ISSN 2384-9169
Fascicolo n. 4 - 2020
rivista.eurojus.it

New opinions *ex* Protocol no. 16 to the ECHR and the Inter-American advisory practice: some comparative remarks

BY NAIARA POSENATO*

Summary: 1. Foreword. – 2. Some preliminary data and a brief timeline of the two regional advisory experiences. – 3. The Courts' jurisdiction *ratione materiae* and *ratione personae* and their respective significance. – 4. Dialogue presupposes understanding: the form of judgments of advisory opinions and the question of separate opinions. – 5. Final observations.

1. The comparative analysis of the European and Inter-American systems for the protection of human rights has been largely addressed by the literature, given the increasing cooperation between the two regional systems and the similarity of issues brought before the Strasbourg and the San José Courts[1]. A renewed interest for the Inter-American consultative

* Aggregate professor of Comparative Law, Università degli Studi di Milano.

1 See, among others, A. A. CANÇADO TRINDADE, *Approximations and Convergences in the European and Inter-American Court of Human Rights*, in J. F. FLAUSS (eds.), *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l'homme*, Bruxelles, 2005, pp. 101-138; G. COHEN JONATHAN; G. CITRONI, *Corte europea e Corte interamericana: due corti regionali dei diritti umani a confronto*, in T. SCOVAZZI; I. PAPANICOLOPULU; S. URBINATI (eds.), *I diritti umani di fronte al giudice internazionale*, Milano, 2009, p. 49 ss.; L. CAPPUCCIO; A. LOLLINI; P. TANZARELLA, *Le corti regionali tra Stati e diritti. I sistemi di protezione dei diritti fondamentali europeo, americano e africano a confronto*, Napoli, 2012; E. FERRER MAC-GREGOR, *What Do We Mean When We Talk About Judicial Dialogue?: Reflections Of A Judge Of The Inter-American Court Of Human Rights*, in *Harv. Hum. Rts. J.*, vol. 30, 2017, pp. 99-106; T. GROPPI; A. M. LECIS COCCU-ORTU, *Le citazioni reciproche tra la Corte europea e la Corte interamericana, dall'influenza al dialogo*, in *Federalismi.it - Rivista di diritto pubblico italiano, comunitario e comparato*, n. 19, 2013; T. GROPPI, *The Inter-American Court of Human Rights and the European Court of Human Rights: Towards a 'Cross Fertilization?'*, in *Ordine internazionale e diritti umani*, n. 1, 2014, p. 97 ss.; H. GROS ESPIELL, *La Convention américaine et la Convention européenne des droits de l'Homme: analyse comparative*, Leiden, 1989, p. 2 ss.; O. PARRA-VERA, *Algunos aspectos procesales y sustantivos de los diálogos recientes entre la Corte Interamericana de derechos humanos y el Tribunal Europeo de Derechos Humanos*, in I. WENCES; P. SANTOLAYA MACHETTI (eds.), *La América de los Derechos*, Madrid, 2016; F. SALVIOLI; C. ZANGHÌ (eds.), *Jurisprudencia regional comparada de derechos humanos: el Tribunal europeo y la Corte interamericana*, Valencia, 2013, p. 3 ss.; A. DI STASI, *La*

procedure was expressed in view of the entry into force of Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter Protocol No. 16 to the ECHR or Protocol No. 16)[2]. The two European first advisory opinions under this Instrument brings additional elements for understanding the European consultative procedure's functioning and for a concrete comparison with the almost forty years of Inter-American's advisory practice.

Against this background, and taking for granted the essential features of the regional mechanisms, the essay will first analyse the Courts jurisdiction *ratione personae* and *ratione materiae*, focusing on the standing to file a request and on the subject matter of the referred question, as illustrative of the advisory opinions' object. The *stylus curiae*, that is, the form of the advisory opinions, and the admissibility of separate opinions will also be briefly treated, given their relevance as premises for a real dialogue.

Concentrating on these issues will permit us to originally establish whether formal differences between the two regional systems correspond to actual divergences in the consultative mechanisms' practical working.

2. Protocol No. 16 to the ECHR, entered into force on first August 2018, allows the highest jurisdictions of the member states that have ratified it[3] to request non-binding opinions from the European Court of Human Rights (ECtHR) on questions of principle relating to the interpretation or application of the treaty provisions relevant to the definition of cases pending before them. Having institutionalized a form of direct cooperation between the national higher courts and the Strasbourg Court, Protocol No. 16 was called the "Protocol of the Dialogue"[4]. It also reiterated the courts' centrality in the multilevel European judicial

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Corte interamericana e la Corte Europea dei diritti dell'uomo: da un transnational judicial dialogue ad una cross-fertilization?, in L. CASSETTI; A. DI STASI; C. LANDA ARROYO (eds.), *Diritti e giurisprudenza. La Corte interamericana dei diritti umani e la Corte europea di Strasburgo*, Napoli, 2014, p. 1 ss.; *Diálogo Transatlántico: Selección de Jurisprudencia del Tribunal Europeo y la Corte Interamericana de Derechos Humanos*, WLP, 2015.

2 "*It is true that there are many areas in which there is still room for strengthening our dialogue. I am thinking, for instance, of the valuable experience of the Inter-American Court in advisory opinions, which can be of great interest to the European Court in view of the forthcoming entry into force of Protocol No. 16 to the Convention on August 1 this year*." G. RAIMONDI, in INTER-AMERICAN COURT OF HUMAN RIGHTS, *Dialogue between Regional Human Rights Courts*, San José C.R., 2020, p. 53. See also EUROPEAN COURT OF HUMAN RIGHTS, *Reflection Paper on the Proposal to extend the Court's Advisory Jurisdiction*, ref. No. 3853038, 2012, § 46. See also M. DICOSOLA, C. FASONE; I. SPIGNO, *The Prospective Role of Constitutional Courts in the Advisory Opinion Mechanism Before the European Court of Human Rights: A First Comparative Assessment with the European Union and the Inter-American System*, in *German Law Review*, vol. 16, n. 6, 2015, p. 1387 ss.; N. POSENATO, *Il Protocollo n. 16 alla CEDU e il rafforzamento della giurisprudenza sui diritti umani in Europa*, in *Dir. pubbl. comp. eur*., 2014, p. 1421 ss.; P. DE SENA, *Caratteri e prospettive del Protocollo 16 nel prisma dell'esperienza del sistema interamericano di protezione dei diritti dell'uomo*, in *Diritti umani e Diritto internazionale*, f. 3, 2014, p. 593 ss., e in E. LAMARQUE (ed.), *La richiesta di pareri consultivi alla Corte di Strasburgo da parte delle più alte giurisdizioni nazionali. Prime riflessioni in vista della ratifica del Protocollo 16 alla Convenzione europea dei diritti dell'uomo*, Torino, 2015, p. 1 ss.

3 The Protocol No. 16 entered into force following the deposit by France of the tenth instrument of ratification. Currently, the instrument has been ratified by 15 states: France, Albania, Andorra, Armenia, Estonia, Finland, Georgia, Greece, Lithuania, the Netherlands, the Slovak Republic, San Marino, Slovenia, and Ukraine. For an updated status, see https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214/signatures?p_auth=1KRaeTqX

4 The expression appears for the first time in the speech of the President of the ECHR on the occasion of the 123rd Section of the Committee of Ministers, on 16-5-2013 (available at

panorama: the national courts are asked to play a leading role in preventing violations of conventional rules; at the same time the ECtHR could strengthen its proactive role.

On 10 April 2019, the Strasbourg Court issued its "Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother"[5], following the request formulated barely six months before by the French *Cour de cassation*. According to it, where a child is born abroad through a gestational surrogacy arrangement conceived using the eggs of a third-party donor and where the legal parent-child relationship with the intended father has been recognised in the domestic law, art. 8 ECHR requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother". The duty of recognition can be implemented not only by an entry in the national registry of births but also through adoption by the intended mother, provided that domestic legislation enables a decision to be taken 'promptly and effectively, in accordance with the child's best interests'[6].

The Armenian Constitutional Court has definitive launching the dialogue between the European Court of Human Rights and the national courts based on Protocol no. 16 with the lodging of the second request for an advisory opinion in September 2019. The question concerned the interpretation of art. 7 of the European Convention, in relation to a specific provision of the Armenian Criminal Code. On 29 May 2020, the Grand Chamber delivered its "Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law"[7]. Setting for several preliminary considerations, the Court found that legislation by reference technique can be compatible with the Convention requirements if the provisions (read together) enable individuals to foresee what conduct would make them criminally liable. Concerning the principle of non-retroactivity of criminal law, under art. 7 ECHR, the Court stated that the criterion for assessing the law more favourable to the accused is to be found with regard to the specific circumstances of the case or, in other words, using the principle of concretisation[8].

Thus in just over a year, the Strasbourg Court has produced two consultative opinions, formulated in response to a supreme court of a consolidated democracy, in one case, and to a constitutional court of a state seeking its democratic balance, in the other. Furthermore, the opinions concerned issues of a different nature, mainly social (gestational surrogacy

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www.echr.coe.int/Documents/Speech_20130516_Spielmann_CM_FRA.pdf). Deepening the idea of the dialogue promoted by Protocol no. 16 M. WĄSEK-WIADEREK, *Advisory Opinions of the European Court of Human Rights: Do National Judges, Really Need This New Forum of Dialogue?*, in P. PINTO DE ALBUQUERQUE; K. WOJTYCZEK (eds.), *Judicial Power in a Globalized World*, 2019, p. 637 ss.

5 ECHR, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother Requested by the French Court of Cassation*, 10 April 2019, Request no. P16-2018-001.

6 ECHR, Advisory Opinion P16-2018-001, cit., § 53.

7 ECHR, *Advisory Opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law*, 29 May 2020, Request no. P16-2019-001.

8 ECHR, Advisory Opinion P16-2019-001, cit., § 92.

arrangement) or technical with political repercussions (*ne bis in idem* principle)[9]. Despite these differences, some relevant elements have emerged, as we will see below, helping to shape the new European consultative function.

The Inter-American system has a very different advisory jurisdiction story[10]. It is well known that the Court began to operate through this mode and has issued eight advisory opinions even before deciding a contentious case[11]. As of July 2020, the Court's website counts 25 advisory opinions, seven rejections to requests for an advisory opinion[12], and four other requests are currently being processed[13].

The Inter-American advisory mechanism provided by art. 64 of American Convention on Human Rights (ACHR)[14] allows member states and organs of the Organization of American States (OAS) – a such as the Inter-American Commission on Human Rights, the Inter-American Juridical Committee or other entities within the Organization of the American

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9 Cf. L. BURGORGUE-LARSEN, *Actualité de la convention européenne des droits de l'homme (janvier - juillet 2020)*, in *L'Actualité Juridique Droit Administratif*, n. 32, 2020, p. 1844 ss.

10 On this procedure see, among others, T. BUERGENTHAL, *The Advisory Practice of the Inter-American Human Rights Court*, in *American Journal of International Law*, vol. 79, n. 1, 1985, p. 1 ss.; L. BURGORGUE-LARSEN, *Advisory Jurisdiction*, in L. BURGORGUE-LARSEN; A. ÚBEDA DE TORRES, *The Inter-American Court of Human Rights. Case Law and Commentary*, Oxford University Press, 2011, p. 75 ss.; P. NIKKEN, *La función consultiva de la Corte Interamericana de Derechos Humanos*, in *El sistema interamericano de protección de derechos humanos en el umbral del siglo XXI, Memoria del Seminario*, San José, 1999, 2 ed., 2003, p. 161 ss.; Jo. M. PASQUALUCCI, *Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law*, in *Stan. J Int'l L.*, vol. 38, 2002, p. 241 ss.; ID., *The Practice and Procedure of Inter-American Court of Human Rights*, Cambridge University Press, 2nd. ed., 2013, p. 37 ss.; M. RÁBAGO DORBECKER, *El avance de los derechos humanos en las Opiniones Consultivas de la Corte Interamericana de Derechos Humanos*, in M. BECERRA RAMÍREZ (eds.), *La Corte Interamericana de Derechos Humanos a veinticinco años de su funcionamiento*, México D.F., 2007, p. 223 ss.; M.-C. RUVANOT, *La Fonction Consultative de la Cour Interaméricaine des Droits de L'Homme : Splendeurs et Misères de l'avis du Juge Interaméricain*, in L. HENNEBEL; H. TIGROUDJA (eds.), *Le particularisme interaméricain des droits de l'homme*, Paris, 2009, p. 122 ss.; F. SALVIOLI, *La competencia consultiva de la Corte Interamericana de Derechos Humanos: marco legal y desarrollo jurisprudencial*, in *Homenaje y Reconocimiento a Antônio Cançado Trindade*, Brasilia, 2004, T. III, p. 417 ss.; H. TIGROUDJA, *La fonction consultative de la Cour Interaméricaine des droits de l'homme*, in A. ONDOUA; D. SYIMCZAK (eds.), *La fonction consultative des juridictions internationales*, Paris, 2009, p. 67 ss.

11 L. BURGORGUE-LARSEN; A. ÚBEDA DE TORRES, *op. cit.*, p. 85.

12 I/A Court H.R., Advisory Opinion OC-12/91 of December 6, 1991, on *Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights*; I/A Court H.R., *Rejection to the Request of an Advisory Opinion submitted by Costa Rica*. Order of the Inter-American Court of Human Rights of May 10, 2005; I/A Court H.R., *Rejection to the Request of an Advisory Opinion submitted by the Inter-American Commission of Human Rights*. Order of the Inter-American Court of Human Rights of June 24, 2005; I/A Court H.R., *Rejection to the Request of an Advisory Opinion submitted by the Inter-American Commission of Human Rights*. Order of the Inter-American Court of Human Rights of January 27, 2009; I/A Court H.R., *Rejection to the Request of an Advisory Opinion submitted by the Secretary General of the Organization of American States*. Order of the Inter-American Court of Human Rights of June 23, 2016; I/A Court H.R., *Rejection to the Request of an Advisory Opinion presented by the Inter-American Commission of Human Rights*. Order of the Inter-American Court of Human Rights of May 29, 2018.

13 On the topic see E. BENZ, *The Inter-American Court's Advisory Function Continues to Boom – A few comments on the requests currently pending*, in *EJIL:Talk! Blog of the European Journal of International Law*, of November 25, 2019.

14 "*Article 64 - 1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, 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 opinion regarding the compatibility of any of its domestic laws with the aforesaid international instruments*."

States to consult the Court concerning the interpretation of the American Convention on Human Rights or any other convention which is related to the protection of human rights binding on the American States. Under that provision, any member state of the OAS may also request an advisory opinion on their national legislation's compatibility with the American Convention or other treaties. At the outcome of this procedure, the Inter-American Court in solemn formation will issue a consultative opinion of non-binding nature.

The scope of the advisory jurisprudence is varied: the Court addressed several procedural provisions of the American Convention on questions related, for instance, to its specific consultative attributions[15] as well as the Inter-American Commission of Human Rights[16], to the exhaustion of domestic remedies as a condition of admissibility of complaints[17], to the appointment of judges *ad hoc* in contentious cases[18], or the entitlement of legal entities as the subject of human rights[19]. Similarly, the Court treated more general topics regarding the sources of regional law for human rights, their nature and their interpretation: stressing their distinct character as compared to international legal treaties in general, the existence of the common core of basic human rights standards, and affirming the need to give an autonomous meaning in their context[20].

Likewise, classic protection issues have been the object of advisory procedures referring to the death penalty[21], children's rights[22], freedom of expression[23], and right to a nationality,

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15 I/A Court H.R., Advisory Opinion OC-1/82 of September 24, 1982, on "*Other treaties" subject to the consultative jurisdiction of the Court (Art. 64 American Convention on Human Rights)*.

16 I/A Court H.R., Advisory Opinion OC-13/93 of July 16, 1993, on *Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights)*; I/A Court H.R., Advisory Opinion OC-15/97 of November 14, 1997, on *Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights)*; I/A Court H.R., Advisory Opinion OC-19/05 of November 28, 2005, on *Control of due process in the exercise of the powers of the Inter-American Commission on Human Rights (Articles 41 and 44 to 51 of the American Convention on Human Rights).*

17 With this Opinion the Court clarified "*That if his indigency or a general fear in the legal community to represent him prevents a complainant before the Commission from invoking the domestic remedies necessary to protect a right guaranteed by the Convention, he is not required to exhaust such remedies*." Cf. I/A Court H.R., Advisory Opinion OC-11/90 of August 10, 1990, on *Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights)*, operative § 1, p. 9.

18 With its twentieth Advisory Opinion, the Inter-American Court stated that the possibility for respondent States to appoint a judge *ad hoc* to be part of the Court is restricted to interstate cases. Cf. I/A Court H.R., Advisory Opinion OC-20/09 of September 29, 2009, on *Article 55 of the American Convention on Human Rights*, operative § 1, p. 67.

19 The Court reiterated its jurisprudence according to which indigenous communities are holders of rights and can defend them and those of their members before the Inter-American System. Besides, the Court held that even if legal persons are not holders of rights under the art. 1.2 or the American Convention, under certain assumptions, the individual who exercises his rights through legal persons can enforce them before the Inter-American System. Cf. I /A Court H.R., Advisory Opinion OC-22/16 of February 26, 2016, on *Entitlement of legal entities to hold rights under the Inter-American Human Rights System (Interpretation and scope of Article 1(2), in relation to Articles 1(2), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of the American Convention on Human Rights, as well as of Article 8(1)(A) and (B) of the Protocol of San Salvador*, operative § 2 ss., p. 46 ss.

20 I/A Court H.R., Advisory Opinion OC-2/82 of September 24, 1982, on *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, § 47; I/A Court H.R., Advisory Opinion OC-10/89 of July 14, 1989, on the *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, § 37-38.

21 I/A Court H.R., Advisory Opinion OC-3/83 of September 8, 1983, on *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*.

among others[24]. The Court jurisprudence on substantial provisions is evolutive: for example, in a pair of advisory opinions, the Writ of *Habeas Corpus* and the *Amparo* have been considered essential juridical remedies for the protection of life and bodily integrity, whose derogation is prohibited even during the state of emergency[25]. The recognition of an individual right to consular assistance as part of the Due Process of Law, as affirmed by the Court based on Article 36 of the Vienna Convention on Consular Relations[26], was also a contribution to international legal discourse[27]. The Inter-American advisory praxis is distinctive on the relationship between human rights and the concept of the rule of law as well: for example, by emphasizing the importance of democracy for the protection of human rights[28] or the principle of non-discrimination[29], raised by the Court an expression of *jus cogens*[30].

In recent years, the Court has dealt with issues concerning the protection of human rights under the impact of globalization: after an early pronunciation on the rights of the undocumented migrants[31], over the past five years relevant and ground-breaking opinions have been adopted on children in the context of migration[32], human rights and environment[33],

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22 I/A Court H.R., Advisory Opinion OC-17/02 of August 28, 2002, on the *Juridical Condition and Human Rights of the Child*.

23 I/A Court H.R., Advisory Opinion OC-5/85 of November 13, 1985, on *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*; and I/A Court H.R., Advisory Opinion OC-7/85 of August 29, 1986, *Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights)*.

24 I/A Court H.R., Advisory Opinion OC-4/84 of January 19, 1984, on *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*.

25 I/A Court H.R., Advisory Opinion OC-8/87 of January 30, 1987, on *Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*; I/A Court H.R., Advisory Opinion OC-9/87 of October 6, 1987, on *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights).*

26 Under its consultative jurisdiction on "other treaties concerning the protection of human rights in the American states" (art. 64, 1). Cf. I/A Court H.R., Advisory Opinion OC-16/99 of October 1, 1999, on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law*.

27 Evoked by the International Court of Justice in LaGrand and Avena cases latter, cf. LaGrand Case (Germany v. United States of America), [2001] I.C.J. Rep. 466, and Case Concerning Avena and Other Mexican Nationals (Mexico v. United States), [2004] I.C.J. Rep. 12.

28 I/A Court H.R., Advisory Opinion OC-6/86 of May 9, 1986, on *The Word "Laws" in Article 30 of the American Convention on Human Rights*.

29 I/A Court H.R., Advisory Opinion OC-4/84, cit., 1984; I/A Court H.R., Advisory Opinion OC-17/02 of August 28, 2002, on *Juridical Condition and Human Rights of the Child*; I/A Court H.R., Advisory Opinion OC-18/03 of September 17, 2003, on *Juridical Condition and Rights of the Undocumented Migrants*, operative § 5, p. 113; I/A Court H.R., Advisory Opinion OC-24/17 of November 24, 2017, on *Gender identity, and equality and non-discrimination with regard to same-sex couples.*

30 For a critical appraisal of the methodology and results of the Inter-American Court's efforts to expand *jus cogens* see A. BIANCHI, *Human Rights and the Magic of Jus Cogens*, in *European Journal of International Law*, vol. 19, 2008, p. 506; G. L. NEUMAN, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, in *European Journal of International Law*, vol. 19, n. 1, 2008, pp. 117-122.

31 I/A Court H.R., Advisory Opinion OC-18/03, cit.

32 I/A Court H.R., Advisory Opinion OC-21/14 of August 19, 2014, on *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*.

33 I/A Court H.R., Advisory Opinion OC-23/17 of November 15, 2017, on *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights).*

gender identity and non-discrimination of same-sex couples[34], and finally the right of asylum[35].

3. The previous brief references to the two regional Courts' specific experiences introduce us to synthetic illustration and analysis of the respective advisory jurisdiction scope. The conventional rules' mere reading reveals significant differences between the two consultative mechanisms' competencies *ratione materiae* and *ratione personae*. However, the true question is whether a distinct legal model may also correspond to dissimilar practices concerning the submitted questions' nature.

The American Convention recognizes the standing to request an advisory opinion to all OAS member states and many regional entities listed in the OAS Charter's applicable section [36], according to the nature of the application (art. 64, 1 or 2)[37]. The broad scope of the regional consultative legitimacy is the counterweight of the Inter-American litigation system's weaknesses, as even a state non-party to the American Convention can have access to the advisory jurisdiction of the San José Court. Meanwhile, and differently from the Council of Europe system, national courts of OAS member states have not standing to ask for advice[38]. Such a setting may suggest that the submitted questions are generally more abstract, as they do not necessarily arise in the context of a concrete procedure. Nevertheless, the Inter-American practice evinces that even if the question submitted has not been raised in a contentious national case, the advisory jurisdiction should not rule on mere academic speculations lacking an (at least) foreseeable application to specific situations[39]. The filed issue has to be placed in a particular juridical, historical, and political context to illustrate the different interpretations that it can ingenerate. The use of practical situations allows the Court to show that its Advisory Opinion is not mere academic speculation and might benefit the

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34 I/A Court H.R., Advisory Opinion OC-24/17 of November 24, 2017, on *Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights)*.

35 I/A Court H.R., Advisory Opinion OC-25/18 of May 30, 2018, on *The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights)*. See M. FRIGO, *The Inter-American Court's Advisory Opinion on Asylum and Its Impact for the Human Rights of Refugees Worldwide*, in *Opinio Juris Blog*, Oct. 2018.

36 Pursuant to art. 53 of the Charter of the Organization of American States, these organs are: the General Assembly; b) the Meeting of Consultation of Ministers of Foreign Affairs; c) the Councils; d) the Inter-American Juridical Committee; e) the Inter-American Commission on Human Rights; f) the General Secretariat; g) the Specialized Conferences; and h) the Specialized Organizations.

37 To date, however, only some member states and the Inter-American Commission have exercised this right, with the sole exception of the Rejection to the Request of an Advisory Opinion submitted by the Secretary General of the Organization of American States of May 19, 2016, regarding the due process rights of the then President of Brazil, Dilma Rousseff during impeachment proceedings against her.

38 Some authors suggested that domestic courts of national states could be authorized to request an advisory opinion through, for instance, the Inter-American Juridical Committee, an advisory OAS organ on juridical matters that also promotes the codification and development of international law. See J. M. PASQUALLUCCI, *op. cit.*, pp. 256-257. In the same sense H. FAÚNDEZ LEDESMA, *El Sistema Interamericano de Protección de los Derechos Humanos. Aspectos institucionales y procesales*, 3 ed., 2004, San José, C.R., pp. 959-960, p. 963.

39 Cf., *inter alia*, I/A Court H.R., Advisory Opinion OC-9/87, cit., § 16; I/A Court H.R., Advisory Opinion OC- 13/93, cit., § 17; I/A Court H.R., Advisory Opinion OC-16/99, cit., § 49; and I/A Court H.R., Advisory Opinion OC-21/14, cit., § 25.

international protection of human rights[40]. Obviously, this does not mean that the references to the factual context need to be so specific as to necessarily associate the response to a ruling on a specific case[41], which would not be in the general interest that a request of an advisory opinion is intended to serve[42].

By the European side, as is known, the legitimacy to ask for an advisory opinion is reserved to the highest national courts and tribunals in the context of a case pending before them[43]. Such an approach would favour the arising of a more concrete issue linked to a specific situation; however, this conclusion was undermined by the second Opinion under Protocol No. 16. In fact, the Strasbourg Court considered that the first two questions submitted by the Armenian Constitutional Court about the concept of "law" and the degree of qualitative requirements under art. 7 ECHR and referred to in arts. 8-11 ECHR (certainty, accessibility, foreseeability, and stability) were abstract and general and unlinked with domestic proceedings. For these reasons, they went beyond the scope of an advisory opinion as envisaged by that procedure[44]. Consequently, and because the questions could not be reformulated (as have been done in the Advisory Opinion No. 1 concerning surrogacy motherhood[45]), the Court decided not to answer them[46].

The decision to reject remitted questions due to their abstract nature could be seen as too restrictive and, therefore, contrary to the spirit of dialogue that Protocol n. 16 wants to promote[47]. The Opinion nevertheless pointed out that the issues of legal certainty and foreseeability referred to in the first and second questions would still have been addressed sufficiently in the third question's answer[48]. The Court statement also clarifies an important aspect relating to the admissibility of a request and the interpretation of art. 2 § 2 of the Protocol No. 16: the Grand Chamber is not entirely bound by the acceptance of the application by the Panel, also in light of the powers conferred on the Court according to arts. 19 and 32 ECHR[49].

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40 Cf. I/A Court H.R., Advisory Opinion OC-16/99, cit., § 49. "*The fact that the request for an advisory opinion cites as antecedent a specific case in which the Commission has specifically applied the criteria on which the State seeks a response, is an argument in favor of the Court's exercising its advisory jurisdiction, inasmuch as it is not being used for purely academic speculation, without a foreseeable application to concrete situations justifying the need for an advisory opinion*." Cf. I/A Court H.R., Advisory Opinion OC-15/97, cit., § 32.

41 I/A Court H.R., Advisory Opinion OC-16/99 of October 1, 1999, § 38-41.

42 For this and other reasons, the Court issued in 2018 an order of inadmissibility on the Request for an Advisory Opinion submitted by the Inter-American Commission of Human Rights on "the implications of the guarantees of due process and the principle of legality in the context of the impeachment of constitutional and democratically elected Presidents". See I/A Court H.R., Order of the Inter-American Court of Human Rights, of May 29, 2018, on *Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*, § 9-11.

43 Limitation that seems to aim primarily to avoid an excessive flow of requests cf. ECHR, *Reflection paper on the proposal to extend the Court's advisory opinion*, 2013, § 20 (available at https://www.echr.coe.int/Documents/2013_Courts_advisory_jurisdiction_ENG.pdf).

44 ECHR, Advisory Opinion P16-2019-001, cit., § 55-56.

45 ECHR, Advisory Opinion P16-2018-001, cit., § 26-33.

46 ECHR, Advisory Opinion P16-2019-001, cit., § 55-56.

47 L. LAVRYSSEN, *Advisory Opinion n° 2: a Slightly Bigger Rodent*, in *Strasbourg Observers*, 5 June 2020: "One may, however, wonder whether rejecting questions for being formulated at a too high level abstraction does not go against the objective of Protocol n° 16 to encourage judicial dialogue in a spirit of subsidiarity."

48 ECHR, Advisory Opinion P16-2019-001, § 55.

49 Id., § 47.

The Armenian request's second interesting point is related to the non-complete acquisition of the national judgment's factual elements. Actually, the procedure that gave rise to the Opinion was a review of constitutionality, in its turn preliminary to the main national criminal proceeding. In this double referral procedure context, the main criminal proceeding was pending at a very early stage. Despite that, the Strasbourg Court decided to proceed based on the facts as provided by the Constitutional Court, even if they may be subject to a subsequent review by the first instance Court[50]. This has not been seen as an obstacle to giving the Opinion as it would have anyway enabled the Constitutional Court to assess the constitutionality of Article 300.1 of the 2009 Armenian Criminal Code in the light of the requirements flowing from art. 7 ECHR. Concrete facts will have relevance for the national First-Instance Court, according to the principle of subsidiarity.

Summing up, what has emerged in this second Advisory Opinion seem to lead to the conclusion that the issues admitted to the European consultative procedure, although defined in the context of the dispute in which they arose, may have a more abstract character not strictly limited to the factual framework of the case under analysis. As in the Armenian example, this framework can even be modified during the national proceedings, so the Advisory Opinion's concrete impact on the domestic proceedings is more hypothetical[51]. It is self-evident where the consultative mechanism must perform a preventive function, and the opinions shall provide information useful to other jurisdictions[52].

The subject matter of advisory jurisdiction is another domain where the European and the Inter-American systems differ. As provided by art. 64, § 1, of the American Convention, the Inter-American Court can rule not only on the interpretation of the American Convention on Human Rights but also on other "other treaties concerning human rights". The expression confers "the power to interpret any treaty as long as it is directly related to the protection of human rights in a Member State of the Inter-American system", regardless of it has not been adopted within the OAS framework, its main object is not the protection of human rights, or whether or not non-member states of the Inter-American system are or have the right to become parties thereto[53]. Such an approach implies a very wide extension *ratione materiae* of the consultative competence of the Inter-American Court and reveals its claim for universality: through the consultative instrument, the Court proposes to carry out a pedagogical function of interpreter of human rights in favour of the States of the region, without subjecting them to the formalism associated with the contentious judicial process.

The Advisory Opinion n. 16 of 1999 on the right to consular assistance is an emblematic example of this broad scope jurisdiction: art. 36 of the Vienna Convention on Consular Relations was interpreted as granting a personal right of information to the accused person, as part of his right to a due process of law[54]. On that basis, the Court has rendered an advisory opinion on the American Declaration of the Rights and Duties of Man of 1948,

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50 Id., § 49.

51 Cf. L. LAVRYSSEN, *op. cit*., p. 2.

52 In the same sense L. A. SICILIANOS, *L'élargissement de la competénce consultative de la Cour européenne des droits de l'homme – À propos du Protocole n° 16 à la Convention européenne des droits de l'homme*, in *Rev. trim. dr. h.*, vol. 97, 2014, pp. 17-18.

53 The topic has been subjected of the first advisory opinion issued by the Inter-American Court, Advisory Opinion OC-1/82 of September 25, 1982, cit.

54 Cf. I/A Court H.R., Advisory Opinion OC-16/99, cit., § 110 ss.

following the request submitted by the Government of the Republic of Colombia, even if that instrument is not technically a treaty[55].

Under Protocol No. 16, otherwise, requests for an advisory opinion may only concern the interpretation or application of the European Convention on Human Rights and its Protocols. However, nothing excludes that the European Court may contribute to interpreting rules produced by sources outside the Convention, as acts of international organizations or rules of general or conventional law. For instance, a State can ask the Court for an opinion formally concerning the interpretation of an ECHR provision, aimed at clarifying whether the behaviour required by a rule external to the Convention is or is not compatible with the Convention itself[56]. The first Advisory Opinion contains a reference to the 1989 United Nations Convention on the rights of the child, to the work of the Hague Conference on Private International Law and a UN Special Committee on the Rights of the Child report[57]. However, these international instruments have only been recalled and not subjected to analysis. In the second Advisory Opinion, no element relating to the issue of the "legislation by reference" technique or the principle of non-retroactivity of criminal law was sought in the context of international law.

Still concerning the *ratione materiae*, as provided for by art. 64, § 2 ACHR, the Inter-American advisory jurisdiction expressly includes the compatibility of national legislation with the American Convention or with one of these international instruments[58]. According to the Inter-American jurisprudence, which has interpreted the provision in a broad form, the notion of "national legislation" refers to both ordinary and constitutional norms [59] and regulations at a draft stage. This possibility is strongly linked to the preventive dimension of the protection of human rights: the Court reasoned that by refusing to issue an advisory opinion on legislation not duly promulgated could force the State to violate the Convention by the adoption and application of a legislative measure, which would then be deemed to permit the request[60].Nevertheless, the Court has adopted a prudent approach to avoid that advisory jurisdiction becomes a tool to change or alter the internal political debate[61], to unduly exploited to resolve contentious matters or, in general, weak or alter the system established by the Convention, in a manner that would impair the rights of potential victims of human rights violations[62]. This has been the basis for the Court to decline its jurisdiction in a specific case, considering that the government that presented the request of an advisory opinion was raising a contentious case undercover: "the Court believes that a reply to the questions presented by Costa Rica, could produce, under the guise of an advisory opinion, a determination of contentious matters not yet referred to the Court, without providing the victims with the

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55 Cf. I/A Court H.R., Advisory Opinion OC -10/89, cit., § 25.

56 P. DE SENA, *op. cit.*, p. 601.

57 Cf. ECHR, Advisory Opinion P16-2018-001, cit., § 19-21.

58 As in the cases I/A Court H.R., Advisory Opinion OC-4/84, cit.; I/A Court H.R., Advisory Opinion OC-5/85, cit., and I/A Court H.R., Advisory Opinion OC-12/91, cit.

59 I/A Court H.R., Advisory Opinion OC-4/84, cit., § 14, 26.

60 I/A Court H.R., Advisory Opinion OC-4/84, cit., § 26.

61 Cf. I/A Court H.R., Advisory Opinion OC-4/84, cit., § 30; *Rejection to the Request of an Advisory Opinion submitted by Costa Rica. Order of the Inter-American Court of Human Rights, of May* 10, 2005, *Whereas* no. 11.

62 I/A Court H.R., Advisory Opinion OC-1/82, cit., § 31; I/A Court H.R., Advisory Opinion OC-3/83, cit., § 36-37.

opportunity to participate in the proceedings. Such a result would distort the Convention system."[63]

The possibility of assessing the compatibility of internal laws with conventional text is not provided in the European system. However, that scenario seems not absolutely excluded from the instrument's text and can concretely occur. Indeed, official documents mention the Strasbourg Court's impossibility of making an abstract review of national legislation in the light of the Convention only if disconnected from the contentious case[64]. This statement, therefore, seems to overcome positions in the opposite sense subscribed in the past, according to which any review of national law or draft law should be avoided[65]. A question relating to the compatibility of national legislation with the conventional rule may be highlighted in the concrete functioning of the European mechanism and nothing precludes it from being analysed by the Court, provided that it is relevant for the case in question and other similar situations. On the contrary, the preventive function of the advisory jurisdiction could be unfairly limited[66].

The dispute for which the opinion is requested can refer, for instance, to violations caused by structural dysfunctions of the State involved. In such case, the Court could be induced to render a ruling containing indications of a general nature, suitable for guiding the national legislator, to avoid repeating of the violations[67]. In its first Opinion, for instance, the Strasbourg Court, in discussing how national legal systems can recognize the relationship between the intended mother and child, specifically noted that the adoption procedure provided for in the French system is open only to married intended parents and presents uncertainties, for example, regarding the need to obtain the prior consent of the gestational mother[68]. The Court naturally did not arrive to concretely assess the French adoption law's conformity to the Convention in the specific case[69]. However, it did gave guidance to domestic courts analysing national law in this sense.

4. By style or form of judgment, we mean the analysis of a series of formal elements of the judicial decision, such as its language (concise or lengthy, technical or informal), its reasoning method (casuistic or conceptualistic), its structure (single, seriatim, single majority and separate concurring/dissenting opinions), etc., as a distinctive and institutionalized manner of deciding of a court of justice. Comparative studies traditionally confront Common law and Civil law traditional form of judgments, and the importance of this analysis has

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63 I/A Court H.R., Advisory Opinion OC-12/91, cit., § 28.

64 *Explanatory Report to the Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, § 10.

65 Cf. *Reflection Paper on the Proposal to extend the Court's Advisory Jurisdiction*, § 29; and *Draft CDDH Report on the proposal to extend the Court□s jurisdiction to give advisory opinions*, DH-GDR(2011) R8 Appendix VII, § 7.

66 Cf. V. ZAGREBELSKY, *Parere consultivo della Corte europea dei diritti umani: vera e falsa sussidiarietà*, in E. LAMARQUE (ed.), *La richiesta di pareri consultivi alla Corte di Strasburgo da parte delle più alte giurisdizionali nazionali. Prime riflessioni in vista della ratifica del Protocollo 16 alla Convenzione europea dei diritti dell'uomo*, Torino, 2015, p. 91 ss.; P. TANZARELLA, *Il sistema interamericano di protezione dei diritti umani nella prassi della Corte di San José*, n. 20, 2009, p. 23.

67 P. DE SENA, *op. cit.*, p. 604.

68 ECHR, Advisory Opinion P16-2018-001, cit., § 57.

69 ECHR, Advisory Opinion P16-2018-001, cit., § 58.

increased over the years, on account of transparency and legitimacy of the Judiciary, as well as the right of access to justice[70].

In the last decades, the human rights Courts' style of judgments is drawing the Academy's attention [71]. It is undoubtedly due to the practical importance that this jurisprudence has acquired in national legal systems and the strategic role at the regional level. Nevertheless, such decisions also have scientific profiles of interest deriving from these courts' peculiar characteristics: their uncertain status, oscillating between international and constitutional nature[72], the particular formulation of conventional sources[73], the international formation of the judicial body[74], among others.

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[70] There is a vast body of legal literature on the subject, so the following are general indications and not a comprehensive bibliography. See, *inter alia*, among dated and more recent contributions: M. ANDENAS; D. FAIRGRIEVE, *Simply a matter of style? Comparing Judicial Decisions*, University of Oslo Faculty of Law Legal Studies, Research Paper Series N. 2013-13, 2013; J. P. DAWSON, *The Oracles of the Law*, Michigan, 1968; G. GORLA, *Lo stile delle sentenze. Ricerca storico-comparativa*, in *Foro it., Quaderni*, 1967, vol. 90, p. 313 ss.; N. HULS; M. ADAMS; J. BOMHOFF (eds.), *The Legitimacy of Highest Courts' Rulings. Judicial Deliberations and Beyond*, The Hague, 2009; LASSER, M. DE S.-O. -L'E., *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy*. Oxford, 2004; K. LLEWELLYN, *The Common Law Tradition: Deciding Appeals*, Boston, 1960; P. STEIN, *Judgments in the European Legal Tradition*, in AA.VV., *La sentenza in Europa. Metodo, tecnica e stile*, Padova, 1988, p. 27 ss.; R. SEFTON-GREEN, *Vices et vertus de la motivation judiciaire: comparaisons anglo-françaises*, in *Les cahiers de la justice*, 2, 2011, p. 89 ss.; F. RANIERI, *Styles judiciaire dans l'histoire européenne: modèles divergents ou tradition communes?*, in R. JACOB (dir.), *Le juge et le jugement dans les traditions juridiques européennes. Études d'histoire comparée*, Paris, 1996, p. 181 ss.; A. TOUFFAIT; A. TUNC, *Pour une motivation plus explicite des décisions de justice, notamment de celles de la Cour de Cassation*, in *Rev. trim. dr. civ.*, LXXII, 1974, p. 487 ss.; M. WELLS, *French and American Judicial Opinions*, in *Yale J. Int. Law*, vol. 19, 1994, p. 81 ss.; J. G. WETTER, *The styles of appellate judicial opinions. A case study in comparative law*, Leyden, 1960. We also have pleasure to refer the reader to our *Lo stile delle sentenze. Profili di attualità di diritto comparato*, Padova, 2017.

[71] E. CALZOLAIO, *National Judges and Strasbourg Case Law. Comparative Reflections about the Italian Experience*, in M. ADENAS; D. FAIRGRIEVE (eds.), *Courts and Comparative Law*, Oxford, 2015, p. 177 ss.; L. GARLICKI, *Judicial deliberations: the Strasbourg perspective*, in N. HULS; M. ADAMS; J. BOMHOFF (eds.), *The Legitimacy of Highest Courts' Rulings. Judicial Deliberations and Beyond*, The Hague, 2009, p. 389 ss.; F. SUDRE, *La motivation des décisions de la Cour Européenne des Droits de l'Homme*, in H. R. FABRI; J.-M. SOREL (eds.), *La motivation des décisions des juridictions internationales*, Paris, 2008, p. 171 ss.; R. C. A. WHITE, *Judgments in the Strasbourg Court: some reflections*, 2009 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1435197); A. SCHAHMANECHE, *La motivation des décisions de la Cour Européenne des Droits de l'Homme*, Paris, 2014; V. ZAGREBELSKY, *Considérations sur les sources d'inspiration et la motivation des arrêts de la Cour europeenne des droit de l'homme*, in C. HOHMANN-DENNHARDT; P. MASUCH; M. E. VILLIGER (eds.), *Grundrechte und Solidarität. Durchsetzung und Verfahren. Festchrift für Renate Jaeger*, 2011, p. 211 ss.

[72] Today the doctrinal positions for the recognition of a constitutional or quasi-constitutional status the nature of the ECtHR appear to be the minority. On the Inter-American Court see L. BURGORGUE-LARSEN, *La corte interamericana de derechos humanos como tribunal constitucional*, in A. VON BOGDANDY; H. FIX-FIERRO; M. MORALES ANTONIAZZI (eds.), *Ius Constitutionale Commune en América Latina. Rasgos, potencialidades y desafíos*, México, 2014, p. 421 ss.; L. HENNEBEL, *La cour interaméricaine des droits de l'homme: entre particularisme et universalisme*, in L. HENNEBEL; H. TIGROUDJA (eds.), *Le particularisme interaméricain des droits de l'homme*, Paris, 2009, p. 91 ss.

[73] Cf. V. ZAGREBELSKY, *Considérations sur les sources d'inspiration etc.*, cit., p. 211; F. SUDRE, *La réécriture de la Convention par la Cour Européenne des Droits de l'Homme*, in AA.VV., *La conscience des droits. Mélanges en l'honneur de Jean-Paul Costa*, 2011, p. 597 ss.

[74] Cf., on the topic, A. VON BOGDANDY; C. KRENN, *Sobre la legitimidad democrática de los jueces de Europa. Una reconstrucción comparada y de principios de los procedimientos de selección*, in AA.VV., *La garantía jurisdiccional de los Derechos Humanos. Un estudio comparado de los sistemas regionales de tutela: europeo, interamericano y africano*, Oñati, 2015, p. 156 ss.; L. BURGORGUE-LARSEN, *Des idéaux à la réalité. Réflexions comparées sur les processus de sélection et de nomination des membres des Cours européenne et interaméricaine des droits de l'homme*, in *La Revue des droits de l'homme*, 2014, n. 6, p. 2 ss.; O. RUIZ-

The reasons for the interest in the style of contentious jurisprudence also extend to consultative opinions, perhaps even more: since not binding, they must be particularly clear and persuasive to favour broad acceptance. If we talk about dialogue, as in the case of Protocol No. 16, it is logical that it presupposes understanding between the parties[75], and it is not always obvious to communicate easily with 47 different legal cultures starting from the same text.

The mentioned specificities impact the *stylus curiae* of the regional courts of protection, which is in many features different from national superior courts, especially from the Civil law tradition. One of these characteristics is their extent, usually more pronounced than many higher court decisions, easily reaching hundreds of pages. Such particularity depends on various causes, which can be associated with the functioning of the protective judicial bodies or with regional specificities: the need for preventive exhaustion of national appeals, for instance, requires the reconstruction of the factual context in each dispute and the judicial analysis carried out at national level. Coming to the single regional system, the European Grand Chamber's decisions must report the solutions adopted by the Chamber, especially under the art. 43 ECHR procedure[76]. On its side, the Inter-American procedure provides for a mandatory oral phase reported in the text of the judgment and a complex reparations system, with different remedial measures frequently included in the body of the decision[77]. Besides, to develop its jurisprudence beyond the limits of the case, the Court of San José has always applied the technique of extensively discussing the multiple violations emerging from the same controversy[78].

Frequently these Courts adopt a case-by-case approach and a combination of deductive reasoning and (to a lesser instant) an inductive one, constantly recalling its previous precedents. The decisions adopted in contentious jurisdiction by the ECtHR, for example, have a casuistic nature and are strictly focused on the events of the *sub judice* case, which leads to the eventual ascertainment of violation of the Convention[79]. The argumentative process mainly consists of illustrating the general principles that inspire the Court, often

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CHIRIBOGA, *The independence of the interamerican judge*, in *The Law and Practice of International Courts and Tribunals*, vol. 11, 2012, p. 111 ss.

75 F. BENNOIT-ROMER, *Le Protocole 16 ou le renouveau de la fonction consultative de la Cour européenne des droits de l'Homme*, in *Les défis liés à l'entrée en vigueur du Protocole 16 à la Convention européenne des droit de l'Homme*, IRCM Université de Strasbourg, 2019, p. 4; L. A. SICILIANOS, *L'élargissement de la compétence consultative de la cour européenne des droits de l'homme - A propos du Protocole n°16 à la Convention européenne des droits de l'homme*, in *RTDH*, 2014, p. 19.

76 The doctrine indicates as a further reason for the growing extension of judgments the reference to the precedents of the Court itself and the use of the "copy-paste" practice, cf. F. SUDRE, *La motivation*, cit., p. 181.

77 On the reparations, for more bibliographic references, see N. POSENATO, *Memoria e riparazione delle violazioni dei diritti umani nella giurisprudenza della Corte interamericana dei diritti umani*, in M. ROSTI; V. PALEARI (eds.), *Donde no habite el olvido. Herencia y transmisión del testimonio. Perspectivas socio-jurídicas*, Milano, 2017, p. 45 ss.

78 G. L. NEUMAN, *op. cit.*, p. 104.

79 W. THOMASSEN, *Judicial legitimacy in an internationalized world*, in N. HULS; M. ADAMS; J. BOMHOFF (eds.), *The Legitimacy of Highest Courts' Rulings. Judicial Deliberations and Beyond*, The Hague, 2009, pp. 419-420.

extrapolating them from its own case law and finding the solution applicable to the case in question[80].

Consistent with its mission of protecting human rights, the Inter-American Court seems to adopt a similar case-based approach, but not remarkable compared to that of the European Court[81]. The jurisprudence has shown that the Court can engage a form of conventionality control of national law with the Inter-American *corpus iuris* without asserting a concrete violation: a representative example is the inconsistency of the amnesty laws to the States rights and obligations[82].

Despite the absence of statutory provisions providing a rule of binding precedent (*stare decisis*), both regional courts regularly refer to their jurisprudence. The previous rulings provide the decisions relating to similar facts from which extract the *ratio decidendi* to apply to the case to be decided subsequently. It is also usual to refer to more than one precedent, usually the most dating or representative, followed by the others, chosen without a specific criterion. This practice seems oriented to highlight jurisprudence's continuity rather than any applicable praetorian rule[83].

Regarding the style of the advisory opinions, their respective regulation is different in the two regional systems: art. 75 of the Rules of Procedure of the Inter-American Court of Human Rights establishes in detail the opinion's content[84]. On the other hand, the European system only regulates the authentic language versions, the majority vote, and the possibility of attaching a separate opinion, which will be discussed below[85].

Comparing the advisory opinions already released, an immediate difference that pertains to prolixity arises: in the Inter-American case, those issued in the last years, and the majority concerning substantive rights before 2010, were extensive, reaching or exceeding one hundred pages. On the contrary, European practice reveals the adoption of brief opinions, which do not exceed the total of about 30 pages, also distancing from the Grand Chamber rulings, which have an average three times higher. It seems that the European judge sought

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80 D. SZYMCZAK, *La manipulation par la Cour européenne des droits de l'homme de ses propres precedentes*, in F. HOURQUEBIE; M.-C. PONTHOREAU (eds.), *La motivation des décisions des cours suprêmes et cours constitutionnelles*, Bruxelles, 2012, p. 68.

81 The Court «*semble toujours vouloir se saisir du prétexte qu'est un cas individuel pour poser, au moyen d'obiter dicta, des principes fondamentaux, voire constitutionnels*». Cf. H. TIGROUDJA, *La légitimité du particularisme interaméricaine en question*, in L. HENNEBEL; H. TIGROUDJA (eds.), *Le particularisme interaméricain des droits de l'homme*, Paris, 2009, p. 396.

82 For a synthesis, see C. BINDER, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, in A. VON BOGDANDY; I. VENZKE (eds.), *International Judicial Lawmaking. On Public Authority and Democratic Legitimation in Global Governance*, Springer, 2012, p. 295 ss.

83 D. SZYMCZAK, *op. cit*., p. 72.

84 "*Art. 75. Delivery and Content of Advisory Opinions. (…) 2. Advisory opinions shall contain: a. the names of the person who presides in the Court, the Judges who rendered the opinion, the Secretary, and the Deputy Secretary; b. the issues presented to the Court; c. a description of the proceedings; d. the legal arguments; e. the opinion of the Court; f. a statement indicating which text of the opinion is authentic*." Furthermore, the norm establishes in n. 3 that "*Any judge who has taken part in the delivery of an advisory opinion is entitled to append a separate reasoned opinion, concurring or dissenting, to that of the Court*."

85 "*Rule 94. Proceedings following the panel's acceptance of a request (…)7. Advisory opinions shall be given by a majority vote of the Grand Chamber. They shall mention the number of judges constituting the majority. 7B. Advisory opinions shall be given in both official languages of the Court, and both language versions shall be equally authentic. 8. Any judge may, if he or she so desires, attach to the advisory opinion of the Court either a separate opinion, concurring with or dissenting from the advisory opinion, or a bare statement of dissent*. (…)"

conciseness, associating it with the idea of clarity[86]. The conciseness can also be linked to the need for celerity due to the procedure's prejudicial nature: this can explain, for instance, the renunciation of the public hearing, which would be the practice for the formation of the Grand Chamber[87].

Diversely of the European Court, the Inter-American judicial organ does not face any docket difficulty, and the consultancy is not linked to an on-going national process, so it can afford to analyse each aspect of the legal question in the opinion. Moreover, other elements may help increase the length of the San José Court's opinions: one of these is undoubtedly the broad contribution of the *amicus curiae*, provided for in the discipline of advisory opinions under the present art. 73, 3 of its Rules of Procedure[88]. Since the 1990s, the Court has admitted associations and individuals interested in participating in public hearings and presenting writings and, especially from OC-16/99 on the right to information on consular assistance, has started the practice of reporting the relevant arguments presented by the *amici curiae* and evaluating their weight in the decision's body[89].

Diversely, the *amici curiae* were admitted to the written procedure *ex* Protocol No. 16, but only a generic reference to their contribution is present in the decisions. Indeed, more generally, in both Advisory Opinions the Court stated that it would not reply to all grounds and arguments submitted to by the participants, where its role under new consultative mechanism is only provide, "within as short a time frame as possible, … the requesting court or tribunal with guidance"[90]. In doing so, the Court made a clear distinction between the advisory and the contentious proceedings. However, the lack of reference to the parties' arguments is also related to the concise content of the opinions and the need to provide to the national court as quickly as possible. However, if the clarity is not necessarily correlated to a more detailed motivation, it is likewise necessary to avoid that a summary and urgent opinion undermine the very guiding purpose of Protocol No. 16 procedure.

Concerning the admissibility analysis of the requests presented by the *Cour de cassation* and by the Armenian Constitutional Court, the Strasbourg judge merely reported that "*the jury of five judges of the Grand Chamber* (...) *decided to accept the request*"[91]. The Explanatory Report to Protocol No. 16 affirms the need to give reasons only for the decisions of refusal by the college, with the scope of guiding the court and tribunal about the interpretation of the nature of the questions on which a domestic court or tribunal may request the Court's advisory opinion[92]. However, it is not explained why the advisory opinion's

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86 Cf. T. LARROUTUROU, *Coup de projecteur sur les aspects procéduraux du premier avis rendu dans le cadre du Protocole 16 à la Convention européenne des droits de l'homme*, in *Recueil Dalloz*, 2019, p. 1404 ss.

87 ECHR, Advisory Opinion P16-2018-001, cit., § 8; ECHR, Advisory Opinion P16-2019-001, cit., § 10.

88 "*Art. 73. Procedure (…) 3. The Presidency may invite or authorize any interested party to submit a written opinion on the issues covered by the request. (…)".The rule precedes the introduction, in the latest reform of the Court's Rules, of a specific provision (Article 44) governing the participation of the Curiae friends in the written phase of the litigation procedure*."

89 H. FAÚNDEZ LEDESMA, *op. cit.*, p. 985. On the specific topic see F. J. RIVERA JUARISTI, *The Amicus Curiae in the Inter-American Court of Human Rights (1982-2013)*, (August 1, 2014). Available at SSRN: https://ssrn.com/abstract=2488073 or http://dx.doi.org/10.2139/ssrn.2488073.

90 Cf. ECHR, Advisory Opinion P16-2019-001, cit., § 51. In the same sense ECHR, Advisory Opinion P16-2018-001, cit., § 34.

91 ECHR, Advisory Opinion P16-2018-001, cit., § 2; ECHR, Advisory Opinion P16-2019-001, cit., § 4.

92 *Explanatory Report to the Protocol No. 16*, cit., § 15: "*This is intended to reinforce dialogue between the Court and national judicial systems, including through clarification of the Court's interpretation of what is*

admission decision reasons are not revealed, if not precisely for the necessity of brevity and speed.

This is another specific difference regarding the content of the Inter-American opinion, as the San José Court has always profusely motivated both the rejection and the acceptance decisions of requests for consultative opinions. The art. ACHR establishes that the judgments must be reasoned, and this obligation was early extended to the advisory opinions[93].

The last point is individual opinions' admissibility, an element that unites, at least formally, the two regional systems. In both European[94] and Inter-American[95] contentious jurisdictions, the judgment is impersonal and collegial, but separate opinions can be attached. A similar procedure is envisaged for advisory opinions, pursuant to Rule 88 (2) of Rules of Court[96] and the Art. 75 (3) of the Rules of Procedure of the Inter-American Court of Human Rights[97].

However, even if not previewed in the regional normative, there is a difference between the separate opinions in one system and the other: while in the European system there are dissenting opinions, concurring opinions, and declarations of dissent, the Inter-American system provides for an additional modality: the judge can use the concurring opinion to expand the legal reasons supporting the conclusion and to express a personal position, promoting reflection and discussion of the decision rational basis in a wider context.

The separate opinions in the two systems are habitual in light of the different geographical, cultural, and professional origins of the judging body. It is affirmed that separate opinions can contribute to the European Court's function, improving the the decision-making's transparency [98] or correcting the sometimes bureaucratic style of its judgments [99], and often constitute an essential element for the very understanding of judgment[100]. The Inter-American system affirms the usefulness of separate opinions to clarify and deepen the technical arguments underlying the main judgment, also in light of the

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meant by "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto", which would provide guidance to domestic courts and tribunals when considering whether to make a request and thereby help to deter inappropriate requests."

93 I/A Court H.R., Advisory Opinion OC-1/82, cit., § 29-31.

94 Art. 45 (2) of the European Convention on Human Rights: "*2. If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion*." Art. 74 of Rules of Court: "*2. Any judge who has taken part in the consideration of the case by a Chamber or by the Grand Chamber shall be entitled to annex to the judgment either a separate opinion, concurring with or dissenting from that judgment, or a bare statement of dissent*."

95 Art 66 (2) of the American Convention on Human Rights: "*2. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment.*"

96 Rule 88 of the Rules of Court: "*2. Any judge may, if he or she so desires, attach to the reasoned decision or advisory opinion of the Court either a separate opinion, concurring with or dissenting from the reasoned decision or advisory opinion, or a bare statement of dissent*."

97 Art. 75 (3) of the Rules of Procedure of the Inter-American Court of Human Rights: "*Any judge who has taken part in the delivery of an advisory opinion is entitled to append a separate reasoned opinion, concurring or dissenting, to that of the Court. These opinions shall be submitted within a time limit to be fixed by the Presidency, so that the other Judges can take cognizance thereof before the advisory opinion is served. Advisory opinions shall be published in accordance with Article 32(1)(a) of these Rules*."

98 R. C. A. WHITE; I. BOUSSIAKOU, *Separate Opinions in the European Court of Human Rights*, in *Human Rights Law Review*, vol. 9, n. 1, 2009, p. 57.

99 E. CALZOLAIO, *op. cit.*, p. 180.

100 V. ZAGREBELSKY, *Considérations sur les sources d'inspiration etc.*, cit., p. 217.

reconstruction of the jurisprudential development[101] and, sometimes, expressing one's pride in the Court's contribution to the wider human rights discourse[102].

Separate opinions have been used in the Inter-American system since OC-3/83, of September 1983, on the Restrictions to the Death Penalty; about a half part of the decisions provided to date, like those dealing with substantive issues, contain one or more individual opinions. Even decisions rejecting requests for advisory opinions can include separate opinions, as demonstrated by the Order of the Inter-American Court of Human Rights of May 29, 2018, to the Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights[103].

The Strasbourg Court, as regards advisory jurisdiction, has always spoken "with one voice", as the Court itself stated in the *Opinion of the Court on Draft Protocol No. 16* of 2013[104]. It could be an additional element to strengthen the idea of intelligibility towards the national judge. However, separate opinions also contribute to the understanding of the comprehensive reasoning of the Court and, therefore, to enhance clarity. The current practice is still uncertain because if the first Opinion of the Court was adopted unanimously, the second contains the *ad hoc* Armenian judge's separate opinion.

Albeit formally concurrent, this separate opinion was largely directed to critically remarks subjects not addressed by the Grand Chamber, such as the lack of motivation for acceptance of the request, based on the contrary practice on the point of the Inter-American Court[105], the African Court of Human Rights, and the International Court of Justice[106]. From a substantive point of view, and to provide the most valuable guidance, the judge also censured that the Court did not analyse more accurately the various options that would concretely present to the Armenian Court when it will have to apply in practice the principles identified in the Opinion[107].

5. The comparison between Protocol No. 16 to the ECHR and the Inter-American consultative discipline is not new, but carrying it out based on the courts' concrete answers is an unprecedented exercise.

Summarizing in few sentences what emerges from this inevitably brief confrontation between the first two European opinions with the Inter-American praxis on the subject, it can first be said that formal differences in the advisory regulation do not always prevent the affirmation of similar practices. For instance, despite the important diversity between the two procedures as regards the *locus standi* and the consequent probable more or less abstract setting of the questions subject to consultation, the two regional systems in practice do not seem so distant.

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101 L. BURGORGUE-LARSEN, *Les nouvelles tendances dans la jurisprudence de la Cour interaméricaine des droits de l'homme*, in *Cursos de Derecho Internacional y Relaciones y Internacionales de Vitoria- Gasteiz* 2008, Universidad del Pais Vasco, Bilbao, 2009, nt. 51.

102 G. L. NEUMAN, *op. cit*., pp. 116-117.

103 With dissenting opinion of the Judge L. Patricio PAZMIÑO FREIRE.

104 ECHR, *Opinion of the Court on Draft Protocol No. 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention* (Adopted by the Plenary Court on 6 May 2013), § 11.

105 Cf. ECHR, Advisory Opinion P16-2019-001, cit., Concurring Opinion of Judge SARVARIAN, § 5.

106 Id., § 6.

107 Id., § 13.

Nevertheless, elements attained from the analysis of the form of judgments and, specifically, from the style of the advisory opinions are indicative. Even limited to aspects such as the length of the opinions, or the kind of separate opinions that are annexed to them, the European and the Inter-American consultative mechanisms preserve relevant dissimilitude, so revealing the different function performed by the two regional systems in the field of protection and promotion of human rights.