The Advisory Practice and Procedure of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law

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I. INTRODUCTION

In the last decade, states and international organizations, sometimes led by nongovernmental human rights organizations, have emphasized the advisory jurisdiction of international courts to address controversial or developing issues in international law. For instance, Mexico requested an advisory opinion from the Inter-American Court of Human Rights ("Inter-American Court" or "the Court") on the question of whether the Vienna Convention on Consular Relations ("Vienna Convention") requires that an arresting state inform detained foreigners that they have the right to confer with their national consulates. In its request, Mexico advised the Court that the issue arose because Mexican nationals, who had not been informed of their rights under the Convention, had been sentenced to death in the United States. The Inter-American Court, while refusing to involve itself in the underlying controversy between the states, interpreted the relevant provisions of the Vienna Convention to confer the right to receive consular assistance on detained foreign nationals. After the advisory opinion request was filed in The Right to Information on Consular Assistance, the U.S. Department of State disseminated a handbook to all local, state, and federal law enforcement

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2 Advisory Opinion OC-16/99, supra note 1, para. 2.

3 Id. para. 82.

departments in the United States explaining the importance of compliance with the procedures required by the Vienna Convention.  

An advisory opinion, which is less confrontational than a contentious case and not limited to the specific facts placed in evidence, often serves to give judicial expression to the underlying principles of the law.  

Whereas scholars have ample opportunity to attempt to influence international human rights law through their writings, the occasion for judicial pronouncements on the conceptual underpinnings of the law generally has been limited due to the few contentious cases that come before international tribunals.  

Advisory proceedings may, thus, be the primary judicial medium to address these debated issues.  

According to Judge Thomas Buergenthal, advisory proceedings, more so than contentious cases, "clarify or establish basic doctrines" of international law and "make important contributions to the conceptual evolution of the international law of human rights."  

Thus, an advisory opinion may be more influential than a judgment in a contentious case, in that it affects the general interpretation of international law for all states rather than exclusively for the parties to an individual case.  

The Inter-American Court of Human Rights has the broadest advisory jurisdiction of any international tribunal. The extensive judicial latitude in its advisory mode allows the Court to address many sensitive issues and doctrinal conflicts that have arisen since international human rights law evolved into a separate branch of public international law. The emergence of international human rights law, which protects individuals from the actions of the state, requires the conceptual rethinking of the traditional principles of public international law that have long governed relations between states.  

The traditional voluntarist view that states are the sole subjects of international law, and that human beings have virtually no independent rights, is not supported by the jurisprudence of the Inter-American Court or the wording of the American Convention.  

In emphasizing the distinct nature of international human rights law, the Court has consistently maintained the principle that "the rule most favorable to the individual must prevail."  

This position limits the voluntarist theory of international law, and divorces the state's international human rights obligations from the traditional concept of state reciprocity. In this regard, the

4 U.S. DEP'T OF STATE, PUB. NO. 10518, CONSULAR NOTIFICATION AND ACCESS: INSTRUCTIONS FOR FEDERAL, STATE AND LOCAL LAW ENFORCEMENT AND OTHER OFFICIALS REGARDING FOREIGN NATIONALS IN THE UNITED STATES AND THE RIGHTS OF CONSULAR OFFICIALS TO ASSIST THEM (1998). In a subsequent decision, the International Court of Justice (ICJ) held that the United States had violated the rights of Germany by not providing the LaGrand brothers with information as to consular assistance. LaGrand Case, (Ger. v. U.S.), 2001 I.C.J. 104 (June 27).


6 Id. at 18.

Thomas Buergenthal served as a judge on the Inter-American Court for its first twelve years of existence. He was generally considered to have been the Court's most influential and creative member. He is currently a judge on the International Court of Justice. Jo M. Pasqualucci, Thomas Buergenthal: Holocaust Survivor to Human Rights Advocate, 18 Hum. Rts. Q. 877, 884–890 (1996)).

7 Buergenthal, supra note 5 at 26–27.

Court has affirmed that "modern human rights treaties . . . are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States."\(^9\) Whereas traditional international law has at times presented a barrier to the rights of the individual, the Court's well-reasoned advisory opinions have consistently reinforced the independent foundation of international human rights law based on the rights of the individual.

This Article represents a comprehensive study of the practice of the Inter-American Court of Human Rights' advisory jurisdiction, and sets forth proposals for the refinement and expansion of that jurisdiction. An understanding of the Inter-American Court's advisory practice may serve to inform other regional human rights systems, which presently have more limited advisory jurisdiction or have not yet implemented their advisory jurisdiction. On the level of the Inter-American system, it may encourage organs of the Organization of American States (OAS) and states to submit relevant advisory opinion requests. It may also motivate nongovernmental organizations (NGOs) to lobby authorized parties to request opinions on issues of public concern and to file *amici* briefs. Moreover, should there be a protocol to the American Convention in the future, the suggestions made throughout this Article, if followed, would provide for an even stronger and more effective advisory jurisdiction.

Part II of this Article delineates the doctrinal divergence between traditional international law and international human rights law. Part III outlines the role of advisory jurisdiction in general. Part IV briefly describes the structure of the Inter-American human rights system. Part V analyzes the character and scope of the Inter-American Court's advisory jurisdiction including *compétence de la compétence*, jurisdiction *ratione personae*, jurisdiction *ratione materiae*, and the author's proposed expansion of that jurisdiction. Part VI analyzes the Court's discretion in choosing whether to exercise its advisory jurisdiction, and suggests a three-pronged test for the Court to use in making its determination. Part VII discusses the liberalization of the Court's procedures in its consideration of advisory opinion requests. Finally, Part VIII summarizes state and institutional changes made in response to the advisory opinions of the Inter-American Court.

## II. DOCTRINAL DIVERGENCE BETWEEN TRADITIONAL INTERNATIONAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW

The emergence of international human rights law as a separate and formal branch of public international law necessitates a reevaluation of the foundational concepts of public international law. International human rights law developed primarily in the wake of the atrocities of World War II, and only gradually gained acceptance. As late as the 1960s, influential members of the American Society of International Law argued that human rights law was not a

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part of international law. Professor Louis Sohn described the advent of human rights law as a "revolution," observing that, "the human rights revolution that began at the 1945 San Francisco Conference of the United Nations has deprived the sovereign States of the lordly privilege of being the sole possessors of rights under international law."

Traditional international law was founded on the basic doctrine of state sovereignty which allows a state almost complete freedom in the conduct of its internal affairs, unless the state voluntarily relinquishes certain aspects of its sovereignty. Without voluntary relinquishment, external entities, such as other states or international organizations, ordinarily cannot interfere. Even a state’s treatment of its nationals was traditionally considered to be a matter of state sovereignty not subject to outside intervention. A state’s voluntary act or omission, however, has long been held to cede subject matter that was originally under its sovereignty to the domain of international law. The state could cede sovereignty by ratifying a treaty or failing to persistently object to an emerging principle of customary international law. This positivist or classical view thus holds that international law is derived from the voluntary will of the state. It was expressed in the celebrated statement by the Permanent Court of International Justice in the Lotus case, which determined that,

[i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

The doctrine dictates that all international norms are a result of willful state acts. Thus, states arguably create international law by arriving at agreement on the rule or law. A treaty, according to this view, is a reciprocal contract between states.

The voluntary aspect of international law was defensible when international law pertained exclusively to obligations between states. Under this doctrine, many serious but politically sensitive questions could not be considered by international tribunals because states involved in the dispute would not consent to international adjudication of the case. In this way, the development of many aspects of international law, especially human rights, was hindered. Today, however, when international law is increasingly

13 Id. at 289–97; cf. Sohn, supra note 11, at 4–5. The doctrine of humanitarian intervention has permitted States to intervene when the “[t]yrannical conduct of a government towards its subjects and gross mistreatment of national or religious minorities have occasionally reached a level at which intervention in the name of humanity [is] considered permissible.” Id.
envisioned as regulating state obligations to individuals, organizations, and the global environment, the voluntarist position is losing ground.

More recently, international courts and commentators have suggested that the voluntary nature of state obligations is not appropriate in international human rights law. Judge Cançado Trindade cites several factors supporting this position, including the objective nature of human rights obligations, the independence of treaty terms from the domestic law of the state, the collective guarantee underlying human rights treaties, the broad scope of the protection, and the narrow interpretation of the express restrictions permitted. He suggests that

[t]hese elements converge in sustaining the integrity of human rights treaties, in seeking the fulfillment of their object and purpose, and, accordingly, in establishing limits to State voluntarism. From all this one can detect a new vision of the relations between the public power and the human being, which is summed up, ultimately, in the recognition that the State exists for the human being and not vice versa.

If international human rights law is to continue to develop a conceptual framework separate from the dictates of traditional public international law, international tribunals must avail themselves of the full range of authority possible under widely ratified treaties. Treaties that confer advisory jurisdiction do not require that state parties independently accept advisory jurisdiction as they often require in relation to contentious jurisdiction. It is usually sufficient that a state ratify the treaty that confers advisory jurisdiction on a tribunal. Consequently, the tribunal may have the opportunity to issue opinions on controversial subjects that would not be raised by states, and thereby contribute to the further advancement of international human rights law.

III. ADVISORY OPINIONS IN GENERAL

An advisory opinion in the international legal arena is an authoritative but nonbinding statement or interpretation of international law by an international
tribunal or arbitral body. Advisory proceedings are less confrontational than contentious proceedings, in that states are not parties and do not have to defend themselves against formal charges. A tribunal does not have the authority under its advisory jurisdiction to order judicial sanctions or impose duties or obligations on any state. An advisory opinion, therefore, must encourage rather than compel a course of action.

Most treaties that provide for tribunal oversight endow those tribunals with advisory jurisdiction. For example, the Charter of the United Nations authorizes the International Court of Justice (ICJ) to render advisory opinions. The European Convention on Human Rights and Fundamental Freedoms ("European Convention") now accords the European Court of Human Rights a restricted advisory jurisdiction. The Law of the Sea Convention provides the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea with advisory jurisdiction. Most recently, the Protocol to the African Charter on Human and People's Rights ("Protocol to the African Charter"), establishing an African Court to enforce human rights in the region, empowers the Court with advisory jurisdiction. Historically, on the international level, several international bodies, including the International Bureau of the Universal Postal Union, the International Commission for Air Navigation, and the League of Nations Advisory and Technical Committee for

20 Id.

21 Advisory Opinion OC-3/83, Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights), Inter-Am. Ct. H.R. (ser. A) para. 22 (Sept. 8, 1983); see also, Thomas Buergenthal, The Inter-American Court, Human Rights and the OAS, 7 HUM. RTS. L.J. 157, 159-60 (1986). Judge Buergenthal stated that, "an advisory opinion... does not stigmatize a government as a violator of human rights... however, it makes the abstract legal issue perfectly clear for any government wishing to avoid being held in violation of its international legal obligations." Id. at 159-60.


Communications and Transit have had the statutory authority to issue advisory opinions. National courts in many countries also possess advisory jurisdiction. Courts in Colombia, Ecuador, Honduras, Panama, El Salvador, Norway, and Sweden, among others, have long had this authority. Although the U.S. Supreme Court holds that it does not have authority under the U.S. Constitution to issue advisory opinions, many individual state constitutions within the United States do authorize state supreme courts to respond to requests for advisory opinions.

The utility of advisory opinions in international law has become widely accepted. In effect, advisory opinions contribute to an international common law and to the resolution of doctrinal differences. They also provide an alternative nonconfrontational means to settle certain international disputes.

IV. THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

A basic understanding of the structure and function of the Inter-American human rights system is necessary to understand the role of the advisory jurisdiction of the Inter-American Court. The Charter of the Organization of American States (OAS Charter), which is the constitutive treaty forming the alliance between the American states, established the Inter-American Commission on Human Rights ("Inter-American Commission" or "Commission") as an organ of the OAS. A subsequent treaty, the American Convention on Human Rights (American Convention), set forth the rights protected, and empowered two bodies to enforce those rights: the already-established Inter-American Commission, located in Washington, D.C., and the Inter-American Court of Human Rights, seated in San Jose, Costa Rica. Twenty-four of the thirty-five member states of the OAS currently are parties.

28 HUDSON, supra note 22, at 484-85.
30 HUDSON, supra note 22, at 486, nn. 20, 21.
32 These states include Colorado, Florida, Maine, Massachusetts, New Hampshire, Rhode Island, and South Dakota. In other states, including Alabama and Delaware, the authority to issue advisory opinions has been conferred by statute. HUDSON, supra note 22, at 485, nn. 15, 16.
34 Id. art. 53. The Commission was established in 1959 by resolution of the OAS, and was granted status as one of the "principle organs" of the OAS in 1970, pursuant to the Protocol of Buenos Aires, supra note 33 (entered into force Feb. 27, 1970). See Christina Cerna, The Inter-American Commission on Human Rights: Its Organization and Examination of Petitions and Communications, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS, supra note 16, at 65, 68.
36 Id. art. 33.
to the American Convention, thereby contracting to observe the rights it enumerates. These rights include, *inter alia*, the right to life, humane treatment, freedom from slavery, personal liberty, a fair trial, privacy, assembly, property, and freedom of religion.

An individual who alleges that a state party to the American Convention violated his or her rights may file a complaint with the Inter-American Commission. The Commission receives hundreds of complaints a year, many alleging egregious human rights violations, including torture, extrajudicial executions, and forced disappearances of individuals. If the state does not cooperate with the Commission in resolving the case or does not comply with the recommendations of the Commission, the Commission may refer the case to the contentious jurisdiction of the Inter-American Court. However, the Inter-American Court can only exercise contentious jurisdiction over a state that has accepted the Court’s jurisdiction as binding *ipso facto* or by special agreement for a particular case. Twenty-one states have accepted this compulsory jurisdiction, and can therefore be named as respondents in contentious cases before the Court.

Under its contentious jurisdiction, the Court must interpret the American Convention in relation to the denounced acts in a specific case. The Court has stated that “*the contentious jurisdiction of the Court is intended to protect the rights and freedoms of specific individuals, not to resolve abstract questions.*” The Court must determine the truth of the allegations and determine whether they constitute a violation of the American Convention that can be imputed to the state party. If it determines that the state is accountable for a violation, the Court may order the state to make reparations to the injured

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37 The states parties to the American Convention are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. The states parties are listed in *BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM*, O.A.S. Doc. OEA/Ser.L.V/I.4 rev. 8, 48 (May 22, 2001), available at http://www.cidh.oas.org/document.htm [hereinafter *BASIC DOCUMENTS*]. Trinidad & Tobago ratified the American Convention but then denounced it on May 26, 1998, which became effective on May 26, 1999.

38 American Convention, *supra* note 35, arts. 4-8, 11, 12, 15, 21.

39 *Id.* art. 44.

40 *Id.* art. 51(1). Only the states parties to the case and the Commission have standing. *Id.* art. 61.

41 A state party to the American Convention accepts the Court’s jurisdiction as binding *ipso facto* when it files a special declaration to that effect. *Id.* art. 62.

42 The following States have accepted the contentious jurisdiction of the Court: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. *BASIC DOCUMENTS, supra* note 37, at 48. Trinidad and Tobago had accepted the jurisdiction of the Court but has since denounced the Court’s jurisdiction and the American Convention.


party.\textsuperscript{45} The state party is legally bound to comply with the judgment of the Court.\textsuperscript{46}

Unlike its contentious jurisdiction, the Inter-American Court's advisory jurisdiction can be exercised without the additional consent of the states. Even member states of the OAS that have not ratified the American Convention may request an advisory opinion of the Court or find their actions scrutinized and subject to review under the advisory jurisdiction of the Court.\textsuperscript{47} The Court has explained that its advisory jurisdiction "offers an alternate judicial method of a consultative nature, which is designed to assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process."\textsuperscript{48} All member states are informed of an advisory opinion request and can submit briefs and participate in the public hearing.\textsuperscript{49} While an advisory opinion is not binding in the same sense as the Court's judgment in a contentious case, it does have undeniable legal and moral effects on both national and international law.\textsuperscript{50}

V. CHARACTER AND SCOPE OF THE INTER-AMERICAN COURT'S ADVISORY JURISDICTION

The Inter-American Court's advisory jurisdiction is governed by Article 64 of the Convention,\textsuperscript{51} which provides:

1. The member states of the Organization [of American States] 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.\textsuperscript{52}


\textsuperscript{46} American Convention, \textit{supra} note 35, art. 68(1).

\textsuperscript{47} Advisory Opinion OC-3/83, \textit{supra} note 21, para. 43.

\textsuperscript{48} \textit{Id.}

\textsuperscript{49} Rules of Procedure of the Inter-American Court of Human Rights, art. 62(1), \textit{approved by the Court at its Forty-Ninth Regular Session held Nov. 16–25, 2000 (entered into force June 1, 2001), reprinted in BASIC DOCUMENTS, supra note 37, at 186.}

\textsuperscript{50} Advisory Opinion OC-15/97, Reports of the Inter-American Commission of Human Rights (art. 51 of the American Convention on Human Rights), Inter-Am. Ct. H.R. (ser. A) para. 26 (Nov. 14, 1997); see also, discussion \textit{infra} Part VIII.

\textsuperscript{51} American Convention, \textit{supra} note 35, art. 64; see also Statute of the Inter-American Court of Human Rights, Adopted by the General Assembly of the OAS at its Ninth Regular Session, held in La Paz, Bolivia, Oct. 1979 (Res. No. 448), art. 2(2), \textit{reprinted in BASIC DOCUMENTS, supra note 37, at 155.}

\textsuperscript{52} American Convention, \textit{supra} note 35, art. 64.
The legislative history of the American Convention reveals that the drafters intended to define the advisory jurisdiction of the Inter-American Court “in the broadest terms possible.” The original draft of the Convention provided only that the Inter-American Commission, the OAS General Assembly, and the Permanent Council could consult the Court for an interpretation of the American Convention or other treaties, and that the state signatories to the Convention could consult the Court regarding the compatibility of their domestic laws with those international instruments. The text of the provisions was later expanded to its present form to allow other organs and OAS member states to request advisory opinions in particular circumstances. The purpose of the Court’s advisory jurisdiction is “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.” In the exercise of this jurisdiction, the Court clarifies the object, purpose, and meaning of international human rights norms, and provides the requesting party with a judicial interpretation of the law or provision in question. When the Inter-American Court is presented with a request for an advisory opinion it must first determine whether the request is within its jurisdiction ratione personae and ratione materiae. This requires the Court to determine the nature of the advisory opinion request and the standing of the body submitting the request. The Court will then determine whether there is a valid reason to decline to exercise its jurisdiction.

A. Compétence de la Compétence

The Inter-American Court, in accordance with the principle of compétence de la compétence, exercises its inherent authority to determine whether it has jurisdiction to issue an advisory opinion. This principle provides that the court itself is competent to decide the question of its own jurisdiction. As explained by Judge Cançado Trindade,


55 American Convention, supra note 35, art. 64.

56 Advisory Opinion OC-1/82, supra note 53, para. 25. The Inter-American Court’s advisory jurisdiction was initially more instrumental in developing international human rights law in the Americas than was its contentious jurisdiction. For an extensive analysis in Spanish of the first five years of the advisory jurisdiction of the Inter-American Court, see MANUEL E. VENTURA ROBLES & DANIEL ZOVATO, LA FUNCION CONSULTIVA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS: NATURALEZA Y PRINCIPIOS 1982–1987 (Instituto Interamericano de Derechos Humanos, Editorial Civitas, S.A., ed. 1989). The Court, which came into existence after the entry into force of the American Convention in 1979, first exercised its advisory jurisdiction in 1982. The Convention entered into force when the eleventh State deposited its instrument of ratification with the General Secretariat of the Organization of American States. American Convention, supra note 35, art. 74.

57 See, e.g., Advisory Opinion OC-1/82, supra note 53, para. 40.


59 By comparison, the International Court of Justice also held in the Nottebohm Case that the principle that “an international tribunal has the right to decide as to its own jurisdiction” is a general principle of international law. Nottebohm Case (Liech. v. Guat.), 1953 I.C.J. 111, at 119 (Nov. 18). The
Whenever the Court decides to respond or not to a request for an Advisory Opinion, it is exercising the power to determine its own competence, derived from a principle of general International Law, and not conditioned by the behaviour of the requesting State or organ. Such principle, in turn, rests, not on the "will of the parties" (that is the State or organ concerned), as conceived in the past... but rather on the intrinsic nature of the international judicial organ.\(^{60}\)

The issue of whether the court has the authority to determine its own jurisdiction was raised when the Commission asked the Court for a determination of when the American Convention enters into force for those states that ratify it with reservations.\(^{61}\) Traditionally, all issues regarding reservations to treaties in the Inter-American system had been determined through consultations between the Secretary General of the OAS and the member states.\(^{62}\) In its advisory opinion *The Effect of Reservations*, the Court distinguished the American Convention from other OAS treaties by noting that the Convention establishes a formal process according to which the Inter-American Court will resolve disputes involving the interpretation of the Convention.\(^{63}\) Thus, the Court held that the Court itself is the most appropriate body to exercise jurisdiction and “render an authoritative interpretation of all provisions of the Convention,” including provisions relating to the entry into force of the Convention.\(^{64}\)

The Court has also assumed the related inherent authority to clarify, define, or even reformulate the questions submitted to it so as to consider only those issues that fall within its jurisdiction.\(^{65}\) This authority is necessary when the advisory request contains both acceptable and extraneous issues. In *The Enforceability of the Right to Reply or Correction*, Costa Rica combined two issues in its advisory opinion request.\(^{66}\) The first issue concerned the interpretation of the American Convention, whereas the second issue was purely within the domestic jurisdiction of the state.\(^{67}\) The Court separated the two issues and dealt only with the former, over which it had jurisdiction.\(^{68}\) The Court’s only other option would have been to reject the entire request until Costa Rica had modified it, which would have been unnecessarily time-consuming.

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\(^{60}\) Advisory Opinion OC-15/97 (Judge Cançado Trindade concurring), *supra* note 50, para. 6.

\(^{61}\) Advisory Opinion OC-2/82, *supra* note 9, para. 11.

\(^{62}\) *Id.* para. 13. The Secretary General is the depositary of all OAS treaties.

\(^{63}\) *Id.*

\(^{64}\) *Id.*


\(^{67}\) *Id.* para. 14.

\(^{68}\) *Id.*
The determination of whether the Court has jurisdiction to consider an advisory opinion request can only be made by the plenary Court. In Restrictions to the Death Penalty, the Court rejected Guatemala's argument that the Permanent Commission of the Court, comprised of the President, Vice President, and a third Judge named by the President, should have ruled on the issue of jurisdiction. The Court held that the Permanent Commission does not have the authority to make a decision on jurisdiction even in advisory proceedings.

B. Jurisdiction Ratione Personae (Standing)

All member states of the OAS and all the organs listed in the applicable section of the OAS Charter have standing under Article 64 of the American Convention to request an advisory opinion of the Inter-American Court. This is a much broader range than is or has been authorized for the Permanent Court of International Justice, the International Court of Justice, or the European Court of Human Rights. The future African Court on Human and People's Rights will have a more extensive jurisdiction ratione personae in that the Organization of African Unity (OAU), OAU member states, any OAU organ, and "any African organization recognized by the OAU will be authorized to request advisory opinions."

One limitation on the advisory jurisdiction of the Inter-American Court is that it does not have the authority to render an advisory opinion on its own

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69 Advisory Opinion OC-3/83, supra note 21, paras. 16-17. The Court's Rules of Procedure provide that a judgment or interlocutory decision to discontinue a case must be "rendered exclusively by the Court." Rules of Procedure of the Inter-American Court of Human Rights, supra note 49, art. 29.

70 Advisory Opinion OC-3/83, supra note 21, paras. 13, 16. The function of the Permanent Commission is to assist and advise the President of the Court. Rules of Procedure of the Inter-American Court of Human Rights, supra note 49, art. 6.

71 Advisory Opinion OC-3/83, supra note 21, para. 16.

72 OAS CHARTER, supra note 33, art. 53.

73 American Convention, supra note 35, art. 64.

74 Article 14 of the Covenant of the League of Nations provided in relevant part "[t]he Court shall also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." LEAGUE OF NATIONS COVENANT art. 14, available at http://www.tufts.edu/departments/fletcher/multi/www/league-covenant.html (last visited April 1, 2002). Two organs, the League of Nations Assembly and Council, were authorized to make advisory opinion requests before the Permanent Court of International Justice. Although there was no express provision that the request must relate to the organ's sphere of competence, "[i]n the case relating to Danzig and the International Labor Organization, Judge Anzilotti expressed the view that as the admission of members of the League of Nations 'is a matter falling within the exclusive jurisdiction of the Assembly,' it would seem to follow that 'the Assembly alone could ask the Court for an advisory opinion' relating to such admission." HUDSON, supra note 22, at 488.

75 U.N. CHARTER art. 96. The General Assembly and the Security Council may request advisory opinions of the ICI. Other U.N. organs and specialized agencies may be authorized by the General Assembly to request advisory opinions on legal questions.

76 The European Convention on Human Rights restricts standing to request an advisory opinion to the Committee of Ministers. European Convention, supra note 25, art. 47(1). Van Dijk and van Hoof suggest that, in addition, the European Commission on Human Rights, the Parliamentary Assembly of the Council of Europe, and perhaps even the Contracting States to the European Convention should be entitled to request an advisory opinion of the European Court. P. VAN DUK & GJ.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 265 (3d ed. 1998).

77 Protocol to the African Charter, supra note 27, art. 4(1).
motion.\textsuperscript{78} Thus, the Inter-American Court cannot identify a problem of interpretation and then initiate advisory proceedings \textit{ex officio}. Judge Cançado Trindade is of the opinion that the Court should not be authorized to issue advisory opinions. He opined that if the Court itself could freely offer advisory opinions it "would be tantamount to transforming itself, \textit{ultra vires}, into an international legislator."\textsuperscript{79}

1. Standing of Member States to Request Advisory Opinions

Article 64(1) authorizes OAS member states to request advisory opinions concerning the interpretation of the American Convention and other treaties.\textsuperscript{80} All states in the western hemisphere, except Cuba, are member states of the OAS.\textsuperscript{81} Thus, any OAS member state has an absolute right to request an advisory opinion, even if the state is not a state party to the American Convention.\textsuperscript{82}

An OAS member state also has standing under Article 64(2) of the American Convention to request advisory opinions as to whether its domestic laws are compatible with the American Convention and other treaties. A request under this provision must be made by an entity empowered to speak for the state on the international plane.\textsuperscript{83} In general, the executive branch of the government has the authority to engage in international relations, and is thus the proper authority to request an advisory opinion. In \textit{Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica}, a Committee of the Legislative Assembly that was empowered to study amendments to the Costa Rican Constitution initially submitted the request to the Court.\textsuperscript{84} The Court, however, did not become seized of the matter until the Minister of Foreign Affairs, who was entitled to act for the government, filed a formal request for an advisory opinion.\textsuperscript{85} In no instance may one state utilize the advisory jurisdiction of the Court under Article 64(2) to elicit an opinion on another state's domestic laws, even if those laws have an effect on the requesting state.

\textsuperscript{78} Advisory Opinion OC-15/97 (Judge Cançado Trindade concurring), \textit{supra} note 50, para. 4.
\textsuperscript{79} Id. para. 37.
\textsuperscript{80} American Convention, \textit{supra} note 35, art. 64(1).
\textsuperscript{81} OAS CHARTER, \textit{supra} note 33. The member states of the OAS are Antigua & Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts & Nevis, Saint Lucia, Saint Vincent & the Grenadines, Suriname, Trinidad and Tobago, United States of America, Uruguay, and Venezuela. Although Cuba ratified the OAS Charter, its membership was suspended in 1962 due to its form of government.
\textsuperscript{82} American Convention, \textit{supra} note 35, art. 64(1). Christina Cerna, Human Rights Specialist at the Inter-American Commission, explains that "[i]t is an unusual feature of this multilateral convention that it grants certain rights to States which are not parties to it, and reflects the expectation of its drafters that its complete implementation would take some time, during which non-States parties should be granted a limited access to the Court in order to facilitate their eventual entry into the system." Christina Cerna, \textit{The Structure and Functioning of the Inter-American Court of Human Rights (1979–1992)}, Brit. Y.B. Int’l L. 135, 141 (1992).
\textsuperscript{84} Id.
\textsuperscript{85} Id.
States have accused the Inter-American Commission of encroaching on their right to request an advisory opinion in regard to their domestic laws. When Peru’s draft constitution broadened the application of the death penalty, Peru did not request an advisory opinion as to whether the proposed constitutional provisions were in keeping with the American Convention. The Commission, however, in *International Responsibility for the Promulgation and Enforcement of Laws* asked the Court for an advisory opinion on the question. Peru then accused the Commission of seeking “to obtain indirectly what it is prevented from achieving directly,” meaning that the Commission could not bring a contentious case against Peru. The Court held that the Commission had standing to request the advisory opinion under Article 64(1), in light of its function to make recommendations to member states as to the compliance of their domestic laws with the American Convention. Consequently, if the Commission phrases its request correctly, the Court will not find that it has infringed on the state’s rights to request an opinion on the compatibility of a domestic law with its international obligations.

2. **Standing of OAS Organs to Request Advisory Opinions Under Article 64(1)**

Article 64(1) of the Convention authorizes organs of the OAS to request advisory opinions. These OAS organs include: the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, the Councils, the Inter-American Juridical Committee, the Inter-American Commission on Human Rights, the General Secretariat, the Specialized Conferences, and the Specialized Organizations. The American Convention limits the standing of

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87 Advisory Opinion OC-14/94, *supra* note 44, para. 1. The American Convention provides that “in countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.” American Convention, *supra* note 35, art. 4(2).


89 *Id.* para. 25.

90 American Convention, *supra* note 35, art. 64(1). These organs are now listed in Chapter VIII of the OAS Charter, as amended by the 1985 Protocol of Cartagena de Indias. OAS CHARTER, *supra* note 33, art. 53.

The U.N. Charter similarly allows U.N. agencies, under certain circumstances, to request advisory opinions on legal questions arising within the scope of their activities. Under the Charter of the United Nations, “[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.” Furthermore, “[o]ther organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.” U.N. CHARTER art. 96.

91 See BASIC DOCUMENTS, *supra* note 37, at 2–3, for a description of the functions of the OAS organs. The Specialized Organizations include the Pan American Health Organization, the Inter-American Institute for Cooperation on Agriculture, the Inter-American Indian Institute, the Inter-American Institute of Geography and History, the Inter-American Children’s Institute, and the Inter-American Commission of Women. *Id.* at 3.
OAS organs to questions within "their spheres of competence."92 A question within the sphere of competence of an OAS organ is one in which that entity has a "legitimate institutional interest."93 It is initially for each organ to decide whether its request falls within its sphere of competence.94 Ultimately, however, it is within the providence of the Court, based on the OAS Charter, and the constitutive instrument and legal practice of the organ requesting the opinion, to determine whether the subject matter of a request is within the organ's sphere of competence.95 The Court used this approach to specify that the Inter-American Commission on Human Rights has an absolute right to request advisory opinions on the American Convention.96 When the Commission requests an opinion concerning other treaties, however, it is required to explain its competence to make the request.97

Advisory opinions could be instrumental in allowing organs that regularly deal with human rights matters to effectively carry out their activities. These opinions could facilitate the efficient functioning of the OAS organs by clarifying difficult legal questions that impede their action.98 For example, the Inter-American Commission of Women could submit an advisory request to the Court to assist in its efforts to promote human rights relating to women in the United Nations, the International Labor Organization, and under OAS treaties.99 Also, the OAS General Assembly could request an advisory opinion to resolve questions on any draft resolution calling upon an OAS member state to comply with its human rights obligations under the American Convention or other treaty.100 Buergenthal opined that the General Assembly of the OAS should also have an absolute right to request advisory opinions of the Court due to the broad nature of its sphere of competence.101 Notwithstanding the advantages that would accrue to organs that request advisory opinions, the Inter-American Commission is the only organ that has availed itself of the Court's advisory jurisdiction to date.

92 American Convention, supra note 35, art. 64(1); OAS CHARTER, supra note 33, art. 53.
93 Advisory Opinion OC-2/82, supra note 9, para. 14.
94 Id.
95 Id. paras. 15–16.

The ICJ, when confronted with the question of the scope of an agency's responsibilities, has taken a restrictive view. For example, when the World Health Organization (WHO) requested an ICJ advisory opinion as to whether the dangerous health and environmental effects that would result from a state's deployment of nuclear weapons would breach the state's international obligations, including those set forth in the WHO Constitution, the ICJ rejected the request. The Court found that it was outside the scope of the WHO's responsibilities. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J. 66, 84 (July 8). However, the ICJ did issue an advisory opinion on this question upon request by the U.N. General Assembly. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 227–29 (July 8), 35 I.L.M. 809, 814–15.

96 Advisory Opinion OC-2/82, supra note 9, para. 16.
97 Rules of Procedure of the Inter-American Court of Human Rights, supra note 49, art. 60(2).
98 The Permanent Court of International Justice issued six opinions that dealt with the functioning of the International Labor Organization, two with the work of the Greco-Turkish Mixed Commission for the Exchange of Greek and Turkish Populations, and others dealing with the Greco-Bulgarian Emigration Commission and the European Commission of the Danube. HUDSON, supra note 22, at 523.
99 Buergenthal, supra note 5, at 5.
100 Id. at 4; see also SCOTT DAVIDSON, THE INTER-AMERICAN COURT OF HUMAN RIGHTS 102 (1992).
101 Buergenthal, supra note 5, at 5.
3. Proposals to Allow Other Entities to Request Advisory Opinions

Despite the broad standing permitted by the American Convention, there are important entities that are not authorized to request advisory opinions. Any attempts to broaden the Inter-American Court’s advisory jurisdiction at this time should focus on changes that can be made without a revision of the American Convention or of the Statute of the Court. In the future, if there is a protocol to the Convention, it should include changes to expand standing to request an advisory opinion.

a. Entities Within the OAS

Additional entities within the OAS could benefit from standing to request an advisory opinion. For example, in view of the political powers of the Secretary General, the office would be aided by the authority to ask the Inter-American Court for advice on legal questions concerning human rights. The Legal Counsel to the OAS, who may be presented with questions concerning human rights, could also benefit from standing to request an advisory opinion. The Legal Counsel should not be obliged to make a preliminary determination of human rights issues before a state or authorized organ can raise the issue with the Court. For example, prior to the Court’s advisory opinion on the Effect of Reservations, the OAS Legal Counsel determined that a state, upon the deposit of its ratification, was not necessarily a party to the American Convention. The Court disagreed with the decision of the Legal Counsel and determined that the Convention did enter into force for a state as of the moment of deposit of the state’s instrument of ratification or adherence. It would be more efficient if the Legal Counsel had standing to directly request an advisory opinion in relevant cases.

b. Domestic Courts in Member States

The advisory jurisdiction of the Inter-American Court could also be expanded to allow domestic courts in OAS member states to request advisory opinions on questions of international human rights law that arise in domestic cases. This procedure is successful in Europe where any court in a member state of the European Union has standing to request a ruling from the European Court of Justice on questions of European Union law that arise before a national tribunal. The American Bar Association has recommended that the United States approve the expansion of the advisory jurisdiction of the ICJ to allow it to consider international law questions referred to it by national

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102 Cema, supra note 82, at 141.
103 Buergenthal, supra note 5, at 21. Judge Buergenthal, who was sitting on the Court at the time, explains the background of the Commission’s request. The opinion in the case does not mention the OAS Legal Counsel’s prior determination.
104 Advisory Opinion OC-2/82, supra note 9, para. 37.
courts. Such a procedure would also be beneficial in the Inter-American system.

Alternately, domestic courts could be authorized to request an advisory opinion through an already-established OAS organ or through the executive branch of their domestic government. The existing OAS organ that would be appropriate to carry out this function is the Inter-American Juridical Committee, which serves as an advisory body to the OAS on legal matters and promotes the codification and progressive development of international law. The primary benefit of this procedure is that it would not require an amendment to the American Convention. The principal limitation is that it would require more time, in that the domestic court would need to petition the OAS organ, which then would make the request of the Court.

c. Legally Recognized Nongovernmental Organizations

Nongovernmental organizations that are legally recognized in any OAS member state could also be authorized to request an advisory opinion, although this change would require a protocol to the American Convention. Precedent already suggests an expanded role for NGOs in the Inter-American human rights system; the American Convention provides that "any nongovernmental entity legally recognized in one or more member states of the Organization may lodge petitions with the Commission." Moreover, persuasive authority exists internationally in that the proposed African court will have jurisdiction to respond to advisory opinion requests from "any African organization recognized by the OAU."

At present, the only avenue available to NGOs in the Inter-American system is to attempt to convince states or authorized organs to request an advisory opinion. In Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, the Inter-American Press Association successfully petitioned the Costa Rican government to request an advisory opinion concerning the compatibility of a Costa Rican law with the American Convention. The law, which was similar to laws in other Latin American countries, mandated the compulsory membership of journalists in associations


107 BASIC DOCUMENTS, supra note 37, at 2.

108 Id.

109 LORD MCNAIR, LAW OF TREATIES 23 (1961) (stating that a protocol is essentially an amendment to a treaty to which states are bound only upon consent).

110 American Convention, supra note 35, art. 44.

111 Protocol to the African Charter, supra note 27, art. 4.

112 E.g., Edda Kristjansdottir, Note, The Legality of the Threat or Use of Nuclear Weapons Under Current International Law: The Arguments Behind the World Court's Advisory Opinion, 30 N.Y.U. J. INT'L L. & POL. 291, 291 (1997-1998) (stating that the requests for an ICJ advisory opinion on the legality of nuclear weapons was "the result of intensive lobbying by a network of anti-nuclear activists and non-governmental organizations, known as the World Court project.").

113 Advisory Opinion OC-5/85, supra note 8, para. 1.
that often required a specific type of university degree. Costa Rica’s compliance in submitting the request, despite the fact that it disagreed with the position of the Inter-American Press Association, was an anomaly. Seldom have NGOs been successful in finding a champion to submit their requests. For instance, a consortium of thirty NGOs could not convince the Inter-American Commission to request an advisory opinion as to whether a candidate for the position of judge on the Inter-American Court had the Convention-mandated credentials. Although the possibility exists that states or authorized organs may be persuaded to request advisory opinions on issues of general interest, most individuals and organizations will not have this level of influence, and few states are likely to be amenable to this avenue. Given standing, human rights organizations could be expected to make requests for opinions in areas of broad public interest that states or OAS organs, controlled by member states, would not be likely to raise before the Court.

It would be impractical, however, to open the floodgates of the Court by permitting unlimited access to request advisory opinions for all legally recognized NGOs in the Americas. Consequently, the Court would need to exercise discretion, according to a transparent and impartial decisionmaking procedure, in considering such requests. A possible model would require organizations to ask leave of the Court to file a request, setting forth the reasoning underlying the importance of the issue which would be raised. A panel of judges could then be authorized to accept only those requests that raised important or novel questions that would contribute to the development of international human rights law. When the Court rejected a request it could be required to write a short statement outlining the reasons for its refusal to consider the issue raised.

C. Jurisdiction Ratione Materiae (Subject Matter Jurisdiction)

The subject matter, or ratione materiae, of the Court’s advisory jurisdiction encompasses three areas: (1) questions concerning the interpretation of the American Convention, including the Protocol to Abolish the Death Penalty and the Additional Protocol in the Area of Economic, Social and Cultural Rights, known as “the Protocol of San Salvador,” under Article 64(1); (2) questions relating to the interpretation of “other treaties concerning the protection of human rights in the American States” under Article 64(1); and (3) requests pertaining to whether a state’s domestic laws are

114 Id.
115 Id. paras. 14, 15, 19. For an excellent analysis of the facts underlying the case before the Commission and the submission of the request to the Court, see Cerna, supra note 82, at 173–80, proposing that one possible reason for Costa Rica’s submission of the request to the Court was “its support for the continued survival of the Court, sometimes to the point of appearing adversely to affect its own self-interest . . . .” Id. at 176.
117 Protocol to Abolish the Death Penalty, approved on June 8, 1990 (entered into force on August 28, 1991), OAS T.S. No.73, reprinted in BASIC DOCUMENTS, supra note 37, at 79.
compatible with the American Convention or “other treaties” under Article 64(2).\footnote{American Convention, supra note 35, art. 64(2).} Although this subject matter is relatively broad, it is limited to the interpretation of legal questions. The Court does not have jurisdiction to issue advisory opinions relating to other issues that could affect the human rights of the peoples of the Americas.

1. Jurisdiction to Issue Advisory Opinions Interpreting the American Convention

The Court’s advisory jurisdiction to interpret the American Convention provides a means to resolve contradictions and uncertainties in the text of the Convention. Despite precautions in the drafting process, it is inevitable that there will be varying interpretations of the provisions in a complex treaty. An additional problem with the American Convention is that there are irreconcilable differences between the English, Spanish, Portuguese, and French versions of certain provisions.

When called upon to interpret the American Convention, the Court applies the Vienna Convention on the Law of Treaties, which specifies that “a treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”\footnote{1969 Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331. The Inter-American Court subsequently reiterated that “the ‘ordinary meaning’ of terms [of a treaty] cannot of itself become the sole rule, for it must always be considered within its context and in particular, in the light of the object and purpose of the treaty.” Advisory Opinion OC-4/84, supra note 83, para. 23. For a detailed analysis of the Inter-American Court’s technique of treaty interpretation, see DAVIDSON, supra note 100, at 130–45.}

The object and purpose of the American Convention “is the protection of the basic rights of individual human beings irrespective of their nationality, both against the state of their nationality and all other contracting states.”\footnote{Advisory Opinion OC-2/82, supra note 9, para. 29. In accordance with that objective, the Court has stated that it must interpret the Convention so “as to give full effect to the system of human rights protection.” Advisory Opinion OC-15/97, supra note 50, para. 29.}

The Court also applies the principles of legal certainty and procedural equality in its interpretations.\footnote{Advisory Opinion OC-15/97, supra note 50, para. 48. The Court stated that it considers several equally important factors when deciding whether to accept a state’s request for an advisory opinion. These factors include the need to “preserve a fair balance between the protection of human rights, which is the ultimate purpose of the system, and the legal certainty and procedural equity that will ensure the stability and reliability of the international protection mechanism.” Id. para. 39, quoting Cayara Case, Preliminary Objections, Inter-Am. Ct. H.R., Judgment of Feb. 3, 1993, (ser. C) No. 14, para. 63.}

The Court does not take a strict constructionist position in its interpretation of the Convention. In light of changing social conditions, interpretation of the rights protected by the Convention and the procedures employed by the enforcement organs may evolve over time. In this regard, the Court has stated that it may not ignore the important developments in the last fifty years that have enriched human rights law.\footnote{Advisory Opinion OC-16/99, supra note 1, para. 113.} Therefore, it interprets the Convention “within the framework of the entire legal system prevailing at the time of the interpretation.”\footnote{Id.}
2. Interpretation of the Substantive Provisions of the American Convention

An advisory opinion interpreting the substantive provisions of the American Convention accords the parties to the Convention a uniform understanding of the meaning and scope of the human rights they have committed to respect. It also provides the people of the Americas with knowledge of the rights ensured to them by the Convention. On a larger scale, by taking into consideration and citing the jurisprudence of the Permanent Court of International Justice, the International Court of Justice, the European Court of Human Rights, international arbitral decisions, and scholarly writings, the Inter-American Court reinforces internationally recognized rights and principles. The Inter-American Court, however, does not merely follow external authority. As Davidson observed: "[I]t is apparent that the Court's own jurisprudence is distinctive in certain areas, most particularly in its identification of the philosophical bases of human rights obligations and ideological issues concerning the relationship of human rights to the concept of the rule of law and to democratic ideals." 125

For example, the Court has emphasized the fundamental principle that a democratic form of government is essential to the protection and enforcement of human rights.126 In its advisory opinion, *The Word “Laws,”* the Court determined that laws which permit the restriction of certain rights include only "formal law." 127 According to the Court, a formal law in this context is a legal norm passed by a democratically elected legislature and promulgated by a democratically elected executive branch, pursuant to procedures set forth in the domestic law of that state.128 In contrast, laws promulgated by governments that are not democratically elected, as has occurred in the past in several Latin American states, would not be recognized under the American Convention as legally restricting the enjoyment or exercise of human rights.

The Court addressed the issue of the nonderogability of certain human rights in its advisory opinion on the meaning of "judicial guarantees" from which no state derogation is permitted.129 In *Habeas Corpus in Emergency Situations*, the Court responded to a Commission request for clarification as to which judicial rights are guaranteed even during a state of emergency130 when international law in general, and the American Convention in particular, permit

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125 Davidson, supra note 100, at 130.
127 Advisory Opinion OC-6/86, supra note 126, para. 27.
128 Id. The American Convention provides that in limited circumstances “a State may restrict the exercise of rights protected by the Convention.” American Convention, supra note 35, art. 30. For example, Article 16 provides that the right to freedom of association “shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedoms of others.” Id. art. 16. These restrictions, however, “may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.” Id.
130 Id. para. 11.
a state to suspend certain protected rights on a temporary basis.131 Some rights, however, such as the rights to life and humane treatment, are so crucial that even during a state of emergency the American Convention does not allow state derogation.132 Included in the Convention’s prohibitions of those rights that cannot be suspended are “essential judicial guarantees.”133

The Convention does not specify which judicial guarantees are deemed “essential,” however, and, therefore, that issue remained for the Court to clarify. The Commission particularly questioned whether the right of a prisoner to habeas corpus was included in the judicial guarantees that cannot be suspended.134 In its advisory opinion on Habeas Corpus in Emergency Situations, the Court verified that the peoples of the Americas have a right to the judicial guarantee of habeas corpus even during a state of emergency.135 In so finding, it reasoned that “the realities that have been the experience of some of the peoples of this hemisphere in recent decades, particularly disappearances, torture and murder committed or tolerated by some governments”136 has repeatedly demonstrated that the rights to life and to humane treatment are threatened whenever the right to habeas corpus is partially or wholly suspended.137

The Court linked the concept of the nonderogability of select fundamental human rights to the incompatibility of certain state reservations. In Restrictions to the Death Penalty,138 the Commission’s request questioned the effect and scope of Guatemala’s reservation to the death penalty provision of the Convention.139 Guatemala’s reservation stated that it “only exclude[d] the application of the death penalty to political crimes, but not common crimes

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131 American Convention, supra note 35, art. 27(1). “In times of war, public danger, or other emergency that threatens the independence or security of a State party,” the state may take measures derogating from certain of the rights protected by the Convention. Id. The derogation may be only “to the extent and for the period of time strictly required by the exigencies of the situation . . . .” Id.

132 American Convention, supra note 35, art. 27(2). Other rights that may never be derogated from under the American Convention include: the rights to juridical personality (art. 3), freedom from slavery (art. 6), freedom from ex post facto laws (art. 9), freedom of conscience and religion (art. 12), rights of the family (art. 17), right to a name (art. 18), rights of the child (art. 20), and the right to participate in government (art. 23). Id.

133 Advisory Opinion OC-8/87, supra note 129, para. 28.

134 Id. para. 11. The purpose of a writ of habeas corpus is to bring a detained person before a judge, who can then verify that the prisoner is alive, and that he or she has not been tortured. Id. paras. 33, 35. The Commission argued that certain states had laws or a practice under which detainees could be held incommunicado for as long as fifteen days. Id. para. 12.

135 Id. para. 42.

136 Id. para. 36.


138 Advisory Opinion OC-3/83, supra note 21, para. 61; see also Buergenthal, supra note 5, at 25.

139 Advisory Opinion OC-3/83, supra note 21, para. 13. A state may ratify a treaty with reservations that exclude or modify the legal effect of rights protected by the treaty. The American Convention provides that it is subject only to those reservations that conform to the Vienna Convention on the Law of Treaties. American Convention, supra note 35, art. 75. The Vienna Convention specifies that a ratifying state may not make a reservation that is “incompatible with the object and purpose of the treaty.” 1969 Vienna Convention on the Law of Treaties, supra note 120, art. 19.
related to political crimes.”140 The Court found that the Guatemalan reservation did not contravene the object and purpose of the Convention.141 The Court, however, made the important statement that “a reservation which was designed to enable a state to suspend any of the nonderogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention, and, consequently, not permitted by it.”142

Another basis of international human rights law, which was addressed by the Court in its advisory opinion on Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, is the underlying philosophy of the essential principle of nondiscrimination.143 The American Convention provides that there can be no discrimination on the basis of “race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”144 In Proposed Amendments, the Court relied on natural law in theorizing that “[t]he notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual.”145 The Court did not find all discrepancies in legal treatment to be per se discriminatory, but rather, only those that have “no objective and reasonable justification.”146 Thus, although states have the right to confer and regulate nationality, state regulations and procedures in this area cannot conflict with “superior norms” such as the right to nondiscrimination.147 Whether the Inter-American Court’s treatment of the philosophical bases of the law is the subject of the advisory opinion request, or is laid down by the Court as an underlying assumption, the Court’s well-reasoned advisory opinions contribute to the foundations of international human rights law.

The Court has also given judicial expression to the general principle of “margin of appreciation,” which is frequently raised in the European human rights system.148 According to this principle, a state has a certain amount of discretion in implementing international rules in the domestic sphere. In Proposed Amendments, the Court recognized that a margin of appreciation is reserved to states in establishing requirements for the acquisition of nationality.149

The interpretation or scope of other substantive provisions of the American Convention could also be addressed through advisory opinions. For example, there are questions about the meaning and justiciability of the Convention provision that provides for the “progressive development” of economic, social,

140 Advisory Opinion OC-3/83, supra note 21, para. 10.
141 Reservation of Guatemala to the American Convention on Human Rights, reprinted in BASIC DOCUMENTS, supra note 37, at 84.
142 Advisory Opinion OC-3/83, supra note 21, para. 61.
143 Advisory Opinion OC-4/84, supra note 83, para. 55.
144 American Convention, supra note 35, art. 1(1). In addition, Article 24 provides that “[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.” Id. art. 24.
145 Advisory Opinion OC-4/84, supra note 83, para. 55.
146 Id. para. 56.
147 Id. paras. 33, 67.
148 Id.; see also VAN DUIK & VAN HOOF, supra note 76, at 282–95.
149 Advisory Opinion OC-4/84, supra note 83, para. 62.
and cultural rights, and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. Also, an advisory opinion on the question of whether widespread corruption by government officials, which robs the public treasury of the monies needed to provide for economic rights, is a violation of the Convention, could give judicial imprimatur to those who are attempting to eliminate official corruption. Another question currently being debated in international human rights law is whether individuals can violate human rights treaties such as the American Convention. A request for an advisory opinion on Article 32 of the American Convention, which affirms the principle of individual responsibility while limiting individual freedom by reference to general welfare and security, could result in a much anticipated judicial pronouncement on the issue.

3. Interpretation of the Procedural Provisions of the American Convention

The American Convention specifies the procedures that shall be followed by the organs that oversee state compliance. The Court’s resolution of disputes in the application of these requirements reinforces legal certainty and procedural equality between the parties, which in turn contributes to the credibility of the Commission and the Court. Just as the state parties to the Convention must comply with their substantive obligations, the Court and Commission must comply with their procedural obligations. When a procedural question arises within a contentious case before the Court, the state party involved may raise it as a preliminary objection claiming that the case should be dismissed due to a procedural irregularity. Alternatively, if a case is not before the Court, the state could request an advisory opinion as to whether the procedures used by the Commission comply with the mandate of the Convention.

A far-reaching procedural issue resolved by the Court in its advisory opinion, Exceptions to the Exhaustion of Domestic Remedies, involved the question of when a petitioner must exhaust internal state remedies before filing a complaint with the Inter-American Commission. Under the American Convention, unless there is a relevant exception, legal remedies in the state where the violation occurred must be "pursued and exhausted" before a complainant can turn to the Inter-American system for relief. This generally

150 American Convention, supra note 35, art. 26.
152 American Convention, supra note 35, arts. 48–51.
153 See generally Jo M. Pasqualucci, Preliminary Objections Before the Inter-American Court of Human Rights, 40 VA. J. INT’L L. 1 (1999) (discussing a range of grounds upon which a state party may make preliminary objections to the Court’s decision regarding a case’s admissibility) [hereinafter Pasqualucci, Preliminary Objections].
155 American Convention, supra note 35, art. 46(1)(a) (stating that the exhaustion of domestic remedies must be "in accordance with generally recognized principles of international law"); see also Advisory Opinion OC-11/90, supra note 154, para. 14.
recognized rule allows a state to attempt resolution of the case under its internal law before being confronted with an international proceeding. The requirement of exhaustion of remedies is not, however, absolute. It is based on the availability of effective domestic remedies in the state in question. The American Convention therefore enumerates specific exceptions to the rule of exhaustion that are applicable in limited situations. In Exceptions to the Exhaustion of Domestic Remedies the Commission asked the Court to determine whether an exception to the doctrine of exhaustion was applicable to an individual petitioner who could not secure legal representation due to either indigence or an atmosphere of fear. The Court advised that, under the American Convention, if indigence or general fear prevented a complainant from securing an attorney to represent him or her before domestic authorities, the petitioner need not exhaust domestic remedies before filing a complaint with the Commission. This opinion paved the way for many victims in the Americas to find recourse before the Inter-American human rights system. It may also serve as persuasive authority in cases before the European Court of Human Rights originating in countries of Eastern Europe, which suffer from poverty and authoritarian traditions, or in cases before the future African Court on Human and Peoples' Rights.

The Court has also clarified certain procedural requirements that the Commission must apply when processing a complaint. States parties had long complained that the Commission did not fulfill all of the Convention-mandated legal procedures. As a result of two advisory opinions issued by the Court, Reports of the Inter-American Commission of Human Rights and Certain Attributes of the Inter-American Commission on Human Rights, and preliminary objections in contentious cases that were resolved against the

157 American Convention, supra note 35, art. 46(2). This Article provides that domestic remedies do not need to be exhausted when (a) "the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated"; (b) "the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them"; or (c) "there has been unwarranted delay in rendering a final judgment under the aforementioned remedies." Id.
158 Advisory Opinion OC-11/90, supra note 154, para. 2.
159 Id. para. 42.
160 See Pasqualucci, Preliminary Objections, supra note 153, at 69–96. Tom Farer, a former commissioner, explains that:

Before the Convention came into force, the Commission had occasionally granted audiences to individual petitioners and to governments where they could argue their cases ex parte. These audiences were as informal as they sounded. There were rules neither of evidence nor procedure. Commission members might or might not ask questions. There was no record.

Tom Farer, The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS, supra note 16, at 61–62. In time, however, especially after the entry into force of the American Convention, state parties, petitioners, and the Court came to expect and demand formal procedures, technical competence, and explicit deadlines. The Commission had difficulty adequately addressing these complaints due to the number of individual petitions filed with the Commission and its lack of staff and resources. Id. at 62.
Commission, the Commission eventually restructured the manner in which it processes individual cases.\textsuperscript{162}

Although the resulting transparency of the Commission's procedures contributes to confidence in the Inter-American human rights system, the Court's interpretations of the Convention's procedural provisions have not been universally applauded. In \textit{Certain Attributes of the Inter-American Commission}, the Court advised that the American Convention does not permit the Commission to send its preliminary report to both the state and the petitioner.\textsuperscript{163} The Convention provision states that “[t]he report shall be transmitted to the States concerned, which shall not be at liberty to publish it.”\textsuperscript{164} The Court interpreted the provision to provide that only states have a right to the report.\textsuperscript{165} Thus, the petitioner initially does not receive notice of the Commission's ruling when the Commission finds that the state has violated the victim's rights. The petitioner is notified only that the Commission has adopted and transmitted a report to the state concerned, but is not informed of the contents of the report.\textsuperscript{166} Critics argue that this results in the procedural inequality of the parties and violates a basic tenet of human rights law: that laws should be interpreted in favor of the individual.\textsuperscript{167}

States continue to question whether the Commission strictly adheres to Convention-mandated procedures in all instances. Some of these procedural questions could be submitted to the Inter-American Court for advisory opinions. For example, the Inter-American Commission currently publishes its admissibility decisions in its annual report\textsuperscript{168} despite the opposition of certain states that argue that the Convention authorizes the Commission to publish only a final report.\textsuperscript{169} The Chair of the Commission suggested in response that


\textsuperscript{163} Advisory Opinion OC-13/93, \textit{supra note 161}, paras. 48–49. Article 50 provides that if the parties do not reach a settlement, the Commission shall draw up a report setting forth its findings of fact and conclusions of law. American Convention, \textit{supra note 35}, art. 50(1).

\textsuperscript{164} American Convention on Human Rights, \textit{supra note 35}, art. 50(2).

\textsuperscript{165} Advisory Opinion OC-13/93, \textit{supra note 161}, paras. 48–49.

\textsuperscript{166} Rules of Procedure of the Inter-American Commission of Human Rights, \textit{supra note 162}, art. 43(3).


\textsuperscript{168} Rules of Procedure of the Inter-American Commission of Human Rights, \textit{supra note 162}, art. 37(1) (which provides that the Commission shall make public its reports on admissibility and inadmissibility).

\textsuperscript{169} \textit{Dialogue on the Inter-American System for the Promotion and Protection of Human Rights}, Permanent Council of the OAS Committee on Juridical and Political Affairs, (ser. G) CP/CAJP-1610/00 rev. 2, 10 (April 24, 2000). At least three states—Brazil, Mexico, and Peru—voiced the opinion that the Commission's decision on admissibility should be “communicated exclusively to the State and to the petitioners on a confidential basis.” From their perspective, the publication of the report on admissibility prejudices the state's responsibility for the alleged violation and serves as a sanction before formal procedures have been completed. Conversely, the Commission takes the position that admissibility reports are unrelated to the reports treated in the Court's earlier advisory opinions because admissibility reports do not include conclusions or recommendations. According to the Commission, an admissibility report is merely a statement that the Commission has declared the petition to be admissible, and its publication serves to disseminate the case law of the Commission. \textit{Id.}
the states raise the issue in an advisory opinion request.\textsuperscript{170} This is the type of procedural question that should be resolved by the Court through an advisory opinion. States also have questioned the legitimacy of some recent changes that the Commission and the Court have made to their Rules of Procedure.\textsuperscript{171} For instance, a new Commission rule specifies that the Commission may follow up on state compliance with Commission recommendations and friendly settlements by holding hearings or requesting information from the parties—practices that the states challenge.\textsuperscript{172} One state delegation to the OAS suggested that the reforms to the Rules of the Commission and the Court be submitted to the Sub-Secretariat of the OAS Juridical Committee to determine if the new rules comply with the American Convention.\textsuperscript{173} The OAS General Assembly instructed the Permanent Council of the OAS to study “the relationship between the rules of procedure of [the Commission and the Court] and the provisions of their statutes and the American Convention on Human Rights.”\textsuperscript{174} These are not the proper bodies to determine the compatibility of human rights instruments with the American Convention. The American Convention specifies that questions concerning the interpretation of the Convention are to be submitted to the Inter-American Court.\textsuperscript{175} Only the Inter-American Court through its advisory jurisdiction has the competence to rule on these issues.\textsuperscript{176} The questions, therefore, should be submitted to the Court in the form of a request for an advisory opinion.

4. Jurisdiction to Issue Advisory Opinions Interpreting Other Treaties

The states of the Americas have ratified various regional and international treaties that impose human rights obligations on the ratifying states. For the benefit of the American states that must comply with these obligations and the OAS organs that may be called upon to apply these treaty provisions, the Court has jurisdiction \textit{ratione materiae} under Article 64(1) to interpret “other treaties concerning the protection of human rights in the American States” and to clarify the scope of the human rights obligations created by these treaties.\textsuperscript{177}

The scope of the Court’s jurisdiction in regard to “other treaties” is not clearly delineated in the American Convention. Consequently, the Government of Peru requested an interpretation of the phrase “other treaties concerning the

\begin{footnotes}
\textsuperscript{170} Id. at 6.
\textsuperscript{171} Nikken, \textit{supra} note 167, at 33.
\textsuperscript{172} Rules of Procedure of the Inter-American Commission of Human Rights, \textit{supra} note 162, art. 46.
\textsuperscript{173} Nikken, \textit{supra} note 167, at 28–29.
\textsuperscript{174} Id. at 30.
\textsuperscript{175} \textit{Evaluation of the Workings of the Inter-American System for the Protection and Promotion of Human Rights with a View to Its Improvement and Strengthening}, AG/RES 1828 (XXXI-0/01), available at http://www.oas.org. The Resolution was adopted at the first plenary session, held on June 5, 2001, in which the OAS General Assembly suggested that the possibility of a permanent Court and Commission be examined.
\textsuperscript{176} American Convention, \textit{supra} note 35, art. 64(1).
\textsuperscript{177} Id.
\textsuperscript{178} Id. art. 64(1); Advisory Opinion OC-1/82, \textit{supra} note 53, para. 20.
\end{footnotes}
protection of human rights in the American States." 179 In its opinion, Other Treaties, the Court interpreted the phrase "other treaties" to include:

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. 180

The Court defined the word "treaty" to be "an international instrument" in accordance with the definitions in the 1969 Vienna Convention on the Law of Treaties 181 and the 1986 Vienna Convention on the Law of Treaties among States and International Organizations or among International Organizations. 182 It understood the term "American State" to mean all states that may ratify the American Convention, which is any member state of the OAS. 183 The Court further determined that a treaty concerns the protection of human rights if it "has bearing upon, affects or is of interest" in the area of human rights. 184 The principal purpose of the treaty need not be the protection of human rights; it is only relevant that the pertinent provision concern human rights. 185 Thus, the Court found that "a treaty can concern the protection of human rights, regardless of what the principal purpose of that treaty might be." 186 As such, the source of the obligation, the main purpose of the treaty, and the bilateral or multilateral nature of the treaty are not determining factors. 187 This interpretation grants the Court an extremely broad jurisdiction to interpret human rights provisions.

Mexico's request in The Right to Information on Consular Assistance seeking an advisory opinion on the Vienna Convention on Consular Relations specifically raised the question of whether a specific treaty provision falls within the Court's advisory jurisdiction. 188 The United States objected to the request on the grounds that the Vienna Convention on Consular Relations was neither a human rights treaty nor a treaty concerning the protection of human

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179 Advisory Opinion OC-1/82, supra note 53, para. 8. Peru asked the Court to determine the limits of this aspect of its advisory jurisdiction. According to the request, the phrase in question was subject to at least three possible interpretations. It could refer (a) only to treaties adopted within the Inter-American system, (b) to treaties in which only American states are parties, or (c) to all treaties to which one or more American states are parties. Id.

180 Id. para. 52.

181 1969 Vienna Convention on the Law of Treaties, supra note 120, art. 2(1)(a) (defining "treaty" as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation").


183 Advisory Opinion OC-1/82, supra note 53, para. 35.

184 Advisory Opinion OC-16/99, supra note 1, para. 72.

185 Id. para. 76; see also Advisory Opinion OC-1/82, supra note 53, para. 34 (citing as an example the OAS CHARTER, which has other principal purposes, but contains provisions regarding human rights).

186 Advisory Opinion OC-16/99, supra note 1, paras. 70, 76 (stating that "the language of the article in question indicates a very expansive tendency, one that should also inform its interpretation").

187 Advisory Opinion OC-1/82, supra note 53, para. 34.

188 Advisory Opinion OC-16/99, supra note 1, para. 3.
rights, and that it was not intended by the ratifying states to confer rights on individuals. The United States claimed that it was a multilateral treaty "of the traditional type concluded to accomplish reciprocal exchange of rights for the mutual benefit of the contracting states," which the Court had earlier contrasted to human rights treaties. The Court rejected this argument. It instead interpreted the relevant provisions of the Vienna Convention to confer rights on the individual and clarified that those rights qualified as human rights.

a. Other Inter-American Treaties

The Court's jurisdiction to interpret "other treaties" encompasses specialized OAS human rights treaties such as the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, as well as the human rights provisions of the Charter of the OAS. Although the Court held the American Declaration of the Rights and Duties of Man ("American Declaration" or "Declaration") not to be a treaty per se, the Court issued an advisory opinion concluding that the Declaration is an authoritative interpretation of the Charter of the OAS and the American Convention. Consequently, the Court is authorized to interpret the American Declaration when necessary to interpret the OAS Charter or the American Convention.

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189 Id. para. 26. The United States asserted that "the intent of the Vienna Convention on Consular Relations is to establish legal rules governing relations between States, not to create rules that operate between States and individuals." The United States also argued that "not every obligation of States regarding individuals is perforce a human rights obligation. Nor does the fact that one provision in the Vienna Convention on Consular Relations may authorize beneficial assistance to certain individuals in certain circumstances transform the Vienna Convention into a human rights instrument or a source of the human rights of individuals."


191 Advisory Opinion OC-2/82, supra note 9, para. 29.

192 Advisory Opinion OC-16/99, supra note 1, paras. 74, 82, 84, 86, 87, 141(1), 141(2) (examining specifically in paragraph 74 the travaux préparatoires of the treaty in making this determination).


196 OAS CHARTER, supra note 33. Though not specifically focusing on human rights, the OAS Charter has been amended over time to incorporate human rights provisions.

197 American Declaration of the Rights and Duties of Man, reprinted in BASIC DOCUMENTS, supra note 37, at 15 (adopted at the 9th Int'l Conf. of American States in 1948); Advisory Opinion OC-10/89, supra note 182, paras. 33, 44. The American Declaration sets forth approximately twenty-eight human rights and ten duties.

198 Advisory Opinion OC-10/89, supra note 182, para. 44. The United States contended that the American Declaration is a "statement of principles" rather than a binding legal instrument and that "[i]t would seriously undermine the process of international law making—by which sovereign states voluntarily undertake specified legal obligations—to impose legal obligations on states through a process of 'reinterpretation' or 'inference' from a non-binding statement of principles." Id. para. 12.
b. Nonregional Treaties

In determining that its advisory jurisdiction extends beyond the Inter-American system to the interpretation of human rights provisions in any treaty ratified by an American state, the Inter-American Court took a position on another long-standing debate among human rights commentators: whether human rights are universal or culturally relative in character. The Court reasoned that culturally relative distinctions based on a regional character of obligations would "deny the existence of the common core of basic human rights standards." Thus, the Court gave its judicial imprimatur to the universality of human rights. Subsequent to the Court's opinion, universalism also found support at the World Conference on Human Rights in Vienna.

To date, the Inter-American Court has interpreted provisions of two nonregional treaties. In response to Mexico's request for an advisory opinion in The Right to Information on Consular Assistance, the Court held that an individual's right to information conferred by the Vienna Convention gives practical effect in concrete cases to the right to due process recognized by the International Covenant on Civil and Political Rights. The Court further advised that the articles in question of the International Covenant of Civil and Political Rights do "concern the protection of human rights in the American States."

5. Jurisdiction to Issue Advisory Opinions on the Compatibility of Domestic Laws of a Member State

Any member state of the OAS can request an advisory opinion under Article 64(2) as to whether its domestic laws are compatible with the American Convention or with any treaty that concerns human rights protection in the American states. The American Convention's use of the unqualified term "domestic laws" has been interpreted by the Court to mean that it has jurisdiction to determine the compatibility of "all national legislation and legal norms" of any character.

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199 Advisory Opinion OC-1/82, supra note 53, para. 40.
200 id.
201 Vienna Declaration and Programme of Action, U.N. GAOR, World Conf. on Hum. Rts., U.N. Doc. A/Conf. 157/23, 32 I.L.M. 1661 (1993). The Vienna Declaration states that all human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.
Id. art. I, para. 5.
203 Advisory Opinion OC-6/99, supra note 1, para. 141(5) (referring to arts. 2, 6, 14, and 50).
Provisions of the Constitution of Costa Rica, the state asked for an advisory opinion on whether proposed constitutional amendments, which had not yet been adopted by the legislative assembly, were compatible with the American Convention. The Convention does not specify whether domestic laws must be in force to be the subject of an advisory opinion request. Therefore, the initial issue to be decided was whether the Court’s advisory jurisdiction extended to draft laws, such as proposed constitutional amendments, or only to those laws already enacted and implemented. The Court determined that it did have jurisdiction to interpret draft legislation, given that a restrictive reading of the Convention would “unduly limit the advisory function of the Court.” The Court reasoned that, by refusing to issue an advisory opinion on draft laws, a state might adopt and perhaps apply a law that would be in violation of its human rights obligations.

The Court cannot use its advisory jurisdiction to order a state to reform its laws. This power is reserved for the Court’s contentious jurisdiction. An advisory opinion, however, may clarify the legal issue of whether the law is in violation of the state’s international legal obligations, and thereby inform the national political debate on the law in question. Whether a state has a monist or dualist system, a state is in violation of its international obligations if its domestic laws are in conflict with the international treaties it has ratified. One way for a state to avoid inadvertently violating its international human rights obligations is to request an advisory opinion as to the compatibility of its laws with its treaty obligations. This aspect of the Court’s jurisdiction enables the Court “to perform a service for all of the members of the Inter-American system and is designed to assist them in fulfilling their international human rights obligations.”

In some cases, the Court may choose not to issue an advisory opinion on the compatibility of domestic laws if there is a danger that by granting the request the Court will be embroiled in national partisan politics. In this regard, the Court has stated that it will “exercise great care to ensure that its advisory jurisdiction in such instances is not resorted to in order to affect the

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206 Id. paras. 1, 7.
207 Id. para. 13.
208 Id. para. 28.
209 Id. para. 26.
210 Cassel explained the relationship between the Court’s advisory and contentious jurisdiction in this regard:

Advisory opinions can review legislation “in the abstract;” it makes sense to allow such review only upon request, rather than to grant the Court a roving power of legislative review. In contrast, in contentious cases, individuals injured by application of legislation violating the Convention seek a remedy. The Court has consistently held that in contentious cases, it will not grant remedial orders against national laws “in the abstract,” i.e. if they have not actually been applied to the victim in the case. Only where the offending law has in fact been applied to the victim has the Court ordered reform. The Court’s remedies in contentious cases thus do not conflict with the limitation on its advisory jurisdiction.


211 Buergenthal, supra note 21, at 160.
outcome of the domestic legislative process for narrow partisan political ends.\footnote{Id. para. 30; see also Buergenthal, supra note 5, at 14–15 (noting that there was no problem with partisan politics in the Proposed Amendments case because the Costa Rican government requested the opinion at the behest of a multiparty legislative committee charged with determining the legality of the draft legislation).} The Court should not be overly cautious in this area because there is political opposition to almost any position taken by a government. The Court has admitted that “an advisory opinion might either weaken or strengthen a State’s legal position in a current or future controversy.”\footnote{Advisory Opinion OC-3/83, supra note 21, para. 24.} Although this may be true, the Court’s purpose is to help state governments comply with their international human rights obligations. Thus, when the government of the state makes a request, the Court should generally render an advisory opinion.

6. Proposal for Expansion of the Ratione Materiae of the Inter-American Court’s Advisory Jurisdiction

The American Convention’s precision in delimiting the *ratione materiae* of the Court’s advisory jurisdiction excludes other categories of requests that could also positively influence human rights in the Americas. For instance, no provision is made for the Court to issue an advisory opinion on a matter in dispute between two states if that dispute does not involve the interpretation of a human rights treaty. Yet such a dispute could lead to hostilities that would endanger the human rights of the civilians caught in the conflict. Although the states involved could bring a contentious case before the ICJ or submit the dispute to arbitration, states might be more willing to submit the dispute to the advisory jurisdiction of a court in the region. Advisory proceedings that do not involve parties, formal charges, or judicial sanctions and that conclude with a nonbinding court determination may be less threatening to the states and could therefore hasten a settlement.

As the judicial arm of the League of Nations, the Permanent Court of International Justice had authority to issue an advisory opinion on “any dispute or question.”\footnote{LEAGUE OF NATIONS COVENANT art. 14.} Although the states involved in a dispute could not request an advisory opinion directly from the Court, the League of Nations Assembly or Council could do so, perhaps at the suggestion of a state or the states involved in a dispute, or a neighboring state that was suffering repercussions from the hostilities.\footnote{See HUDSON, supra note 22, at 486–87, 490 (citing the particular example of the League of Nations Council voting to request an advisory opinion related to issues of the merits of a dispute between the Soviet Union and Finland concerning the autonomy of Eastern Karelia).} Judge Hudson stated that “[i]n the broad sense of the term, it may be said that each of the requests for an advisory opinion which have been made by the Council has related to a dispute.”\footnote{Id. at 495.} The states involved in the dispute could, of course, have turned to the Court’s contentious jurisdiction, but chose not to do so.

The expansiveness of the advisory jurisdiction of the former Permanent Court of International Justice has not been extended to current international tribunals. The Charter of the United Nations authorizes the International Court

\footnote{Id. para. 30; see also Buergenthal, supra note 5, at 14–15 (noting that there was no problem with partisan politics in the Proposed Amendments case because the Costa Rican government requested the opinion at the behest of a multiparty legislative committee charged with determining the legality of the draft legislation).}

\footnote{Advisory Opinion OC-3/83, supra note 21, para. 24.}

\footnote{LEAGUE OF NATIONS COVENANT art. 14.}

\footnote{See HUDSON, supra note 22, at 486–87, 490 (citing the particular example of the League of Nations Council voting to request an advisory opinion related to issues of the merits of a dispute between the Soviet Union and Finland concerning the autonomy of Eastern Karelia).}

\footnote{Id. at 495.}
of Justice to issue advisory opinions solely on "legal questions." The subject matter of the European Convention is even more limited than the advisory jurisdiction of other international tribunals, in that the European Court of Human Rights may issue advisory opinions dealing only with "legal questions concerning the interpretation of the [European] Convention and the protocols thereto." Moreover, the subject matter of the European Court's advisory jurisdiction is further limited by the Convention proviso that an advisory opinion shall not deal with "any questions relating to the content or scope of the rights or freedoms defined in [those instruments], or with any other question which the [European] 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." Scholars of the European system, have commented that "[i]t is obvious that a high degree of inventiveness is required for the formulation of a question of any importance which could stand the test." As a result of these limitations, the European Court of Human Rights has, to date, not received any requests for advisory opinions.

Although the advisory jurisdiction of the Inter-American Court is broader than that of other international tribunals, any future protocol to the American Convention should further broaden the rights protected and the subject matter of advisory opinion requests. The possibility of advisory opinions dealing with third generation human rights, such as the right to peace, development, and a clean environment, should be included. Most of these rights would involve disputes between states. If the Court's advisory jurisdiction were expanded to entertain legal questions that underlay a dispute between states, irrespective of the will of the states to submit to the contentious jurisdiction of the Court, it could contribute to the maintenance of peace in the region, and thereby to the protection of human rights.

D. Jurisdiction Ratione Temporis

The Inter-American Court continues to have jurisdiction ratione temporis even after the party requesting the opinion has attempted to withdraw the request. For example, in Reports of the Inter-American Commission on Human Rights, Chile submitted a request for an advisory opinion and then later

219 U.N. CHARTER art. 96.
220 European Convention, supra note 25, art. 47(1).
221 Id. art. 47(2); see also Advisory Opinion OC-1/82, supra note 53, para. 16.
222 VAN DIJ & VAN HOOF, supra note 76, at 265; see also Advisory Opinion OC-15/97 (Judge Cançado Trindade concurring), supra note 50, para. 10 (suggesting that the extreme restrictions on the advisory jurisdiction of the European Court "almost deprive it of purpose, rendering it meaningless").
223 Advisory Opinion OC-15/97, supra note 50, para. 28. But see HUDSON, supra note 22, at 509–10. When confronted with the same issue, the Permanent Court of International Justice did permit the withdrawal of a request for an advisory opinion. Judge Hudson opined that:

The Council or Assembly may withdraw a request for an advisory opinion; the withdrawal may certainly be made at any time prior to the opening of oral proceedings, and it would seem that it might be made at any time prior to the actual delivery of the opinion in open court.

Id. This conclusion, however, may have been a result of the particular circumstances of the case before the Court in which the underlying problem had been resolved.
attempted to withdraw it.\textsuperscript{224} The Court determined that the state’s attempted withdrawal “raised a substantive question concerning the scope and nature of the Court’s advisory jurisdiction.”\textsuperscript{225} It reasoned that other OAS member states might also have an interest in the issue raised in the request.\textsuperscript{226} The Court emphasized that an advisory opinion request is communicated to all member states, and those states may then submit their observations to the Court in writing or participate in the oral hearing.\textsuperscript{227} At the time Chile attempted to withdraw its request, two states had already submitted their briefs to the Court.\textsuperscript{228} The Court held that “the State requesting an advisory opinion is not the only interested party and that even if it withdraws the request, that withdrawal is not binding on the Court.”\textsuperscript{229} Consequently, the Court determined that the scope of its advisory jurisdiction allowed it to process the request.\textsuperscript{230} The Court analogized its advisory jurisdiction to its jurisdiction in contentious cases, in which an applicant’s attempted withdrawal also does not obligate the Court to close the case.\textsuperscript{231} It should be noted that the Court’s denial of the requested withdrawal in no way prejudges the admissibility or merits of the advisory request.\textsuperscript{232}

The Inter-American Court’s decision to put the interests of the development and integrity of international law above the individual will of the state is, in this instance, another positive step in the evolution of principles of international law. As stated by Judge Cançado Trindade, the Court’s jurisdiction “cannot be conditioned by the vicissitudes of the manifestations of consent on the part of the State or organ requesting the Advisory Opinion.”\textsuperscript{233}

\begin{itemize}
\item \textsuperscript{224} Advisory Opinion OC-15/97, supra note 50, para. 24.
\item \textsuperscript{225} Id.
\item \textsuperscript{226} Id. para. 28.
\item \textsuperscript{227} Id. para. 26.
\item \textsuperscript{228} Id. paras. 10, 12.

The decision of the Court to sustain the wide scope of its advisory jurisdiction, despite the withdrawal of the original request by Chile, represents, in my view, an advance on the matter, with positive consequences towards the strengthening of its advisory function under Article 64 of the American Convention on Human Rights.

\textit{Id.}

\item \textsuperscript{230} Advisory Opinion OC-15/97, supra note 50, para. 28.
\item \textsuperscript{231} Order of the Inter-Am. Ct. H.R., supra note 229, sect. “Considering,” para. 5; see also Advisory Opinion OC-15/97 (Judge Cançado Trindade concurring), supra note 50, para. 32. Judge Cancado Trindade reasoned that

if in the exercise of its contentious jurisdiction (conditioned by the prior consent of the states parties) the Court can proceed with the examination of a concrete case even after the discontinuance (désistement) by the complainant party, \textit{a fortiori} the Court can, with all the more reason, proceed with the examination of a matter in order to render an Advisory Opinion (whose proceedings are not conditioned by the prior consent of the State) even after the withdrawal of the original request.

\textit{Id.}

\item \textsuperscript{232} Advisory Opinion OC-15/97, supra note 50, para. 28.
\item \textsuperscript{233} Id. para. 9.
\end{itemize}
VI. ADVISORY JURISDICTION SUBJECT TO THE COURT'S DISCRETION

The Inter-American Court retains discretion to decline to exercise its jurisdiction, even when the request meets the requirements specified in the Convention and the Court's Rules of Procedure. The Court explained that "its advisory jurisdiction is permissive in character in the sense that it empowers the Court to decide whether the circumstances of a request for an advisory opinion justify a decision rejecting the request." The wording of the American Convention, which provides that the Court "may" provide a member state with an opinion on the compatibility of its domestic laws, supports the Court's discretion. The Statute of the International Court of Justice similarly provides that the Court "may" render an advisory opinion.

The Court bases its decision to accept or reject an advisory opinion request "on considerations that transcend merely formal aspects." Principally, the Court will refuse to consider "any request for an advisory opinion 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." However, the Court would possibly consider an advisory opinion request on a subject when the Commission's failure to refer a case to the Court impairs "the delicate balance of the protective system established by the Convention." The Court could also abstain from issuing an advisory opinion when the issue raised by a request is a juridical question that does not refer to a specific fact situation. The Court reasoned that its advisory jurisdiction "should not, in principle, be used for purely academic speculation, without a foreseeable application to concrete situations justifying the need for an advisory opinion." On only one occasion to date, in Compatibility of Draft Legislation, has the Inter-American Court refused to exercise its jurisdiction to render an advisory opinion.

234 Advisory Opinion OC-16/99, supra note 1, para. 31.
235 Advisory Opinion OC-1/82, supra note 53, para. 28 (explaining that the Court's approach was consistent with that of the ICJ and citing Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950 I.C.J. 65 (Mar. 30)).
236 American Convention, supra note 35, arts. 64(1), 64(2). The Convention is not clear as to whether the Court has the authority to refuse to consider requests for interpretations of the American Convention or other treaties, but this conclusion would follow from the nature of the Court's jurisdiction in this area.
237 STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 65, para. 1; see also SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 652 (2d rev. ed. 1985) (explaining that "[t]he permissive character of the advisory competence included not only a discretion whether the Court would give the requested opinion at all, but also a broad discretion regarding the rules of law to be applied, and the procedure to be followed, in exercise of the advisory competence").
238 See Advisory Opinion OC-16/99, supra note 1, paras. 31, 42 (noting that when the Court's jurisdiction to issue an advisory opinion is challenged, the Court will first determine whether it has the requisite jurisdiction, and, if it finds that it has, the Court will then determine whether it will exercise that jurisdiction).
239 Advisory Opinion OC-1/82, supra note 53, para. 31; see also Advisory Opinion OC-16/99, supra note 1, para. 44.
242 Id.
opinion. In that matter, Costa Rica requested the Court’s opinion on whether its draft legislation establishing a court of criminal appeals and providing for the right to appeal complied with the requirements of the American Convention. Although the Court held that it has jurisdiction to issue an advisory opinion on draft laws, it refused to render the requested opinion. The Court reasoned that the questions presented “could produce, under the guise of an advisory opinion, a determination of contentious matters not yet referred to the Court, without providing the victims with the opportunity to participate in the proceedings.”

The Court’s discretion to deny a request for an advisory opinion is not unfettered. The Court “must have compelling reasons founded in the conviction that the request exceeds the limits of its advisory jurisdiction under the Convention before it may refrain from complying with a request for an opinion.” If, however, after considering the circumstances of a request, the Inter-American Court decides that there are compelling reasons to decline to consider an advisory request, it must still issue an opinion that includes an explanation of its reasons for the refusal.

A. Discretion to Exercise Advisory Jurisdiction Over a Case in Dispute Between Two States or Between a State and an International Organization

Historically there has been controversy as to whether international courts can or should consider advisory opinion requests that concern issues in dispute between states or between a state and an international organization. States object that an international tribunal’s exercise of advisory jurisdiction in those instances can serve to evade the principle of state consent to the adjudication of a legal dispute. The state concerned may argue that the “advisory opinion is a disguised contentious case and that it should be heard only if all the parties have accepted the tribunal’s contentious jurisdiction.”

The Inter-American Court has categorically rejected the argument that it should decline to render an advisory opinion simply because the request is

243 Advisory Opinion OC-12/91, supra note 204, para. 30.
244 Id. paras. 1, 2.
245 Id. para. 28.
246 Advisory Opinion OC-1/82, supra note 53, para. 30.
247 Id.; see also Advisory Opinion OC-10/89, supra note 182, para. 27; Advisory Opinion OC-8/87, supra note 129, para. 10. In several cases, the Court issued an advisory opinion because it found “no good reason” to make use of its discretionary powers to decline to issue an advisory opinion when the request met admissibility requirements. The ICJ has also held that “[a] reply to a request for an Opinion should not, in principle, be refused.” Reservations to The Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 19 (May 28).
248 American Convention, supra note 35, art. 66(1) (providing that “[r]easons shall be given for the judgment of the Court”).
250 Buergenthal, supra note 5, at 8.
based on an underlying case that is in dispute between states. In The Right to Information on Consular Assistance, the United States alleged that Mexico had submitted a “contentious case in the guise of a request for an advisory opinion,” although the United States had not accepted the Court’s contentious jurisdiction. The basis of the dispute was an acrimonious controversy between the United States and several other states, including Mexico, concerning the failure of the United States to advise foreign detainees after arrest that they could contact their consulates, in accordance with the Vienna Convention on Consular Relations. The Inter-American Court rejected the arguments of the United States, holding that it could examine the subject matter of the request without ruling on the underlying contentious cases.

The Court will also entertain a request for an advisory opinion when the dispute is between a state and an international organization, such as the Inter-American Commission. States have argued that the Court should not consider a request for an advisory opinion from the Commission concerning a disputed case. Many of the Commission’s activities, including its authority to conduct country-wide studies of human rights violations in any member state of the OAS or to process individual petitions alleging state human rights abuses, could result in disputes with states over the proper interpretation of a treaty provision concerning human rights. In Restrictions to the Death Penalty, the Court ruled that the Inter-American Commission is not barred from seeking an advisory opinion from the Court “merely because one or more governments are involved in a controversy with the Commission.” The Court reasoned that the Commission, as an organ of the OAS, has the right to ask the Court to resolve disputed legal issues that arise within the performance of its Convention-mandated activities.

251 Advisory Opinion OC-15/97, supra note 50, para. 40; Advisory Opinion OC-16/99, supra note 1, para. 50.
252 Advisory Opinion OC-16/99, supra note 1, para. 26 (articulating the position of the United States that the request was “an attempt to subject the United States to the contentious jurisdiction of this Court” despite the fact that the United States had neither ratified the American Convention nor accepted the Court’s contentious jurisdiction).
253 Advisory Opinion OC-16/99, supra note 1, para. 46. See generally Federal Republic of Germany v. United States, 526 U.S. 111 (1999); Republic of Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998) (exemplifying cases brought by states in U.S. courts alleging that their nationals were not informed of their right to contact their national consulate as provided in Article 36 of the Vienna Convention on Consular Relations); Erik G Luna & Douglas J. Sylvester, Beyond Breard, 17 BERKELEY J. INT’L L. 147 (discussing similar cases); Jordan J. Faust, Breard and Treaty-Based Rights Under the Consular Convention, 92 AM. J. INT’L L. 691 (1998) (discussing similar cases).
254 Advisory Opinion OC-16/99, supra note 1, para. 50.
255 Advisory Opinion OC-3/83, supra note 21, paras. 39, 76.
256 Id. para. 30.
257 The Commission is authorized to conduct country studies and issue related reports by the Statute of the Inter-American Commission, arts. 18(c), 18(d), 18(g), reprinted in BASIC DOCUMENTS, supra note 37, at 123–24; American Convention, supra note 35, art. 41(c); and general authority of the OAS CHARTER, supra note 33, art. 112. American Convention, supra note 35, art. 48 (providing authority to process individual petitions).
258 Advisory Opinion OC-3/83, supra note 21, paras. 8, 13, 39. The Commission’s request dealt with the effect and scope of reservations to the American Convention’s right to life. The Court clarified that “the mere fact that there exists a dispute” between the Commission and the state party regarding the meaning of a provision of the Convention would not justify a denial by the Court to exercise its advisory jurisdiction. Id. para. 39.
259 Id. para. 39.
The Court also refused to dismiss an advisory opinion request in the opposite situation when the Commission complained that the state was submitting a disguised contentious case. The Court explained that its decision was in full conformity with the international jurisprudence on the subject, which has repeatedly rejected any request that it refrain from exercising its advisory jurisdiction in situations in which it is claimed that, because the matter is in dispute, the Court is being asked to rule on a disguised contentious case.

The Court relied on the ICJ’s advisory opinion in Interpretation of Peace Treaties in which the ICJ rendered an advisory opinion despite states’ objections that the ICJ could not render the requested opinion “without violating the well-established principle of international law according to which no judicial proceedings relating to a legal question pending between states can take place without their consent.” The ICJ responded that the consent of states to the Court’s jurisdiction is a requirement only in contentious cases but not in advisory proceedings.

In accepting requests based on underlying disputes, the Court has analyzed and rejected arguments supporting a state’s objections. One argument put forth is that an advisory proceeding is summary in nature and, therefore, is not the proper forum to decide complex factual issues in dispute. States contend that because there is no provision for the introduction or examination of evidence, the Court cannot resolve the factual contentions necessary to the analysis of the advisory opinion request. The Inter-American Court agreed, in principle, that the Court may not rule on charges against a state or the alleged supporting evidence, for doing so would deny the state the...

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260 Advisory Opinion OC-15/97, supra note 50, para. 22(c).
261 Id. para. 40. The Court cited Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950 I.C.J. 65 (Mar. 30); Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (May 28); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (June 21); Western Sahara, 1975 I.C.J. 12 (Oct. 16); Applicability of Article VI, Section 22, of the Convention on Privileges and Immunities of the United Nations, 1989 I.C.J. 177 (Dec. 15). In actuality, international authority, although favoring the acceptance of a request over matters in dispute, is not unanimous. The Permanent Court of International Justice refused to exercise its advisory jurisdiction when a related argument was made in the Eastern Carelia Opinion, 1923 P.C.I.J. (ser. B) No. 5 (July 23). The European Court of Human Rights, which has an extremely limited advisory jurisdiction, does not have authority to consider a case in dispute. European Convention, supra note 25, art. 47. Even leading commentators who advocate broadening the scope of the European Court’s jurisdiction do so with the caveat that “the request must not directly relate to a dispute which is pending before the Commission or the Court.” VAN DIJK & VAN HOOF, supra note 76, at 265.
263 Id. at 71. In this regard, the ICJ stated that:

This objection reveals a confusion between the principles governing contentious procedure and those which are applicable to Advisory Opinions. The consent of States, parties to a dispute, is the basis of the Court’s jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court’s reply is only of an advisory character: as such, it has no binding force.

Id.  
264 Advisory Opinion OC-16/99, supra note 1, para. 27.  
265 Id.
opportunities provided in a contentious proceeding to establish its defense.\textsuperscript{266} The Court observed, however, that in the exercise of its advisory jurisdiction, there is no need for it to settle questions of fact; rather, the Court is only called upon to interpret the meaning, object, and purpose of international human rights norms.\textsuperscript{267} Although the Court can interpret a provision of the Convention that is at issue in a disputed case, it is not authorized to examine the case itself.\textsuperscript{268} Therefore, to avoid reaching a conclusion that could distort the Convention system by eliminating the victims' opportunity to participate in contentious proceedings, the Court is "particularly careful" when exercising its advisory jurisdiction on matters based on an underlying specific case.\textsuperscript{269}

Another argument submitted by states is that when the underlying facts are based on a case in dispute, the international tribunal cannot or should not render an advisory opinion because the request may be politically motivated. In such instances, the ICJ has held that any alleged political motivation for an advisory opinion request and any eventual "political implications" of the advisory opinion are irrelevant to the Court's determination of its competence to render the advisory opinion.\textsuperscript{270} The Inter-American Court, if confronted by a similar argument, should adopt the ICJ's well-founded position.

The Inter-American Court could apply a three-pronged test to determine whether it will respond to an advisory opinion request when a state objects that the request is a disguised contentious case. First, the Court could determine whether the requested advisory opinion will provide meaningful guidance on the specific issues raised or will contribute to the overall development of international law. Second, if the answer to that question is positive, the Court should determine if it can be seized of the case through its contentious jurisdiction. If the state does submit the issue in dispute within the context of a contentious case, the Court should refuse to issue an advisory opinion and should instead adjudicate the contentious case. Third, if the Court is not seized of the case under its contentious jurisdiction, it should respond positively to the advisory opinion request only after making a determination that an advisory opinion would not adversely affect the rights of victims.\textsuperscript{271}

\textbf{B. Discretion to Exercise Advisory Jurisdiction over a Dispute Before Another International Body}

The Inter-American Court is likely to exercise its discretion to render an advisory opinion even though the core issue of the request is under consideration by another international tribunal such as the ICJ.\textsuperscript{272} States argue against the Court's acceptance of jurisdiction in such cases contending that there is a risk that there will be inconsistency between the findings of the

\textsuperscript{266} Id. para. 47.
\textsuperscript{267} Id.
\textsuperscript{268} Advisory Opinion OC-15/97, supra note 50, para. 33.
\textsuperscript{269} Id. para. 37 (citing and quoting Advisory Opinion OC-12/91, supra note 204, para. 28).
\textsuperscript{270} Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J. 73, 74 (July 8).
\textsuperscript{271} See Buergenthal, supra note 5, at 11.
\textsuperscript{272} Advisory Opinion OC-16/99, supra note 1, para. 57.
This situation could occur, for example, if the Inter-American Court exercises its advisory jurisdiction to interpret a treaty concerning human rights that was not propagated in the Inter-American system. The Inter-American Court has dismissed this argument stating:

[T]he possibility of conflicting interpretations is a phenomenon common to all those legal systems that have certain courts which are not hierarchically integrated. Such courts have jurisdiction to apply and, consequently, interpret the same body of law. Here it is, therefore, not unusual to find that on certain occasions courts reach conflicting or at the very least different conclusions in interpreting the same rule of law.

States further contend that for reasons of comity the Inter-American Court should refrain from exercising its advisory jurisdiction when the case is before another international tribunal. In The Right to Information on Consular Assistance, the United States argued that prudence and comity were compelling reasons to decline jurisdiction in view of the contentious cases brought by Paraguay and Germany against the United States before the ICJ. The issues and subject matter of those cases were similar to many of the central issues raised in the request for an advisory opinion before the Inter-American Court. The Court dismissed that argument and chose to exercise its advisory jurisdiction.

Also, certain globally ratified treaties specify the international mechanism that shall be employed to settle disputes between states parties to the treaty. States may object to the consideration of a request by a tribunal, such as the Inter-American Court, when resort to that tribunal is not included as an option for dispute settlement under the treaty. In The Right to Information on Consular Assistance, the Inter-American Court rejected the United States' argument that disputes concerning the Vienna Convention on Consular Relations could be settled only by the Convention's specified means of conciliation, arbitration, or referral to the ICJ. Judge Buergenthal subsequently argued that the Inter-American Court should have limited its holding to an interpretation of the provision within the context of the Inter-American system. The legitimacy of international judicial pronouncements could otherwise be jeopardized unless regional courts adopt a policy of judicial deference. If tribunals "stay within their respective spheres of competence, apply traditional international legal reasoning, show judicial restraint by

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273 Id. paras. 26, 27.
274 Id. para. 61.
275 Id. para. 27.
276 Id.
279 Id. at 272.
seeking to avoid unnecessary conflicts, and remain open to reconsider their prior legal pronouncements," there should be less risk of major conflict.280

VII. LIBERALIZATION OF PROCEDURES AND PRACTICES APPLICABLE TO AN ADVISORY OPINION REQUEST

The Inter-American Court's liberalization of the procedures applicable to an advisory opinion request has also contributed to the evolution of international human rights law. Through a broad interpretation of its Rules of Procedure and subsequent amendments to those rules, the Court has enhanced the role of individuals and amici without sacrificing the Convention's structure or procedural equality between the alleged victims and the state parties.281

A. Acceptance of Amicus Briefs

Although the Convention and the Statute of the Court do not authorize amicus briefs, the Court has amended its Rules of Procedure to permit parties other than states and OAS organs to submit briefs.282 The practice of the Court is to accept amicus curiae briefs from NGOs and even from individuals.283 Human rights organizations have assumed an active role in these proceedings, as evidenced by the number and quality of amicus briefs filed with the Court in most advisory proceedings. In The Right to Information on Consular Assistance, twenty-two NGOs and individuals filed amicus briefs.284 One such brief was filed on behalf of José Trinidad Loza, a Mexican national on death row in Ohio who allegedly had not been given the right to contact the Mexican consulate when he was arrested.285 Ten major news organizations, including Newsweek, The Wall Street Journal, the American Newspaper Publishers Association, the Federation Internationale des Éditeurs de Journaux, and the Inter-American Press Association, filed amicus briefs in another advisory proceeding, The Enforceability of the Right to Reply or Correction, which concerned the state's duty to ensure that newspapers, radio, and television

280 Id. at 273.
281 See Statute of the Inter-American Court of Human Rights, O.A.S. Res. 448 (IX-O/79), reprinted in BASIC DOCUMENTS, supra note 37, at 155, 162; Rules of Procedure of the Inter-American Court of Human Rights, supra note 49, art. 63. The Court has the authority to draft and amend its Rules of Procedure. The Rules of Procedure of the Court provide that the procedural rules for contentious cases shall be applied by analogy in advisory proceedings to the extent that the Court finds them compatible. The Inter-American Court has broad discretion to determine to what extent the specific circumstances of an advisory request lead to the analogous application of contentious procedures. Cf. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 68 (including a similar provision which provides that "[i]n the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable").
282 Rules of Procedure of the Inter-American Court of Human Rights, supra note 49, art. 62(3).
283 See BLACK'S LAW DICTIONARY 83 (7th ed. 1999) (defining an amicus curiae as a person or organization that has a strong interest in the subject matter before the court and submits a brief which suggests a rationale for deciding the case that is consistent with its views); Dinah Shelton, The Participation of Nongovernmental Organizations in International Judicial Proceedings, 88 A.J.I.L. 611, 638-39 (1994) (explaining that "[a]mici, with permission, suggest to a court matters of fact and law within their knowledge").
284 Advisory Opinion OC-16/99, supra note 1, para. 62.
285 Id. para. 14.
stations provide individuals injured by an inaccurate statement with a right to reply.\textsuperscript{286} The Court also received several \textit{amicus} briefs from international organizations in \textit{Restrictions to the Death Penalty}.\textsuperscript{287}

The Court’s acceptance of \textit{amicus} briefs in advisory proceedings provides NGOs and individuals with a forum to present an alternative viewpoint and thereby influence the development of international law. These organizations are more likely to support the position of the individual, a position that may not receive adequate support in the briefs submitted by states. As such, \textit{amicus} briefs offer valuable assistance to the Court and Commission, which operate with small legal staffs.\textsuperscript{288} The Court is not required to accept or consider every \textit{amicus} brief submitted, although there is no formal procedure for the rejection of briefs. The potential for abuse exists in that organizations with a primarily political agenda could attempt to convert the \textit{amicus} process into a forum for their political viewpoints. The Court should use its authority to reject such briefs, insofar as they do not contribute to the Court’s understanding of the legitimate legal issues before it.\textsuperscript{289}

\textbf{B. Oral Proceedings}

At the conclusion of the initial written stage of the proceedings, the Court shall determine whether to continue with oral proceedings.\textsuperscript{290} If the Court exercises its discretion to hold oral proceedings, those proceedings must be public, unless exceptional circumstances warrant private hearings.\textsuperscript{291} Previous practice indicates the unlikelihood that such exceptional circumstances would be present in advisory proceedings, which are presently limited to legal questions of interpretation. To date, oral hearings have been held in proceedings of all sixteen advisory requests submitted to the Court.\textsuperscript{292} Consequently, the criteria to be applied by the Court in determining the necessity of oral hearings have not been formalized. From a practical perspective, oral hearings are not necessary in all advisory proceedings, as the

\textsuperscript{286} Advisory Opinion OC-7/86, \textit{supra} note 65, para. 5.

\textsuperscript{287} \textit{See} Advisory Opinion OC-3/83, \textit{supra} note 21, para. 5. The Court received \textit{amici curiae} briefs from the International Human Rights Law Group and Washington Office on Latin America, the Lawyers Committee for International Human Rights and Americas Watch Committee, the Institute for Human Rights of the International Legal Studies Program at the University of Denver College of Law, and the Urban Morgan Institute for Human Rights of the University of Cincinnati College of Law.

\textsuperscript{288} \textit{See} Charles Moyer, \textit{The Role of Amicus Curiae in the Inter-American Court of Human Rights}, \textit{in La Corte Interamericana de Derechos Humanos: Estudios y Documentos} 103, 113 (Instituto Interamericano de Derechos Humanos, ed., 1986); Shelton, \textit{supra} note 283, at 639–40 (reporting that although the Inter-American Court has rarely quoted from or cited to \textit{amicus} briefs, there is evidence in the opinions that the Court has relied on the research and analysis provided by them).

\textsuperscript{289} \textit{See} Moyer, \textit{supra} note 288, at 108 (noting that the European Court of Human Rights has rejected \textit{amicus} briefs filed in contentious cases).

\textsuperscript{290} Rules of Procedure of the Inter-American Court of Human Rights, \textit{supra} note 49, art. 62(4). Prior consultation with the State’s Agent is required in cases governed by Article 64(2) of the Convention. \textit{Id.} art. 62(3).

\textsuperscript{291} \textit{Id.} art. 14(1).

\textsuperscript{292} In its advisory opinion on \textit{Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism}, the Court severed the proceedings and held two public hearings. Costa Rica’s request raised issues under both Articles 64(1) and 64(2). The proceedings under 64(1) were of possible interest to all OAS member states and organs, whereas the proceedings under the second clause were particularly pertinent to Costa Rica. \textit{See} Advisory Opinion OC-5/85, \textit{supra} note 8, para. 6.
proceedings are intended to be nonfactual in nature. Absent an underlying dispute that would require greater transparency, the Court should be able to issue advisory opinions, such as those requesting an interpretation of the American Convention, on the basis of written briefs alone.

Initially, only member states and organs of the OAS were permitted to present oral arguments to the Court. Then, in *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, a case involving domestic state laws, the Court invited Costa Rican government officials possessing knowledge of the laws in question to testify. Subsequently, in a proceeding also concerning a state’s domestic law, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, the Court invited the Inter-American Press Association and the Colegio de Periodistas of Costa Rica to testify. Although there is no provision in the Rules of the Court specifically authorizing the Court to hear such oral arguments, the Court applies by analogy the rule followed in contentious proceedings. That rule states that the Court “may hear as a witness, expert witness, or in any other capacity, any person whose evidence, statement or opinion it deems to be relevant.” In more recent advisory proceedings, the Court has invited all parties that submitted written comments, including NGOs and individuals, to present arguments during the oral proceedings.

The opportunity for NGOs and even individuals to provide input before an international human rights tribunal is significant. Although their participation through *amicus* briefs has been permitted in certain international tribunals, the occasion to present oral arguments represents a breakthrough. This step increases opportunities for nongovernmental actors to influence the development of international law, and it further erodes the exclusive role of states. It is neither possible nor desirable, however, for every organization or individual that submits a brief to also present an oral argument before the Court. These briefs have increased in number, and accommodating the corresponding oral arguments has the potential to overwhelm the resources of the Court. While state parties and OAS organs have automatic access to address the Court, other participants should only have that opportunity when invited by the Court to address a particular argument raised in the brief. Moreover, time limits should be placed on oral presentations in order to expedite the proceeding.

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293 See *Advisory Opinion OC-3/83*, *supra* note 21, para. 6.

294 Advisory Opinion OC-4/84, *supra* note 83, para. 5. In addition to the agent of the state, representatives of the Ministry of Justice, Supreme Electoral Tribunal, Legislative Assembly, Civil Registry, and the Faculty of Law of the University of Costa Rica presented oral arguments to the Court.

295 Advisory Opinion OC-5/85, *supra* note 8, para. 6 (inviting the organizations to make presentations at the public hearing only after the Court had consulted with the government of Costa Rica).

296 *Rules of Procedure of the Inter-American Court of Human Rights*, *supra* note 49, art. 44(1).

297 See *Advisory Opinion OC-16/99*, *supra* note 1, para. 8; *Advisory Opinion OC-14/94*, *supra* note 44, para. 10.
C. Proposal for Amendment to the Court’s Rules of Procedure in Advisory Proceedings

The Inter-American Court should provide an expedited procedure for time-sensitive advisory opinion requests. At present, the Court’s Rules lack a provision akin to that of the ICJ for expedited procedures when a request for an advisory opinion necessitates an urgent answer.\(^{298}\) To date, there have been at least two advisory opinion requests that would have benefited from expedited proceedings. In *Restrictions to the Death Penalty*, the underlying fact situation involved the execution of prisoners who had been tried by “faceless courts” in accordance with a law that reinstated the death penalty in Guatemala in violation of the American Convention.\(^{299}\) Also, in *The Right to Information on Consular Assistance*, the Court’s opinion applied to the legitimacy of the application of the death penalty to certain foreign prisoners on death row in the United States.\(^{300}\) When lives are at stake, a rapid response is necessary. Although the Inter-American Court attempts to deliver advisory opinions in a timely fashion, the process is still lengthy. The average duration of an advisory proceeding before the Court has been approximately ten months.\(^{301}\)

The Court has taken limited steps to expedite its procedures. Initially, advisory opinions were delivered at a separate public hearing at the seat of the Court. Today it is no longer necessary for the Court to hold a separate hearing or to await its next session. Advisory opinions are now delivered to the requesting party, operative points are disseminated in a press release, the entire opinion is posted on the Court’s website, and the opinions are subsequently published in the Court’s annual report and in Series A of the Court’s opinions.

Despite these steps, the Court should incorporate a provision in its Rules of Procedure to expedite consideration of advisory requests when circumstances so require. The Rules should provide that the state or organ requesting the expedited review inform the Court of the need to accelerate the opinion and the reasons therefore. If the Court is not in session, the President of the Court should have the discretion to determine if an expedited opinion is necessary under the specified circumstances. If such a finding is made, the President should then be authorized to determine the scope and nature of the accelerated

\(^{298}\) Rules of Court, 1978 I.C.J. art. 103 (as amended Dec. 5, 2000), http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicrulesofcourt_20001205.html. Under the Rules of the ICJ, when the requesting party “informs the Court that its request necessitates an urgent answer, or the Court finds that an early answer would be desirable, the Court shall take all necessary steps to accelerate the procedure, and it shall convene as early as possible for the purpose of proceeding to a hearing and deliberation on the request.” Id.


\(^{300}\) Advisory Opinion OC-16/99, *supra* note 1, para. 2. These prisoners had not been informed of their rights under the Vienna Convention on Consular Assistance. Id. paras. 3, 26.

\(^{301}\) OFFICE OF THE SECRETARY GENERAL OF THE ORGANIZATION OF AMERICAN STATES, *FINANCING THE INTER-AMERICAN HUMAN RIGHTS SYSTEM*, sec. II(A)(2) (April 28, 2000), available at http://www.derechos.org.ar/nizkor/la/doc/fine.html. For example, the request for an advisory opinion in *The Right to Information on Consular Assistance* was filed on December 9, 1997, and the Court’s advisory opinion was not issued until almost two years later on October 1, 1999. See Advisory Opinion OC-16/99, supra note 1, para. 1.
proceedings, including whether written briefs would be necessary. In all likelihood, written briefs will be necessary as the Court cannot make an informed decision without the availability of adequate information. Time periods for the submission of written observations in such cases should be kept to a minimum. If adequate information is made available to the Court through written briefs and documents, the Rules could allow the Court the discretion to dispense with the oral proceedings. To protect the legitimacy of the Court, however, this step must be taken with caution, as the transparency of the Court’s proceedings is of as much importance as their expeditiousness. Moreover, dispensing with oral proceedings may not necessarily accelerate the process, since the Court must still convene for deliberations on the request.

VIII. NATIONAL AND INSTITUTIONAL CHANGES IN RESPONSE TO THE INTER-AMERICAN COURT’S ADVISORY OPINIONS

Inter-American Court advisory opinions are influencing the implementation of human rights law on a national basis. For example, the Costa Rican Supreme Court’s Constitutional Chamber has nullified or reinterpreted domestic laws found by the Inter-American Court to be incompatible with the American Convention. In response to the Inter-American Court’s advisory opinion, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, the Costa Rican Constitutional Chamber nullified a domestic law mandating compulsory membership of journalists and reporters in an association that limited membership to university graduates who had specialized in certain fields. The Inter-American Court advised Costa Rica that the law was incompatible with freedom of expression under the Convention because it denied “any person access to the full use of the news media as a means of expressing

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302 Rosenne opines that the issuance of an advisory opinion without written briefs would be a “questionable development” in that it would accentuate the summary character of the advisory decision and severely reduce the Court’s authority. ROSENNE, supra note 24, at 1719.

303 The OAS has now approved funds to allow the Court to hold four two-week sessions. FINANCING THE INTER-AMERICAN HUMAN RIGHTS SYSTEM, supra note 301, sec. II(A)(2). In addition, the Court may meet for special sessions. The judges, who generally live and work in their countries of residence, must travel to the seat of the Court in San Jose, Costa Rica for sessions. Statute of the Inter-American Court of Human Rights, supra note 51, art. 16. Most of the judges, who are paid emoluments, per diem, and travel allowances when the Court is in session, have full time positions in their countries of residence.

304 Acción de Incost, Exp. 0421-S-90.-No. 2313-95, Roger Ajun Blanco, Art. 22 Ley Org. Col. de Periodistas, Constitutional Chamber of the Supreme Court of Justice of Costa Rica (May 9, 1995). Not all states have revised their internal laws to comply with the Court’s advisory opinions. Some states, for instance, continue to have laws that authorize suspension of the right of habeas corpus during a state of emergency. This practice ignores two advisory opinions interpreting the American Convention as prohibiting the suspension of habeas corpus. See Advisory Opinion OC-9/87, supra note 241, paras. 30–31; Advisory Opinion OC-8/87, supra note 129, para. 42.

opinions or imparting information.\footnote{Advisory Opinion OC-5/85, supra note 8, para. 85 (citing Costa Rican Law No. 4420 of Sept. 22, 1969, Organic Law of the Association of Journalists of Costa Rica).} The Costa Rican Constitutional Chamber reiterated the reasoning of the Inter-American Court in its decision.\footnote{Nikken, supra note 305, at 178–79.} The Constitutional Chamber also stated that when a State requests an advisory opinion on the compatibility of its domestic laws with the American Convention or other treaties, the opinion is binding on the government that requested it.\footnote{Id. at 179 (citing Acción de Incost, Exp. 0421-S-90.-No. 2313-95, Roger Ajun Blanco, Art. 22 Ley Org. Col. de Periodistas, Constitutional Chamber of the Supreme Court of Justice of Costa Rica (May 9, 1995)).} In another Costa Rican opinion, the Constitutional Chamber declared, in accordance with the Inter-American Court's advisory opinion \textit{Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica}, that a state law on nationalization of spouses could not discriminate on the basis of gender.\footnote{Exp. 2965-S-91, Voto 3435-92, Ricardo Fliman Wargraft v. Director y el Jefe de la Sección de Opciones y Naturalizaciones, Constitutional Chamber of the Supreme Court of Justice of Costa Rica (Nov. 11, 1992); Advisory Opinion OC-4/84, supra note 83, para. 67.} The Argentine Supreme Court, relying on the advisory opinion \textit{Enforceability of the Right to Reply or Correction}, held that the American Convention on Human Rights creates a directly enforceable right of reply in Argentina without the need for separate domestic legislation.\footnote{Thomas Buergenthal, \textit{International Tribunals and National Courts: The Internationalization of Domestic Adjudication, in RECHT ZWISCHEN UMBRUCK UND BEWAHRUNG FESTSCHRIFT FÜR RUDOLF BERNHARDT} 687, 695 (U. Beyerlin et al. eds., 1995) (citing “Ekmekdjian,” CSJN 315 Fallos 1492 (1992) (Argentina)). The applicable provision of the American Convention provides that a person "injured by inaccurate or offensive statements disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make correction using the same communications outlet, under such conditions as the law may establish." American Convention, supra note 35, art. 14(1). The Inter-American Court stated in its advisory opinion that "any state party that does not already ensure the free and full exercise of the right to reply or correction is under an obligation to bring about that result, be it by legislation or whatever other measures may be necessary under its domestic legal system." Advisory Opinion OC-7/86, supra note 65, para. 33.}

Even advisory opinions that have not necessarily met a positive response in national courts may nonetheless influence human rights domestically. Although most U.S. courts have not granted relief to defendants who allege that they were not informed of their right to notify their consulate under the Vienna Convention on Consular Assistance,\footnote{In \textit{United States v. Li}, the defendants and several \textit{amici} cited the Inter-American Court's advisory opinion in \textit{The Right to Consular Assistance} in their respective briefs. The First Circuit refused to consider the advisory opinion, stating that "the United States is not a party to the treaty that formed the [Inter-American Court of Human Rights], and is not bound by that court's conclusions." \textit{United States v. Li}, 206 F.3d 56, 64 n.4 (1st Cir. 2000) (en banc), discussed in William J. Aceves, \textit{International Decision: The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law}, 94 A.J.I.L. 555, 562–63 (2000). In \textit{United States v. Lombera-Camorlinga}, the defendant, a Mexican citizen, was arrested for transporting marijuana into the United States. Lombera-Camorlinga made self-incriminating statements, which defense counsel attempted to suppress because the defendant had not been advised of his rights under the Vienna Convention. Both the defendant and \textit{amici} cited the advisory opinion alleging that the suppression of evidence would be the appropriate remedy for the failure to notify the defendant of the right to notify his consulate in violation of the Vienna Convention. \textit{Id.}, the Ninth Circuit, sitting \textit{en banc}, refused to grant the remedy requested and did not address the Inter-American Court's advisory opinion. United States of America v. José Lombera-Camorlinga, 206 F.3d 882, 883–84 (2000) (en banc). The United States, while acknowledging the advisory opinion in its supplemental brief to the court, argued that the advisory opinion was not binding on the United States. \textit{Id.}, (citing to Supplemental Brief for Defendant-Appellants at 6, \textit{United States v. Lombera-Camorlinga}, 170 F.3d 1241 (9th Cir. 1999) (Nos. 98-50347 and 98-50305)).} the negative publicity raised by
the Inter-American Court’s advisory opinion and the ICJ’s decision in the LaGrand case have resulted in positive changes for foreign nationals arrested in the United States.\textsuperscript{312} Shortly after submission of The Right to Consular Assistance advisory request to the Inter-American Court, the U.S. Department of State, as already noted, issued and distributed to domestic law enforcement officials a handbook that informs arresting authorities of the rights provided to foreign nationals by the Vienna Convention on Consular Relations.\textsuperscript{313} Moreover, it encourages enforcement officers to employ the golden rule by advising: “In general, you should treat a foreign national as you would want an American citizen to be treated in a similar situation in a foreign country.”\textsuperscript{314} The State Department’s instructions to U.S. authorities are at least partially in response to the Inter-American Court’s advisory opinion and the negative worldwide publicity it generated regarding the U.S. failure to provide the necessary information.

The mere institution of advisory proceedings may encourage a state to examine its laws and bring them into compliance with its human rights obligations. One example of such governmental action occurred at a public hearing on an advisory request concerning the legality of Guatemala’s extension of the death penalty.\textsuperscript{315} In 1982, following a military coup by General Efraim Rios Montt, Guatemala established special courts to combat subversion.\textsuperscript{316} These Courts of Special Jurisdiction typically met in secret and arguably did not provide even minimum due process guarantees to defendants.\textsuperscript{317} The government had also extended the death penalty to crimes that were not punishable by death at the time Guatemala ratified the American Convention.\textsuperscript{318} Guatemala executed those defendants convicted under the new laws.\textsuperscript{319} Despite pleas from the Inter-American Commission and from Pope John Paul II, who was about to visit Guatemala, the state proceeded with the executions.\textsuperscript{320} Although Guatemala had not accepted the Court’s jurisdiction, and thus could not be brought before it in a contentious case, the Commission sought an advisory opinion from the Court.\textsuperscript{321} Guatemala objected to the admissibility of the advisory opinion petition, but attended the public hearing on the matter.\textsuperscript{322} At the public hearing, Guatemala unexpectedly announced the suspension of the executions, which never resumed. The public exposure generated by the Court’s consideration of the issue resulted in this change of

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\textsuperscript{312} See LaGrand (Germany v. United States of America), 2001 I.C.J. 104 (June 27).
\textsuperscript{314} U.S. Dep’t of State, Pub. No. 10518, supra note 4, at 3 (summarizing requirements pertaining to foreign nationals).
\textsuperscript{315} Advisory Opinion OC-3/83, supra note 21, paras. 6, 76.
\textsuperscript{316} Moyer & Padilla, supra note 299, at 508.
\textsuperscript{317} Id.
\textsuperscript{318} Id. at 509.
\textsuperscript{319} Id. at 511.
\textsuperscript{320} Id.
\textsuperscript{321} See Advisory Opinion OC-3/83, supra note 21, paras. 27–28.
\textsuperscript{322} Id. para. 11.
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Moreover, Guatemala subsequently withdrew its reservation to the Convention that had resulted in the advisory decision. Thus, advisory opinions regarding the compatibility of a state's domestic laws with its international legal obligations have encouraged states to revise their domestic laws and actions.

Advisory opinions on the procedural provisions of the American Convention have also contributed to refinement in the application of the procedures by the Inter-American Commission. States have twice requested that the Court interpret those provisions of the American Convention specifying procedures that the Commission must follow. In part responding to the Inter-American Court's advisory opinions as well as to preliminary objections in contentious cases, the Commission has revised its procedures in handling individual complaints. The Commission now registers petitions, makes an express declaration of admissibility, requires a friendly settlement phase, protects confidentiality, and follows guidelines to determine which cases shall be referred to the Court.

Finally, the Court's advisory opinion in The Effect of Reservations resulted in a change of policy in the OAS. Prior to the advisory opinion, states that ratified the American Convention with reservations were not immediately considered to be parties to the treaty. Subsequent to the Court's advisory opinion, which held the opposite, the OAS Legal Advisor advised the Secretary General that Argentina had become a state party on the date of its ratification despite doing so with reservations. Thus, the Inter-American Court's advisory opinions are contributing to the development of human rights law on several levels: institutional, national, and international.

IX. CONCLUSION

In summary, the Inter-American Court of Human Rights currently has the broadest advisory jurisdiction of any international tribunal. The Court has exercised this jurisdiction to make important conceptual contributions to international human rights law. Its advisory opinions have contributed to the emergence of international human rights law from the traditional principles of public international law that govern relations between states. An advisory opinion, a vehicle much less confrontational than a contentious case and not

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323 Moyer & Padilla, supra note 299, at 516, 520. The Court held in its advisory opinion in Restrictions to the Death Penalty that reservations to the American Convention should be narrowly interpreted. Consequently, it did not permit Guatemala to use its reservation to the right to life to extend the death penalty to crimes that were not subject to the death penalty at the time the state ratified the Convention. Advisory Opinion OC-3/83, supra note 21, paras. 74, 76(3)(b).

324 Nikken, supra note 305, at 177 (quoting el Acuerdo Gubernativo de Guatemala, No. 281–86 de 20 de Mayo de 1986).

325 Advisory Opinion OC-13/93, supra note 161, para. 1; Advisory Opinion OC-15/97, supra note 50, para. 1.


327 Buergenthal, supra note 5, at 23, n.92.

328 Id. at 2.
limited to the specific facts placed in evidence, serves to give judicial expression to the underlying principles of the law.

The advisory jurisdiction of the Inter-American Court could be strengthened to give the Court an even stronger influence on the evolution of international human rights law. Standing to request an advisory opinion could be extended to additional parties such as the Secretary General and Legal Counsel of the OAS, to national courts seeking opinions on the proper interpretation of human rights treaties, and to NGOs that have the permission of the Court. NGOs could ask leave of the Court to request an opinion, and a panel of judges could screen all requests to determine if the issues raised are pressing questions or would advance international human rights law. The subject matter of the Court’s advisory jurisdiction could also be expanded to allow the Court to issue an advisory opinion on an issue in dispute between two states at the request of those states, even if that dispute does not involve the interpretation of a human rights treaty. By expanding its jurisdiction to include the consideration of such disputes, the Court could have a positive impact on the human rights of individuals who might otherwise fall victim to armed conflict. An advisory opinion provided by a regional court might have fewer negative repercussions and could hasten settlement of a potentially explosive situation.

The Court also contributes to the evolution of human rights law through procedural innovations in its advisory proceedings. The Court accepts amicus briefs submitted by NGOs and individuals. Although amicus briefs increase the Court’s workload, they provide a public interest perspective that may otherwise be under-represented in the proceedings. In recent cases, the Court has also allowed the amici to make oral presentations to the Court during public hearings. Thus, through the broad interpretation of its Rules of Procedure and subsequent amendments thereto, the Inter-American Court has enhanced the role of individuals and amici in advisory proceedings without sacrificing the Convention’s structure and procedural equality. The Court could make further progress in this area by amending its Rules of Procedure to provide for expedited consideration of advisory requests in urgent cases.

Through its advisory jurisdiction, the Court has contributed to the uniformity and consistency of the interpretation of the substantive and procedural provisions of the American Convention and other human rights treaties. It has also given its judicial imprimatur to foundational yet disputed concepts of human rights law, including the nonvoluntary nature of many state human rights obligations, the nonreciprocal character of human rights treaties, nondiscrimination, the incompatibility of reservations to nonderogable rights, democracy as the basis for human rights, and the universal nature of human rights. Thus, the Inter-American Court’s advisory opinions provide a forum in which the Court influences important fundamental doctrinal principles and questions in the evolving law governing international human rights.