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.

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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.

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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.

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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.

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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.

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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.

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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.

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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.

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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

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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

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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.

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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.

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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.*

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> *"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

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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

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]

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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.

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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].

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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].

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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.

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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.

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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.

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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*.

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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.

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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.

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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.

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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;

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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.

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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.

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- 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.

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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

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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-

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.

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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.

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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.

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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.*

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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].

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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.

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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].

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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.

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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.

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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.

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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.

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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.

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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.

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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.

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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.

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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.

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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).

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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

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*.

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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.

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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]

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

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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.

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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.

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(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]

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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.

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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).

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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).

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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*

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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-

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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.

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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.

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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

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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.

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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.

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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

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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.

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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.

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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.

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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.

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(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.

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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/.

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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 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/ 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.

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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.

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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.

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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.

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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.

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(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.

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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.

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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.

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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.

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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

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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.

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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.

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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].

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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.

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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.

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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.

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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.

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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.

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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]

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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.

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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.

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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*

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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.

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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.

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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.

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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.

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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.

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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).

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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.

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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

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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.

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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.

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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.

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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

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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.

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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

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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).

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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).

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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]

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.

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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.

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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.

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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

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• 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.

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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.

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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.

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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.

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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.

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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]

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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.

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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.

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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]

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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.

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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.

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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

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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.

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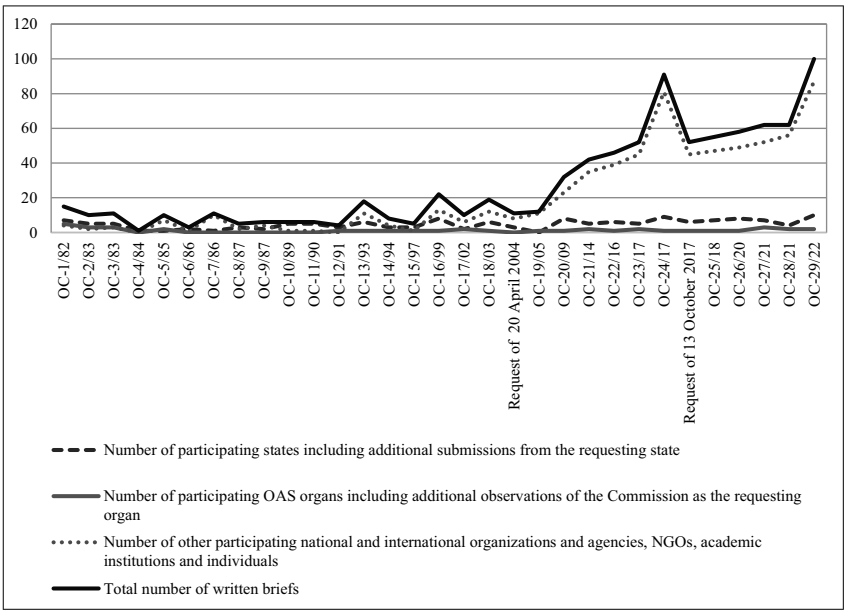
Figure 1: Level of participation in written proceedings



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.

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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.

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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.

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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=enLUufILie0, https://www.youtube.com/watch?v=Ik4B9d4NQJA and here https://www.youtube.com/watch?v=bYuyqA9HKIw.

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.

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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.

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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.

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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

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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

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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.

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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.

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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.

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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

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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://derecho aldia.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

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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/hoyeneltec/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.

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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.

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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.

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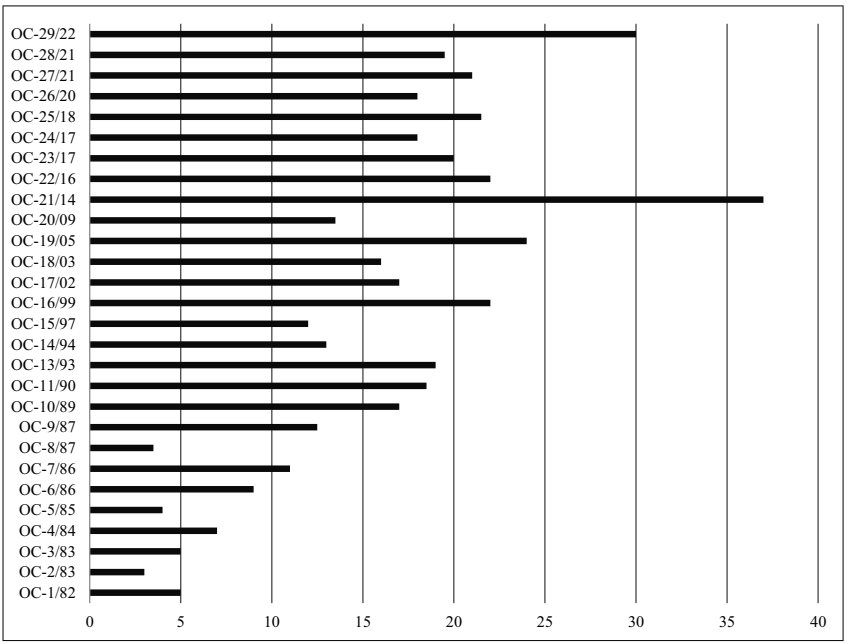
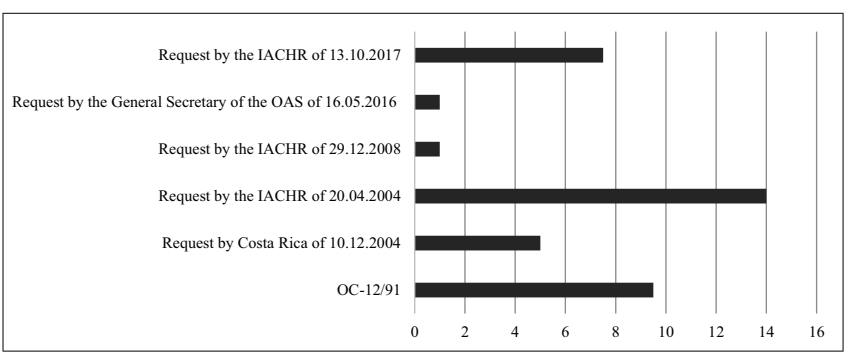
Figure 2: Length of the advisory proceedings in months



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.

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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).

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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/.

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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.

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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.l. 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/.

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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=1CYkjzyPLJA. 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.

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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.

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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

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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.

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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.

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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.

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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.

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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.

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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.

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