

## Table of contents

|  |    |
|--|----|
| <b>List of figures</b>   | 17 |
| <b>List of abbreviations</b>   | 19 |
| <b>Introduction</b>  | 23 |
| <b>Chapter 1: The IACtHR as part of the inter-American human rights system</b> | 33 |
| <b>Chapter 2: Origins of the advisory function of the IACtHR</b>               | 43 |
| A. Advisory opinions in general  | 43 |
| B. Historical development of advisory opinions                                 | 46 |
| I. England   | 46 |
| II. United States of America   | 48 |
| III. Canada and India  | 52 |
| IV. Latin American states  | 52 |
| V. Permanent Court of International Justice                                    | 55 |
| VI. International Court of Justice   | 61 |
| VII. Intermediate conclusion   | 63 |
| C. Genesis of Article 64 ACHR  | 65 |
| I. The idea to create a binding American Human Rights Convention               | 65 |
| II. Draft of the Inter-American Council of Jurists                             | 67 |
| III. Chilean draft convention  | 68 |
| IV. Draft of the Inter-American Commission on Human Rights                     | 71 |
| V. 1969 Specialized Inter-American Conference                                  | 74 |
| VI. Rejection of an optional advisory jurisdiction in the draft Statute        | 80 |
| VII. Concluding summary  | 82 |

|   |           |
|---|-----------|
| <b>Chapter 3: Advisory jurisdiction</b>   | <b>85</b> |
| A. Jurisdiction <i>ratione personae</i> (standing)  | 85        |
| I. OAS member states  | 86        |
| II. OAS organs including the IACHR  | 89        |
| III. Entitlement of other additional entities to request advisory opinions?               | 93        |
| 1. National courts  | 93        |
| 2. National parliaments   | 97        |
| 3. Non-governmental organizations   | 99        |
| 4. Other regional organizations independent of the OAS                                    | 101       |
| IV. Authority to render advisory opinions <i>proprio motu</i> ?                           | 103       |
| B. Jurisdiction <i>ratione materiae</i>   | 107       |
| I. Article 64 (1): “The interpretation of...”   | 107       |
| II. “... this Convention”   | 110       |
| III. “...other treaties concerning the protection of human rights in the American states” | 112       |
| 1. OC-1/82  | 112       |
| 2. Interpretation of soft law instruments and references to customary international law   | 116       |
| 3. Concluding summary   | 119       |
| IV. Article 64 (2): Compatibility of domestic laws  | 119       |
| C. Power to determine and to broaden the scope of requests                                | 127       |
| I. Clarification and reduction  | 127       |
| II. Summarizing and expanding   | 129       |
| 1. OC-23/17   | 131       |
| 2. OC-24/17   | 133       |
| 3. Extension of the subject matter upon request of amici                                  | 135       |
| D. Advisory jurisdiction of the Court in an international comparison                      | 136       |
| I. Advisory jurisdiction of the IACtHR compared to the ICJ’s advisory jurisdiction        | 137       |
| II. Advisory jurisdiction of the IACtHR compared to the ECtHR’s advisory jurisdiction     | 140       |
| III. Advisory jurisdiction of the IACtHR compared to the AfrCtHPR’s advisory jurisdiction | 143       |

|   |            |
|---|------------|
| IV. Overview over the advisory and related jurisdiction of several international courts and the trend towards preliminary ruling procedures | 148        |
| <b>Chapter 4: Admissibility and advisory procedure</b>  | <b>159</b> |
| A. Written admissibility requirements   | 160        |
| B. Submission and notification of a request   | 162        |
| C. Discretion of the Court not to answer a request  | 164        |
| I. Requests for advisory opinions rejected by the Court   | 169        |
| 1. First rejection  | 169        |
| 2. Second rejection   | 172        |
| 3. Third rejection  | 173        |
| 4. Fourth rejection   | 175        |
| 5. Fifth rejection  | 177        |
| 6. Sixth rejection  | 179        |
| II. Inconsistent application of the Court's criteria in other advisory procedures   | 183        |
| 1. Disguised contentious cases, determination of facts  | 185        |
| a) Requests by the Commission related to a dispute with states  | 187        |
| aa) OC-3/83   | 187        |
| bb) OC-14/94  | 190        |
| cc) Intermediate conclusion   | 191        |
| b) Requests by states relating to a dispute with the Commission   | 192        |
| aa) OC-13/93  | 192        |
| bb) OC-15/97  | 194        |
| cc) OC-19/05  | 195        |
| dd) Combined analysis in light of OC-5/85   | 197        |
| c) Requests related to petitions pending before the Commission  | 201        |
| aa) OC-16/99  | 201        |
| bb) OC-23/17  | 202        |
| cc) OC-24/17  | 203        |
| dd) OC-28/21  | 204        |
| ee) Intermediate conclusion   | 208        |

|  |     |
|--|-----|
| d) Requests related to concrete conflicts between states   | 208 |
| aa) Related proceedings before the ICJ   | 208 |
| bb) Conflict with a state not party to the OAS   | 218 |
| cc) Smoldering conflict in the region  | 221 |
| dd) Intermediate conclusion  | 232 |
| 2. Political debates, controversies and proceedings at the national level                            | 233 |
| 3. Issues on which the Court has already ruled in its jurisprudence                                  | 235 |
| 4. Abstract speculations without a foreseeable application to specific situations                    | 238 |
| III. Suitability of the Court's criteria and the proposal of an interests- and values-based approach | 239 |
| 1. Disguised contentious cases, determination of facts   | 244 |
| a) Requests by the Commission relating to a dispute with states                                      | 246 |
| b) Requests by states relating to a dispute with the Commission                                      | 247 |
| c) Requests by the Commission relating to petitions pending before it                                | 248 |
| d) Requests by states relating to petitions pending before the Commission                            | 249 |
| e) Requests related to conflicts between states  | 250 |
| 2. Political debates, controversies and proceedings at the national level                            | 254 |
| 3. Issues on which the Court has already ruled in its jurisprudence                                  | 257 |
| 4. Abstract speculations without a foreseeable application to specific situations                    | 258 |
| IV. Concluding summary   | 261 |
| D. Composition of the Court in advisory proceedings  | 266 |
| E. Written proceedings   | 273 |
| F. Role of amici   | 276 |
| G. Public hearing  | 281 |
| H. Delivery and publication of the final advisory opinion  | 285 |
| I. Average length of the advisory proceedings  | 289 |

|  |     |
|--|-----|
| J. Proposals to reform the procedure   | 292 |
| I. Exclusion of national judges  | 292 |
| II. Separate decision on jurisdiction and admissibility / preliminary objections                 | 296 |
| III. Accelerated procedure   | 299 |
| IV. Creation of a preliminary ruling procedure   | 300 |
| K. Conclusion  | 303 |
| <b>Chapter 5: Legal nature and effects of advisory opinions</b>                                  | 305 |
| A. Legal nature and effects of advisory opinions under general public international law          | 307 |
| I. Permanent Court of International Justice  | 308 |
| II. International Court of Justice   | 313 |
| III. Intermediate conclusion   | 322 |
| B. Legal nature and effects of the advisory opinions of the IACtHR                               | 325 |
| I. Legal nature and effects of the advisory opinions as conceived by the constituent instruments | 328 |
| II. Introduction to the Court's doctrine of conventionality control                              | 332 |
| 1. Origins and foundation of the doctrine  | 332 |
| 2. Legal basis of the doctrine   | 338 |
| 3. Jurisprudential development of the doctrine   | 343 |
| a) Case of Aguado-Alfaro: <i>Ex officio</i> exercise within the spheres of competence            | 343 |
| b) Case of Boyce <i>et al.</i> : Conventionality control includes constitutional norms           | 344 |
| c) Case of Radilla Pacheco: Duty of consistent interpretation                                    | 344 |
| d) Case of Cabrera García and Montiel Flores: Extension on all state authorities                 | 345 |
| e) Extension of the control on all human rights treaties   | 346 |
| f) Gelman case: Conventionality control and the binding effects of the Court's decisions         | 347 |
| g) OC-21/14: Inclusion of advisory opinions in the <i>material controlante</i>                   | 349 |
| 4. Summary and conclusion  | 350 |

|   |     |
|---|-----|
| III. Evolving position of the Court regarding the legal nature and effects of its advisory opinions | 351 |
| 1. Early years  | 351 |
| 2. Acknowledgment of “undeniable legal effects”   | 354 |
| 3. Inclusion of advisory opinions in the doctrine of conventionality control                        | 356 |
| 4. Evaluation and intermediate conclusion   | 359 |
| IV. Positions on the legal nature and effects of the Court’s advisory opinions                      | 361 |
| 1. Authoritative interpretation   | 361 |
| a) Views held before the advisory opinions’ inclusion in the doctrine of conventionality control    | 362 |
| b) Contemporary voices  | 363 |
| c) Evaluation and intermediate conclusion   | 366 |
| 2. Attribution of legal bindingness   | 368 |
| a) Academics holding the advisory opinions to be binding  | 368 |
| aa) Faúndez Ledesma   | 368 |
| bb) Salvioli  | 372 |
| cc) Roa   | 373 |
| dd) Zelada  | 374 |
| b) Domestic courts holding the advisory opinions to be binding (at least within their country)      | 374 |
| aa) Costa Rica  | 377 |
| bb) Ecuador   | 382 |
| cc) Peru  | 383 |
| c. Evaluation and intermediate conclusion   | 385 |
| 3. <i>Res interpretata</i> and <i>erga omnes partes</i> effects                                     | 388 |
| a) <i>Res interpretata</i> versus <i>res judicata</i>   | 391 |
| b) Legal basis and the applicability of <i>res interpretata</i> to advisory opinions                | 393 |
| c) Formation of <i>res interpretata</i>   | 396 |
| d) Type of obligations resulting from <i>res interpretata</i>                                       | 398 |
| aa) Arguments against the strict understanding of <i>res interpretata</i>                           | 403 |
| bb) Problems of a too lax understanding of <i>res interpretata</i>                                  | 406 |
| cc) Suggested understanding of <i>res interpretata</i>  | 407 |

|  |     |
|--|-----|
| e) <i>Res interpretata</i> and the asymmetries in the inter-American human rights system | 410 |
| f) Evaluation and intermediate conclusion  | 416 |
| C. Final summary and conclusion  | 420 |
| <b>Chapter 6: Present and future of the Court's advisory function</b>                    | 429 |
| A. Present   | 429 |
| B. Future  | 432 |
| <b>Table of cases and advisory opinions</b>  | 437 |
| <b>Bibliography</b>  | 451 |
| <b>Table of documents</b>  | 467 |