

§ 4 Eastern Carelia before other international courts and tribunals

The ICJ is not the only international court or tribunal (IC) with the jurisdiction to render advisory opinions. The stark expansion of the number of ICs in the second half of the 20th century⁴⁵³ also brought about an expansion of the advisory function.⁴⁵⁴ There are currently at least ten ICs with some kind of advisory function.⁴⁵⁵ This chapter examines the advisory jurisdiction of some of these ICs. ICs are understood here as “permanent judicial bodies made up of independent judges who are entrusted with adjudicating international disputes on the basis of international law according to a pre-determined set of rules of procedure and rendering decisions which are binding on the parties.”⁴⁵⁶

While it is a necessary condition of an IC that it *may* render binding decisions, not all of its pronouncements must have binding force. The focus of this study lies on advisory procedures, thus on procedures that regularly, though not always⁴⁵⁷, lack binding force. Advisory procedures may generally be defined as judicial procedures in which an authorized body requests from an IC a non-binding legal opinion on a question of international law. This definition includes advisory opinions on abstract questions of law as well as concrete disputes.

This chapter examines the advisory function of three regional human rights courts – the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), and the African Court on Human and Peoples’ Rights (ACtHPR) – as well as of the International Tribunal for the Law of the Sea (ITLOS). The aim is to present an overview

453 On this, see *K. Oellers-Frahm*, 5 MPYUNL (2001), 67.

454 For an overview of the advisory function of different international courts and tribunals, see *A. Aust*, 1 JIDS 1 (2010), 123; *K. Oellers-Frahm*, 12 GLJ 5 (2011), 1033 (1034–1040); see also *A. Keene*, 14 NZJPIL 1 (2016), 67.

455 *K. Oellers-Frahm*, 12 GLJ 5 (2011), 1033 (1034–1040). *Benz* even lists 21 ICs with an advisory jurisdiction, see *E. Benz*, *The Advisory Function of the Inter-American Court of Human Rights*, 2024, 149–156.

456 *C. Tomuschat*, *International Courts and Tribunals* (last updated 2019), in: *A. Peters/R. Wolfrum* (eds.), *The Max Planck Encyclopedia of Public International Law*, 2008 (1).

457 On the concept of “binding” ICJ advisory opinions, see *R. Ago*, 85 AJIL 3 (1991), 439.

of the extent of the respective advisory jurisdiction and identify whether the legal framework of the respective advisory procedures provides guidance as to the use of advisory opinions for the settlement of international disputes.

The preliminary ruling procedure of the Court of Justice of the European Union is not considered here.⁴⁵⁸ Not examined in this chapter are further the advisory procedures of the COMESA Court⁴⁵⁹, the ECOWAS Court⁴⁶⁰, the OAPEC Judicial Board⁴⁶¹, and the Badinter Commission⁴⁶². While the Badinter Commission has issued 15 advisory opinions on important legal questions in the context of the dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY), it has ceased its operations in 1993.⁴⁶³ The advisory function of the other three ICs lays dormant.

A. European Court of Human Rights

The principal function of the ECtHR⁴⁶⁴ is to ensure the observance under the obligations of the European Convention on Human Rights and Fundamental Freedoms⁴⁶⁵ (ECHR). The ECHR was adopted by the Member States of the Council of Europe (CoE) on 4 November 1950 as the first comprehensive international convention on human rights. The ECtHR began its work in 1959, although it was not until 1998, with the entry into force of Protocol No. 11, that the ECtHR's jurisdiction became obligatory

458 The EU Member States have agreed to transfer a unique degree of sovereignty to the EU institutions. This makes it difficult to compare the powers of the EU institutions with those of the UN. Secondly, the powers of the ECJ are determined by European law, which is a distinct legal system and, because of its systematic nature, can only be compared to general international law to a limited extent.

459 See Article 32(1) of the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA Treaty).

460 See Article 10 of the Protocol A/Pl/7/91 on the Community Court of Justice, 6 July 1991.

461 See Article 25 of the Special Protocol for a Judicial Board for the settlement of disputes, adopted 9 May 1978, entered into force 20 April 1980.

462 UN/EC Geneva Conference of 27 January-26 April 1993.

463 *K. Oellers-Frahm*, 12 GLJ 5 (2011), 1033 (1039).

464 Since the ratification of Protocol 11 which abolished the Commission, there is no other body charged with monitoring the compliance with human rights in the Council of Europe system.

465 Convention for the Protection of Human Rights and Fundamental Freedoms, European Treaty Series No. 5, adopted 4 November 1950, entry into force 3 September 1953.

for CoE Member States and individual applicants had direct access to the Court.⁴⁶⁶

I. Overview of the ECtHR's advisory jurisdiction

The advisory jurisdiction of the ECtHR has evolved over time, culminating in three different types of advisory procedures: The first type of advisory procedure was bestowed upon the ECtHR by Article 47 of the ECHR which is limited in its personal scope to the Committee of Ministers of the CoE and concerns only the interpretation of non-substantive provisions of the ECHR. Recognizing a need for a procedure to also interpret the rights and freedoms under the ECHR, the CoE Member States later created an opt-in advisory procedure by passing Protocol No. 16 to the ECHR. A third type of advisory procedure is conferred upon the Court by the Oviedo Convention.⁴⁶⁷ The first two advisory procedures are of particular interest for this study.

I. Article 47-procedure

The ECHR did not originally envision an advisory jurisdiction for the ECtHR. On 22 January 1960, the Consultative Assembly (now Parliamentary Assembly) of the CoE adopted Recommendation 232 in which it proposed to the Committee of Ministers to give to the ECtHR “the competence to interpret the Convention on Human Rights, when a doubt has arisen of a legal character, even though no case has been brought“⁴⁶⁸

466 Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (adopted 11 May 1994, entered into force 1 November 1998) ETS 155. On the history of the ECtHR, see A. Nußberger, *The European Court of Human Rights*, First edition 2020, 1 et seq. On the ratification of Protocol No. 11, see *ibid.*, 27–28.

467 Any State Party to the 1997 Oviedo Convention as well as the Committee on Bioethics may ask the ECtHR for an advisory opinion on the interpretation of the Oviedo Convention, Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, European Treaty Series No. 164, adopted 4 April 1997, entry into force 1 December 1999, Articles 29 and 32.

468 CoE, Consultative Assembly Recommendation 232 of 22 January 1960.

The Committee of Ministers instructed a Committee of Experts to assess the desirability of introducing such a procedure and to produce a draft agreement.⁴⁶⁹ The Committee of Experts prepared what became Protocol No. 2 to the ECHR, which gave the ECtHR the competence to give advisory opinions at the request of the Committee of Ministers on legal questions concerning the interpretation of the Convention and the Protocols thereto (Article 1 para. 1 Protocol 2).⁴⁷⁰ With the adoption of Protocol No. 11, the advisory jurisdiction of the ECtHR was incorporated into the main text of the ECHR in Articles 47 to 49 ECHR.

The advisory jurisdiction lies with the Grand Chamber of the Court.⁴⁷¹ It was a deliberate decision not to allocate the advisory jurisdiction to smaller formations, as the Explanatory Report to Protocol No. 2 indicates:

“The Committee [of Ministers] considered that the power conferred on the Court to give advisory opinions was such an important one that it ought to be exercised by the Court sitting in plenary session.”⁴⁷²

Article 47 ECHR sets out the conditions for the advisory jurisdiction of the ECtHR. It stipulates:

“1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.

469 The Committee of Experts was a group of governmental experts instructed by the Committee of Ministers by resolution (60) 6 of 22 March 1960 to study problems relating to the ECHR, particularly regarding the introduction of an advisory competence of the ECtHR.

470 Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give Advisory Opinions, European Treaty Series No. 44, adopted 6 May 1963, entry into force 21 September 1970. Interestingly, the Committee of Experts made another proposal in 1962 which would have introduced a prejudicial ruling procedure in which national courts or tribunals could have submitted questions of interpretation of the ECHR which arose in cases before them as well as an advisory opinion procedure in which governments of the Member States could request advisory opinions. This idea would be picked up some 50 years later in Protocol 16 to the ECHR.

471 See Article 87 Rules of Court.

472 Committee of Ministers, Explanatory Report to Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions, 6 May 1963, 5.

2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the committee.”

The ECtHR’s advisory jurisdiction *ratione personae* under Article 47 ECHR is limited to the Committee of Ministers, which is composed of the Ministers for Foreign Affairs of the CoE Member States.⁴⁷³ The CoE’s other organ – the Parliamentary Assembly –, as well as the Secretary General are not authorized to request advisory opinions. During the drafting process of Protocol No. 2, the European Commission of Human Rights proposed that it too should be authorized to request advisory opinions from the ECtHR.⁴⁷⁴ However, the proposal was rejected by the Committee of Ministers. Likewise, Member States of the ECtHR may also not request advisory opinions pursuant to Article 47 ECHR. They may, however, submit a proposal for such a request to the Committee of Ministers, which may then refer them by majority vote of its members⁴⁷⁵ to the ECtHR.⁴⁷⁶

473 The original Art. 1 Protocol 2 to the ECHR contained a two-thirds majority for the vote of the Committee of Ministers.

474 Committee of Ministers, Explanatory Report to Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions, 6 May 1963, 1.

475 See Article 47 para. 3 ECHR.

476 See Committee of Ministers, Explanatory Report to Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions, 6 May 1963, 2. The Committee of Ministers has followed proposals made by the Parliamentary Assembly in the *Decision on the competence of the Court to give an advisory opinion*, 2 June 2004, A47–2004–001 (para. 14) and in the *Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights (No. 2)*, 22 January 2010, A47–2010–001 (paras. 17–18); similarly it has followed proposals made by a CoE Member State (Malta) in the *Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights*, 12 February 2008, A47–2008.

The ECtHR's advisory jurisdiction *ratione materiae* is governed by Article 47 paras. 1 and 2 ECHR. According to Article 47 para. 1, the ECtHR's advisory jurisdiction extends to "legal questions concerning the interpretation of the Convention and the Protocols thereto". The Committee of Ministers understands the term "legal questions" to have the same meaning as in other international instruments.⁴⁷⁷ Legal questions concerning other international law instruments as well as policy matters such as amendments of the ECHR are excluded from the ECtHR's advisory jurisdiction.⁴⁷⁸

Article 47 para. 2 ECHR makes several important qualifications to the ECtHR's advisory jurisdiction. It firstly excludes from the ECtHR's advisory jurisdiction "any question relating to the content or scope of the rights or freedoms under Section I of the Convention and the Protocols thereto". The Committee of Ministers in its Commentary to Protocol 2 did not elaborate on the reasons for the exclusion. It merely referred to the reasons for the exclusion as being "self-evident".⁴⁷⁹ It can be assumed that the CoE Member States were not willing to grant the ECtHR the competence to determine the scope of the Member States' substantive obligations under the ECHR.

Article 47 para. 2 ECHR secondly excludes from the ECtHR's advisory jurisdiction "any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention". These "proceedings as could be instituted in accordance with the Convention" concern the inter-state cases under Article 33 ECHR as well as individual applications under Article 34 ECHR.⁴⁸⁰ The wording "could be instituted" implies that this exclusion not only extends to past or presently pending cases, but also to future or merely hypothetical proceedings.⁴⁸¹ The ECtHR confirmed this extensive reading of Article 47 para. 2 ECHR in its first advisory opinion in 2004. The ECtHR found that Article 47 para. 2 prevented the court from answering any "legal question [...] which it *might* be called upon to address

477 Ibid., 2.

478 Cf. Ibid., 2.

479 Ibid., 3.

480 *Decision on the competence of the Court to give an advisory opinion*, 2 June 2004, A47-2004-001 (para. 26).

481 Committee of Ministers, Explanatory Report to Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions, 6 May 1963, 4; *Decision on the competence of the Court to give an advisory opinion*, 2 June 2004, A47-2004-001 (para. 33).

in the future [...] in the examination of the admissibility or merits of a concrete case.”⁴⁸²

The ECtHR based its interpretation on the wording of Article 47 para. 2 ECHR, the commentary to Protocol 2 issued by the Committee of Ministers and the provision’s *travaux préparatoires*.⁴⁸³ The underlying idea of such a stark separation of the proceedings was to “avoid the potential situation in which the Court adopts in an advisory opinion a position which might prejudice its later examination of an application brought under Articles 33 or 34 of the Convention”.⁴⁸⁴

The exclusion does not only relate to the merits. The Court’s task in proceedings under Articles 33 and 34 also includes ascertaining the admissibility of an application. Such questions concerning the admissibility of a potential application under Articles 33 and 34 ECHR are thus equally excluded from the ECtHR’s advisory competence under Article 47 ECHR.⁴⁸⁵ The ECtHR’s advisory jurisdiction therefore only extends to questions about procedural matters such as the election of judges⁴⁸⁶ and the duties of the Secretary General of the CoE.⁴⁸⁷ Any questions which involve the Member States’ obligations under the ECHR are excluded.⁴⁸⁸

The strict separation of the ECtHR’S advisory procedure from its contentious procedure is intended to prevent the advisory procedure from interfering with the ECtHR’s primary function of deciding on inter-state cases and individual applications.⁴⁸⁹ Notably, by creating Article 47 para. 2 ECHR, the Committee of Ministers intended to protect the ECtHR’s “judicial function”. The Committee regarded the ECtHR’s “judicial function” as

482 *Decision on the competence of the Court to give an advisory opinion*, 2 June 2004, A47–2004–001 (para. 33). The case concerned the question of whether CoE Member States could join other, less robust human rights instruments.

483 *Ibid.*

484 *Ibid.*

485 *Ibid.*, para. 27.

486 *Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights*, 12 February 2008, A47–2008–001.

487 *Decision on the competence of the Court to give an advisory opinion*, 2 June 2004, A47–2004–001 (para. 28).

488 Committee of Ministers, Explanatory Report to Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions, 6 May 1963, 4.

489 *Decision on the competence of the Court to give an advisory opinion*, 2 June 2004, A47–2004–001 (para. 28); *Ibid.*, 3.

being equivalent to the ECtHR's contentious function,⁴⁹⁰ and thus excluding the Court's advisory procedure. However, the ECtHR has broadened the scope of its judicial function in its case law by referring to its contentious function as its *primary* rather than *only* judicial function.⁴⁹¹

2. Protocol 16-procedure

Pursuant to the optional Protocol 16-procedure,⁴⁹² which has been ratified by 22 Member States of the CoE,⁴⁹³ the highest courts and tribunals of the CoE Member States may request an advisory opinion from the ECtHR in the context of a pending case on “questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto” (Article 1 Protocol 16).

The Protocol 16-procedure fills the gap left by the Article 47-procedure which explicitly excludes requests relating to rights enshrined under the ECHR from the subject-matter jurisdiction of the Court.

A panel of five judges decides about the admissibility of a request (Article 2 Protocol 16) in accordance with the rules laid out in Article 1. Accordingly, the request must relate to an ongoing case, the requesting court must explain its reasons and provide relevant legal and factual context. Since these conditions are quite broad, the Court will need to further clarify when a request for an advisory opinion is admissible *vel non*.⁴⁹⁴

Advisory opinions rendered by the Court under its Protocol 16-Procedure are formally not binding (Article 5 Protocol 16). However, they have a “hybrid legal nature”⁴⁹⁵. As former Vice-President of the ECtHR *Nußberger* explained:

490 Explanatory Report to Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions, 6 May 1963.

491 *Decision on the competence of the Court to give an advisory opinion*, 2 June 2004, A47-2004-001 (para. 33).

492 On the Protocol 16-procedure, see *J. Jahn*, 74 *ZaöRV / HJIL* (2014), 821; *A. Paprocka/M. Ziolkowski*, 11 *European Constitutional Law Review* 2 (2015), 274.

493 See the chart of signatures and ratifications of Protocol 16 on the CoE's website: <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&reatynum=214>.

494 *A. Nußberger*, *The European Court of Human Rights*, First edition 2020, 56.

495 *Ibid.*, 52.

“[T]hey form part of the Court’s case-law on an equal footing with other Grand Chamber judgments. They may have implicit *erga omnes* effects even for those Member States not parties to Protocol 16. In theory States requesting an advisory opinion may be free not to follow it, but might then be faced with individual complaints on the same issue.”⁴⁹⁶

The Protocol 16-procedure was created for domestic courts to receive advisory opinions which shall be used to settle an ongoing dispute. The Protocol 16-procedure could thus be seen as an example of an advisory procedure that operates as a means of dispute settlement. Crucially, however, it is not the ECtHR that decides the pending dispute. The Court merely provides an authoritative interpretation of the ECHR.

The views on the Protocol 16-procedure differ: While some fear that the new advisory procedure could disturb the “existing balance between ordinary and Constitutional Courts in fundamental rights adjudication across Europe”,⁴⁹⁷ others argue that the new procedure could “help increase the acceptance of the ECtHR’s jurisprudence as well as the homogeneity of human rights interpretation across Europe”⁴⁹⁸.

II. Use of ECtHR advisory opinions to settle inter-state disputes

The ECtHR’s Article 47-procedure strictly separates the ECtHR’s contentious procedure from its advisory procedure. No matter that can be brought before the ECtHR by means of its contentious procedure may be the subject of the ECtHR’s Article 47-procedure. This is to prevent the advisory procedure from interfering with the dispute settlement function of the ECtHR. This strict separation is somewhat reduced by the Protocol 16-procedure, which allows national courts of CoE Member States to refer the interpretation of substantive human rights provisions to the ECtHR. However, even under this procedure, the ECtHR’s function is strictly limited to the interpretation of the human rights provision without deciding the underlying dispute that is before the national court.

496 *Ibid.*, 52–53.

497 *M. Dicosola/C. Fasone/I. Spigno*, 16 *German Law Journal* 6 (2015), 1387 (1425).

498 *E. Benz*, *The Advisory Function of the Inter-American Court of Human Rights*, 2024, 142.

B. Inter-American Court of Human Rights

I. Overview of the IACtHR's advisory jurisdiction

The advisory jurisdiction of the IACtHR is governed by Article 64 of the American Convention on Human Rights (ACHR), Article 2 of the IACtHR Statute, and the Court's Rules of Procedure.⁴⁹⁹

Article 64 ACHR stipulates:

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

2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.”⁵⁰⁰

Under Article 64 ACHR, certain organs of the Organization of American States (OAS)⁵⁰¹ and all OAS Member States may request an advisory opinion from the IACtHR. By giving the OAS organs and Member States the right to request advisory opinions, the IACtHR's advisory procedure aims “to assist the American States in fulfilling their international human rights obligations and to assist the different organs of the inter-American system to carry out the functions assigned to them in this field.”⁵⁰²

It is worth noting that the right to request advisory opinions is not limited to Member States of the IACtHR Statute or the ACHR but open

499 For an extensive study of the IACtHR's advisory function, see *Ibid.*; see also *J. M. Pasqualucci*, *The practice and procedure of the Inter-American Court of Human Rights*, 2nd ed. 2013, 37 et seq.

500 On the drafting history of Article 64 ACHR, see *E. Benz*, *The Advisory Function of the Inter-American Court of Human Rights*, 2024, 65 et seq.

501 The power to request advisory opinions from the IACtHR extends to all organs listed in Chapter X of the OAS Charter. These include the Meeting of Consultation of Ministers of Foreign Affairs (Art. 61), the Permanent Council of the OAS (Art. 62), the Advisory Defense Committee (Art. 66), the Organ of Consultation (Art. 66), and the General Assembly (Art. 69).

502 “*Other Treaties*” *Subject to the Consultative Jurisdiction of the Court*, Advisory Opinion OC-1/82, IACtHR Series A No. 1, para. 25.

to all OAS Member States.⁵⁰³ States like Canada or the USA, which have ratified neither the ACHR nor the IACtHR Statute but are OAS Member States, could thus request advisory opinions from the IACtHR.⁵⁰⁴

The fact that individual Member States may request advisory opinions from the IACtHR provides an interesting counter-example to the ICJ's advisory jurisdiction, which deliberately excludes individual states from requesting advisory opinions from the Court.⁵⁰⁵ It also significantly contributes to the number of advisory opinions requested from the IACtHR.⁵⁰⁶ However, despite the possibility of individual states to present a question to the IACtHR, the IACtHR has made clear that the exercise of its advisory function is "multilateral rather than litigious":

"The advisory jurisdiction of the Court differs from its contentious jurisdiction in that there are no "parties" involved in the advisory procedure nor is there any dispute to be settled. The sole purpose of the advisory function is "the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states." (...) The Court therefore observes that the exercise of the advisory function assigned to it by the American Convention is multilateral rather than litigious in nature (...)." ⁵⁰⁷

The IACtHR's advisory jurisdiction *ratione materiae* encompasses the interpretation of the ACHR as well as "other treaties concerning the protec-

503 "Other Treaties" Subject to the Consultative Jurisdiction of the Court, Advisory Opinion OC-1/82, IACtHR Series A No. 1, para. 35.

504 Such states could, for example, ask the IACtHR under Art. 64 para. 2 ACHR to issue an advisory opinion on the compatibility of their domestic laws with the ACHR or other human rights instruments. In theory, states that intend to join the ACHR could thereby ensure that their domestic laws are complying with the ACHR.

505 On the rejected proposals made by the Informal Inter-Allied Committee, the United Kingdom, and Venezuela to extend the ICJ's advisory jurisdiction *ratione personae* to two or more states acting in concert, see *supra*: § 1 Section D.II.

506 Of the 29 advisory opinions rendered until 2024, 21 have been requested by OAS Member States. Of these 21 requests, 17 requests were made in accordance with Art. 64 para. 1 ACHR, they thus concerned the interpretation of the ACHR or other treaties, while only four requests concerned the interpretation of the requesting state's domestic law under Art. 64 para. 2 ACHR. Costa Rica is the only OAS Member State that has asked the IACtHR to determine the compatibility of its own laws with the ACHR or other human rights treaties, which, incidentally, is also where the IACtHR is located. For a list of all advisory opinions rendered by the IACtHR, see https://www.corteidh.or.cr/opiniones_consultivas.cfm?lang=en.

507 *Reports of the Inter-American Commission on Human Rights*, Advisory Opinion OC-15/97, IACtHR Series A No. 15, paras. 25–6.

tion of human rights in the American states”. The IACtHR interpreted this wording to mean that

“the advisory jurisdiction of the Court can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto.”⁵⁰⁸

The IACtHR’s advisory jurisdiction is thus open to applications concerning a wide range of treaties. For example, the IACtHR found that the ICCPR and the VCCR were “other treaties” in the sense of Article 64 para. 1 ACHR.⁵⁰⁹

Articles 70 to 75 of the Rules of Procedure, which the IACtHR adopted in accordance with Article 25 para. 1 of the IACtHR Statute, contain further provisions on the IACtHR’s advisory jurisdiction. According to Article 74, the IACtHR “shall apply the provisions of Title II of these Rules [i.e., the rules concerning the IACtHR’s contentious procedure] to advisory proceedings to the extent that it deems them to be compatible.” The provision is similar to Article 68 ICJ Statute and Article 102 paras. 2–3 of the ICJ’s Rules of the Court. However, unlike Article 102 of the ICJ’s Rules of the Court, Article 74 Rules of Procedure of the IACtHR does not expressly refer to advisory opinions relating to “legal question[s] actually pending between two or more states”, i.e. to inter-state disputes. The IACtHR’s legal framework thus does not expressly address the question whether advisory opinions may be requested on matters relating to pending inter-state disputes.

508 “*Other Treaties*” Subject to the Consultative Jurisdiction of the Court, Advisory Opinion OC-1/82, IACtHR Series A No. 1, para. 52.

509 *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, IACtHR Series A No. 16, 36–37. In fact, the wording “other treaties concerning the protection of human rights in the American states” was likely included in Article 64 ACHR precisely to allow the Inter-American human rights system to be compatible with the international human rights treaties that were adopted shortly before the creation of the ACHR, see *E. Benz*, *The Advisory Function of the Inter-American Court of Human Rights*, 2024, 73–74.

Just like the ICJ, the IACtHR has held that it is not required to reply to all requests for advisory opinions.⁵¹⁰ Accordingly, the IACtHR found that its advisory jurisdiction is “permissive in character” which allows the IACtHR to assess whether to grant or deny a request for an advisory opinion on a case-by-case basis.⁵¹¹ The IACtHR regards its “power of appreciation” not as a kind of “unfettered discretion to grant or deny a request”.⁵¹² Instead, the Court may only decline a request if there are “compelling reasons founded in the conviction that the request exceeds the limits of its advisory jurisdiction”.⁵¹³ By echoing the “compelling reasons” standard, the IACtHR echoes the case law of the ICJ.

When determining the admissibility of a request for an advisory opinion, the IACtHR distinguishes between formal and substantive requirements of admissibility.⁵¹⁴ The formal requirements concern the formulation of the question, the identification of the provisions to be interpreted, the considerations that gave rise to the request, as well as the name and address of the agent (Art 70, 71 Rules of Procedure). The substantive admissibility requirements are less clearly defined. At this stage the IACtHR determines the admissibility of the request based on “considerations that exceed questions of mere form and that relate to the characteristics it has recognized for the exercise of its advisory function”.⁵¹⁵

Among these “characteristics for the exercise of its advisory function” the IACtHR is above all guided by the function of its advisory opinions

510 Cf. *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, IACtHR Series A No. 16, para. 31; *Rights and guarantees of children in the context of migration and/or in need of international protection*, Advisory Opinion OC-21/14, para. 25; *Entitlement of legal entities to hold rights under the Inter-American Human Rights System (Interpretation and scope of Article 1(2), in relation to Articles 1(2), 8, II(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of the American Convention on Human Rights, as well as of Article 8(1)(A) and (B) of the Protocol of San Salvador)*, Advisory Opinion OC-22/16, IACtHR Series A No. 22, para. 21.

511 “*Other Treaties*” *Subject to the Consultative Jurisdiction of the Court*, Advisory Opinion OC-1/82, IACtHR Series A No. 1, paras. 27–29.

512 *Ibid.*, para. 30.

513 *Ibid.*

514 *Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, II(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights)*, Advisory Opinion OC-24/17, IACtHR Series A No. 24, paras. 19–22.

515 *Ibid.*, para. 20.

to assist OAS Member States and OAS organs to effectively comply with their human rights obligations.⁵¹⁶ The IACtHR derived from this focus on the protection of human rights in the American states that any request for an advisory opinion is inadmissible “which is likely to undermine the Court’s contentious jurisdiction or, in general, to weaken or alter the system established by the Convention, in a manner that would impair the rights of potential victims of human rights violations.”⁵¹⁷ The IACtHR’s concern to protect the integrity of its contentious procedure showcases a clear parallel to the ICJ’s Eastern Carelia doctrine. The IACtHR’s standard of admissibility is the result of a case law which has been shaped primarily by cases involving an inter-state dimension.

II. Use of IACtHR advisory opinions to settle inter-state disputes

The IACtHR’s standard of admissibility insofar as it concerns the use of advisory opinions in the context of inter-state disputes has been shaped primarily by four cases: the 1983 *Death Penalty* case, the 1999 *Consular Assistance* case, the 2017 *Environment and Human Rights* case, and the 2018 *Asylum as a Human Right* case.

1. Death Penalty case (1983)

In 1983, the IACtHR was asked by the Inter-American Commission on Human Rights (IACHR) to interpret Article 4 paras. 2 and 4 ACHR which deals with the death penalty. At the time, a proceeding was pending before the IACHR against Guatemala regarding the interpretation of the provision.⁵¹⁸ Guatemala requested the Court to decline to exercise its advisory

516 “*Other Treaties*” *Subject to the Consultative Jurisdiction of the Court*, Advisory Opinion OC-1/82, IACtHR Series A No. 1, para. 25; cf. *Restrictions to the Death Penalty*, Advisory Opinion OC-3/83, IACtHR Series A No. 3, para. 22; *The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article I(1) of the American Convention on Human Rights)*, Advisory Opinion OC-25/18, IACtHR Series A No. 25, para. 50.

517 “*Other Treaties*” *Subject to the Consultative Jurisdiction of the Court*, Advisory Opinion OC-1/82, IACtHR Series A No. 1, para. 31.

518 *Restrictions to the Death Penalty*, Advisory Opinion OC-3/83, IACtHR Series A No. 3, para. 10.

jurisdiction arguing that it had not consented to bringing its dispute with the ACHR before the Court in accordance with Article 62 para. 3 ACHR.⁵¹⁹

The IACtHR found that Article 62 ACHR only applied to contentious proceedings, thereby rejecting Guatemala's claim that the provision also applied to advisory proceedings.⁵²⁰ In considering whether the existing dispute between the IACHR and Guatemala constituted a compelling reason for the IACtHR to decline to exercise its advisory jurisdiction, the IACtHR focused on the purpose of its advisory jurisdiction to support the OAS organs in their functions. The IACtHR held:

“The powers conferred on the Commission require it to apply the Convention or other human rights treaties. In 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.”⁵²¹

The IACtHR also examined the wording of Article 64 ACHR:

“The right to seek advisory opinions under Article 64 was conferred on OAS organs for requests falling “within their spheres of competence.” This suggests that the right was also conferred to assist with the resolution of disputed legal issues arising in the context of the activities of an organ, be it the Assembly, the Commission, or any of the others referred to in Chapter X of the OAS Charter. It is clear, therefore, that the mere fact that there exists a dispute between the Commission and the Government of Guatemala regarding the meaning of Article 4 of the Convention does not justify the Court to decline to exercise its advisory jurisdiction in the instant proceeding.”⁵²²

519 *Ibid.*, para. 11.

520 *Ibid.*, paras. 30–35.

521 *Ibid.*, para. 38.

522 *Ibid.*, para. 39.

The IACtHR recognized that there may be “legitimate interests of a State in the outcome of an advisory opinion proceeding”, however such interests were adequately protected by the state’s right to participate in the proceedings, to raise jurisdictional objections and to present its views on the matter to the court.⁵²³ Consequently, the IACtHR found that the existence of a pending international dispute over the interpretation of a provision does not constitute a compelling reason for the Court to refuse to issue the requested advisory opinion.⁵²⁴

2. Consular Assistance case (1999)

In the *Consular Assistance* case,⁵²⁵ Mexico requested from the IACtHR an advisory opinion on the obligations of states under the VCCR, the ICCPR, and the OAS Charter.⁵²⁶ One of the most contentious questions during the proceeding concerned the interpretation of Article 36 para. 1 lit. b VCCR. The provision contains the right of nationals of a sending state to have their state of nationality informed of their arrest abroad. As a prerequisite to the IACtHR’s jurisdiction to give the requested advisory opinion under Article 64 para. 1 ACHR, the IACtHR had to establish that the VCCR was a treaty “concerning the protection of human rights in the American States”. To do so, the IACtHR had to decide whether the right enshrined in Article 36 para. 1 lit. b VCCR constituted a human right.⁵²⁷

523 *Restrictions to the Death Penalty*, Advisory Opinion OC-3/83, IACtHR Series A No. 3, para. 24.

524 See also *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, IACtHR Series A No. 13; *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94, IACtHR Series A No. 14, para. 28.

525 *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, IACtHR Series A No. 16.

526 *Ibid.*

527 *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, IACtHR Series A No. 16, paras. 68 et seq. In 2003, Mexico took the same matter to the ICJ and initiated contentious proceedings against the USA in the *Avena* case. While the ICJ left open the question of whether VCCR rights constitute human rights, it emphasized that it was skeptical about this, see *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, ICJ Reports 2004, 12 (60–61, para. 124).

While Mexico phrased its questions to the IACtHR in abstract terms, the underlying issues arose from and related to a pending dispute pending between Mexico and the USA. The USA repeatedly failed to immediately notify Mexican nationals (as well as other foreign nationals) who were arrested, tried, and sentenced to death of their rights under Article 36 para. 1 lit. b VCCR and to immediately notify their home state of their arrests. In its request for an advisory opinion, Mexico referred to specific examples of Mexican nationals that have been detained by the USA and cited relevant US laws and practices.⁵²⁸ The US practice was in fact so wide-spread that shortly after Mexico requested the advisory opinion from the IACtHR, Paraguay and Germany instituted similar proceedings against the USA before the ICJ.⁵²⁹

The United States requested the IACtHR to reject the requested opinion *inter alia* because of the close connection between Mexico's request for an advisory opinion and the pending cases before the ICJ.⁵³⁰ The United States further argued that "Mexico has in fact presented a contentious case in the guise of a request for an advisory opinion. The Court has on several occasions expressed its concern over this possibility."⁵³¹ The United States argued that the IACtHR's advisory jurisdiction pursuant to Article 64 para. 1 ACHR is limited to interpreting the law, yet Mexico requested a legal assessment of specific facts which have not yet been established and which the IACtHR cannot establish by means of its advisory procedure.⁵³² The advisory procedure, the USA claimed, was unsuited to decide complex questions of fact because it lacked clear evidentiary rules.⁵³³ The USA fur-

528 *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, IACtHR Series A No. 16, para. 46.

529 See *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Order, ICJ Reports 1998, 426 (discontinued on 2 November 1999); *LaGrand (Germany v. United States of America)*, Judgment, ICJ Reports 2001, 466.

530 IACtHR Pleadings, *Consular Assistance*, Written Observations of the United States of America, 1 June 1998, 4–5 (on file with the author). On the issue of parallel proceedings before ICs, see Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals*, 2003; J. Finke, *Die Parallelität internationaler Streitbeilegungsmechanismen*, 2004.

531 IACtHR Pleadings, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Written Observations of the United States of America, 1 June 1998, 9 (on file with the author).

532 *Ibid.*, 9–10.

533 *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, IACtHR Series A No. 16, 26.

ther argued that the IACtHR would have to decide about several cases that were pending before US courts without access to the case files and without the participation of the relevant parties.⁵³⁴ The USA concluded by repeating its claim that Mexico was abusing the IACtHR's advisory procedure:

“Thus, the present case is patently an attempt to subject the United States to the contentious jurisdiction of this Court, notwithstanding that the United States is not a party to the American Convention and has not accepted the contentious jurisdiction of the Court under Article 62. An advisory opinion in the form sought here by Mexico will necessarily prejudice the rights and interests of the United States in any future contentious proceeding before this Court and in other international legal proceedings, as well as in its domestic legal system.”⁵³⁵

The IACtHR agreed with the USA that it may not, in the course of its advisory proceeding, evaluate evidence against a state:

“The Court observes that it may not rule on charges or evidence alleged against a State because to do so would be at variance with the nature of its advisory function and would deny the respective State the opportunities to defend itself that it would have in a contentious proceeding. This is one of the distinctive differences between the Court's contentious and advisory functions. (...) in exercising its advisory jurisdiction, the Court is not called upon to settle questions of fact, but rather to throw light on the meaning, object and purpose of international human rights norms.”⁵³⁶

In doing so, the IACtHR demonstrated a divergence from the practice of the ICJ which has often made findings on questions of facts in the course of its advisory proceedings.⁵³⁷ Nevertheless, the IACtHR decided to answer

534 IACtHR Pleadings, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Written Observations of the United States of America, 1 June 1998, 10 (on file with the author).

535 Ibid., 10–11.

536 *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, IACtHR Series A No. 16, para. 47.

537 See for example *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95 See, however, the Separate Opinion of Judge Nolte in the *Policies and Practices of Israel in the Occupied Palestinian Territory* case, in

Mexico's request and, in doing so it decided not to ignore the request's factual context. The IACtHR regarded Mexico's specific references to ongoing judicial proceedings in the United States as a "use of examples [which] places the request in a particular context and illustrates the differences as to the interpretation that might be given of the legal issue raised in the present Advisory Opinion, without the Court having to rule on those examples."⁵³⁸ The IACtHR thus limited itself to answering legal questions, while not deciding on "charges or evidence alleged against a State".⁵³⁹

This distinction between questions of law and questions of international responsibility seems persuasive in the context of the IACtHR. The IACtHR's subject-matter jurisdiction extends to the interpretation of the ACHR and "other treaties" containing human rights provisions as well as the compatibility of domestic law with these instruments. While questions of international responsibility are legal questions, they are not questions of interpretation of the ACHR or other human rights treaties. It may be noted that the IACtHR approach set an example for Germany's proposal in the *Chagos* case 20 years later, in which Germany argued that the ICJ may interpret the law even if it relates to pending bilateral disputes but it should be careful not to make findings on the international responsibility of the states involved.⁵⁴⁰ However, unlike the IACtHR, the ICJ's advisory jurisdiction *ratione materiae* extends to "any legal question", which clearly encompasses questions of international responsibility.

which he argued for a limited fact-finding in advisory proceedings: "The particular purpose of advisory proceedings explains why the factual assessment in this Advisory Opinion has a different focus and depth than factual determinations made in contentious proceedings. (...) In advisory proceedings the Court will examine the facts only to the extent necessary for its response to the legal question posed, and it will draw legal conclusions only to the extent permitted by those facts." see *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, Separate Opinion Nolte, Publication pending in ICJ Reports 2024, 1 (2, para. 5).

538 *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, IACtHR Series A No. 16, para. 49.

539 *Ibid.*, para. 47.

540 Cf. ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of Germany, para. 141. On the German proposal, see *supra*: § 3 Section H.II.3.

3. Environment and Human Rights case (2017)

In the *Environment and Human Rights* case,⁵⁴¹ Colombia requested an advisory opinion from the IACtHR on the interpretation of ACHR provisions in the context of Nicaragua's plan to construct a canal between the Atlantic and the Pacific Ocean. In its request, Colombia referred to "a danger that the construction and operation of major new infrastructure projects may have severe effects on the marine environment in the Wider Caribbean Region", specifically giving the example of the "construction, maintenance and expansions of canals for maritime traffic".⁵⁴² At the same time, the IACHR examined a petition concerning "alleged violations of the American Convention in the context of the project for the construction of the Grand Interoceanic Canal of Nicaragua".⁵⁴³ Additional proceedings were pending before the ICJ between Nicaragua and Colombia over the alleged violations of Nicaragua's sovereign maritime waters by Colombia.⁵⁴⁴

Despite these other proceedings, the IACtHR found that the request for an advisory opinion was admissible. The Court held that petitions before the IACHR on the same subject-matter would not render a request for an advisory opinion inadmissible.⁵⁴⁵ The same was true, the IACtHR held, for parallel contentious proceedings before the ICJ.⁵⁴⁶ The reason for this, the Court argued, lied in the different function the IACtHR was exercising when giving advisory opinions:

"The task of interpretation that the Court must perform in the exercise of its advisory function differs from its contentious competence because there is no litigation to be decided. The central purpose of the advisory function is to obtain a judicial interpretation of one or several provisions

541 *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Advisory Opinion OC-23/17, IACtHR Series A No. 23.

542 *Ibid.*, para. 1.

543 *Ibid.*, para. 25. IACHR, Petition 912/14, 17 June 2014.

544 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, 3.

545 *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Advisory Opinion OC-23/17, IACtHR Series A No. 23, paras. 26–27.

546 *Ibid.*

of the Convention or of other treaties concerning the protection of human rights in the American States. (...) The citing of examples in the request for an advisory opinion serves the purpose of referring to a specific context and illustrating the different situations that may arise in relation to the legal issue that is the purpose of the advisory opinion, without this meaning that the Court is issuing a legal ruling on the situations described in such examples.”⁵⁴⁷

4. Asylum as a Human Right case (2018)

In 2016, Ecuador presented the IACtHR with several questions for an advisory opinion on different aspects of the right to asylum, in particular in the context of foreign nationals seeking asylum within the diplomatic mission of a state.⁵⁴⁸ Several states and organizations participating in the proceeding urged the IACtHR not to render the opinion because the subject-matter of the request related to a pending dispute between Ecuador and the UK involving Julian Assange, the founder of Wikileaks, who received asylum within the premises of the Ecuadorian embassy in the United Kingdom.⁵⁴⁹ The situation surrounding Assange’s stay in the Ecuadorian embassy had become a diplomatic minefield involving not only Ecuador and the UK, but also the USA, which urged the UK to extradite Assange to the US to face criminal charges. To determine whether Ecuador’s request for an advisory opinion was intended to resolve a contentious matter, the IACtHR examined the “substantial purpose of the request” and whether it claimed “general validity and transcend[ed] all American States, beyond the reasons that may have given rise to it or reference made to particular facts”.⁵⁵⁰ The IACtHR found that a request may refer to the facts of an actual dispute, as this merely demonstrated that the advisory opinion was not used for “purely academic speculation, without a foreseeable application to concrete situations justifying the need for an advisory opinion”.⁵⁵¹

547 Ibid.

548 *The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights)*, Advisory Opinion OC-25/18, Series A No. 25, para. 3.

549 Ibid., paras. 20, 22.

550 Ibid., para. 52.

551 Ibid., para. 51.

III. Interim conclusions

The IACtHR has developed a differentiated standard of admissibility for requests for advisory opinions.⁵⁵² In determining the admissibility of a request, the Court is guided by the purpose of its advisory function, which the Court identified as the effective promotion of human rights in the American states.⁵⁵³ Accordingly, a request for an advisory opinion is inadmissible if it has “the effect of altering or weakening the system established by the Convention in a manner detrimental to the individual human being”.⁵⁵⁴ Among other considerations of admissibility, the IACtHR found that its advisory opinions “cannot be used to conceal a contentious case nor prematurely obtain a ruling on a matter that could eventually be submitted to the Court as a contentious case” or to “resolve questions of fact”.⁵⁵⁵ However, the IACtHR has also stated on multiple occasions that the fact that a request relates to an existing dispute would not necessarily prevent

552 The IACtHR defines its standard of admissibility along six criteria: “The Court has developed the following jurisprudential standards regarding the admissibility of a request for an advisory opinion: (1) it cannot be used to conceal a contentious case nor prematurely obtain a ruling on a matter that could eventually be submitted to the Court as a contentious case; (2) it cannot be used as a mechanism to obtain an indirect domestic ruling on a matter being litigated or is subject to a controversy; (3) it cannot be used as an instrument of a domestic political debate; (4) it cannot exclusively concern matters on which the Court has already ruled in its jurisprudence and, (5) it cannot be used to resolve questions of fact, but only to untangle the sense, purpose and meaning of inter-national norms on human rights and, above all, (6) it is to assist the OAS Member States and organs to fully and effectively comply with their international obligations.”, see *Differentiated approaches with respect to certain groups of persons in detention (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments)*, Advisory Opinion OC-29/22, IACtHR Series A No. 29, para. 21.

553 Cf. *Restrictions to the Death Penalty, Advisory Opinion OC-3/83, IACtHR Series A No. 3, para. 22; The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights)*, Advisory Opinion OC-25/18, IACtHR Series A No. 25, para. 50.

554 *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, IACtHR Series A No. 16, para. 43.

555 *Differentiated approaches with respect to certain groups of persons in detention (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments)*, Advisory Opinion OC-29/22, IACtHR Series A No. 29, para. 21.

the Court from issuing an advisory opinion.⁵⁵⁶ The Court thus regularly answered requests even if they relate to existing disputes, emphasizing that it does not render a judicial decision about the underlying controversy but only interprets the relevant human rights instruments.

C. African Court on Human and Peoples' Rights

In 1998, the ACtHPR was created to complement the work of the African Commission on Human and Peoples' Rights (ACHPR).⁵⁵⁷ Until the Statute of the African Court of Justice and Human Rights enters into force,⁵⁵⁸ the ACtHPR serves as the regional human rights court of Africa.⁵⁵⁹

I. Overview of the ACtHPR's advisory jurisdiction

The ACtHPR's advisory jurisdiction is enshrined in Article 4 para. 1 Protocol to the African Charter on Human and Peoples' Rights (Banjul Protocol).⁵⁶⁰ It stipulates:

“At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court

556 *Restrictions to the Death Penalty, Advisory Opinion OC-3/83, IACtHR Series A No. 3, para 38; Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights, Advisory Opinion OC-12/91, IACtHR Series A No. 12, para. 28; The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, IACtHR Series A No. 16, para. 45.*

557 *Murray* points out that while concerns that the newly established court would undermine the ACHPR proved unwarranted, the relationship between the two human rights bodies has not been without tension, see *R. Murray*, *The African Charter on Human and Peoples' Rights: A Commentary*, 2019, 11.

558 The Protocol on the Statute of the African Court of Justice and Human Rights was adopted on 1 July 2008. Its purpose is to merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union into a single court, called the African Court of Justice and Human Rights, see Art. 2 Protocol on the Statute of the African Court of Justice and Human Rights. However, the Protocol has not yet entered into force as its entry into force requires the ratification by 15 AU Member States. By 2024, only 8 AU Member States have ratified the Protocol, see <https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights>.

559 *A. P. van der Mei*, 18 *LJIL* 1 (2005), 113 (114).

560 On the advisory jurisdiction of the ACtHPR, see *A. P. van der Mei*, 5 *African Human Rights Law Journal* 1 (2005), 27; *L. Chenwi*, 38 *Nordic Journal of Human Rights* 1 (2020), 61.

may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.”

Being a regional human rights court, the ACtHPR’s advisory jurisdiction *ratione materiae* is limited to the interpretation of the African Charter on Human and Peoples’ Rights (Banjul Charter) and other human rights instruments. The ACtHPR thus rejects requests for advisory opinions which “raise issues of general Public International Law and not human rights law”.⁵⁶¹ Article 4 of the Banjul Protocol contains a particularly broad advisory jurisdiction *ratione materiae*. Note the difference in wording between Article 4 Banjul Protocol and the previously discussed Article 64 para. 1 ACHR. While Article 4 refers to “any relevant human rights instrument”, Article 64 para. 1 ACHR more specifically refers to “other treaties concerning the protection of human rights in the American states”. The advisory jurisdiction of the ACtHPR therefore arguably extends even further than that of the IACtHR and includes any human rights instrument, regardless of its application to AU Member States.⁵⁶² However, it seems likely that the ACtHPR will interpret its advisory jurisdiction under Article 4 of the Banjul Protocol in a similar way to the IACtHR’s interpretation of its advisory jurisdiction under Article 64 para. 1 ACHR. This reading is also supported by Article 7 of the Banjul Protocol which lists as the sources of law the Court shall apply the Banjul Charter and “any other relevant human rights instrument ratified by the States concerned”. The ACtHPR’s advisory jurisdiction *ratione materiae* is further limited by Article 4 para. 1 Banjul Protocol to matters that are not currently pending before the ACHPR. This provision is echoed in the Rules of Court, which the ACtHPR has adopted pursuant to Article 33 of the Banjul Protocol.⁵⁶³ According to Rule 82 para. 3, “[t]he subject matter of the request for advisory opinion shall not relate to a Communication pending before the Commission”. Article 4 para. 1 Banjul Protocol and Rule 82 para. 3 aim to harmonize the ACtHPR’s

561 *Request for Advisory Opinion by the Coalition for the International Criminal Court, the Legal Defence & Assistance Project (LEDAP), the Civil Resource Development & Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC)*, No. 001/2014, Order, para. 13.

562 *A. P. van der Mei*, 5 *African Human Rights Law Journal* 1 (2005), 27 (38).

563 ACtHPR, Rules of Court, 1 September 2020, <https://www.african-court.org/wpafcf/wp-content/uploads/2021/04/Rules-Final-Revised-adopted-Rules-eng-April-2021.pdf>.

activities with the activities of the ACHPR, the other international body charged with the protection of human rights on the African continent. In accordance with these provisions, the ACtHPR's Registry enquires from the ACHPR whether the subject-matter of a request for an advisory opinion relates to a matter pending before the ACHPR. If there is a parallel proceeding pending before the ACHPR, the ACtHPR will reject the request for an advisory opinion.⁵⁶⁴

Interestingly, and unlike the ICJ, the ACtHPR's broad advisory jurisdiction *ratione materiae* is not counterbalanced by a narrow jurisdiction *ratione personae*. Instead, the ACtHPR has the broadest advisory jurisdiction *ratione personae* of any of the ICs extending to the AU, any AU organ, any AU Member State,⁵⁶⁵ as well as "any African organization recognized by the OAU [now AU]".⁵⁶⁶ The term "African organization" includes non-governmental organizations.⁵⁶⁷ The advisory procedure under the Banjul Protocol thus provides a forum for civil society actors to exert pressure on states on human rights issues. The respective NGO must be "African", which the ACtHPR interprets to mean that the NGO must be registered in one African state and operate in at least one other African state⁵⁶⁸ and it must be recognized by the AU, i.e. it must have been granted observer status before the AU or have signed a "Memorandum of Understanding and Cooperation" with the AU.⁵⁶⁹ Recognition by an AU organ, such as the IACHR, is not sufficient.⁵⁷⁰

564 The ACtHPR thus rejected the request by the for an advisory opinion by the Pan African Lawyer's Union and the Southern African Litigation Centre in the case *Request for advisory opinion by Pan African Lawyers' Union and Southern African Litigation Center*, No. 002/2012, because the subject-matter of the request related to a matter that was already being examined by the Commission (i.e., the suspension of the SADC Tribunal).

565 *Request for Advisory Opinion by the Pan African Lawyers Union (PALU) on the compatibility of vagrancy laws with the African Charter on Human and Peoples' Rights and other human rights instruments applicable in Africa*, No. 001/2018, Advisory Opinion, para. 37. All 55 states in Africa are Member States of the African Union.

566 The fact that article 4 lists the AU separately from its organs seems to perform no particular purpose as the AU could in any event only act through its organs, see *A. P. van der Mei*, 5 African Human Rights Law Journal 1 (2005), 27 (32).

567 *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP)*, No. 001/2013, Advisory Opinion, para. 46.

568 *Ibid.*, para. 48.

569 *Ibid.*, para. 65; *Request for Advisory Opinion by Rencontre Africain pour la Defense des Droits de l'Homme*, No. 002/2014, Advisory Opinion, para. 36.

570 *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP)*, No. 001/2013, Advisory Opinion, para. 65; *Request for Advisory*

II. Use of ACtHPR advisory opinions to settle inter-state disputes

To date, the ACtHPR has not received any request for an advisory opinion on a question relating to a pending inter-state dispute. Nor has the ACtHPR been asked to give an advisory opinion on the lawfulness of specific state conduct. However, the ACtHPR has indicated that it would follow a similar approach to the IACtHR in that it will respond to requests which concern the human rights situation in a specific state and treat specific references to the facts of a case as mere examples which illustrate the human rights problem at hand. The ACtHPR thus held that “[i]n exercising its advisory jurisdiction, the Court does not resolve factual disputes between opposing parties. (...) Any use of examples simply serves to highlight the practical dimensions of the opinion and does not amount to a decision on any factual situation described in those illustrations.”⁵⁷¹ In doing so, the ACtHPR does not examine the lawfulness of any specific conduct.⁵⁷²

D. International Tribunal for the Law of the Sea

The advisory function of the ITLOS is divided into two separate procedures: The advisory procedure of the Seabed Disputes Chamber (SDC) under Article 191 UNCLOS⁵⁷³ and the advisory procedure of the ITLOS in full plenum.⁵⁷⁴ The latter is a particularly interesting example, as not

Opinion by l'Association Africaine de Défense des Droits de l'Homme, No. 002/2016, Advisory Opinion, para. 32.

571 *Request by the Pan African Lawyers Union (PALU) on the right to participate in the government of one's country in the context of an election held during a public health emergency or a pandemic, such as the COVID-19 Crisis*, NO. 001/2020, Advisory Opinion, para. 45 citing Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, IACtHR Series A No. 18, para. 65.

572 Cf. *Request by the Pan African Lawyers Union (PALU) on the right to participate in the government of one's country in the context of an election held during a public health emergency or a pandemic, such as the COVID-19 Crisis*, No. 001/2020, Advisory Opinion, para. 47.

573 On the advisory function of the SDC, see *L. B. Sohn*, Advisory Opinions by the International Tribunal for the Law of the Sea or Its Seabed Disputes Chamber, in: Moore (ed.), *Oceans Policy*, 1999, 61; *T. Treves*, Advisory Opinions under the Law of the Sea Convention, in: J. N. Moore/M. H. Nordquist (eds.), *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea*, 1st ed., 2001, 81.

574 On the advisory function of the ITLOS in full plenum, see *K.-J. You*, 39 *Ocean Development & International Law* 4 (2008), 360; *T. M. Ndiaye*, 9 *Chinese Journal*

only its extent but its very existence is contested. A close examination of the two procedures provides valuable insights into the nature of advisory procedures in general. Many of the same critiques voiced against the ICJ's advisory jurisdiction are echoed in relation to the ITLOS.

I. Overview of the ITLOS's advisory jurisdiction

1. Seabed Disputes Chamber

The SDC was established in accordance with Part XI, Section 5, of UNCLOS as well as Article 14 ITLOS Statute. The SDC is composed of eleven ITLOS judges and has jurisdiction to decide disputes relating to activities in the Area (Article 187 UNCLOS). The Area refers to the "seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction" (Article 1 para. 1 subpara. 1 UNCLOS). Article 191 UNCLOS confers advisory jurisdiction upon the SDC:

"The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency."⁵⁷⁵

Accordingly, the SDC's advisory jurisdiction *ratione personae* extends to the Assembly and the Council of the International Seabed Authority. The SDC's advisory jurisdiction *ratione materiae* extends to legal questions aris-

of International Law 3 (2010), 565; J. L. Kateka, 17 Max Planck Yearbook of United Nations Law 1 (2013), 159; G. Le Floch *Annuaire français de droit international* (2015), 669; M. García García-Revillo, *The contentious and advisory jurisdiction of the International Tribunal for the law of the sea*, 2015, 311; M. A. Becker, 109 *Am. j. int. law* 4 (2015), 851; T. Ruys/A. Soete, 29 *Leiden Journal of International Law* 1 (2016), 155; M. Lando, 29 *LJIL* 2 (2016), 441; A. von Rebay/C. Oberle, 83 *ZaöRV / HJIL* 2 (2023), 283.

575 Another advisory procedure is enshrined in Art. 159 para. 10 UNCLOS which allows for the SDC to review proposals before the Assembly on their conformity with UNCLOS. Wolfrum further identified the procedure under Art. 188 UNCLOS as a type of advisory procedure, see R. Wolfrum, *Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes*, in: R. Wolfrum/I. Gatzschmann (eds.), *International Dispute Settlement: Room for Innovations?*, 2013, 35 (55).

ing within the requesting organ's scope of activities.⁵⁷⁶ For this, the request must fall within the competence of the International Seabed Authority and the requesting organ.⁵⁷⁷

Article 191 UNCLOS stipulates that the SDC “shall give advisory opinions”. This wording stands in contrast to the wording “may give” employed in Article 65 ICJ Statute and Article 4 of the Banjul Charter. Some states have argued that this wording indicates that the SDC has a duty to give any advisory opinion if the jurisdictional requirements of Article 191 UNCLOS are fulfilled.⁵⁷⁸ The wording would thus exclude any discretion of the SDC in the exercise of its advisory jurisdiction.⁵⁷⁹ In its first (and so far only) advisory opinion, the SDC has noted the difference in wording between Article 191 UNCLOS and Article 65 ICJ Statute but decided to leave the question of discretion unanswered.⁵⁸⁰

The function of the SDC's advisory opinions is to assist the Authority in its duties regarding the administration of the Area. As the SDC stated:

“In order to exercise its functions properly in accordance with the Convention, the Authority may require the assistance of an independent and impartial judicial body. This is the underlying reason for the advisory jurisdiction of the Chamber. In the exercise of that jurisdiction, the Chamber is part of the system in which the Authority's organs operate, but its task within that system is to act as an independent and impartial body.”⁵⁸¹

The first request for an advisory opinion to the SDC exemplifies this function. In 2008, the Authority received two applications for seabed exploration in the Area which were sponsored by the Republic of Nauru and the Kingdom of Tonga. Nauru, unsure about the legal ramifications

576 Cf. *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, ITLOS Reports 2011, 10 (paras. 31–32).

577 R. Wolfrum, *Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes*, in: R. Wolfrum/I. Gatzschmann (eds.), *International Dispute Settlement: Room for Innovations?*, 2013, 35 (50).

578 Cf. ITLOS Pleadings, *Responsibilities and obligations of States with respect to activities in the Area*, Written Statement of Mexico paras. 50–54; Written Statement of Australia para. 5.

579 So also R. Wolfrum, *Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes*, in: R. Wolfrum/I. Gatzschmann (eds.), *International Dispute Settlement: Room for Innovations?*, 2013, 35 (52).

580 *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, ITLOS Reports 2011, 10 (para. 48).

581 *Ibid.*, para. 26.

of sponsoring such an application and fearing an overburdening financial liability, asked the Authority to postpone its decision and to request an advisory opinion from the SDC on the legal obligations of sponsoring states. The Council modified Nauru's questions and submitted a request for an advisory opinion on three issues: the obligations of UNCLOS Member States sponsoring activities in the area, on the specific measures Member States must take when sponsoring activities in the area and on the liability of sponsoring states for the sponsored entities' failures to comply with relevant UNCLOS provisions.⁵⁸² The requested advisory opinion was intended to guide the Authority's decision whether to permit the activities sponsored by Nauru and Tonga.

2. ITLOS

While the legal basis of the SDC's advisory jurisdiction is expressly enshrined in Article 191 of UNCLOS, the legal basis for an advisory jurisdiction of the Tribunal in plenum is more nebulous.⁵⁸³ Lacking an express legal basis within UNCLOS or the ITLOS Statute, not only the extent of the Tribunal's advisory jurisdiction is contested, but also its very existence.⁵⁸⁴ Several states challenged the existence of the Tribunal's advisory jurisdiction when the Sub-Regional Fisheries Commission (SRFC) requested the first advisory opinion from the Tribunal in 2013.⁵⁸⁵

582 Cf. *Ibid.*, para. 1.

583 On the advisory jurisdiction of the ITLOS in full plenum, see *K.-J. You*, 39 *Ocean Development & International Law* 4 (2008), 360; *T. M. Ndiaye*, 9 *Chinese Journal of International Law* 3 (2010), 565; *J. L. Kateka*, 17 *Max Planck Yearbook of United Nations Law* 1 (2013), 159.

584 For a critical account, see *G. Le Floch* *Annuaire français de droit international* (2015), 669; *M. A. Becker*, 109 *Am. j. int. law* 4 (2015), 851; *M. Lando*, 29 *LJIL* 2 (2016), 441; *T. Ruys/A. Soete*, 29 *Leiden Journal of International Law* 1 (2016), 155. Favorable to the advisory jurisdiction of the ITLOS, see *M. García García-Revillo*, *The contentious and advisory jurisdiction of the International Tribunal for the law of the sea*, 2015, 311; *A. von Rebay/C. Oberle*, 83 *ZaöRV / HJIL* 2 (2023), 283.

585 The states that voiced their opposition to an advisory jurisdiction of ITLOS during the SRFC proceeding were Argentina, Australia, China, Ireland, Spain, Thailand, the UK, and the US. Additionally, France, the Netherlands, and Portugal raised their doubts over an advisory jurisdiction of the full plenum without taking a clear position on the topic. Other states argued in favor of a plenary advisory jurisdiction. These were Chile, Cuba, Germany, Japan, Micronesia, Montenegro, New Zealand, Saudi Arabia, Somalia, Sri Lanka, and Switzerland.

The objections of states against the existence of a plenary advisory jurisdiction of the ITLOS can be summarized as follows: First, neither UNCLOS nor the ITLOS Statute provide for an express conferral of an advisory jurisdiction on the ITLOS.⁵⁸⁶ Second, Article 288 UNCLOS and Article 21 ITLOS Statute, which contain rules governing the Tribunal's jurisdiction, cannot be interpreted to allow for an advisory jurisdiction of the full Tribunal. This follows from a comparison of the different authentic texts of Article 21 ITLOS Statute⁵⁸⁷, its *travaux préparatoires*⁵⁸⁸, and the fact that the UNCLOS States Parties did not omit the matter of advisory opinions, but decided to limit its scope to the SDC⁵⁸⁹. Third, the Tribunal cannot, by means of creating its own rules of procedure in accordance with Article 16 ITLOS Statute, confer upon itself a jurisdiction which is not provided for under UNCLOS.⁵⁹⁰ Finally, neither the doctrine of inherent powers nor the doctrine of implied powers can provide for an advisory jurisdiction of the Tribunal.⁵⁹¹ It is worth exploring these arguments in more detail since they provide an interesting perspective on the matter of jurisdiction of ICs.

The ITLOS bases its advisory jurisdiction primarily on Article 21 of its Statute. The provision stipulates:

“The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters

586 ITLOS Pleadings, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Written Statement of Australia para. 13; Written Statement of the United States of America para. 13.

587 ITLOS Pleadings, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Written Statement of Australia paras. 23 et seq.; Written Statement of the United Kingdom para. 24.

588 ITLOS Pleadings, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Written Statement of China para. 36; Written Statement of the United Kingdom para. 7; Written Statement of the United States para. 18.

589 ITLOS Pleadings, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Written Statement of Australia para. 13; Written Statement of the United Kingdom para. 24; United States para. 13.

590 ITLOS Pleadings, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Written Statement of the United Kingdom para. 12.

591 ITLOS Pleadings, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Written Statement of Australia para. 7; Written Statement of China paras. 9–15; Written Statement of Spain para. 6; Written Statement of the United Kingdom paras. 9–12. See also ITLOS Pleadings, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Written Statement of China para. 21.

specifically provided for in any other agreement which confers jurisdiction on the Tribunal.”

The provision refers to three elements of the Tribunal’s jurisdiction: “disputes”, “applications”, and “matters”. While Article 21 thus does not expressly refer to advisory opinions, it refers to “all matters”. According to the ITLOS

“the words all “matters” (...) should not be interpreted as covering only ‘disputes’, for if that were to be the case, article 21 of the Statute would simply have used the word ‘disputes’. Consequently, it must mean something more than only ‘disputes’. That something more must include advisory opinions, if specifically provided for in ‘any other agreement which confers jurisdiction on the Tribunal.’”⁵⁹²

The ITLOS found that by including the reference to “all matters”, the ITLOS Statute allowed for the conferral of an advisory jurisdiction on the full Tribunal.⁵⁹³ However, Article 21 on its own is not a sufficient legal basis for the Tribunal’s advisory jurisdiction. As the ITLOS clarified, Article 21 ITLOS Statute merely recognizes the possibility of an international agreement conferring an advisory jurisdiction on the Tribunal. What is needed, therefore, is another international agreement which confers a specific advisory jurisdiction on the Tribunal.⁵⁹⁴ As the ITLOS held, “Article 21 and the “other agreement” conferring jurisdiction on the Tribunal are interconnected and constitute the substantive legal basis of the advisory jurisdiction of the Tribunal.”⁵⁹⁵

This dual legal basis of the Tribunal’s advisory jurisdiction stands independently from other provisions in UNCLOS. As such, Article 288 UNCLOS which governs the Tribunal’s and the SDC’s jurisdiction in contentious matters does not invalidate the assumption of an advisory jurisdiction of the Tribunal.⁵⁹⁶

592 *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, ITLOS Reports 2015, 4 (para. 56).

593 *Ibid.*, para. 58.

594 *Ibid.*

595 *Ibid.*

596 *Ibid.*, para. 52.

However, as Judge *Cot* pointed out in his Declaration, the wording “all matters” is quite ambiguous and can support arguments both in favor and against an advisory jurisdiction of the Tribunal.⁵⁹⁷

To decipher the meaning of the wording “all matters”, one could thus compare the wording of Article 21 ITLOS Statute in the six authentic versions.⁵⁹⁸ As a rule of treaty interpretation, it is presumed that the terms used in each six versions have the same meaning (see Article 33 para. 3 VCLT). Where two language versions differ from each other in their meaning, the meaning which can be harmonized with both versions prevails.⁵⁹⁹ One must therefore look for a common meaning among all six versions of UNCLOS. As *Lando* has demonstrated, of the six authentic texts of Article 21 ITLOS Statute, four employ a broad wording which can be read to extend the Tribunal’s jurisdiction to include advisory opinions.⁶⁰⁰ However, the Chinese and French versions of Article 21 ITLOS Statute seem to contain a reference to Article 288 UNCLOS which would limit the Tribunal’s jurisdictional scope to the settlement of disputes.⁶⁰¹ *Lando* therefore argued that the two narrowest versions, the Chinese and the French version, are to be preferred as they reconcile all authentic texts of UNCLOS.⁶⁰²

The idea that UNCLOS refers to an advisory jurisdiction of the Tribunal by employing the wording “all matters” becomes even less convincing if one considers that UNCLOS expressly mentions the advisory jurisdiction of the SDC in Article 191 UNCLOS. This begs the question why the same instrument would expressly mention the advisory jurisdiction regarding the SDC but merely imply it regarding the Tribunal.⁶⁰³ It seems likely that had the States Parties to UNCLOS intended to confer advisory jurisdiction on the plenary Tribunal as well, they would have expressly stated it, as they did

597 “The ambiguity of the provision is blindingly obvious”, see *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, Declaration Judge *Cot*, ITLOS Reports 2015, 73 (para. 3); see also *M. Lando*, 29 LJIL 2 (2016), 441 (446).

598 *M. Lando*, 29 LJIL 2 (2016), 441 (453).

599 *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Judgment, 1924, PCIJ Series A, no. 2, 5 (19).

600 According to *Lando*, the Arabic, English, Russian, and Spanish versions are in line with a broad interpretation of Art. 21 ITLOS Statute which is compatible with an advisory jurisdiction of the Tribunal, *M. Lando*, 29 LJIL 2 (2016), 441 (453).

601 *Ibid.*, 453.

602 *Ibid.*, 453.

603 ITLOS Pleadings, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Written Statement of Australia para. 13; Written Statement of the United States of America para. 13.

with the SDC.⁶⁰⁴ However, such an inference from the express mentioning of one jurisdiction to the exclusion of all not-mentioned jurisdictions (*expressio unius est exclusio alterius*) is only compelling if one can demonstrate not only that UNCLOS confers advisory jurisdiction on the SDC, which it does, but also that it confers advisory jurisdiction *only* on the SDC.⁶⁰⁵

During the advisory proceeding instituted by the SRFC, several states referred to the preparatory materials of UNCLOS which indicate that the question of the Tribunal giving advisory opinions has not been discussed by the negotiating states at any stage.⁶⁰⁶ One could counter this argument, as *von Rebay* and *Oberle* did, by arguing that the ITLOS advisory jurisdiction is not an advisory jurisdiction under UNCLOS but under another agreement in conjunction with Article 21 ITLOS Statute.⁶⁰⁷ As such, it is hardly surprising that UNCLOS only refers to the advisory jurisdiction of the SDC.

While UNCLOS itself does not expressly mention the Tribunal's advisory jurisdiction, Article 138 of the Rules of ITLOS does.⁶⁰⁸ Based on this provision, the ITLOS found that its advisory jurisdiction was subject to three conditions: (1) there must be an international agreement related to the purposes of the Convention specifically providing for the submission of a request for an advisory opinion to the Tribunal; (2) the request must be transmitted to the Tribunal by a body authorized by or in accordance with

604 ITLOS Pleadings, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Written Statement of the United Kingdom para. 24. One could also argue the opposite, i.e. that the parties could have included more express language in Article 21 ITLOS Statute, if they had intended to exclude the Tribunal from issuing advisory opinions, see *A. von Rebay/C. Oberle*, 83 ZaöRV / HJIL 2 (2023), 283 (288).

605 Cf. *K. Larenz*, *Methodenlehre der Rechtswissenschaft*, 6. ed. 1991, 390.

606 ITLOS Pleadings, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Written Statement of China para. 36; Written Statement of the United Kingdom para. 7; Written Statement of the United States of America para. 18.

607 *A. von Rebay/C. Oberle*, 83 ZaöRV / HJIL 2 (2023), 283 (289).

608 Art. 138 of the Rules of ITLOS reads:

“1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.

2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.

3. The Tribunal shall apply *mutatis mutandis* articles 130 to 137.”

the agreement; and (3) an opinion may only be given on a legal question.⁶⁰⁹ However, as the ITLOS found in its *SRFC* advisory opinion,⁶¹⁰ Article 138 of the ITLOS Rules is not the legal basis for the Tribunal's advisory jurisdiction, it merely stipulates certain prerequisites for the exercise of it.⁶¹¹ While Article 16 ITLOS Statute authorizes the Tribunal to formulate rules on how to carry out its functions, it cannot by doing so create *new* functions.

Nevertheless, by adopting Article 138 of the ITLOS Rules, the Tribunal clearly indicated its understanding that Article 21 ITLOS Statute in conjunction with other agreements provide a legal basis for the Tribunal's advisory jurisdiction. Furthermore, no state objected to Article 138 prior to the *SRFC* advisory proceedings. One could thus argue that the States Parties to UNCLOS by not objecting to Article 138 ITLOS Rules acquiesced to the Tribunal's advisory capacity.⁶¹² The UNCLOS States Parties could also be said to have formed a subsequent practice (see Article 31 para. 3 lit. b VCLT) in the application of UNCLOS which modified the meaning of Article 21 ITLOS Statute to include advisory opinions among the Tribunal's powers.⁶¹³ However, the subsequent practice of the parties to a treaty must be "in the application of the treaty" and it must "establish the agreement of the parties" (Article 31 para. 3 lit. b VCLT).⁶¹⁴ The third element enshrined in Article 21 ITLOS Statute ("all matters") was applied for the first time when the first advisory opinion was requested from the Tribunal in the *SRFC* case at which point several states objected to the Tribunal's advisory

609 *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, ITLOS Reports 2015, 4 (para. 60).

610 *Ibid.*, para. 59.

611 See however, Rüdiger Wolfrum, who argues that "Art. 138 of the Rules establishes a consensual solution. If the jurisdiction of international courts and tribunals is based upon the consensus of the parties concerned there is no reason to deny them to establish an additional jurisdiction.", R. Wolfrum, *Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes*, in: R. Wolfrum/I. Gatzschmann (eds.), *International Dispute Settlement: Room for Innovations?*, 2013, 35 (54).

612 Cf. *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, Declaration Judge Cot, ITLOS Reports 2015, 73 (para. 4).

613 So A. von Rebay/C. Oberle, 83 *ZaöRV* / *HJIL* 2 (2023), 283 (290–291).

614 Subsequent practice which falls below this threshold can be used as a supplementary means of interpretation under Article 32 VCLT; see ILC, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, 2018, Article 4 para. 3.

jurisdiction.⁶¹⁵ This objection seriously undermines the claim that there was an agreement of the parties expressed by subsequent practice.

Several states convincingly argued that neither the *doctrine of inherent powers* nor the *doctrine of implied powers* can provide a legal basis for the plenary advisory jurisdiction of the ITLOS.⁶¹⁶ While the two doctrines have sometimes been used as synonymous, they have distinct applications:

The idea that a certain power is an “inherent power” concerns the nature of the power in question.⁶¹⁷ Inherent powers are those powers which are inherent in any organ of a particular nature.⁶¹⁸ Inherent to any judicial organ are thus those powers which derive from its nature as a judicial organ.⁶¹⁹ Examples of this are the power of a court to determine its own jurisdiction in a certain case and the power to rule on provisional measures and preliminary objections.⁶²⁰

Implied powers, on the other hand, are powers “which, though not expressly provided in the [constituent instrument], are conferred upon it by necessary implication as being essential to the performance of its duties.”⁶²¹ The doctrine of implied powers refers to the idea that certain powers may be implicitly contained within an organ’s constituent instrument and need to be revealed by interpreting the organ’s functions and objectives.⁶²² The

615 So *M. Lando*, 29 LJIL 2 (2016), 441 (448); *T. Ruys/A. Soete*, 29 Leiden Journal of International Law 1 (2016), 155 (162).

616 See ITLOS Pleadings, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Written Statement of Australia para. 7; Written Statement of China paras. 9–15; Written Statement of Spain para. 6; Written Statement of the United Kingdom paras. 9–12. See also ITLOS Pleadings, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Written Statement of China para. 21.

617 *M. Paparinskis*, Inherent Powers of ICSID Tribunals: Broad and Rightly So, in: I. A. Laird/T. Weiler (eds.), *Investment treaty arbitration and international law*, 2012 (14–15).

618 *C. Brown*, Inherent Powers in International Adjudication, in: C. Romano/K. J. Alter/Y. Shany (eds.), *The Oxford Handbook of International Adjudication*, 2013, 828–847 (832–833).

619 *Ibid.*, 834.

620 *M. Paparinskis*, Inherent Powers of ICSID Tribunals: Broad and Rightly So, in: I. A. Laird/T. Weiler (eds.), *Investment treaty arbitration and international law*, 2012 (14–15).

621 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174 (182).

622 *M. Paparinskis*, Inherent Powers of ICSID Tribunals: Broad and Rightly So, in: I. A. Laird/T. Weiler (eds.), *Investment treaty arbitration and international law*, 2012 (14–15); *C. Brown*, Inherent Powers in International Adjudication, in: C. Romano/K. J.

doctrine examines which powers the States Parties to that instrument must have intended to confer on that organ in order for it to effectively perform its functions and achieve its objectives. The doctrine of implied powers thus is a kind of effective treaty interpretation.⁶²³ These implied powers may (but do not have to) go beyond the powers that are inherent to the respective organ.⁶²⁴

In practice, the two doctrines often overlap. The nature of the organ which forms the basis for its inherent powers is necessarily influenced by the content of its constituent instrument. While within a domestic context there may be an abstract concept of a judicial organ, the contours of an international court or tribunal are mostly determined by its constituent instrument. The constituent instrument also specifies that organ's functions which in turn determine which powers may have been implied by the constituent instrument's drafters.

It seems convincing to argue that the power to issue advisory opinions is not a competence which is inherent to an IC because the proper administration of justice does not necessarily rely on the existence of such a function.⁶²⁵ The inherent powers doctrine assumes that a judicial organ has those powers which it requires to exercise its existing functions, not however to extend its functions to include new ones. Arguing for the existence of such an inherent power also goes against international practice, since there are several ICs that do not possess an advisory function.⁶²⁶ Similarly, an advisory competence is not necessary for a judicial organ to effectively exercise its functions and achieve its objectives in the sense of the implied

Alter/Y. Shany (eds.), *The Oxford Handbook of International Adjudication*, 2013, 828-847 (840).

623 C. Brown, *Inherent Powers in International Adjudication*, in: C. Romano/K. J. Alter/Y. Shany (eds.), *The Oxford Handbook of International Adjudication*, 2013, 828-847 (839).

624 M. Paparinskis, *Inherent Powers of ICSID Tribunals: Broad and Rightly So*, in: I. A. Laird/T. Weiler (eds.), *Investment treaty arbitration and international law*, 2012 (14-15).

625 ITLOS Pleadings, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Written Statement of Australia para. 7; Written Statement of China paras. 9-15; Written Statement of Spain para. 6; Written Statement of the United Kingdom para. 9.

626 ICs without an advisory jurisdiction include the Court of Justice of the European Union (CJEU), the Appellate Body of the World Trade Organization (WTO AB) and the International Criminal Court (ICC).

powers doctrine.⁶²⁷ Thus, neither the inherent powers doctrine nor the implied powers doctrine provide a legal basis for the Tribunal's advisory jurisdiction.⁶²⁸

It seems that UNCLOS neither permits nor prohibits the ITLOS from giving advisory opinions.⁶²⁹ Considering that international organizations and their organs have only those powers which have been expressly or implicitly conferred upon them (principle of specialty)⁶³⁰, this finding seems to indicate that ITLOS has no plenary advisory jurisdiction. However, Article 21 ITLOS Statute indicates that the Tribunal's functions are not conclusively determined by UNCLOS and its Annexes. Instead, by including Article 21 in the ITLOS Statute, the States Parties clearly intended for the Tribunal's jurisdiction to be malleable to a certain extent.⁶³¹

The Tribunal's advisory practice is still in its infancy. It seems too early to tell whether the Tribunal was successful in asserting its advisory jurisdiction *vis-à-vis* the UNCLOS States Parties. On the one hand, only one of the nine states that rejected the Tribunal's advisory jurisdiction during the first advisory proceeding also did so during the second advisory proceeding.⁶³² Most states participating in the second advisory proceeding only addressed the specific conditions of the Tribunal's advisory jurisdiction, not its existence. However, many of the "doubters" did not participate in the second advisory proceeding at all.⁶³³ What is more, some states, while not submitting arguments on this point, prefaced their submissions with a statement expressing doubt as to the existence of the Tribunal's advisory

627 ITLOS Pleadings, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Written Statement of the United Kingdom paras. 11–12. See also ITLOS Pleadings, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Written Statement of China para. 21.

628 So also *M. Lando*, 29 LJIL 2 (2016), 441 (457).

629 Cf. *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, Declaration Judge Cot, ITLOS Reports 2015, 73 (paras. 3–4).

630 On the principle of specialty, see *infra*: § 5 Section B.II.

631 *A. von Rebay/C. Oberle*, 83 ZaöRV / HJIL 2 (2023), 283 (294–295).

632 ITLOS Pleadings, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Written Statement of China paras. 6–21.

633 Among the states not participating in the COSIS advisory proceeding were Argentina, Ireland, Spain, and the United States of America.

jurisdiction.⁶³⁴ However, considering that the Tribunal has clearly found that it has an advisory jurisdiction, it seems unlikely that the Tribunal will backpedal on this matter. The existence of the Tribunal's advisory jurisdiction thus seems settled for now. The focus of jurisdictional arguments thus shift to the *extent* of this advisory jurisdiction as can already be seen in the written submissions during the second advisory proceeding before the Tribunal.⁶³⁵

II. Use of ITLOS advisory opinions to settle inter-state disputes

I. Seabed Disputes Chamber

In principle, nothing in UNCLOS or ITLOS Statute prevents the SDC from giving advisory opinions on pending bilateral disputes, as long as the SDC receives a request which satisfies the jurisdictional requirements laid down in Article 191 UNCLOS. On the contrary, certain provisions in the Statute and the Tribunal's Rules speak in favor of such a broad advisory jurisdiction. Article 140 para. 2 ITLOS Statute states that the SDC shall be guided by the provisions relating to the Tribunal's contentious procedure when exercising its advisory function. Even more pertinent, Article 130 para. 2 ITLOS Rules expressly refers to the SDC advisory jurisdiction extending to pending disputes. It states:

“The Chamber shall consider whether the request for an advisory opinion relates to a legal question pending between two or more parties.

634 Australia submitted its views in the *COSIS* case “without prejudice to Australia's position on the advisory jurisdiction of the Tribunal”, see ITLOS Pleadings, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Written Statement of Australia para. 4. The United Kingdom repeated its arguments against an advisory jurisdiction of the Tribunal and merely “recognize[d] (...) that in that case, ITLOS found that it did have advisory jurisdiction” and asked the Tribunal to “clarify its reasoning with respect to the basis of its advisory jurisdiction in these proceedings”, Written Statement of the United Kingdom paras. 15a-16. France similarly did not expressly recognize the Tribunal's advisory jurisdiction but merely recognized that “the Tribunal's advisory jurisdiction now seems to be accepted”, Written Statement of France para. 9.

635 See ITLOS Pleadings, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Written Statement of Argentina para. 17; Written Statement of Australia para. 27; Written Statement of China para. 77; Written Statement of Ireland para. 2.11; Written Statement of the Netherlands paras. 2.3 et seq.; Written Statement of the United States paras. 36–7.

When the Chamber so determines, article 17 of the Statute applies, as well as the provisions of these Rules concerning the application of that article.”

It is worth noting that Article 130 para. 2 ITLOS Rules, which is based upon Article 102 para. 3 of the ICJ Rules⁶³⁶, does not oblige the SDC to reject requests for advisory opinions relating to pending disputes. Instead it merely stipulates that when the SDC determines that the request relates to a pending dispute, Article 17 ITLOS Statute applies, allowing the disputing states to appoint a judge ad-hoc of their nationality. One can derive from this provision that the fact that an advisory opinion relates to a pending bilateral dispute is not considered a problem *per se* as long as the procedural rights of the states that are directly affected by the outcome of the proceedings are protected.

While the ITLOS Rules are not binding treaty law, they are relevant for two reasons: First, the States Parties to UNCLOS have authorized ITLOS to formulate the ITLOS Rules in Article 16 ITLOS Statute.⁶³⁷ The ITLOS Statute “forms an integral part” of UNCLOS (Article 318 UNCLOS) and thus enjoys the same legal status as UNCLOS.⁶³⁸ The States Parties to UNCLOS are thus bound by Article 16 ITLOS Statute which authorizes the Tribunal to formulate its own rules on how to carry out its functions. Secondly, the ITLOS Rules reflect the practice and legal opinion of the ITLOS. They are thus a reliable guide on how the ITLOS and the SDC will deal with future cases. It is therefore likely that the SDC will not reject requests relating to pending bilateral disputes. Instead, the SDC will likely develop its own approach on how to deal with such requests. Considering the central role of discretion in the ICJ’s handling of such requests, the SDC will have to develop its position on whether the wording of Article 191 UNCLOS is compatible with exercising a similar kind of discretion.

636 R. Wolfrum, *Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes*, in: R. Wolfrum/I. Gatzschmann (eds.), *International Dispute Settlement: Room for Innovations?*, 2013, 35 (50).

637 Art. 16 ITLOS Statute stipulates: “The Tribunal shall frame rules for carrying out its functions. In particular it shall lay down rules of procedure.”

638 *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, ITLOS Reports 2015, 4 (para. 52).

2. ITLOS

The question whether advisory opinions may be requested from the ITLOS to settle inter-state disputes has not explicitly been raised so far. However, a related issue was raised during the second advisory proceeding before the ITLOS. It concerned the question whether the ITLOS advisory jurisdiction *ratione materiae* was limited to the interpretation of the “other agreement” which confers advisory jurisdiction on the ITLOS or also to other treaties including UNCLOS.

Several states argued that the Tribunal’s subject-matter jurisdiction is limited to the interpretation and application of the “other agreement” in the sense of Article 21 ITLOS Statute.⁶³⁹ Supporters of this view highlighted the wording “matters specifically provided for” in Article 21 ITLOS Statute.⁶⁴⁰ Accordingly, Article 21 ITLOS Statute limits the advisory jurisdiction to these matters governed by the separate agreement. Proponents of this view further argued that giving the Tribunal the power to interpret UNCLOS through another agreement outside UNCLOS would constitute an *inter se* agreement affecting the rights of third states, as it would require the Tribunal to interpret UNCLOS without the consent of the UNCLOS States Parties.⁶⁴¹ In principle, any question or treaty provision could thus be brought before ITLOS by means of a separate agreement. Such a conferral by another agreement would be at odds with the decision of UNCLOS not to confer an express competence upon the Tribunal to interpret UNCLOS in advisory proceedings.⁶⁴² Australia expressed this point most succinctly:

639 ITLOS Pleadings, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Written Statement of Argentina para. 17; Written Statement of Australia para. 27; Written Statement of China para. 77; Written Statement of Ireland para. 2.11; Written Statement of the Netherlands paras. 2.3 et seq.; Written Statement of the United States paras. 36–7.

640 ITLOS Pleadings, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Written Statement of the Netherlands para. 2.3.

641 “Permitting States Parties of one treaty to ask for an advisory opinion about questions under another treaty violates the consent of the States Parties to the other treaty”, ITLOS Pleadings, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Written Statement of the United States para. 37; see also Written Statement of Australia paras. 27–30.

642 ITLOS Pleadings, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Written Statement of Australia para. 28; cf. Written Statement of Ireland para. 2.11.

“Simply put, any form of jurisdiction to be exercised by an international court or tribunal must be based upon the consent of the relevant parties. The giving of an advisory opinion at the request of a limited number of States which will focus primarily on the interpretation and application of the provisions of other treaties without the consent of the States parties to those other treaties would be inconsistent with this principle.”⁶⁴³

Other states argue for a broader interpretation of Article 21 ITLOS Statute.⁶⁴⁴ Accordingly, the Tribunal’s advisory jurisdiction *ratione materiae* extends not only to the interpretation and application of the other agreement (as long as it relates to UNCLOS, see Article 138 ITLOS Rules) but also to all matters which have a “sufficient connection with the purposes and principles” of that agreement.⁶⁴⁵ Accordingly, the Tribunal may also interpret treaty provisions which relate to the other agreement’s subject-matter. The ITLOS particularly rejected the argument that it should not pronounce on the rights and obligations of third states not members to the other agreement without their consent.⁶⁴⁶ It argued that such consent was not necessary, as the advisory opinion had no binding force and was given only to the requesting organ in order to assist it in the performance of its activities under its constituent instrument (i.e., the other agreement).⁶⁴⁷

The ITLOS was clearly inspired by the jurisprudence of the ICJ. Like the Den Haag Court, the Hamburg Court rebutted the allegation of circumventing state consent by pointing out that its opinions were non-binding and not addressed to states but only to the requesting organ. Irrespective of the merit of this argument,⁶⁴⁸ this nonchalant reference to the ICJ’s advisory jurisprudence seems questionable at best. The ICJ’s advisory jurisdiction is expressly enshrined in the UNC and the ICJ Statute. As such,

643 ITLOS Pleadings, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Written Statement of Australia para. 30.

644 *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, ITLOS Reports 2015, 4 (paras. 68 et seq.); cf. ITLOS Pleadings, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Written Statement of Germany para. 12.

645 *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, ITLOS Reports 2015, 4 (para. 68), citing ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66, (77, para. 22).

646 *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, ITLOS Reports 2015, 4 (paras. 75–77).

647 Ibid.

648 See on this in detail *infra*: § 6 Section D.II.

it has been directly accepted by all UN Member States.⁶⁴⁹ What is more, the ICJ is an organ of the UN. When the ICJ states in its case law that it has a duty to give the requested advisory opinion and may only refuse to do so when there are compelling reasons, it refers to its duty as an organ of the UN to promote the activities of the UN and support the other UN organs in their activities. Furthermore, the ICJ advisory jurisdiction *ratione personae* is significantly more restricted than that of the ITLOS under Article 21 ITLOS Statute.⁶⁵⁰ Access to the ICJ's advisory jurisdiction is limited to the UNSC and the UNGA as well as certain UN organizations with the express authorization of the UNGA. As such, only UN organs and certain organizations that are linked to the UN have the right to request advisory opinions from the ICJ. The requesting organizations thus have quasi-universal state membership and resolutions of the organizations' organs are generally preceded by prolonged debates which allow for broad participation by the organization's Member States and are carried by a majority of the organization's Member States. As such, the views and concerns of a large number of states are taken into account early in the process of requesting an advisory opinion from the ICJ which bestows upon these requests significant legitimacy.⁶⁵¹ The idea to allow individual states or two or more states acting in concert to request advisory opinions from the ICJ was deliberately rejected, as it was feared that this would entice states to abuse the advisory jurisdiction to circumvent state consent to dispute settlement procedures.⁶⁵²

In contrast, the ITLOS's advisory jurisdiction under Article 21 ITLOS Statute in conjunction with other international agreements enables any "body" (see Article 138 ITLOS Rules) authorized by an international agreement to request an advisory opinion from the Tribunal. While Article 21 ITLOS Statute could be read to allow only organs of an international organization created by another agreement to request advisory opinions from the ITLOS, it could also be read to extend to individual states which are so authorized by an international agreement.⁶⁵³ Read broadly individual

649 Highlighting this important difference between the advisory jurisdiction of the two courts, see *T. Ruys/A. Soete*, 29 *Leiden Journal of International Law* 1 (2016), 155 (169–170).

650 So also *Ibid.*, 170.

651 So also *Ibid.*, 170.

652 See *supra*: § 1 Section D.II.

653 *T. Ruys/A. Soete*, 29 *Leiden Journal of International Law* 1 (2016), 155 (164); arguing for such a broad reading, see *R. Wolfrum*, *Advisory Opinions: Are they a*

states could thereby have recourse to the ITLOS advisory procedure. States could conclude such agreements merely for the reason of requesting an advisory opinion from the ITLOS.⁶⁵⁴ In contrast to requests for advisory opinions from the ICJ, the plenary advisory jurisdiction of the ITLOS thus allows a small number of states (as the requests by the SRFC and the COSIS illustrate)⁶⁵⁵ to request an advisory opinion on matters affecting a large number of states without the direct or indirect participation of those states. There is thus a significant potential for states to abuse the Tribunal's advisory jurisdiction by bringing a dispute with a third state before the ITLOS in the guise of advisory proceedings under Article 21 ITLOS Statute.⁶⁵⁶

III. Interim conclusions

The recent developments regarding the plenary advisory jurisdiction of the ITLOS raise several important aspects of advisory jurisdictions of ICs in general. First, it illustrates how ICs can use their power to formulate their own rules of procedure not only to specify but also assert their advisory function. By means of Article 138 ITLOS Rules, the Tribunal asserted its competence to give advisory opinions in full plenum, a power which was only implied by its constituent instrument. Secondly, it provides guidance on the role of state consent in the context of advisory proceedings. While state consent is not required for the *exercise* of advisory jurisdiction, it is required for the initial *creation* of the advisory jurisdiction.⁶⁵⁷ Thirdly, by indirectly enabling states to request advisory opinions via newly formed international organizations, the plenary advisory jurisdiction raises questions of legitimacy in advisory proceedings. The ITLOS will have to defend its extensive advisory jurisdiction against states that see it as a means for a small number of states to bring their international disputes before the ITLOS.

Suitable Alternative for the Settlement of International Disputes, in: R. Wolfrum/I. Gatzschmann (eds.), *International Dispute Settlement: Room for Innovations?*, 2013, 35 (54).

654 *T. Ruys/A. Soete*, 29 *Leiden Journal of International Law* 1 (2016), 155 (165).

655 The SRFC had seven Member States, the COSIS had six Member States when requesting the respective advisory opinion.

656 So also *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, Declaration Judge Cot, ITLOS Reports 2015, 73 (para. 9).

657 On this, see *M. Lando*, 29 *LJIL* 2 (2016), 441 (454 et seq.).

E. Conclusions on the Eastern Carelia doctrine before other ICs

All the ICs examined in this chapter share a common concern: to ensure that their advisory procedures do not adversely affect their other procedures, in particular their dispute settlement and individual complaint procedures. This concern about safeguarding the integrity of the dispute settlement procedure is also the driving force behind the ICJ's Eastern Carelia doctrine.⁶⁵⁸ The different ICs have developed different approaches to ensure the integrity of their respective procedures.

In the case of the ECtHR, the relationship between its advisory and its contentious procedures is explicitly regulated by its legal framework. The ECtHR maintains a strict separation between its contentious procedure and its advisory procedures. This strict separation is most apparent in the ECtHR's Article 47-procedure, under which the ECtHR may not deal with substantive human rights provisions or any matter which may come before the ECtHR through its other procedures. While under the Protocol 16-procedure, the ECtHR may deal with substantive human rights obligations that are the subject of a dispute pending before domestic courts, the ECtHR has made clear that its function is limited to providing legal guidance and not to settling the underlying dispute.

Lacking an express provision in its constituent instrument, the IACtHR had to develop its own approach on how to reconcile its different procedures. Similarly to the ICJ, the IACtHR found that its advisory opinions "cannot be used to conceal a contentious case nor prematurely obtain a ruling on a matter that could eventually be submitted to the Court as a contentious case" or to "resolve questions of fact".⁶⁵⁹ The IACtHR thus follows a similar doctrine to the Eastern Carelia doctrine, in that it does not allow its advisory function to be used to circumvent its contentious function. Another feature the IACtHR shares with the ICJ is its reluctance to reject requests for advisory opinions. The IACtHR has stated on several occasions that the fact that a request relates to an existing dispute would not necessarily prevent the Court from issuing an advisory opinion.⁶⁶⁰

658 See *infra*: § 6 Section D.

659 *Differentiated approaches with respect to certain groups of persons in detention (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments)*, Advisory Opinion OC-29/22, IACtHR Series A No. 29, para. 21.

660 *Restrictions to the Death Penalty, Advisory Opinion OC-3/83, IACtHR Series A No. 3, para 38; Compatibility of Draft Legislation with Article 8(2)(h) of the American*

The IACtHR has thus regularly responded to requests, even when they relate to existing disputes. The IACtHR has emphasized that it does not make a judicial decision on the underlying dispute, but merely interprets the relevant human rights instruments. However, there is an important difference between the approaches of the IACtHR and the ICJ: In contrast to the ICJ, the IACtHR refrains from making any findings on questions of fact or international responsibility. As indicated above, this is in line with the IACtHR's subject-matter jurisdiction which, unlike that of the ICJ, expressly limits the Court's powers to the interpretation of human rights provisions. By limiting the content of its advisory opinions to the interpretation of human rights instruments, the IACtHR draws a sharper distinction between its advisory and its contentious procedures. Only in contentious proceedings does the IACtHR make findings on questions of fact and international responsibility. In advisory proceedings, the Court will refer to the facts of a case only to demonstrate the practical relevance of its legal guidance on the interpretation of the applicable human rights instruments.⁶⁶¹ The IACtHR's approach resembles the approach proposed by Germany in the *Chagos* case, in which Germany asked the ICJ not to rule on the UK's international responsibility.⁶⁶²

There are several important lessons to be drawn from this excursus into other ICs for the study of the ICJ's advisory function: First, the ICJ is not the only IC that is concerned about a negative spill-over effect between its advisory and contentious procedures. This makes the approaches taken by other ICs an interesting reference point. Secondly, other ICs found that the mere fact that a request relates to an existing dispute does not necessarily prevent the Court from issuing an advisory opinion. They recognized a certain flexibility of the Court in deciding whether or not to give a requested advisory opinion. Thirdly, other ICs deal with the question of whether a request for an advisory opinion negatively affects

Convention on Human Rights, Advisory Opinion OC-12/91, IACtHR Series A No. 12, para. 28; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, IACtHR Series A No. 16, para. 45.

661 Cf. *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94, IACtHR Series A No. 14, para. 27; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, IACtHR Series A No. 16, para. 49.

662 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of Germany, paras. 120, 141.

the Court's other procedures as a question of admissibility. This echoes the ICJ's approach. Fourthly, a practical way of preventing a negative spill-over effect between advisory and contentious proceedings in this context is for the IC to refrain from making findings on the international responsibility of the states involved.