory function and contradict in particular its preventive function.

If the Court however processes the advisory opinion request while related petitions directed against other states than the requesting state are pending before the Commission, it must again be assured that the individuals who filed the respective pending petitions can adequately participate in the advisory proceeding. This is because the advisory opinion is likely to set the relevant standards for the solution of the individual complaints, provided it is published before the parallel individual proceedings have been terminated. This does not mean, however, that the Commission or later the Court cannot, on the basis of the specific facts of the particular case and the submissions of the parties, deviate from the abstract standards elaborated in the earlier advisory opinion if the fair solution of the specific contentious case so requires.

e) Requests related to conflicts between states

Finally, we have seen various requests that could be called "disguised contentious cases" as they somehow relate to disputes between two or more states.

If the dispute concerns two states parties to the ACHR, those requests could be rejected based on the "disguised contentious case" criterion in order to prevent the circumvention of the principle of state consent, which is required for the filing of contentious inter-state complaints in terms of Article 45.[805]

Furthermore, as regards requests relating to proceedings pending before other international courts and tribunals, a rejection might be indicated in order to prevent the creation of conflicting jurisprudence and to prevent

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

the courts from being played off against each other by way of strategic forum shopping.

The above analysis has however shown that the Court has mostly decided to answer these types of requests regardless of the existence of an underlying inter-state dispute. The Court decided to provide advisory opinions OC-16/99, OC-18/03, OC-23/17, OC-25/18, OC-26/20 and OC-28/21 despite their politically motivated backgrounds, their possible political implications, and the parallel proceedings before the ICJ.

The approach not to reject requests despite parallel proceedings before other courts and tribunals may be justifiable. At least, when the advisory proceeding has been started before the other cases became pending, as was the case in the OC-16/99 proceedings, the Court is not expected to reject the request nor to interrupt its processing.[806] However, in cases like OC-23/17 the Court should take into account whether the requesting state is merely seeking to obtain an argument for its position in another pending case and the possible political implications thereof, or whether the questions are indeed of genuine interest for the protection of human rights.

In most of the cases the potential to influence the parallel proceedings will be quite limited anyway, as the fundamental issues will probably be different, given that the IACtHR as a human rights court will, for example, not deal with maritime law issues or border disputes, which may be at the center of the dispute before the ICJ.[807] On the other hand, if it is indeed a human rights issue that can be clarified in an abstract advisory opinion, such an advisory opinion by the IACtHR may also be beneficial to the other international proceeding. Although the ICJ did not explicitly mention advisory opinion OC-16/99 in the *LaGrand* and *Avena* cases, it did align itself with the argument of the IACtHR that Article 36 (1)(b) of the Vienna Convention on Consular Relations also protects the rights of the individual.[808]

806 On the various constellations in which the rule of "the Court first seised" can be applied according to the principle of *lis pendens* see: McLachlan (n 672).

807 *Cf.*: ICJ, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia),* Judgment of 19 November 2012, I.C.J. Reports 2012, p. 624; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia),* Counter-Claims, Order of 15 November 2017, I.C.J. Reports 2017, p. 289, 297, para. 26.

808 OC-16/99 (n 227) para. 122–124; ICJ, *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001, I.C.J. Reports 2001, p. 466, 494, para. 77; ICJ, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, I.C.J. Reports 2004, p. 12, 36, para. 40.

Nevertheless, the IACtHR should consider and address the *lis pendens* principle and should not ignore the risk that states could abuse the possibility of forum shopping, and that conflicting interpretations of the law may impair the implementation of judgments and the intervention of the rule of law. One option to be explored could be for the Court to communicate with the ICJ in cases like OC-23/17 in order to assure that they either only deal with different legal questions or do not reach conflicting interpretations.[809]

Also as regards requests which are not related to a parallel ICJ proceeding but nevertheless politically motivated, the above analysis has shown that it is unlikely that the Court rejects such requests based on the "disguised contentious case"- criterion although the underlying inter-state conflict might lead to an inter-state complaint in terms of Article 45.

This approach of not granting priority to the inter-state-complaint procedure over the advisory jurisdiction is justifiable, too. There are several reasons why the use of the inter-state complaint procedure in terms of Article 45 has been very scarce so far, and why in contrast the advisory function is more popular among states than the possibility of filing a complaint against another OAS state.[810]

First of all, filing an inter-state complaint under Article 45 often offers no real alternative to an advisory proceeding due to the high procedural hurdles. Submitting a promising inter-state communication under Article 45 requires firstly that both states have recognized the Commission's competence within the meaning of Article 45.[811] For the case to be submitted to

809 A risk of conflicting interpretations also exists when advisory proceedings related to very similar matters, e.g. the combat against climate change, are pending before the IACtHR and other international courts at the same time. In these situations, a dialogue between the courts concerned might be reasonable, too.

810 To date there have been only two inter-state communications under Article 45, and none of them has reached the Court. The first case, a communication lodged by Nicaragua against Costa Rica, was declared inadmissible by the Commission. In the second case, Ecuador and Colombia reached a friendly settlement. See: IACHR, Report No 11/07, Interstate Case 01/06, *Nicaragua v. Costa Rica*, 8 March 2007; IACHR, Informe No 96/13, Decisión de Archivo, Caso Interestatal 12.779, *Ecuador v. Colombia*, 4 November 2013; see also: Contesse, *'Inter-State Cases in Disguise under Inter-American Human Rights Law: Advisory Opinions as Inter-State Disputes'* (n 722); Hennebel and Tigroudja, *The American Convention on Human Rights: A Commentary* (n 203) Article 45, p. 1039, 1040.

811 According to the information provided by the OAS, at the moment only the following 11 states have recognized the Commission's competence in terms of Art. 45: Chile, Ecuador, Uruguay, Argentina, Colombia, Costa Rica, Jamaica, Nicaragua, Peru, (Venezuela), Bolivia. Notably, it is disputed whether the recognition declared

the Court, both states must moreover have recognized the Court's jurisdiction in terms of Article 62. What is more, the available domestic remedies must have been exhausted and concrete evidence must be presented to support the inter-state complaint.

In contrast, for a request for an advisory opinion to be admissible, it is sufficient to provide an abstract description of a possible violation of the Convention along with a request to the Court to provide an interpretation of the relevant article of the Convention in the described context. Hence, especially questions that are more of a preventive character, where no human rights violation has actually occurred yet, are better posed by way of an advisory opinion.

Furthermore, an inter-state complaint always involves a more direct bilateral confrontation, whereas an advisory proceeding, even when indirectly addressing a certain behavior of another state, is subtler. Although the intention to criticize another state is obvious in requests such as the ones from Colombia that led to OC-23/17, OC-26/20 or OC-28/21, the other state against which the request is at least indirectly addressed is still less exposed than in a contentious proceeding.[812] What is more, with one single request for an advisory opinion, a 'message' can be sent to several states at the same time, while it would be much more complicated to lodge communications under Article 45 against several states.

Another aspect one has to note is that the authors of the ACHR deliberately opened the advisory function of the IACtHR to states, which stands in contrast to that of the ICJ, and thus accepted – either consciously or unconsciously[813] – the possibility of greater political recourse to the advisory function. Although it is not the actual purpose of the advisory function to deal with inter-state conflicts, the initiation of an advisory procedure is, after all, a peaceful means and can therefore be a useful valve to prevent the further escalation of a smoldering conflict which could in the worst case even lead to the use of force.

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by Juan Guaidó in the name of Venezuela is valid or not. As to the list of ratifications and declarations see: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm.

812 On the controversial question whether advisory opinions too produce binding legal effects see Chapter V.

813 As noted *supra*: Chapter 2, Section C.V. the *travaux préparatoires* of the ACHR do unfortunately not disclose on the motives behind the decision to extend the standing in advisory proceedings to states, nor on any concerns that may have been expressed in this regard.

Nevertheless, the Court should be cautious not to be used as a tool in a conflict in which a legal analysis is unlikely to solve the actual problem. The Court should rethink its current approach to also accept purely "quasicontentious" requests that do not seem to have any "client-lawyer"-consultation character. While Mexico's requests that led to OC-16/99 and OC-18/03 were related to a conflict with the United States, there can be no doubt that Mexico had an own interest in the clarification of the law as its own nationals were concerned.

In contrast, in case of OC-28/21, Colombia admitted that it did not itself consider allowing indefinite presidential re-elections, but that it was worried about the practice of other states.[814] As Colombia is, however, not directly affected by the way in which other states of the region design their electoral processes, one could have said that Colombia lacks a legitimate interest in the consultation of the Court. On the other hand, one could of course argue that the OAS member states have obliged themselves to the principle of democracy and that therefore each and every state has a legitimate interest in the other states remaining functioning democracies.

2. Political debates, controversies and proceedings at the national level

Apart from the disguised contentious case-criterion, the Court has established the criterion that requests for an advisory opinion should neither be used as a mechanism to obtain an indirect ruling on a matter that is in dispute, or being litigated at the domestic level, nor be used as an instrument in a political debate in the domestic sphere.[815]

The importance of this rejection criterion for the IACtHR's advisory function results from the close interconnectedness between the regional human rights system and the domestic legal systems. The matters treated in the advisory opinions of the ICJ are normally exclusively related to international law. Concerns that the rendering of an advisory opinion by the ICJ might unduly interfere with an ongoing democratic process in a state therefore rarely arise.

814 Colombia, *Request for an Advisory Opinion on the figure of indefinite presidential re-election in the context of the Inter-American system of human rights*, 21 October 2019, para. 6.

815 IACtHR, Order of 29 May 2018, *Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*, para. 6; OC-25/18 (n 227) para. 46.

In contrast, the IACtHR's advisory function encompasses the power to examine the compatibility of domestic laws with international human rights law, and according to the Court, the conventionality control requires the states to take the Court's findings made in advisory opinions into account and to adapt, when necessary, their domestic legal and administrative processes.[816] Besides, when it is the states themselves rather than international organizations that request the opinion, it is more likely that a request for an advisory opinion concerns matters of national political debates.

Against the backdrop of this close interconnectedness, the object and purpose of the rejection criterion "political debates, controversies and proceedings at the national level" is to protect the integrity of democratic processes at the national level and the separation of powers. While the advisory function shall guide the national governments in matters of human rights, it is not supposed to invite national governments to circumvent democratic decisions made by the parliament, nor to undermine decisions of the domestic courts by referring matters to the IACtHR. The degree of the national bodies' democratic legitimacy is normally higher than that of the Court and the principle of subsidiarity arguably also applies in the context of the Court's advisory function.[817] Therefore, as a matter of principal, the IACtHR should not interfere with democratic processes that are not yet completed.

As important as the rejection criterion is, the above analysis has demonstrated the difficulty of the Court to apply the criterion consistently. As a matter of fact, there will almost always be some political debate at the domestic level before a government decides to request an advisory opinion of the Court. Especially as regards requests in terms of Article 64 (2), it is hardly imaginable that a government would approach the IACtHR without any preceding national debate on the issue. If there were no debate at all, it could be said that the request relates to a purely academic issue, which is, according to the Court, another criterion for rejection. Thus, the mere existence of a debate on the issue at the domestic or regional level should not suffice to justify a rejection. Rather, it is again necessary to look at the specific factual setting and the motivations that trigger a request, and to

816 As to the doctrine of conventionality control and the different possible understandings of the *erga omnes* effect of *res interpretata* see *infra*: Chapter 5, Section B.II. and IV.3.

817 On the subsidiarity principle in this context see: Candia Falcón (n 465) p. 57–80.

question whether the interests and values the rejection criterion is supposed to protect are actually at risk if the Court answers the advisory opinion request.

Applying this interests- and values-based approach, leads for example to the conclusion that the issuance of an advisory opinion is unproblematic when the government and parliament of a state have agreed to request an advisory opinion of the Court in order to resolve an internal dispute, or if the government forwards a request of a divided parliament to the Court. In these scenarios, the national authorities have agreed to ask for external help and no domestic organ is circumvented by another.

In contrast, the Court should not allow to be used by a government to circumvent the national democratic processes, and be cautious not to allow itself to be instrumentalized by one party in a constitutional dispute either. It should refrain from interfering with national processes that are still ongoing. It should therefore generally decline to answer requests for an advisory opinion when it is obvious that the requesting government thereby seeks to circumvent other national institutions like the parliament or its supreme or constitutional court.

This holds true unless the domestic legislative process has been stalled for years without progress on urgent reforms. Further, the Court might exceptionally accept such a problematic request if the requesting government considers the interpretation of international human rights norms by the national supreme or constitutional court to be contrary to the Convention, and if it seems impossible, due to the current national political majorities, to achieve a necessary legal reform that would also oblige the judiciary to adopt a jurisprudence in line with the Convention.

In situations where it seems impossible to domestically redress a situation that obviously violates human rights and thus contravenes the Convention, requesting an advisory opinion of the IACtHR may be the ultimate way to end a blockade at the national level, and to finally achieve reforms to bring the respective domestic legislation in conformity with the Convention.

Under such exceptional circumstances rendering the requested opinion may be useful as a trigger to lift legislative or judicial blockades which may justify not applying the rejection criterion. But it should of course not become the norm to sideline domestic instances. States like Costa Rica should rather more try to implement constitutional reforms so that political blockades can be better resolved within their own national political system

at the first place,[818] and the Court should reject all those requests that are motivated by dishonest intentions unless it can ensure that its advisory opinion will contribute to the peaceful resolution of the internal conflict.

3. Issues on which the Court has already ruled in its jurisprudence

Given that advisory opinions do not produce a *res judicata* effect, the only *rationale* of this rejection criterion is to be seen in the protection of the Court against abusive requests that would unnecessarily add to the Court's workload.[819] Even if there already exists related jurisprudence of the Court, a request for an advisory opinion does not have to be automatically rejected. While a dispute requires a final solution, and while it is the main objective of *res iudicata* to reach a lasting *Rechtsfrieden*, the interpretation of legal norms is a constantly developing process.

Even if the answer to the questions posed in a request for an advisory opinion may already be inferred from the Courts existing jurisprudence, the request will in most cases nevertheless contain aspects on which the Court has not yet ruled, or that can at least be further clarified and further developed.

What is more, it does not seem harmful to the authority of the Court, or to the knowledge and understanding of its jurisprudence, if the Court issues an advisory opinion reiterating standards already established in its previous jurisprudence. Normally, the abstract form of an advisory opinion allows for an even clearer and more pronounced formulation of general standards than rulings in a contentious case.

Thus, even if a request *prima facie* does not seem to raise any new questions, the Court should carefully examine whether the request includes any issues that have remained open and that deserve to be further clarified. Even if part of the advisory opinion to be given would do no more than to compile and update holdings from previous jurisprudence, this can still have a useful guiding effect. Given that the Court may issue an advisory opinion without having convened a public hearing, particularly when the answers to the questions posed seem clear to it, a brief and concise response

818 *Cf.*: Vega-Murillo and Vargas-Mazas (n 764) p. 207-208.

819 The ICJ has so far not indicated in how far its advisory opinions produce the effect of *res judicata*, see d'Argent, 'Art. 65' (n 73) mn. 50. The IACtHR nowadays holds that its advisory opinions produce the effect of *res interpretata*. On this see Chapter 5.

to a request does not require much more time and resources than issuing an order of rejection in which the Court normally briefly refers to its previous jurisprudence anyway.

There are only two scenarios in which the rejection criterion might be reasonably applied. First, in case a request is manifestly seeking a mere confirmation of well-established, pre-existing jurisprudence, and thus appears to be abusive in view of the additional workload to be created. Second, in case a request of a state is repeated with the hope that the Court, in its then new composition of judges, might change the interpretation it had made in its earlier advisory opinion. Even the IACtHR, which is known for its bold and progressive jurisprudence, is not immune to the possibility that it will one day be composed of more conservative judges. This may happen notably when conservative state parties decide to strategically elect such judges to the Court. If states then pursue the goal of lowering the Court's standards of protection through strategic requests for advisory opinions, it is to be hoped that the judges will then reject such requests on the basis of the criterion here examined.

In sum, in most cases the rejection criterion of "already existing jurisprudence" does not seem to be imperative when it comes to the decision on whether or not to reject a request.

4. Abstract speculations without a foreseeable application to specific situations

This criterion constitutes the counterpart of the "disguised contentious case/determination of facts" criterion. While the latter precludes the Court from resolving disputed facts which might arise, or already form part of a contentious case, this criterion shall prevent the Court from pondering on issues that have no relation to actual reality, and from engaging in "semi-legislative activities".[820] Like the other criterion, it was already known from advisory functions at the national level and also voiced as a concern or as an objection to the advisory jurisdiction of the PCIJ and later the ICJ.[821] But none of the two courts rejected an advisory opinion request for being too abstract or speculative in nature.

820 *Cf.*: United Nations, '*Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice*' (n 156) p. 22, para. 69.

821 According to Ellingwood (n 66) p. 28–29 in England it was already in the 19th debated whether the Lords were allowed to ask the judges general questions. The

Whereas the PCIJ was mostly concerned with questions that bore a relation to concrete situations, the ICJ has repeatedly dismissed objections directed against the abstractness of the questions and has rather followed the strategy to further "abstractify" the questions in order to refute claims that it was in fact going to decide a concrete dispute.[822]

As regards the practice of IACtHR, this criterion has not gained much practical relevance either, as the Court has never rejected a request for an advisory opinion on that basis. On the contrary, the Court often follows a strategy similar to the ICJ, and mentions the criterion that a request should not seek abstract speculations only to justify that a request contains references to concrete factual situations.[823]

At the same time, those who from the outset have warned against semi-legislative activity when deliberating on the ICJ's advisory function would likely feel vindicated in light of some of the IACtHR's advisory opinions.[824] The questions posed in the requests, especially those by the Commission, have become ever more comprehensive, and the Court's opinions have, since the end of the 1990s, started to become very long scholarly pieces.[825]

Lords insisted that these were not mere speculations but that the questions were intended to support them in their legislative activities. As to PCIJ and ICJ see: Council of the League of Nations, *18th Meeting, 26 September 1923*, (1923) LNOJ, 1330–31 (Mr. Salandra); *idem*., *22nd Meeting, 28 September 1923*, (1923) LNOJ, 1350 (Mr. Salandra); United Nations, '*Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice*' (n 156) p. 22, para. 69; instead of all objections raised before the ICJ see: Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 310.

822 Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 307–312.

823 See e.g.: OC-13/93 (n 595) para. 17; OC-18/03 (n 227) para. 65; OC-25/18 (n 227) para. 51.

824 *Cf*.: United Nations, '*Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice*' (n 156) p. 22, para. 69. The Informal Inter-Allied Committee voiced the concern that the advisory function of the future ICJ might be used in "a semi-legislative capacity for making general statements or declarations of law, instead of giving advice as to what the law is in relation to a defined issue or set of facts" if the advisory jurisdiction *ratione materiae* was not strictly confined to questions of law. As noted *supra* in Chapter 2, Section C.V. the *travaux préparatoires* of the ACHR do not disclose whether there existed any related concerns as to the advisory function of the future IACtHR.

825 For example, OC-11/90 has only 11 pages while OC-16/99 is 77 and OC-29/22 even 140 pages long. See: *Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights*, Advisory Opinion OC-11/ 90, Series A No. 11 (10 August 1990); OC-16/99 (n 227); OC-29/22 (n 275).

Yet, like the ICJ has remarked in relation to Article 96 UN Charter and Article 65 ICJ Statute[826], the text of Article 64 can also only be understood in a way that permits precisely abstract questions of interpretation. Therefore, it is questionable whether the rejection criterion at hand is suitable at all.

Quite to the opposite, the examples of OC-1/82 and of OC-6/86 highlight that it is important that the Court also render advisory opinions that just seek to clarify certain terms contained in the ACHR without foreshadowing a direct foreseeable application. Moreover, one can never predict with certainty that a question is purely theoretical in nature and that it will never become relevant in practice, because reality produces the most unexpected situations. Besides, it is in particular perfectly legitimate for the Commission to make strategic use of its right to submit requests for advisory opinions in order to achieve a clarification, concretization and further development of human rights law.

Instead of focusing on the abstractness of the topic or whether it is speculative in nature, it seems more important that the Court examines more strictly whether the request indicates, in accordance with Article 70 (2) of the Rules of Procedure of the Court, the provisions the interpretation of which is sought, that a true relationship be maintained between the questions and the Convention or the other human rights treaties, and that the questions are answerable by way of a legal interpretation.[827] In OC-25/18, the Court did this in an exemplary manner by declaring one of the questions posed by Ecuador inadmissible for being too vague and not answerable by an interpretation of conventional norms.[828]

As regards requests that seek the strategic progressive development of the law, it should be kept in mind that these areas of law must still be related to the Convention and other human rights treaties in terms of Article 64 and

826 In the *Admission* Advisory Opinion, the ICJ held: "It has also been contended that the Court should not deal with a question couched in abstract terms. That is a mere affirmation devoid of any justification. According to Article 96 of the Charter and Article 65 of the Statute, the Court may give an advisory opinion on any legal question, abstract or otherwise". See: ICJ, *Admission of a State to the United Nations (Charter, Art. 4),* Advisory Opinion of 28 May 1948, I.C.J. Reports 1948, p. 57, 61; see also Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 310–311.

827 *Cf.*: OC-14/94 (n 371) para. 27.

828 OC-25/18 (n 227) para. 26. As to the full wording of this question see already *supra*: (n 318).

therefore still be covered by the Commission's and the Court's jurisdiction. Finally, if the Court decides to answer the questions, it must ensure that it remains within the framework of legal interpretation and argumentation, and does not assume the role of a legislator. If the Court establishes too precise rules in the abstract, it might be "unfairly prejudiced" if a similar issue comes up in a later contentious case.[829]

IV. Concluding summary

In this section, the discretion of the Court to reject advisory opinion requests even though they comply with all formal admissibility requirements, and the Court's practice in this regard have been thoroughly studied.

Overall, the examination has shown that the Court is keen to fulfil its advisory role of providing guidance to states and OAS organs in matters of human rights law. While the Court has established various criteria that may lead to the rejection of a request, it has from the very beginning held that the decision in the end depends on the facts of the specific case, and that there must be compelling reasons for it to reject a request.[830] Even when the Court is confronted with problematic or very sensitive requests, it rather tries to reformulate the questions posed than to decline to answer the entire request.

Nevertheless, in contrast to the ICJ, the IACtHR has already made use of its discretion, and has declined to answer advisory opinion requests in six cases.

Generally, it tends to reject a request made by the Commission more easily than a request made by a state, especially when several states ask the Court to reject the Commission's request.[831]

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829 *Cf.*: Concerns of Mr Salandra, Council of the League of Nations, *22nd Meeting, 28 September 1923*, (1923) LNOJ, 1350; Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (n 113) p. 308.

830 OC-1/82 (n 42) paras. 30–31.

831 Of the six rejected requests for advisory opinions only two were made by a state. One was made by the OAS Secretary General and all the remaining three were made by the IACHR. As concerns the most recent rejection of a request by the Commission, it was especially states who held the request to be inadmissible. See *supra*: Chapter 4, Section C.I.6.

Between 2004–2009 the Court was stricter in the application of its rejection criteria, and even established additional ones.[832] More recently however, the Court has instead stressed that the criteria are not only not exhaustive, but also not insurmountable, and has rendered advisory opinions although one or more rejection criteria that in other similar cases had led to a rejection was actually given.[833]

The analysis of the Court's rejection criteria and their inconsistent application by the Court has shown that most of the criteria are indeed suitable indicators for which kind of requests might be problematic and better declined. At the same time, the Court's current practice of listing the rejection criteria but then mostly answering the request even though one or more criteria are arguably fulfilled is unsatisfactory. This is especially true, if the Court, after enumerating the abstract criteria, does not apply them to the specific case, and does not properly justify why it decided to answer the request despite the factual background.

Therefore, the interests- and values-based approach suggested here, essentially requires the Court to make its considerations more transparent, and to better justify why it ultimately decided to render an advisory opinion despite its political implications. While the Court is right in holding that it has to possess the discretion to evaluate the details and the factual context of each advisory opinion request, it has to explain why the arguments for rendering the requested opinion outweighed the ensuing risks. In particular, in the interests of the states, OAS organs or *amicus curiae* who raised concerns regarding the propriety of rendering an advisory opinion, it does not suffice to justify the acceptance of a request just by repeating standard phrases.

It has been demonstrated that it is not decisive whether one or more of the rejection criteria is met with regard to a request, but whether the interests and values the rejection criteria are supposed to protect are actually likely to be adversely affected in that specific constellation. In many instances the Court will be able to prevent possible negative effects of rendering an advisory opinion by the way in which it designs the proceeding

832 OC-12/91 (n 362); IACtHR, Order of 10 May 2005, *Solicitud de Opinión Consultiva presentada por la República de Costa Rica*; IACtHR, Order of 24 June 2005, *Solicitud de Opinión Consultiva presentada por la Comisión Interamerican de Derechos Humanos* [Available only in Spanish.]; Order of 27 January 2009, *Solicitud de Opinión Consultiva presentada por la Comisión Interamerican de Derechos Humanos* [available only in Spanish].

833 OC-25/18 (n 227) para. 46.

and reformulates the questions posed. In other instances, the risk that one legitimate interest or value might be impaired by rendering the requested opinion is outweighed by the potential benefit the advisory opinion will have in the region.

Many of the interests and values that may be adversely affected by an advisory opinion, as well as the arguments that nevertheless speak in favor of rendering a problematic advisory opinion, have been outlined in the preceding subsections.

Without repeating this analysis and without claiming to be exhaustive, the following table summarizes once more, and provides an overview over the important interests and values that may be adversely affected on the one hand, and the counter arguments on the other hand. Some of the latter correspond to the general object and purpose and the advantages of the Court's advisory function, while other aspects may mitigate some of the adverse effects and thus lead to the final result that the potential benefit of giving the advisory opinion outweighs the possible adverse effects.

Notably, the arguments in the right column do not directly refer to the mentioned interest or value in the left column. It rather depends on the circumstances of each advisory proceeding which interests, values and potential benefits have to be balanced against each other.

Interests which may be adversely affected by an advisory opinion, and which can thus be protected when the Court exercises its discretion to abstain from answering the request	**Arguments that may argue in favor of providing an advisory opinion although such interests and values may be affected**
• Procedural rights of individuals who filed a related complaint that is pending before the Commission	• The opportunity to develop human rights law, especially when the requests concern a matter that is unlikely to come before the Court under its contentious jurisdiction
• Procedural rights of individuals involved in proceedings pending at the national level	• The advisory procedure is normally faster than the contentious procedure before Commission and Court so that affected individuals may also benefit from an advisory opinion that strengthens their position in other pending litigations
• Procedural rights of states involved in a controversy with the requesting state that may already be pending before another international court or might in future lead to an inter-state procedure before the Commission or another judicial body	• The rights of states and affected individuals may be protected by giving them adequate procedural rights in the advisory procedure
• Interests of third states that are non-members of the OAS	• The opportunity to provide guidance to governments and OAS organs; the format of an advisory opinion allows the Court to deal at length with questions it could otherwise only ponder on in form of an *obiter dictum*.
Values that may be negatively affected if the Court renders a requested advisory opinion	
• The authority of the Commission either when related cases are still pending before it, or when it solved related matters without those matters having been referred to the Court under its contentious jurisdiction	• The chance to establish abstract standards that the Commission can then apply in several related cases which saves time and resources
• The Court's own authority in case the request has no genuine interest in the interpretation of human rights law, but rather intends to use the Court for other purposes	• The advisory procedure may be one of the last peaceful means by which to mitigate a human rights crisis when diplomatic attempts have failed, and when the prerequisites for filing an inter-state complaint are not given
• The integrity of national democratic processes	• A systematic blockade which prevents discriminatory practices from being stopped by legislative reforms or judicial decisions at the domestic level, and which is likely to be lifted in reaction to an advisory opinion of the IACtHR
• The balance between the three powers of the national states	• The possibility to reformulate the questions so that they gain general relevance beyond the specific case that triggered the request
• The principle of subsidiarity	• The advisory opinion may fertilize the dialogue between courts, be it with other international or national courts that are dealing with related matters
• The principle of *lis pendens*, avoidance of conflicting interpretations and legal fragmentation	• The parallel proceedings before other courts have become pending after the request for an advisory opinion has been submitted, and focus on at least slightly different questions than the advisory opinion request

• Diplomatic relations between states when a request is obviously intended to offend another state before the disputed matter has been subject of any serious bilateral negotiations	• The Court is an autonomous institution and the risk of conflicting interpretations and legal fragmentation not only exists in parallel proceedings, but also in cases that concern related issues and are dealt with by different courts at different times
• National sovereignty as concerns requests that deal more with questions of state organization than with questions of human rights law	• Other contentious proceedings may not be available for a lack of jurisdiction (of course here the counter argument of states is that their sovereign decision not to recognize the contentious jurisdiction of a court shall not be undermined by the advisory jurisdiction)
	• A great general interest in the topic of the advisory opinion request voiced by many states and/or civil society in the whole region
	• Questions that may appear speculative now may become practically relevant at a later point in time

Contrary to what was held by former Judge Zaffaroni in his dissenting opinion attached to OC-26/20, it is not the only object and purpose of the Court's advisory function to prevent foreseeable violations of the Convention.[834] This is highlighted for example by the first and by the sixth advisory opinion, which both concerned abstract questions of interpretation of certain terms contained in the ACHR.[835] The clarification of terms contained in human rights treaties may be helpful in itself.

Yet, Zaffaroni's dissenting opinion points to several serious concerns as to possible negative consequences if the Court responds to requests that are not primarily sought in order to obtain a clarification of the law, and to prevent possible future violations of human rights, but which are rather motivated by other, more political motives.[836] He warns that advisory opinions might be abused as weapons in inter-state disputes, and might fuel an existing conflict instead of preventing human rights violations.[837]

Following the interests- and values-based approach suggested here would require the Court to consider and address concerns like these more openly and seriously. It would require the Court to balance both, the possible positive and the negative effects of rendering an advisory opinion. Should it reach the conclusion that the arguments in favor of providing the opinion outweigh the concerns, it has to address these concerns nevertheless, and

834 *Cf.*: OC-26/20 (n 24), Dissenting Opinion of Judge E. Raúl Zaffaroni, para. 2.
835 OC-1/82 (n 42); OC-6/86 (n 316).
836 OC-26/20 (n 24), Dissenting Opinion of Judge E. Raúl Zaffaroni.
837 OC-26/20 (n 24), Dissenting Opinion of Judge E. Raúl Zaffaroni, para. 24.

has to explain furthermore why it holds that these concerns are unfounded or outweighed by other weightier reasons.

Apart from the more transparent reasoning and better justification of the acceptance or rejection of a request, as well as the design of the proceeding and the formulation of the advisory opinion, it is important that the Court refrain from trying to answer questions that are not answerable in terms of legal interpretation and that exceed the limits of the Court's jurisdiction and competence as regional human rights court.[838] These may be questions that are only framed and disguised to be a question of human rights law, but that are in fact questions of domestic law of state organization, or questions whose answer first and foremost requires a philosophical debate or a reply by social or political science. Lastly, the Court has to consider not only the effect an advisory opinion is going to have in the requesting state, but also in all the other OAS member states.

D. Composition of the Court in advisory proceedings

Given that Articles 70ff. Rules of Procedure do not state anything on the Court's composition in advisory proceedings, the Rules pertaining to contentious proceedings are applicable analogously. Accordingly, the Court deliberates in plenary and decisions are made pursuant to Article 16 Rules of Procedure.

Article 25 of the Court's Statute sets out that certain parts of proceedings may be delegated by the Rules of Procedure to the President or to Committees of the Court "with the exception of issuing final rulings or advisory opinions". This means that the final decision in advisory proceedings must be taken by the Court as a whole.

However, one could imagine that the decision on admissibility – should the Court decide to take a separate decision on it in the first place[839] – was delegated to a Committee of the Court. This question was raised early on in the proceeding of OC-3/83, when Guatemala claimed that the Permanent Commission of the Court, composed of the President, the Vice President and a third judge appointed by the President, should have ruled the request

838 See already *supra*: Chapter 3, Section B.I. on the limits of the Court's advisory jurisdiction *ratione materiae*.

839 On the proposal, to insert in the procedure a separate admissibility stage, see *infra*: Chapter 4, Section J.II.

of the IACHR to be inadmissible.[840] The President replied to Guatemala, that neither he nor the Permanent Commission were competent to reject a request for an advisory opinion.[841]

To the contrary, the Court held that decisions on admissibility had to be adopted by the whole Court sitting in accordance with Article 56.[842] This decision was based on Article 44 (1) of the Rules of Procedure in force at the time, stating that "judgments, advisory opinions and the interlocutory decisions that put an end to a case or proceedings, shall be decided by the Court". The corresponding Article 31 of the current Rules of Procedure does not mention advisory opinions explicitly anymore. Nevertheless, it still prescribes that "orders completing proceedings shall be rendered exclusively by the Court". This wording suggests that a decision on the admissibility of an advisory opinion request can still not be delegated to a panel of single judges. A rule explicitly providing for such a possibility would have to be inserted into the Articles 70ff Rules of Procedure regulating the advisory procedure.

Article 56 of the Convention and Article 14 Rules of Procedure provide that the quorum for deliberations of the Court consists of five judges. Irrespective of this minimum quorum, the Court is normally composed of seven judges including the President and acts as a plenary Court during the whole advisory proceeding. Thus, while it is the internal practice that one judge and his or her team of lawyers and interns is assigned with the preparation of a draft advisory opinion, when it comes to the oral hearing, the actual deliberation and the final voting, the Court always acts as a whole.

In contrast to the procedural rules of the ICJ, there is no provision allowing states to appoint an *ad hoc* judge in advisory proceedings that relate to an inter-state dispute.[843]

Article 19 (1) Rules of Procedure, pursuant to which judges shall not participate in the deliberation of individual cases against their own state of nationality, is not applied to advisory proceedings. As will be further described below, this has been criticized in the context of OC-24/17 given

840 OC-3/83 (n 245) para. 13; Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 60; See Art. 6 (1) Rules of Procedure.
841 OC-3/83 (n 245) para. 14.
842 OC-3/83 (n 245) para. 17.
843 *Cf.*: Article 102 (3) Rules of Court of the ICJ in combination with Article 31 ICJ Statute.

that the Costa Rican Judge Odio Benito was said to have close ties with the requesting government that had also appointed her to the Court.[844] However, the fact that the knowledge of national judges may be very beneficial in advisory proceedings under Article 64 (2) and that there is no respondent in advisory proceedings speaks against an application of Article 19 (1) Rules of Procedure.

In contrast to that, Article 19 of the Court's Statute, which regulates the disqualification of judges, should also be applicable in advisory proceedings. This is indicated by the term "matters" which is broader than "cases", thus implying that the application of the provision is not limited to contentious proceedings.[845] Furthermore, Article 17 (2) of the ICJ Statute, which is almost identical to Artikel 19 (1) of the Court's Statute, is also considered to be applicable in advisory proceedings, although it contains the even narrower term "cases" instead of "matters".[846]

However, so far, no judge has ever been disqualified from participating in an advisory proceeding on the basis of Article 19 (1) of the Court's Statute. In the oral hearing in the matter of OC-28/21, Bolivia asked the Court to exclude Judge Zaffaroni from the deliberation of the advisory opinion on presidential re-election given that he was the legal advisor of the former Bolivian President Evo Morales, to whose case the matter of the advisory opinion was obviously related.[847] The Court took note of the objection brought forward but held in the final opinion that the advisory opinion was a general pronouncement not relating to one particular state.[848] Therefore, it held that "none of the grounds for recusal set forth in paragraph 1 of

844 As to this question see *infra*: Chapter 4, Section J.I.

845 Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 73. Article 19 (1) of the Court's Statute states:
"Article 19. Disqualification
1. Judges may not take part in matters in which, in the opinion of the Court, they or members of their family have a direct interest or in which they have previously taken part as agents, counsel or advocates, or as members of a national or international court or an investigatory committee, or in any other capacity."

846 Although the ICJ has both in the proceedings leading to the *Namibia* and the *Wall* opinion rejected all objections raised to the participation of members of the Court, Article 17 (2) ICJ Statute remains in principle applicable to advisory proceedings. See: Philippe Couvreur, 'Article 17' in Andreas Zimmermann *et al.* (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn OUP, 2019) mn 19–20.

847 See: OC-28/21 (n 274) para. 10. The video of the oral hearing in the OC-28/21 proceedings is available at: https://vimeo.com/462631408.

848 OC-28/21 (n 274) para. 10.

Article 19 of the Statute apply" and did not disqualify Judge Zaffaroni.[849] The reasoning was so short and general that it results not entirely clear whether the Court only held that Article 19 (1) of the Court's Statute was not pertinent in that specific case, or whether it considers the provision to be generally inapplicable in advisory proceedings. In any case, in light of the Court's decision in OC-28/21, it is hard to imagine a situation in which the Court would disqualify a judge from participating in an advisory proceeding.

Yet, as the wording of Article 19 (1) of the Court's Statute, as just noted, indicates that the provision is applicable to advisory proceedings, and as it is, furthermore, not convincing that the difference between advisory and contentious proceedings would justify applying lower ethical standards of judicial independence and impartiality, the Court would be well advised to reconsider its approach.

Instead of rejecting the application of Article 19 (1) of the Court's Statute altogether, or of following a very cautious approach on disqualification like the ICJ in the *Wall* advisory proceedings, the Court should rather apply a stricter standard as set for example by the Special Court for Sierra Leone (SCSL) in the *Sesay* case.[850] In that case, the SCSL disqualified Judge Robertson as passages in a book he had published before his appointment to the Special Court created the appearance of bias against revolutionary groups to which the accused had belonged.[851]

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849 OC-28/21 (n 274) para. 10.

850 In the *Wall* advisory proceedings Israel had asked the ICJ to disqualify Judge Elaraby as his participation in Special Sessions of the UN General Assembly, his activity as legal adviser to Egypt and a newspaper interview gave raise to the appearance of bias against Israel. The ICJ, however, held that Judge Elaraby had performed most of these activities many years before the questions of the construction of the wall in the occupied Palestinian territory arose, and that they did not fall under the scope of Article 17 (2) ICJ Statute. ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 January 2004, I.C.J. Reports 2004, p. 3–6; SCSL, *Prosecuter v. Sesay*, Decision on Defence Motion seeking the Disqualification of Justice Robertson from the Appeals Chamber, Case No. SCSL-2004–15-AR15, 13 March 2004; *cf.*: Yuval Shany and Sigall Horovitz, '*Judicial Independence in The Hague and Freetown: A Tale of Two Cities*' (2008) 21 Leiden Journal of International Law, 113–129.

851 SCSL, *Prosecuter v. Sesay*, Decision on Defence Motion seeking the Disqualification of Justice Robertson from the Appeals Chamber, Case No. SCSL-2004–15-AR15, 13 March 2004; YuvalShany and Sigall Horovitz, '*Judicial Independence in The Hague and Freetown: A Tale of Two Cities*' (2008) 21 Leiden Journal of International Law, 113, 114.

Notably, in the *Chagos* advisory proceedings, the ICJ did not have to take any decision on disqualification as Judges Crawford and Greenwood, who had participated as counsel and arbitrator respectively in the related *Chagos Marine Protected Area*[852] arbitration, decided to recuse themselves even though neither Mauritius nor the United Kingdom had made any request to this effect.[853] In contrast, Judge Zaffaroni did not take such a step in the OC-28/21 proceedings, although he had announced at his presentation as legal advisor to Evo Morales that he would excuse himself immediately if the matter were to come before the Court.[854]

If the Court were to disqualify a judge in advisory proceedings, it would obviously face the problem of admitting that a proceeding is not entirely detached from a specific contentious case or dispute. Yet, this would not preclude the Court from rendering an abstract opinion that is generally applicable. The mere appearance that one judge of the Court might be biased to a certain extent weighs however more heavily, and should be prevented if possible.[855]

Even though the Court does not decide a specific case but "only" clarifies the law in an advisory opinion, and even if they are considered to be non-binding, advisory opinions still affect the interests of states and individuals, and the Court should avoid the impression that its clarification of the law appears to be biased by personal interests of one or more of its judges.[856]

852 *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*. For further information on this arbitral proceeding see: https://pca-cpa.org/en/cases/11/.

853 ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of the United Kingdom of 15 February 2018, para. 7.13.c; Zeno Crespi Reghizzi, 'The Chagos Advisory Opinion and the Principle of Consent to Adjudication' in Thomas Burri and Jamie Trinidad (eds), *The International Court of Justice and Decolonisation* (CUP, 2021), p. 62.

854 *'Evo Morales presentó a Zaffaroni como asesor legal'*, Página 12, 3 January 2020, available at: https://www.pagina12.com.ar/239612-evo-morales-presento-a-zaffaroni-como-asesor-legal; *Zaffaroni and Ferreyra to act as legal advisors to Evo Morales'*, Buenos Aires Times, 4 January 2020, available at: https://www.batimes.com.ar/news/argentina/zaffaroni-and-ferreyra-to-act-as-legal-advisors-to-evo-morales.phtml.

855 See the argumentation of Judge Buergenthal: ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 January 2004, Dissenting Opinion of Judge Buergenthal, I.C.J. Reports 2004, p. 7–10. As to the standard of 'reasonable appearance of bias' see also: ICTY, *Prosecutor v. Furundžija*, Judgment of 21 July 2000, Case No. IT-95–17/1-A, para. 189 and Shany and Horovitz (n 850) p. 113–129.

856 *Cf.*: Shany and Horovitz (n 850) p. 128.

Notably, some concurring and dissenting opinions attached to recent advisory opinions suggest that the voting behavior of some judges is influenced by their respective political opinion and maybe, even if unconsciously, also by the expectations of the respective nominating government in their home country.[857] This does not automatically mean that these judges should all have been excluded from these proceedings. Yet, it shows once again that even judges never decide entirely free of their social background and political stance which is why it is important not to negate this finding of social science but to keep it in mind when it comes to the design of procedural rules, as well as to procedural decisions.[858] A proceeding should be designed in a way that minimizes these effects in order to render the Court's decisions as impartial and neutral as possible.

One option that would definitely increase the independence and impartiality of the judges and that would free the Court from having to take such uncomfortable decisions as in the OC-28/21, would be to forbid the judges to work as agent, counsel or advocate in any legal proceeding before a national or international court while they are serving at the Court. While such a rule is stipulated by Article 17 (1) ICJ Statute, and while the ICJ has adopted an even stricter Practice Direction for *ad hoc* judges[859], the equivalent Article 18 of the Court's Statute only prohibits the judges to work as high-ranking officials for a government or international organization while they are serving at the Court. Of course, one could argue that the work as agent, counsel or advocate falls within the scope of Article 18 (1) lit. c of

857 See for example the Separate Opinion of Judge Vio Grossi attached to the OC-24/17, the dissenting votes of Judge Patricio Pazmiño Freire attached to the Order of Rejection of 29 May 2018 and to the OC-28/21 and the dissenting votes of Judge E. Raúl Zaffaroni attached to the OC-26/20 and the OC-28/21.

858 *Cf.*: Karl Larenz, *Richtiges Recht: Grundzüge einer Rechtsethik* (C.H. Beck, 1979) p. 167; Arthur Kaufmann, *Über Gerechtigkeit* (Carl Heymanns Verlag KG, 1993) p. 147–148; Rolf Lamprecht, *Vom Mythos der Unabhängigkeit – Über das Dasein und Sosein der deutschen Richter* (2nd edn Nomos, 1996) p. 176; von Bogdandy and Venzke, *'On the Democratic Legitimation of International Judicial Lawmaking'* (n 289) p. 1358; See for further references: Susanne Baer, *Rechtssoziologie* (3rd edn Nomos, 2017) p. 241.

859 In addition to Article 17 (1) ICJ Statute stating that "No member of the Court may act as agent, counsel, or advocate in any case", Article 16 ICJ Statute forbids the judges also to "engage in any other occupation of a professional nature". Practice Direction VII of the ICJ forbids judges *ad hoc* not only to work as agent, counsel or advocate in another case before the Court while they serving as judge *ad hoc* but forecloses the parties to nominate a person as judge *ad hoc* who has acted in such a capacity in the three preceding years.

the Court's Statute declaring that the "position of judge […] is incompatible with" any activity that "might prevent the judges from discharging their duties, or might affect their independence or impartiality […]".[860] However, the example of OC-28/21 shows that said provision is not applied that way.

Therefore, it would be desirable to amend Article 18 (1) of the Court's Statute so as to include the activity as agent, counsel and advocate among the positions that are incompatible with being a judge at the Court. This would complement and reinforce the regulation contained in Article 19 of the Court's Statute that – at least if the above demanded stricter standard was applied – prevents that judges participate in a decision in a matter in which they had been involved *before* becoming a judge or in which they have otherwise a direct interest. On the contrary, it does not seem necessary to extend the prohibition to work as agent, counsel or advocate to the years after the end of the judgeship, as Practice Direction VIII of the ICJ provides at least for proceedings before that very court.

Obviously, stricter rules on incompatibilities would require that the OAS member states finally secure the Court a sufficient funding to allow the judges to serve full-time, and not only part-time, and to be remunerated adequately.[861]

860 The text of Article 18 (1) of the Court's Statute states:
"Article 18. Incompatibilities
1. The position of judge of the Inter-American Court of Human Rights is incompatible with the following positions and activities:
a. Members or high-ranking officials of the executive branch of government, except for those who hold positions that do not place them under the direct control of the executive branch and those of diplomatic agents who are not
Chiefs of Missions to the OAS or to any of its member states;
b. Officials of international organizations;
c. Any others that might prevent the judges from discharging their duties, or that might affect their independence or impartiality, or the dignity and prestige of the office."

861 *Cf.* Lucas Sánchez and Raffaela Kunz, "'The Inter-American System has always been in crisis, and we have always found a way out'" – An Interview with Eduardo Ferrer Mac-Gregor Poisot", Völkerrechtsblog, 17 October 2016, available at: https://voelkerrechtsblog.org/de/the-inter-american-system-has-always-been-in-crisis-and-we-always-found-a-way-out/; Geir Ulfstein, 'Individual Complaints' in Hellen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies* (CUP, 2012), p. 81–82 for a related discussion as concerns the independence of Committee Members of the UN Treaty Bodies.

E. Written proceedings

When the Secretary notifies the OAS member states, the OAS organs and the public about a request for a new advisory opinion pending before the Court, it invites at the same time all interested entities and persons to file written observations. As regards proceedings in terms of Article 64 (2), the Presidency may proceed with the invitations only upon prior consultation with the agent.[862]

The deadline for the submission of written observations is often extended one time so that the interested parties have in total approximately five to six months of time for the submission of their written observations.[863] Sometimes the Court has decided to also consider submissions received after the expiry of the deadline[864] and sometimes it has declined to do so[865].

After the conclusion of the public hearing, the Court regularly receives additional briefs with final or complementary comments.[866]

As depicted by the graph below in *Figure 1*, the number of written briefs received by the Court has significantly increased over the years. The main reason for this increase is the growing number of non-governmental organizations, and the more open policy of the Court to involve them as well as other civil society actors like academic institutions and individuals.

While the important role of these *amici* will be addressed in more detail in the next section, the level of participation of OAS member states and OAS organs has more or less remained the same over the past forty years.

Especially the participation of OAS organs and specialized organizations has, except for the first advisory proceeding[867], constantly been very low. Normally, the Commission is the only organ that submits written observations to the Court. In the OC-10/89 proceeding, the Court regretted that not even the Commission had sent any written observations, and that

862 See Art. 73 (3) Rules of Procedure.

863 See e.g. OC-26/20 (n 24) para. 5; OC-25/18 (n 227) para. 5; OC-21/14 (n 320) para. 5; OC-27/21 (n 347) para. 5; OC-24/17 (n 1) para. 5.

864 OC-3/83 (n 245) para. 4.

865 OC-21/14 (n 320) para. 6.

866 OC-16/99 (n 227) paras. 19–22; OC-21/14 (n 320) para. 14; OC-25/18 (n 227) para. 10. In the case of OC-20/09 Guatemala and Barbados only submitted written observations after having participated in the oral hearing.

867 In the OC-1/82 proceedings participated the Permanent Council, the General Secretariat, the IACHR, the Pan-American Institute for Geography and History and the Inter-American Juridical Committee. Since then, never more than three OAS organs or specialized organizations participated in advisory proceedings.

it also did not send any representative to the public hearing.[868] In the proceedings of OC-17/02 and OC-21/14 concerning children's rights, the Inter-American Children's Institute participated as a specialized organization of the OAS. In the recent OC-27/21, the Inter-American Commission of Women as well as the Working Group of the Protocol of San Salvador participated next to the Commission, but it is doubtful whether this is a sign of a slowly increasing participation of other OAS organs and specialized organizations.

As regards OAS member states, their interest was relatively high in the beginning, then declined, and has increased again in the past years. Generally, their participation is higher in politically sensitive proceedings like the OC-16/99, the OC-24/17 or the OC-26/20. However, the relatively low participation in the OC-28/21 shows that there are also exceptions to this observation. Proceedings like the OC-1/82 or the OC-20/09, that concern the Court's jurisdiction and rules of procedure, have also provoked a higher participation of states.

Yet, considering the fact that the biggest number of participating states has been 10 and that there are in total 35[869] OAS member states, the level of participation has generally remained rather low. This phenomenon is however not unique to the IACtHR's advisory proceedings. In advisory proceedings before the ICJ, the number of participating states has to date also always been relatively low in relation to the total number of 193 UN member states.[870] Likewise, when the UN Treaty Bodies call on states to submit their points of view on a new General Comment they are working on, they only receive feedback from very few states.[871] Of course, General Comments that are issued *proprio motu* by the UN Treaty Bodies differ

868 OC-10/89 (n 348) para. 9.

869 Only 34 or 33 OAS member states if one considers that Venezuela's denunciation of the OAS Charta has become effective by now, and/or once the denunciation of Nicaragua has become effective. See for further information *supra*: (n 24) and (n 725). As can be seen in *Figure 1* below, it was the recent OC-29/22 proceeding in which ten states participated.

870 The highest number of participation by states as concerns the written phase was reached in the *Wall* opinion with 44. For an overview of the number of states participating in the written and oral phase in advisory proceedings before the ICJ see: Aljaghoub (n 63) p. 135–136.

871 See for instance the relatively low participation of states in the drafting process of General Comment 36 of the Human Rights Committee compared to the large share of comments received from representatives of civil society: https://www.ohchr.org/en/calls-for-input/days-general-discussion-dgd/general-comment-no-36-article-6-right-life. See furthermore the low number of written contributions received by

from advisory opinions rendered by courts at the request of an authorized entity, but the two processes can be compared at least in so far as states have in both situations the opportunity to express their point of view on a certain issue of international law, and one could expect that more states would be willing to seize this opportunity.

Given that the Court nowadays invites any interested party to submit written observations, theoretically also African, Asian or European states could participate in the advisory proceedings. So far however, this has never happened. In the proceeding of OC-25/18, it would have been interesting to hear the opinion of the United Kingdom on the matter that was obviously related to the case of Julien Assange, who was then still staying inside the Ecuadorian Embassy in London.

On the one hand, the filing of a submission would have allowed the United Kingdom to present its point of view. One could argue that the UK should have cared as the IACtHR's final opinion qualifies as a judicial decision[872] in terms of Article 38(1) lit. d ICJ Statue, and thus as subsidiary means for the determination of the rules of international law. But of course, any substantive submission by a non-member state would create the impression that the state – at least to a certain degree – recognizes the Court's final opinion although it has no jurisdiction whatsoever over it. Therefore, it is unlikely that non-member states will in future decide to participate in an advisory proceeding before the IACtHR. Rather they will demonstratively ignore a proceeding even though the issues dealt with might concern them directly or indirectly.

Given that the number of participating states will consequently never rise as much as the number of participating NGOs, academic institutions and individuals, the share of submissions coming from states will remain comparatively low in the long term.

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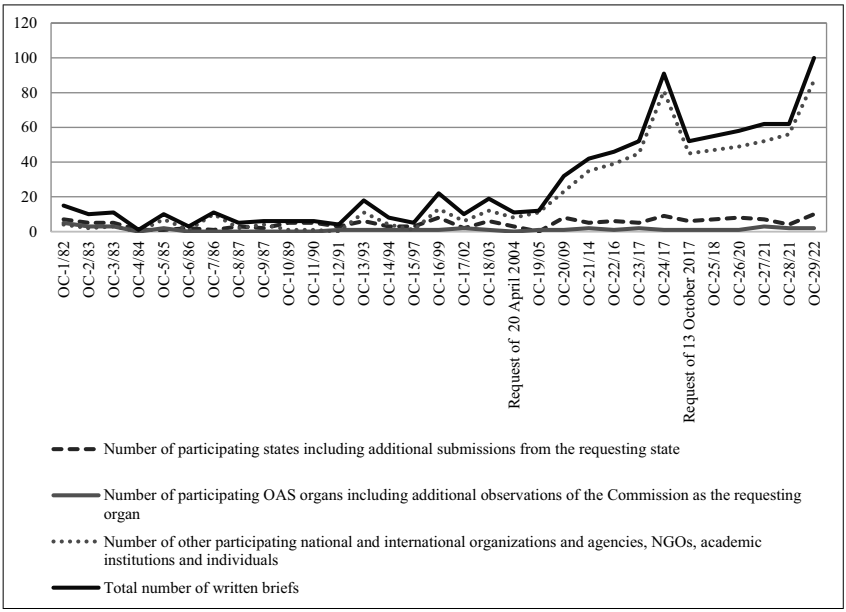
the Committee on Economic, Social and Cultural Rights on the planned General Comment on Land and Economic, Social and Cultural Rights: https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCR-draft-GC-land.aspx.

872 Strictly speaking advisory opinions might not be considered to fall under the term "decisions" but generally, Article 38(1) lit. d ICJ Statute is understood to encompass all international jurisprudence, including advisory opinions. In fact, an earlier draft of that article used the expression "international jurisprudence". The change to "decisions" is held to have been "purely terminological". See Alain Pellet and Daniel Müller, 'Art. 38', in Andreas Zimmermann *et al.* (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn OUP, 2019) mn 309.

Figure 1: Level of participation in written proceedings



Note: The data shown in the chart was collected by the author from the information shared in the advisory opinions and from archives obtained from the Court. Especially as regards the first advisory opinions, there is no guarantee that the data are complete, but the trend of an increasing participation of amici is undisputable. As regards the more recent advisory opinions, the written observations are also published on the Court's website.

F. Role of amici

Although neither the ACHR nor the first version of the Court's Rules of Procedure explicitly mentioned *amicus curiae*, the Court has from the very first advisory proceeding onwards always accepted the filing of *amicus* briefs by interested third parties.[873]

Thereby, it followed the example of the PCIJ that had in its first advisory proceeding decided to hear the views of any unofficial organization that

873 Charles Moyer, 'The Role of Amicus Curiae in the Inter-American Court of Human Rights' in Daniel Zovatto (ed), *La Corte Interamericana de Derechos Humanos: Estudios y Documentos* (IIDD, 1985) p. 104.

wanted to be heard.[874] In contrast, the ICJ has only in one instance allowed a non-governmental organization to make submissions in an advisory proceeding.[875] Apparently, the ICJ tends to limit the term "international organization" contained in Article 66 (2) ICJ Statute to *public* international organizations, although the wording of Article 66 (2) ICJ Statute remained the same as in the PCIJ Statute, and differs from Article 34 (2) ICJ Statute which speaks explicitly of "public international organizations".[876]

The ECtHR modified its Rules to permit *amicus* briefs only in 1983, and thus after the start of the first advisory proceedings before the IACtHR.[877]

Like the whole tradition of advisory opinions[878], the instrument of *amicus curiae* briefs has also become popular mainly under the common law system, although it was also already known under Roman law.[879] Therefore, it was not self-evident that the first judges, who almost all came from civil law countries, were open to this procedural feature.[880] But the decision to accept them has been proven to be very important both to furnish the Court with relevant information and views on the respective topic, and also to augment the final opinions' legitimacy and their integrative effect.[881]

Buergenthal saw the legal basis for the brief's acceptance by the Court in Article 34(1) of the Court's first Rules of Procedure from 1980, according to which the Court was allowed to hear "any person whose testimony or

874 PCIJ, *Designation of the Worker's Delegate for the Netherlands at the Third Session of the International Labor Conference*, Advisory Opinion of 31 July 1922, Series B, No. 1, p. 11; Moyer (n 873) p. 111; Keith (n 67) p. 189.

875 ICJ, *International Status of South-West Africa*, Advisory Opinion of 11 July 1950, I.C.J. Reports 1950, p. 128, 130; Andreas Paulus, 'Art. 66', in Andreas Zimmermann *et al.* (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn OUP, 2019) mn. 18. Notably, in the pending advisory proceedings on *Obligations of States in Respect of Climate Change*, the ICJ authorized the International Union for Conservation of Nature which has among its members both governmental and civil society organizations to participate in the proceedings. See: ICJ, Press Release No. 2023/29 of 14 June 2023.

876 Andreas Paulus, 'Art. 66', in Andreas Zimmermann *et al.* (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn OUP, 2019) mn 18.

877 Moyer (n 873) p. 112.

878 As to the history of advisory opinions in particular in the Anglo-American legal tradition see Chapter 2.

879 Moyer (n 873) p. 111.

880 Moyer (n 873) p. 112.

881 Moyer (n 873) p. 112; David J. Padilla, '*The Inter-American Commission on Human Rights of the Organization of American States: A Case Study*' (1993) 9(1) American university Law Review, 95, 111; *cf.*: von Bogdandy and Venzke, '*On the Democratic Legitimation of International Judicial Lawmaking*' (n 289) p. 1366.

statements seem likely to assist it in carrying out its functions" and which was pursuant to Article 53 of the first Rules of Procedure[882] also applicable in advisory procedures.[883]

The Court's acceptance of *amicus briefs* has steadily been broadened. At first, most *amicus briefs* stemmed from well-known international human rights NGO's that were experienced in presenting *amicus briefs* before domestic courts in the United States.[884] In the first advisory opinion sought under Article 64 (2) the Court decided on its own motion to hear – in addition to representatives of the requesting state Costa Rica – a law Professor of the University of Costa Rica, and thus an individual in its private capacity. Article 54 (3) of the 1991 Rules of Procedure for the first time explicitly stated that the "President may invite or authorize any interested party to submit a written opinion on the issue covered by the request". It was at the same time that the Court also broadened its policy towards the appearance of *amici* in the public hearings.

Today, the convocation and invitation to participate is as broad as possible, and any *amici* who has submitted written observations to the Court is also invited to the public hearing.

Frequently, not only regional institutions and citizens from the Americas participate, but also NGOs, academic institutions and interested individuals from all over the world. Also United Nations entities such as the United Nations High Commissioner for Human Rights or the United Nations High Commissioner for Refugees, or international organizations like the International Organization for Migration or the International Labor Organization may participate depending on the subject matter of the request.[885]

As *Figure 1* above depicts, the number of participating *amici* has increased constantly over the years, reaching its current peak in the OC-29/22 proceeding with 87 different institutions, NGOs, agencies and individu-

882 Today Article 74 Rules of Procedure. As to the text of Article 74 of the current Rules of Procedure see *supra* (n 308).

883 Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court* (n 41) p. 15. See also: Moyer (n 873) p. 104. In the current Rules of Procedure, Article 44 explicitly allows for the submission of *amicus curiae* briefs.

884 Moyer (n 873) p. 111, 113.

885 For example, the UN High Commissioner for Human Rights participated in the OC-24/17 proceeding and the UN High Commissioner for Refugees participated in the proceedings of OC-25/18, OC-21/14 and OC-18/03. A regional office of the IOM participated in the OC-21/14 and the ILO submitted written observations in the OC-27/21 proceedings. Also in the OC-29/22 proceedings, several representatives of UN agencies participated. See OC-29/22 (n 275), paras. 6, 9.

als.[886] The constant rise over the years can be explained by the growing number of NGOs and by the broader publication of the pending requests by the Court.

Furthermore, the extremely high participation in the OC-24/17 and OC-29/22 proceedings indicates that the matters of gender identity and rights of same sex couples, as well as of differentiated approaches to persons deprived of liberty, were of extraordinarily high public interest.

While the number of NGOs and the willingness to participate of both NGOs and other civil society groups has significantly increased, the number of OAS member states that could participate has remained the same. This raises the question of how much weight the Court attaches to the different types of submissions, since if it were to give each submission equal weight, irrespective of the authorship, the *briefs* by entities other than states would always be in the majority.

The fact that the Court rejected the Commission's request on democracy and human rights in the context of impeachment after four of the six participating states and only two of the 47 participating *amici* had argued that the Court should abstain from answering the request, might indicate that the Court still gives special weight to written contributions from states irrespective of their relatively low number.

Nevertheless, the high numbers of contributions from civil society – that normally tend to argue in favor of more liberal positions on human rights protection than submissions from states do[887] – have influence on the Court and may encourage it to adopt very bold and progressive positions. It is, however, not carved in stone that contributions from *amici* will always try to influence the Court in that direction. Instead, it is imaginable that

886 All written observations submitted in the OC-29/22 proceeding can be found here: https://www.corteidh.or.cr/observaciones_oc_new.cfm?lang=es&lang_oc=es&nId_oc=2224; the submissions made in the oral hearings can be accessed here: https://www.youtube.com/watch?v=xymLQkRqLbU, Audiencia pública de la Solicitud de Opinión Consultiva sobre Enfoques Diferenciados. Parte 2 – YouTube, https://www.youtube.com/watch?v=enLUuflLie0, https://www.youtube.com/watch?v=Ik4B9d4NQJA and here https://www.youtube.com/watch?v=bYuyqA9HK1w.

887 This impression is not only evinced by the study of the *amicus curiae* briefs received by the IACtHR in advisory proceedings. It has been noted that civil society generally shows "a greater sensibility for social and ecological questions when compared with actors at the centre of international political decision-making". See: von Bogdandy and Venzke, '*On the Democratic Legitimation of International Judicial Lawmaking*' (n 289) p. 1366 with further references.

more conservative movements will discover the tool of *amicus briefs* for their strategic campaigning, too.

As it seems to be difficult to adopt criteria by which abusive submissions could be rejected in an objective way, it is all the more important that the Court adopts, irrespective of its composition, internal criteria for how to evaluate the content of submissions from *amici*. Whereas some briefs may contain very useful legal thoughts and arguments, others rather illustrate personal misery, and still others may be clearly politically motivated.

Overall, the open interaction with civil society makes the Court more approachable to individuals and thus to the actual holders of human rights. Furthermore, the participation of both states, OAS organs and of diverse groups from civil society, enables the Court to correctly assess the existing positions on the subject as well as to anticipate possible political implications. Thus, it allows the Court to prepare its final advisory opinion on a broad basis of information which increases the epistemic value of the advisory opinions.[888] At the same time, high levels of participation in the advisory proceeding increase the democratic legitimacy of the final advisory opinion.[889]

Nevertheless, the Court should be cautious not to allow the growing number of submissions from civil society to overwhelm its resources at some point. Lastly, the sheer number of submissions from civil society should not lead the Court to abandon the rules of international law and treaty interpretation. That is, even if the submissions might tempt the Court to broaden the subject matter of a request, it should be mindful of the principle of *non ultra petita*.[890] Finally, the basis for any legal finding should still remain the text of the Convention, or other treaty concerning the protection of human rights in the Americas, and not wishes articulated in *amicus curiae* briefs that lack any legal basis.

888 *Cf.*: Diana P. Hernández Castaño, *Legitimidad democrática de la Corte Interamericana de Derechos Humanos en el control de convencionalidad* (Universidad Externado de Colombia, 2014) p. 124 with further references as to the effect citizen participation has on the epistemic value of the Court's decisions.

889 *Cf.*: von Bogdandy and Venzke, *In Whose Name?: A Public Law Theory of International Adjudication* (n 19) p. 178–183; *idem*, '*On the Democratic Legitimation of International Judicial Lawmaking*' (n 289) p. 1366; on the correlation between citizen participation and democratic legitimacy see as well: Hernández Castaño (n 888) p. 122–127.

890 On this see also *supra*: Chapter 3, Section C.II.

G. Public hearing

When the deadline for the submission of written observations has expired, the Court may decide pursuant to Article 73 (4) Rules of Procedure whether to convene a hearing or not. If it decides to hold oral proceedings, the hearing must be public, "unless the [Court] deems it appropriate" to hold a private hearing.[891] The task of setting the date for the hearing may be delegated to the Presidency. Only in cases under Article 64 (2) is prior consultation with the Agent required.

Whereas the Court from the outset, always received written submission from *amici*, as concerns the first public hearings, only OAS member states and OAS organs were invited. In the first advisory proceeding under Article 64(2) the Court was not required under the Rules of Procedure in effect at the time to notify the other OAS member states and organs. Instead, it decided on its own motion to hear the opinions of the different branches of the state of Costa Rica. Among the invited groups was, in addition to representatives of the government and the Legislative Assembly, also a law Professor of the University of Costa Rica.[892] This was the first time that a representative of a civil society institution spoke at a public hearing before the IACtHR.

In the following OC-5/85, after consultation with the requesting Costa Rican government, the Court invited the Inter-American Press Association and the *Colegio de Periodistas* of Costa Rica to the hearing.[893]

It was only when the 1991 Rules of Procedure had entered into force, that the Court began to regularly invite other interested parties than just OAS member states and OAS organs to appear in the public hearing. Although Article 54 (3) of the new Rules of Procedure only broadened the circle of parties which the President could invite to file written submissions, the Court also began to change its practice of invitations to public hearings.[894]

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891 Art. 15 (1) Rules of Procedure of the IACtHR; Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 74. During the Covid-19 pandemic, the Court started holding its public hearings online via Zoom. The sessions are broadcast via livestream on platforms like Facebook and YouTube.

892 OC-4/84 (n 233) paras. 4–6; Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 75.

893 OC-5/85 (n 363) para. 7; Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 75.

894 Art. 54 (3) Rules of Procedure of 1991 stated: "The President may invite or authorize any interested party to submit a written opinion on the issues covered by the

In the OC-13/93 proceedings, the President, having consulted with the Permanent Commission of the Court, authorized three international organizations to appear in the public hearing.[895] The requests from other national and regional non-governmental organizations to participate in the oral hearing had however been declined by the Court.[896] It was argued that it was impossible to hear all the numerous national and regional NGOs. Furthermore, it was said that the right to appear in public hearings was exceptional, and that the fact that the Court allowed selected organizations to participate once did not create any precedent that would bind the Court to do so in every future proceeding.[897]

However, it did not take long for the Court to change its opinion on this. Since the OC-15/97 proceedings, the Court has moved towards inviting all those who participated in the written procedure to the hearing without any restriction.[898] As regards OAS member states and organs, they may always appear at the public hearing even if they have not filed any written observations.[899]

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request. If the request is governed by Article 64(2) of the Convention, he may do so after consulting with the Agent." Until today, the Rules of Procedure do not explicitly regulate whom the Court may invite to participate in public hearings in advisory proceedings.

895 OC-13/93 (n 595) para. 11.

896 Letter of the Secretary of the Court to Ms. María Luisa Turon de Toledo and Dr. Juan Carlos Wlasic, representatives of Familiares – Madres y Abuelas de Detenidos Desaparecidos of 28 October 1992, OC-13/93 proceedings; Letter of the Secretary of the Court to Ms. María de Ignace and Dr. Juan Carlos Wlasic, representatives of Federación Latinoamericana de Asociaciones de Familiares de Detenidos Desaparecidos of 3 November 1992, OC-13/93 proceedings [both letters only available in Spanish].

897 Letter of the Secretary of the Court to Ms. María Luisa Turon de Toledo and Dr. Juan Carlos Wlasic, representatives of Familiares – Madres y Abuelas de Detenidos Desaparecidos of 28 October 1992, OC-13/93 proceedings; Letter of the Secretary of the Court to Ms. María de Ignace and Dr. Juan Carlos Wlasic, representatives of Federación Latinoamericana de Asociaciones de Familiares de Detenidos Desaparecidos of 3 November 1992, OC-13/93 proceedings [both letters only available in Spanish].

898 OC-15/97 (n 300) para. 20; OC-16/99 (n 227) para. 8; OC-28/21 (n 274) para. 7.

899 For example, in the OC-18/03 proceedings, several states like Brazil, Peru and Argentina appeared in the oral hearing without having filed written observations. In the OC-21/14 proceedings, Nicaragua had sent its written observations too late and was told that it could present its arguments at the public hearing. Likewise, in the OC-23/17 proceedings Guatemala only appeared in the public hearing where it advised the Court that it was necessary to consider the implications of the

In the OC-18/03 proceedings, the Court issued an order stating that persons and organizations who had not sent any written observations could also participate in the hearing if they had accredited accordingly with the Court.[900] Due to the larger number of participants, the oral hearings have become longer, sometimes lasting up to three days.

So far, the Court has never declined to render an advisory opinion on the merits after a public hearing had taken place in the respective matter. Thus, the fact that a public hearing is convened is a strong indicator that the Court is going to issue a final opinion.

Normally, the Court holds a public hearing in every advisory proceeding. Only in a few exceptional cases did the Court decide otherwise. In the case of the OC-9/87, a public hearing had already been convened, but upon request of the requesting government of Uruguay, the hearing was suspended.[901] After the Court had received precisions on the request from the government through written communication, it held that it was not necessary to set the date for another hearing.[902]

In the case of OC-12/91, no hearing has taken place either. Yet, as noted above, in that proceeding the Court declined to render an opinion on the merits, which is why OC-12/91 should actually not be counted as advisory

proceeding to the state of Nicaragua. See: OC-21/14 (n 320) para. 6; OC-23/17 (n 4) para. 25.

900 OC-18/03 (n 227) para. 36.

901 Telex of the President of the Court to the Foreign Minister of Uruguay, 1 April 1987, , available at: http://hrlibrary.umn.edu/iachr/B/9-esp-2.html; Reply of the Foreign Minister of Uruguay to the President of the Court, 24 April 1987,available at: http://hrlibrary.umn.edu/iachr/B/9-esp-3.html; Telex of the Foreign Minister of Uruguay to the President of the Court, 12 June 1987, available at: http://hrlibrary.umn.edu/iachr/B/9-esp-10.html; Reply of the President of the Court to the Foreign Minister of Uruguay, 16 June 1987, available at: http://hrlibrary.umn.edu/iachr/B/9-esp-11.html.

902 Reply of the President of the Court to the Foreign Minister of Uruguay, 16 June 1987, available at:http://hrlibrary.umn.edu/iachr/B/9-esp-11.html; Telex of the government of Uruguay of 22 September 1987, available at:http://hrlibrary.umn.edu/iachr/B/9-esp-12.html; OC-9/87 (n 366) para. 12. Unfortunately, para. 12 of the English version of the opinion does not correspond to the Spanish one. In the English version it sounds as if the hearing had taken place and had been "continued" upon request of the government. Yet, the President of the Court had told the government in his telex of 22 September 1987 that in consequence of the government's request for suspension there would be no public hearing at all due to the schedule and workload of the Court ("en consecuencia no se celebrará una audiencia"). As the Spanish version of the opinion depicts this bilateral correspondence correctly, it is taken as the original one and the English translations understood to be inaccurate.

opinion, but as the first case of rejection.[903] Hence, the OC-12/91 is one example for the rule that the Court is likely to reject a request if it does not convene a public hearing.

The only other case in which the Court issued a final opinion without having convened a public hearing was that of OC-19/05. After examining the briefs received, the President, upon consultation with the other judges, decided not to convene a hearing as none of the OAS member states had submitted any written observations.[904] Instead, the Court permitted the Commission and the persons and institutions that had submitted written observations to send additional written observations.[905]

Against the backdrop of the examples of OC-9/87 and OC-19/05, one can assert that the availability of the requesting entity and the level of interest shown by other states are decisive factors for the evaluation of whether to hold a public hearing or not. Yet, there is no fixed rule. In the end, the Court's decision whether to convoke a hearing or not will in each case depend on the specific circumstances of the case.

Given that the Court in advisory proceedings is actually called to interpret abstract legal norms and not to decide disputed facts, one could hold that it was not strictly necessary to hear the opinion of states, OAS organs and the public.[906] The Court itself should know the relevant law, or in any event, the written submissions should suffice to become aware of all pertinent issues related to a request.[907]

Yet, the public hearings are important.[908] On the one hand they allow the judges to ask questions and to hear testimonies of affected persons directly. But even more importantly, they create a public forum of deliberation of often very relevant and topical legal issues in which the whole region has an interest. While the written submissions are only published when the advisory opinion has already been given, the hearing makes the arguments of the respective states, organs and civil society groups transparent, and

903 See *supra*: Chapter 4, Section C.I.1. first rejection.
904 OC-19/05 (n 612) para. 12.
905 OC-19/05 (n 612) para. 12.
906 *Cf.*: Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 74.
907 *Cf.*: Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 74.
908 *Cf.*: With regard to the ICJ: Aljaghoub (n 63) p. 139.

how this could influence the Court's deliberations, thereby, increasing the democratic legitimacy of the whole advisory proceeding.[909]

Especially as regards NGOs and private individuals that may not themselves initiate advisory proceedings, the chance to appear before the Court in the public hearing provides them and their arguments with greater visibility. Against the backdrop of the history of international law and the practice of other international courts before which individuals still have no right to speak in their own name and cause, the involvement of civil society in international proceedings is still not a matter of course. The right to appear in the public hearing allows, for example, NGOs to directly refer to arguments brought forward by states, which would be more difficult if they could only react by way of written submission.

H. Delivery and publication of the final advisory opinion

After the public hearing, and at the end of the written proceedings, the Court deliberates and takes its final decision. The advisory opinions are not always delivered in a chronological manner. For instance, the OC-8/87 was delivered before OC-9/87 even though the request for OC-9/87 had been made before the request for OC-8/87.[910]

After the Court has adopted the final text, the advisory opinion is not immediately published. The Court always undertakes a final internal review of the opinion's text in order to double check the correctness of its formulations. Furthermore, the judges who want to add a concurring or dissenting opinion may need some additional time. Therefore, the advisory opinions are commonly published several weeks or months after the official date of their delivery.

Like the delivery, the publication may also not always occur in a chronological manner. For example, OC-24/17 was published one month before

909 For more information how public hearings contribute to the democratic legitimacy of courts see: von Bogdandy and Venzke, *In Whose Name?: A Public Law Theory of International Adjudication* (n 19) p. 172–175 and *idem*, *'On the Democratic Legitimation of International Judicial Lawmaking'* (n 289) p. 1362–1364.

910 While the Commission requested OC-8/87 on 10 October 1986, Uruguay had submitted its request for OC-9/87 already on 17 September 1986.

OC-23/17 even though the latter had been adopted by the Court a few days before OC-24/17.[911]

Article 75 (4) of the Court's Rules of Procedure still provides for the possibility that advisory opinions are delivered in public, but in practice the Court has abandoned its earlier practice to read out loud its advisory opinions in open Court.[912] Today, the Court notifies the requesting party, publishes the final advisory opinion on its website, and disseminates a press release containing a summary of the most important findings made in the opinion.[913]

Whereas the publication of an advisory opinion is often eagerly awaited by the requesting entity and also by other interested groups, the specific point in time at which a certain opinion is published is normally not very decisive. However, the case of OC-24/17 highlights that the publication date of an advisory opinion may indeed become very important, and that the Court – not only as regards the acceptance of requests and the content of its opinions but also as concerns the formal publication – should be very well aware of what is going on outside its *Casa Blanca*.

This advisory opinion, which had been requested by the Costa Rican government of former President Luis Guillermo Solís on the politically very sensitive topic of gender identity and patrimonial rights of same sex couples, was published on 9 January 2018 in the midst of the then running presidential election campaign in Costa Rica.[914] The publication of the opinion caused such a spin in the election campaign that the date of the 9th January was marked explicitly in the polls.[915] It allowed the fundamental Evangelist Fabricio Alvarado Muñoz of the Partido Restauración Nacional to win the first round of the elections.[916] Upon the publication of the very

911 While the OC-24/17, adopted on 24 November 2017, was published on 9 January 2018, OC-23/17, adopted on 15 November 2017, was only published on 7 February 2018.

912 Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 76.

913 *Ibid.*

914 See the Court's press release of that day: https://www.corteidh.or.cr/docs/comunicados/cp_01_18.pdf.

915 See: *'Carlos Alvarado e indecisos son los únicos que crecen en incierto cierre electoral'*, Semanario Universidad, 31 January 2018, available at: https://semanariouniversidad.com/pais/carlos-alvarado-e-indecisos-los-unicos-crecen-incierto-cierre-electoral/.

916 As to the results of the first round of the elections see: Tribunal Supremo de Elecciones, *Compúto de votos y declaratorias de elección 2018*, p. 24, available at: https://www.tse.go.cr/pdf/elecciones/computovotos_febrero_abril_2018.pdf; for

liberal and progressive opinion, he made the question of same sex marriage the central theme of the continuing election campaign, and announced that he would withdraw the country from the ACHR and maybe also from the OAS, so that Costa Rica would no longer be subject to the Court's jurisdiction.[917] Thus, if Fabricio Alvarado Muñoz had also won the run-off ballot and become President, this would have not only barred the opinion's implementation in Costa Rica, but would have had also direct negative effects on the Court and the inter-American human rights system as a whole. This is especially true given that the Court has since its beginnings had a very close and special relationship with its host state Costa Rica.

What is more, the publication date shortly before the elections, as well as the fact that OC-24/17 was published before OC-23/17, and that the government held a direct press conference on the day of the opinion's publication, gave rise to speculations on social media whether the government had somehow influenced the date of the opinion's publication in order to allow the governing party to use it for their election campaign.[918] The Court

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the impact, the publication had on the election campaign see: *'La Corte notificó al Gobierno opinión sobre matrimonio gay el 8 de enero, no antes'*, La Nacion, 14 February 2018, available at: https://www.nacion.com/el-pais/politica/corte-idh-notifico-al-gobierno-opinion-sobre/LC2CYZUG4JDAVIJDWIYA2CZJPM/story/; *'Las ideas de Fabricio Alvarado sobre la Corte IDH, puestas a prueba'*, Semanario Universidad, 3 February 2018, available at: https://semanariouniversidad.com/pais/ideas-fabricio-alvarado-sobre-corte-idh-puestas-a-prueba/; *'Carlos Alvarado e indecisos son los únicos que crecen en incierto cierre electoral'*, Semanario Universidad, 31 January 2018, https://semanariouniversidad.com/pais/carlos-alvarado-e-indecisos-los-unicos-crecen-incierto-cierre-electoral/.

917 *'Fabricio Alvarado dispuesto a salirse de la Corte IDH para. que no le 'impongan' agenda LGBTI'*, Elmundo.cr, 11 January 2018, available at: 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, available at: https://semanariouniversidad.com/pais/ideas-fabricio-alvarado-sobre-corte-idh-puestas-a-prueba/.

918 *'La Corte notificó al Gobierno opinión sobre matrimonio gay el 8 de enero, no antes'*, La Nacion, 14 February 2018, available at: https://www.nacion.com/el-pais/politica/corte-idh-notifico-al-gobierno-opinion-sobre/LC2CYZUG4JDAVIJDWIYA2CZJPM/story/; Nicolas Boeglin, *'Mucho más que una respuesta a Colombia: a propósito de la Opinión Consultiva OC-23 de la Corte Interamericana de Derechos Humanos sobre ambiente y derechos humanos,'* 24 February 2018, available at: https://derechoaldia.com/index.php/derecho-ambiental/ambiental-doctrina/981-mucho-mas-que-una-respuesta-a-colombia-a-proposito-de-la-opinion-consultiva-oc-23-de-la-corte-interamericana-de-derechos-humanos-sobre-ambiente-y-derechos-humanos; *Idem*, *La opinión consultiva de la Corte IDH sobre derechos de la comunidad LGBTI en Costa Rica: balance y perspectivas*, 23 January 2018, available at: https://www.pres

had to confirm that it had notified the government only the day before the official publication and not earlier, and had to explain that it was normal that advisory opinions were only published several weeks after the Court had adopted the text of the advisory opinion.[919]

In fact, the candidate of the governing Partido Acción Ciudadana, Carlos Alvarado Quesada, started to gain more approval after the opinion's publication. He managed to gain the support of youth and supporters of LGBTIQ* rights especially, not least thanks to a successful social media campaign.[920] While he had still been ranked around six percent in the polls of early January, he gained 21,6 % in the first electoral round, and managed to win the second ballot against Fabricio Alvarado Muñoz.[921]

Despite this in the end fortunate outcome, the course of the election campaign and the discussions the publication of OC-24/17 provoked, show that the Court should choose the date of publication of future advisory opinions more carefully. The Court should have anticipated the possible effect the opinion's publication might have on the election campaign, as well as the arising questions concerning its own independence, and should have therefore waited with the publication of OC-24/17 until after the closure of the final electoral round in order to avoid a direct intervention in an internal democratic process.

The lesson to be learned from this example is that the Court must be aware of possible side-effects of the publication of its advisory opinions and should abstain from publishing opinions shortly before decisive elections, especially if these are held in the requesting state and when the opinion

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senza.com/es/2018/01/la-opinion-consultiva-de-la-corte-idh-sobre-derechos-de-la-comunidad-lgbti-en-costa-rica-balance-y-perspectivas/.

919 *'La Corte notificó al Gobierno opinión sobre matrimonio gay el 8 de enero, no antes'*, La Nacion, 14 February 2018, available at: https://www.nacion.com/el-pais/politica/corte-idh-notifico-al-gobierno-opinion-sobre/LC2CYZUG4JDAVIJDWIYA2CZJPM/story/.

920 Álvaro Murillo, '*Elecciones 2018 en Costa Rica: los medios de comunicación llevados al límite*', FES Comunicación 3/2018, p. 7, available at: https://library.fes.de/pdf-files/bueros/la-comunicacion/14641.pdf; *'El papel de las redes sociales en la contienda electoral'*, Hoy en el Tec, 23 March 2018, available at: https://www.tec.ac.cr/hoyenelitec/2018/03/23/papel-redes-sociales-contienda-electoral

921 See: *'Carlos Alvarado e indecisos son los únicos que crecen en incierto cierre electoral'*, Semanario Universidad, 31 January 2018, available at: https://semanariouniversidad.com/pais/carlos-alvarado-e-indecisos-los-unicos-crecen-incierto-cierre-electoral/; Tribunal Supremo de Elecciones, *Compúto de votos y declaratorias de elección 2018*, p. 20, available at: https://www.tse.go.cr/pdf/elecciones/computovotos_febrero_abril_2018.pdf.

concerns highly controversial matters. This is not only in order to protect its own neutrality, and to avoid external interference in domestic politics, but also in order to prevent political backlash against the Court.

I. Average length of the advisory proceedings

The first chart below depicts the length of the advisory proceedings in which the Court issued a final advisory opinion on the merits. Unsurprisingly, the proceedings have become longer over the years. In the beginning, the Court had no contentious cases to deal with so that it could dedicate its entire time on the pending advisory proceedings. Moreover, the matters dealt with in the early proceedings were less complex than the later ones. Not least, the more open policy towards the inclusion of *amici* constitutes yet another factor prolonging the advisory proceedings.

The extraordinary length of more than three years in the OC-21/14 proceeding can be explained by the fact that the proceeding was, upon the request of Argentina, Uruguay and Brazil, interrupted for almost a year due to the political crisis surrounding the impeachment of former President Fernando Lugo in the fourth requesting state Paraguay in June 2012.[922]

As shown by the second chart, the decision of the Court to reject a request for an advisory opinion may come promptly, after just one month, or take over a year, depending on whether the Court first calls for written submissions or rejects the request immediately.

The average length of the proceedings in which the Court renders a final advisory opinion is currently 15.68 months. In comparison, the average time to process contentious cases was 24 months in 2022.[923] Notably, this is just the average time the contentious cases are pending before the Court. The time the petitions had been pending before the Commission beforehand, is not included.

Hence, even though also advisory proceedings take much longer today than in the beginning, it still takes significantly longer for an individual complaint to be settled in the form of a judgment after having first passed

922 OC-21/14 (n 320) paras. 8–10. As to the political crisis in Paraguay see: '*Paraguay's President Fernando Lugo faces impeachment*', BBC News, 21 June 2012, available at: https://www.bbc.com/news/world-latin-america-18535552.

923 In 2017 the average time had been 24,7 months, since then the time had constantly been reduced up to 19.03 months in 2020, but now it has risen again. See: IACtHR, Annual Report 2022, p. 67.

the stage at the Commission, than to process a request for an advisory opinion. This fact is also one of the reasons that might make it more attractive to states to request an advisory opinion of the Court than to file an inter-state complaint in terms of Article 45.

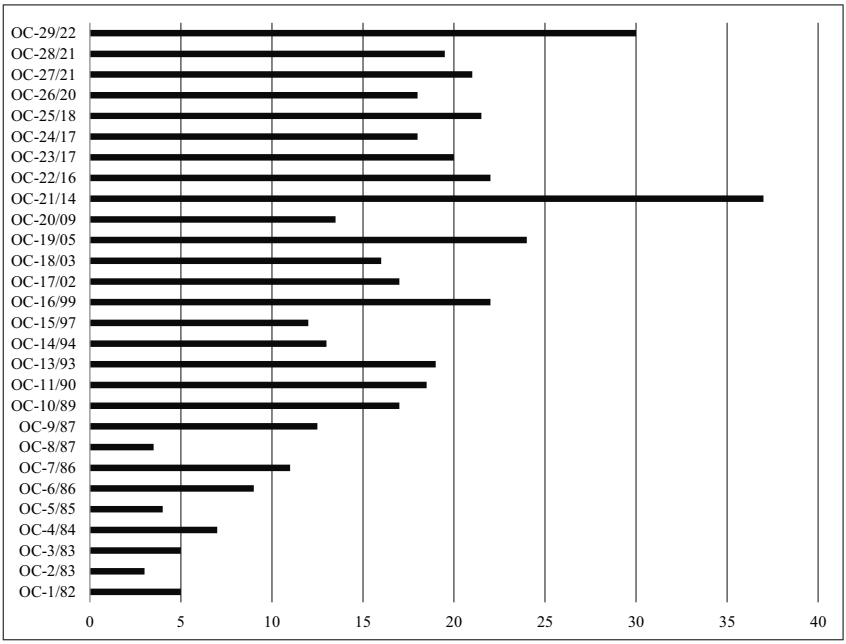
What is more, the shorter proceeding may be one argument in favor of processing an advisory opinion request despite the fact that there are related petitions pending before the Commission.

For example, the complaints regarding LGBTIQ* rights in Costa Rica had already been pending before the Commission when the then Costa Rican government decided to request an advisory opinion of the Court, and when the Court issued the final OC-24/17, the petitions had still not even been transferred to the Court by the IACHR. Thus, while a petitioner had asked the Court to reject the request, as rendering it would infringe on his procedural rights, when the OC-24/17 was published he gained a strong argument in favor of his cause even before his individual complaint had been further processed.[924]

This shows that one measure to prevent requests for advisory opinions that actually circumvent the contentious jurisdiction is to further accelerate the contentious proceedings, and to allow more topical complaints to reach the Court.

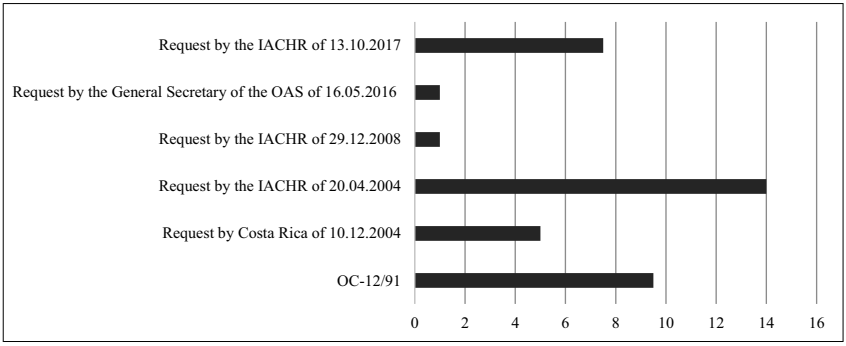
924 *Cf.*: *Amicus curiae* brief of Yashín Castrillo Fernández, OC-24/17 proceedings, available at: http://www.corteidh.or.cr/sitios/observaciones/costaricaoc24/21_castrillo_fernandez.pdf. In 2020, the Commission only published the decision on the admissibility of his individual petition: IACHR, *Informe No. 166/20: Petición 2090–12, Informe de Admisibilidad Yashín Castrillo Fernández y e.n.l. Costa Rica*, OEA/Ser.L/V/II., Doc. 176, 17 June 2020.

Figure 2: Length of the advisory proceedings in months



Note: The author counted the date the requests were made as the starting point and the date of the advisory opinion as the final date. Thus, the months in between the date of the decision and the date of the publication of the advisory opinion were not counted.

Figure 3: Length of the proceedings ending with rejection in months



Note: The author counted the date the requests were made as the starting point and the date of the order of rejection as the final date. Thus, the months in between the date of the decision and the date of the publication of the order of rejection were not counted.

J. Proposals to reform the procedure

Since the Court began its advisory practice, the advisory procedure has constantly been developing. As was described in the last sections, especially the involvement of civil society has increased. The written submissions are now available on the Court's website, and the hearings are streamed online, which has both increased transparency and publicity.

But there are other aspects of the procedure which might be worth reforming. Four reform proposals shall be discussed in the following: The exclusion of national judges (I.), whether the Court should take a separate decision on admissibility (II.), whether an accelerated procedure should be introduced to the Court's Rules of Procedure (III.), and lastly, whether the advisory function should be complemented by a preliminary ruling procedure (IV.).

I. Exclusion of national judges

Advisory opinion OC-24/17 has already been mentioned several times, as not only the propriety to answer Costa Rica's request was questionable, but also since the opinion's publication in the midst of the presidential election campaign raised severe problems.

This sensational proceeding and the fact that the Costa Rican Judge Odio Benito did not abstain from the Court's deliberation and voting, even though the opinion had been requested by the same government that had appointed her as a judge, also raised the question whether Article 19 (1) of the Court's Rules of Procedure – according to which judges of the nationality of the respondent state shall not participate in the hearing and deliberation of cases originating in individual petitions – should be applied analogously in advisory proceedings.

In OC-20/09, which triggered the subsequent insertion of Article 19 (1) in the Court's Rules of Procedure, the Court held that the main reason for the participation of a national judge as well as a judge *ad hoc* was "the need to maintain procedural balance between the parties constituted by one or more sovereign States equal under the law".[925] According to this logic, the participation of a national judge was not needed in advisory

925 *Article 55 of the American Convention on Human Rights*, Advisory Opinion OC-20/09, Series A No. 20 (29 September 2009).

proceedings, as there are no parties between which a balance would have to be maintained.

Furthermore, it had been argued in the OC-20/09 proceedings that "the participation of a judge national of the respondent State in cases originated in individual petitions could affect the perception of impartiality and independence of that judge, among other, due to the consideration that in those cases nationality is an important connection with the State."[926] Likewise, one could argue that there may be an important and close connection between a government requesting an advisory opinion and its national judge at the Court.

For instance, it had been known before her term at the Court that Elizabeth Odio Benito was a supporter of women's rights, that she had criticized homophobia in Costa Rica, and argued for non-discrimination.[927] Thus, the Costa Rican government could expect her to support its position on patrimonial rights of same sex couples when it submitted its request for the later OC-24/17, which was submitted to the Court shortly after Judge Odio Benito had started her term.

This example shows that it could be even more compelling to exclude national judges from the Court's deliberation in advisory procedures initiated by their own home state, than in contentious cases in which the national state is the respondent. For while it is difficult to anticipate at the moment a new judge is appointed, which contentious cases against the state of the appointing government will reach the Court in the years to come, an appointing government may already have a plan for what kind of advisory opinion it is going to request of the Court once the appointed judge will have started to serve. Hence, a government may appoint a person that is likely to support the government's agenda and then file a request, hoping that the national judge and eventually the overall Court will prepare an advisory opinion that meets the expectations of the requesting government.

These arguments in favor of an analogous application of Article 19 (1) Rules of Procedure weigh all the more heavily when one considers that the Court nowadays holds that findings made in advisory opinions shall also form part of the conventionality control, which might increase the legal

926 OC-20/09 (n 925) para. 70.

927 *Cf.*: '*Polémica por posición de jueza Elizabeth Odio sobre aborto*', La Nación, 22 June 2015, available at: https://www.nacion.com/el-pais/politica/polemica-por-posicion-de-jueza-elizabeth-odio-sobre-aborto/JDE6WOZTPNHSJFJUWJ5EQNGABU/story/.

effects of advisory opinions.[928] If, however, the main difference between binding judgments in contentious cases and legally non-binding advisory opinions is more or less dissolved, the same reasons arguing for an exclusion of the national judge in a contentious case could also apply to the advisory procedures.

On the other hand, the participation of a national judge in proceedings can be very useful for the whole Court, which argues for the complete deletion of Article 19 (1) Rules of Procedure, or at least the non-application of the provision in advisory proceedings. The knowledge of the respective domestic legal system and the insights and better understanding of ongoing debates in national politics may be very helpful for the Court's deliberation, and may prevent it from disregarding both peculiar legal and political circumstances in the requesting state. A national judge might also be better equipped to assess the validity of statements made by *amici*, both in the written and the oral phase of the proceedings. Especially as regards advisory proceedings in terms of Article 64 (2), the knowledge of the domestic law the national judge is supposed to have, is considered very valuable for the deliberations of the Court.

Based on this close connection and better understanding of the requesting state, the participation of a national judge in the advisory proceeding may enhance the reception and acceptance of the final advisory opinion in the requesting home state.

While the Court supported its argumentation in OC-20/09 in favor of an exclusion of national judges in contentious cases originating in individual petitions also with the similar practice of other international human rights institutions such as the HRC and the AfrCtHPR[929], it is unlikely that the AfrCtHPR would hold the relevant Article 22 AfrCHPR Protocol to be applicable to advisory proceedings, given that said provision only speaks of judges that are nationals of a state "party to a case".[930] As concerns the ECtHR, national judges participate both in contentious cases against their home state and in advisory proceedings. The new rules inserted in the context of the implementation of Additional Protocol No. 16 even

928 See on this *infra*: Chapter 5, Section B.II and Section B.III.3 and Section B.IV.1.b) and Section B.IV.2.a), cc) and dd) and Section B.IV.3.

929 OC-20/09 (n 925) para. 83.

930 To date, the AfrCtHPR has received only one request for an advisory opinion by a state and this was withdrawn. All other requests were issued by African organizations. Consequently, the question of the participation of a national judge in an advisory proceeding initiated by its national state has not yet arisen.

provide that the judge elected by the state to which the requesting court or tribunal pertains has to be part of the panel that first examines the request for an advisory opinion.[931] In advisory proceedings before the ICJ, affected states may even appoint a judge *ad hoc* when the request concerns a legal question actually pending between states.[932] Hence, there seems to be no international court at all that excludes national judges in advisory proceedings.

Lastly, it must be kept in mind that the national judge is only one of seven. Even if there is a close connection between the requesting state's government and its national judge, the majority of the Court will not adopt legal arguments of which it is not fully convinced.

In light of this, the advantages of having a national judge participating in advisory proceedings, especially in those under Article 64 (2), seem to outweigh the advantages that would be gained by an analogous application of Article 19 (1) Rules of Procedure.

What seems more straightforward than excluding national judges from the deliberation is strengthening the judge's independence and impartiality in general. As noted above[933], this argues first and foremost for a full-time Court with the according remuneration of the judges. Apart from this, the process of the election of the judges is improvable in terms of transparency, rationality and diversity of the actors involved, both at the national and the level of the OAS.[934] Already at this point, special attention should be paid to ensuring that the candidates are not only professionally and personally capable and suitable, but also possess the necessary independence from their respective governments.

931 See ECtHR, *Rules of Court*, 16 September 2022, Rule 93 para. 1.1. lit. d and Rule 24 para. 2 lit. g.

932 As to the application of Article 102 (3) Rules of the ICJ in combination with Article 31 ICJ Statute see *infra*: (n 1005).

933 See *supra*: Chapter 4, Section D.

934 See: Informe final del Panel independiente para la Elección de Jueces y Juezas para la Corte Interamericana de Derechos Humanos, 31 May 2018, pp. 32–48, available at: https://www.wcl.american.edu/impact/initiatives-programs/center/documents/informe-panel-2018/.

II. Separate decision on jurisdiction and admissibility / preliminary objections

It has been criticized that the Court, upon reception of a request for an advisory opinion, at first always only checks whether the request fulfills the formal admissibility requirements, while it can later still decide to discontinue the proceeding at any time, possibly even after having conducted an oral hearing, if it holds the request to be inappropriate because of its material scope.[935] This causes lots of uncertainty in the advisory proceedings, not least for the participating entities and individuals.[936] Therefore, it was suggested that the Rules of Procedure be generally reformed so as to clarify the admissibility criteria, and to fix a point in time at which the Court takes a definite decision on the admissibility of a request.[937]

If the Court were to take such a separate decision on admissibility before receiving written observations, the Court would be more autonomous from external opinions in its decision whether to comply with a request or not. Besides, the procedure would be more efficient if the Court did not have to receive hundreds of pages of written observations before eventually deciding not to continue processing the concerned request anyway.

However, such a separate admissibility stage would imply the risk either to prematurely reject a request, or to positively decide on its admissibility without being aware of all the possible implications that might argue for a rejection.

In the context of a discussion of urgent requests, it was remarked that it would be a "questionable development" to issue advisory opinions without having first received written statements, as they add authority to the proceedings and as courts "cannot make an informed decision without the availability of adequate information".[938] The same argument seems to also apply to a possible separate decision on jurisdiction and admissibility.

935 See the presentation on the Legal Value and Impact of the Advisory Opinions of the Court's current Legal Director Alexei Julio Estrada: "Valor Jurídico e Impacto de las Opiniones Consultivas", available at:https://www.youtube.com/watch?v=1CYkjzy PLJA. Contrary to the indications of Mr. Alexei Julio, the author did not find any proceeding that was stopped after the Court had convened a public hearing.

936 *Ibid.*

937 *Ibid.*

938 Shaw, *Rosenne's Law and Practice of the International Court 1920–2015, Vol. III: Procedure* (n 463) p. 1724; Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 284.

Should such a decision be taken without having asked for written observations before, there would be no opportunity at all for states and other entities to raise preliminary objections[939] and the Court would deprive itself of the possibility of being made aware of any problematic issue of a given request at the earliest possible opportunity.

Obviously, if one were to insert a separate admissibility stage in the proceeding, it could be also provided for in the Rules of Procedure that the Court may first ask for preliminary objections to its jurisdiction, and receive written observations that are limited to issues of jurisdiction and admissibility. This would, however, rather delay the whole proceeding, and thus run against the purpose and utility of the Court's advisory function as the Court already noted in OC-3/83.[940] Besides, the participating entities and *amici* would have additional work if they wanted to submit observations both at the admissibility stage and at a possible later merits stage.

If, on the other hand, the Court were not to receive any written observations before taking a separate decision on admissibility, the problem of overlooking problematic issues could later still be cured if the Court was still allowed to decide not to answer the request on the merits after having received written observations on the subject matter. In that case, the first decision on jurisdiction, admissibility and propriety would, however, not be definite. Moreover, a possible revocation of its earlier positive decision would probably harm the Court's authority more than not taking a separate decision on jurisdiction, admissibility and propriety from the outset. For in the event of a revocation, the Court would contradict itself and frustrate the expectations raised by the preliminary decision to render the advisory opinion. Moreover, the Court would need to find convincing arguments that support rejecting the request only at the merits stage when the underlying circumstances may have already been known before.

Of course, it is true that it is time-consuming for the Court and frustrating for many observers and participants if the Court decides to reject a request only after several months, and after having received so many written observations. Furthermore, it may be right that a very late decision to reject a request could raise questions as to the Court's independence when

939 *Cf.*: Preliminary objections raised by Guatemala in the proceedings of the OC-3/83, see Letter from the Permanent Mission of Guatemala to the Organization of American States to the President of the IACHR, 19 April 1983.

940 OC-3/83 (n 245) paras. 25–26.

the impression is created that the Court was intimidated by observations from states and other entities.

However, inserting into the procedure an imperative decision on jurisdiction and admissibility before receiving external opinions is not likely to solve this problem satisfactorily. Nor is such a step likely to generally improve the procedural standard and outcome of the advisory proceedings.

Moreover, as was also noted by the ICJ when rejecting suggestions as to take a separate decision on preliminary issues in advisory proceedings, many supposedly preliminary questions cannot be separated from substantive issues, which is why a separate decision on admissibility is not likely to facilitate the Court's work.[941]

The IACtHR itself, in OC-3/83, rejected Guatemala's submissions regarding a separate decision on the preliminary objections filed by that state.[942] The Court argued not only that a preliminary examination of jurisdictional objections would prolong the proceeding, but also that none of the reasons justifying a separate decision on jurisdiction in contentious cases applied to advisory procedures.[943] For in advisory proceedings no declaration of state consent in terms of Article 62 was required, nor were there any parties, formal charges or sanctions.[944]

The development the advisory function has undergone since this decision of 1983 does not appear to be so fundamental as to justify a contrary assessment of this issue. Of course, the Court must maintain the power to reject a request based on its discretion without asking for written observations if the Court immediately notes that jurisdiction, admissibility or propriety are obviously lacking.[945] A general separation of the advisory

941 ICJ, *Western Sahara*, Advisory Opinion of 16 October 1975, I.C.J. Reports 1975, p. 12, 17 para. 12; ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, p. 16, 26 para. 38; for more information on the practice of the PCIJ and ICJ on this point see: Malcolm N. Shaw, *Rosenne's Law and Practice of the International Court 1920–2015, Vol. II: Jurisdiction* (5th edn Martinus Nijhoff Publishers, 2016) p. 1035–1040 who argues that a separate decision on jurisdiction would be appropriate in advisory proceedings on questions actually pending between states or a state and an international organization or other entity.

942 OC-3/83 (n 245) para. 29.

943 OC-3/83 (n 245) paras. 21–22, 25–26.

944 OC-3/83 (n 245) paras. 21–22.

945 *Cf.*: The request of Costa Rica of 10 December 2004 on the compatibility of two national law provisions with the ACHR rejected via Order of 10 May 2005; the

proceedings in a preliminary and in a merits phase does, however, not appear to be desirable.

The critics are right that it would be desirable if the Court's Rules of Procedure contained more substantive admissibility requirements than just the formal ones existing so far. Yet, as also discussed above in the section on the Court's discretion to reject requests, it seems very difficult to insert substantive admissibility criteria into the Court's Rules of Procedure that would really work without limiting the Court's flexibility to react properly to the peculiar situation of any single advisory proceeding too much.

Instead of reforming the Rules of Procedure, the Court should therefore try to apply its rejection criteria more consistently, and to explain the underlying reasons better. The fact that the Court, in such an explanation of its decision on admissibility or rejection, recurs on statements made in written or oral observations, does not raise severe questions as to the autonomy and independence of its decisions. To the contrary, it shows that the proceeding was open and transparent, and that the Court listened to and balanced the countervailing arguments.

III. Accelerated procedure

Pursuant to a further suggestion of how the Court's advisory proceedings could be complemented, a provision akin to Article 103 of the ICJ's Rules of Court could be incorporated into the Court's Rules of Procedure.[946] Based on Article 103 Rules of Court, the ICJ rendered the *Headquarters Agreement* opinion within eight weeks, and the *Wall* opinion seven months after the request of the General Assembly.[947]

The incorporation of an explicit article providing for an accelerated procedure has the advantage that the possibility of a quicker proceeding is transparent to all possible requesting entities, and that they may refer to such provision in their request. Furthermore, such a provision could indicate measures the Court may take to expedite the proceeding, e.g.

request of the IACHR of 29 December 2008 on corporal punishment of children rejected via Order of 27 January 2009 and the request of the OAS General Secretary of 19 May 2016 on impeachment rejected via Order of 23 June 2016.

946 Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (n 48) p. 67–68.

947 For further information as to the expedition of these proceedings see Shaw, *Rosenne's Law and Practice of the International Court 1920–2015, Vol. III: Procedure* (n 463) p. 1723.

prioritizing the advisory proceeding over other proceedings, or declining to conduct a public hearing.

However, the incorporation of a provision regulating an accelerated procedure is not absolutely essential. Even without such an explicit norm, the advisory procedure is, as described above, flexible enough for the Court to react adequately in the event that a request for a really urgent advisory opinion is submitted. The Court could e.g. treat a later but urgent request with priority over a request that was submitted earlier. Moreover, the Court is free in the determination of time limits for the submission of written observations, and could even decide to give the advisory opinion without convening an oral hearing.

Therefore, it is likely that the Court – should another request like the one on the death penalty that led to the OC-3/83 be submitted – would find a practical solution for how to handle the urgent request in order to reply to it as fast as possible, even without being able to recur on an explicit provision comparable to Article 103 of the ICJ's Rules of Court.

IV. Creation of a preliminary ruling procedure

The most fundamental of all reform proposals discussed here would be the creation of a preliminary ruling procedure. In the section on possible extensions of the Court's advisory jurisdiction *ratione personae*, it has already been held that it could be highly beneficial if domestic courts could directly approach the IACtHR, but that their standing would have to be restricted on legal questions that have arisen in a specific case pending before them.[948] Furthermore, it has been noted that such a preliminary ruling procedure could only be established on the basis of an additional protocol to the Convention.[949]

The overview over the advisory or related jurisdiction of other international courts and tribunals provided above has shown that there already exist various types of preliminary ruling procedures.[950] There exist both

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

949 See *supra*: Chapter 3, Section A.III.1. and there especially n 266.

950 See *supra* Chapter 3, Section D.IV. For a more in-depth analysis of different preliminary ruling procedures see: Roberto Virzo, '*The Preliminary Ruling Procedures at International Regional Courts and Tribunals*' (2011) 10 The Law and practice of International Courts and Tribunals, 285–313.

procedures in which domestic courts may obtain a non-binding advisory opinion of the international court, for example the procedure provided for by Additional Protocol No. 16 to the ECHR[951], and procedures in which it is acknowledged that the preliminary ruling is, at least for the requesting domestic court, binding, such as the procedure pursuant to Article 267 TFEU.[952]

Apart from the legal effect which the advisory opinion/preliminary ruling given to the domestic court should have, an additional protocol creating such a procedure would have to regulate which kind of domestic courts may approach the IACtHR, and whether it should perhaps even be mandatory for these courts in certain moments to seek guidance from the IACtHR before deciding a question on their own. If the additional protocol were to essentially allow any kind of domestic court to refer a question to the IACtHR, states parties to the additional protocol could then still dictate within their domestic law that, for example, only the supreme or constitutional court may refer questions to the IACtHR if the right to judicial review is normally concentrated at that court.

Irrespective of the concrete design, a preliminary ruling procedure could facilitate the implementation of the doctrine of conventionality control and foster the common understanding of human rights norms within the American states.[953] Not only the IACtHR would have the possibility to communicate its jurisprudence more directly to domestic courts. The posi-

951 Before the actual drafting of Protocol No. 16, a Report of the Group of Wise Persons to the Committee of Ministers stated that it would be useful if national courts could request non-binding advisory opinions from the ECtHR, but that a preliminary ruling procedure comparable to that of the EU system was not compatible with the principle of subsidiarity established by the ECHR. See: Council of Europe, Report of the Group of Wise Persons to the Committee of Ministers, 15 November 2006, paras. 80–82 and *cf.*: Samantha Besson, 'The Erga Omnes Effect of Judgments of the European Court of Human Rights: What's in a Name?' in Samantha Besson (ed), *La cour européenne de droits de l'hommme après le Protocole 14 – Premier bilan et perspectives: The European Court of Human Rights after Protocol 14 – Preliminary Assessment and Perspectives* (Schulthess, 2011) p. 125, 147.

952 As to the established jurisprudence of the CJEU on the bindingness of its rulings in terms of Article 267 TFEU see instead of all: CJEU, Case C-446/98 (Fazenda Pública), ECLI:EU:C:2000:691, para. 49; Case C-173/09 (Elchinov), ECLI:EU:C:2010:581, para. 29; Case C-62/14 (Gauweiler and others), ECLI:EU:C:2015:400, para. 16.

953 *Cf.*: Zelada (n 262) p. 102- 106; Hentrei (n 262) p. 256; Dulitzky (n 262) p. 89; as to the content of the doctrine of conventionality control, see *supra*: Chapter 5, Section B.II.

tion of the latter within their respective states could also be strengthened by the possibility to obtain direct backing from the IACtHR.[954]

Nevertheless, a preliminary ruling procedure, especially if the rulings are deemed to be binding, could be perceived by domestic courts as a limitation of their competences.[955] Therefore, it seems to be preferable not to oblige domestic courts to refer certain questions to the IACtHR, but to give them the power to do so voluntarily.[956] Furthermore, the procedure should ensure that the domestic court and the IACtHR can meet unbureaucratically and exchange ideas about the correct answer to the legal question on an equal footing. Moreover, the advisory opinion/preliminary ruling issued by the IACtHR should be limited to answering the abstract question of human rights law, and not contain any determination of the facts of the case pending at the national level.

Other arguments that might speak against the creation of an additional protocol to the ACHR are that the amendment process could be used to weaken the effectiveness of the Court[957] by some actors and that the adoption of an additional protocol would probably cause further asymmetries within the inter-American human rights system.

The main argument against the establishment of a preliminary ruling procedure is however that it might cause an overload of the IACtHR.[958] This could then lead to a prolongation of all pre-existing procedures. Thus, the effective creation of such a procedure would depend on a significant increase in the Court's human and financial resources. In addition to this, the issuance of preliminary rulings/advisory opinions could, in this kind of proceeding, be delegated to a panel of only three judges.[959] This might reduce the authority of the final ruling/advisory opinion but would help save resources and accelerate the procedure.

954 Dulitzky (n 262) p. 88.
955 *Cf.* Dulitzky (n 262) p. 88.
956 Dulitzky (n 262) p. 88.
957 Hentrei (n 262) p. 256 with further references on possibly negative side-effects of the creation of Additional Protocol No. 16 to the ECHR.
958 Hentrei (n 262) p. 256.
959 As to the Court's composition in normal advisory proceedings, and the fact that the Rules of Procedure would have to be changed if particular decisions to be made in advisory proceedings should be delegated to a commission of single judges, see *supra*: Chapter 4, Section D.

K. Conclusion

The analysis undertaken in this chapter has shown that the advisory procedure has developed over the years. While the Rules of the Court remain very flexible, the Court's practice has increased the level of participation from civil society, and thus made it possible to turn advisory proceedings into a forum of regional debate. Even in proceedings that have ended with an order of rejection, the public exchange of ideas and arguments over topics of current debate, both in the written and in the oral phase of the proceeding, is valuable.

Overall, the way the proceeding is designed is as important as the content of the final advisory opinion. As the example of OC-24/17 depicts, even minor facts like the date of the publication of the final opinion can be very decisive for the effect and reception of the advisory opinion.

Given this importance of procedural decisions, it is paramount that the Court not only pays attention to objections raised, but that it also addresses these concerns and that its decision of whether to accept or to reject a request is as well-founded and transparent as possible. Whereas the inconsistent handling of rejection criteria may lower the authority of an advisory opinion, the precise response and well-founded rebuttal of objections, as well as the clever rephrasing of questions, also allow for the successful answering of requests that at first appear very delicate and inappropriate.

Apart from the adoption of an interests- and values-based approach to the question of acceptance or rejection of requests, which was suggested and outlined in Section C, other reform proposals concerning the procedure, which were examined in Section J, do not seem to be expedient or imperative. The one exception is the idea to create a preliminary ruling procedure through which domestic courts could directly refer questions to the Court and either obtain a non-binding advisory opinion, or even a binding preliminary ruling. Provided that such a procedure was carefully designed in order to encourage domestic courts to cooperate with the IACtHR, such a procedure could mark a decisive advancement when it comes to the implementation of the doctrine of conventionality control[960] and to the strengthening of the regional human rights system as a whole.

960 The development and content of this doctrine is explained in Chapter 5, Section B.II.

Chapter 5: Legal nature and effects of advisory opinions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. Permanent Court of International Justice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

976 Engel (n 961) p. 800.

977 Engel (n 961) p. 800.

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

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

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

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

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

979 de Visscher (n 961) p. 26.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. International Court of Justice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

997 *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Intermediate conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1021 *Cf.*: Hambro (n 961) p. 21–22.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1032 OC-3/83 (n 245) paras. 34–35.

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Origins and foundation of the doctrine

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Legal basis of the doctrine

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1073 Dulitzky (n 262) p. 63.

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

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

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

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

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

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

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

3. Jurisprudential development of the doctrine

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c) Case of Radilla Pacheco: Duty of consistent interpretation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

e) Extension of the control on all human rights treaties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Summary and conclusion

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

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

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

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

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

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relation to Articles 1.1., 8, 11.2, 13, 16, 21, 24, 25, 29, 30, 44, 46 y 62.3 of the American Convention on Human Rights, as well as of Article 8.1 a and b of the Protocol of San Salvador, Advisory Opinion OC-22/16, Series A No. 22 (26 February 2016), para. 26; OC-23/17 (n 4) para. 28; OC-24/17 (n 1) para. 26; OC-25/18 (n 227) para. 58.

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

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

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

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

1. Early years

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Acknowledgment of "undeniable legal effects"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Evaluation and intermediate conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Authoritative interpretation

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

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

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

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

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

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

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

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

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

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

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

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

b) Contemporary voices

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

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

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

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

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

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

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

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

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

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

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

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

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

1174 *Ibid.*

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

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

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

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

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

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

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

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

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

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

c) Evaluation and intermediate conclusion

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

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

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

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

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

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

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

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

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

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

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

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

2. Attribution of legal bindingness

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

a) Academics holding the advisory opinions to be binding

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

aa) Faúndez Ledesma

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1202 As to the full text of Article 33 see *supra* (n 1192).
1203 *Supra*: Chapter 5, Section B.I.
1204 As to the text of Article 62 see *supra* (n 214) and on how it has been interpreted by the Court see *supra*: Chapter 5, Section B.I.

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

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

bb) Salvioli

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

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

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

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

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

1209 Salvioli (n 1208).

1210 Salvioli (n 1208).

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

cc) Roa

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

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

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

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

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

dd) Zelada

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

aa) Costa Rica

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

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

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

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

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

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

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

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

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

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

1231 *Ibid.*

1232 *Ibid.*

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

1234 OC-3/83 (n 245) paras. 32–35.

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

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

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

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

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

1236 *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

bb) Ecuador

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

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

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

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

1250 Constitutional Court of Ecuador, Judgment 184–18-SEP-CC of 29 May 2018, case No. 1692–12-EP, p. 58; Constitutional Court of Ecuador, Judgment 11–18-CN/19 of 12 June 2019, case No. 11–18-CN, paras. 281, 300. As to the notion of "block of constitutionality" and its manifestations in Latin America see: Góngora-Mera, *Inter-American Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication* (n 1026) p. 161–198; *idem*, 'The Block of Constitutionality as Doctrinal Pivot of a *Ius Commune*' (n 1026) p. 235–253.

1251 Constitutional Court of Ecuador, Judgment 10–18-CN/19 of 12 June 2019, case No. 10–18-CN, para. 98.

Constitution was complemented by the international human rights instruments.[1252]

However, like the decision of the *Sala Constitucional* of Costa Rica, the decisions of the Ecuadorian Constitutional Court were not unanimous either.[1253] In a dissenting opinion, four judges rejected the binding effect of the advisory opinions, and held that same-sex marriage could not be introduced by an interpretation of the Constitution that was in line with the Convention, but only by way of a constitutional amendment to be adopted by the Ecuadorian parliament.[1254]

cc) Peru

The example of Peru illustrates very well the difficulty – described at the beginning of this subsection – of grasping and clearly assigning the case law of the national courts of a state to one of the views held with regard to the legal nature and effects of advisory opinions of the IACtHR.

On the one hand, the Peruvian Constitutional Tribunal has recognized the obligation to perform a conventionality control, and in 2007 it has held that both, the IACtHR's judgments as well as its advisory opinions, are binding on the State of Peru, and form part of its national legal order based on Article 55 of the Peruvian Constitution.[1255]

Following this line of jurisprudence, the Superior Court of Justice of Lima in 2019, in a case of a lesbian couple that had married in the United States, performed a conventionality control and held the jurisprudence of the IACtHR, including its interpretations made in OC-24/17, to be binding

1252 Constitutional Court of Ecuador, Judgment 11–18-CN/19 of 12 June 2019, case No. 11–18-CN, paras. 211, 300.

1253 Constitutional Court of Ecuador, Judgment 184–18-SEP-CC of 29 May 2018, case No. 1692–12-EP, p. 105; Constitutional Court of Ecuador, Judgment 10–18-CN/19 of 12 June 2019, case No. 10–18-CN, p. 29; Constitutional Court of Ecuador, Judgment 11–18-CN/19 of 12 June 2019, case No. 11–18-CN, p. 62.

1254 Constitutional Court of Ecuador, Judgment 10–18-CN/19 of 12 June 2019, case no. 10–18-CN, Dissenting Opinion of Judge Hernán Salgado Pesantes, supported by Judges Carmen Corral Ponce, Enrique Herrería Bonnet and Tersa Nuques Martínez, paras. 7, 67–95.

1255 Constitutional Tribunal of Peru, Resolution of 19 June 2007, 00007–2007-PI/TC, para. 41. As to the implementation of the conventionality control in Peru see: Tello Mendoza, *El Control de Convencionalidad: Situación en algunos Estados Americanos* (n 1074) p. 155–163.

on Peru.[1256] Consequently, it ordered the civil registry of Lima to refrain from enforcing Article 234 of the Peruvian Civil Code, which defines marriage as the union between a man and a woman, and to recognize and register the marriage of the lesbian couple.[1257]

However, when confronted with a similar case of a gay couple that had married in Mexico, the Peruvian Constitutional Tribunal in 2020 upheld the decision of the National Identity and Civil Registry, which had declined to recognize the marriage of the gay couple in Peru.[1258] The majority of the constitutional judges referred to the separate opinion of Judge Vio Grossi, attached to OC-24/17, in which the latter had stated that the Court's advisory opinions were not binding.[1259] They held that the advisory opinion, if at all, was only binding on the requesting state of Costa Rica, and that the recognition of a same sex marriage was not compatible with the Peruvian Constitution or with the Civil Code.[1260]

The three dissenting judges objected and held that the marriage of the gay couple had to be recognized in Peru.[1261] They warned that Peru would be condemned, should the case reach the IACtHR.[1262] At least one of the dissenting judges held the advisory opinions of the IACtHR explicitly to be binding, while the other two held that the advisory opinions contained im-

1256 Supreme Court of Justice of Lima, Eleventh Constitutional Court, Judgment of 22 March 2019, Exp. 10776–2017, paras. 44–45.

1257 Supreme Court of Justice of Lima, Eleventh Constitutional Court, Judgment of 22 March 2019, Exp. 10776–2017, parte resolutiva.

1258 Constitutional Tribunal of Peru, Judgment 676/2020 of 3 November 2020, case no. 01739–2018-PA/TC.

1259 Constitutional Tribunal of Peru, Judgment 676/2020 of 3 November 2020, case no. 01739–2018-PA/TC, vote of Judge Blume Fortini, para. 9, vote of Sardón de Taboada.

1260 Constitutional Tribunal of Peru, Judgment 676/2020 of 3 November 2020, case no. 01739–2018-PA/TC, vote of Judge Ferrero Costa, vote of Judge Blume Fortini, vote of Judge Sardón de Taboada; *cf.* Dissenting Vote of Judges Ledesma Narváez and Ramos Núñez, para. 117.

1261 Constitutional Tribunal of Peru, Judgment 676/2020 of 3 November 2020, case no. 01739–2018-PA/TC, Dissenting Vote of Judges Ledesma Narváez and Ramos Núñez and Dissenting Vote of Judge Espinosa-Saldaña Barrera.

1262 Constitutional Tribunal of Peru, Judgment 676/2020 of 3 November 2020, case no. 01739–2018-PA/TC, Dissenting Vote of Judge Espinosa-Saldaña Barrera, para. 67, Dissenting Vote of Judges Ledesma Narváez and Ramos Núñez, para. 118.

portant parameters that had to be taken into account by the Constitutional Tribunal.[1263]

Hence, in addition to Colombia[1264], Peru provides another example of the domestic jurisprudence being often neither constant nor uniform. In light of the 2020 decision of the Constitutional Tribunal, it looks like the position that the IACtHR's advisory opinions are binding on Peru does no longer constitute the majority position within the country's Constitutional Tribunal.

c. Evaluation and intermediate conclusion

The preceding section has shown that authors and domestic courts have, at different times and with different reasons, come to the conclusion that the advisory opinions of the IACtHR are legally binding.

At first, it was only individual authors and domestic courts that argued for a legal bindingness of the advisory opinions, but since the IACtHR has held that its advisory opinions shall be included in the conventionality control, and in particular since the controversial OC-24/17, the view that advisory opinions are legally binding has become more popular.

However, in light of the above assessment of the constituent basis of the Court's advisory function, and for reasons that will be pointed out in more detail in the following discussion on the meaning of *res interpretata*, it remains preferable to abstain from using the term "bindingness" in relation to advisory opinions.

First of all, it has been shown that the interpretation of Article 64 made by Faúndez Ledesma, and supported by Salvioli is not convincing. Although a teleological and *pro persona* interpretation of the Convention is generally supported[1265], such an interpretation alone does not support the conclusion that the advisory opinions are legally binding in a formal sense.

When authors like Roa and Zelada nowadays argue that the advisory opinions are not per se legally binding, but become either *de jure* or *de*

1263 Constitutional Tribunal of Peru, Judgment 676/2020 of 3 November 2020, case no. 01739–2018-PA/TC, Dissenting Vote of Judge Espinosa-Saldaña Barrera, para. 63, Dissenting Vote of Judges Ledesma Narváez and Ramos Núñez, paras. 117–119.

1264 See *supra*: Chapter 5, Section B.IV.2.b), *inter alia* n 1221.

1265 This thesis supports the view that in particular human rights treaties should be interpreted in a dynamic way, and in light of the *pro persona* principle. However, the *pro persona* principle must not be used in such a way that it overrides all other rules of treaty interpretation. As to a critical view on the more extensive

facto binding because of the doctrine of conventionality control, this view comes close to those authors who hold that the advisory opinions produce *res interpretata*, and speak in this context of an indirect bindingness.

However, although the observation that the conventionality control increases the value and impact of the Court's advisory opinions is correct, the conventionality control alone does not change the legal nature of the advisory opinions. As concerns the notion "*de facto*", it is held that it complicates the understanding of the actual legal effects of advisory opinions more than it clarifies it. Lastly, the term "bindingness" is generally closely related to judgments and the effect of *res judicata*, and thus implies that the advisory opinions could be enforced, and that no deviation was permissible.

In contrast to the authors presented in this section, the examined decisions of domestic courts have not only been based on an interpretation of Article 64 or the position of the IACtHR, but have also argued on the basis of provisions of national constitutional law, which assign international human rights instruments a supra-constitutional rank if they contain more favorable rights than the domestic law. Therefore, one has to be careful about what can be inferred from these decisions regarding the general normative value of the advisory opinions of the IACtHR.

If a decision to recognize the advisory opinions of the IACtHR as binding is based on domestic law, this decision is of course only binding for that state and says little, if anything, about the legal value the advisory opinions have under international law. Nevertheless, such a decision may inspire other states to adopt a similar provision or to interpret their domestic law in the same way. This could then, step by step, lead to the formation of a regional custom, provided that these states then also act in the believe that they are under international law required to interpret their domestic law that way, and not, *vice versa*, that they have adopted these domestic provisions precisely in order to amend the existing rules under international law.

If a decision is not only based on domestic law, but also on the interpretation of the ACHR, and on the Court's doctrine of conventionality control, such a decision may constitute subsequent practice in terms of Article 31 (3) lit. b or Article 32 VCLT. However, as indicated above[1266], the interpretive value of subsequent practice depends among other factors on its clarity,

understanding of the *pro persona* principle supported by several courts in Latin America see: Rodiles (n 1067) in particular p. 161–163, 171.

1266 See *supra*: Chapter 5, Section B.II.2. and ILC, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with*

consistency and breadth, which is why single court decisions carry only little weight when it is still unclear whether the state as a whole will adopt the view of its judiciary, and even less clear, whether the other state parties agree with that interpretation.

As outlined, all of the above-presented decisions have combined the interpretation of domestic law provisions with arguments of international law.

As far as the 1995 decision of the Costa Rican *Sala Constitucional* is concerned, it was presumably not only the interpretation of Article 48 of the Costa Rican Constitution that was decisive for classifying the advisory opinions as binding on the state, but also the noticeably embarrassing fact for the *Sala Constitucional* that Costa Rica had still not changed its legislation ten years after OC-5/85 had found this legislation to be incompatible with the ACHR.[1267]

What is more, it may have played a role that Piza Escalante, who was the first president of the IACtHR and had also participated in the OC-5/95 proceedings, formed part of the bench of the *Sala Constitucional* in the 1995 decision. As noted above, the actual normative argumentation of the *Sala Constitucional* that Costa Rica had become a "party" to the advisory proceeding was not convincing.

Nevertheless, the Costa Rican jurisprudence has, in contrast to that of other states, been remarkably consistent since that precedence. The normative reasoning established by the *Sala Constitucional* in 1995 has, however, not been adopted by courts of other states. Furthermore, the cautious formulation of the majority opinion and the critical minority votes attached to the 2018 decision on same-sex marriage show that it is not certain that the Costa Rican judges will always automatically adopt the criteria established by the IACtHR. At least, the decision not to annul with immediate effects the domestic law provision that was in conflict with the jurisprudence of the IACtHR, but to give the *Asamblea Nacional* time to regulate the matter itself, shows a certain resistance to implement the conventionality control as demanded by the IACtHR.

The decisions of the Ecuadorian Constitutional Court and that of the Superior Court of Justice of Lima are in turn examples of an exemplary

commentaries, adopted at the seventieth session of the ILC in 2018, conclusion 9 and commentary thereto, p. 70, 74, para. 12

1267 *Cf.*: Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 9 May 1995, No. 2313–95, Exp. 0421-S-90, p. 6, para. 6.

implementation of the doctrine of conventionality control, given that these courts refused to apply the relevant domestic norms, and instead based their decision on the IACtHR's interpretation contained in OC-24/17. This highlights how this doctrine can increase the effectiveness of advisory opinions. Notably, in both states the constitution facilitates this implementation of the doctrine of conventionality control, stipulating that the rights enshrined in it shall be interpreted in light of international human rights law, or that international human rights treaties shall prevail if they contain more favorable rights than the constitution.[1268] However, the decision of the Peruvian Constitutional Tribunal, which contradicted that of the Superior Court of Justice of Lima, shows that there is no agreement on the understanding and application of the doctrine of conventionality control in Peru.

With respect to the question whether there already exists a subsequent practice of the contracting states in terms of Article 31 (3) lit. b VCLT, which would support the doctrine of conventionality control as stipulated by the Court, the interpretive value and significance of the sensational judgments rendered after the issuance of OC-24/17 is further relativized by the fact that OC-24/17 was more or less completely ignored in another comparable decision of the Chilean Constitutional Tribunal.[1269]

3. *Res interpretata* and *erga omnes partes* effects

It has already been mentioned above that ever since OC-21/14, the Court not only holds that the conventionality control should also be performed on the basis of its interpretations made in advisory opinions, but that it furthermore holds that its advisory opinions produce the effect of "*la norma convencional interpretada*".[1270] This term had already been used by other

1268 Article 55 as well as the fourth final provision of the Constitution of Peru and Article 424 of the Constitution of Ecuador.

1269 Instead of relying on OC-24/17, the Chilean Constitutional Tribunal argued among other reasons with the jurisprudence of the ECtHR when it rejected the claim of a lesbian couple. The Tribunal held that the fact that same-sex couples who have married abroad can only register as civil union in Chile did not violate their rights. The Tribunal held that only the legislator could decide to give same-sex couples the right to marry. The doctrine of conventionality control was not mentioned at all. See: Constitutional Tribunal of Chile, Judgment 7774–2019 of 25 June 2020.

1270 OC-21/14 (n 320) para. 31. Unfortunately, the English version of the opinion, in contrast to the Spanish original, does not use the proper technical terms "conventionality control" and "res interpretata" but instead speaks of "control of conformity with the Convention" and "the interpretation given to a provision

authorities in relation to the Court's advisory opinions years before the Court had adopted this view, and also before Judge Ferrer Mac Gregor first mentioned the term in relation to advisory opinions.[1271] By its supporters, the *erga omnes (partes)* effect of *res interpretata* and the conventionality control doctrine are considered two sides of the same coin.[1272]

Yet, to date – like in the debate on the exact legal consequences of the doctrine of conventionality control – it remains often unclear what is exactly meant when the term "*res interpretata*", or in Spanish, "*la norma interpretada*" is used. Is *res interpretata* understood to have only a guiding effect, does it entail an obligation to *consider* the Court's jurisprudence, or can it even be equated with an obligation to *follow* the Court's jurisprudence?[1273]

Moreover, there is a discrepancy as to whether the effect of *res interpretata* already exists *de lega lata,* or whether it was only desirable *de lege ferenda*. Whereas the concept of *res interpretata* is endorsed by the Court[1274], as noted above[1275], apparently not even all of the (former) judges of the Court associate the same effects with the term "*res interpretata*", and in practice the effect of *res interpretata* is as infrequently recognized

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of the Convention". Especially the latter phrase can easily be read over without noticing the doctrinal concept the Court is referring to.

1271 Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 9 May 1995, No. 2313–95, Exp. 0421-S-90, p. 7, para. 7; Víctor M. Rodríguez Rescia, *La Ejecución de Sentencias de la Corte Interamericana de Derechos Humanos* (Investigaciones Jurídicas, S.A., 1997) p. 59, 63; *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, para. 59 and similarly, albeit without using the notion of "*res interpretata*" explicitly: *Case of Cabrera García and Montiel Flores v. Mexico* (n 1027), Concurring Opinion of *Ad hoc* Judge Eduardo Ferrer Mac-Gregor Poisot, para. 49.

1272 Argelia Queralt Jiménez, 'El efecto de cosa interpretada y la función de armonización de estándares del tribunal Europeo de Derechos Humanos', in Eduardo Ferrer Mac-Gregor Poisot and Rogelio Flores Pantoja (eds), *La Constitución y sus garantías – A 100 años de la Constitución de Querétaro de 1917* (UNAM, 2017) p. 695, 713.

1273 *Cf.* Malarino, 'Acerca de la pretendida Obligatoriedad de la Jurisprudencia de los Órganos Interamericanos de Protección de Derechos Humanos para. los Tribunales Judiciales nacionales' in Christian Steiner (ed), *Sistema Interamericano de Protección de los derechos humanos y derecho penal internacional Vol. II* (Konrad Adenauer Stiftung e.V. 2011) p. 435, 441, not using the term "*res interpretata*" but referring to the conventionality control doctrine and mentioning two possible understandings of the Spanish term "servir de guía" which means "serve as guide".

1274 *Case of Gelman v. Uruguay* (n 1105) paras. 67ff; OC-21/14 (n 320) para. 31.

1275 See *supra*: Chapter 5, Section B.III.3. and Chapter 5, Section B.IV.1.b).

as the conventionality control doctrine has so far been implemented only inconsistently.

Sometimes the position of the Court is supported without providing a further analysis of the precise effects of *res interpretata*.[1276] On the other hand, critics of the Court often do not even mention the concept, but reject anything related to the doctrine of conventionality control, or use different terms when they propose changes in the doctrine of conventionality control – without questioning whether the concept of *res interpretata* could be reconciled with their critique if it was understood less strictly than by supporters such as Judge Ferrer Mac-Gregor Poisot.[1277]

In this section, it shall therefore be more closely examined what is actually to be understood by the term "*res interpretata*", and what the ensuing legal effects are. At first, the differences between *res judicata* and *res interpretata* are pointed out, the legal basis of *res interpretata* is discussed, and it is questioned whether the concept can reasonably be applied to advisory opinions. As the idea of *res interpretata* and its applicability to advisory opinions is principally affirmed, it is then questioned how *res interpretata* is formed and what kind of obligations it entails. At this point, this work not only analyzes the supporters' opinions of *res interpretata*. Rather, the concept is defined in a way that is, according to the view expressed here, not only feasible and justifiable *de lege lata*, but also reconcilable with part of the criticism that has been raised with regard to the Court's approach. Finally, it is asked for whom the *res interpretata* is particularly relevant in light of the asymmetries still prevailing in the inter-American human rights system.

1276 Juan C. Hitters, *'Un Avance en el Control de Convencionalidad. (El Efecto 'erga omnes' de las Sentencias de la Corte Interamericana)'* (2013) 11(2) Estudios Constitucionales, 695–710; Oswaldo Ruiz-Chiriboga, *'The Conventionality Control: Examples of (un)succesful experiences in Latin America'* (2010) 3 Inter-American and European Human Rights Journal, 200, 214–215.

1277 As will be further outlined *infra*, in the inter-American context, the critique of any kind of *erga omnes* effect of the Court's jurisprudence is embedded in the broader debate on the doctrine of conventionality control. See Chapter 5, Section C.IV.3.d) and in particular (n 1326-1330).

a) *Res interpretata* versus *res judicata*

According to Article 67, the judgments of the IACtHR are "final and not subject to appeal" and pursuant to Article 68 (1) the "States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties". Hence, it is undisputed that the judgments of the Court rendered in contentious cases produce the effect of *res judicata*, which is "the effect of a final and unchallengeable judgment"[1278] and that they are binding *inter partes*.

The operative part of a judgment is definitely binding but the *res judicata* effect of a judgment may also extend to the Court's reasoning, at least if it is essential to understanding or even inseparable from the operative part.[1279] The IACtHR went even further and held that "[t]he binding effect of the [j]udgment is not limited to the operative paragraphs, but rather includes all its grounds, reasoning, implications and effects; in other words, the [j]udgment as a whole is binding for the State, including its *ratio decidendi*".[1280]

Apart from this effect of *res judicata inter partes*, the Convention, like the ECHR and the AfrCHPR as well, does not explicitly recognize any *erga omnes* effects of the decisions of the Court.

Yet, if the *inter partes* approach was strictly adhered to, and any kind of *erga omnes* effect of the jurisprudence of a human rights court negated, the regional human rights system would be highly inefficient.[1281] This is because the human rights court would then likely be repeatedly faced with

1278 Chester Brown, 'Art. 59' in Andreas Zimmermann *et al.* (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn OUP, 2019) mn. 30.

1279 PCIJ, *Interpretation of Judgments Nos. 7 and 8 (The Chórzow Factory)*, Judgment of 16 December 1927, Series A, No. 13, p. 20; ICJ, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011, p. 537, 542, para. 23; Andreas Zimmermann and Tobias Thienel, 'Art. 60' in Andreas Zimmermann *et al.* (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn OUP, 2019) mn. 72; William S. Dodge, '*Res Judicata*' in Max Planck Encyclopedias of International Law (last updated January 2006), available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1670?prd=MPIL para. 11.

1280 *Case of Gelman v. Uruguay* (n 1105) para. 102.

1281 Obonye Jonas, '*Res interpretata principle: Giving domestic effect to the judgments on the African Court of Human and Peoples' Rights*' (2020) 20 African Human Rights Law Journal, 736, 739.

very similar claims, and while the court would have to reiterate its findings again and again, the states concerned could still maintain that they were not bound by the earlier similar judgments.[1282]

The ECtHR has thus stated early on that its judgments "serve not only to decide those cases brought before [it] but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention".[1283] It thus recognized that the effect of its judgments extends beyond the parties and the specific case decided.[1284] As explained above, the IACtHR, by establishing its doctrine of conventionality control, went even further than the ECtHR.[1285] By holding that all state authorities of the contracting states have to carry out a conventionality control, and that the decisive parameter is not only the Convention's text, but also the way it has been interpreted by the Court, the IACtHR attributes to its jurisprudence an *erga omnes* effect.[1286]

Once the Court has interpreted a provision of the Convention, this interpretation becomes an integral part of the Convention and participates in the binding authority of the Convention.[1287] *Res interpretata* is thus the consequence of the interpretive authority of the Court and is produced when the Court interprets the text of the Convention or other human rights treaties.[1288] In contrast to *res judicata*, the effect of *res interpretata* is not

1282 *Cf.*: *Case of Tibi v. Ecuador* (n 1043), Separate Concurring Opinion of Judge Sergio García Ramírez, paras. 4–6.

1283 ECtHR, *Case of Ireland v. The United Kingdom*, Judgment of 18 January 1978, Appl. no. 5310//71, para. 154.

1284 See Adam Bodnar, 'Res Interpretata: Legal Effect of the European Court of Human Rights' Judgments for other States Than Those Which Were Party to the Proceedings' in Yves Haeck and Eva Brehms (eds), *Human Rights and Civil Liberties in the 21st Century* (Springer, 2014) p. 223, 227–229 for further references as to how the effect of *res interpretata* is observed by the ECtHR.

1285 *Cf.* Kunz, *Richter über internationale Gerichte* (n 1071) p. 56.

1286 Kunz, *Richter über internationale Gerichte* (n 1071) p. 82.

1287 *Cf.*: Jörg Polakiewicz, *Die Verpflichtung der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte* (Springer, 1993) p. 354; Kunz, *Richter über internationale Gerichte* (n 1071) p. 30, 57; Besson (n 951) p. 129.

1288 *Cf.*: Besson (n 951) p. 132–134, 158. Given that this description of *res interpretata* would admittedly also fit to the term "authoritative interpretation", it has to be noted once more that the different terms and concepts used to describe the legal effects of advisory opinions are not always understood and defined the same way and may to a certain extent definitely overlap. However, as will be shown in the following sections, according to the view taken here, the *erga omnes partes* effect of *res interpretata* differs in so far from an authoritative interpretation, that it entails for all contracting parties the treaty-based obligation to take the Court's in-

limited to the parties of a case but extends *erga omnes* to all contracting parties.[1289] More precisely, one should thus speak of an *erga omnes partes* effect of *res interpretata*.[1290]

As the notion of *res interpretata* has originally been used to describe the effects judgments rendered in contentious cases have on contracting states not party to the respective case, the question arises whether it is at all transferrable to advisory opinions.

b) Legal basis and the applicability of *res interpretata* to advisory opinions

While the Court (since OC-21/14), and other authorities[1291] (already prior to OC-21/14) have stated that advisory opinions produce *res interpretata*, it has also been argued that the doctrine of *res interpretata*, which was originally developed in the European context, could not be analogously applied to the advisory opinions of the IACtHR.[1292] According to that opinion, in the European context, the doctrine was based on Articles 32 (1) and 46 ECHR, and Article 32 (1) ECHR also comprised the advisory function of the ECtHR, while the corresponding articles of the ACHR,

terpretations as standard from which a deviation is only allowed in certain legally justified circumstances. The term authoritative interpretation, on the contrary, does normally not entail such a treaty-based legal obligation. As noted *supra* in Chapter 5, Section B.IV.1., it is often rather used in relation with attributes such as "moral" in order to highlight the lack of a legal obligation. It means that an interpretation carries the authority of the Court and that it may therefore serve as guiding source for the determination of rules of international law. See *infra* in Chapter 5, Section B.IV.3.e) what this difference between the *erga omnes partes* effect of *res interpretata* and that of an authoritative interpretation means with regard to the asymmetries in the inter-American human rights system.

1289 Besson (n 951) p. 129.

1290 Speaking precisely of an *erga omnes partes* effect also helps to clearly distinguish this discussion on the effect of the jurisprudence of human rights courts on contracting states not party to a given case from the *erga omnes* obligations recognized by the ICJ, which states owe to the international community as a whole. As to this necessary distincion and as to the ICJ's recognition of *erga omnes* obligations see: Besson (n 951) p. 131; Obonye (n 1281) p. 736, 741; ICJ, *Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain)*, Judgment of 5 February 1970, I.C.J. Reports 1970, p. 3, 32, para. 33.

1291 *Cf.*: Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 9 May 1995, No. 2313–95, Exp. 0421-S-90, p. 7, para. 7; Rodríguez Rescia (n 1271) p. 59, 63.

1292 Guevara Palacios (n 12) p. 337.

namely Article 62 and 68, would only apply to the Court's contentious jurisdiction.[1293] Therefore, the doctrine was not transferrable to the Court's advisory opinions.[1294]

Whereas it is of course correct that Articles 62 and 68 only relate to the Court's contentious function, that argumentation is misguided from its outset. This is due to the fact that the European doctrine is not based on the cited articles, at least not on Article 46 ECHR. To the contrary, Article 46 ECHR, like Article 68, only refers to the effects of the ECtHR's judgments, and only establishes that the judgments are binding *inter partes*, thus stipulating the classical effect of *res judicata*. Therefore, Article 46 ECHR could actually be used as an argument against an *erga omnes* effect. The supporters of *res interpretata*, however, argue that Article 46 ECHR is not conclusive. They hold that it only regulates the *res judicata inter partes* effect of judgments while it does not preclude the Court's interpretations from producing a different type of legal effect apart from *res judicata inter partes*.[1295]

1293 Guevara Palacios (n 12) p. 337.

1294 Guevara Palacios (n 12) p. 337. Despite this finding, Guevara Palacios' position on the legal effects of the Court's advisory opinions is in fact very similar to the position that they have an *erga omnes partes* effect of *res interpretata*. According to his position that the advisory opinions produce what he calls an "*interpretación constitucional y/o convencional*", the Court's interpretative criteria shall be taken into account and generally be followed by the states. Only in case there exists a more progressive interpretation or one that is more favorable to the individual, the national authorities may deviate from the criteria developed by the Court. The point where his position slightly differs from the explanations of the Court lies in the fact that Guevara Palacios takes the asymmetries of the inter-American human rights system into account and holds that not all interpretations made by the Court in the context of its advisory function have to have the same strong effect on all OAS member states but that it depends on whether the Court interprets norms constituent for the whole system or whether it interprets treaty norms that are not binding on all 35 OAS member states. Only states that are bound by the respective treaty which the Court has interpreted in an advisory opinion have to adopt and follow the Court's interpretations. See: Guevara Palacios (n 12) p. 337–338, 346–367. Although this differentiation is important given the persisting asymmetries (see *infra*: Chapter 5, Section B.IV.3.e)), there is no need to reject the whole concept of *res interpretata* in order to develop a similar position under a different denomination. Therefore, Guevara Palacio's idea of an "*interpretación constitucional y/o convencional*" is not further outlined in this chapter.

1295 *Cf.*: Polakiewicz (n 1287) p. 352 speaking of Article 53 instead of 46 ECHR as the numbering of the articles was still different at that time.

Instead of being based on Articles 32 (1) and 46 ECHR, the *res interpretata* effect is rather deduced from an interpretation of Articles 1, 19 and 32 ECHR.[1296] Furthermore, the general role of the ECtHR, as the competent and final interpreter of the ECHR, as deduced from Articles 19 and 32 ECHR, is in this context more important than the explicit wording of these norms, and this role applies *mutatis mutandis* to the IACtHR in relation to the ACHR.

Accordingly, the *res interpretata* effect of the IACtHR's jurisprudence has also been based on Articles 1 and 2 and on the principle of *effet utile*, and not on Articles 62 and 68.[1297] It has been held that Articles 1 (1) and 2 provide even clearer than the ECHR that the states parties have to undertake measures to ensure the effectiveness of the rights enshrined in the Convention, and that they therefore have to take the Court's jurisprudence into account, given that the Court's jurisdiction comprises all matters relating to the "interpretation or application" of the Convention.[1298]

In light of this, the argument that the doctrine of *res interpretata* could not be applied to the advisory opinions of the IACtHR is not convincing.

On the contrary, if one assumes that the judgments of the IACtHR produce *res interpretata*, and that, more importantly, not the bindingness of the judgments is extended, but that the effect of *res interpretata* follows from the obligation to ensure the effectiveness of the substantive conventional rights[1299], it is only logical to affirm this effect for the Court's advisory opinions as well. For the *res interpretata* is contained in those parts of a judgment that can be generalized, and that do not refer to the assessment of the facts of the individual case.[1300]

As advisory opinions, however, per se mostly contain abstract and generalizable interpretations, the idea that they produce *res interpretata* is all

1296 Kunz, *Richter über internationale Gerichte* (n 1071) p. 30; Besson (n 951) p. 140; Bodnar (n 1284) p. 223, 226; Hans-Joachim Cremer, 'Kapitel 32: Entscheidung und Entscheidungswirkung' in Oliver Dörr *et al.* (eds), *EMRK/GG Konkordanzkommentar* (Band II, 3nd edn Mohr Siebeck, 2022) mn. 147; Anne Peters und Tilmann Altwicker, *Europäische Menschenrechtskonvention* (2nd edn C.H. Beck, 2012) § 37, mn. 18.

1297 *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, paras. 54, 91.

1298 *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, paras. 44, 54. As to the full text of Articles 1 and 2 see *supra* (n 1054).

1299 *Cf.*: Kunz, *Richter über internationale Gerichte* (n 1071) p. 30–31, 57.

1300 Besson (n 951) p. 132, 161.

the more convincing in relation to them than to judgments in contentious cases. Thus, if the IACtHR holds that its judgments produce not only *res judicata* but also *res interpretata*, it is only logical to hold that its advisory opinions contain *res interpretata*, too.[1301]

c) Formation of *res interpretata*

It has already been stated that *res interpretata* is produced when the Court interprets a legal provision, and that this interpretation then becomes an integral part of the Convention.[1302] Yet, in order to be more precise, it needs to be asked whether *res interpretata* is immediately formed by *any* interpretation made by the Court, or whether it is only formed when the Court has confirmed the interpretation at least once in a later judgment or advisory opinion.

As a starting point, *res interpretata* exists in any case in the presence of a well-established jurisprudence.[1303] For instance, already before OC-24/17 the Court had held that states must not discriminate on the basis of sexual orientation, and that Article 17 does not only protect a traditional family model.[1304] Consequently, these interpretations of Article 1 (1) and 17, reiterated in OC-24/17, by now constitute without a doubt *res interpretata*.

1301 That jurisprudential authority or *res interpretata* not only emanates from judgments but also from other court pronouncements is also exemplified by the Human Rights Act 1998 of the United Kingdom which recognizes the obligation to take into account the case-law of the ECtHR and explicitly includes advisory opinions among the sources of jurisprudential authority: Section 2.1. (a) states: (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any (a)judgment, decision, declaration or advisory opinion of the European Court of Human Rights, […] whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen. The Human Rights Act 1998 is available at: https://www.legislation.gov.uk/ukpga/1998/42/section/2; *cf.* also: Bodnar (n 1284) p. 250; Besson (n 951) p. 141.

1302 See *supra* Chapter 5, Section B.IV.3.a) and there (n 1287).

1303 *Cf.*: Kathrin Brunozzi, 'Art. 46' in Jens Meyer-Ladewig *et al.* (eds), *EMRK: Europäische Menschenrechtskonvention* (5th edn Nomos, 2023) mn. 16.

1304 OC-17/02 (n 253) paras. 69, 70; IACtHR, *Case of Atala Riffo and Daughters v. Chile*, Judgment of 24 February 2012 (Merits, Reparations and Costs), Series C No 239, paras. 83–93, 142; *Case of Duque v. Colombia*, Judgment of 26 February 2016 (Preliminary Objections, Merits, Reparations and Costs), Series C No 310, paras. 104–138; OC-21/14 (n 320) para. 272; OC-24/17 (n 1) paras. 178, 197–199.

Yet, the reiteration of an interpretation is not mandatory for the formation of *res interpretata*. As a matter of fact, advisory opinions in particular often deal with questions of interpretation that do not arise so frequently, which is why no contentious case law might develop with regard to these questions. Therefore, an interpretation once provided for in an advisory opinion is likely to persist for a long time without being further developed or overruled.

For example, interpretations of terms contained in Article 64 such as "other treaties" or "domestic laws" are not likely to be questioned in contentious cases, so that these interpretations can only be reconfirmed if a later, similar request for an advisory opinion is made.

The fact that the interpretations of these terms – which the Court established in OC-1/82 and OC-4/84 – are still valid, shows that the Court's jurisprudence is mostly consistent, and that its interpretations therefore do not necessarily have to be reiterated before they can be considered to constitute *res interpretata*.[1305] But the more often an interpretation is confirmed by the Court, all the clearer the presence of *res interpretata* becomes.

In contrast to the formation of *res judicata*, the formation of *res interpretata* does not depend on the fact that the respective interpretation was essential for the final *ratio decidendi* of judgments, or for the final answer to the legal questions as far as advisory opinions are concerned. Rather, an *obiter dictum* that is without relevance for the solution of a concrete case or for the direct answer of an advisory opinion request may also contain an important interpretation of a provision of the Convention, or of another human rights treaty, and thus contribute to the formation of *res interpretata*.[1306]

In sum, as concerns advisory opinions, any interpretation of a certain provision established in an advisory opinion, be it established procedural or material standards, statements as to the legal status of an obligation (e.g. whether it forms part of *ius cogens*), or also as to obligations that are said

1305 *Cf.*: OC-4/84 (n 233), paras. 13–19; OC-1/82 (n 42) first final finding. The finding, that the definition of the term "other treaties" is still valid is true although the Court has in fact extended its advisory jurisdiction *ratione materiae* also on non-binding legal instruments like the American Declaration and the OAS Democratic Charter by holding that their interpretation was necessary in order to be able to interpret the Convention or the OAS Charter. See *supra*: Chapter 3, Section B.III.

1306 *Cf.*: Ezequiel Malarino, 'Acerca de la pretendida Obligatoriedad de la Jurisprudencia de los Órganos Interamericanos de Protección de Derechos Humanos para los Tribunales Judiciales nacionales' (n 1273) p. 435, 454.

to be derived from a Convention right or other provision, are assumed to produce *res interpretata*. This is all the more true if these interpretations and established standards are reiterated in later judgments or advisory opinions.

d) Type of obligations resulting from *res interpretata*

Once it is affirmed that the concept of *res interpretata* is also applicable to advisory opinions, and clarified when *res interpretata* is produced, it needs to be defined what kind of obligations actually follow from the emergence of *res interpretata*.

Despite the early pronouncement of the ECtHR on the *erga omnes* effect of its judgments[1307] and the IACtHR's repeated statements on *res interpretata*, the actual legal obligation that follows from the acceptance of *res interpretata* and an *erga omnes* effect of judgments and advisory opinions is still indeterminate.[1308] This can be explained by the discrepancy between the endorsement of the concept by the Courts and the still reserved reaction by states.[1309] The indeterminacy is also highlighted by the many different termini used and opinions held to date both among states and in academia.

1307 See next to the *Case of Ireland v. The United Kingdom* also ECtHR, *Case of Karner v. Austria*, Judgment of 24 July 2003, Appl. no. 40016/98, para. 26 and see Besson (n 951) p. 139 fn. 27 for further references.

1308 *Cf.*: Besson (n 951) p. 126, 173.

1309 *Cf.*: Besson (n 951) p. 137ff.

In the European context, some only speak of an "orientative effect" [1310] or "factual effects" [1311], or hold the *res interpretata* effect to be something desirable de *lege ferenda*[1312].

Others however derive such an *erga omnes* effect of *res interpretata* from Articles 1, 19 and 32 ECHR and from a teleological interpretation of the ECHR as a whole, and deduce from it an already *de lege lata*

1310 The German Federal Constitutional Court holds that the jurisprudence of the ECtHR has a "factual orientation and guiding function" ("faktische Orientierungs- und Leitfunktion") also in cases in which Germany was not a party to the case. See: German Federal Constitutional Court, Judgment of 4 May 2011 – 2 BvR 2333/08, para. 89 and Judgment of 12 June 2018 – 2 BvR 1738/12, paras. 129ff. With regard to the jurisprudence of the Federal Constitutional Court, it is important to note that the obligation to take the jurisprudence of the ECtHR into account ("Berücksichtigungspflicht"), which the Constitutional Court established in the famous case of "Görgülü", was firstly established with regard to a judgment against Germany, and secondly derived from the German Constitution (Basic Law). See: German Federal Constitutional Court, Decision of 14 October 2004 – 2 BvR 1481/04, paras. 29ff. Thus, while the obligation to take the jurisprudence of the IACtHR into account which is supposed to follow from *res interpretata* as discussed in this Chapter, is derived from an interpretation of the ACHR, and hence held to exist under international law, the "Berücksichtigungspflicht" usually spoken of in the German legal context concerns a constitutional law obligation.

1311 Marten Breuer, 'Art. 46' in Ulrich Karpenstein und Franz Mayer (eds), *EMRK: Konvention zum Schutz der Menschenrechte und Grundfreiheiten* (3rd edn C.H. Beck, 2022) mn. 45; following the words of the German Federal Constitutional Court, Brunozzi and Peters/Altwicker also mention the factual orientative effect ("faktische Orientierungs- und Leitfunktion") but Brunozzi assumes a binding effect on the basis of Article 1 ECHR at least in case of a well-established jurisprudence and Peters/Altwicker leave it open whether there exists also a legal obligation to consider apart from the factual effects. See: Brunozzi (n 1303) mn. 16–17; Peters and Altwicker (n 1296) § 37, mn. 18; Mirjana Lazarova Trajkovska, 'Ways and means to recognize the interpretative authority of judgments against other states', speech of 1–2 October in Skopje, in *Committee on Legal Affairs and Human Rights, Contribution to the Conference on the Principle of Subsidiarity, Skopje, 1–2 October, "Strengthening Subsidiarity: Integrating the Strasbourg Court's Case law into National Law and Judicial Practice*, p. 12, available at: https://assembly.coe.int/committeedocs/2010/20101125_skopje.pdf.

1312 Bodnar (n 1284) p. 255; for further references on this question see also: Elisabeth Lambert, *Les effects des arrêts de la Court européenne des droits de l'homme: Contribution à une approche pluraliste du droit européen des droits de l'homme* (Bruylant, 1999) p. 303ff; Kunz, *Richter über internationale Gerichte* (n 1071) p. 31; Besson (n 951) p. 138, 173ff.

existing obligation to take into account or to consider the judgments of the ECtHR.[1313]

Furthermore, an "*untrue erga omnes*" effect has also been spoken of, given that in fact not the binding force of the judgments is being extended, but that the Court's case law partakes in the bindingness of the interpreted and further developed Convention.[1314] As the actual obligation is therefore not directly derived from the judgments as such, but rather derived from the rights enshrined in the Convention, it was held to be preferable not to speak of an (untrue) *erga omnes* effect, but only of *res interpretata* or of an obligation to consider.[1315]

There exists a similar debate on *res interpretata* and "*de facto erga omnes*" effects with regard to the decisions of the AfrCtHPR, although that Court has not yet positioned itself on a possible *res interpretata* effect of its decisions.[1316]

In the inter-American context, the debate is embedded in the broader discussion on the correct implementation and the precise legal consequences of the conventionality control doctrine.[1317] The Court has distinguished between two different manifestations of how strict the conventionality control has to be exercised, depending on whether a state was a party to a respective proceeding or not.[1318] This statement of the Court was further explained by Judge Ferrer Mac-Gregor Poisot in a detailed separate opinion[1319], which received widespread attention. Therein, Judge Ferrer Mac-Gregor Poisot differentiates between the subjective and the

1313 Polakiewicz (n 1287) p. 347–354; Kunz, *Richter über internationale Gerichte* (n 1071) p. 30–31; Besson (n 951) p. 140, 164ff; Presentation by Mr Pourgourides in *Committee on Legal Affairs and Human Rights, Contribution to the Conference on the Principle of Subsidiarity, Skopje, 1–2 October, "Strengthening Subsidiarity: Integrating the Strasbourg Court's Case law into National Law and Judicial Practice*, p. 2 et seq., available at: https://assembly.coe.int/committeedocs/2010/20101125_skopje.pdf; on the obligation to consider its judgments see also: ECtHR, *Case of Opuz v. Turkey*, Judgment of 9 June 2009, Appl. no. 33401/02, para. 163; Bodnar (n 1284) p. 226–227, 245ff.

1314 Kunz, *Richter über internationale Gerichte* (n 1071) p. 30; see also: Polakiewicz (n 1287) p. 354.

1315 Kunz, *Richter über internationale Gerichte* (n 1071) p. 31 fn. 22.

1316 Obonye (n 1281) p. 736–755, in particular, pp. 748–751 with further references.

1317 As stated above, it has also been held that *res interpretata* and conventionality contol were two sides of the same coin. See: Queralt Jiménez (n 1272) p. 695, 713.

1318 *Case of Gelman v. Uruguay* (n 1105) para. 67–69.

1319 *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot.

objective effectiveness or, in other words, between the direct binding effect *inter partes* and the indirect binding effect *erga omnes* of the decisions of the Court.[1320] Thus, he also speaks in relation to "*res interpretata*" of a binding effect, and the difference between the effect of *res judicata* and *res interpretata* lies in his opinion only in the degree and scope of the binding obligation imposed on the respective states. In an earlier concurring opinion, he had gone even further, stating that "conventional jurisprudence is not simply guidance, but is also mandatory for [national] judges".[1321] Although this statement did not directly refer to advisory opinions, it was nevertheless made with regard to the effect of *res interpretata* – which the Court nowadays holds is also attached to advisory opinions.

When it comes to the actual obligation that follows from *res interpretata*, Judge Ferrer Mac-Gregor holds the standards established by the Court to be the binding minimum standard.[1322] Accordingly, all contracting states have to implement the standards set by the Court in any judgment or advisory opinion, and may only depart from the Court's interpretations and standards if they thereby increase effectiveness, that is to say, if they implement rules that are even more favorable to the individual than the Court's standard.[1323]

While this position seems to be that of the majority of the Court, which is also supported by other authors and domestic courts[1324], the above analysis of the domestic court decisions rendered in the aftermath of OC-24/17 has already shown that this view is also in the inter-American context not

1320 *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, paras. 31–79.

1321 *Case of Cabrera García and Montiel Flores v. Mexico* (n 1027), Concurring Opinion of *Ad hoc* Judge Eduardo Ferrer Mac-Gregor Poisot, para. 79.

1322 *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, paras. 52–55; 72, 94.

1323 *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, para. 72.

1324 Constitutional Court of Ecuador, Judgment 184–18-SEP-CC of 29 May 2018, case No. 1692–12-EP, p. 58; Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 9 May 1995, No. 2313–95, Exp. 0421-S-90, p. 7 para. 7; Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 8 August 2018, No. 12782–2018, Exp. 15–013971–0007-CO, Separate Vote of Judge Hernández López; Hitters, *'Un Avance en el Control de Convencionalidad. (El Efecto 'erga omnes' de las Sentencias de la Corte Interamericana)'* (n 1276); Rodríguez Rescia (n 1271) p. 59, 63.

uncontroversial.[1325] Yet, as stated, the critique is embedded in the broader debate on the doctrine of conventionality control.

Only a few critics mention the concept of *res interpretata*,[1326] and those who do, do not at all question whether the legal consequences of *res interpretata* could be understood less strictly than by the Court. Rather, the critique is framed in different terms. It is mostly directed at the Court's position that the doctrine of conventionality control implies that national courts, and also all other state organs, should accept and follow the Court's jurisprudence.[1327] While critics reject the Court's position, they often refer to former Judge Vio Grossi and especially to his statements that the advisory opinions of the Court are not binding.[1328] Even when the doctrine of conventionality control is principally accepted, any term that would hint to a legal bindingness of the Court's advisory opinions is avoided.[1329] Nevertheless, most critics accept that the Court's jurisprudence, including its advisory opinions, has a "guiding" or "orientating" effect for all contracting states.[1330]

1325 See *supra*: Chapter 5, Section B.IV.2.b).

1326 Vítolo mentions the concept of *res interpretata* explicitly and rejects it, holding that the assumption that the Court's jurisprudence had an *erga omnes* effect of *res interpretata* would violate the principle of democratic legitimacy. Yet, he does not further analyze the concept of *res interpretata* as such, and does not question whether it could be understood differently than by the Judge Ferrer Mac-Gregor-Poisot. See: Alfredo M. Vítolo, *'Una novedosa categoría jurídica: "el querer ser". Acerca del pretendido carácter normativo erga omnes de la jurisprudencia de la Corte Interamericana de Derechos Humanos. Las dos caras del "control de convencionalidad"'* (2013) 18 Pensamiento Constitucional, 357, 373–374.

1327 Vítolo, *'Una novedosa categoría jurídica: "el querer ser". Acerca del pretendido carácter normativo erga omnes de la jurisprudencia de la Corte Interamericana de Derechos Humanos. Las dos caras del "control de convencionalidad"'* (n 1326) p. 357–380; Malarino, 'Acerca de la pretendida Obligatoriedad de la Jurisprudencia de los Órganos Interamericanos de Protección de Derechos Humanos para los Tribunales Judiciales nacionales' (n 1306) p. 435, 438–439.

1328 Constitutional Tribunal of Peru, Judgment 676/2020 of 3 November 2020, case no. 01739–2018-PA/TC, Vote of Judge Blume Fortini, para. 9, Vote of Sardón de Taboada; Vio Grossi (n 1034) p. 322–323; OC-24/17 (n 1), Separate Opinion of Judge Eduardo Vio Grossi, paras. 149–150.

1329 Vio Grossi (n 1034) p. 322–323; OC-24/17 (n 1), Separate Opinion of Judge Eduardo Vio Grossi, paras. 149–150.

1330 Vio Grossi (n 1034) p. 322–323; Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 8 August 2018, No. 12782–2018, Exp. 15–013971–0007-CO, Dissenting Vote of Judge Castillo Víquez; Dulitzky (n 262) p. 78. See also the position on the orientating effects of the advisory opinions for Mexican judges held by the 8th Circuit Court of the first

This means that these critical views could be reconciled with the concept of *res interpretata* as long as the legal consequences going along with it are not understood as strictly as by the Court. This is because the acceptance of *res interpretata* and of an obligation to consider the Court's jurisprudence does not have to lead to the understanding of Ferrer Mac-Gregor Poisot that states may only deviate from the Court's jurisprudence if they provide for higher protection standards.

Thus, if one wants to accept the concept of *res interpretata*, and try to reconcile it with concerns and critique raised in light of the development of the Court's position instead of discarding it right away, the central question is how the effect of *res interpretata* is actually defined. Can it be equated with an obligation to *follow* the Court's jurisprudence; does it entail at least an obligation to *consider* the Court's jurisprudence or is *res interpretata* understood to have only a guiding effect?[1331]

aa) Arguments against the strict understanding of *res interpretata*

The IACtHR and the supporters of a strict *res interpretata* approach seem to assume that not only is there a legal obligation to consider the Court's jurisprudence, but that it, moreover, goes along with an obligation to actively act.[1332] Thus, in case a state recognizes that its domestic law does not exactly correspond to an interpretation made by the IACtHR in an advisory opinion or in a judgment rendered against another state, the authorities of this state should without undue delay adapt the state's legislation, administration and jurisprudence to new elements of *res interpretata*. Domestic courts should then apply the standards set by the IACtHR except when the domestic laws provide for an even higher protection standard.

Mexican region: Octavo Tribunal Colegiado de Circuito del Centro Auxiliar de la Primera Región, Opiniones Consultivas de la Corte Interamericana de derechos Humanos. Implicaciones de su carácter orientador para los jueces mexicanos, tesis aislada (I Región)80.1 CS (10a.), published on 28 April 2017.

1331 See already *supra*: (n 1273) the reference to Malarino who notes different possible understandings of the term "servir de guía" which means "serve as guide".

1332 Although the Court in OC-24/17 acknowledged that some states would need some time to adapt their domestic law in a way that gives same-sex couples access to marriage, it nevertheless expected them to become active and to overcome the remaining hurdles. See: OC-24/17 (n 1) paras. 226–227.

The application of a higher protection status is of course one legitimate argument to deviate from the Court's established jurisprudence. This is already recognized by Article 29 lit. b.[1333]

Yet, the question arises, whether this can be the only margin states have when dealing with *res interpretata*. For example, there are situations in which two rights or interests are in conflict with each other and in which there is no clear answer which possibility of resolving the conflict of norms ultimately provides the higher protection for the individual.[1334] Rather, a balance has to be struck between conflicting interests and it is sometimes more a political than a legal decision which protected value and interest should prevail under certain circumstances.[1335] It is in these situations, that domestic authorities might have reasonable arguments why they reach a different solution than the Court supposedly would have come to.

This holds especially true if the relevant line of jurisprudence of the IACtHR seems to be outdated in light of social change or new legal developments, or because new scientific studies have shown that it is better to strike a different balance between conflicting rights and interests.[1336]

Furthermore, it may be that the enjoyment of a conventional right is guaranteed in a state through different legal and administrative avenues than proposed by the Court in its jurisprudence. If the state's authorities nevertheless reach the conclusion that the right in question is, under the

1333 As to the exact wording of Article 29 lit. b see *supra*: (n 1066).

1334 One example for such a situation in which the *pro homine* or *pro persona* principle does not provide for a clear answer are cases concerning the right to abortion or the prohibition of *in vitro* fertilization in which rights of the mother may conflict with rights of the unborn embryo. While the Court in the *Case of Artavia Murillo et. al ("In vitro ferilization") v. Costa Rica* declared that Costa Rica had to annul, as soon as possible, the prohibition of *in vitro* fertilization, several domestic courts have departed from the Court's ruling, applying *inter alia* the *pro homine* principle in favor of the unborn embryo. See: IACtHR, *Case of Artavia Murillo et. al ("In vitro ferilization") v. Costa Rica*, Judgment of 28 November 2012 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 257, para. 381; Tello Mendoza, 'El control de convencionalidad y sus disonancias con la democracia constitucional' (n 169) p. 233 with further references to the domestic courts' decisions. The fact that the *pro homine* or *pro persona* principle does not always provide for a clear answer is also noted by Kunz, *Richter über internationale Gerichte* (n 1071) p. 241.

1335 As to further strategic considerations which may play a role when domestic courts have to decide whether to follow the line of the IACtHR or not, see: Chehtman, *'The relationship between domestic and international courts: the need to incorporate judicial politics into the analysis'* (n 1224).

1336 *Cf.*: Dulitzky (n 262) p. 77–79.

existing national laws, as well protected as it would be if the state adopted the approach suggested by the Court, it seems disproportionate to require that state to adopt the exact approach as suggested by the Court.

Finally, the strict *res interpretata* approach – according to which states may only deviate from the Court's jurisprudence if they provide for higher protection standards – may raise questions of democratic legitimacy.[1337] If a change of the domestic jurisprudence or administrative procedure does not suffice to comply with the *res interpretata* produced by the Court, but if instead, a change of domestic laws or even the constitution is required, such a legal reform depends on the necessary democratic majorities which may not be given. Although the Court is right that a state in case of *res judicata* is absolutely bound by the judgment, and thus under an obligation to undertake the necessary legal reforms, it has been held that there may be exceptional circumstances in which it should be justified for a state to disobey a judgment with the force of *res judicata*.[1338]

In the same vein, it has been argued that the hurdles to deviate from *res interpretata* should be lower.[1339] Thus, while the obligation to consider the Court's jurisprudence is of course also directed to the national parliaments, it is hard to argue, that they are under a strict obligation to follow any aspect of the Court's *res interpretata* if there is no democratic majority for it after a substantive debate. Needless to say, a state risks being held accountable by the Court in a later judgment rendered against it if it does not comply with *res interpretata*. Nevertheless, the state should have the opportunity to explain and to convince the Court of its reasons for maintaining or adopting a different approach than that suggested by the Court.

1337 *Cf.*: Vítolo, '*Una novedosa categoría jurídica: "el querer ser"". Acerca del pretendido carácter normativo erga omnes de la jurisprudencia de la Corte Interamericana de Derechos Humanos. Las dos caras del "control de convencionalidad"*' (n 1326) p. 357, 373; Ezequiel Malarino, 'Activismo Judicial, Punitivización y Nacionalización. Tendencias Antidemocráticas y Antiliberales de la Corte Interamericana de Derechos Humanos' in Gisela Elsner (ed), *Sistema Interamericano de Protección de los Derechos Humanos y Derecho Penal Internacional* (Konrad Adenauer Stiftung e.V., 2010) p. 25, 51–53; Tello Mendoza, 'El control de convencionalidad y sus disonancias con la democracia constitucional' (n 169) p. 223–262, in particular p. 230–234 on the Court's problematic understanding of the *pro homine* principle.

1338 Hentrei (n 262) p. 265–268.

1339 Hentrei (n 262) p. 265–268.

bb) Problems of a too lax understanding of *res interpretata*

Having outlined the problems of a strict understanding of *res interpretata*, this subsection will now have a closer look at the alternative understanding, according to which *res interpretata* either does not include any legal, but merely a moral, obligation to consider the Courts jurisprudence, or according to which *res interpretata* entails at best a guiding or orientational effect, which is not more closely defined.[1340]

First of all, *res interpretata* is like *res judicata* a legal concept, which is why its effects should also be described in legal terms and not only with attributions such as "moral", "scientific" or "*de facto*".[1341] A *bona fide* implementation of the Convention requires states to take the Court's jurisprudence into account as the Court is the competent organ established under the Convention to interpret its terms and to secure its enforcement.[1342] Notably, the interpretation by a neutral and competent organ plays a particularly important role with regard to human rights treaties, given that these treaties contain non-reciprocal obligations for states, and are drafted in abstract terms, so that their interpretation is a necessary precondition for their application.[1343]

Furthermore, the Court is right that it lacks the capacity to deal with high numbers of similar cases, and that an effective enforcement of the Convention therefore requires the national states to be the first guardians of the Convention. If *res interpretata* was only understood as a moral obligation, or if the obligation to consider the Court's jurisprudence is not further specified, it is unlikely that the states' authorities will actively act when they have found out that their domestic laws, administration or jurisprudence contradicts the Court's interpretation of the Convention. In that case, the concept of *res interpretata* would be only of very little use as it would neither considerably improve the enforcement of the Convention and appropriate human rights standards, nor reduce the amount of very similar cases that might eventually be brought to the Court.

1340 Vio Grossi (n 1034) p. 322–324. This view mostly overlaps with the traditional view that advisory opinions constitute non-binding, but authoritative interpretations of the law.
1341 *Cf.*: Guevara Palacios (n 12) p. 359; Besson (n 951) p. 158.
1342 *Cf.*: Bodnar (n 1284) p. 226–227, 246.
1343 Besson (n 951) p. 150.

cc) Suggested understanding of *res interpretata*

Against this backdrop, an intermediate course between the view that *res interpretata* has only a guiding effect, and the view that it must always be followed exactly as proposed by the Court except when states want to apply a more favorable standard, seems to be preferable.[1344] Accordingly, the Court's interpretations that have acquired the status of *res interpretata* should not only be considered and taken into account, but be principally respected as the conventional standard. Hence, states should not wait until a similar case is brought against themselves before the Court, but take the interpretations of the Court as a standard and act pre-emptively in order to avoid a ruling against them. This is not only in the interest of an effective enforcement of the Convention and the protection of human rights, but also in the interest of states, as it helps them to improve their rule of law standards and to prevent being required to pay compensation for human rights violations. This principle holds especially true with regard to situations where there exists a well-established jurisprudence of the Court concerning the most fundamental human rights such as e.g. the right to life, to humane treatment and to personal liberty.[1345]

At the same time, the *res interpretata* effect should not be confused with a strict obligation to always apply the Court's criteria exactly as suggested by the Court. There must be space for any state authority that has to apply or to enforce legislation, and especially for the legislative organs, to undertake their own assessment and to find the right solution in the context of the respective national constitutional and legal setting.[1346]

1344 Without referring directly to the concept of *res interpretata*, Kunz' analysis has shown that many domestic courts in practice have indeed taken a kind of "middle-ground position" between strict compliance and mere guidance with regard to the jurisprudence of regional human rights courts. See Kunz, *Richter über internationale Gerichte* (n 1071) p. 167–209; Kunz, *'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts'* (n 1224) p. 1145–1149.

1345 *Cf.*: Kunz, *'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts'* (n 1224) p. 1146ff. and *idem*, *Richter über internationale Gerichte* (n 1071) p. 199ff. noting that domestic courts are in fact more willing to implement orders from the ECtHR or the IACtHR in cases of very severe human rights violations or when the violation is still ongoing.

1346 On the broader topic of democratic iterations and the therefore necessary discursive spaces see *inter alia*: Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (CUP, 2004) p. 176ff; *idem*, *'Democratic Exclusions and Democratic Iterations: Dilemma's of 'Just Membership' and Prospects of Cosmopolitan Federal-*

National parliaments should be guided by the Court's jurisprudence, but, if after an intense debate, there is no democratic majority to adopt the required legal reforms, the state may present the respective arguments before the Court in case of a later contentious proceeding. Of course, arguments that are based on a lack of resources, on a lack of willingness to reform, or on discrimination will not convince the IACtHR that there is no violation of the Convention despite the reasoned disregard of *res interpretata*.[1347] However, a reasoned legal argumentation that a state has, through decisions of democratically elected organs, struck a different balance between two important constitutional values or legal interests might justify a deviation from the Court's line of jurisprudence.

As concerns domestic courts, after taking the Court's jurisprudence into account, they have to consider whether the Court's criteria are at all applicable to the case pending before them, or whether this case needs to be differentiated. If the Court's criteria are applicable and the domestic judges nevertheless hold a different solution to be indicated, they have to provide good reasons, and justify why they deviate from the IACtHR's line of jurisprudence.[1348] As held above, a deviation may in particular be justified in case of conflicting rights, if the domestic courts hold that the balance between two different rights in question should be struck in a different way than suggested by the IACtHR.[1349] In contrast, the finding that other states

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ism' (2007) 6(4) European Journal of Political Theory, 445–462; Hentrei (n 262) p. 125–131 with further references; *cf.*: Armin von Bogdandy, 'Del Paradigma de la Soberanía al Paradigma del Pluralismo. Una nueva Perspectiva (Mirada) de la Relación entre el Derecho Internacional y los Ordenamientos jurídicos nacionales' in Griselda Capaldo et al. (eds), *Internacionalización del Derecho Constitucional, Constitucionalización del Derecho Internacional* (Eudeba, 2012) p. 21, 40.

1347 It should however be noted that a lack of resources may indeed constitute a serious challenge for states, especially as regards the guarantee of economic, social, cultural and environmental rights. *Cf*: The considerations of Judge Sierra Porto in OC-29/22 (n 275), Concurring Opinion of Judge Humberto A. Sierra Porto, para. 13.

1348 *Cf.*: The four steps proposed by Ezequiel Malarino: Malarino, 'Acerca de la pretendida Obligatoriedad de la Jurisprudencia de los Órganos Interamericanos de Protección de Derechos Humanos para los Tribunales Judiciales nacionales' (n 1273) p. 435, 453–455; and see as well: Octavo Tribunal Colegiado de Circuito del Centro Auxiliar de la Primera Región, Opiniones Consultivas de la Corte Interamericana de derechos Humanos. Implicaciones de su carácter orientador para los jueces mexicanos, tesis aislada (I Región)80.1 CS (10a.), published on 28 April 2017.

1349 One typical example of conflicting rights are cases in which fundamental criminal defense rights of the alleged perpetrator conflict with the fight against impunity

have not yet adopted and implemented the Court's standards should not suffice to justify a disregard of *res interpretata* and a deviation from the Court's jurisprudence.

This understanding of the concept of *res interpretata* allows for an effective enforcement of the Convention, while at the same time protecting democratic processes and preventing domestic courts from getting the impression that they are mere "*Erfüllungsgehilfen*" called to enforce the IACtHR's jurisprudence, rather than equal partners in the further development of human rights law.[1350] This way, the domestic authorities could enter into a fruitful dialogue with the IACtHR.[1351] It could of course still happen that the IACtHR finds a violation if it is not convinced by the arguments brought up by the domestic authorities in order to justify a deviation from the Court's precedent, but the IACtHR should be open to the arguments of the domestic authorities. This means it should be ready to acknowledge that the circumstances surrounding the national case justified national authorities in deviating from the *res interpretata* established by the Court, and in some cases the Court might even consider adapting its own line of jurisprudence to the arguments provided by the national authorities, which would then lead to a further development or change of *res interpretata*.

Lastly, this understanding of the legal consequences brought about by the concept of *res interpretata* does not mean that the Court should adopt the margin of appreciation doctrine developed by the ECtHR, as has been demanded both by scholars and states, but so far been rejected by the

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and the interest of the victims in a proper investigation and conviction of the perpetrator. Typically, the *pro homine* principle does not provide for a clear answer in these cases. As to examples in which domestic courts have sometimes struck the same balance as the IACtHR and sometimes not, see Kunz, *'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts'* (n 1224) p. 1147–1148.

1350 In German civil law, an "Erfüllungsgehilfe" is defined as a person who works with the knowledge and intent of the debtor within the latter's scope of duties in the fulfillment of the debtor's obligations. Raffaela Kunz has used the term with regard to the relationship between domestic courts and regional human rights courts. She states that most domestic courts see themselves not as mere "Erfüllungsgehilfen" of the regional court but also as "guardians of their own legal order" and that they therefore do not blindly follow the view taken by the regional court. See: Kunz, *Richter über internationale Gerichte* (n 1071), in particular p. 165, 167.

1351 On the importance of judicial dialogue see *inter alia*: Dulitzky (n 262) p. 76–79; Contesse, *'The final word? Constitutional dialogue and the Inter-American Court of Human Rights'* (n 1069) p. 427–435; Bazán (n 1121) p. 63, 93–95; Hentrei (n 262) in particular pp. 285–288.

Court.[1352] Calls for adopting the margin of appreciation doctrine by Latin American states have sometimes just been poorly disguised pleas for a more restrained Court and a more cautious human rights jurisprudence.[1353] The IACtHR does not have to give in to these calls. However, as proposed, national authorities and especially domestic courts should be encouraged to come up with their own legal arguments and solutions, and should be allowed to justify why they hold another legal standard or solution to be more suitable in a specific case and in the context of the respective legal system.

e) *Res interpretata* and the asymmetries in the inter-American human rights system

After having outlined the type of legal obligation that follows from *res interpretata* according to the view suggested here, it still needs to be clarified *who* is actually bound to consider the Court's jurisprudence and either comply with its interpretative standards, or provide for a sound justification for deviating from the Court's *res interpretata*. This question is not pertinent in human rights systems like the European in which any member state of the Council of Europe is simultaneously bound by the ECHR. Yet, in light of the asymmetries still persisting in the inter-American human rights system, the question becomes especially relevant in the context of the Court's advisory jurisdiction, as all OAS member states may request advis-

1352 The Court has referred to the margin of appreciation only in very rare occasions and has neither developed any other constant theory on deference. See: Hentrei (n 262) in particular pp. 268–279; Pablo Contreras, '*National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between the Jurisprudence of the European and the Inter-American Court of Human Rights*' (2012) 11 Northwestern Journal of International Human Rights, 28, 55–67 with further references; Maria-Louiza Deftou, '*Fostering the Rule of Law in the Americas: Is There any Room for Judicial Dialogue between the IACtHR and National Courts?*' (2020) 38(1) Nordic Journal of Human Rights, 78–95.

1353 See for example the joint declaration of the governments of Argentina, Brazil, Chile, Colombia and Paraguay of 11 April 2019: https://www.mre.gov.py/index.php/noticias-de-embajadas-y-consulados/gobiernos-de-argentina-brasil-chile-colombia-y-paraguay-se-manifiestan-sobre-el-sistema-interamericano-de-derechos-humanos?fbclid=IwAR24ZiaqFhGvQniznEnL3SX2MMu7litqud8-p2CBo98cnMNleC_6OdHg&ccm_paging_p=164.

ory opinions of the Court, while only part of them have ratified the ACHR, and even fewer have accepted the Court's contentious jurisdiction.[1354]

The Court holds that its advisory opinions cannot only be requested by any OAS member state, but that its advisory opinions also *vice versa* address and have "legal relevance" for all OAS member states.[1355] While the Court's doctrine of conventionality control is limited to the contracting states, the Court is apparently of the opinion that the *erga omnes* effect of *res interpretata* in the context of its advisory function extends to a certain extent to all OAS member states. As noted above, it held already in OC-18/03 that "everything indicated" in its advisory opinions applied to all OAS member states.[1356] Since OC-21/14 it has then repeatedly stated that

> *"the interpretation given to a provision of the Convention through an advisory opinion provides all the organs of the Member States of the OAS, including those that are not parties to the Convention but that have undertaken to respect human rights under the Charter of the OAS (Article 3(l)) and the Inter-American Democratic Charter (Articles 3, 7, 8 and 9) with a source that by its very nature, also contributes, especially in a preventive manner, to achieving the effective respect and guarantee of human rights [and that can in particular] provide guidance […]."*[1357]

While the Court here refers to the notion of *res interpretata* in relation to all OAS member states, it is noteworthy that the Court has mostly separated this paragraph from the paragraph in which it addresses the inclusion of the advisory opinions in the doctrine of conventionality control.[1358] This, and the further fact that the Court only speaks of a guiding effect when it refers to all OAS member states, might indicate that it holds that the effect of *res interpretata* is with regard to states that are not party to the Convention, not as strong as with regard to contracting states for which the

1354 The fact that the Court's advisory jurisdiction extends to all OAS member states is for Guevara Palacios another reason to hold the *res interpretata* concept inapplicable to the IACtHR's advisory opinions. See Guevara Palacios (n 12) p. 537.

1355 OC-24/17 (n 1) para. 28.

1356 See *supra*: Chapter 5, Section B.III.2. and OC-18/03 (n 227) para. 60.

1357 OC-21/14 (n 320), para., 31; OC-24/17 (n 1), para. 27.

1358 In the following advisory opinions the paragraph on the advisory opinions' inclusion in the doctrine of conventionality control was separated from that on the guiding effect which the Court's *res interpretata* has on all OAS member states: OC-23/17 (n 4) paras. 28–29; OC-24/17 (n 1) paras. 26–27; OC-25/18 (n 227) para. 58–59.

res interpretata – according to the Court's position outlined in the *Gelman* case – establishes, as outlined above, a binding minimum standard from which they may only depart if they apply a standard that is more favorable to the individual.[1359]

Yet, in OC-26/20 the Court not only recalled its statement made since OC-21/14, but noted in the merits part of the opinion that its interpretations of the Convention "necessarily transcend[ed] the Convention" and that they also constituted "parameters for the effective fulfilment of the human rights obligations set forth [...] in the OAS Charter, the American Declaration and other treaties and instruments."[1360] This was particularly evident with regard to the Court's interpretive criteria established in advisory opinions because these opinions had "legal effects" for all OAS member states.[1361]

These statements imply that the Court holds that also OAS member states that are not party to the Convention need to consider the Court's interpretations made of the Convention in the context of an advisory opinion in order to be able to fulfill the human rights obligations following from the OAS Charter and the American Declaration.[1362] In light of this, it seems

1359 This difference has also been noted by Vítolo, *'El Valor de las Opiniones Consultivas de la Corte Interamericana de Derechos Humanos a la Luz de las OC-21/14 y OC-23/17* (n 1162) p. 201. As to the Court's understanding of the *res interpretata* effect with regard to contracting states and in the context of the conventionality control see *Case of Gelman v. Uruguay* (n 1105) para. 67–69. *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, paras. 31–79 and *supra*: Chapter 5, Section B.IV.3.d).

1360 OC-26/20 (n 24) paras. 91, 93.

1361 OC-26/20 (n 24) para. 92.

1362 The Spanish version of OC-26/20 (n 24) para. 93 implies this stronger than the English version. The Court derives human rights obligations for example from Articles 3 lit. l, 34 and 45 OAS Charter. In OC-10/89 (n 348) para. 45, the Court held that the American Declaration of the Rights and Duties of Man, which had originally been adopted by the 9th International American Conference as a legally non-binding declaration, defined the "human rights referred to in the Charter" and that it was therefore a "source of international obligations" for the OAS member states. Also the Commission and other authors hold that the American Declaration has acquired legally binding force. See: Written observations of Uruguay, OC-10/89 proceedings, 14 June 1988, available at: http://hrlibrary.umn.edu/iachr/B/10-esp-5.html; Jorge A. Quindimil López, *'El estatus jurídico de la Declaración Americana de los Derechos y Deberes del Hombre'* (2019 Edición Especial) 13 Revista Electrónica Iberoamericana, 1–15; Florabel Quispe Remón, *'La importancia de la Declaración Americana de los Derechos y Deberes del Hombre en el Sistema Interamericano y la interpretación que de ella realiza la Corte Interamer-*

that the Court draws, if at all, only a minimal distinction between the *res interpretata* effect its advisory opinions have on contracting states on the one hand, and on the other OAS member states on the other hand.

In contrast to this rather unclear position of the Court, another view has distinguished more precisely between the legal effects the Court's advisory opinions have on the states parties to the Convention and on the other OAS member states.[1363] While advisory opinions in which the Court interprets provisions applicable to all OAS member states, like e.g. the OAS Charter or the American Declaration, were relevant for all OAS member states, only states that are parties to the ACHR or the other human rights treaties that the Court may interpret were required to follow the Court's interpretations made of those treaties.[1364]

This distinction according to the treaty provision which the Court interprets seems plausible, but in light of the above outlined understanding of the concept of *res interpretata*, it still requires an according specification.

Although the terms "*res interpretata*" and "*erga omnes (partes)* effect" are often used interchangeably, the asymmetries still persisting in the inter-American human rights system highlight that it is worth being precise and differentiating between *res interpretata* on the one hand, and the ensuing *erga omnes (partes)* effects on the other. *Res interpretata* is first and foremost the tangible product generated by the Court's interpretation. The *erga omnes (partes)* effect however addresses whomever this interpretive authority or *res interpretata* becomes relevant for. Put otherwise, *res interpretata* is what has *ratione materiae* been created by the Court's interpretations, and the *erga omnes (partes)* effect addresses who is *ratione personae* bound by the obligations arising from the concept of *res interpretata*.

While the Court is right that all OAS member states *may* of course consider the *res interpretata* created in its advisory opinions, and while its human rights interpretations *may* of course also provide guidance to all those states, the precise *erga omnes* effect of *res interpretata* as determined

icana' (2019 Edición Especial) 13 Revista Electrónica Iberoamericana, 1, 23; Grace Nacimiento, *Die Amerikanische Deklaration der Rechte und Pflichten des Menschen* (Springer, 1995) p. 172–175; *cf*: the critical view of Christina M. Cerna, 'Reflections on the normative status of the American Declaration of the Rights and Duties of Man', available at: https://www.corteidh.or.cr/tablas/r31598.pdf.

1363 Guevara Palacios (n 12) p. 338, 355. As to a short summary of his view see already *supra*: (n 1294).

1364 Guevara Palacios (n 12) p. 354, 355.

above can only apply to states that are bound by the treaty provision which the Court has interpreted.

With regard to the Convention as the main treaty interpreted by the Court, this is due to the fact that, as outlined above, the legal basis for the acceptance of an *erga omnes* effect of *res interpretata* is to be found in Articles 1 and 2 and in a *bona fide* interpretation of the Convention. Only vis-à-vis states which have acceded to the Convention under which the Court has been established, can an obligation to take the Court's jurisprudence into account, and to generally follow the Court's interpretations be established. Thus, the precise *erga omnes* effect of *res interpretata*, is limited to the contracting states, and it is more appropriate to speak of an *erga omnes partes* effect.

Res interpretata has the greatest relevance for those contracting states that have also accepted the Court's contentious jurisdiction, as it is these states that risk being held responsible for a violation of the Convention if they have not properly taken into account the Court's jurisprudence.

For the OAS member states that are not party to the Convention, or to other international human rights instruments eventually interpreted by the Court, the advisory opinions remain authoritative interpretations that may serve as a source for the determination of rules of international law, but as long as a state is not bound by a treaty provision, it cannot be urged to respect it unless the norm and its interpretation have also become part of customary international law.

Although this precise delimitation of the *erga omnes partes* effect of *res interpretata* is important, the Court is in so far right as that the practical relevance of the distinction between contracting states and other OAS member states is diminished by the fact that all OAS member states are bound by the OAS Charter and subject to the mandate of the Commission. As the Commission is likely to also apply the Court's interpretative standards as far as possible to the American Declaration, which is by the Court and other authorities[1365] considered to be binding, all OAS member states are well-advised to take the Court's interpretations into account, even if they are not party to the ACHR. This is all the more true since the OAS Charter also obliges all member states to respect fundamental human rights.

1365 See *supra*: (n 1362).

Finally, the question remains in how far the effect of *res interpretata* can be said to apply to the OAS organs. As noted above, the concept of *res interpretata* has originally been developed in the context of the discussion of the effects judicial decisions have on states not party to a specific case[1366], and it has just been found that the precise *erga omnes partes* effect of *res interpretata* only applies to contracting states and not to the other OAS member states. Yet, the OAS organs are also not themselves parties to the human rights treaties interpreted by the Court as these treaties are normally only open for signature and ratification to states.[1367]

The Court has held that "everything indicated" in advisory opinions "also has legal relevance [...] for the OAS organs whose sphere of competence relates to the matter that is the subject of the request."[1368] With regard to the Commission, the Court has stated, that the Commission has to rely on the legal criteria that can be derived from the Court's jurisprudence when it performs its work.[1369]

In this regard it is noteworthy that in contrast to the advisory opinions of the ICJ, which may only be requested by organs or specialized agencies of the United Nations, and which sometimes deal with specific administrative issues of that organization[1370], the advisory opinions of the IACtHR nor-

1366 See *supra*: Chapter 5, Section C.IV.3.a).

1367 See e.g. Article 74 (1) of the Convention. Article 74 states:
"Article 74
1. This Convention shall be open for signature and ratification by or adherence of any member state of the Organization of American States.
2. Ratification of or adherence to this Convention shall be made by the deposit of an instrument of ratification or adherence with the General Secretariat of the Organization of American States. As soon as eleven states have deposited their instruments of ratification or adherence, the Convention shall enter into force. With respect to any state that ratifies or adheres thereafter, the Convention shall enter into force on the date of the deposit of its instrument of ratification or adherence.
3. The Secretary General shall inform all member states of the Organization of the entry into force of the Convention."

1368 OC-23/17 (n 4) para. 30, OC-21/14 (n 320) para. 32.

1369 OC-26/20 (n 24) para. 93. The wording of the Spanish version of that paragraph is stronger than that of the English one.

1370 See e.g. ICJ, *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion of 20 July 1982, I.C.J. Reports 1982, p. 325; ICJ, *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, Advisory Opinion of 13 July 1954, I.C.J. Reports 1954, p. 47; ICJ, *Judgment No. 2867 of the Administrative Tribunal of the International Labor Organization upon a Complaint Files against the International Fund for Agricultural Development*, Advisory Opinion of 1 February 2012, I.C.J. Reports 2012, p. 10.

mally concern the obligations of states rather than the work of most of the OAS organs. Only the IACHR, which is next to the Court the second competent organ established under the Convention, is the major exception.

An interpretation of the Convention based on the principles of effectiveness and good faith requires that the Commission and the Court work hand in hand. Thus, the Court is right that the Commission has to take the Court's jurisprudence into account in order to fulfill its tasks under the Convention.[1371] The regular requests for advisory opinions submitted by the Commission also show that it does so, and that it considers the Court's advisory opinions very useful for its work. Consequently, one can reasonably argue that the Commission too must consider the *res interpretata* created by the Court in advisory opinions, that it has to take the Court's interpretations as standard when performing its tasks under the Convention, and that it has to provide reasons should it want to depart from them.

As concerns the other OAS organs, the advisory opinions provide relevant legal guidance to them when they are confronted with issues relating to human rights.[1372] As the Court is the judicial institution of the inter-American human rights system established by the OAS, its advisory opinions are of particular high authority for the organs of that organization.

f) Evaluation and intermediate conclusion

Describing the effect of *res interpretata* is challenging because the concept is, like the exact legal consequences of the doctrine of conventionality control, still controversial and indeterminate. While it has been endorsed by human rights courts, there is not yet a consistent state practice on it, and in academia it is either ignored or rejected, or it remains unclear whether it is considered to apply *de lega lata* or only to be implemented *de lege ferenda*. Especially the literature on the IACtHR mostly focuses on the doctrine of conventionality control, and proposals to correct this doctrine have rather

1371 *Cf.*: OC-26/20 (n 24) para. 93.

1372 Regarding the General Assembly of the OAS, Article 54 OAS Charter provides in the end that *"[T]he General Assembly shall exercise its powers in accordance with the provisions of the Charter and of the other inter-American treaties"*. Thus, as concerns the interpretation of the inter-American human rights treaties and the provisions of the Charter relating to human rights, the General Assembly should be guided by the interpretations made by the Court of these treaties. Given that many OAS organs are made up of states or states representatives, the members of these organs should take account of the Court's advisory opinions anyway.

invented different terms and concepts instead of taking up and defining the idea of *res interpretata*.

The rejection may partly be explained by the fact that the *erga omnes partes* effect of *res interpretata* is, like the whole doctrine of conventionality control, sometimes equated with an *erga omnes* bindingness of the whole jurisprudence of the IACtHR. The fact that the Court allows states to deviate from its jurisprudence if they provide for a higher protection standard does not change this impression and the resulting rejection, given firstly that the *pro homine* principle does not always provide for a clear answer, and secondly, given that this approach excludes other possible legitimate reasons to deviate from the Court's jurisprudence, and thus does not encourage a fruitful dialogue between the Court and the states.

However, like there are different possible understandings of the doctrine of conventionality control[1373], the concept of *res interpretata* does not have to be understood in such a strict and narrow way either.

The analysis undertaken in this section started from the observation that the human rights system would be highly inefficient if any *erga omnes* effect of the Court's jurisprudence was negated. Moreover, the interpretative work of courts is particularly relevant in the field of human rights treaties, as the latter contain non-reciprocal obligations, and as the human rights are drafted in abstract terms and are subject to an evolutive or dynamic interpretation.[1374] Therefore, the obligation to ensure the effective enjoyment of the rights enshrined in the Convention, which is stipulated by Articles 1 (1) and 2, requires that the contracting states take the jurisprudence of the Court into account. In other words, Articles 1 (1) and 2, as well as a *bona fide* interpretation of the Convention provide a sound legal basis to hold that states are already *de lege lata* obliged to consider the jurisprudence of the Court.

As *res interpretata* is, as explained above, however not only contained in the Court's judgments, this obligation to consider the interpretations of the Court also applies to the Court's advisory opinions. The obligation to consider the Court's interpretations may also require contracting states to adapt their laws, administrative practice or jurisprudence to the jurisprudence

1373 See for instance González-Domínguez (n 328) p. 177–234 who rejects the "integration model" proposed by Dulitzky (n 262) and instead interprets "the doctrine of conventionality control in light of the principle of subsidiarity". See also Hentrei (n 262) p. 221f. who argues in favor of a principle of complementarity and holds that "conventionality control and discursive spaces are two sides of the same coin".

1374 Besson (n 951) p. 150.

of the Court. For a mere obligation to consider the Court's interpretative standards without any further practical steps being derived from it would be meaningless.

At the same time, the obligation to *consider* the Courts jurisprudence cannot be equated with an obligation to always *follow* the Court's interpretation in any aspect. This is because the legal basis for the *erga omnes partes* effect of *res interpretata* and the entailed obligation to consider the Court's jurisprudence is not the same as that of *res judicata* and the *inter partes* bindingness of the Court. Given that the effect of *res interpretata* cannot be derived from Articles 67 and 68, but follows instead from the substantive conventional rights as such, it is not the bindingness of the Court's decisions that is extended on all contracting states.

Further, while the Court may be the "ultimate interpreter"[1375] of the Convention when it comes to deciding whether a conventional right has been violated in a specific case, the Court is not the sole interpreter of the Convention. According to the principle of subsidiarity, it is first of all the states that have to interpret and apply the Convention. If states were under an obligation not only to consider, but also to always follow the Court's jurisprudence, without any possibility to provide a legal justification to deviate from the Court's jurisprudence, there would be no jurisprudential dialogue, and no corrective to new and possibly controversial lines of the Court's jurisprudence.

The fact that the hurdles to justify a deviation from *res interpretata* must be lower than the hurdle to justify a deviation from *res judicata* is also highlighted by the different *rationale* behind the two types of legal effects. The effect of *res judicata* ensures legal security and *Rechtsfrieden*. While the effect of *res interpretata* also provides for legal stability and a greater effectiveness of the Convention, legal interpretations are always subject to change and further legal debate. This however requires fruitful and also controversial dialogue. Without the latter, the Court's jurisprudence risks becoming too rigid.

A stricter understanding, namely one that equates the effect of *res interpretata* with a binding obligation to adopt and enforce any interpretation of the Court contained in advisory opinions, would also contradict the above outlined systematic of the Convention that requires the explicit recognition of the Court's jurisdiction only with regard to its contentious jurisdiction.

1375 See instead of all: OC-23/17 (n 4) para. 16.

Moreover, it has been pointed out above that such a strict understanding of the *erga omnes partes* effect of *res interpretata*, which equates it with legal bindingness and an obligation to follow, is also problematic in terms of democracy and the separation of powers.

If the concept of *res interpretata* is, however, understood and applied as suggested, it provides an important tool to increase the effective implementation of the Convention without simply subordinating the organs of the states to the Court and curtailing their powers too much, and without relieving them of their responsibility to also participate in the interpretation and implementation of the Convention. According to the suggested understanding, the Court's interpretations are seen as the standard, but it is at the same time acknowledged that there may exist reasonable justifications for states to choose a different approach to guarantee the respective human right in question, provided that the enjoyment of the right remains to be principally ensured. For example, there may be effective administrative fines or other administrative measures instead of criminal sanctions in place, or the respective national context requires that the balance between two conflicting rights be struck differently than suggested by the Court. It is the justification and argumentation that matters, and that may lead to a fruitful dialogue with the IACtHR about how to best protect human rights in the given legal setting. Thereby, domestic courts are not mere "*Erfüllungsgehilfen*" of the Court but may contribute to the further development of *res interpretata* and the understanding of conventional rights.[1376]

Finally, it has been clarified, that the *erga omnes partes* effect of *res interpretata* as determined above applies only to the contracting states, while the other OAS member states may of course also be guided by the Court's advisory opinions, as they definitely constitute authoritative interpretations of the law. As concerns the OAS organs, the Commission has to take the Court's interpretations into account in order to fulfill its tasks under the Convention, and the other OAS organs too should be guided by the interpretations made in advisory opinions when confronted with human rights issues that the Court has addressed in its advisory opinions.

1376 As to the term "Erfüllungsgehilfe" see *supra*: (n 1350).

C. Final summary and conclusion

The analysis of the legal discourse on the legal nature and effects of the advisory opinions of the PCIJ and ICJ has highlighted that this discourse has always oscillated between a formalistic and a more substantive view on the effects of advisory opinions.

The formalistic approach relies on the formal distinction between binding judgments and non-binding advisory opinions, which is established by the underlying statute and rules of procedure. It allows the rendering of advisory opinions that can be regarded as disguised contentious cases by stressing that the principle of consensual jurisdiction is not violated in the proceeding given the non-binding nature of the advisory opinion.

The more substantive view looks at the actual practical effects advisory opinions may have, rather than on the theoretic legal non-bindingness. In the League era, this view has led to greater consideration being given to the will of the states concerned in the proceedings.

For both courts, the relationship of the advisory to the contentious function and the respect for the court's limited jurisdiction has been decisive for the advisory practice and the view on the legal effects of the advisory opinions.

Before the corresponding legal discourse on the legal nature and effects of the advisory opinions of the IACtHR was analyzed, several decisive differences between the setting of the IACtHR in the inter-American human rights system and its advisory jurisdiction on the one hand, and the advisory function of the ICJ in the UN system on the other hand, were pointed out. It was indicated that these differences might lead to the finding that the advisory opinions of the IACtHR have different effects on states than those of the ICJ, although the concept of the Court's advisory function had originally been adopted from the older international court.[1377]

In fact, the analysis has shown a remarkable development in the discourse from the beginning of the Court's functioning until today. This development has gone along with the consolidation of the Court, its growing awareness of itself as a transformative Court, and the resulting use of legal tools to maximize the impact of its work.[1378]

1377 See *supra*: Chapter 5, Section B.

1378 The doctrine of conventionality control which has been introduced in this chapter is one of these legal tools. As to the Court's development and its aspiration to be a transformative court, that is to bring about change in the Americas, see

While the Court itself, and most commentators in the beginning, shared the view that the advisory opinions constitute authoritative but non-binding interpretations of the law, which is also the predominant view held with regard to the advisory opinions of the ICJ, the Court's position evolved over the years and finally shifted after the establishment of its doctrine of conventionality control.

Initially, the Court adopted the formalistic approach of the ICJ, and defined the effects of its advisory opinions only in the negative in contrast to that of judgments. In contrast, the Court's current position differs from both, that of the ICJ and that of the former PCIJ. While the fact that the Court today attaches stronger legal effects to its advisory opinions than at the beginning, might initially be reminiscent of the League era, the consequences are different.

For the fact that the Court holds that its advisory opinions produce *res interpretata* does not lead it to show greater consideration for sovereignty interests and the will of states in the proceeding, as the PCIJ had done. On the contrary, the IACtHR is driven by a *pro-homine* approach and understanding of international law. It places the individual at the center and obliges states to also take its interpretations of human rights law as a preventive measure into account when they are contained in an abstract advisory opinion, and not only when they have directly been held to be responsible for a violation of the Convention.

The perception of the legal nature and effects of the advisory opinions of the IACtHR in academia and the domestic jurisprudence has changed according to the development of the Court's position. Although many different opinions still exist, the position that the advisory opinions are legally binding has become more popular since their inclusion in the doctrine of conventionality control, which is highlighted by the finding of the Ecuadorian Constitutional Court that the interpretations made by the Court complement the text of the Ecuadorian Constitution.[1379]

In the course of the above examination, it has been affirmed that the advisory opinions of the IACtHR of course constitute authoritative interpretations of the law. At the same time, it has been held that this finding alone does not suffice to determine the effects emanating from them. The view

Soley Echeverría, *The Transformation of the Americas* (n 19) p. 273–311 and Soley Echeverría, 'The Transformative Dimension of Inter-American Jurisprudence' (n 54) p. 338 – 348.

1379 As to this finding of the Ecuadorian Constitutional Court see *supra*: Chapter 5, Section B.IV.2.b)bb).

that the advisory opinions have only moral or scientific effects has been rejected because they constitute the result of a legal assessment undertaken by a Court of law in a judicial proceeding and with the means of legal interpretation. In contrast, the fact that the Court's advisory opinions constitute authoritative interpretations of the law does not necessarily exclude the further finding that advisory opinions may also have further legal effects, even though these legal effects differ from the binding effect of *res judicata* which judgments have on the parties of a case.

In the further course of the examination, it has been shown that authors and domestic courts have over the years provided different reasonings for the view that the Court's advisory opinions are legally binding. The analysis of the constituent instruments of the advisory function has, however, demonstrated that the advisory opinions were actually not supposed to produce legally binding effects, at least not like judgments do on the parties of a case. Furthermore, arguments that a teleological interpretation would lead to the assumption that the advisory opinions are legally binding, or the idea that they are more comparable with preliminary rulings of the ECJ than with advisory opinions of the ICJ, have been rejected.

Since the establishment of the doctrine of conventionality control and its extension onto advisory opinions, it has been held that the advisory opinions thereby become *de jure* or *de facto* binding.[1380] Parts of the Court have held the Court's jurisprudence to be mandatory, too, and have in relation to *res interpretata* spoken of "indirect bindingness".[1381]

However, be it with regard to the effect of the doctrine of conventionality control, or be it with regard to the concept of *res interpretata*, it is preferable not to speak of "bindingness" in the context of advisory opinions. While advisory opinions certainly produce legal effects, the use of the term "binding" causes confusion and unnecessary rejection, given that the term is originally connected with judgments and the effect of *res judicata*. Furthermore, it gives the wrong impression that advisory opinions could

1380 See e.g. *supra* in Chapter 5, Section C.IV.2.a)cc) and dd) the opinions of Roa and Zelada.

1381 *Case of Gelman v. Uruguay* (n 1105), Separate Opinion of Judge Eduardo Ferrer-Mac-Gregor Poisot, paras. 43, 70 and also former Judge Sergio García Ramírez has used the term "binding" in relation to advisory opinions, thereby clarifying that he used the term in the "broadest understanding". See: García Ramírez, '*The Relationship between Inter-American Jurisdiction and States (National Systems): Some Pertinent Questions*', (2015) 5 Notre Dame Journal of International and Comparative Law, 115, 136.

be executed and implemented as a whole within any domestic legal system, and that national decision-makers and courts had no margin at all for their own considerations and the weighing up of conflicting interests.

In the above discussion of the *erga omnes partes* effect of *res interpretata*, it has been argued that *de lege lata* an obligation for states parties already exists to consider the Courts jurisprudence – including its advisory opinions – even though this is not yet consistently implemented in practice.

However, recognizing that the advisory opinions produce *res interpretata*, and that this entails an obligation for states to take them into account, does not mean that they are binding in the strict sense of the word. In advisory proceedings, there are no clear parties and they normally do not contain explicit orders that could be enforced. *Res interpretata* rather means that the Court's interpretations partake in the general bindingness of the Convention.[1382]

Whereas the Court's interpretations are thus to be regarded as the standard, the Court is not the sole interpreter of the Convention, and interpretations are always subject to possible changes, which is why a constructive legal discourse between the Court and the states should exist. The effect of *res interpretata* and the ensuing obligation to consider the Court's jurisprudence should not be equated with an obligation to always automatically follow the Courts jurisprudence. Rather, states may have legitimate reasons for justifying a deviation of the Court's line of jurisprudence.

This may not only be the case if they invoke the *pro homine* principle. Reasons grounded in their democratic and legal system may also justify a slightly different interpretation and implementation of conventional rights than suggested by the IACtHR. In particular, domestic courts need to question whether the line of the Court provides the best solution in the specific case and legal setting they are confronted with, or whether the balancing of all interests at stake leads to a different finding. If so, they have to explain and justify this deviation so that the IACtHR can, in a possible later contentious case, retrace and review the decision of the domestic court.

The term "bindingness" should only be used in relation to the advisory opinions of the Court, if this effect is explicitly recognized by a national law or the domestic jurisprudence of a state. In these cases, it needs to be clear that the bindingness is prescribed by domestic law and not derived

1382 See *supra*: Chapter 5, Section B.IV.3.a), in particular (n 1287) and also Section B.IV.3.c).

from international law, which is why this effect cannot be generalized with regard to the other OAS member states. This situation is comparable to the so-called 'compulsive' opinions of the ICJ, when states have in a treaty agreed to accept the terms of a possible future advisory opinion of the ICJ relating to that very treaty as binding. While states are free to agree on such an effect, such a bilateral or multilateral agreement does not change the general legal nature of advisory opinions. The same applies *mutatis mutandis* when an OAS member state decides to recognize the advisory opinions of the IACtHR, or at least those opinions that the state itself requested, to be binding within its domestic legal order.

Having affirmed that the advisory opinions of the IACtHR have an *erga omnes partes* effect of *res interpretata* on the contracting states, the precise legal effect an advisory opinion has within a state then also depends on how the contracting state has implemented the doctrine of conventionality control, and how the obligation to take the Court's jurisprudence into account is fulfilled. This depends as well on the rank that the respective domestic law allocates to the Convention and other international human rights treaties.

A further examination of the legal nature and effects of the Court's advisory opinions must thus look even more thoroughly than was possible in this work, at the reception of the advisory opinions within the contracting states and their respective legal system.

In conclusion, the discussion on the legal effects of the Court's advisory opinions can be embedded in the broader discussion on *res interpretata* and the *erga omnes partes* effects that judgments generate for third states not parties to a case. Thereby, it also becomes part of the more general debate on the correct implementation of the conventionality control doctrine, on the relation between the IACtHR and domestic courts, the principle of subsidiarity, and the relation between regional human rights law and domestic law.

Even if one does not share the view that the advisory opinions of the IACtHR produce an *erga omnes partes* effect of *res interpretata*, and the understanding of this concept suggested here, any determination of the legal nature and effects of the Court's advisory opinions should not end at the point where it is determined that the text, systematic, and drafting history of the Convention show that, unlike judgments, advisory opinions were not conceived to be legally binding. For this formalistic view that describes advisory opinions only in contrast to judgments fails to explain the effects advisory opinions actually have. This was already highlighted by

the discussion on the legal nature and effects of advisory opinions of the PCIJ.

On the contrary, even if one maintains the traditional position that the advisory opinions of the IACtHR are "only" authoritative interpretations of the law, one needs to take into account that there may be other factors contributing to the authority of the advisory opinions of the IACtHR than, for example, to the authority of advisory opinions of the ICJ. One of these factors is the embeddedness of the IACtHR in a regional human rights system and the growing legal integration of that system.

The development of the Court and the creation of its doctrine of conventionality control was not a one-way process.[1383] Since the beginning of the Court's functioning, two parallel processes have taken place – one at the national and one at the regional level. The political landscape in the region has changed significantly, and more and more states have granted the Convention and other human rights treaties a higher rank in their national legal systems, either by way of constitutional reforms or through their supreme or constitutional jurisprudence.[1384] This incorporation of international treaties into domestic law also affects the importance of the interpretations of these treaties made by the Court in its advisory opinions.

At the same time, the regional human rights system has consolidated, and the Court has interpreted and performed its role with increasing self-confidence. Even though the Court, as concerns its advisory jurisdiction, could not follow the direct example of another human rights court, given the extremely limited advisory practice of the ECtHR, the Court's bold interpretations and judicial doctrines known from its contentious jurisdiction did not stop at its advisory function either.[1385] As outlined above, since OC-21/14 the Court has held that the conventionality control must also be performed on the basis of the Court's interpretations made in the context of its advisory function.[1386]

These two processes lead to the fact that although the concept behind Article 64 and the Court's advisory jurisdiction remains the same as that

1383 *Cf.*: Ferrer Mac-Gregor Poisot, 'The Conventionality Control as a Core Mechanism of the *Ius Constitutionale Commune*' (n 1041) p. 321–327 explaining the creation of the doctrine of conventionality control "in the context of the internationalization of constitutional law".

1384 See *supra*: (n 1026).

1385 As to the Court's development and examples of its bold interpretations see: Soley Echeverría, *The Transformation of the Americas* (n 19) p. 273–311.

1386 See *supra*: Chapter 5, Section B.II.3.g) and Section B.III.3.

known from the ICJ, the advisory opinions of the IACtHR can have a greater and more direct impact within the OAS member states, which are, in contrast to the UN system also direct addressees of the advisory opinions, along with the OAS organs.

This difference becomes particularly visible in advisory proceedings that touch on delicate questions of constitutional law, like the definition of family and the question who may marry who. While advisory opinions of the ICJ may also be highly political and controversial, they mostly center on questions of general international law, and in the great majority of states will not lead to debates on domestic laws, individual claims and the change or non-application of certain domestic legislation or even the constitution. No matter how important the advisory opinions of the ICJ are for the clarity and development of international law, they are not directly directed at the states, but only at the UN organs, and there is no international treaty the ICJ could interpret that would play such a central role in the internal legal order of the UN member states as the ACHR does in the legal order of the contracting states.

Another side effect of the stronger integration within the regional system is that at least most states that have ratified the ACHR have also recognized the contentious jurisdiction of the IACtHR. Hence, these states have to fear being held responsible in a contentious case if they have not complied with the interpretations made by the Court in an earlier advisory opinion. In contrast, states affected by advisory opinions of the ICJ, such as Israel by the *Wall* opinion or the United Kingdom by the *Chagos* opinion[1387], have often either not recognized the compulsory jurisdiction of the ICJ, or have withdrawn their declaration once made under Article 36 (2) ICJ Statute, or have formulated their declaration in very narrow terms. Therefore, states affected by an advisory opinion of the ICJ do not often need to fear that a subsequent contentious case will be brought against them if they ignore the advisory opinion.

Not all advisory opinions of the IACtHR produce as heated debates in the midst of American societies like OC-24/17 did, but the fact that this advisory opinion led domestic courts to change the interpretation of a country's civil code, and even that of the constitution, despite its unam-

1387 See: ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004 p. 136 and ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, I.C.J. Reports 2019 p. 95.

biguous wording[1388], shows that the subject matter of a request, and the rank the interpreted norms are given in the domestic legal systems, may increase the direct impact of the advisory opinions of the IACtHR.

Finally, the fact that the decisions on how to react to, and to follow the Court's interpretations made in an advisory opinion, are today no longer only made on the political level (as was for example still the case in 1983, when Guatemala decided to stop the execution of death penalties issued by certain courts of special jurisdiction), but in national courts and administrations on the basis of domestic laws, highlights the inaccuracy of attributing only moral or scientific effects to the advisory opinions of the IACtHR.

1388 On this see *supra*: Chapter 5, Section B.IV.2.b)bb).

Chapter 6: Present and future of the Court's advisory function

A. Present

Since its inception, the IACtHR has undergone a remarkable development, and with it its advisory function. Whereas initially it was the advisory function that allowed the Court to get functioning in the first place, when the Commission was still reluctant to refer contentious cases to the Court, nowadays the handling of contentious cases is at the center of the Court's work.

Today, the IACtHR is also no longer the only international court with an advisory jurisdiction that is both *rationae personae* and *ratione materiae* very broad. There are several other international courts before which states have standing in advisory proceedings, and there is a trend to establish preliminary ruling procedures so that domestic courts can also directly approach the international court.[1389]

Despite these developments, the advisory function of the IACtHR remains very relevant to the work of the Court and unique in international law. This is not only because the Court's advisory function is still more frequently used than that of other international courts, but also due to the topics and the way the Court is dealing with them, and due to the effect this may have in the OAS member states.

The Court has interpreted its advisory jurisdiction *ratione materiae* so broadly that it can interpret any treaty containing a provision which somehow concerns the protection of human rights. Furthermore, the Court not only interprets treaties, but also refers to other international law instruments such as the American Declaration or the Inter-American Democratic Charter. This broad interpretation of its advisory jurisdiction *ratione materiae* allows for advisory opinions covering an almost unlimited range of topics such as the right to information on consular assistance, the autonomy of trade unions and the question of presidential reelections without term limits.

The advisory procedure has been increasingly opened to civil society. Depending on the topic, the Court has received more than 80 briefs from

1389 See *supra*: Chapter 3, Section D, in particular the table in Section D.IV.

agencies, NGOs, academic institutions, and individuals. This possibility for everyone to participate in advisory proceedings allows the Court to get a broad picture of the subject matter of the proceedings and the possible political implications. On this basis, the Court can then prepare the advisory opinions. Although strong participation from civil society increases the democratic legitimacy of the final advisory opinions, at the same time it holds the risk that the arguments from states and OAS organs will be outnumbered.[1390] As the Court, however, ultimately still depends on the acceptance of states, the Court should also be interested in a rising level of participation of states. In this regard, it is very pleasing to see that the Court received written observations from ten states in the recent OC-29/22 proceedings, which is more than ever before.[1391] As concerns Argentina, even two different ministries participated in this advisory procedure.[1392]

Whereas in the early years states had occasionally filed requests for advisory opinions to signal their commitment to democracy and human rights, for example after the end of a military dictatorship[1393], more recently the advisory function has increasingly been used by states to obtain advisory opinions that might be a helpful argument in an inter-state conflict. Against this background, the Court's practice of rejecting certain requests for advisory opinions has been thoroughly examined in this work.

The analysis has shown that in a two-stage regional human rights system there exist many more constellations that could be regarded as disguised contentious case, than only the one constellation where a request relates to a dispute between two states. It has been demonstrated that the rejection criteria established by the Court are not precise enough to allow for a schematic application, and that the Court is therefore correct not to regard them as insurmountable limitations. The incoherent and therefore unpredictable application of the rejection criteria nevertheless appears problematic. Given that it is, however, impossible to define criteria that would provide for a clear answer whether a request should better be rejected or not in any possible case, and given that the existing criteria are not entirely unsuitable, the values and interests the existing criteria are

1390 See *supra*: Chapter 4, Section F.

1391 See *supra*: *Figure 1* in Chapter 4, Section E.

1392 As to the submissions in the OC-29/22 proceedings see: https://www.corteidh.or.cr/observaciones_oc_new.cfm?lang=es&lang_oc=es&nId_oc=2224.

1393 See Soley Echeverría, *The Transformation of the Americas* (n 19) p. 219 naming OC-9/87 (n 366) requested by Uruguay as example.

actually intended to protect have been highlighted. It has been proposed that instead of operating with categorical criteria, the Court should focus more on explaining better why the arguments for providing a requested advisory opinion in a certain case outweigh the risks related to it, although the situation of that case might be similar to one in which the Court had decided to reject the request.[1394]

This proposed interests- and values-based approach could reduce the critique that the Court's practice is incoherent, and it would make the Court's balancing decision more transparent. Addressing the raised concerns more thoroughly would assure those who are afraid that the issuance of a requested advisory opinion will interfere with their rights or interests that the Court is aware of what is at stake.

Finally, if the Court decides that the public interest in obtaining the requested advisory opinion outweighs the concerns that go along with it, the way in which the Court reframes and answers the questions can still be decisive in preventing a possible abuse of the opinion. The Court has already shown this in several proceedings.[1395]

The establishment of the Court's doctrine of conventionality control has not only caused a debate about the effects of judgments and the general relationship between international and national law, but also about the effects of the Court's advisory opinions.

This work outlined why it is at all worth discussing the legal nature and effects of the advisory opinions of the IACtHR, although this matter is no longer much debated in general international law. It then analyzed how the Court's own position on the legal effects of its advisory opinions has gradually changed over time. The analysis of the various positions held on the legal effects of the advisory opinions has revealed that any argumentation that only sticks to the strict distinction between binding like judgments or legally non-binding falls too short, and that the finding that the advisory opinions constitute authoritative interpretations of the law alone does not suffice to explain and define the specific effects emanating from them.

Even though there is still a huge discrepancy between the position of the Court and the practice of states on all questions relating to the doctrine of conventionality control, it has been affirmed that the concept of *res interpretata* can be applied to the advisory opinions of the IACtHR, and

1394 On the Court's practice of rejecting requests and the proposed interests- and values-based approach see *supra*: Chapter 4, Section C.

1395 See for instance: OC-23/17 (n 4) and OC-25/18 (n 227).

that it is justifiable to hold that the states parties are already *de lege lata* under an obligation to consider the interpretations the IACtHR establishes in advisory opinions.

However, it has also been shown that the obligation to consider the advisory opinions as part of the Court's jurisprudence cannot be equated with an obligation to automatically follow and adapt all national legislation and administration to what the Court has outlined in an advisory opinion. Democratically legitimized state authorities must be able to undertake their own assessment and find the right solution in the context of the respective national constitutional and legal setting. Yet, if they decide to deviate from the Court's line of jurisprudence, they have to provide a reasonable justification for it, and they risk later being held responsible for having violated the Convention if the Court is not satisfied with this justification.

Overall, the close interrelation between human rights law and constitutional law, and the growing regional integration in the Americas, permit that advisory opinions of the IACtHR may have a more direct and bigger impact within states than advisory opinions of the ICJ commonly have. This increases the responsibility of the IACtHR to be aware of the democratic processes and of the finely balanced interplay of the various powers within the states.

B. Future

For some years at the beginning of the 2000s, there were fewer advisory proceedings, but in the past years there have been more advisory proceedings than ever before. Whether this trend will continue is not reliably predictable. But given that the Court has entertained even very politically sensitive requests for advisory opinions, it is likely that states will continue to use the Court's advisory function as a strategic tool in their foreign politics, as Colombia in particular has tried to do in the past years. Rather unlikely is, however, that states other than Costa Rica will suddenly start filing requests in terms of Article 64 (2), although it is in particular this type of advisory proceeding that has a strong potential to trigger significant legal reforms in the state parties. As concerns the IACHR, it is likely that it will continue to use the advisory function to obtain clarifications and to advance the development of human rights law in specific fields, e.g. the rights of certain minority groups.

While the path towards considering economic, social, cultural and environmental rights to be directly justiciable under Article 26, which the Court has pursued since the 2017 *Lagos del Campo* decision[1396], is highly controversial[1397], it must be stressed that the Court's advisory function offers an alternative and less problematic way to further specify the content of these economic, social, cultural and environmental rights. Unlike the Court's contentious jurisdiction, which is basically limited to the Convention and Articles 8(1) lit. a and 13 of the Protocol of San Salvador, the Court's advisory jurisdiction *ratione materiae* is broader and encompasses the whole Protocol of San Salvador, as well as possible other human rights instruments in which economic, social, cultural and environmental rights are stipulated. Thus, although an interpretation of the economic, social, cultural and environmental rights as contained in the Protocol of San Salvador by way of an advisory opinion does not entail the direct justiciability of these rights, as does the Court's current approach to Article 26, such a use of the Court's advisory function still provides for a good avenue to obtain clarifications of the content of these rights.[1398]

1396 *Case of Lagos del Campo v. Peru* (n 6).

1397 See: *Case of Lagos del Campo v. Peru* (n 6), Partially Dissenting Opinion of Judge Eduardo Vio Grossi and Partially Dissenting Opinion of Judge Humberto A. Sierra Porto; Juana M. Ibáñez Rivas, 'La justiciabilidad directa de los derechos económicos, sociales, culturales y ambientales. Génesis de la innovadora jurisprudencia interamericana' in Mariela Morales Antoniazzi *et al.* (eds*), Interamericanización de los DESCA: El Caso Cuscul Pivaral de la Corte IDH* (Max Planck Institute for Comparative Public Law and International Law *et al.*, 2020), 51–94; Lucas Sánchez, *'Der IAGMR und WSK-Rechte: Eine wegweisende Rechtsprechungsänderung'*, Völkerrechtsblog, 20 August 2018, available at: https://voelkerrechtsblog.org/de/der-iagmr-und-wsk-rechte/; Eleanor Benz and Verena Kahl, *'Das Urteil im Fall Lhaka Honhat: Die Ausweitung der direkten Justiziabilität von Desca und die unerfüllte Hoffnung der Konkretisierung des Rechts auf eine gesunde Umwelt'* (2021) 59(2) Archiv des Völkerrechts, 199–226 with further references.

1398 Notably, the Court has rather used its latest advisory opinions to extend its controversial jurisprudence on Article 26, although it was not necessary to recur to this provision in order to answer the respective advisory opinion requests. This has been criticized by Judges Sierra Porto and Vio Grossi. See: OC-27/21 (n 347), Concurring Opinion of Judge Eduardo Vio Grossi and Concurring Opinion of Judge Humberto A. Sierra Porto [both only available in Spanish], and OC-29/22 (n 275), Concurring Opinion of Judge Humberto A. Sierra Porto.

This is highlighted by the latest requests concerning the climate emergency[1399] and the content and scope of care as a human right[1400]. In the first, the Court is asked by Chile and Colombia to interpret among other rights the right to a healthy environment which will allow the Court to follow up and deepen its elaborations made in OC-23/17 regarding the interrelationship between the environment and human rights.[1401] In the second request, Argentina enumerated almost all articles of the Protocol of San Salvador in the list of norms to be interpreted by the Court.[1402]

It has been pointed out that the creation of a preliminary ruling procedure through which domestic courts could directly refer questions to the IACtHR would be a decisive advancement of the Court's advisory function. This applies not least against the backdrop of the Court's doctrine of conventionality control. A direct avenue of domestic courts to the IACtHR could fundamentally change the dynamic and interaction between the regional court and its domestic counterparts. However, it has also been outlined that an additional procedure would require an increase in personal and financial resources of the Court. Furthermore, the design of the procedure would have to ensure that national courts do not feel disempowered in relation to the IACtHR, but rather are encouraged to cooperate with the IACtHR on an equal footing.

Overall, the advisory function is, and will remain an important instrument that is likely to continue to shape the work of the IACtHR significantly in the future. While contentious cases normally only reach the Court after having been pending for many years before the Commission, the advisory function enables the Court to deal with current issues, and thus to contribute to important ongoing legal debates. By clarifying and contributing to the progressive development of the law, advisory opinions may help to prevent future human rights violations.

Just as the topics of the advisory opinions always reflect the human rights situation prevailing in the Americas at the time, the design of the

1399 Colombia and Chile, *Request for an Advisory Opinion on the Climate Emergency and Human Rights*, 9 January 2023.

1400 Argentina, *Request for an Advisory Opinion on the content and scope of care as a human right, and its interrelationship with other rights*, 20 January 2023.

1401 Colombia and Chile, *Request for an Advisory Opinion on the Climate Emergency and Human Rights*, 9 January 2023, p. 6, 8; OC-23/17 (n 4) in particular paras. 56–63.

1402 Argentina, *Request for an Advisory Opinion on the content and scope of care as a human right, and its interrelationship with other rights*, 20 January 2023, p. 3.

advisory procedure can, and should also be regularly scrutinized, and if necessary, further developed. The procedure should be adapted to the level of integration in the region, and to other new developments so that the advisory function can always contribute in the best possible way to the effective protection of human rights.

Table of cases and advisory opinions

A. IACtHR

Advisory opinions

"Other treaties" subject to the consultative jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82, Series A No. 1 (24 September 1982)

The effect of reservations on the entry into force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82, Series A No. 2 (24 September 1982)

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)

Proposed amendments to the naturalization provisions of the constitution of Costa Rica, Advisory Opinion OC-4/84, Series A No. 4 (19 January 1984)

Compulsory membership in an association prescribed by law for the practice of journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85, Series A No. 5 (13 November 1985)

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)

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)

Habeas corpus in emergency situations (Arts. 27.2, 25.1 and 7.6 American Convention on Human Rights), Advisory Opinion OC-8/87, Series A No. 8 (30 January 1987)

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)

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)

Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights, Advisory Opinion OC-11/ 90, Series A No. 11 (10 August 1990)

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)

Certain attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights), Advisory Opinion OC-13/93, Series A No. 13 (16 July 1993)

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)

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)

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)

Juridical condition and human rights of the child, Advisory Opinion OC-17/02, Series A No. 17 (28 August 2002)

Juridical condition and rights of the undocumented migrants, Advisory Opinion OC-18/03, Series A No. 18 (17 September 2003)

Control of due process in the exercise of the powers of the Inter-American Commission on Human Rights (Articles 41 and 44 to 51 of the American Convention on Human Rights), Advisory Opinion OC-19/05, Series A No. 19 (28 November 2005)

Article 55 of the American Convention on Human Rights, Advisory Opinion OC-20/09, Series A No. 20 (29 September 2009)

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)

Entitlement of legal entities to hold rights under the inter-American Human Rights system (interpretation and scope of Article 1.2, in relation to Articles 1.1., 8, 11.2, 13, 16, 21, 24, 25, 29, 30, 44, 46 y 62.3 of the American Convention on Human Rights, as well as of Article 8.1 a and b of the Protocol of San Salvador, Advisory Opinion OC-22/16, Series A No. 22 (26 February 2016)

The environment and human rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights of life and to personal integrity: Interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-23/17, Series A No. 23 (15 November 2017)

Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (Interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Series A No. 24 (24 November 2017)

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)

The obligations in matters of human rights of a state that has denounced the American Convention on Human Rights and the Charter of the Organization of American States (Interpretation and scope of Articles 1, 2, 27, 29, 30, 31, 32, 33 to 65 and 78 of the American Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States), Advisory Opinion OC-26/20, Series A No. 26 (9 November 2020)

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)

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)

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)

Contentious cases

IACtHR, *Case of Velásquez Rodríguez v. Honduras*, Judgment of 26 June 1987 (Preliminary Objections), Series C No. 1

IACtHR, *Case of Velásquez Rodríguez v Honduras*, Judgment of 29 July 1988 (Merits), Series C. No 4

IACtHR, *Case of El Amparo v Venezuela*, Judgment of 14 September 1996 (Reparations and Costs), Series C No. 28

IACtHR, *Case of Caballero-Delgado and Santana v Colombia*, Judgment of 29 January 1997 (Reparations and Costs), Series C No. 31

IACtHR, *Case of Súarez Rosero v Ecuador*, Judgment of 12 November 1997 (Merits), Series C No. 35

IACtHR, *Case of Castillo Petruzzi et al v Peru*, Judgment of 30 May 1999 (Merits, Reparations and Costs), Series C No. 52

IACtHR, *Case of the "Street Children" (Villgrán-Morales et. al.) v. Guatemala*, Judgment of 19 November 1999 (Merits), Series C No. 63

IACtHR, *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al) v Chile*, Judgment of 5 February 2001 (Merits, Reparations and Costs), Series C No. 73

IACtHR, *Case of Barrios Altos v Peru*, Judgment of 14 March 2001 (Merits), Series C No. 75

IACtHR, *Case of Barrios Altos v Peru*, Judgment of 3 September 2001 (Interpretation of the Judgment of the Merits), Series C No. 83

IACtHR, *Case of Myrna Mack Chang v. Guatemala*, Judgment of 25 November 2003 (Merits, Reparations and Costs), Series C No. 101

IACtHR, *Case of the Gómez-Paquiyauri Brothers v. Peru*, Judgment of 8 July 2004 (Merits, Reparations and Costs), Series C No. 110

IACtHR, *Case of Tibi v. Ecuador*, Judgment of 7 September 2004 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 114

IACtHR, *Case of the Girls Yean and Bosico v. Dominican Republic*, Judgment of 8 September 2005 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 130

IACtHR, *Case of López Álvarez v. Honduras*, Judgment of 1 February 2006 (Merits, Reparations and Costs), Series C No. 141

IACtHR, *Case of Almonacid-Arellano et al v. Chile*, Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 154

IACtHR, *Case of Vargas Areco v. Paraguay*, Judgment of 26 September 2006 (Merits, Reparations and Costs), Series C No. 155

IACtHR, *Case of Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru*, Judgment of 24 November 2006 (Preliminary Objections, Reparations and Costs), Series C No. 158

IACtHR, *Case of La Cantuta v. Peru*, Judgment of 29 November 2006 (Merits, Reparations, and Costs), Series C No. 162

IACtHR, *Case of Boyce et al. v. Barbados*, Judgment of 20 November 2007 (Preliminary Objection, Reparations and Costs), Series C No. 169

IACtHR, *Heliodoro Portugal v. Panama*, Judgment of 12 August 2008 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 186

IACtHR, *Case of Radilla Pacheco v. Mexico*, Judgment of 23 November 2009 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 209

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

IACtHR, *Case of Cabrera García y Montiel Flores v. Mexico*, Judgment of 26 November 2010 (Preliminary Objection, Merits, Reparations and Costs), Series C No 220

IACtHR, *Case of Gelman v. Uruguay*, Judgment of 24 February 2011 (Merits and Reparations), Series C No. 221

IACtHR, *Case of Atala Riffo and Daughters v. Chile*, Judgment of 24 February 2012 (Merits, Reparations and Costs), Series C No 239

IACtHR, *Case of the Río Negro Massacres v. Guatemala*, Judgment of 4 September 2012 (Preliminary Objection, Merits, Reparations and Costs), Series C No. 250

IACtHR, *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, Judgment of 20 November 2012 (Merits, Reparations and Costs), Series C No. 253

IACtHR, *Case of Artavia Murillo et. al ("In vitro ferilization") v. Costa Rica*, Judgment of 28 November 2012 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 257

IACtHR, *Case of the Santo Domingo Massacre v. Colombia*, Judgment of 30 November 2012 (Preliminary Objections, Merits and Reparations), Series C No. 259

IACtHR, *Case of Gelman v. Uruguay*, Order of the Court of 20 March 2013 (Monitoring Compliance with Judgment)

IACtHR, Case of *Liakat Ali Alibux v. Surinam*, Judgment of 30 January 2014 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 276

IACtHR, *Case of Rochac Hernández et al. v. El Salvador*, Judgment of 14 October 2014 (Merits, reparations and Costs), Series C No. 285

IACtHR, *Case of Duque v. Colombia*, Judgment of 26 February 2016 (Preliminary Objections, Merits, Reparations and Costs), Series C No 310

IACtHR, *Case of Andrade Salmón v. Bolivia*, Judgment of 1 December 2016 (Merits, Reparations and Costs), Series C No. 330

IACtHR, *Case of Lagos del Campo v. Peru*, Judgment of 31 August 2017 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 340

IACtHR, *Case of Mota Abarullo et. al. v. Venezuela*, Judgment of 18 November 2020 (Merits, Reparations and Costs), Series C No. 417

Orders/Resolutions of the Court

All of the cited Orders issued since 2005 are available on the website of the IACtHR.

IACtHR, Order of 14 April 1997, *Solicitud de Opinión Consultiva OC-15* [available only in Spanish in the archives of the IACtHR]

IACtHR, Order of 10 May 2005, *Solicitud de Opinión Consultiva presentada por la República de Costa Rica* [available only in Spanish]

IACtHR, Order of 24 June 2005, *Solicitud de Opinión Consultiva presentada por la Comisión Interamerican de Derechos Humanos* [available only in Spanish]

IACtHR, Order of 27 January 2009, *Solicitud de Opinión Consultiva presentada por la Comisión Interamerican de Derechos Humanos* [available only in Spanish]

IACtHR, Order of 23 June 2016, *Solicitud de Opinión Consultiva presentada por el Secretatio General de la Organización de los Estados Americanos* [available only in Spanish]

IACtHR, Order of 29 May 2018, *Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*

Requests for advisory opinions

All requests without further indication are available on the website of the IACtHR.

IACHR, *Solicitud de Opinion Consultiva presentada por la Comision Interamericana de Derechos Humanos*, 25 April 1983 [available only in Spanish in the archives of the IACtHR]

Costa Rica, *Request for an Advisory Opinion*, 8 July 1985 [available only in Spanish in the archives of the IACtHR]

Uruguay, *Solicitud del Gobierno de Uruguay*, 17 September 1986, available at: http://hrlibrary.umn.edu/iachr/B/9-esp-1.html

IACHR, *Solicitud de Opinion Consultiva presentada por la Comision Intermamericana de Derechos Humanos*, 10 October 1986, available at: http://hrlibrary.umn.edu/iachr/B/8-esp-1.html

IACHR, *Solicitud de Opinion Consultiva*, 8 November 1993 [available only in Spanish in the archives of the IACtHR]

Chile, *Request for an Advisory Opinion*, 5 November 1996 [available only in Spanish in the archives of the IACtHR]

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 [available only in Spanish in the archives of the IACtHR]

Mexico, *Request for an Advisory Opinion*, 10 May 2002 [available only in Spanish in the archives of the IACtHR]

Bolivarian Republic of Venezuela, *Request for an Advisory Opinion*, 12 November 2003 [available only in Spanish in the archives of the IACtHR]

Colombia, *Request for an Advisory Opinion presented by the Republic of Colombia concerning the interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights*, 14 March 2016

Secretary General of the OAS, *Request for an Advisory Opinion*, 18 May 2016 [available only in Spanish in the archives of the IACtHR]

Ecuador, *Request for an Advisory Opinion concerning the scope and purpose of the right of asylum in light of international human rights law, inter-American law and international law*, 18 August 2016

IACHR, *Request for an Advisory Opinion on Democracy and Human Rights in the context of impeachment*, 13 October 2017

IACHR, *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

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

Colombia, *Request for an Advisory Opinion on the figure of indefinite presidential re-election in the context of the Inter-American system of human rights*, 21 October 2019

IACHR, *Request for an Advisory Opinion on differentiated approaches to persons deprived of liberty*, 25 November 2019

Colombia and Chile, *Request for an Advisory Opinion on the Climate Emergency and Human Rights*, 9 January 2023

Argentina, *Request for an Advisory Opinion on the content and scope of care as a human right, and its interrelationship with other rights*, 20 January 2023

B. IACHR

IACHR, Resolution N° 17/84, Case N° 9178 (Costa Rica), 3 October 1984

IACHR, Informe N° 99/03, Case N° 11.331, Merits, 29 December 2003

IACHR, Report No 11/07, Interstate Case 01/06, *Nicaragua v. Costa Rica*, 8 March 2007

IACHR, Informe No 96/13, Decisión de Archivo, Caso Interestatal 12.779, *Ecuador v. Colombia*, 4 November 2013

C. ICJ

Advisory opinions

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

ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, I.C.J. Reports 1950, p. 65

– Separate Opinion of Judge Azevedo, I.C.J. Reports 1950, p. 79

– Dissenting Opinion of Judge Winiarski, I.C.J. Reports 1950, p. 89

– Dissenting Opinion of Judge Zoričić, I.C.J. Reports 1950, p. 98

– Dissenting Opinion of Judge Krylov, I.C.J. Reports 1950, p. 105

ICJ, *International Status of South-West Africa*, Advisory Opinion of 11 July 1950, I.C.J. Reports 1950, p. 128

ICJ, *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, Advisory Opinion of 13 July 1954, I.C.J. Reports 1954, p. 47

ICJ, *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

ICJ, *Judgments of the Administrative Tribunal of the International Labour Organisation upon complaints made against the United Nations Educational Scientific and Cultural Organisation*, Advisory Opinion of 23 October 1956, I.C.J. Reports 1956, p. 77

ICJ, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, p. 151

– Dissenting Opinion of Judge Koretsky, I.C.J. Reports 1962, p. 253

– Dissenting Opinion of Judge Moreno Quintana, I.C.J. Reports 1962, p. 239

ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Order of 29 January 1971, I.C.J. Reports 1971, p. 12

ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, p. 16

ICJ, *Western Sahara*, Order of 22 May 1975, I.C.J. Reports 1975, p. 6

ICJ, *Western Sahara*, Advisory Opinion of 16 October 1975, I.C.J. Reports 1975, p. 12

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

ICJ, *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion of 20 July 1982, I.C.J. Reports 1982, p. 325

ICJ, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion of 15 December 1989, I.C.J. Reports 1989, p. 177

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

ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, p. 226

ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 January 2004, I.C.J. Reports 2004, p. 3

– Dissenting Opinion of Judge Buergenthal, I.C.J. Reports 2004, p. 7

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

– Separate Opinion of Judge Owada, I.C.J. Reports 2004, p. 260

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, *Judgment No. 2867 of the Administrative Tribunal of the International Labor Organization upon a Complaint Files against the International Fund for Agricultural Development*, Advisory Opinion of 1 February 2012, I.C.J. Reports 2012, p. 10

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

– Dissenting Opinion of Judge Donoghue, I.C.J. Reports 2019, p. 261

Contentious cases

ICJ, *South West Africa Cases (Ethiopia* v. *South Africa; Liberia* v. *South Africa),* Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports 1962, p. 319

ICJ, *North Sea Continental Shelf (Germany v. Denmark and Germany v. the Netherlands)*, Judgment of 20 February 1969, I.C.J. Reports 1969, p. 3

ICJ, *Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain)*, Judgment of 5 February 1970, I.C.J. Reports 1970, p. 3

ICJ, *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001, I.C.J. Reports 2001, p. 466

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

ICJ, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, I.C.J. Reports 2004, p. 12

ICJ, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011, p. 537

ICJ, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of 19 November 2012, I.C.J. Reports 2012, p. 624

ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua vs. Colombia)*, Application instituting proceedings filed on 26 November 2013

ICJ, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Application instituting proceedings filed on 16 September 2013

ICJ, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia),* Preliminary Objections, Judgment of 17 March 2016, I.C.J. Reports 2016, p. 100

ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, Preliminary Objections, Judgment of 17 March 2016, I.C.J. Reports 2016, p. 3

ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia),* Counter-Claims, Order of 15 November 2017, I.C.J. Reports 2017, p. 289

ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment of 21 April 2022

ICJ, *Questions of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment of 13 July 2023

D. PCIJ

Advisory opinions

PCIJ, *Designation of the Worker's Delegate for the Netherlands at the Third Session of the International Labor Conference*, Advisory Opinion of 31 July 1922, Series B, No. 1

PCIJ, *Status of Eastern Carelia*, Advisory Opinion of 23 July 1923, Series B No. 5

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

PCIJ, *Exchange of Greek and Turkish Populations*, Advisory Opinion of 21 February 1925, Series B No. 10

PCIJ, *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, Advisory Opinion of 8 December 1927, Series B No. 14

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

Contentious cases

PCIJ, *Interpretation of Judgments Nos. 7 and 8 (The Chórzow Factory)*, Judgment of 16 December 1927, Series A, No. 13

E. ECtHR

Advisory opinions

ECtHR, Decision on the Competence of the Court to give an advisory opinion, 2 June 2004

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

Contentious cases

ECtHR, *Case of Ireland v. The United Kingdom*, Judgment of 18 January 1978, Appl. no. 5310//71

ECtHR, *Case of Karner v. Austria*, Judgment of 24 July 2003, Appl. no. 40016/98

ECtHR, *Case of Opuz v. Turkey*, Judgment of 9 June 2009, Appl. no. 33401/02

F. AfrCtHPR

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

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

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

AfrCtHPR, *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP)*, No. 001/2013 of 26 May 2017

AfrCtHPR, *Request for Advisory Opinion by Recontre Africaine pour la Defense des Droits de l'homme*, No. 002/2014 of 28 September 2017

AfrCtHPR, *Request for Advisory Opinion by l'association africaine de défense des droits de l'homme*, No. 002/2016 of 28 September 2017

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

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, women advocates research and documentation centre, Zimbabwe women lawyers association*, No. 001/2016 of 28 September 2017

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

G. CJEU

CJEU, Case C-446/98 (Fazenda Pública), ECLI:EU:C:2000:691

CJEU, Case C-173/09 (Elchinov), ECLI:EU:C:2010:581

CJEU, Case C-62/14 (Gauweiler and others), ECLI:EU:C:2015:400

H. ICTY

ICTY, *Prosecutor v. Furundžija*, Judgment of 21 July 2000, Case No. IT-95–17/1-A

I. Special Court for Sierra Leone

SCSL, *Prosecuter v. Sesay*, Decision on Defence Motion seeking the Disqualification of Justice Robertson from the Appeals Chamber, Case No. SCSL-2004–15-AR15, 13 March 2004

J. ITLOS

ITLOS, *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean*, Preliminary Objections, Judgment of 28 January 2021

K. Arbitral awards

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

L. Domestic courts

Chile

Constitutional Tribunal of Chile, Judgment 7774–2019 of 25 June 2020

Colombia

Constitutional Court of Colombia, Judgment C-408/96 of 4 September 1996
Constitutional Court of Colombia, Judgment C-500/14 of 16 July 2014
Constitutional Court of Colombia, Judgment C-327/16 of 22 June 2016

Costa Rica

Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 9 May 1995, No. 2313–95, Exp. 0421-S-90
Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Sentencia de fondo* of 5 September 2000, No. 07818, Exp. 99–007428–0007-CO
Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 7 March 2007, No. 2007–03043, Exp. 05–015208–0007-CO
Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 27 March 2007, No. 2007–004267, Exp. 07–003891–0007-CO
Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad*, 8 August 2018, No. 12782–2018, Exp. 15–013971–0007-CO
Constitutional Chamber of the Costa Rican Supreme Court of Justice, *Acción de Inconstitucionalidad* of 8 August 2008, No. 2018012783, Exp. 13–013032–0007-CO
Tribunal Superior de Casación Penal de San José, Judgment of 27 May 1996, No. 00219–00, Exp. 94–000299–008-PE

Ecuador

Constitutional Court of Ecuador, Judgment N° 0005-TC of 26 September 2006
Constitutional Court of Ecuador, Decision 0038–07-TC of 5 March 2008
Constitutional Court of Ecuador, Judgment N° 003–14-SIN-CC of 17 September 2014
Constitutional Court of Ecuador, Judgment 184–18-SEP-CC of 29 May 2018, case No. 1692–12-EP
Constitutional Court of Ecuador, Judgment 10–18-CN/19 of 12 June 2019, case No. 10–18-CN
Constitutional Court of Ecuador, Judgment 11–18-CN/19 of 12 June 2019, case No. 11–18-CN

Germany

German Federal Constitutional Court, Decision of 14 October 2004 – 2 BvR 1481/04

German Federal Constitutional Court, Judgment of 4 May 2011 – 2 BvR 2333/08

German Federal Constitutional Court, Judgment of 12 June 2018 – 2 BvR 1738/12

Mexico

Supreme Court of Mexico, Contradicción de Tesis 293/2011 of 3 September 2013

Supreme Court of Mexico, Tesis P./J. 21/2014 (10a.) of 25 April 2014

Octavo Tribunal Colegiado de Circuito del Centro Auxiliar de la Primera Región, Amparo directo 346/2016, 22 September 2016

Octavo Tribunal Colegiado de Circuito del Centro Auxiliar de la Primera Región, Opiniones Consultivas de la Corte Interamericana de derechos Humanos. Implicaciones de su carácter orientador para los jueces mexicanos, tesis aislada (I Región)80.1 CS (10a.), published on 28 April 2017

Peru

Constitutional Tribunal of Peru, Judgment of 24 April 2006, Exp. No. 047–2004/AI/TC

Constitutional Tribunal of Peru, Resolution of 19 June 2007, 00007–2007-PI/TC

Constitutional Tribunal of Peru, Judgment 676/2020 of 3 November 2020, case no. 01739–2018-PA/TC

Supreme Court of Justice of Lima, Eleventh Constitutional Court, Judgment of 22 March 2019, Exp. 10776–2017

United States of America

US Supreme Court, *Alabama v. Arizona*, 291 U.S. 286, 291 (1934)

US Supreme Court, *Hoffman Plastic Compounds, INC. v. National Labor Relations Board*, argued 15 January 2002, decided 27 March 2002

Bibliography

Abreu Burelli, Alirio, 'Jurisprudencia de la Corte Interamericana de Derechos Humanos' in La Corte Interamericana de Derechos Humanos (ed), *La Corte Interamericana: Un Cuarto de Siglo: 1979–2004*, 87–149

Aljaghoub, Mahasen M., *The Advisory Function of the International Court of Justice 1946–2005* (Springer, 2006)

Amador Garita, Carolina and Rodríguez Mata, Nelson David, *El control de convencionalidad en Costa Rica: propuesta de aplicación por los jueces ordinarios – Análisis comparado desde la perspectiva del derecho internacional público* (Universidad de Costa Rica, 2016)

d'Argent, Pierre, 'Art. 65', in Andreas Zimmermann *et al.* (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn OUP, 2019)

d'Argent, Pierre, 'Art. 96 UN Charter', in Andreas Zimmermann et al. (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn OUP, 2019)

Ayala Corao, Carlos, *'Inconstitucionalidad de la denuncia de la Convención Americana sobre Derechos Humanos por Venezuela'* (2013) XIX Anuario de Derecho Constitucional Latinoamericano, 43–79

Baer, Susanne, *Rechtssoziologie* (3rd edn Nomos, 2017)

Bailliet, Cecilia M., *'The strategic prudence of The Inter-American Court of Human Rights: rejection of requests for an advisory opinion'* (2018) 15 Revista de Direito Internacional, 255–276

Baldwin, James F., *The Kings Council in England during the Middle Ages* (Clarendon Press, 1913)

Bazán, Víctor, *'Control de Convencionalidad, Aperturas dialógicas e Influencias jurisdiccionales recíprocas'* (2011) 18 Revista Europea de Derechos Fundamentales, 63–103

Benhabib, Seyla, *The Rights of Others: Aliens, Residents and Citizens* (CUP, 2004)

Benhabib, Seyla, *'Democratic Exclusions and Democratic Iterations: Dilemma's of 'Just Membership' and Prospects of Cosmopolitan Federalism'* (2007) 6(4) European Journal of Political Theory, 445–462

Benz, Eleanor, *'The Inter-American Court's Advisory Function Continues to Boom – A few comments on the requests currently pending'*, 25 November 2019, EJIL:Talk!, available at: https://www.ejiltalk.org/the-inter-american-courts-advisory-function-continues-to-boom-a-few-comments-on-the-requests-currently-pending/

Benz, Eleanor and Kahl, Verena, *'Das Urteil im Fall Lhaka Honhat: Die Ausweitung der direkten Justiziabilität von Desca und die unerfüllte Hoffnung der Konkretisierung des Rechts auf eine gesunde Umwelt'* (2021) 59(2) Archiv des Völkerrechts, 199–226

Beg, Mirza Anwer, *The Attitude of the United Nations Members towards the Use of Advisory Opinion Procedure 1945–1963* (Columbia University, 1965)

Besson, Samantha, 'The Erga Omnes Effect of Judgments of the European Court of Human Rights: What's in a Name?' in Samantha Besson (ed), *La cour européenne de droits de l'hommme après le Protocole 14 – Premier bilan et perspectives: The European Court of Human Rights after Protocol 14 – Preliminary Assessment and Perspectives* (Schulthess, 2011) pp. 125–175

Bidart, Germán J. and Albanese, Susana, *Derecho Internacional, Derechos Humanos y Derecho Comunitario* (Ediar, 1998)

Binder, Christina, '*The Prohibition of Amnesties by the Inter-American Court of Human Rights*' (2011) 12 German Law Journal, 1203–1230

Bodnar, Adam, 'Res Interpretata: Legal Effect of the European Court of Human Rights' Judgments for other States Than Those Which Were Party to the Proceedings' in Yves Haeck and Eva Brehms (eds), *Human Rights and Civil Liberties in the 21st Century* (Springer, 2014) pp. 223–262

von Bogdandy, Armin, 'Del Paradigma de la Soberanía al Paradigma del Pluralismo. Una nueva Perspectiva (Mirada) de la Relación entre el Derecho Internacional y los Ordenamientos jurídicos nacionales' in Griselda Capaldo et al. (eds), *Internacionalización del Derecho Constitucional, Constitucionalización del Derecho Internacional* (Eudeba, 2012) pp. 21–40

von Bogdandy, Armin and Venzke, Ingo, *In Whose Name?: A Public Law Theory of International Adjudication* (OUP, 2014)

von Bogdandy, Armin und Venzke, Ingo, *'On the Democratic Legitimation of International Judicial Lawmaking'* (2011) 12 German Law Journal, 1341–1370

Boeglin, Nicolas, *'La opinión consultiva de la Corte IDH sobre derechos de la comunidad LGBTI en Costa Rica: balance y perspectivas'*, 23 January 2018, available at: https://www.pressenza.com/es/2018/01/la-opinion-consultiva-de-la-corte-idh-sobre-derechos-de-la-comunidad-lgbti-en-costa-rica-balance-y-perspectivas/

Boeglin, Nicolas, *'Mucho más que una respuesta a Colombia: a propósito de la Opinión Consultiva OC-23 de la Corte Interamericana de Derechos Humanos sobre ambiente y derechos humanos'*, 24 February 2018, available at: https://derechoaldia.com/index.php/derecho-ambiental/ambiental-doctrina/981-mucho-mas-que-una-respuesta-a-colombia-a-proposito-de-la-opinion-consultiva-oc-23-de-la-corte-interamericana-de-derechos-humanos-sobre-ambiente-y-derechos-humanos

Bowett, Derek W., 'The Court's role in relation to international organizations' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (CUP, 1996) pp. 181–192

Breuer, Marten, 'Art. 46' in Ulrich Karpenstein und Franz Mayer (eds), *EMRK: Konvention zum Schutz der Menschenrechte und Grundfreiheiten* (3rd edn C.H. Beck, 2022)

Brown, Chester, 'Art. 59' in Andreas Zimmermann *et al.* (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn OUP, 2019)

Brunozzi, Kathrin, 'Art. 46' in Jens Meyer-Ladewig *et al.* (eds.), *EMRK: Europäische Menschenrechtskonvention* (5th edn Nomos, 2023)

Buergenthal, Thomas, *'New Upload - Remembering the Early Years of the Inter-American Court of Human Rights'* (2005) 37 New York University Journal of International Law and Politics, 259–280

Buergenthal, Thomas, *'The Advisory Practice of the Inter-American Human Rights Court'* (1985) 79 American Journal of International Law, 1–27

Buergenthal, Thomas, *'The Inter-American Court of Human Rights'* (1982) 76 American Journal of International Law, 231–245

Burgorgue-Larsen, Laurence, 'The Right to ad intra Enforcement of the Convention' in Laurence Burgorgue-Larsen and Amaya Úbeda de Torres (eds), *The Inter-American Court of Human Rights: Case Law and Commentary* (OUP, 2011) pp. 243–268

Burgorgue-Larsen, Laurence, 'Chronicle of a Fashionable Theory in Latin America – Decoding the Doctrinal Discourse on Conventionality Control', in: Yves Haeck et al. (eds), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia, 2015) pp. 647–676

Cabranes, José A., *'The Protection of Human Rights by the Organization of American States'* (1968) 62 (4) American Journal of International Law, 889–908

Calidonio Schmid, Julie, *'Advisory Opinions on Human Rights: Moving beyond a phyrric Victory'* (2006) 16 Duke Journal of Comparative & International Law, 415–455

Candia Falcón, Gonzalo, *'Causales de Inadmisibilidad de Opiniones Consultivas: Reforzando el Carácter subsidiario del Sistema Intermaericano de Derechos Humanos'* (2018) 45(1) Revista Chilena de Derecho, 57–80

Carillo-Santarelli, Nicolás, *'The Politics behind the Latest Advisory Opinions of the Inter-American Court of Human Rights', Blog of the International Journal of Constitutional Law'*, 24 February 2018, available at: https://www.iconnectblog.com/the-politics-behind-the-latest-advisory-opinions-of-the-inter-american-court-of-human-rights/

Carillo-Santarelli, Nicolás, *'The Strategic Use of Advisory Opinion Requests in Colombian-Venezuela Bilateral Relations'*, 25 October 2019, Opinio Juris, available at: http://opiniojuris.org/2019/10/25/the-strategic-use-of-advisory-opinion-requests-in-colombian-venezuela-bilateral-relations/

Carozza, Paolo and González, Pablo, *'The final word? Constitutional dialogue and the Inter-American Court of Human Rights: A reply to Jorge Contesse'* (2017) 15 I•CON, 436–442

Castilla Juárez, Karlos A., *'¿Control interno o difuso de convencionalidad? – Una mejor idea: la garantía de tratados'* (2013) 13 Anuario Mexicano de Derecho Internacional, 51–97

Castilla Juárez, Karlos A., *'Control de convencionalidad interamericano: Una propuesta de orden ante diez años de incertidumbre'* (2016) 64 Revista IIDH, 87–125

Charney, Jonathan I., 'Disputes Implicating the Institutional Credibility of the Court: problems of Non-Appearance, Non-Participation, and Non-Performance' in Lori F. Damrosch (ed), *The International Court of Justice at a Crossroads* (Transnational Publishers, 1987) pp. 288–319

Cerna, Christina M., *'Reflections on the normative status of the American Declaration of the Rights and Duties of Man'*, available at: https://www.corteidh.or.cr/tablas/r31598.pdf

Chehtman, Alejandro, *'International Law and Constitutional Law in Latin America'* (July 2018), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3207795

Chehtman, Alejandro, *'The relationship between domestic and international courts: the need to incorporate judicial politics into the analysis'*, 8 June 2020, EJIL:Talk!, available at: https://www.ejiltalk.org/the-relationship-between-domestic-and-international-courts-the-need-to-incorporate-judicial-politics-into-the-analysis/

Cisneros Sanchez, Maximo, *'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) pp. 53–66

Contesse, Jorge, *'The Rule of Advice in International Human Rights Law'* (2021) 115(3) American Journal of International Law, 367–408

Contesse, Jorge, *'Inter-State Cases in Disguise under Inter-American Human Rights Law: Advisory Opinions as Inter-State Disputes'*, Völkerrechtsblog, 27. April 2021, available at: https://voelkerrechtsblog.org/de/inter-state-cases-in-disguise-under-inter-american-human-rights-law/

Contesse, Jorge, *'The final word? Constitutional dialogue and the Inter-American Court of Human Rights'*, (2017) 15 I CON, 414–435

Contreras, Pablo, *'National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between the Jurisprudence of the European and the Inter-American Court of Human Rights'* (2012) 11 Northwestern Journal of International Human Rights, 28–82

Couvreur, Philippe, 'Article 17' in Andreas Zimmermann et al. (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn OUP, 2019)

Cremer, Hans-Joachim, 'Kapitel 32: Entscheidung und Entscheidungswirkung' in Oliver Dörr et al. (eds), *EMRK/GG Konkordanzkommentar* (Band II, 3nd edn Mohr Siebeck, 2022)

Crespi Reghizzi, Zeno, 'The Chagos Advisory Opinion and the Principle of Consent to Adjudication' in Thomas Burri and Jamie Trinidad (eds.), *The International Court of Justice and Decolonisation* (CUP, 2021) pp. 51–70

Dahlquist, Robert P., *'Advisory Opinions, Extrajudicial Activity and Judicial Advocacy: A Historical Perspective'* (1983) 14(1) Southwestern University Law Review, 45–79

Deftou, Maria-Louiza, *'Fostering the Rule of Law in the Americas: Is There any Room for Judicial Dialogue between the IACtHR and National Courts?'* (2020) 38(1) Nordic Journal of Human Rights, 78–95

Dicosola, Maria *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, 1387–1428

Dodge, William S., *'Res Judicata'* in Max Planck Encyclopedias of International Law (last updated January 2006), available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1670?prd=MPIL

Dörr, Oliver, 'Article 31' and 'Article 32' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn Springer, 2018)

Dulitzky, Ariel E., *'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, 45–93

Dunshee de Abranches, Carlos, *'The Inter-American Court of Human Rights'* (1980–1981) 30 The American University Law Review, 79–125

Ellingwood, Albert R., *Departmental Coöperation in State Government* (The Macmillan Company, 1918)

Engel, Salo, *'La Force obligatoire des Avis Consultatifs de la Court Permanente de Justice Internationale'* (1936) 17 Revue de Droit International et de Legislation Comparee, 768–800

Farer, Tom, *'The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox'* (1997) 19(3) Human Rights Quarterly, 510–546

Faúndez Ledesma, Héctor, *El Sistema Interamericano de Protección de los Derechos Humanos: Aspectos institucionales y procesales* (3rd edn IIDH, 2004)

Feria-Tinta, Monica and Milnes, Simon C., *'The Rise of Environmental Law in International Dispute Resolution: The Inter-American Court of Human Rights Issues a Landmark Advisory Opinion on the Environment and Human Rights'* (2016) 27 (1) Yearbook of Environmental Law, 64–81

Ferrer Mac-Gregor Poisot, Eduardo, 'The Conventionality Control as a Core Mechanism of the Ius Constitutionale Commune' in Armin von Bogdandy et al. (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (OUP, 2017) pp. 321–336

Ferrer Mac-Gregor Poisot, Eduardo, *'Symposium: The Constitutionalization of International Law in Latin America: Conventionality Control: The new Doctrine of the Inter-American Court of Human Rights'* (2015–2016) 109 American Journal of International Law Unbound, 93–99

Fitzmaurice, Gerald G., *'The Law and Procedure of the International Court of Justice: International Organizations and Tribunals'* (1952) 29 British Yearbook of International Law, 1–62

Fix-Zamudio, Héctor, *'Notas sobre el Sistema Interamericano de Derechos Humanos'* in García Belaunde, Domingo and Fernández Segado, Francisco (eds), La Jurisdicción Constitucional en Iberoamerica (Dykinson, 1997) pp. 163–224

Fuentes Torrijo, Ximena, *'International and Domestic Law: Definitely an Odd Couple'* (2008) 77 (2) Revista Juridica Universidad de Puerto Rico, 483–505

García Ramírez, Sergio, *'El Futuro del Sistema Interamericano de Protección de los Derechos Humanos'* (2001) 101 Boletín Mexicano de Derecho Comparado, 653–683

García Ramírez, Sergio, *'Relationship between Inter-American Jurisdiction and States (National Systems): Some Pertinent Questions'*, (2015) 5 Notre Dame Journal of International and Comparative Law, 115–151

Gerrard, Michael B., *'Taking Climate Change to the International Court of Justice: Legal and Procedural Issues'*, Climate Law Blog, 29 September 2021, available at: http://blogs.law.columbia.edu/climatechange/2021/09/29/taking-climate-change-to-the-international-court-of-justice-legal-and-procedural-issues/

Góngora-Mera, Manuel E., *Inter-American Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication* (IIDH, 2011)

Góngora-Mera, Manuel E., 'The Block of Constitutionality as Doctrinal Pivot of a Ius Commune' in Armin von Bogdandy *et al.* (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (OUP, 2017) pp. 235–253

González-Domínguez, Pablo, *The Doctrine of Coventionality Control: Between Uniformity and Legal Pluralism in the Inter-American Human Rights System* (Intersentia, 2018)

Gónzalez Morales, Felipe, *'Surgimiento y desarollo del sistema interamericano de derechos humanos en un contexto de régimenes autoritarios (1960–1990)'* (2007) 46 Revista IIDH, 124–157

Goodman, Reuben, *'Chapter 10: Advisory Opinions'* (1964) Annual Survey of Massachusetts Law, Vol. 1964, Article 13, 95–115

Goodrich, Leeland M., *'The Nature of the Advisory Opinions of the Permanent Court of International Justice'* (1938) 32 American Journal of International Law, 738–758

Goodrich, Leeland M. *et. al.* (eds), *Charter of the United Nations: Commentary and Documents* (3rd edn Columbia University Press, 1969)

Grimmel, Andreas and Jakobeit, Cord (eds.), *Regionale Integration – Erklärungsansätze und Analysen zu den wichtigsten Integrationszusammenschlüssen in der Welt* (Nomos, 2015)

Grijalva Jiménez, Augustín and Castro-Montero, José Luis, *'La reelección presidencial indefinida en Venezuela, Nicaragua, Ecuador y Bolivia'* (2020) 18 (1) Estudios Constitucionales, 9–49

Gros Espiell, Héctor, 'El Procedimiento contencioso ante la Corte Interamericana de Derechos Humanos' in Daniel Zovatto (ed), *La Corte Intermamericana de Derechos Humanos: Estudios y Documentos* (IIDD, 1985) pp. 67–101

Gros Espiell, Héctor, *La Convención Americana y la Convención Europea de Derechos Humanos: Análisis Comparativo* (Editorial Jurídica de Chile, 1991)

Gross, Leo, *'The International Court of Justice and the United Nations'* (1967) 120 Recueil des Cours, 313–440

Guevara Palacios, Augusto, *Los Dictámenes Consultivos de la Corte Interamericana de Derechos Humanos: Interpretación constitucional y convencional* (Bosch Editor / IIDH, 2012)

Hambro, Edvard, *'The Authority of the Advisory Opinions of the International Court of Justice'* (1954) 3 International and Comparative Law Quarterly, 2–22

Hammarskjöld, Åke, *'The early work of the Permanent Court of International Justice'* (1922–1923) 36 Harvard Law Review, 704–725

Hennebel, Ludovic and Tigroudja, Hélène, *The American Convention on Human Rights: A Commentary* (OUP, 2022)

Hentrei, Simon, *Complementary Adjudication: Legitimating International Judicial Authority in the Americas* (Johann-Wolfgang Goethe Universität, 2021)

Hernández Castaño, Diana P., *Legitimidad democrática de la Corte Interamericana de Derechos Humanos en el control de convencionalidad* (Universidad Externado de Colombia, 2014)

Hitters, Juan C., *'¿Son vinculantes los pronunciamientos de la Comisión y de la Corte Interamericana de Derechos Humanos? (control de contitucionalidad y convencionalidad)'* (2008) 10 Revista Iberoamericana de Derecho Procesal Constitucional, 131–156

Hitters, Juan C., *'Un Avance en el Control de Convencionalidad. (El Efecto 'erga omnes' de las Sentencias de la Corte Interamericana)'* (2013) 11(2) Estudios Constitucionales, 695–710

Hudson, Manley O., *'The Advisory Opinions of the Permanent Court of International Justice'* (1925) 10 International Conciliation, 321–364

Hudson, Manley O., *'Advisory Opinions of National and International Courts'* (1923–1924) 37(8) Harvard Law Review, 970–1001

Hudson, Manley O., *The Permanent Court of International Justice: 1920–1942: A Treatise* (Macmillan Company, 1943)

Hudson, Manley O., *'The Central American Court of Justice'* (1932) 26(4) American Journal of International Law, 759–786

Hudson, Manley O., *International Tribunals: Past and Future* (Carnegie Endowment for International Peace and Brookings Institution, 1944)

Huffman, James L. and MardiLyn Saathoff, *Advisory Opinions and Canadian Constitutional Development: The Supreme Court's Reference Jurisdiction* (1990) 74 Minnesota Law Review, 1251–1336

Ibáñez Rivas, Juana M., 'La justiciabilidad directa de los derechos económicos, sociales, culturales y ambientales. Génesis de la innovadora jurisprudencia interamericana' in Mariela Morales Antoniazzi *et al*. (eds*), Interamericanización de los DESCA: El Caso Cuscul Pivaral de la Corte IDH* (Max Planck Institute for Comparative Public Law and International Law *et al*., 2020), pp. 51–94

Illueca, Alonso, *'The Venezuela Crisis at the Organization of American States: between Withdrawal and Suspension'*, 29 May 2017, Opinio Juris, available at: http://opiniojuris.org/2017/05/29/the-venezuela-crisis-at-the-organization-of-american-states-between-withdrawal-and-suspensionhttp://opiniojuris.org/2017/05/29/the-venezuela-crisis-at-the-organization-of-american-states-between-withdrawal-and-suspension/

Jay, Stewart, *Most Humble Servants: The Advisory Role of Early Judges* (Yale University Press, 1997)

Jiménez de Aréchaga, Eduardo, *'Judges ad hoc in Advisory Proceedings'* (1971) 31 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 697–711

Kahl, Verena, *'Ökologische Revolution am Interamerikanischen Gerichtshof für Menschenrechte'* (2019) 2 Zeitschrift für Europäisches Umwelt und Planungsrecht, 1–22

Kaufmann, Arthur, *Über Gerechtigkeit* (Carl Heymanns Verlag KG, 1993)

Keith, Kenneth James, *The Extent of the Advisory Jurisdiction of the International Court of Justice* (A.W, Sijthoff/Leiden, 1971)

Ker-Lindsay, James, '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

Kolb, Robert, *The International Court of Justice* (Bloomsbury Publishing, 2014)

Kokott, Juliane, *Das interamerikanische System zum Schutz der Menschenrechte* (Springer, 1986)

Kunz, Raffaela, *Richter über internationale Gerichte* (Springer, 2020)

Kunz, Raffaela, *'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts'* (2020) 30 (4) European Journal of International Law, 1129–1163

Lambert, Elisabeth, *Les effects des arrêts de la Court européenne des droits de l'homme: Contribution à une approche pluraliste du droit européen des droits de l'homme* (Bruylant, 1999)

Lammasch, Heinrich, *Der Völkerbund zur Bewahrung des Friedens: Entwurf eines Staatsvertrages mit Begründung* (2nd edn W. Trösch, 1919)

Lamprecht, Rolf, *Vom Mythos der Unabhängigkeit – Über das Dasein und Sosein der deutschen Richter* (2nd edn Nomos, 1996)

Larenz, Karl, *Richtiges Recht: Grundzüge einer Rechtsethik* (C.H. Beck, 1979)

Lookwood, Bert B. Jr., *'Advisory Opinions of the Inter-American Court of Human Rights'* (1984) 13 Denver Journal of International Law & Policy, 245–267

Maldonado Jordison, Sasha, *'The Central American Court of Justice: Yesterday, Today and Tomorrow?'* (2009) 25 Connecticut Journal of International Law, 183–242

Malarino, Ezequiel, 'Acerca de la pretendida Obligatoriedad de la Jurisprudencia de los Órganos Interamericanos de Protección de Derechos Humanos para los Tribunales Judiciales nacionales' in Christian Steiner (ed), *Sistema Interamericano de Protección de los derechos humanos y derecho penal internacional Vol. II* (Konrad Adenauer Stiftung e.V., 2011) pp. 435–455

Malarino, Ezequiel, 'Activismo Judicial, Punitivización y Nacionalización. Tendencias Antidemocráticas y Antiliberales de la Corte Interamericana de Derechos Humanos' in Gisela Elsner (ed), *Sistema Interamericano de Protección de los Derechos Humanos y Derecho Penal Internacional* (Konrad Adenauer Stiftung e.V., 2010) pp. 25–61

Marsteintredet, Leiv, '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) pp. 248–272

Mayr, Teresa F. and Mayr-Singer, Jelka, *'Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law'* (2016) 76 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 425–449

McLachlan, Campbell, *Lis Pendens in International Litigation* (Hague Academy of International Law, 2009)

McNair, Arnold D., *'The Council's Request for an advisory Opinion from the Permanent Court of International Justice'* (1926) 7 British Yearbook of International Law, 1–13

Medina Quiroga, Cecilia, 'Las Obligaciones de los Estados bajo la Convención Americana de Derchos Humanos' in La Corte Interamericana de Derechos Humanos (ed), *La Corte Interamericana: Un Cuarto de Siglo: 1979–2004*, 207–270

van der Mei, Anne Pieter; *'The advisory jurisdiction of the African Court on Human and Peoples' Rights'* (2005) 5 African Human Rights Law Journal, 27–46

Mejía R., Joaquín A. (ed.), *'La reelección presidencial en Centroamérica: ¿Un derecho absoluto?'*, available at: https://www.corteidh.or.cr/tablas/r38379.pdf

Miller, David H., *Drafting of the Covenant, Vol. I* (G. P. Putnam's Sons, 1928)

Miller, David H., *Drafting of the Covenant, Vol. II* (G. P. Putnam's Sons, 1928)

Moench, Lucas, *'State Court Advisory Opinions: Implications for Legislative Power and Prerogatives'* (2017) 97 Boston University Law Review, 2243–2301

Montalvo, Andrés E., *'Reservations to the American Convention on Human Rights: A New Approach'* (2000) 16 American University International Law Review, 269–313

Moyer, Charles, 'The Role of Amicus Curiae in the Inter-American Court of Human Rights' in Daniel Zovatto (ed), *La Corte Interamericana de Derechos Humanos: Estudios y Documentos* (IIDD, 1985) pp. 103–114

Moyer, Charles and Padilla, David, *'Executions in Guatemala as Decreed by the Courts of Special Jurisdiction in 1982–83: A Case Study'* (1984) 6 Human Rights Quarterly, 507–520

Murillo, Álvaro, *'Elecciones 2018 en Costa Rica: los medios de comunicación llevados al límite'*, FES Comunicación 3/2018, p. 7, available at: https://library.fes.de/pdf-files/bueros/la-comunicacion/14641.pdf

Nacimiento, Grace, *Die Amerikanische Deklaration der Rechte und Pflichten des Menschen* (Springer, 1995)

Negulesco, Démètre, *'L'Evolution de la Procedure des Avis consultatifs de la Cour Permanente de Justice Internationale'* (1936) 57 Recueil des Cours, 64–80

Nikken, Pedro, 'La Función Consultiva de la Corte Interamericana' in Antônio A. Cançado Trindade (ed.), *Memoria del Seminario El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI, Vol. I* (2nd edn IACtHR, 2003), 161–181

Nolte, Detlef, *'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

Obonye, Jonas, *'Res interpretata principle: Giving domestic effect to the judgments on the African Court of Human and Peoples' Rights'* (2020) 20 African Human Rights Law Journal, 736–755

Oellers-Frahm, Karin, 'Article 96 UN Charter', in Andreas Zimmermann et al. (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn OUP, 2012)

Oellers-Frahm, Karin, '*Lawmaking Through Advisory Opinions*' (2011) 12 German Law Journal, 1033–1056

Pacheco Gómez, Máximo; *'La Competencia Consultiva de la Corte Interamericana de Derechos Humanos'*, available at: https://archivos.juridicas.unam.mx/www/bjv/libros/5/2454/5.pdf

Padilla, David J., *'The Inter-American Commission on Human Rights of the Organization of American States: A Case Study'* (1993) 9(1) American university Law Review, 95–115

Pasqualucci, Jo M., *The Practice and Procedure of the Inter-American Court of Human Rights* (1st edn CUP, 2003)

Pasqualucci, Jo M., *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn CUP, 2013)

Pasqualucci, Jo M., *'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, 241–288

Paúl, Álvaro, *'The Emergence of a More Conventional Reading of the Conventionality Control Doctrine'* (2019) 49 Revue Générale de Droit, 275–302

Paulus, Andreas, 'Art. 66', in Andreas Zimmermann et al. (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn OUP, 2019)

Pavlopoulos, Niko, *'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

Pellet, Alain and Müller, Daniel, 'Art. 38', in Andreas Zimmermann et al. (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn OUP, 2019)

Pérez, Antonio F., *'Mechanisms for the Protection of Democracy in the Inter-American System and the Competing Lockean and Aristotelian Constitutions'*, available at: http://www.oas.org/es/sla/ddi/docs/publicaciones_digital_XXXIII_curso_derecho_internacional_2006_Antonio_F_Perez.pdf

Perez-Leon-Acevedo, Juan Pablo, *'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

Persky, Jonathan D., *'Ghosts That Slay: A Contemporary Look at State Advisory Opinions'* (2005) 37 Connecticut Law Review, 1155–1233

Pescatore, Pierre, *'Das Vorabentscheidungsverfahren nach Art. 177 EWG-Vertrag und die Zusammenarbeit zwischen dem Gerichtshof und den nationalen Gerichten'* (1987) No. 2 Bayrische Verwaltungsblätter, 33–73

Peters, Anne and Altwicker, Tilmann, *Europäische Menschenrechtskonvention* (2nd edn C.H. Beck, 2012)

Piza Escalante, Rodolfo E., 'La Jurisdicción Contenciosa del tribunal Interamericano de Derechos Humanos' in Daniel Zovatto (ed), *La Corte Interamericana de Derechos Humanos: Estudios y Documentos* (IIDD, 1985) pp. 155–176

Polakiewicz, Jörg, *Die Verpflichtung der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte* (Springer, 1993)

Pomerance, Michla, *The Advisory Function of the International Court in the League and U.N. Eras* (Johns Hopkins University Press, 1973)

Pomerance, Michla, 'The Advisory Role of the International Court of Justice and its 'Judicial' Character: Past and Future Prisms' in Sam Muller *et al.* (eds), *The International Court of Justice: Its Future Role after Fifty Years* (Martinus Nijhoff Publishers, 1997) pp. 271–323

Popkin, William D., *'Advisory Opinions in India'* (1962) Articles by Maurer Faculty, 401–434

Pratap, Dharma, *The Advisory Jurisdiction of the International Court* (Clarendon Press, 1972)

Puma, Guiseppe, *'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, 841–880

Pushaw, Robert J. Jr., *'Why the Supreme Court never gets any "Dear John" Letters: Advisory Opinions in Historical Perspective'* (1998) 87 The Georgetown Law Journal, 473–497

Queralt Jiménez, Argelia, *'El efecto de cosa interpretada y la función de armonización de estándares del Tribunal Europeo de Derechos Humanos'* in Eduardo Ferrer Mac-Gregor Poisot and Rogelio Flores Pantoja (eds), La Constitución y sus garantías – A 100 años de la Constitución de Querétaro de 1917 (UNAM, 2017) pp. 695–717

Quindimil López, Jorge A, *'El estatus jurídico de la Declaración Americana de los Derechos y Deberes del Hombre'* (2019 Edición Especial) 13 Revista Electrónica Iberoamericana, 1–15

Quintana Osuna, Karla I., *El Control de Convencionalidad: Un Estudio del Derecho Interamericano de los Derechos Humanos y del Derecho Mexicano. Retos y Perspectivas* (Universidad Nacional Autónoma de México, 2017)

Quispe Remón, Florabel, *'La importancia de la Declaración Americana de los Derechos y Deberes del Hombre en el Sistema Interamericano y la interpretación que de ella realiza la Corte Interamericana'* (2019 Edición Especial) 13 Revista Electrónica Iberoamericana, 1–23

Rábago Dorbecker, Miguel, 'El Avance de los Derechos Humanos en las Opiniones Consultivas de la Corte Interamericana de Derechos Humanos' in Manuel Becerra Ramírez (ed), *La Corte Interamericana de Derechos Humanos a veinticinco Años de su Funcionamiento* (UNAM, Instituto de Investigaciones Jurídicas, 2007) pp. 223–271

Ragone, Sabrina, 'The Inter-American System of Human Rights: Essential Features' in Armin von Bogdandy et al. (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (OUP, 2017) pp. 279–300

Read, Horace E., *'Advisory Opinions in International Justice'* (1925) 3(4) Canadian Bar Review, 186–195

Ripley, Charles, *'The Central American Court of Justice (1907–1918): Rethinking the Word's first Court'* (Jan.-Jun. 2018) 19(1) Diálogos Revista Electrónica, 47–68

Ripplinger, Alina M., *'Ante la salida de Nicaragua de la OEA'*, El País Agenda Pública, 1 December 2021, available at: https://agendapublica.elpais.com/noticia/13476/ante-salida-nicaragua-oea

Ripplinger, Alina M. and Kriener, Florian, *'Nicaragua's OAS Raid and the Inter-American System'*, Verfassungsblog, 2 Mai 2022, available at: https://verfassungsblog.de/nicaraguas-oas-raid-and-the-inter-american-system/

Roa, Jorge E., *La función consultiva de la Corte Interamericana de Derechos Humanos* (Universidad Externado de Colombia, 2015)

Rodiles, Alejandro, 'The Law and Politics of the Pro Persona Principle in Latin America' in Helmut P. Aust and Geord Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP, 2016) pp. 153–174

Rodríguez Rescia, Víctor M., *La Ejecución de Sentencias de la Corte Interamericana de Derechos Humanos* (Investigaciones Jurídicas, S.A., 1997)

Rudy, Timothy D., *'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, 237–248

Ruiz-Chiriboga, Oswaldo, *'The Conventionality Control: Examples of (un)succesful experiences in Latin America'* (2010) 3 Inter-American and European Human Rights Journal

Ruiz Miguel, Carlos, 'La Función Consultiva en el Sistema Interamericano de Derechos Humanos: ¿Crísalida de una Jurisdicción Supra-Constitucional?' in IACtHR (ed), *Liber Amicorum Héctor Fix-Zamudio, Vol. II.*, (IACtHR, 1998) pp. 1345–1363

Russell, Ruth B. and Muther, Jeannette E., *A History of the United Nations Charter: The Role of the United States 1940–1945* (The Brookings Institution, 1958)

Ruys, Tom and Soete, Anemoon, *'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, 155–176

Sagüés, Néstor P., *'Las opinions consultivas de la Corte Interamericana de Derechos Humanos en el control de convencionalidad'* (2015) 50 Revista IUS ET VERITAS, 292–297

Salazar Marín, Daniela *et al.*, *'La fuerza vinculante de las Opiniones Consultivas de la Corte Interamericana de Derechos Humanos a la luz del derecho y la justicia constitucional en Ecuador'* (July-December 2019) 32 Foro Revista de Derecho, 123–143

Salvioli, Fabián O., 'La competencia consultiva de la Corte Interamericana de Derechos Humanos: marco legal y desarollo jurisprudencial' available at: http://www.derechoshumanos.unlp.edu.ar/assets/files/documentos/la-competencia-consultiva-de-la-corte-interamericana-de-derechos-humanos-marco-legal-y-desarrollo--2.pdf.

Samson, Marika G. and Douglas Guilfoyle, 'The Permanent Court of International Justice and the 'Invention' of International Advisory Jurisdiction' in Christian J. Tams and Malgosia Fitzmaurice (eds.), *Legacies of the Permanent Court of Justice* (Martinus Nijhoff Publishers, 2013) p. 41–68.

Sánchez de Bustamente y Sirven, Antonio, *El Tribunal Permanente de Justicia Internacional* (Editorial Reus, 1925)

Sánchez, Lucas, *'Der IAGMR und WSK-Rechte: Eine wegweisende Rechtsprechungsänderung'*, Völkerrechtsblog, 20 August 2018, available at: https://voelkerrechtsblog.org/de/der-iagmr-und-wsk-rechte/

Sánchez, Lucas and Kunz, Raffaela, "'*The Inter-American System has always been in crisis, and we have always found a way out*'" – *An Interview with Eduardo Ferrer Mac-Gregor Poisot*", Völkerrechtsblog, 17 October 2016, available at: https://voelkerrechtsblog.org/de/the-inter-american-system-has-always-been-in-crisis-and-we-always-found-a-way-out/

Savaresi, Annalisa *et al.*, '*Beyond COP26: Time for an Advisory Opinion on Climate Change?*', EJIL:Talk!, 17 December 2021, available at: https://www.ejiltalk.org/beyond-cop26-time-for-an-advisory-opinion-on-climate-change/

Skordas, Achilles, '*The Missing Link in Migration Governance: An Advisory Opinion by the International Court of Justice*', EJIL:Talk!, 11 May 2018, available at: https://www.ejiltalk.org/the-missing-link-in-migration-governance-an-advisory-opinion-by-the-international-court-of-justice/

Seifert, Karsten, *Das interamerikanische System zum Schutz der Menschenrechte und seine Reformierung* (Peter Lang, 2008)

Shany, Yuval and Horovitz, Sigall, '*Judicial Independence in The Hague and Freetown: A Tale of Two Cities*' (2008) 21 Leiden Journal of International Law, 113–129

Shaw, Malcolm N., *Rosenne's Law and Practice of the International Court 1920–2015, Vol. I: The Court and the United Nations* (5th edn Martinus Nijhoff Publishers, 2016)

Shaw, Malcolm N., *Rosenne's Law and Practice of the International Court 1920–2015, Vol. II: Jurisdiction* (5th edn Martinus Nijhoff Publishers, 2016)

Shaw, Malcolm N., *Rosenne's Law and Practice of the International Court 1920–2015, Vol. III: Procedure* (5th edn Martinus Nijhoff Publishers, 2016)

Shaw, Malcolm N., 'The Security Council and the International Court of Justice: Judicial Drift and Judicial Function' in Sam Muller *et al.* (eds), *The International Court of Justice: Its Future Role after Fifty Years* (Martinus Nijhoff Publishers, 1997) pp. 219–259

Soley Echeverría, Ximena, *The Transformation of the Americas: The Rise of Human Rights in the Inter-American System* (Johann-Wolfgang Goethe Universität, 2021)

Soley Echeverría, Ximena, 'The Transformative Dimension of Inter-American Jurisprudence' in Armin von Bogdandy *et al.* (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (OUP, 2017) pp. 337–355

Steininger, Silvia, '*Don't Leave Me This Way: Regulating Treaty Withdrawal in the Inter-American Human Rights System*', 5 March 2021, EJIL:Talk!, available at: https://www.ejiltalk.org/dont-leave-me-this-way-regulating-treaty-withdrawal-in-the-inter-american-human-rights-system/

Stumpe, Friederike, *Parallele Verfahren in der privaten Schiedsgerichtsbarkeit und bei Investitionsschutzstreitigkeiten – Anwendungsmöglichkeiten des lis pendens Prinzips* (Dr. Kovač, 2015)

Tanzi, Attila, '*Ultra Petita*' in Max Planck Encyclopedias of International Law (last updated November 2019), available at: https://opil.ouplaw.com/view/10.1093/law-mpeipro/e2239.013.2239/law-mpeipro-e2239?rskey=N0dIwR&result=1&prd=MPIL

Tello Mendoza, Juan A., '*La doctrina del Control de Convencionalidad. Un pretendido cambio de paradigma en la región americana*' (2019) 37 Agenda Internacional, 159–181

Tello Mendoza, Juan A., *El Control de Convencionalidad: Situación en algunos Estados Americanos* (Leyer, 2016)

Tello Mendoza, Juan A., 'El control de convencionalidad y sus disonancias con la democracia constitucional' in Núria Saura-Freixes (ed), *Derechos Humanos, Derecho Constitucional y Derecho Internacional: Sinergias Contemporáneas. Human Rights, Constituonal Law and International Law: Contemporary Synergies* (Centro de Estudios Políticos y Constitucionales, 2021) pp. 223–262

Tello Mendoza, Juan A., *El Control de Convencionalidad según la Corte Interamericana de Derechos Humanos y su difícil articulación con la noción del Estado Constitucional de Derecho* (Universitat de Barcelona, 2021)

Thayer, James B., *Legal Essays* (Boston Book Company, 1908)

Thin, Sarah, *'The Curious Case of the 'Legal Effect' of ICJ Advisory Opinions in the Mauritius/Maldives Maritime Boundary Dispute'*, EJIL:Talk!, 5 February 2021, available at: https://www.ejiltalk.org/the-curious-case-of-the-legal-effect-of-icj-advisory-opinions-in-the-mauritius-maldives-maritime-boundary-dispute/

Thirlway, Hugh, *The International Court of Justice* (OUP, 2016)

Thirlway, Hugh, *'Advisory Opinions'*, in Max Planck Encyclopedias of International Law (last updated April 2006), available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e4?prd=EPIL

Topf, Mel A., *'The Jurisprudence of the Advisory Opinion Process in Rhode Island'* (1997) 2 Roger Williams University Law Review, 207–256

Ulfstein, Geir, 'Individual Complaints' in Hellen Keller and Geir Ulfstein (eds.), *UN Human Rights Treaty Bodies* (CUP, 2012) pp. 73–115

Urueña, Rene, *'Colombia se retira del Pacto de Bogotá: Causas y Efectos'* (2013) Anuario de Derecho Público UDP, 511–547

Vargas Carreño, Edmundo, 'La Corte Interamericana de Derechos Humanos' in Francisco Orrego Vicuña and Jeannette Irigoin Barrenne (eds), *Perspectivas del Derecho Internacional Contemporaneo: Experiencias y visión de América Latina, Vol. II: La Solución Pacífica de Controversias* (Instituto de Estudios Internacionales Universidad de Chile, 1981) pp. 128–155

Vasel, Johann J., *Regionaler Menschenrechtsschutz als Emanzipationsprozess: Grundlagen, Strukturen und Eigenarten des europäischen und interamerikanischen Menschenrechtsschutzsystems* (Duncker & Humblot, 2017)

Vega-Barbosa, Giovanny and Aboagye, Lorraine, *'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/

Vega-Murillo, William and Vargas-Mazas, Esteban, *'La opinión consultiva OC-24/17 solicitada por Costa Rica: El resultado de una consulta estratégica'* (2017) 66 Revista IIDH, 171–208

Ventura Robles, Manuel E. and Zovatto, Daniel, *La Función Consultiva de la Corte Interamericana de Derechos Humanos: Naturaleza y Principios 1982–1987* (Editorial Civitas, 1989)

Ventura Robles, Manuel E., 'El Proyecto de Estatuto de la Corte Interamericana de Derechos Humanos de 1979' in Daniel Zovatto (ed), *La Corte Interamericana de Derechos Humanos: Estudios y Documentos* (IIDD, 1985) pp. 177–206

Viljoen, Frans, *International Human Rights Law in Africa* (2nd edn OUP, 2012)

Viljoen, Frans, *'Understanding and overcoming challenges in accessing the African Court on Human and People's rights'* (2018) 67 International Comparative Quarterly, 63–98

Vio Grossi, Eduardo, *'El control de convencionalidad y la Corte Interamericana de Derechos Humanos'* (2018) 24 Anuario de Derecho Constitucional Latinoamericano, 311–335

Virzo, Roberto, *'The Preliminary Ruling Procedures at International Regional Courts and Tribunals'* (2011) 10 The Law and practice of International Courts and Tribunals, 285–313

de Visscher, Charles, *'Les avis consultatifs de la Cour Permanente de Justice Internationale'* (1929) 26 Recueil des Cours, 23–51

Vítolo, Alfredo M., *'El Valor de las Opiniones Consultivas de la Corte Interamericana de Derechos Humanos a la Luz de las OC-21/14 y OC-23/17 (El "Canto del Tero" u "Otro Ladrillo más en la Pared de la Doctrina del 'Control de Convencionalidad'")* 2020 (1) Revista Jurídica Austral, 187–217

Vítolo, Alfredo M., *'Una novedosa categoría jurídica: «el querer ser». Acerca del pretendido carácter normativo erga omnes de la jurisprudencia de la Corte Interamericana de Derechos Humanos. Las dos caras del «control de convencionalidad»'* (2013) 18 Pensamiento Constitucional, 357–380

Viveros, Luis, *'A critical Assessment of Colombia's Request before the IACtHR – and Why it Should Be Rejected'*, EJIL:Talk!, 25 October 2016, available at: https://www.ejiltalk.org/a-critical-assessment-of-colombias-advisory-request-before-the-iacthr-and-why-it-should-be-rejected/

de Wet, Erica, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, 2004)

Wolfrum, Rüdiger, 'Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes?' in Wolfrum/Gätzschmann (eds.), *International Dispute Settlement: Room for Innovations?* (Springer, 2013) pp. 33–123

Zelada, Carlos J., *'¿Son vinculantes las opiniones consultivas de la Corte Interamericana de Derechos Humanos?: Una propuesta de refomra para un problema de antaño'* (2020), available at: https://promsex.org/wp-content/uploads/2020/05/Son-vinculantes-las-opiniones-consultivas-de-la-Corte-IDH.pdf

Zimmermann, Andreas and Thienel, Tobias, 'Art. 60' in Andreas Zimmermann et al. (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn OUP, 2019)

Zovatto, Daniel, 'Antecedentes de la Creación de la Corte Interamericana de Derechos Humanos' in Daniel Zovatto (ed), *La Corte Interamericana de Derechos Humanos: Estudios y Documentos* (IIDD, 1985) pp. 207–254

Table of documents

A. IACtHR

General publications of the Court

IACtHR, *Opinión Consultiva sobre identidad de género, y no discriminación a parejas del mismo sexo*, press release of 9 January 2018 [only available in Spanish]

IACtHR, *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 7: Control de Convencionalidad*, available at: https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo7.pdf

IACtHR, *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 7: Control de Convencionalidad*, San José, Costa Rica, 2021.

IACtHR, Annual Report 2020

IACtHR, Annual Report 2022

Procedural documents from advisory proceedings before the Court

All written observations and amicus curiae briefs cited without further link were obtained upon request from the IACtHR's archive.

Amicus Curiae brief of the Inter-American Institute of Human Rights containing a report of Héctor Gros Espiell, OC-1/82 proceedings, 16 September 1982, available at: http://hrlibrary.umn.edu/iachr/B/1-esp-13.html

Written observations of the OAS General Secretariat in the OC-1/82 proceedings, August 1982, available at: http://hrlibrary.umn.edu/iachr/B/1-esp-9.html

Letter from the Permanent Mission of Guatemala to the Organization of American States to the President of the IACHR, 19 April 1983

Amicus Curiae brief of the International Human Rights Law Group and the Washington Office on Latin America, OC-3/83 proceedings, 15 July 1983

Amicus Curiae brief of the Lawyers Committee for International Human Rights and Americas Watch Committee, OC-3/83 proceedings, 18 July 1983

Telex of the President of the Court to the Foreign Minister of Uruguay, 1 April 1987, OC-9/87 proceedings, available only in Spanish at: http://hrlibrary.umn.edu/iachr/B/9-esp-2.html

Reply of the Foreign Minister of Uruguay to the President of the Court, 24 April 1987, OC-9/87 proceedings, available only in Spanish at: http://hrlibrary.umn.edu/iachr/B/9-esp-3.html

Telex of the Foreign Minister of Uruguay to the President of the Court, 12 June 1987, OC-9/87 proceedings, available only in Spanish at: http://hrlibrary.umn.edu/iachr/B/9-esp-10.html

Reply of the President of the Court to the Foreign Minister of Uruguay, 16 June 1987, OC-9/87 proceedings, available only in Spanish at: http://hrlibrary.umn.edu/iachr/B/9-esp-11.html

Telex of the government of Uruguay of 22 September 1987, OC-9/87 proceedings, available only in Spanish at: http://hrlibrary.umn.edu/iachr/B/9-esp-12.html

Written observations of Uruguay, OC-10/89 proceedings, 14 June 1988, available only in Spanish at: http://hrlibrary.umn.edu/iachr/B/10-esp-5.html

IACHR, Letter to the Court providing information on the request of Costa Rica, OC-12/91 proceedings, 30 September 1991 [available only in Spanish]

Letter of the Secretary of the Court to Ms. María Luisa Turon de Toledo and Dr. Juan Carlos Wlasic, representatives of Familiares – Madres y Abuelas de Detenidos Desaparecidos of 28 October 1992, OC-13/93 proceedings [available only in Spanish]

Letter of the Secretary of the Court to Ms. María de Ignace and Dr. Juan Carlos Wlasic, representatives of Federación Latinoamericana de Asociaciones de Familiares de Detenidos Desaparecidos of 3 November 1992, OC-13/93 proceedings [available only in Spanish]

Amicus curiae brief of María Elba Martínez, OC-13/93 proceedings, 14 November 1992 [available only in Spanish]

Amicus Curiae of CEJIL *et al*., OC-13/93 proceedings, 16 November 1992 [available only in Spanish]

Amicus curiae brief of George Rogers *et al*, OC-13/93 proceedings, 9 September 1992 [available only in Spanish]

IACtHR, *Transcripción de la audiencia pública celebrada en la sede de la Corte sobre la opinión consultiva OC-13 sometida por los gobiernos de la República Argentina y la República Oriental del Urugay*, 1 February 1993, p. 11 [available only in Spanish].

Written observations of Costa Rica, OC-14/94 proceedings, 20 December 1993 [available only in Spanish]

Written observations of Peru, OC-14/94 proceedings, 29 December 1993 [available only in Spanish]

IACHR, Fax to the President of the Court, OC-15/97 proceedings, 25 March 1997 [available only in Spanish]

Written observations of the IACHR in the OC-15/97 proceedings, 31 July 1997 [available only in Spanish]

Amicus curiae brief of CEJIL and Human Rights Watch/Americas, OC-15/97 proceedings, 28 August 1997 [available only in Spanish]

Written observations of the United States of America, OC-16/99 proceedings, 1 June 1998Written observations of the IACHR, OC-16/99 proceedings, 30 April 1998*Amicus curiae* brief of Sandra Babcock and the Minnesota Advocates for Human Rights, OC-16/99 proceedings

Amicus curiae brief of the International Human Rights Law Institute of Depaul University College of Law and Macarthur Justice Center, OC-16/99 proceedings, 28 April 1998

Amicus curiae brief of S. Adele Shank and John Quigley, OC-16/99 proceedings, 24 April 1998

Written observations of El Salvador, OC-16/99 proceedings, 29 April 1998 [available only in Spanish]

Written observations of Guatemala, OC-16/99 proceedings, 30 April 1998 [available only in Spanish]

Written Observations of Costa Rica, OC-16/99 proceedings, May 1998 [available only in Spanish]

Written observations of the Dominican Republic, OC-16/99 proceedings, 30 April 1998 [available only in Spanish]

Written observations of Paraguay, OC-16/99 proceedings [available only in Spanish]

Additional observations of the Mexican Commission on the Defense and Promotion of Human Rights Watch, and the Center for Justice and International Law on the request for an advisory opinion, OC-16 before the Inter-American Court of Human Rights, 18 August 1998

Written observations of the IACHR in the OC-17/02 proceedings, 8 November 2001 [available only in Spanish]

Amicus curiae brief of the Delgado Law Firm, OC-18/03 proceedings, 12 December 2002

Amicus curiae brief of Javier Juárez of the Law Office of Sayre & Chavez, OC-18/03 proceedings, 6 February 2003

Amicus curiae brief of Luis Peraza Parga in the OC-19/05 proceedings [available only in Spanish]

Additional *amicus curiae* brief of Luis Peraza Parga, OC-19/05 proceedings, 15 August 2005 [available only in Spanish]

Amicus curiae brief of the Clínica Jurídica del Centro de Invstigación y Docencia Económicas, OC-19/05 proceedings, 5 April 2005 [available only in Spanish]

Amicus curiae brief of CEJIL, OC-19/05 proceedings, 4 April 2005[available only in Spanish]

Amicus Curiae brief of Carlos Alberto Loria Quiros, OC-19/95 proceedings, 20 November 2005 [available only in Spanish]

Amicus curiae brief of La Clínica de Derechos Humanos del Departamento de Derecho de la Universidad Iberoamericana, Ciudad de México, OC-19/05 proceedings, 1 June 2005 [available only in Spanish]

Written observations of Honduras, OC-23/17 proceedings, 19 September 2016, available at: https://www.corteidh.or.cr/sitios/observaciones/colombiaoc23/1_honduras.pdf

Amicus *curiae* brief of Silvana Insignares Cera et al., OC-23/17 proceedings, September 2016, available at: https://www.corteidh.or.cr/sitios/observaciones/colombiaoc23/6_sil_ins.pdf

Amicus curiae brief of the ECCHR, OC-23/17 proceedings, available at: https://www.corteidh.or.cr/sitios/observaciones/colombiaoc23/22_ecchr.pdf

Written observations of the IUCN World Commission on Environmental Law, OC-23/17 proceedings, 19 January 2017, available at: https://www.corteidh.or.cr/sitios/observaciones/colombiaoc23/40_world_com.pdf

Amicus curiae brief of Alfredo Ortega Franco, OC-23/17 proceedings, 19 January 2017, available at: https://www.corteidh.or.cr/sitios/observaciones/colombiaoc23/43_alfre_orte.pdf

Written observations of Panama, OC-23/17 proceedings, 19 January 2017, available at: https://www.corteidh.or.cr/sitios/observaciones/colombiaoc23/3_panama.pdf

Written observations of the IACHR, OC-23/17 proceedings, 19 January 2017, available at: https://www.corteidh.or.cr/sitios/observaciones/colombiaoc23/1_comision.pdf

Audio files of the public hearing in the OC-23/17 proceedings, available at: https://soundcloud.com/corteidh/sets/solicitud-de-opinion-consultiva-presentada-por-el-estado-de-colombia-22-03-2017

Amicus curiae brief of Yashín Castrillo Fernández, OC-24/17 proceedings, available at: www.corteidh.or.cr/sitios/observaciones/costaricaoc24/21_castrillo_fernandez.pdf

Amicus curiae brief of the Law Faculty of the Pontifica Universidad Católica de Chile, OC-24/17 proceedings, 10 February 2017, available at: www.corteidh.or.cr/sitios/observaciones/costaricaoc24/40_fac_der_pucc.pdf

Amicus curiae brief of the Universidad Centroamericana José Simeón Cañas, OC-25/18 proceedings, 15 March 2017, available at: https://www.corteidh.or.cr/sitios/observaciones/oc25/21_uni_simeon.pdf

Amicus curiae brief of the Universidad Autónoma de Baja California, OC-25/18 proceedings, 2 May 2017, available at: https://www.corteidh.or.cr/sitios/observaciones/oc25/29_uni_aut_calif.pdf

Written observations of Mexico, OC-25/18 proceedings, 22 May 2017, available at: https://www.corteidh.or.cr/sitios/observaciones/oc25/5_m%C3%A9xico.pdf

Amicus curiae brief of the University College 'Public International Law Pro Bono project', OC-25/18 proceedings, available at: https://www.corteidh.or.cr/sitios/observaciones/oc25/30_uni_london.pdf

Amicus curiae brief of the Universidad EAFIT, OC-25/18 proceedings, 2 May 2017, available at: https://www.corteidh.or.cr/sitios/observaciones/oc25/28_uni_eafit.pdf

Additional Observations of the Universidad EAFIT, OC-25/18 proceedings, 22 September 2017, available at: https://www.corteidh.or.cr/sitios/observaciones/oc25/comp/5_uni_eafit.pdf

Additional observations of the Universidade do Estado do Rio de Janeiro, OC-25/18 proceedings, 18 September 2017, available at: https://www.corteidh.or.cr/sitios/observaciones/oc25/comp/4_uni_est_rio_jan.pdf

Written observations of Argentina, 25 April 2018, available at: www.corteidh.or.cr/sitios/observaciones/sor_comi/1_argentina.pdf

Written observation of Brazil, April 2018, available at: www.corteidh.or.cr/sitios/observaciones/sor_comi/2_brasil.pdf

Written observations of Chile, 26 April 2018, available at: www.corteidh.or.cr/sitios/observaciones/sor_comi/3_chile.pdf

Written observations of Ecuador, 26 April 2018, available at: www.corteidh.or.cr/sitios/observaciones/sor_comi/4_ecuador.pdf

Written observations of Panama, 27 April 2018, available at: www.corteidh.or.cr/sitios/observaciones/sor_comi/5_panama.pdf

Written observations of Paraguay, 20 April 2018, available at: www.corteidh.or.cr/sitios/observaciones/sor_comi/6_paraguay.pdf

Amicus curiae brief of Jorge E. Roa and Vera Karam de Chueiri, 20 March 2018, available at: www.corteidh.or.cr/sitios/observaciones/sor_comi/29_chueiri_roa.pdf

Amicus curiae brief of Gustavo Arosemena Solórzano and Pablo Cevallos Palomeque, available at: www.corteidh.or.cr/sitios/observaciones/sor_comi/13_arosemena_cevallos.pdf

Amicus curiae brief of the Law Faculty of the National University of Cuyo, 26 April 2018, available at: www.corteidh.or.cr/sitios/observaciones/sor_comi/11_uninaccuyo.pdf

Amicus curiae brief of the Centro Jurídico de Derechos Humanos, available at: www.corteidh.or.cr/sitios/observaciones/sor_comi/3_cjdh.pdf

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

Amicus curiae brief of the University College London, Public International Law Pro Bono Project, OC-26/20 proceedings, 15 December 2019, available at: https://www.corteidh.or.cr/sitios/observaciones/oc26/29_unicolleg.pdf

Amicus curiae brief of Fernando Arlettaz, OC-26/20 proceedings, 6 May 2019, available at: https://www.corteidh.or.cr/sitios/observaciones/oc26/35_fernarletta.pdf

Written observations of Nicaragua, OC-26/20 proceedings, 11 November 2019, available at: https://www.corteidh.or.cr/sitios/observaciones/oc26/5_nicaragua.pdf

Amicus curiae brief of the Comisión Colombiana de Juristas in the OC-28/21 proceedings, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/21_ccj.pdf

Written observations of the IACHR in the OC-28/21 proceedings, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/5_cidh.pdf

Written observations of Nicaragua, OC-28/21 proceedings, 15 April 2020, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/4_nicaragua.pdf

Written observations of Björn Arp in the OC-28/21 proceedings, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/42_arp.pdf

Written observations of Andres Figueroa Galvis, OC-28/21 proceedings, 18 February 2020, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/41_figalvis.pdf

Written observations of Julián Fernando Montoya, OC-28/21 proceedings, 19 July 2020, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/56_monpipica.pdf

Written observations of the Núcleo de Estudios en Sistemas de Derechos Humanos y del Centro de Estudios de la Constitución Universidad Federal de Paraná, OC-28/21 proceedings, 23 July 2020, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/34_unifeparana.pdf

Written observations of Bolivia, OC-28/21 proceedings, 23 July 2020, available at: https://www.corteidh.or.cr/sitios/observaciones/oc28/1_bolivia.pdf

Video of the oral hearing in the OC-28/21 proceedings is available at: https://vimeo.com/462631408

B. IACHR

IACHR, *Informe sobre la situación de los derechos humanos en Venezuela*, OEA/Ser.L/V/II.118, Doc. 4 rev. 2, 29 December 2003

IACHR, *IACHR rejects the request to recuse its executive secretary in matters related to Venezuela*, Press Release N° 6/04, 8 March 2004

IACHR, *Informe No. 166/20: Petición 2090–12, Informe de Admisibilidad Yashín Castrillo Fernández y e.n.l. Costa Rica*, OEA/Ser.L/V/II., Doc. 176, 17 June 2020

C. OAS documents

OAS, Novena Conferencia Internacional Americana, Actas y Documentos, Vol. VI, Bogotá, 30 March 1948 – 2 May 1948

OAS, Final Act of the Fifth Meeting of Consultation of Ministers of Foreign Affairs (Santiago de Chile, 12–18 August 1959), Resolution VIII, part II

Protocol of Amendment to the Charter of the Organization of American States "Protocol of Buenos Aires", 27. February 1967, entry into force 27. February 1970, OAS Treaty Series, No 1-A

Inter-American Yearbook on Human Rights 1968

OAS, Draft Inter-American Convention on Protection of Human Rights and Observations and Comments of the American Governments, Working Document prepared by the Secretariat of the Inter-American Commission on Human Rights, OEA/Ser.K/XVI/1.1 (English), Doc. 13, 22 September 1969

OAS, Actas y Documentos, Conferencia Especializada Interamericana sobre Derechos Humanos, 7–22 November 1969, San José, Costa Rica, OEA/Ser.K/XVI/1.2 (*Travaux préparatoires* of the ACHR, only available in Spanish)

OAS, Annual Report of the Inter-American Juridical Committee to the General Assembly, OAS/Ser.Q/VI.32, 24 August 2001

OAS; General Information on the Treaty B-32, available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm

OAS, Approved Program-Budget 2022, approved by the General Assembly 51 Regular Session in November 2021, AG/RES.2971 (LI-O/21)

OAS, Member States, available at: https://www.oas.org/en/member_states/default.asp

OAS, Who We Are, available at: https://www.oas.org/en/about/who_we_are.asp

D. Documents from Europe

Council of Europe, Honouring of commitments entered into by member states when joining the Council of Europe, Resolution 1031 (1994)

Council of Europe, Report of the Group of Wise Persons to the Committee of Ministers, 15 November 2006

Council of Europe, Programme and Budget 2022–2025, 10 December 2021

E. League of Nations and PCIJ

League of Nations, PCIJ, Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant, 1921

PCIJ, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, 16 June – 24 July 1920

PCIJ, *Rules of Court*, adopted on 24 March 1922, Series D No. 1

PCIJ, Acts and Documents concerning the Organisation of the Court, Preparation of the Rules of the Court, Series D No. 2

PCIJ, Series E No. 4, Fourth Annual Report of the Permanent Court of International Justice (June 15th, 1927 – June 15th, 1928)

Council of the League of Nations, *18th Meeting, 26 September 1923*, (1923) LNOJ, 1330–31

Council of the League of Nations*, 22nd Meeting, 28 September 1923*, (1923) LNOJ, 1350

(1928) 65 LNOJ, Special Supplement, p. 46–53

F. United Nations and ICJ

United Nations, '*Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice*' (Jan. 1945) 39(1) Supplement Official Documents, American Journal of International Law, 1–56

UNCIO, *Vol. III: Dumbarton Oaks Proposals, Comments and Proposed Amendments*, San Francisco 1945

UNCIO, *Vol. IX: Commission II General Assembly*, San Francisco 1945

UNCIO, *Vol. XII: Commission III Security Council*, San Francisco 1945

UNCIO, *Vol. XIII: Commission IV Judicial Organization*, San Francisco 1945

UNCIO, *Vol. XIV: United Nations Committee of Jurists*, San Francisco 1945

SC Res. 284 (1970) adopted at the 1550th meeting on 29 July 1970

UNGA, *Advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, adopted on 22 May 2019, UN Doc. A/RES/73/295

UNGA, *Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law*, adopted on 9 September 2010, UN Doc. A/RES/64/298

UNGA, *Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem*, adopted on 20 July 2004, UN Doc. A/RES/ES-10/15

ILC, *Report of the International Law Commission*, Sixty-eighth session, 2 May – 10 July and 4 July – 12 August 2016, UN Doc. A/71/10

ILC, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries*, adopted at the seventieth session of the ILC in 2018

ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Pleadings, Oral Arguments, Documents, Vol I, Written Statement of the Government of the Republic of South Africa

ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of the United Kingdom of 15 February 2018

ICJ, Press Release No. 2023/29 of 14 June 2023

G. Newspaper articles and websites

'*Paraguay's President Fernando Lugo faces impeachment*', BBC News, 21 June 2012, available at: https://www.bbc.com/news/world-latin-america-18535552

'*Venezuela denounces American Convention on Human Rights as IACHR faces reform*', IJRC, 19 September 2012, available at: https://ijrcenter.org/2012/09/19/venezuela-denounces-american-convention-on-human-rights-as-iachr-faces-reform/

'*Colombia perdió 40 % de mar pero conservó los cayos de San Andrés*', Vanguardia, 18 November 2012, available at: https://www.vanguardia.com/colombia/colombia-perdio-40-de-mar-pero-conservo-los-cayos-de-san-andres-ETVL183755

'*Qué gane Nicaragua y qué pierde Colombia con el fallo de la Corte de La Haya*', Infobae, 20 November 2012, available at: https://www.infobae.com/2012/11/20/1061748-que-gana-nicaragua-y-que-pierde-colombia-el-fallo-la-haya/

'*Colombia denuncia Pacto de Bogotá tras fallo de la CIJ*', DW, 28 November 2012, available at: https://www.dw.com/es/colombia-denuncia-pacto-de-bogot%C3%A1-tras-fallo-de-la-cij/a-16414772

'*Quién fue Raúl Bazán, el autor del polémico informe que ingrime Péru para intentar desvirtuar el tratado de 1952*', La Segunda, 5 December 2012, available at: http://www.lasegunda.com/Noticias/Politica/2012/12/803352/quien-fue-raul-bazan-el-autor-del-polemico-informe-que-esgrime-peru-para-intentar-desvirtuar-el-tratado-de-1952

'*Raúl Bazán Dávila, abogado y diplomático*', available at: http://jaimebazan.blogspot.com/2007/08/ral-bazn-dvila-abogado-y-diplomtico.html and at: http://www.genealogiachilenaenred.cl/gcr/IndividualPage.aspx?Id=I59827

'*Venezuela abandona el Sistema de derechos humanos interamericano*', El País, 10 September 2013, available at: https://elpais.com/internacional/2013/09/10/actualidad/1378780644_769381.html

'*Re-Thinking the OAS: A Forum*', Americas Quarterly, 3 February 2015, available at: https://www.americasquarterly.org/fulltextarticle/re-thinking-the-oas-a-forum/

'*Polémica por posición de jueza Elizabeth Odio sobre aborto*', La Nación, 22 June 2015, available at: https://www.nacion.com/el-pais/politica/polemica-por-posicion-de-jueza-elizabeth-odio-sobre-aborto/JDE6WOZTPNHSJFJUWJ5EQNGABU/story/

'*Denuncia penal contra matrimonio gay se encuentra frenada*', crhoy.com, 11 January 2017, available at: https://www.crhoy.com/nacionales/denuncia-penal-contra-matrimonio-gay-se-encuentra-frenada

'*Venezuela necesitaría dos años y pagar deuda de 8,7 milliones para dejar OEA*', El Nacional, 26 April 2017, available at: https://www.elnacional.com/mundo/venezuela-necesitaria-dos-anos-pagar-deuda-millones-para-dejar-oea_179217/

'*Congreso frena avance de derechos para personas LGBTI*', crhoy.com, 18 May 2017, available at: https://www.crhoy.com/nacionales/congreso-frena-avance-de-derechos-para-personas-lgbti/

'*Fabricio Alvarado dispuesto a salirse de la Corte IDH para que no le 'impongan' agenda LGBTI*', Elmundo.cr, 11 January 2018, available at: https://www.elmundo.cr/costa-rica/fabricio-alvarado-dispuesto-salirse-la-corte-idh-no-le-impongan-agenda-lgtbi/

'*Carlos Alvarado e indecisos son los únicos que crecen en incierto cierre electoral*', Semanario Universidad, 31 January 2018, available at: https://semanariouniversidad.com/pais/carlos-alvarado-e-indecisos-los-unicos-crecen-incierto-cierre-electoral/

'*Las ideas de Fabricio Alvarado sobre la Corte IDH, puestas a prueba*', Semanario Universidad, 3 February 2018, available at: https://semanariouniversidad.com/pais/ideas-fabricio-alvarado-sobre-corte-idh-puestas-a-prueba/

'*La Corte notificó al Gobierno opinión sobre matrimonio gay el 8 de enero, no antes*', La Nacion, 14 February 2018, available at: https://www.nacion.com/el-pais/politica/corte-idh-notifico-al-gobierno-opinion-sobre/LC2CYZUG4JDAVIJDWIYA2CZJPM/story/

'*El papel de las redes sociales en la contienda electoral*', Hoy en el Tec, 23 March 2018, available at: https://www.tec.ac.cr/hoyeneltec/2018/03/23/papel-redes-sociales-contienda-electoral

'*Why does Ecuador want Assange out of its London embassy?*', The Guardian, 15 May 2018, available at: https://www.theguardian.com/world/2018/may/15/ecuador-julian-assange-why-does-it-want-him-out-london-embassy

'*La OEA reconoce como president interino de Venezuela a Juan Guaidó*', Perfil, 11 January 2019, available at: https://www.perfil.com/noticias/internacional/la-oea-reconoce-como-presidente-interino-de-venezuela-a-juan-guaido.phtml

'*Corte Plena sansiona a juez que validó unión de hecho de pareja homosexual*', La Nación, 26 February 2019, available at: https://www.nacion.com/sucesos/judiciales/corte-plena-sanciona-a-juez-que-valido-union-de/VFTLNNHNUZCPLLVIE4XHYM43QE/story/

'*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

'*How Ecuador's Moreno Is Undoing Correa's Legacy, and Not Just With Assange*', World Politics Review, 24 April 2019, available at: https://www.worldpoliticsreview.com/trend-lines/27787/how-ecuador-s-moreno-is-undoing-correa-s-legacy-and-not-just-with-assange

'*Wanted for espionage – the hunt for Wikileaks*', Panorama, 13 June 2019, available at: https://daserste.ndr.de/panorama/wikileaks304_page-1.html

'*Evo Morales presentó a Zaffaroni como asesor legal*', Página 12, 3 January 2020, available at: https://www.pagina12.com.ar/239612-evo-morales-presento-a-zaffaroni-como-asesor-legal

'*Zaffaroni and Ferreyra to act as legal advisors to Evo Morales*', Buenos Aires Times, 4 Ja nuary 2020, available at: https://www.batimes.com.ar/news/argentina/zaffaroni-and-ferreyra-to-act-as-legal-advisors-to-evo-morales.phtml

'*Matrimonio igualitario se hace realidad en Costa Rica*', Ministry of Foreign Affairs and Worship of Costa Rica, 26 May 2020, available at: https://rree.go.cr/?sec=servicios&cat=prensa&cont=593&id=5543

'*El matrimonio igualitario ya es legal en Costa Rica*', DW, 26 May 2020, available at: https://www.dw.com/es/el-matrimonio-igualitario-ya-es-legal-en-costa-rica/a-53567435.

'*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

'*Hace ocho años Colombia perdió 40 % de mar*', infobae, 19 November 2020, available at: https://www.infobae.com/america/colombia/2020/11/19/hace-ocho-anos-colombia-perdio-40-de-mar/

'*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/

'*UN court rules UK has no sovereignty over Chagos islands*', BBC News, 28 January 2021, available at: https://www.bbc.com/news/world-africa-55848126

'*The Organization of American States*', Council on Foreign Relations, last updated 18 February 2022, available at: https://www.cfr.org/backgrounder/organization-american-states

'*Gobierno de Nicargua ratifica su salida de la OEA y clausura la sede de la organicazión en el país*', CNN, 24 April 2022, available at: https://cnnespanol.cnn.com/2022/04/24/gobierno-de-nicaragua-ratifica-su-salida-de-la-oea/

'*Nicargua llega a la mitad de su salida de la OEA: la ruta del autoaislamiento*', Confidencial, 19 November 2022, available at: https://confidencial.digital/especiales/nicaragua-llega-a-la-mitad-de-su-salida-de-la-oea-la-ruta-del-autoaislamiento/

'*Cuenta atras para la salida de Nicaragua de la OEA*', Despacho 505, 23 September 2023, available at: https://www.despacho505.com/cuenta-atras-salida-de-nicaragua-oea-noviembre/

'*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/

'*Nicaragua se retira formalmente de la OEA*', Ciudadano.news, 8 November 2023, available at: https://ciudadano.news/internacionales/nicaragua-se-retira-formalmente-de-la-oea.

H. Miscellaneous

Mirjana Lazarova Trajkovska, 'Ways and means to recognize the interpretative authority of judgments against other states, speech of 1–2 October in Skopje, in *Committee on Legal Affairs and Human Rights, Contribution to the Conference on the Principle of Subsidiarity*, *Skopje, 1–2 October, "Strengthening Subsidiarity: Integrating the Strasbourg Court's Case law into National Law and Judicial Practice*, p. 12, available at: https://assembly.coe.int/committeedocs/2010/20101125_skopje.pdf

Presentation by Mr Pourgourides in *Committee on Legal Affairs and Human Rights, Contribution to the Conference on the Principle of Subsidiarity, Skopje, 1–2 October, "Strengthening Subsidiarity: Integrating the Strasbourg Court's Case law into National Law and Judicial Practice*, p. 2 et seq., available at: https://assembly.coe.int/committeedocs/2010/20101125_skopje.pdf

Presentation of Alexei Julio Estrada, Legal Value and Impact of the Advisory Opinions, available at: https://www.youtube.com/watch?v=kqEvKAEhB0E&t=2349s

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

Declaration of the President of Colombia of 17 March 2016, available at: https://www.cancilleria.gov.co/newsroom/news/declaracion-presidente-colombia-juan-manuel-santos-decisiones-corte-internacional

Tribunal Supremo de Elecciones, *Compúto de votos y declaratorias de elección 2018*, p. 24, available at: https://www.tse.go.cr/pdf/elecciones/computovotos_febrero_abril_2018.pdf

Tribunal Supremo de Elecciones, Report of 14 May 2018, Acta N.º 49–2018

Informe final del Panel independiente para la Elección de Jueces y Juezas para la Corte Interamericana de Derechos Humanos, 31 May 2018, available at: https://www.wcl.american.edu/impact/initiatives-programs/center/documents/informe-panel-2018/

Joint declaration of the governments of Argentina, Brazil, Chile, Colombia and Paraguay of 11 April 2019: https://www.mre.gov.py/index.php/noticias-de-embajadas-y-consulados/gobiernos-de-argentina-brasil-chile-colombia-y-paraguay-se-manifiestan-sobre-el-sistema-interamericano-de-derechos-humanos?fbclid=IwAR24ZiaqFhGvQniznEnL3SX2MMu71itqud8-p2CBo98cnMNleC_6OdHg&ccm_paging_p=164

All internet sources were last accessed on 13 November 2023.