

### § 3 Development of the Eastern Carelia doctrine by the ICJ

The ICJ addressed the Eastern Carlia doctrine in several cases with the first case being the 1950 *Peace Treaties* case and the most recent case being the 2024 *Palestine* case.<sup>204</sup> The aim of this chapter is to present an overview of the arguments that states have presented and the stance the ICJ has developed regarding the use of advisory opinions to settle inter-state disputes. One essential observation concerns a shift from arguments focusing on the protection of the interested states' rights towards the protection of the Court's judicial function. In line with this, the focus also shifted from arguments concerning the Court's jurisdiction to give the requested advisory opinion towards "softer" criteria such as the admissibility and propriety of giving it. As will be seen, this shift was prompted by the difference in the jurisdictional framework of the ICJ in comparison to the PCIJ. Whereas Article 17 of the League's Covenant stipulated express limitations to the giving of advisory opinions in relation to disputes that concerned non-consenting non-members of the League of Nations, no such provision exists for the ICJ.

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204 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, ICJ Reports 1950, 65; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, 15; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16; *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities*, Advisory Opinion, ICJ Reports 1989, 177; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, Publication pending in ICJ Reports 2024, 1.

### A. *Peace Treaties case (1950)*

The first example of states invoking the Eastern Carelia doctrine before the ICJ is the *Peace Treaties case*.<sup>205</sup>

#### I. Background

In 1947, Bulgaria, Hungary, and Romania – which were part of the former Axis powers – concluded peace treaties with the Allied states. In 1949, the UNGA asked the ICJ to interpret these peace treaties, in particular the provisions on dispute settlement.<sup>206</sup> The peace treaties established a so-called “Treaty Commission” which functioned as an arbitral tribunal to decide disputes on the implementation of the peace treaties.<sup>207</sup> Bulgaria, Hungary, and Romania, however, argued that the advisory proceedings really concerned another matter: the observance of human rights obligations by the three states.

#### II. Bulgaria, Hungary, and Romania challenge the Court’s jurisdiction

Bulgaria, Hungary, and Romania challenged the jurisdiction of the Court arguing that the UNGA interfered in domestic matters by discussing the implementation of human rights within the three states.<sup>208</sup> The UNGA, they argued, acted *ultra vires*, and, therefore, the ICJ was not competent to issue the requested advisory opinion. Bulgaria employed the PCIJ’s terminology in the *Eastern Carelia* opinion when it stated:

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205 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, Dissenting Opinion Winiarski, ICJ Reports 1950, 65; on the *Peace Treaties case*, see *K. J. Keith*, The extent of the advisory jurisdiction of the International Court of Justice, 1971, 111–119; *M. Pomerance*, The advisory function of the International Court in the League and U.N. eras, 1973, 98–103.

206 UNGA resolution 294(IV) of 22 October 1949, UN doc. A/RES/294(IV), para. 3. The resolution was adopted by 47 votes to 5 against, with 7 abstentions, see A/PV.235.

207 Cf. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, ICJ Reports 1950, 65 (67 et seq).

208 ICJ Pleadings, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Written Statement of Bulgaria, 196; Written Statement of Romania, 202; Written Statement of Hungary, 211.

“The Bulgarian Government considers that the Court cannot issue the requested advisory opinion without seriously undermining the well-established principle in international law [...] namely, the principle that any judicial proceedings in a given case involving a legal issue pending between two parties [...] are only effective if the prior consent of all the parties to the proceedings is obtained.”<sup>209</sup>

Romania also invoked a consent requirement for the Court’s advisory jurisdiction. It argued:

“The Romanian Government draws attention to the fact that in no case can the International Court of Justice have jurisdiction in a matter concerning Romania without the consent of the Romanian Government.”<sup>210</sup>

Hungary, while not directly referring to the Eastern Carelia principle, nevertheless invoked the principle of sovereign equality of states to support its claim.<sup>211</sup>

All three states (Bulgaria and Romania explicitly, Hungary implicitly) argued that the ICJ could not issue the requested advisory opinion because the questions concerned a purely internal matter, and the three states did not consent to the proceeding. Bulgaria’s comments, in particular, can be interpreted as a reference to the PCIJ’s statements in the *Eastern Carelia* advisory opinion. The three states – just like, *mutatis mutandis*, the USSR

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209 Translated by the author. The French original reads: “Gouvernement bulgare estime que Cour ne saurait émettre avis consultatif demandé sans porter grave atteinte au principe bien établi en droit international [...] à savoir principe selon lequel toute procédure judiciaire dans un cas déterminé, portant sur question juridique pendante entre deux parties [...] n’est opérante qu’à condition que consentement préalable de toutes les parties en cause soit acquis.”, ICJ Pleadings, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Written Statement of Bulgaria, 196–197; the PCIJ used a similar language when it stated: “Il est bien établi en droit international qu’aucun Etat ne saurait être obligé de soumettre ses différends avec les autres Etats soit à la médiation, soit à l’arbitrage, soit enfin à n’importe quel procédé de solution pacifique, sans son consentement.”, *Status of Eastern Carelia*, Advisory Opinion, Series B, No. 5, 1923, 7 (27).

210 Translated by the author. The French original reads: “Le Gouvernement roumain attire l’attention qu’en aucun cas, la Cour internationale de Justice ne peut être compétente dans une question concernant la Roumanie sans que le Gouvernement roumain y eût donné son consentement”, ICJ Pleadings, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Written Statement of Romania, 203.

211 ICJ Pleadings, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Written Statement of Hungary, 211.

in the *Eastern Carelia* case – were not Member States of the UN at the time of the advisory proceeding.<sup>212</sup>

### III. Judges Azevedo, Krylov, Winiarski, and Zoričić agree with the objections

Several Judges recognized analogies between the *Peace Treaties* case and the *Eastern Carelia* case in their dissenting opinions. Judges *Azevedo*, *Krylov*, *Winiarski*, and *Zoričić* all agreed that an advisory opinion could not be given on a legal question relating to a bilateral dispute actually pending between two states without their consent and that this principle continued to apply under the UNC.<sup>213</sup> The four judges did not explicitly clarify whether their reasoning related to matters of jurisdiction or admissibility.

Judge *Azevedo* leant towards a “hard” jurisdictional requirement when he declared:

“As was the case in 1923, the point which must primarily be borne in mind is that the Court cannot abandon the fundamental rules of international law in order to favour an indirect action designed to settle a dispute actually pending by way of a Request for an Advisory Opinion. A large measure of flexibility is admissible in seeking the consent of the parties; but this consent cannot be dispensed with altogether when the Court is confronted with a dispute actually pending. [...] To sum up, we must build a wall between the contentious and the advisory functions. [...] To abandon these elementary precautions would be to ignore the decisive refusal of the States to accept any rule of compulsory jurisdiction.”<sup>214</sup>

Judge *Krylov* explicitly invoked the *Eastern Carelia* opinion and argued that the Court could not give the requested advisory opinion. He argued:

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212 Bulgaria, Hungary, and Romania joined the United Nations on 14 December 1955, incidentally as a consequence of the *Peace Treaties* which form the subject-matter of the advisory proceedings.

213 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, Separate Opinion Azevedo, ICJ Reports 1950, 65 (88); Dissenting Opinion Winiarski, ICJ Reports 1950, 65 (92); Dissenting Opinion Zoričić, ICJ Reports 1950, 65 (103); Dissenting Opinion Krylov, ICJ Reports 1950, 65 (108).

214 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, Separate Opinion Azevedo, ICJ Reports 1950, 65 (88).

“Therefore, there is a “legal question actually pending” between those five States. [...] In my opinion, the present request must be dealt with – in so far as possible – as a contentious case would be. I think that the Court *could not* exercise its consultative function in this case unless the interested States, including Bulgaria, Hungary and Romania, had expressly consented. This is demonstrated by the general meaning of the texts quoted and *especially by the precedent established by the P.C.I.J. on July 23rd, 1923.*”<sup>215</sup>

By stating that the Court “could not” rather than “ought not” exercise its advisory function, Judge *Krylov* also implied that consent was required as a matter of jurisdiction. Judge *Winiarski* emphasized the danger of giving advisory opinions on pending bilateral disputes against the will of the affected states. Giving an advisory opinion in such situations could lead to the establishment of a compulsory jurisdiction as, according to Judge *Winiarski*, the advisory opinion would in effect settle the bilateral dispute. He regarded the consent requirement expressed in the *Eastern Carelia* advisory opinion as an attempt by the PCIJ to counter this danger. Judge *Winiarski* stated:

“For the same reason, States see their rights, their political interests and sometimes their moral position affected by an opinion of the Court, and *their disputes are in fact settled by the answer* which is given to a question relating to them, which may be a “key question” of the dispute. [...] This is also why the *Permanent Court* did not hesitate to grant States the necessary guarantees, and, in order to exclude any possibility of introducing compulsory jurisdiction by the circuitous means of its advisory opinions, it deliberately laid down in Opinion No. 5 the principle of the consent of the parties (Article 36 of the Statute).”<sup>216</sup>

Judge *Zoričić* also invoked the “precedent of Eastern Carelia” to argue that consent of the affected states is necessary. He stated:

“The precedent of Eastern Carelia constitutes, in my view, a convincing proof that the consent of the States is necessary, not only in regard to contentious cases, but also in advisory cases where the request for the

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215 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, Dissenting Opinion Krylov, ICJ Reports 1950, 65 (108), emphasis added.

216 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, Dissenting Opinion Winiarski, ICJ Reports 1950, 65 (92), emphasis added.

opinion relates to a dispute between States, so that the answer of the Court would decide the issue that is the subject of the dispute.”<sup>217</sup>

All four judges saw the *Eastern Carelia* advisory opinion of the PCIJ as a kind of precedent which ought to guide the judicial work of the ICJ. The four judges cautioned that too liberal a recourse to the advisory opinion procedure may introduce a sort of compulsory jurisdiction and thus a form of judicial dispute settlement without consent.

#### IV. View of the Court majority: Distinction between jurisdiction and discretion

The Court majority did not share these concerns. Instead, the Court decided to give the requested opinion. How the Court responded to the challenges to its jurisdiction and the admissibility of the request would guide the Court’s approach in all subsequent advisory proceedings.

##### 1. Jurisdiction and state consent

The Court found that it had jurisdiction to give the requested advisory opinion. According to the Court and contrary to the arguments made by Bulgaria, Hungary, and Romania, the UNGA did not act *ultra vires*. Instead, it acted in accordance with the functions of the United Nations to promote the respect and realization of human rights and fundamental freedoms.<sup>218</sup> Additionally, the UNGA did not ask the Court to examine whether human rights and fundamental freedoms had actually been respected by the three states, nor to interpret the relevant human rights provisions. Instead, the Court was merely asked to interpret the provisions of the peace treaties regarding the dispute settlement mechanism. The dispute settlement mechanism agreed upon in the peace treaty, a multilateral treaty, was not an internal matter of the three states.<sup>219</sup>

The Court then picked up the thread left by the *Eastern Carelia* and *Mosul* advisory opinions of the PCIJ and unambiguously found that the

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217 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, Dissenting Opinion Zoričić, ICJ Reports 1950, 65 (103).

218 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, ICJ Reports 1950, 65 (70).

219 *Ibid.* (70–71).

Court's *jurisdiction* to give advisory opinions did not depend on state consent. In one of the most crucial passages of its entire case law on the parameters of its advisory jurisdiction, the ICJ held:

“The Court cannot, it is said, give the Advisory Opinion requested 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. 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. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an ‘organ of the United Nations’, represents its participation in the activities of the Organization, and, in principle, should not be refused.”<sup>220</sup>

The ICJ made several significant findings here. First, the Court stated in clear terms that in advisory proceedings (unlike in contentious proceedings) the jurisdiction of the Court did not depend on the consent of the states that are particularly affected by the proceedings. This holds true even if the advisory opinion relates to a legal question which forms the subject-matter of a pending dispute. Secondly, the Court linked the question of state consent with the question of the binding force of the judicial pronouncement in question. As the advisory opinions of the Court lack binding force, no consent of the disputing states is required. Finally, the Court found that the ICJ as an organ of the UN must participate in the activities of the organization. The principal way for the Court to participate is by replying to a request for an advisory opinion made by another UN organ. Recognizing that the giving of an advisory opinion is a duty of the

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220 Ibid. (71).

Court is one of the most fundamental differences between the role of the ICJ within the UN and the role of the PCIJ within the League of Nations.<sup>221</sup>

## 2. Discretionary nature of the advisory competence

Notwithstanding the Court's clear rejection of a consent requirement, the ICJ nevertheless identified certain limits to its capacity to give advisory opinions. It held:

“There are certain limits, however, to the Court's duty to reply to a Request for an Opinion. It is not merely an “organ of the United Nations”, it is essentially the “principal judicial organ” of the Organization (Art. 92 of the Charter and Art. I of the Statute). It is on account of this character of the Court that its power to answer the present Request for an Opinion has been challenged. Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request. In the opinion of the Court, the circumstances of the present case are profoundly different from those which were before the Permanent Court of International Justice in the Eastern Carelia case (Advisory Opinion No. 5), when that Court declined to give an Opinion because it found that the question put to it was directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties, and that at the same time it raised a question of fact which could not be elucidated without hearing both parties.”<sup>222</sup>

The Court found that it had a discretionary power to refuse to issue certain advisory opinions and it derived this discretion from its character as the principal judicial organ of the UN as well as the wording of Article 65 ICJ Statute. In accordance with the *Eastern Carelia* advisory opinion, the Court identified two scenarios in which it ought to exercise this discretionary power: first, if giving an advisory opinion settled a bilateral dispute and, secondly, if the Court lacked sufficient information. These are the same considerations the PCIJ previously raised in the *Eastern Carelia* case.

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221 On the role of the PCIJ within the framework of the League of Nations, see *supra*: § 1 Section B.I.

222 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, ICJ Reports 1950, 65 (71–72).

The ICJ denied that the requested advisory opinion would settle any pending dispute. According to the ICJ, the subject-matter of the dispute between Bulgaria, Hungary, Romania, and various western states was the observance of human rights by the three states. The submitted question in the advisory proceedings, on the other hand, concerned procedural questions relating to the dispute settlement mechanism under the peace treaty.<sup>223</sup> While the two aspects are connected, questions concerning the supervisory mechanism of human rights treaties are not identical to the question of the actual observance of human rights. As such, answering the request was not identical to deciding the underlying legal dispute.

#### V. Conclusion: Bringing the *Eastern Carelia* doctrine into the UN era

The *Peace Treaties case* is particularly interesting for the analysis of the Eastern Carelia doctrine as the arguments of the three states heavily relied on the statements made by the PCIJ in its *Eastern Carelia* advisory opinion. The case brought the Eastern Carelia doctrine into the UN era. The Court recognized that the Eastern Carelia doctrine continued to be relevant in the UN era despite the many institutional changes brought about by the creation of the UN. The Eastern Carelia doctrine continues to be important not for the *establishment* of the Court's jurisdiction (as argued by Bulgaria, Hungary, and Romania), but for the Court's discretionary *exercise* of its jurisdiction. The ICJ based its discretionary power on its character as an international judicial organ. Being an international judicial organ, there are certain requirements the Court must fulfil. These include that the Court must not settle a bilateral dispute against the will of the states involved and that it may only make judicial findings when it has access to all relevant facts of the case. The Court thus tentatively introduced the protection of its judicial function as the guiding principle of its discretionary power.<sup>224</sup> It is worth pointing out that the Court rejected a consent requirement for its advisory procedure based on the fact that its advisory opinions are non-binding. However, despite their non-binding nature, the Court found that its advisory opinions could settle bilateral disputes.

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223 Ibid. (72).

224 On the ICJ's judicial function, see *infra*: § 6 Section B.

B. Reservations to the Genocide Convention case (1951)

The next step of the development of the Eastern Carelia doctrine is marked by the *Reservations to the Genocide Convention* case<sup>225</sup>.

I. Background

In July of 1950, the Philippines have signed the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).<sup>226</sup> The instrument of ratification submitted by the Philippines contained certain reservations to which Australia, a State Party to the Genocide Convention, objected. On 10 October 1950, the Australian representative before the UNGA stated that a state that had acceded to the Genocide Convention under reservation could, if a State Party objected to that reservation, only choose between withdrawing the reservation or not acceding to the Convention.<sup>227</sup> In November of 1950, the UNGA asked the ICJ to give an opinion on the legal relations between a state that has signed the Genocide Convention subject to a reservation and States Parties to the Convention that have objected to the reservation.<sup>228</sup>

Following the *Peace Treaties* advisory opinion, states could no longer hope to challenge the Court's *jurisdiction* based on the Eastern Carelia doctrine. Rather, states turned to arguments relating to the *admissibility* of giving the requested advisory opinion. Accordingly, the Philippines argued that the questions referred to the Court related to a dispute between the Philippines and Australia over the Philippines' accession to the Genocide Convention and that the Court should therefore exercise its discretion to decline to give the requested opinion. The Philippines stated:

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225 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, 15; on the Reservations opinion, see *K. J. Keith*, The extent of the advisory jurisdiction of the International Court of Justice, 1971, 119–120; *M. Pomerance*, The advisory function of the International Court in the League and U.N. eras, 1973, 117–125.

226 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, entry into force 12 January 1951.

227 ICJ Pleadings, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Written Statement of the Philippines, 296.

228 UNGA resolution 478(V) of 16 November 1950, UN doc. A/RES/478(V). The resolution was adopted by 47 votes to 5 against, with 5 abstentions, see A/PV.305.

“It follows that this Honourable Court, as the principal judicial organ of the United Nations, should decline to render an opinion as requested by the General Assembly for the reason that questions I and II put to it are directly related to the main point of a dispute actually pending between the Philippines and Australia, and that answering these questions would be substantially equivalent to deciding the dispute between the parties.”<sup>229</sup>

## II. ICJ focuses on the object and purpose of the request

The ICJ reaffirmed its position expressed in the *Peace Treaties* case that the existence of a bilateral dispute does not affect the Court’s jurisdiction.<sup>230</sup> The Court then found that the Eastern Carelia doctrine would not hinder the Court from giving the requested advisory opinion: Without determining whether there was a dispute between Australia and the Philippines, the Court found that the request for an advisory opinion was at any rate *not directed* at settling a bilateral dispute.<sup>231</sup> The Court came to this conclusion not by comparing the submitted questions with the subject-matter of the dispute between Australia and the Philippines. Rather, it examined the object and purpose of the request for an advisory opinion and whether it was directed at guiding the UNGA in its work or whether it was directed at resolving a bilateral dispute.<sup>232</sup> The Court found that both the UNGA, as author of the Genocide Convention, and the UNSG, as depositary of the instruments of ratification and accession, had an interest in knowing the legal consequences of reservations made by states wishing to accede to the Convention and objections to these reservations made by Member States.<sup>233</sup>

It is important to note that by focusing on the object and purpose of the request, the Court modified its position developed in the *Peace Treaties* advisory opinion. In the *Peace Treaties* opinion, the Court had adopted

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229 ICJ Pleadings, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Written Statement of the Philippines, 296.

230 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, 15 (19); *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, ICJ Reports 1950, 65 (71).

231 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, 15 (19).

232 Ibid.

233 Ibid.

the PCIJ's standard of what constitutes a circumvention of the principle of consensual dispute settlement by means of its advisory procedure, namely in situations where "the question put to it was directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties".<sup>234</sup> The Court implied in the *Peace Treaties* case that the congruence of subject-matters between advisory proceeding and bilateral dispute suffices for the Court to find that the giving of the opinion would constitute a circumvention of state consent.

In contrast, with the *Reservations to Genocide Convention* case, the ICJ started looking towards the *object and purpose* of the request to determine whether giving an advisory opinion would be substantially equivalent to deciding a pending bilateral dispute. Instead of comparing the subject-matter of the request with the subject-matter of the underlying dispute, the essential criterion became whether the request was *directed* at the settlement of the dispute. By doing so, the Court significantly reduced the scope of the Eastern Carelia doctrine by making the application of the doctrine subject to its own interpretation of the object and purpose of the request. This standard which looks at the object and purpose of the request as the central consideration would be taken up by the ICJ in its 1971 *Namibia* advisory opinion.

### C. Judgments of the ILO Administrative Tribunal case (1956)

In the 1956 *Judgments of the Administrative Tribunal of the ILO* case<sup>235</sup> the UNESCO Executive Board asked the ICJ to examine the competences of the ILO Administrative Tribunal regarding complaints brought against the UNESCO by its staff members.<sup>236</sup> The case did not concern an inter-state dispute and thus does not directly relate to the Eastern Carelia doctrine. However, the Court further outlined the exercise of its advisory jurisdiction by introducing two important and related notions: the standard of compelling reasons and the "requirements of the Court's judicial character".

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234 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, ICJ Reports 1950, 65 (72).

235 *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, Advisory Opinion, ICJ Reports 1956, 77; on the Judgments of the ILO opinion, see *M. Pomerance*, The advisory function of the International Court in the League and U.N. eras, 1973, 125–130.

236 UNESCO Executive Board resolution 42 EX of 25 November 1955, 20–21.

The Court stated that it was not free in its exercise of discretion. Rather, it may only refuse to give a requested opinion if there were “compelling reasons”. The Court found:

“Notwithstanding the permissive character of Article 65 of the Statute in the matter of advisory opinions, *only compelling reasons* could cause the Court to adopt in this matter a negative attitude which would imperil the working of the régime established by the Statute of the Administrative Tribunal for the judicial protection of officials.”<sup>237</sup>

Without explicitly connecting the two terms, the ICJ identified as the principal compelling reason on which it relied in all subsequent cases the protection of the Court’s judicial character:

“The Court is a judicial body and, in the exercise of its advisory functions, it is bound to remain faithful to the requirements of its judicial character.”<sup>238</sup>

The ICJ emphasized here that the Court’s advisory function is not disconnected from the Court’s judicial function. Rather, the Court must at all times – even when issuing advisory opinions – act in accordance with its judicial character. The requirements of the Court’s judicial character are the Court’s guiding considerations when exercising its discretion.

## D. Namibia case (1971)

### I. Background

On 27 October 1966, the UNGA declared that South Africa’s mandate for Namibia (then called “South-West Africa”) had ended, and that South Africa had no legal right to continue its administration of Namibia.<sup>239</sup> After South Africa refused to end its administration of Namibia, the UNSC declared that the continued presence of South Africa in Namibia was illegal and that all acts taken by the government of South Africa on behalf of or concerning Namibia after the termination of the mandate were illegal

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237 *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, Advisory Opinion, ICJ Reports 1956, 77 (86), emphasis added.

238 *Ibid.* (84).

239 UNGA resolution 2145 (XXI) of 27 October 1966, UN doc. A/RES/2145(XXI), para. 4.

and invalid.<sup>240</sup> The UNSC further called upon all states to refrain from any dealings with the government of South Africa which were inconsistent with this declaration.<sup>241</sup> Against this backdrop, in 1970 the UNSC made its first (and so far only) request for an advisory opinion from the ICJ, asking the Court to examine the legal consequences of the continued presence of South Africa in Namibia.<sup>242</sup> This request gave rise to the *Namibia* case.<sup>243</sup>

## II. South Africa invokes the *Eastern Carelia* precedent

In the proceeding, South Africa invoked the Eastern Carelia doctrine and argued that the ICJ ought to refuse to give the requested advisory opinion.<sup>244</sup> South Africa argued that it was involved in a legal dispute with several UN Member States, including Ethiopia and Liberia about South Africa's mandate over Namibia. This legal dispute was already the subject-matter of the *South-West Africa* cases<sup>245</sup> before the Court and continued to exist when the UNSC requested the advisory opinion.<sup>246</sup> According to South Africa, a second dispute existed regarding the powers of the UNGA to terminate Namibia's status as a mandate territory.<sup>247</sup> This second dispute arose during the debates of the UNGA and constituted a pending legal dispute in the sense of the Eastern Carelia doctrine. Finally, South Africa argued that a third dispute arose when 40 states called upon the UNSC

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240 UNSC resolution 276 (1970) of 30 January 1970, UN doc. S/RES/276(1970), para. 2.

241 UNSC resolution 276 (1970) of 30 January 1970, UN doc. S/RES/276(1970), para. 5.

242 UNSC resolution 284 (1970) of 29 July 1970, UN doc. S/RES/284(1970), para. 1. The resolution was adopted by 12 votes to none, with three abstentions, see UNSC official records, 25th year, 1550th meeting, 29 July 1970, UN doc. S/PV.1550, 16.

243 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16; on the Namibia opinion, see *M. Pomerance*, 67 *The American journal of international law* 3 (1973), 446; *M. Pomerance*, *The advisory function of the International Court in the League and U.N. eras*, 1973, 148–157.

244 ICJ Pleadings, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Written Statement of South Africa, 377 (442 et seq.).

245 Cf. *South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment, ICJ Reports 1966, 6.

246 ICJ Pleadings, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Written Statement of South Africa, 377 (445, para. 38).

247 *Ibid.*, 445–446, paras. 39 et seq.

to give effect to UNGA resolution 2145 (XXI) of 27 October 1966 which terminated South Africa's mandate over Namibia.<sup>248</sup> The UNSC complied with this request by passing Resolution 276. According to South Africa, the subject-matter of the advisory proceedings was identical to the subject-matter of the three pending disputes.<sup>249</sup> As such, responding to the advisory request would be substantially equivalent to deciding the pending legal disputes.<sup>250</sup>

### III. Focus on the object and purpose of the request for an advisory opinion

The ICJ first emphasized that South Africa was a Member State of the UN. As such, South Africa accepted Article 96 UNC which gives the UNSC the power to request advisory opinions from the Court.<sup>251</sup> This distinguished the *Namibia* case from the *Eastern Carelia* case. In the *Eastern Carelia* case, the non-consenting state – the USSR – was not a member of the League of Nations.

The Court was doubtful whether there was a pending legal dispute between South Africa and other states in the sense of the *Eastern Carelia* doctrine. In particular, the Court found that a divergence of views is not the same as a legal dispute:

“The fact that, in the course of its reasoning, and in order to answer the question submitted to it, the Court may have to pronounce on legal issues upon which radically divergent views exist between South Africa and the United Nations, does not convert the present case into a dispute [...] Differences of views among States on legal issues have existed in practically every advisory proceeding; if all were agreed, the need to resort to the Court for advice would not arise.”<sup>252</sup>

Regardless of the existence of a pending bilateral dispute, the Court stated, in line with its 1951 *Reservations to the Genocide Convention* advisory opinion, that the advisory opinion was not *intended* to decide any such dispute.

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248 Ibid., 446–447, para. 42.

249 Ibid., 447, para. 43.

250 Cf. *ibid.*, 447, para. 43.

251 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16 (23–24, para. 31).

252 Ibid. (24, para. 34).

The Court, citing its *Reservations to the Genocide Convention* advisory opinion, stated that “[t]he object of this request for an Opinion is to guide the United Nations in respect of its own actions.”<sup>253</sup>

According to the ICJ, the UNSC did not request the advisory opinion to decide a pending legal dispute but to receive legal guidance for its own actions.<sup>254</sup> The advisory opinion thus did not relate to a pending legal dispute in the sense of the Eastern Carelia doctrine. The ICJ established the object and purpose of the request by examining the wording of the UNSC resolution, in particular its preamble which stated that “an advisory opinion from the International Court of Justice would be useful for the Security Council in its further consideration of the question of Namibia and in furtherance of the objectives the Council is seeking”.<sup>255</sup>

According to the Court, all disputes cited by South Africa were directly linked to the work of the UN: the mandate status of Namibia, the competence of the UNGA to revoke this status, and the ensuing UNSC resolution.<sup>256</sup>

The ICJ reaffirmed its position that an advisory opinion may only be regarded as a form of dispute settlement by other means if the opinion was *intended* to be used as a form of dispute settlement. Whether the opinion was intended in such a manner depends on the object and purpose of the request for an advisory opinion as determined by an interpretation of the requesting resolution. Through this approach, the Court can effectively give any advisory opinion regardless of a pending bilateral dispute if it can find an interest of the requesting organ in receiving the advisory opinion beyond the judicial settlement of the dispute. In later advisory opinions, the Court followed this approach by referring to certain legal questions as belonging to a “broader frame of reference”.<sup>257</sup> In other words, a legal dispute which a state does not wish to settle by judicial means might nevertheless be linked to the activities of the UN with the result that giving an advisory opinion on the matter would not constitute a circumvention of that state’s consent. The Court thus determines whether a request for an advisory

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253 Ibid. (24, para. 32).

254 Ibid.

255 Ibid.

256 Ibid. (23-24, paras. 30 et seq.).

257 *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12 (26, para. 38); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (159, para. 50); *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95 (118, para. 88).

opinion constitutes a circumvention of a state's will and thus a violation of the Eastern Carelia doctrine not by comparing the legal question submitted to the Court with the subject-matter of a pending bilateral dispute. Instead, the object and purpose of the requested advisory opinion becomes the Court's essential consideration.

## E. Western Sahara case (1975)

### I. Background

In 1974, the UNGA presented the Court with two questions on the legal status of Western Sahara.<sup>258</sup> It inquired whether Western Sahara was *terra nullius* at the time of colonization by Spain and, if that was not the case, what legal relations existed at that time between Western Sahara, the Kingdom of Morocco, and Mauritania.<sup>259</sup> The request for an advisory opinion was preceded by eight UNGA resolutions, in which the UNGA had called on Spain to implement the obligations contained in the "Declaration on the Granting of Independence to Colonial Countries and Peoples".<sup>260</sup> In particular the UNGA had called upon Spain to hold a referendum on the territorial status of Western Sahara.<sup>261</sup>

### II. Spain invokes incompatibility of advisory opinion with judicial character of the ICJ

Spain invoked the *Eastern Carelia* case and argued that the Court ought not to give the advisory opinion as this would be incompatible with the Court's

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258 UNGA resolution 3292 (XXIX) of 13 December 1974, UN doc. A/RES/3292(XXIX). The resolution was adopted by 87 votes to none, with 43 abstentions, see A/PV.2318.

259 UNGA resolution 3292 (XXIX) of 13 December 1974, UN doc. A/RES/3292(XXIX), para. 1.

260 UNGA resolution 1514 (XV) of 14 December 1960, UN doc. A/RES/1514(XV).

261 UNGA resolutions 2072 (XX) of 16 December 1965, UN doc. A/RES/2072(XX); 2229 (XXI) of 20 December 1966, UN doc. A/RES/2229(XXI); 2354 (XXII) of 19 December 1967, UN doc. A/RES/2354(XXII); 2428 (XXIII) of 18 December 1968, UN doc. A/RES/2428(XXIII); 2591 (XXIV) of 16 December 1969, UN doc. A/RES/2591(XXIV); 2711 (XXV) of 14 December 1970, UN doc. A/RES/2711(XXV); 2983 (XXVII) of 14 December 1972, UN doc. A/RES/2983(XXVII); 3162 (XXVIII) of 14 December 1973, UN doc. A/RES/3162(XXVIII).

judicial character.<sup>262</sup> Spain acknowledged that only the contentious procedure under Article 36 ICJ Statute was subject to state consent. However, if there is a bilateral dispute and the parties to that dispute refuse to have it settled by judicial means – as Spain did<sup>263</sup> – the ICJ must respect this refusal and cannot issue an advisory opinion on the same matter. Otherwise, the advisory procedure would be instrumentalized to circumvent the state's lack of consent to judicial dispute settlement.<sup>264</sup> Spain argued that using the advisory procedure in such a manner would eliminate the distinction between the contentious and the advisory procedure of the ICJ and violate the sovereign equality of states.<sup>265</sup>

### III. The ICJ's standard of discretion

Building on its previous case law, the ICJ emphasized the importance of safeguarding its “judicial character”<sup>266</sup> while at the same time making sure to limit its exercise of discretion to “compelling reasons”.<sup>267</sup> The Court reiterated that the giving of advisory opinions was an expression of the Court being an organ of the United Nations as well as the principal judicial organ in the sense of Article 92 UNC.<sup>268</sup> Relying on this standard, the Court accepted the premise of Spain's argument that the lack of consent of a disputing state to have its dispute settled by judicial means may be a compelling reason for the Court to refuse the requested advisory opinion:

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262 ICJ Pleadings, *Western Sahara*, Vol. I, Written Statement of Spain, 202.

263 On 23 September 1974, the Moroccan Ministry of Foreign Affairs sent a letter from the Moroccan King to the Spanish Ministry of Foreign Affairs, in which Morocco proposed to Spain that the ICJ decide by contentious procedure whether Western Sahara was *terra nullius* at the time of Spanish colonization. Spain did not accept, *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12 (22, para. 26).

264 ICJ Pleadings, *Western Sahara*, Vol. I, Written Statement of Spain, 202.

265 ICJ Pleadings, *Western Sahara*, Vol. I, Written Statement of Spain, 202.

266 In its more recent advisory opinions the Court uses the term “judicial function” instead of “judicial character”, see *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403 (416, para. 29); *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95 (113, para. 64).

267 *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12 (21, para. 23).

268 *Ibid.*

“Thus the Court recognized that lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion. In short, the consent of an interested State continues to be relevant, not for the Court’s competence, but for the appreciation of the propriety of giving an opinion. In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court’s judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.”<sup>269</sup>

The ICJ did not elaborate on the meaning of the term “judicial character”, nor why the giving of an advisory opinion could conflict with it. However, the Court gave its discretionary power some contours by stating that the Court must ensure that the advisory opinion is not used to circumvent the fundamental principle that judicial dispute settlement requires state consent. In other words, the advisory procedure must not be used to circumvent the Court’s contentious procedure and the latter’s consent requirement.

#### IV. Decolonization as an inherently multilateral matter

The ICJ recognized that there was a territorial dispute between Spain and Morocco and that Spain did not consent to the judicial settlement of this dispute.<sup>270</sup> However, this dispute was not bilateral in nature and for that reason giving the advisory opinion could not circumvent the principle of consensual dispute settlement. The reason for this, the Court found, lied in the origins of the dispute as well as its subject-matter.

First, the ICJ found that the dispute did not arise on the bilateral level, but during the sessions of the UNGA and in relation to matters before the UNGA.<sup>271</sup> It arose during an exchange of correspondences between Spain and the UNSG. In these correspondences Spain declared that it had no non-self-governing territories in Africa but only provinces which formed

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269 *Ibid.* (25, paras. 32-33).

270 *Ibid.* (23, para. 29).

271 *Ibid.* (25, para. 34).

an integral part of Spain. Morocco responded with the “most explicit reservations” and declared to the UNSG that the territories currently controlled by Spain were an integral part of Morocco’s territory.<sup>272</sup> In October 1961, both states reiterated their legal views before the UNGA.<sup>273</sup> The dispute remained in a state of limbo until 1974 when Morocco called on Spain to jointly submit the dispute to the ICJ on 23 September 1974.<sup>274</sup> The Court relied on this origin of the dispute within the UN to deny the bilateral nature of the dispute.<sup>275</sup>

Secondly, the subject-matter of the questions before the Court related to matters beyond the bilateral relations between Spain and Morocco. Spain argued that the Court was asked to address a bilateral territorial dispute. The Court, however, identified as the matter before it the decolonization process which was intrinsically linked to the activities of the UN. The UNGA emphasized this link between the UN and decolonization by referring to the “Declaration on the Granting of Independence to Colonial Countries and Peoples” in its request for the advisory opinion:

“In any event, the terms of the request contain a proviso concerning the application of General Assembly resolution 1514 (XV). Thus the legal questions of which the Court has been seised are *located in a broader frame of reference than the settlement of a particular dispute* and embrace other elements.”<sup>276</sup>

By referring to resolution 1514 (XV), the UNGA emphasized the continuity of the efforts made by the UN regarding the decolonization process. The ICJ regarded this as proof that the advisory opinion was not intended to settle a bilateral dispute between Spain and Morocco but to serve the UNGA in the exercise of its duties to support the decolonization process:

“The object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court’s opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court an opinion which the General Assembly deems

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272 Ibid.

273 Ibid. (25-26, para. 35).

274 Ibid. (26, para. 36).

275 Ibid.

276 Ibid. (26, para. 38), emphasis added.

of assistance to it for the proper exercise of its functions concerning the decolonization of the territory.”<sup>277</sup>

The combination of the origins of the dispute and the subject-matter of the request for an advisory opinion were the decisive reasons for the Court to deny that the matter before the Court was a purely bilateral matter. This is convincing considering the UN’s special responsibility for the decolonization of colonized peoples which finds expression in the right of peoples to self-determination in Article 1 para. 2 UNC<sup>278</sup>, the reporting procedure according to Article 73 UNC and numerous resolutions of the UNGA<sup>279</sup>.

## V. Judge Gros on the conditions of a bilateral dispute

Judge *Gros* underscored in his Declaration the finding of the majority that the advisory opinion does not settle a bilateral dispute by examining the requirements of a bilateral dispute. For this, Judge *Gros* relied on the definition of a bilateral dispute provided by Judge *Fitzmaurice* in the *Northern Cameroons* case:

“[...] [T]he one party [or parties] should be making, or should have made, a complaint, claim or protest about an act, omission or course of conduct, present or past of the other party, which the latter refutes, rejects or denies the validity of, either expressly, or else implicitly by

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277 *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12 (26–27, para. 39). In the *Wall* opinion, Judge Higgins regards the purpose of the request for an advisory opinion as the decisive factor in the assessment of whether circumvention in the meaning of the Eastern Carelia principle exists, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, Separate Opinion Higgins, ICJ Reports 2004, 136 (210, para. 12).

278 Art. 1 para. 2 UNC states as a purpose of the United Nations “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples (...)”.

279 See UNGA resolutions 1514 (XV) of 14. December 1960, UN doc. A/RES/1514(XV); 2072 (XX) of 16 December 1965, UN doc. A/RES/2072(XX); 2229 (XXI) of 20 December 1966, UN doc. A/RES/2229(XXI); 2354 (XXII) of 19 December 1967, UN doc. A/RES/2354(XXII); 2428 (XXIII) of 18 December 1968, UN doc. A/RES/2428(XXIII); 2591 (XXIV) of 16 December 1969, UN doc. A/RES/2591(XXIV); 2711 (XXV) of 14 December 1970, UN doc. A/RES/2711(XXV); 2983 (XXVII) of 14 December 1972, UN doc. A/RES/2983(XXVII); 3162 (XXVIII) of 14 December 1973, UN doc. A/RES/3162(XXVIII).

persisting in the acts, omissions or conduct complained of, or by failing to take the action or make the reparation, demanded.”<sup>280</sup>

Judge *Gros* argued that Spain could not possibly be a party to a legal dispute in this sense with Morocco because Spain could not bring about the legal consequence demanded by Morocco:

“It is not enough that two States may have different or even opposing views as to an event or situation for there to be a contentious case, and the end of the passage quoted makes this clear: if it is not possible for any satisfaction for the claim of the one State to be obtained from the other, there is no dispute between them. Now what response could the Government of Spain make to a claim of the Government of Morocco concerning the right of reintegration of the Territory into the Kingdom of Morocco, when these two Governments have specifically agreed to effect the decolonization of the Territory by a procedure set in motion within the United Nations, except to reply that it had no competence to settle by itself this problem which the two Governments, along with many others, are debating in various United Nations bodies. Even if the Government of Spain had agreed to support the claim of the Government of Morocco, such an attitude would have been without any legal effect in the international sphere. The two Governments have explicitly chosen decolonization in the context of the United Nations, in order to study and ultimately settle the future of the Territory, with the other Members of the United Nations. There is no bilateral dispute which is detachable from the United Nations debate on the decolonization; there is no bilateral dispute at all, nor has there ever been any such dispute.”<sup>281</sup>

Spain and Morocco agreed that the decolonization of the territory in question was to be achieved by UN procedures. Spain, as the administrative power of a non-self-governing territory, had no authority to dispose of the sovereignty of this territory. For this reason, Spain could not be a party to a legal dispute about it.

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280 *Western Sahara*, Advisory Opinion, Declaration Gros, ICJ Reports 1975, 12 (71, para. 2), citing *Case concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Judgment, Preliminary Objections, Separate Opinion Fitzmaurice, ICJ Reports 1963, 15 (109).

281 *Western Sahara*, Advisory Opinion, Declaration Gros, ICJ Reports 1975, 12 (71, para. 2).

## VI. Conclusion

In the *Western Sahara* case, Spain tried to argue that the advisory opinion would effectively decide its bilateral dispute with Morocco as it had implications for the underlying legal questions. The ICJ opted for a functional assessment of when the giving of an advisory opinion would be substantially equivalent to the settlement of a dispute without state consent, taking into account the function of the advisory procedure to support the activities of the requesting UN organ. Consequently, the Court examined whether the legal questions submitted by the UNGA were of particular concern to the activities of the UNGA. The ICJ found that giving the advisory opinion would not violate the Eastern Carelia doctrine if it can be established that the requesting organ has an interest in receiving the legal guidance of the Court beyond dispute settlement. The Court effectively equated the scope of its advisory function with the scope of the functions of the UN. Once a matter falls within the functions of the requesting UN organ, giving the advisory opinion can almost never be understood as a violation of the Eastern Carelia doctrine as the opinion is not (primarily) directed at the settlement of a bilateral dispute but instead at supporting the UN organ in its functions. This radically reduces the possibility of states to challenge the admissibility of a request for an advisory opinion. While the Court majority approached the question from the perspective of the requesting organ and its functions, Judge *Gros* approached the matter from the opposite direction. He assessed whether the underlying dispute was bilateral by reference to the capacity of the states involved to bring about the legal consequences which the alleged dispute entails.

### F. Wall case (2004)

The *Wall* case<sup>282</sup> is one of the most controversial advisory proceedings in recent years.<sup>283</sup>

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282 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136.

283 On the *Wall* advisory opinion, see inter alia *R. J. Araujo*, 22 *BUIJL* 2 (2004), 349; *L. F. Damrosch/B. H. Oxman*, 99 *AJIL* 1 (2005), 1; *S. D. Murphy*, 99 *AJIL* 1 (2005), 62; *M. Pomerance*, 99 *AJIL* 1 (2005), 26; *I. Scobbie*, 16 *EJIL* 5 (2005), 941; *G. R. Watson*, 99 *AJIL* 1 (2005), 6; *A. M. Gross*, 19 *Leiden Journal of International Law* 2 (2006), 393; *A. Orakhelashvili*, 11 *Journal of Conflict and Security Law* 1 (2006),

## I. Background

Following a sharp increase in suicide bombings by Palestinians against Israelis in 2000 (known as the Second Intifada), the Israeli government began building a wall in 2002 to separate Israel from the West Bank.<sup>284</sup> The construction of this wall attracted international attention when it became clear that it would extend into the West Bank, enclosing large Israeli settlements and fragmenting Palestinian communities.<sup>285</sup> In 2003, the UNGA requested an advisory opinion from the ICJ on the legal consequences of Israel's construction of the wall, in particular regarding international humanitarian law and previous UNGA and UNSC resolutions.<sup>286</sup>

Israel objected to the advisory proceeding arguing that the submitted question concerned a pending bilateral dispute between Israel and Palestine.<sup>287</sup> Israel stated that it did not agree to a judicial settlement of its dispute, as evidenced by Israel's attempts to seek a negotiated settlement of the dispute for years. Israel further argued that issuing the advisory opinion in these circumstances would circumvent the principle that a state may not be forced to settle its disputes against its will. Finally, Israel argued that the Court lacked sufficient information to answer the questions presented to it.<sup>288</sup>

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119; *J. Dugard*, *Advisory Opinions and the Secretary-General with Special Reference to the 2004 Advisory Opinion on the Wall*, in: L. Boisson de Chazournes/M. G. Kohen/Boisson-de-Chazournes-Kohen (eds.), *International law and the quest for its implementation*, 2010, 403; *M. M. Aljaghoub*, 24 *ALQ* 2 (2010), 191; *A. Watts/R. Jorritsma*, *Israeli Wall Advisory Opinion* (last updated 2019), in: A. Peters/R. Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law*, 2008.

284 *R. C. Williams*, 49 *ILM* 2 (2010), 620 (620).

285 *Ibid.*, 620.

286 UNGA resolution ES-10/14 of 8 December 2003, UN doc. A/RES/ES-10/14. The resolution was adopted by 90 votes to 8 against, with 74 abstentions, see A/ES-10/PV.23, 20.

287 ICJ Pleadings, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Written Statement of Israel, 101–102, paras. 7.9 – 7.10.

288 *Ibid.*, 107 et seq.

## II. UNGA's permanent responsibility for the Israeli-Palestinian conflict places matter in "broader frame of reference"

The Court did not decide whether the questions submitted to it concerned a specific legal dispute between Palestine and Israel.<sup>289</sup> Instead, the Court turned to the question if the matter was even bilateral in nature. The ICJ rejected Israel's argument that the questions referred to it by the UNGA concerned a purely bilateral matter between Israel and Palestine, finding that the matter belonged to a "much broader frame of reference than a bilateral dispute".<sup>290</sup> The Court based its decision on two grounds: the powers and responsibilities of the UN in questions relating to international peace and security and the "permanent responsibility" of the UN regarding the Israeli-Palestinian conflict.<sup>291</sup> The Court found that this "permanent responsibility" has its origin in the UNGA "Partition Resolution concerning Palestine"<sup>292</sup> and has been manifested in many UNGA and UNSC resolutions as well as the creation of several subsidiary bodies to assist the realization of the rights of the Palestinian people.<sup>293</sup> Based on these two grounds, the ICJ decided that the purpose of the UNGA's request for an advisory opinion was not the judicial settlement of a bilateral dispute but the assistance of the UNGA in its work.<sup>294</sup> Consequently, the Court argued, there was no circumvention of the requirement of consent to the judicial settlement of disputes.<sup>295</sup>

At this point, it is worth taking a closer look at the ICJ's reasoning. The ICJ first referred to the powers and responsibilities of the UN in the field of international peace and security.<sup>296</sup> In this regard, Article 11 para. 2 UNC states:

"The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any

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289 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (158, para. 48).

290 *Ibid.* (159, para. 50).

291 *Ibid.* (159, para. 49).

292 UNGA resolution 181(II) of 29 November 1947, UN doc. A/RES/181(II)A-B.

293 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (159, para. 49).

294 *Ibid.* (159, para. 50).

295 *Ibid.*

296 These powers are enshrined, inter alia, in Art. 1 paras. 1 and 2, Art. 2 paras. 2, 3 and 6 UNC and, for the UNGA in Art. 11 UNC and, for the UNSC, in Art. 24 para. 1, Art. 26, Art. 39 et seq. UNC.

Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations [...].”

According to Article 35 para. 1 and Article 34 UNC, any Member State of the UN may bring to the attention of the UNGA “any dispute, or any situation which might lead to international friction or give rise to a dispute”, regardless of whether the Member State is a party to such a dispute or not. As long as a Member State brings an inter-state incident before the UNGA, the incident falls within the UNGA’s competence to discuss it. Following this reasoning, there is hardly a situation conceivable in which the UNGA could not invoke its responsibility to maintain peace and security which places a dispute in a “broader frame reference”. The consequence of this reasoning is that any matter ceases to be “bilateral” in nature once the UNGA decides to exercise its competence with regard to it. If one accepts that the UNGA can exercise its competences regarding almost any international matter, the distinction developed by the ICJ between “bilateral disputes”, which may not be settled by advisory opinions, and matters belonging to a “broader frame of reference” loses any analytical clarity. Following the ICJ’s reasoning in the *Wall* opinion, it is questionable whether there remains any relevance for the Eastern Carelia doctrine.<sup>297</sup>

### III. Access to necessary information and evidence

Israel made another objection which was indirectly linked to the matter of consent. It invoked the Court’s lack of access to sufficient information as a reason for the Court to refuse the requested advisory opinion. Israel refused to make any submissions on the question submitted to the Court and argued that the Court was therefore forced to decide on the question without having recourse to all the relevant information and evidence. According to Israel, giving the advisory opinion without taking into account all relevant information violated the judicial character of the ICJ, and therefore the ICJ should refuse to issue the advisory opinion.<sup>298</sup>

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297 Cf. J. A. Frowein/K. Oellers-Frahm, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm/C. J. Tams/M. Kashgar/D. Diehl (eds.), *The Statute of the International Court of Justice*, 2. ed., 2012: Art. 65, paras. 36–37.

298 ICJ Pleadings, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Written Statement of Israel, 107 et seq.; in particular with a view to possible grounds of justifications, see also *Legal Consequences of the Construction of a Wall in the*

This argument had been raised in earlier advisory proceedings without developing any real significance. In the *Peace Treaties* case, the Court did not have to rule on the substantive legal issue; in the *Namibia* case, the Court could rely on a binding UNSC decision on the issue; and in the *Western Sahara* case, Spain filed extensive briefs despite its opposition to the proceedings. Only in the *Eastern Carelia* case of the PCIJ was this argument recognized by the Court as a significant consideration. The PCIJ found that because the USSR refused its cooperation, the Court would not have access to all the facts of the case.<sup>299</sup>

In line with its previous advisory opinions, the ICJ accepted Israel's argument in principle but rejected its relevance in the *Wall* case. The ICJ stated that it must determine in each case whether sufficient information and evidence were available, otherwise a judicial pronouncement would indeed violate its judicial character.<sup>300</sup> However, it is not necessary that the particularly affected state – in this case Israel – is the source of such information; reports by the UNSG or by special rapporteurs as well as written submissions by other states may likewise provide the necessary information.<sup>301</sup>

#### IV. The ICJ addresses the international responsibility of Israel

The ICJ held that Israel committed an internationally wrongful act by constructing the wall on Palestinian territory.<sup>302</sup> In particular, Israel violated its obligation to respect the Palestinian people's right to self-determination, its

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*Occupied Palestinian Territory*, Advisory Opinion, Declaration Buerghenthal, ICJ Reports 2004, 136 (240 et seq.).

299 *Status of Eastern Carelia*, Advisory Opinion, PCIJ Series B 1923, 7 (29), for a discussion of the Eastern Carelia opinion, see § 2 Section A.

300 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (161, para. 56).

301 *Ibid.* (161-162, para. 57).

302 *Ibid.* (197, para. 149); on the legal consequences of the *Wall* opinion, see *R. J. Araujo*, 22 *BUILJ* 2 (2004), 349 (382 et seq.); on the legal consequences of the *Wall* opinion for the UN and its Member States, see *I. Scobbie*, 16 *EJIL* 5 (2005), 941; for a general overview of the Israeli-Palestinian conflict, see *V. Kattan*, *The Palestine question in international law*, 2008; *Dinstein*, *The International Law of Belligerent Occupation*, 2009.

obligations under international humanitarian law<sup>303</sup> and its obligations under international human rights law.<sup>304</sup> As a consequence of these violations of international law, the ICJ found that Israel must cease the construction of the wall, dismantle those parts of the wall situated within the Occupied Palestinian territory, repeal all legislative and regulatory acts adopted with a view to its construction, and make reparation for the damage caused to all natural or legal persons harmed by the construction of the wall.<sup>305</sup>

This part of the Court's opinion, in which the Court addresses Israel's international responsibility, stands most in tension with the Court's Eastern Carelia doctrine, i.e., the position that the giving of an advisory opinion may not circumvent the principle of consensual dispute settlement. The ICJ not only found that Israel breached its international law obligations, it also laid out the legal consequences of these breaches under the law of international responsibility. While the Court's findings on the legal consequences of Israel's breaches of international law respond to the question submitted by the UNGA, Judges *Owada* and *Higgins* criticized the Court for doing so. Judge *Owada* stated in his separate opinion that "the Court (...) should focus its task on offering its objective findings of law to the extent necessary and useful to the requesting organ, the General Assembly, in carrying out its functions relating to this question, rather than adjudicating on the subject-matter of the dispute between the parties concerned".<sup>306</sup> Similarly, Judge *Higgins* stated the Court "revises, rather than applies, the existing case law" by not clearly addressing the question whether the UNGA requested the opinion to guide its functions concerning decolonization or to use the opinion to peacefully settle the dispute.<sup>307</sup>

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303 The Court held that the construction of the Wall led to the destruction or requisition of properties in violation of Art. 46 and 52 of the Hague Regulations and Art. 53 of the fourth Geneva Convention.

304 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (197, para. 149).

305 *Ibid.* (197-198, paras. 150-152).

306 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, Separate Opinion *Owada*, ICJ Reports 2004, 136 (265, para. 14).

307 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, Separate Opinion *Higgins*, ICJ Reports 2004, 136 (210, paras. 12-13).

## V. Legal consequences for states other than Israel and the UN

After finding that Israel violated several of its international law obligations and determining the legal consequences of these breaches for Israel, the ICJ turned to the legal consequences of Israel's violation for other states as well as for the UN as a whole.<sup>308</sup> The Court found that Israel violated several *erga omnes* obligations, including the right of self-determination of peoples and certain obligations under international humanitarian law.<sup>309</sup> Because Israel violated certain *erga omnes* obligations, the Court found that all states are under the obligations “not to recognize the illegal situation resulting from the construction of the wall” and “not to render aid or assistance in maintaining the situation created by such construction”.<sup>310</sup> Additionally all states must “see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end” and “ensure compliance by Israel with international humanitarian law”.<sup>311</sup> With regard to the UN, the Court refrained from recognizing concrete obligations following from Israel's breaches of *erga omnes* obligations. Instead, it merely found that “the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion”.<sup>312</sup>

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308 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (199 et seq., paras. 154 et seq.).

309 Ibid. (199 et seq., 155 et seq.).

310 Ibid. (200, para. 159).

311 Ibid.

312 Ibid. (200, para. 160).

### G. Kosovo case (2010)

The ICJ was again confronted with a request that directly touched upon the interests of several states in the *Kosovo* case.<sup>313</sup>

#### I. Background

On 17 February 2008, the “Assembly of Kosovo”<sup>314</sup> adopted a resolution in which it declared Kosovo’s independence from Serbia.<sup>315</sup> Serbia was opposed to this move towards independence and presented to the UNGA a draft resolution to request an advisory opinion from the ICJ on the legality of the declaration of independence.<sup>316</sup> Serbia’s Minister of Foreign Affairs asked the UNGA “to convey” Serbia’s request to the Court and argued for a “right of any Member State of the United Nations to pose a simple, basic question on a matter it considers vitally important to the Court.”<sup>317</sup> The UNGA adopted Serbia’s draft resolution, asking the Court the following question:

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313 *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403; on the *Kosovo* opinion, see R. Wilde, *Kosovo* (Advisory Opinion) (last updated 2011), in: A. Peters/R. Wolfrum (eds.), *The Max Planck Encyclopedia of Public International Law*, 2008; R. Falk, 105 *American Journal of International Law* 1 (2011), 50; D. Jacobs/Y. Radi, 24 *Leiden Journal of International Law* 2 (2011), 331-354; M. D. Oberg, 105 *American Journal of International Law* 1 (2011), 81; A. Peters, *Has the Advisory Opinion's Finding that Kosovo's Declaration of Independence was not Contrary to International Law Set an Unfortunate Precedent?*, in: M. Milanović/M. Wood (eds.), *The Law and Politics of the Kosovo Advisory Opinion*, 1. ed., 2015, 291.

314 On 17 November 2007, while negotiations about the legal status of Kosovo were still ongoing, elections were held for the “Assembly of Kosovo” as well as other public offices, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, United Nations doc. S/2007/768. The legal status of the Assembly of Kosovo was a contentious matter in the advisory proceeding before the ICJ, in particular if it was part of the “Provisional Institutions of Self-Government within the Constitutional Framework”, see *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403 (444 et seq., paras. 102 et seq.).

315 *Kosovo Declaration of Independence*, published on 17 February 2008, [http://old.kuvendikosoves.org/common/docs/Dek\\_Pav\\_e.pdf](http://old.kuvendikosoves.org/common/docs/Dek_Pav_e.pdf).

316 Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law, draft resolution submitted by Serbia, UN doc. A/63/L.2.

317 UNGA, 22nd Plenary Meeting, 8 October 2008, A/63/PV.22, 1.

“Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”<sup>318</sup>

## II. ICJ gives deference to requesting organ assuming its need for an advisory opinion

Several states argued that the Court ought to exercise its discretion to refuse to give the advisory opinion requested by the UNGA arguing that the advisory opinion was requested not in order to assist the UNGA but to serve the interests Serbia.<sup>319</sup> The advisory opinion procedure was being abused for the settlement of an inter-state dispute rather than for the assistance of a UN organ.<sup>320</sup> The states proposed that the Court look beyond the formalistic authorship of the UNGA resolution and determine the “real” author to decide on the propriety of issuing the requested advisory opinion.<sup>321</sup> The Court refuted this argument finding that the sponsorship of a resolution by a single state does not make that state the requesting entity. By adopting the resolution, the UNGA made the proposal its own matter:

*“[T]he motives of individual States which sponsor, or vote in favour of, a resolution requesting an advisory opinion are not relevant to the Court’s exercise of its discretion whether or not to respond. As the Court put it in its Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, “once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution” (I.C.J. Reports 1996 (I), p. 237, para. 16).”*<sup>322</sup>

By refusing to look for the “real” or material author of the request for an advisory opinion and thus applying a formalistic understanding of

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318 UNGA resolution 63/3 of 8 October 2008, UN doc. A/RES/63/3. The resolution was adopted by 77 votes in favor, 6 votes against, with 74 abstentions, see A/63/PV.22, 10.

319 *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403 (416-417, para. 32).

320 *Ibid.*

321 *Ibid.*

322 *Ibid.* (417, para. 33), emphasis added.

the authorship, the ICJ further limited the scope of the Eastern Carelia doctrine. Even where the interest in receiving the advisory opinion seems to be limited to or at least driven by a single state, the Court will generally assume that the requesting organ has a legitimate interest in receiving the opinion which goes beyond the settlement of an inter-state dispute.

Vice-President *Tomka* criticized the Court's approach arguing that the Court should have exercised its discretion to decline to give the requested opinion.<sup>323</sup> *Tomka* did not see any "sufficient interest" for the UNGA in requesting the opinion while the UNSC was already dealing with the matter.<sup>324</sup> In particular, he raised the question whether an advisory opinion on the matter would in fact assist the UNGA in their activities, even if no prior activities regarding the matter could be discerned.<sup>325</sup>

#### *H. Chagos case (2019)*

In 2019, the ICJ issued its *Chagos* advisory opinion.<sup>326</sup> On the face of it, the *Chagos* case concerned a territorial dispute between two states over a small archipelago in a remote place, in the middle of the Indian Ocean about 2,200 km north-east of Mauritius. Yet, this simplified description neglects the highly important legal and geo-political questions underlying the case such as the Chagossian people's right to self-determination, the ongoing struggle of non-self-governing people and regional security interests claimed by the United Kingdom and the United States of America.<sup>327</sup> The *Chagos* case was not the first time the Court was asked to give an advisory

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323 Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion, Declaration Vice-President Tomka, ICJ Reports 2010, 403 (454, para. 2).

324 Ibid. (455, para. 5).

325 *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, Declaration Vice-President Tomka, ICJ Reports 2010, 403 (455, para. 5); see also Declaration Keith, ICJ Reports 2010, 403 (489, para. 17).

326 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95.

327 Ibid.; on the *Chagos* opinion, see *G. Puma*, 79 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* (2019), 841; *F. L. Bordin*, 78 *CLJ* 2 (2019), 253; *V. Kattan*, 10 *Asian Journal of International Law* (2020), 12; *R. McCorquodale/J. Robinson/N. Peart*, 69 *ICLQ* 1 (2020), 221; *S. Allen*, 69 *ICLQ* 1 (2020), 203; *S. Allen*, Reflections on the Treatment of General Assembly Resolutions in the *Chagos* Advisory Opinion, in: T. Burri/J. Trinidad (eds.), *The International Court of Justice and decolonisation*, 2021, 41; *F. L. Bordin*, *State Responsibility in Advisory Proceedings*:

opinion in the context of decolonization. However, while the *South-West Africa* case, the *Namibia* case, and the *Western Sahara* took place in the 1950s and 1970s, the *Chagos* opinion was delivered in 2019, highlighting that the process of decolonization is still ongoing. The *Chagos* case also marks an important stage in the development of the Eastern Carelia doctrine, with many states presenting arguments in their written and oral statements on the admissibility of the request.

## I. Background

Mauritius has had a long and painful history of colonization by European powers.<sup>328</sup> Mauritius was occupied by the Netherlands in the 17<sup>th</sup> century and colonized by France in the 18<sup>th</sup> century. Under the Treaty of Paris of 1814, France ceded its colony of Mauritius, including all its dependencies, to Great Britain. Between 1814 and 1965, the Chagos Archipelago was a dependency of the colony of Mauritius and subject to British administration. On 23 September 1965, the United Kingdom and Mauritius concluded the Lancaster House Agreement which paved the way for Mauritian independence but also demanded painful concessions from Mauritius. In particular, Mauritius had to consent to the detachment of the Chagos Archipelago from the rest of its territory. The newly created colony was named “British Indian Ocean Territory” (BIOT) and was administered by the UK. On 30 December 1966, the UK and the USA concluded a separate agreement<sup>329</sup> in which the UK leased the BIOT to the USA for the purpose of establishing a military base. To this end, the UK forcibly resettled the Chagossian popu-

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Thoughts on Judicial Propriety and Multilateralism in the Chagos Opinion, in: T. Burri/J. Trinidad (eds.), *The International Court of Justice and decolonisation*, 2021, 95; Z. Crespi Reghizzi, *The Chagos Advisory Opinion and the Principle of Consent to Adjudication*, in: T. Burri/J. Trinidad (eds.), *The International Court of Justice and decolonisation*, 2021, 51; D. Snoxell, *Prospect of the Chagos Advisory Opinion and the Subsequent UN General Assembly Resolution Helping to Resolve the Future of the Chagos Archipelago and Its Former Inhabitants: A Political Perspective*, in: T. Burri/J. Trinidad (eds.), *The International Court of Justice and decolonisation*, 2021, 262; J. Summers, *Chagos, Custom and the Interpretation of UN General Assembly Resolutions*, in: T. Burri/J. Trinidad (eds.), *The International Court of Justice and decolonisation*, 2021, 9.

328 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95 (107-111, paras. 25-53).

329 Agreement concerning the Availability for Defence Purposes of the British Indian Ocean Territory, 603 UNTS 1967, No 8737, 274.

lation, estimated at 1,500 to 2,000 people between 1967 and 1973.<sup>330</sup> When Mauritius gained its independence on 12 March 1968, the new Mauritian constitution defined Mauritius' territory without reference to the Chagos Archipelago.

Since at least 1980, when then Prime Minister of Mauritius Seewoosagur Ramgoolam called for the reintegration of the Chagos Archipelago into the Mauritian territory before the UNGA<sup>331</sup>, there has been a dispute between the United Kingdom and Mauritius over the territorial affiliation of the Chagos Archipelago. In 2010, the United Kingdom declared the Chagos Archipelago and its surroundings a Marine Protected Area, whereupon Mauritius initiated UNCLOS Annex VII arbitration proceedings to establish *inter alia* that the United Kingdom was not a “coastal state” within the meaning of UNCLOS and thus not entitled to declare a Marine Protected Area.<sup>332</sup> The arbitral tribunal found that the dispute is “properly characterized as relating to land sovereignty over the Chagos Archipelago” and since such a dispute did not concern the interpretation or application of UNCLOS the tribunal declared that it lacked jurisdiction to decide on this first submission.<sup>333</sup>

In 2016, Mauritius inscribed the request for an advisory opinion on the matter into the provisional agenda of the 71<sup>st</sup> session of the UNGA.<sup>334</sup> Mauritius then asked that all discussions on the matter in the plenary were halted until June 2017 to allow for bilateral negotiations between Mauritius and the UK to take place. It was only when negotiations failed that Mauritius asked the plenary of the UNGA to discuss as soon as possible a draft resolution requesting an advisory opinion from the Court. The draft was prepared by Mauritius and formally presented to the plenary by the African Group without any modifications. The UNGA then adopted the resolution

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330 The Guardian, Chagos islanders' exile is ongoing breach of human rights, court told, 12 May 2020, available at: <https://www.theguardian.com/world/2020/may/12/chagos-islanders-exile-human-rights-breach-court-of-appeal-told>.

331 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95 (110, para. 46).

332 See Mauritius' first submission, *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, UNRIAA, Vol. XXXI (2015), 359 (para. 158).

333 *Ibid.*, paras. 213 et seq.

334 UN doc. A/71/142. On the history of UNGA resolution 71/292 of 22 June 2017, see *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, Declaration Tomka, ICJ Reports 2019, 95 (149–150, para. 4).

– again without making any modifications – by majority vote.<sup>335</sup> On 22 June 2017, the UNGA requested an advisory opinion from the Court on two questions regarding the decolonization of Mauritius and the Chagos Archipelago.<sup>336</sup>

## II. Position of the states participating in the proceeding

### 1. UK and others: Giving an advisory opinion violates the Eastern Carelia doctrine

Several states, first and foremost the United Kingdom, argued that the submitted questions concerned a purely bilateral dispute between the UK and Mauritius about the territorial sovereignty over the Chagos Archipelago and that, in the absence of the United Kingdom's consent, the Court could not decide this territorial dispute by way of an advisory opinion.<sup>337</sup> The UK pointed out that Mauritius had only pressed ahead in the UNGA with the application for the advisory opinion when bilateral negotiations with

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335 UNGA resolution 71/292 of 22 June 2017, UN doc. A/RES/71/292. The resolution was adopted with 94 votes in favor, 15 votes against and 65 abstentions, see A/71/PV.88, 18.

336 UNGA resolution 71/292 of 22 June 2017, UN doc. A/RES/71/292:  
“(a) Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?;

(b) What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?”.

337 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of Australia, paras. 21, 32 et seq.; Written Statement of Chile, paras. 4 et seq.; Written Statement of France, para. 19; Written Statement of Israel, paras. 3.6 et seq.; Written Statement of the United Kingdom, paras. 7.14 et seq.; Written Comments of the United Kingdom, para. 3.3; Written Statement of the United States, paras. 1.2, 3.20 et seq.; Written Comments of the United States, para. 2.7.

the United Kingdom had failed.<sup>338</sup> The request for an advisory opinion was a strategy of Mauritius to circumvent the UK's opposition to dispute settlement by means of the advisory opinion procedure. While not every pending dispute would automatically have the Court refuse to give an advisory opinion, the UK argued that the specific questions referred to the Court in the *Chagos* case could not be answered without the Court resolving a long-standing bilateral dispute between the UK and Mauritius over the territorial sovereignty over the Chagos Archipelago.<sup>339</sup>

According to the UK, the Court could decide in the UK's favor and still adhere to its previous case law. The UK argued that the *Chagos* case was distinguishable from the *Peace Treaties* case in that the submitted legal questions in the *Chagos* case concerned the actual subject-matter of the pending dispute and not merely preliminary procedural questions, a point which the ICJ emphasized in the *Peace Treaties* Advisory Opinion when it held that "the present Request for an Opinion is solely concerned with the applicability to certain disputes of the procedure for settlement instituted by the Peace Treaties, and it is justifiable to conclude that it in no way touches the merits of those disputes".<sup>340</sup>

In contrast to the *Namibia* case, there was no binding UNSC resolution declaring the continued administration of the Chagos Archipelago by the UK illegal.<sup>341</sup> Unlike in the *Western Sahara* case, the dispute between the UK and Mauritius did not arise within the UNGA and the answer to the submitted questions would have a direct bearing on the current legal position of the UK as an administering power.<sup>342</sup> According to the UK, the decisive reason why the *Western Sahara* advisory opinion did not violate the Eastern Carelia doctrine was the opinion's lack of influence on Spain's

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338 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of Israel, para. 3.8, citing UNGA official records of 22 June 2017, A/71/PV.88, 7 et seq.

339 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of the United Kingdom, para. 7.15.

340 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, ICJ Reports 1950, 65 (72).

341 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of the United Kingdom, paras. 7.17 lit. b, 7.18 lit. a.

342 *Ibid.*, paras. 7.17 lit. c, 7.18 lit. c.

legal position, not the decolonization context.<sup>343</sup> This, according to the UK, was different in the *Chagos* case, as the questions referred to the Court concerned the hitherto unresolved issue of territorial sovereignty over the Chagos Archipelago. Unlike in the *Wall* case, the questions referred and the subject-matter of the bilateral dispute were identical and there was no special and permanent responsibility of the UN for the dispute, so that the submitted questions could not be classified as belonging to a “broader frame of reference”.<sup>344</sup> While the question submitted to the Court in the *Wall* case only concerned part of the Israeli-Palestinian conflict, the questions in the *Chagos* case concerned the very heart of the dispute between the United Kingdom and Mauritius.<sup>345</sup> The UNGA had not actively considered the Chagos Archipelago in the context of decolonization for several decades.<sup>346</sup> While the UNGA had a special responsibility for the Israeli-Palestinian conflict, no such responsibility existed in the *Chagos* case.<sup>347</sup> Similar to Israel in the *Wall* case, the UK also stressed that the advisory opinion procedure was not suitable for resolving complex questions of law and fact. Irrespective of whether the states particularly affected provided information, the special procedural rules of the contentious procedure, such as more extensive oral hearings and the rules on the burden of proof, do not apply in advisory procedures which is why complex questions of law and fact could not be adequately resolved.<sup>348</sup>

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343 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Comments of the United Kingdom, paras. 3.11, 3.18; Written Comments of the United States, para. 2.12.

344 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of the United Kingdom, paras. 7.17 lit. e, 7.18 lit. a; Written Comments of the United Kingdom, para. 3.21.

345 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of the United Kingdom, paras. 7.17 lit. e; 7.18 lit. a, lit. b; Written Statement of Israel, para. 3.14 – 3.15.

346 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of the United Kingdom, para. 7.18 lit. b.; Written Comments of the United Kingdom, para. 3.21 lit. b.

347 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Comments of the United Kingdom, para. 3.21 lit. d.

348 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of the United Kingdom, para. 7.18 lit. e, f.

According to the United Kingdom, the Court thus ought to refuse the requested advisory opinion unless it wished to abandon the *Eastern Carelia* doctrine entirely.<sup>349</sup>

## 2. Mauritius and others: Advisory opinion concerns decolonization, not a territorial dispute

Mauritius and other states disagreed with the UK's reading of the case. They argued that giving the requested advisory opinion would not violate the Eastern Carelia doctrine. To support their claim, they relied on two conditions established in the Court's jurisprudence as a yardstick for determining when the giving of an advisory opinion would not circumvent state consent: first, the submitted questions are situated in a broader framework than a bilateral dispute and secondly, the purpose of the request for an advisory opinion is to assist the requesting organ in the proper performance of its duties.<sup>350</sup> Mauritius and the majority of states participating in the proceeding, as well as the African Union considered these conditions to be fulfilled in the *Chagos* case.<sup>351</sup> The broader frame of reference in which the submitted questions are placed was – as in the *Western Sahara* advisory opinion – decolonization. Mauritius argued that any dispute about the territorial sovereignty over the Chagos Archipelago was “entirely derivative of, subsumed within, and determined by the question of whether decolonization has or has not been lawfully completed”.<sup>352</sup> The territorial dispute

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349 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Comments of the United Kingdom, para. 3.3.

350 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of Mauritius, para. 5.29.

351 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of Argentina, paras. 25–26; Written Statement of Brazil, paras. 11–12; Written Statement of Cyprus, paras. 26–27; Written Statement of Djibouti, paras. 21–22; cf. Written Statement of India, para. 6; Written Statement of Liechtenstein, para. 16; Written Statement of the Marshall Islands, para. 15; Written Comments of the Marshall Islands, para. 7; Written Statement of Mauritius, paras. 5.29 et seq.; Written Comments of Mauritius, paras. 2.15 et seq.; Written Statement of Namibia, 2; Written Comments of Nicaragua, paras. 15–16; Written Statement of Serbia, paras. 25 et seq.; Written Comments of Serbia, paras. 8 et seq.; cf. Written Statement of the African Union, para. 31.

352 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Comments of Mauritius, para. 2.16.

was thus “completely and fully resolved exclusively by reference to the rules of international law on decolonization and self-determination”.<sup>353</sup>

According to Mauritius, while it was true that disputes between the former colonial power and the former non-self-governing territory *also* have a bilateral component, they affect the entire community of states, which overrides any bilateral element.<sup>354</sup> Any legal question in the context of decolonization thus always falls within the remit of the UN and in particular the UNGA. This, Mauritius argued, follows from the fact that the right of peoples to self-determination creates *erga omnes* obligations and the decolonization process directly affects the UNGA due to its self-declared goal of eliminating colonialism.<sup>355</sup> In sum, according to Mauritius and the majority of participating states, the decisive factor in support of giving the requested opinion was that the submitted questions were located in the context of the decolonization of colonized territories. As evidence of the UNGA’s ongoing efforts in this area, Mauritius referred to the UNGA resolution on the 50<sup>th</sup> anniversary of the Declaration on the Granting of Independence to Colonial Countries and Peoples,<sup>356</sup> in which the UNGA

“[c]onsiders it incumbent upon the United Nations to continue to play an active role in the process of decolonization and to intensify its efforts for the widest possible dissemination of information on decolonization, with a view to the further mobilization of international public opinion in support of complete decolonization[...]”.<sup>357</sup>

In contrast to the UK and the USA,<sup>358</sup> Mauritius did not see the decisive justification for issuing the *Western Sahara* advisory opinion in the fact that the advisory opinion had no influence on Spain’s legal position. Rather, the decisive factor was that the matter of decolonization placed the submitted questions in a “broader frame of reference” than the settlement of a purely bilateral dispute, and that answering the submitted questions supported

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353 Ibid., para. 2.17.

354 Ibid., paras. 2.30 – 2.31.

355 Ibid., para. 2.30.

356 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of Mauritius, para. 5.33.

357 UNGA resolution 65/118 of 10 December 2010, UN doc. A/RES/65/118, paras. 2, 9.

358 See ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Comments of the United Kingdom, paras. 3.11, 3.18; Written Comments of the United States, para. 2.12.

the UNGA in the performance of its tasks.<sup>359</sup> However, Mauritius did not provide an explanation for why the ICJ in the *Western Sahara* case emphasized that the advisory opinion did not affect Spain's legal position. Such a remark would have been superfluous if all that mattered was the broader frame of reference of decolonization.

### 3. Germany proposes compromise

Germany presented in its written submissions an interesting proposal to balance the interests of the requesting UN organ and of the states affected by the requested advisory opinion. At the same time, the proposal also tried to balance the two characteristics of the ICJ as an organ of the UN on the one hand and as a court of justice on the other. Germany pointed out that when the Court is confronted with a question which relates to a pending bilateral dispute, the Court does not only have the choice between issuing and not issuing the requested advisory opinion. The Court may also decide *to which extent* it answers the submitted questions.<sup>360</sup> Germany based its view on three essential premises:

First, the function of the advisory procedure is not to adjudicate bilateral disputes. Rather, the advisory procedure is intended to provide legal guidance to the requesting UN organ in the exercise of its powers under the UNC.<sup>361</sup> In this regard, Germany referred to previous statements the Court made in the *Western Sahara* advisory opinion in which the Court held:

“The object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory.”<sup>362</sup>

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359 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Comments of Mauritius, para. 2.44.

360 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of Germany, paras. 123–124, 127 et seq.

361 *Ibid.*, paras. 107–108.

362 *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12 (26–27, para. 39).

Second, the Court has the power to interpret and, if necessary, rephrase the submitted question.<sup>363</sup> The Court may reformulate the submitted question even if the question is formulated in a clear, narrow and specific manner and even if the reformulation would affect the content of the advisory opinion.<sup>364</sup> By reformulating the question, the Court could avoid making judicial pronouncements on the international responsibility of the states in question.

Third, Article 7 UNC imposes a duty of collegial cooperation on all UN organs. Because of this duty of cooperation, the requesting organ will only request an advisory opinion to the extent it deems necessary for the exercise of its powers.<sup>365</sup> The Court may therefore assume that the submitted question is limited in its extent to what is necessary for the work of the requesting UN organ.

In the case of a pending bilateral dispute, the Court should therefore only make statements on the legal position of individual states if the requesting body has explicitly requested this and if such statements are necessary for the work of the organ.<sup>366</sup> So far, this has only been assumed if the United Nations had a special responsibility for a certain territory.<sup>367</sup> Germany argued that the UNGA had not explicitly requested a statement on the legal consequences for the United Kingdom in the *Chagos* case and the UN – unlike in the case of Palestine or Namibia – did not have any special responsibility for the Chagos Archipelago which went beyond the general responsibility of the UN for the decolonization of colonized territories.<sup>368</sup> The Court should therefore limit its answer to those aspects of the submitted questions that were necessary for the UNGA in the exercise of its tasks in the context of decolonization and exclude, as far as possible, all bilateral

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363 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of Germany, paras. 74 et seq.

364 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of Germany, paras. 88 et seq., citing Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980, 73 (88, para. 35) and Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion, ICJ Reports 2010, 403 (423 et seq., paras. 50 et seq.).

365 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of Germany, paras. 120, 142.

366 *Ibid.*, paras. 119 et seq.

367 *Ibid.*, para. 123.

368 *Ibid.*, paras. 121, 130 et seq.

aspects of the submitted question in particular questions concerning the international responsibility of the United Kingdom.<sup>369</sup>

### III. The Court follows Mauritius' argumentation

The Court unanimously found that it had jurisdiction to give the requested advisory opinion and by twelve votes to two decided that it would not exercise its discretion to decline to give the opinion. Only Judge *Donoghue* and Judge *Tomka* voted against giving the requested advisory opinion.<sup>370</sup> Judge *Gevorgian*, while not voting against complying with the request for an advisory opinion, similarly argued that the Court overstretched its mandate by addressing the UK's international responsibility.<sup>371</sup>

#### 1. Court majority

The overwhelming majority on the bench decided to give the requested advisory opinion on both questions. The Court reiterated its position formulated in the *Western Sahara* case that “there would be a compelling reason for [the Court] to decline to give an advisory opinion when such a reply ‘would have the effect of circumventing the principle that a state is not obliged to allow its disputes to be submitted to judicial settlement without its consent’”.<sup>372</sup> In doing so, the ICJ reaffirmed that it did not intend to abolish the Eastern Carelia doctrine.

The Court found that the object and purpose of the request for an advisory opinion was not to settle a bilateral dispute between Mauritius and the United Kingdom.<sup>373</sup> Rather, the purpose of the advisory opinion was to support the UNGA in its functions relating to the decolonization of

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369 *Ibid.*, para. 141.

370 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95 (140, para. 183).

371 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, Separate Opinion *Gevorgian*, ICJ Reports 2019, 95 (336, para. 5).

372 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95 (117, para. 85), citing *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12 (25, para. 33).

373 *Ibid.* (117, para. 86). The ICJ developed the object and purpose test in its *Reservations to Genocide* advisory opinion, see *Reservations to the Convention on the Pre-*

Mauritius.<sup>374</sup> The ICJ referred to Article 1 para. 2 and Article 73 UNC as well as the active role the UNGA has played in the decolonization process as reflected in the work of the Fourth Committee<sup>375</sup> and the Committee of 24<sup>376</sup> to support its view.<sup>377</sup> The ICJ held:

“The Court therefore concludes that the opinion has been requested on the matter of decolonization which is of particular concern to the United Nations. The issues raised by the request are located in the broader frame of reference of decolonization, including the General Assembly’s role therein, from which those issues are inseparable.”<sup>378</sup>

The Court did not distinguish between the role of the UNGA regarding decolonization in general and regarding the decolonization of Mauritius in particular. As Judge *Tomka* pointed out, the UNGA has not been actively involved in the matter of Mauritius. Nevertheless, the Court argued that the UNGA has a special responsibility for the completion of decolonization which justify a request for an advisory opinion on the matter. Irrespective of the existence of a bilateral dispute, the request for an advisory opinion is thus primarily directed at supporting the UNGA in its activities. The ICJ also rejected the argument that advisory proceedings are not suitable for

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*vention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, 15 (19).

374 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95 (117, para. 86).

375 The "Special Political and Decolonization Committee" or "Fourth Committee" deals with a variety of issues, including decolonization, the effects of atomic radiation, information issues, peacekeeping operations, reviews of special political missions, the United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA), Israeli practices and settlement activities affecting the rights of Palestinians and other Arabs in the Occupied Territories, and international cooperation in the peaceful exploration of outer space, see Allocation of agenda items to the Special Political and Decolonization Committee (Fourth Committee), A/C.4/78/1.

376 The UNGA created the "Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples" also known as "Committee of 24" or "C-24" to monitor the application of the Declaration on the Granting of Independence to Colonial Countries and Peoples (UNGA resolution 1514 (XV) of 14 December 1960, UN doc. A/RES/1514(XV)) and to make suggestions and recommendations on the progress of the implementation of the Declaration, see UNGA resolution 1654 (XVI) of 27 November 1961, UN doc. A/RES/1654(XVI).

377 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95 (118, para. 87).

378 *Ibid.* (118, para. 88).

resolving complex questions of fact as the Court had been provided with sufficient information by UN organs and numerous participating states.<sup>379</sup> This, of course, does not address the issue of the burden of proof brought up by the United Kingdom.

The Court also rejected the suggestion made by Germany in its written submission that the Court should limit its answer to question (a) and not address the UK's international responsibility, so as not to circumvent the UK's lack of consent to dispute settlement. The Court found that "the Court is asked to state the consequences, under international law, of the continued administration by the United Kingdom of the Chagos Archipelago. By referring in this way to international law, the General Assembly necessarily had in mind the consequences for the subjects of that law, including States."<sup>380</sup>

The Court thus did not limit its answer to the finding that the decolonization process of Mauritius has not been completed (question a). It also found that the UK's continued administration of the Chagos Archipelago constituted an internationally wrongful act entailing the international responsibility of the UK (question b).<sup>381</sup> In doing so, one could argue that the Court went beyond what was "strictly necessary and useful" for the work of the UNGA in the realization of the decolonization of Mauritius. The international responsibility of the United Kingdom is not a prerequisite for the decolonization process but only for employing countermeasures, claiming reparation or invoking other legal remedies. It seems that the Court also felt uneasy about this point. As Judge *Gevorgian* pointed out in his declaration, while the Court includes a finding on the international responsibility of the UK in its reasoning, the "recitals" at the end of the advisory opinion make no mention of it.<sup>382</sup>

## 2. Separate opinions and Declarations by Vice-President Xue and Judges Gaja, Iwasawa, and Salam

Judges *Gaja*, *Iwasawa* and Judge *Salam* as well as Vice-President *Xue* added Separate Opinions and Declarations to the *Chagos* opinion in which they

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379 Ibid. (114-115, paras. 73-74).

380 Ibid. (129, para. 136).

381 Ibid. (138, para. 177).

382 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, Separate Opinion *Gevorgian*, ICJ Reports 2019, 95 (337, para. 7).

made specific references to the Eastern Carelia doctrine. The judges presented different proposals where to draw the line between the appropriate use of the advisory procedure to support the activities of the UNGA and its improper use to settle a bilateral dispute.

For Judge *Gaja*, the line would only have been crossed “[i]f the Court had chosen to express views on bilateral questions such as the alleged existence of an obligation for the United Kingdom to make reparation to Mauritius [...]”.<sup>383</sup> In contrast, Judge *Salam* criticized the Court for not going far enough. According to him, the Court should have decided that the United Kingdom owes compensation to the Chagossian people.<sup>384</sup> Judge *Iwasawa* argued that the Court’s reply did not constitute an adjudication of a bilateral territorial dispute because the Court left all the modalities of how the decolonization of Mauritius is to be achieved to the UNGA. The Court merely stated that the decolonization of Mauritius should be completed in a manner consistent with the Chagossian people’s right to self-determination. The Court thus limited its response “to the extent necessary to assist the General Assembly in carrying out its function concerning decolonization”.<sup>385</sup>

Vice-President *Xue* undertook the most detailed examination of the application of the Eastern Carelia doctrine in the *Chagos* case. According to Vice-President *Xue*, the mere existence of a bilateral dispute is not enough to render the giving of an advisory opinion on a certain matter inconsistent with the Eastern Carelia doctrine. Instead, “[w]hat is decisive is the object and nature of the request”.<sup>386</sup> Accordingly, the giving of an advisory opinion only violates the Eastern Carelia doctrine, if the “object and nature” of the request is to settle a bilateral dispute.<sup>387</sup> If, on the other hand, the request’s “object and nature” aims at assisting the UNGA in its functions, the Court ought to give the opinion. Vice-President *Xue* referred to three standards referenced in the Court’s jurisprudence to determine the request’s “object and nature”. Accordingly, the Court must ascertain

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383 Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, Separate Opinion Gaja, ICJ Reports 2019, 95 (269, para. 7).

384 Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, Declaration Salam, ICJ Reports 2019, 95 (339, paras. 6–7).

385 Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, Declaration Iwasawa, ICJ Reports 2019, 95 (342, para. 10).

386 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, Declaration Vice-President Xue, ICJ Reports 2019, 95 (142, para. 4).

387 *Ibid.*

if the request concerns a matter located in a “broader frame of reference than the settlement of a dispute”,<sup>388</sup> if the request aims at providing the UNGA with “enlightenment as to the course of action it should take” and if the dispute arose in proceedings before the UNGA or independently in bilateral relations.<sup>389</sup>

Applying these standards to the case, Vice-President *Xue* found that the object of the request was not to resolve a bilateral territorial dispute between Mauritius and the UK, but to assist the UNGA in the discharge of its functions relating to the decolonization of Mauritius.<sup>390</sup> Vice-President *Xue* argued that the “root cause “ of the detachment of the Chagos Archipelago from Mauritius and thus of the dispute between the two states was the decolonization process of Mauritius.<sup>391</sup> Only because of the imminent independence of Mauritius did the United Kingdom separate the archipelago from the rest of the territory of Mauritius. The UK was aware that by detaching the archipelago and thus creating a new colony, it would provoke criticism by other states and the UN. The criticism soon followed suit in the form of resolution 2066 (XX) in which the UNGA declared that the creation of the BIOT and the establishment of a military base thereon were incompatible with the purposes and principles of the UNC and the Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>392</sup>

Vice-President *Xue* rejected the United Kingdom’s argument that the dispute first arose in 1980, stating that this would “take the issue of the Chagos Archipelago out of its historical context”.<sup>393</sup> During the administration of Mauritius, the United Kingdom never disputed that the Chagos Archipelago forms part of Mauritius and the United Kingdom agreed to return the archipelago once it was no longer needed for defense purposes in order to

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388 Vice-President *Xue* referred to *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12 (26, para. 38); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (159, para. 50).

389 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, Declaration Vice-President *Xue*, ICJ Reports 2019, 95 (142–3, para. 4).

390 *Ibid.*, 143, paras. 5–6.

391 *Ibid.*, 143, para. 7.

392 UNGA resolution 2066 (XX) of 16 December 1965, UN doc. A/RES/2066(XX).

393 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, Declaration Vice-President *Xue*, ICJ Reports 2019, 95 (145, para. 11).

secure Mauritius' consent to the separation of the Chagos Archipelago.<sup>394</sup> The conduct of the United Kingdom, according to Vice-President *Xue*, thus supported the assumption that there existed no territorial dispute and that no sovereignty over the territory was intended to be transferred.<sup>395</sup> Vice-President *Xue* emphasized that the process of decolonization and the concomitant responsibility of the UN to support this process had no temporal limitation.<sup>396</sup> Even though more than fifty years had passed since the independence of Mauritius, unresolved questions concerning its decolonization still remained. The responsibility of the UN did not cease only because Mauritius sought to resolve its dispute with its former colonial power through bilateral or third-party procedures.<sup>397</sup>

### 3. Criticism by Judges *Donoghue*, *Tomka*, and *Gevorgian*

Judges *Donoghue*<sup>398</sup>, *Tomka*<sup>399</sup>, and *Gevorgian*<sup>400</sup> argued that the Court should have been more careful not to circumvent the United Kingdom's consent when giving the requested advisory opinion. While Judges *Donoghue* and *Tomka* in effect took up Germany's suggestion that the Court ought to limit its response to question (a) on the right of self-determination of the Chagossian people while not responding to question (b) on the legal consequences of the continued administration by the UK,<sup>401</sup>

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394 *Ibid.*, 145, para. 12.

395 *Ibid.*, 145, paras. 13–14.

396 *Ibid.*, 145, paras. 16–17.

397 *Ibid.*, 145–6, para. 19.

398 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, Dissenting Opinion Donoghue, ICJ Reports 2019, 95 (261 et seq.).

399 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, Declaration Tomka, ICJ Reports 2019, 95 (148).

400 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, Separate Opinion Gevorgian, ICJ Reports 2019, 95 (336, para. 4).

401 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, Dissenting Opinion Donoghue, 95 (266, para. 22); Declaration Tomka, ICJ Reports 2019, 95 (151–152, paras. 8–9).

Judge *Gevorgian* specifically criticized the Court's statements regarding the international responsibility of the United Kingdom.<sup>402</sup>

a) Dissenting opinion by Judge *Donoghue*

According to Judge *Donoghue*,

“the Advisory Opinion has the effect of circumventing the absence of United Kingdom consent to judicial settlement of the bilateral dispute between the United Kingdom and Mauritius regarding sovereignty over the Chagos Archipelago and thus undermines the integrity of the Court's judicial function.”<sup>403</sup>

Judge *Donoghue* acknowledged that the subject-matter of the proceeding is located within the “broader frame of reference of decolonization, including the General Assembly's role therein”.<sup>404</sup> However, the question concerning decolonization could be separated from the territorial dispute over sovereignty over the Chagos Archipelago. The Court should be careful to avoid this “quintessentially bilateral”<sup>405</sup> dispute as rendering an advisory opinion on this matter would undermine the integrity of the Court's judicial function:

“The Charter of the United Nations and the Statute of the Court give the Court the functions of settling legal disputes in contentious cases and of responding to requests for advisory opinions. To preserve the integrity of both functions, the distinctions between them must be respected. I consider that the Advisory Opinion fails to do so and instead signals that the advisory opinion procedure is available as a fall-back mechanism to be used to overcome the absence of consent to jurisdiction in contentious cases. Some may find this to be a welcome development, but I consider

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402 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, Separate Opinion *Gevorgian*, ICJ Reports 2019, 95 (336, para. 4).

403 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, Dissenting Opinion *Donoghue*, 95 (261, para. 1).

404 *Ibid.*, 262, paras. 3–5.

405 *Ibid.*, 266, para. 21.

that it undermines the integrity of the Court's judicial function. For this reason, I dissent."<sup>406</sup>

b) Declaration by Judge *Tomka*

Judge *Tomka* equally expressed his concern that the Court's advisory opinion procedure is being abused to bring an essentially bilateral dispute before the Court without the consent of one of the disputing parties:

"I am concerned that advisory proceedings have now become a way of bringing before the Court contentious matters, with which the General Assembly had not been dealing prior to requesting an opinion upon an initiative taken by one of the parties to the dispute."<sup>407</sup>

Judge *Tomka* supported his concern by reference to the procedural history of the request for the advisory opinion.<sup>408</sup> The request was not the result of ongoing activities of the UNGA regarding the Chagos Archipelago. On the contrary, the UNGA has not dealt with the Chagos Archipelago or the decolonization process of Mauritius in the past 50 years prior to the adoption of resolution 71/292 in 2017.<sup>409</sup> It was only after the UNCLOS arbitral tribunal declared that it lacked jurisdiction to decide the dispute between Mauritius and the UK that Mauritius, in 2016, inscribed the request for an advisory opinion on the matter into the provisional agenda of the 71<sup>st</sup> session of the UNGA.<sup>410</sup> To allow for bilateral negotiations between Mauritius and the UK, Mauritius then asked that all discussions on the matter in the plenary of the UNGA were halted until June 2017. After negotiations failed, Mauritius asked that the plenary discussed as soon as possible a draft resolution requesting an advisory opinion from the Court. The draft was prepared by Mauritius and formally presented to the plenary by the African Group without any modifications. The UNGA then adopted the resolutions – again without making any modifications – by a majority vote. Judge *Tomka* depicts the request not as an instrument to guide the

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406 Ibid., 266, para. 23.

407 Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, Declaration Tomka, ICJ Reports 2019, 95 (148, para. 2).

408 Ibid., 149–150, para. 4.

409 In fact, Judge Tomka started his Declaration by scolding the United Nations for having abandoned the Chagossian people in 1968, see *ibid.*, 148, para. 1.

410 UN doc. A/71/142.

UNGA but rather as a strategy of Mauritius to bring its dispute with the United Kingdom before the Court.

Notwithstanding his criticism, Judge *Tomka* did not oppose the giving of the requested advisory opinion. Despite the request being the brainchild of Mauritius, the UNGA had, as a collective organ, made the request its own by adopting a resolution by majority vote in which it requested from the Court an advisory opinion. Consequently, the Court ought to respond to the request. However, Judge *Tomka* proposed a nuanced approach. He cautioned:

“If one can accept this course of action, one must also exercise caution not to go further than what is strictly necessary and useful for the requesting organ. The Court must not forget that what looms in the background is a bilateral dispute over which the Court lacks jurisdiction.”<sup>411</sup>

By limiting the Court’s response to what is “strictly necessary and useful for the requesting organ”, Judge *Tomka* did not propose that the Court should make its own assessment of what the requesting organ needs and considers useful. After all, the requesting organ is best suited to make this assessment. Rather, Judge *Tomka* emphasized that the Court must be careful in such a situation not to go beyond what the requesting organ has asked. The Court must carefully look at the wording of the request to determine what the requesting organ needs from the Court. In the *Chagos* case, Judge *Tomka* argued, the Court went beyond the request by not only answering whether the decolonization process was lawfully completed but also addressing matters of state responsibility.<sup>412</sup> The matter of state responsibility was not referred to the Court and a response on this was not necessary to answer the questions presented to the Court. Judge *Tomka* stated:

“The Court, despite stating that it is not “dealing with a bilateral dispute” between Mauritius and the United Kingdom, makes an unnecessary pronouncement on “an unlawful act of a continuing character” of the latter [...]. Advisory proceedings are not an appropriate forum for making these kinds of determinations, especially when the Court is not asked to make them and they are not strictly necessary for providing advice to the requesting organ.”<sup>413</sup>

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411 Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, Declaration Tomka, ICJ Reports 2019, 95 (150–1, para. 6).

412 Ibid., 151–2, paras. 8–9.

413 Ibid., 151, para. 8.

Judge *Tomka's* nuanced approach which advocates for judicial restraint strikes a balance between the Court's duty to give advice to the requesting organ and the Court's duty to protect its judicial integrity.

c) Declaration by Judge *Gevorgian*

Judge *Gevorgian* also argued that the Court should limit its answer to the law of decolonization as enshrined in the UNC without addressing the international responsibility of the United Kingdom.<sup>414</sup> He criticized the Court for ruling that the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the UK's international responsibility:

"I do not disagree with the substance of this conclusion, but in my view such a statement crosses the thin line separating the Court's advisory and contentious jurisdiction."<sup>415</sup>

Judge *Gevorgian* recognized that the Court made similar statements on the international responsibility of a state in the *Namibia* opinion and the *Wall* opinion.<sup>416</sup> However, these cases could be distinguished from the *Chagos* case on the fact that the Court could rely on binding resolutions of the UNSC declaring the respective conduct illegal.<sup>417</sup>

*J. Policies and Practices of Israel in the Occupied Palestinian Territory case (2024)*

The most recent example of a case in which a bilateral dispute arguably formed the subject-matter of an advisory proceeding is the *Policies and Practices of Israel in the Occupied Palestinian Territory case*.<sup>418</sup>

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414 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, Separate Opinion *Gevorgian*, ICJ Reports 2019, 95 (336, para. 4).

415 *Ibid.*, 336, para. 5.

416 *Ibid.*, 336–7, para. 6.

417 *Ibid.*

418 *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, Publication pending in ICJ Reports 2024, 1; for an analysis, see *Mehrdad Payandeh*, 79 JZ 18 (2024), 789.

## I. Background

On 30 December 2022, the UNGA requested from the ICJ an advisory opinion on two questions:

“(a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?

(b) How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?”<sup>419</sup>

After written and oral proceedings have taken place, the ICJ issued its long-expected advisory opinion on 19 July 2024.

Israel voted against resolution 77/247 in which the UNGA requested the advisory opinion from the Court. During the written proceedings, in which an unprecedented number of states and international organizations participated,<sup>420</sup> Israel reiterated its opposition to the proceedings arguing that the question was tendentious and ignored Israel’s security interests as well as efforts to find a diplomatic solution to the conflict.<sup>421</sup> Emphasizing its lack of consent, Israel alluded to the Eastern Carelia doctrine:

“It follows that the present situation is not only one in which Israel, as an interested party, has not given its consent to judicial settlement of its dispute with the Palestinian side; it is also one in which both interested

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419 UNGA resolution 77/247 of 30 December 2022, UN doc. A/RES/77/247, para. 18. The resolution was adopted with 87 votes in favor, 26 votes against with 53 abstentions, see A/77/400 DR I.

420 In total, 54 states and three international organizations submitted written statements. Additionally, 13 states and two international organizations submitted written comments in response to these written statements, see *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, Publication pending in ICJ Reports 2024, 1 (8–9).

421 ICJ Pleadings, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Written Statement of Israel, 2–3.

parties have given their express and binding consent to resolving that dispute through another settlement means. The request for the Court's advisory opinion perversely seeks to circumvent the lack of Israel's consent, and to make a dead letter of the fundamental international legal principle underlying the indispensable need for it.”<sup>422</sup>

Most states and organizations participating in the written proceedings argued in favor of the Court rendering the requested advisory opinion. However, several participants urged the Court not to issue the requested opinion emphasizing the lack of consent by Israel. Among those states were Canada<sup>423</sup>, Fiji<sup>424</sup>, Hungary<sup>425</sup>, the United Kingdom<sup>426</sup>, Togo<sup>427</sup>, and Zambia<sup>428</sup>. While most of these states only briefly touched upon the question of state consent to advisory proceedings, the United Kingdom extensively elaborated on the matter. The United Kingdom presented several arguments for why the principle of non-circumvention of state consent should continue to apply to advisory proceedings.<sup>429</sup> According to the United Kingdom, the formally non-binding nature of advisory opinions does not allow the ICJ to decide a bilateral dispute without consent by means of an advisory opinion.<sup>430</sup> While advisory opinions lack formal binding force, in issuing an advisory opinion the Court “makes statements of law, which may have

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422 Ibid., 4.

423 ICJ Pleadings, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Written Statement of Canada, 2–3.

424 ICJ Pleadings, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Written Statement of Fiji, 4–5.

425 ICJ Pleadings, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Written Statement of Hungary, 4–6.

426 ICJ Pleadings, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Written Statement of the United Kingdom, 22–30.

427 ICJ Pleadings, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Written Statement of Togo, 2.

428 ICJ Pleadings, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Written Statement of Zambia, 2.

429 ICJ Pleadings, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Written Statement of the United Kingdom, 22–25.

430 Ibid., 24.

legal consequences, even if not intended by the Court or required by the Statute.”<sup>431</sup> The United Kingdom also criticized the “broader frame of reference”-standard developed by the Court in its *Western Sahara* advisory opinion arguing that “[e]very legal dispute falls within a broader context” and that this “says nothing about the test to be applied by the Court, viz, whether the specific request requires the Court to determine in effect the specific legal dispute between the parties in circumstances where to do so would circumvent the consent requirement.”<sup>432</sup> The United Kingdom further argued that the mere fact that a UN organ has previously dealt with a matter, does not diminish the necessity of state consent to the proceedings.<sup>433</sup> Instead, the Court should “compare the subject-matter of the bilateral dispute with the issues presented by the request before the Court, recognising the significance of the “origin and scope of the dispute (...) in appreciating, from the point of view of the exercise of the Court’s discretion, the real significance in this case of the lack of (...) consent”.<sup>434</sup>

## II. ICJ pays lip service to Eastern Carelia doctrine

In response to the arguments presented by the United Kingdom and others, the ICJ stated that it continued to adhere to the Eastern Carelia doctrine and reiterated its previous case law on the matter.<sup>435</sup> However, the ICJ declined to exercise its discretion finding that the subject-matter of the request was not merely a bilateral matter between Israel and Palestine.<sup>436</sup> The Court pointed to the long-standing involvement of the organs of the League of Nations and the United Nations in questions relating to Palestine.<sup>437</sup> Two issues stand out in the Court’s response. First, the brevity of it. The ICJ did not engage with the subject-matter of the request to assess if it concerned

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431 Ibid.

432 Ibid., 24–25.

433 Ibid., 25.

434 Ibid., citing *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12, (27, para. 42).

435 *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, Publication pending in ICJ Reports 2024, 1 (17, para. 34).

436 Ibid. (17, para. 35).

437 Ibid. The Court cited UNGA resolution 57/107 of 3 December 2002, UN doc. A/RES/57/107 which refers to “a permanent responsibility [of the UNGA] towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy”.

a bilateral dispute or if it was multilateral in nature. Instead, the Court referenced the long-standing involvement of the UN in matters concerning Palestine to justify that any question relating to Palestine is multilateral in nature. In doing so, the Court also did not engage with Judge *Donoghue's* dissenting opinion in the *Chagos* case in which she raised the concern that the Court's position effectively renders the Eastern Carelia doctrine meaningless. Secondly, the ICJ omitted its usual reference to a "broader frame of reference" which it used in previous advisory opinions when it rejected claims that a matter was bilateral in nature.<sup>438</sup> Maybe the Court recognized that this standard does not add any analytical clarity to deciding whether a matter is bilateral or multilateral in nature.

After finding that the lack of Israel's consent did not constitute a compelling reason for the Court not to render the requested advisory opinion, the Court rejected other grounds for exercising its discretion. These included that the opinion would not assist the UNGA in the performance of its functions,<sup>439</sup> that the opinion would undermine the negotiation process between Israel and Palestine,<sup>440</sup> that the opinion would be detrimental to the work of the UNSC,<sup>441</sup> that the Court lacked sufficient information to give an advisory opinion<sup>442</sup> and that the questions are formulated in a biased manner<sup>443</sup>.

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438 See *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12 (26, para. 38); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (159, para. 50); *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95 (118, para. 88).

439 *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, Publication pending in ICJ Reports 2024, 1 (17-18, paras. 36-37).

440 *Ibid.* (18-19, paras. 38-40).

441 *Ibid.* (19-20, paras. 41-43).

442 *Ibid.* (20, paras. 44-47).

443 *Ibid.* (21, paras. 48-49).

*K. Conclusions: Function, standard, and future of the Eastern Carelia doctrine*

I. The Eastern Carelia doctrine's overarching function: safeguarding the integrity of the Court's judicial function

The ICJ exercises its advisory jurisdiction following a rule-exception-approach: As a rule, and as an expression of the Court's duty as an organ of the UN to cooperate with the other organs and to promote the activities of the UN, the ICJ will give the requested advisory opinion. Only exceptionally, when there are "compelling reasons" will the Court refuse to give an advisory opinion. However, as Judge *Bennouna* pointed out in his dissenting opinion to the *Kosovo* advisory opinion, the ICJ has not made "clear what it means by that".<sup>444</sup> This indeterminacy creates a certain risk of arbitrariness.

Nevertheless, the Court's case law provides guidance. The Court repeatedly emphasized that it will refuse to issue an advisory opinion if giving the opinion would be incompatible with its judicial function. An advisory opinion is incompatible with the Court's judicial function if giving the opinion would circumvent the principle that a state is not obliged to submit its dispute with another state to judicial dispute settlement without its consent.

II. The Eastern Carelia's three-pronged test: Bilateral dispute, lack of consent, dispute settlement by means of the advisory opinion procedure

The Court uses a three-pronged test to assess whether issuing an advisory opinion constitutes a circumvention of state consent in the sense of the Eastern Carelia doctrine: First, there must be a pending bilateral dispute which arose outside the organs of the United Nations and prior to the request for an advisory opinion. The Court denied the bilateral nature of the dispute between Spain and Morocco in the *Western Sahara* case precisely for the reason that the dispute did not originate outside the UN.<sup>445</sup>

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444 *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, Dissenting Opinion *Bennouna*, ICJ Reports 2010, 403 (501), para. 5; cf. *S. Rosenne*, *The law and practice of the International Court, 1920-2005*, 4th ed. 2006, 986–987.

445 *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12 (26, para. 36).

Secondly, at least one of the parties to the dispute must be opposed to the judicial settlement of the dispute within the contentious procedure of the Court. This requirement is usually met, as otherwise the matter would already be pending before the Court in contentious proceedings. Thirdly, the giving of the advisory opinion must be substantially equivalent to the judicial settlement of the bilateral dispute. The last of these conditions is the vaguest and most contentious among the three. To determine if giving the requested advisory opinion constitutes judicial dispute settlement, the ICJ does not compare the subject-matter of the dispute and the referred questions. Instead, it examines if the object and purpose of the request for an advisory opinion is to settle a bilateral dispute or if another object and purpose can be identified. Thus, for the ICJ, the central question is not whether the Court has to make judicial pronouncements on matters which are at the heart of a bilateral dispute but whether the advisory opinion was *intended* to be used as a method of dispute settlement. Only if an advisory opinion is being requested with the aim to settle a bilateral dispute, would the giving of the advisory opinion circumvent the interested state's consent.

Thus, the object and purpose of the request for the advisory opinion is the Court's central consideration when exercising its advisory jurisdiction. To determine a request's object and purpose, the Court interprets the requesting organ's resolution by reference to its wording in light of the request's procedural history. In doing so, the ICJ presumes that the authorized organs request advisory opinions only to the extent that this is necessary for the fulfilment of their functions. The Court views both its judicial restraint and the restraint of the requesting organ in requesting an advisory opinion as an expression of the inter-organ duty of cooperation under Article 7 UNC.

### III. Abandoning or continuing the Eastern Carelia doctrine?

The ICJ regularly prioritizes the interest of the requesting UN body in receiving the requested advisory opinion over the interest of the affected states. The Court gave the requested opinion even in situations where the interest of the requesting organ in receiving the opinion was almost indistinguishable from the settlement of the underlying dispute. In the *Wall* case, the UNGA asked for an advisory opinion not only on the legal obligations of Israel but also on questions of state responsibility, thereby effectively asking the Court to adjudicate the case between Israel and Palestine. For Judge

Higgins, the Court crossed a line, effectively *revising* rather than *applying* the existing case law on the Eastern Carelia doctrine.<sup>446</sup> Similarly, in the *Chagos* case, the United Kingdom argued that the Court effectively abandoned the Eastern Carelia doctrine by deciding the territorial sovereignty over the Chagos Archipelago.<sup>447</sup>

One way of reading these decisions is that the Court recognized a community exception from the principle of consensual dispute settlement. Accordingly, even if the three-pronged test of the Eastern Carelia doctrine is fulfilled, the Court would not be required to refuse to give the requested opinion if the underlying dispute threatens international peace and security or when the referred question relates to *erga omnes* obligations.<sup>448</sup> In these circumstances the collective community interests prevail over individual interests of affected states because the international community has a legitimate interest in receiving an answer from the Court and a response cannot be regarded as a circumvention of state consent.<sup>449</sup> Read in this light, the Eastern Carelia doctrine illustrates a classic conflict at the heart of international law: the conflict between sovereignty and community. Whether this conflict can at all be resolved is questionable.<sup>450</sup> The Eastern Carelia doctrine originated in the case law of the PCIJ and in the context of the

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446 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, Separate Opinion Higgins, ICJ Reports 2004, 136 (210, paras. 12-13); see also *P. d'Argent*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), *The Statute of the International Court of Justice*, 3. ed., 2019: Article 65, 1806-1807.

447 Cf. ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of the United Kingdom, para. 7.21.

448 Cf. J. A. Frowein/K. Oellers-Frahm, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm/C. J. Tams/M. Kashgar/D. Diehl (eds.), *The Statute of the International Court of Justice*, 2. ed., 2012: Art. 65, paras. 33-37; *P. d'Argent*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), *The Statute of the International Court of Justice*, 3. ed., 2019: Article 65, 45.

449 Cf. P.-M. Dupuy, *Recourse to the International Court of Justice for the Purpose of Settling a Dispute*, in: L. Boisson de Chazournes/M. G. Kohen/J. Viñuales (eds.), *Diplomatic and judicial means of dispute settlement*, 2013, 61 (68); *P. d'Argent*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), *The Statute of the International Court of Justice*, 3. ed., 2019: Article 65, para. 45.

450 "It is the great merit of critical legal studies to have demonstrated that this tension between those two poles [sovereignty and community interests] is, really, unresolvable, at least given our normative apparatus which does not allow us to make normative choices.", J. Klabbers, *An introduction to international organizations law*, 3. ed. 2015, 5.

League of Nations which was still heavily influenced by the traditional Westphalian understanding of international law.<sup>451</sup> This context explains the doctrines focus on the protection of the sovereignty of individual states. The expanding scope of international law and modern conceptualizations of the sovereign equality of states focusing on interdependence and collective interests,<sup>452</sup> however, call the Eastern Carelia doctrine into question.

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451 Cf. *S. Rosenne*, *The law and practice of the International Court, 1920-2005*, 4th ed. 2006, 7.

452 Cf. *Ibid.*, 7.

