§ 7 Conclusion and Summary

A. Conclusion

The survey of the ICJ's advisory practice and the analysis of the Court's jurisdictional framework has shown that the ICJ can use its advisory procedure to address legal questions which form the subject-matter of inter-state disputes and thus, contribute to the legal settlement of inter-state disputes by means of its advisory procedure. The Court has continuously adapted its Eastern Carelia doctrine to a point at which it has become increasingly harder to imagine any situation which would lead the Court to reject a request for an advisory opinion from an authorized organ.

Advisory opinions exert significant authority and thus greatly influence the international legal discourse on the legal questions which they address. However, they do not jeopardize the legal position of the states which they address. There is thus no need for a de-facto consent requirement as a strict application of the Eastern Carelia doctrine would establish. Additionally, the ICJ, as a UN organ, has a duty to support the other UN organs in their activities by providing legal advice in the form of advisory opinions. It is asserted that the ICJ should therefore discard the Eastern Carelia doctrine and in doing so invite more requests for advisory opinions on important matters disputed among states.

Since the Court cannot act on its own accord and relies on requests made by authorized organs, the future of the Court's advisory practice regarding inter-state disputes significantly depends on whether these organs regard the Court's advisory procedure as a legitimate means to settle inter-state disputes. The UNGA emphasized the potential of requesting advisory opinions from the Court for the settlement of inter-state disputes in its resolution 43/51 entitled "Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field". In the resolution, the UNGA "solemnly declares" that both the UNSC and the UNGA should consider requesting advisory opinions from the Court, "if it is appropriate for promoting the prevention and removal of disputes or situations".[1688]

In his speech to the UNSC on 18 December 2020, President *Yusuf* drew attention to this resolution and invited the UNSC to make more frequent use of its power to request advisory opinions from the Court on legal questions relating to inter-state disputes:

> "The General Assembly was of the view that a request for an advisory opinion from the Court could play an important role in the Council's work to prevent situations or disputes from becoming a threat to international peace and security. I share that view, and I believe that the Council could consider that possibility more often."[1689]

President *Yusuf* indicated a willingness of the Court to respond to requests whose primary goal is to "prevent (…) disputes from becoming a threat to international peace and security", in other words to settle such inter-state disputes. In his statement, President *Yusuf* distinguished between the power of the UNSC to refer a dispute to the Court to be settled in a binding manner by means of the Court's contentious procedure under Article 36 para. 3 ICJ Statute, which requires the consent of the parties, and the UNSC's power to request advisory opinions:

> "I can understand the reluctance of the Council to recommend the referral of a dispute to the Court, by the Parties concerned, unless it is clear that both Parties are ready for such a step. (…) However, the request for an advisory opinion is a different matter. Such an advisory opinion would not be binding and would not be addressed directly to States, but rendered for the benefit of the Council to clarify a specific legal issue. The Security Council would then be free to do whatever it wishes with such an opinion."[1690]

Of course, the composition of the Court has changed since then. Shortly after President *Yusuf* made these statements, Judge *Donoghue* took over as President of the Court. President *Donoghue* exhibited a much more reserved stance towards the use of advisory opinions to settle inter-state

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[1688] UNGA resolution 43/51 of 5 December 1988, UN doc. A/RES/43/51, paras. 15, 19.

[1689] Abdulqawi Ahmed Yusuf, President of the International Court of Justice, to the Security Council, 18 December 2020, "Upholding international law within the context of fostering close co-operation between the International Court of Justice and the Security Council", 4.

[1690] Ibid., 3.

disputes, as evidenced by her dissenting opinion in the *Chagos* case.[1691] Nevertheless, she could not convince the majority on the bench to follow her approach. The recent *Legal Consequences arising from the Policies and Practices of Israel* advisory opinion, delivered under the current President *Salam*, can be seen as another example of the Court being open to the use of its advisory procedure for the settlement of inter-state disputes.

The trajectory of the Court's advisory practice seems clear. The question is only if the Court will decide to openly abandon the Eastern Carelia doctrine. Such a move could convince the authorized UN organs, in particular the UNGA and the UNSC, to refer pressing legal questions at the heart of inter-state disputes more frequently to the Court. Considering the momentum that the *Chagos* advisory opinion has created to restart the stalled negotiations between the UK and Mauritius over the return of the Chagos Archipelago, such a development could prove auspicious for the international community.

B. Summary

1. **The ICJ advisory jurisdiction extends to inter-state disputes**: An interpretation of Article 96 UNC and Article 65 ICJ Statute reveals that the ICJ's subject-matter jurisdiction extends to any legal question, regardless of its connection to an inter-state dispute. While states have tried to invoke the difference in wording between Article 14 of the Covenant of the League of Nations ("dispute or question") and Article 65 ICJ Statute ("any legal question") to argue that the drafters of the ICJ's constituent instrument deliberately decided to exclude inter-state disputes from the Court's jurisdiction, there is no indication of such an intent in the drafting history.
2. **The ICJ has no discretion in the use of its advisory jurisdiction:** Despite the fact that Article 65 para. 1 ICJ Statute employs the word

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[1691] "Today the Court recites once again that there would be "compelling reasons" 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" (...) However, the decision to render today's Advisory Opinion demonstrates that this incantation is hollow. It is difficult to imagine any dispute that is more quintessentially bilateral than a dispute over territorial sovereignty.", see *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, Dissenting Opinion Donoghue, ICJ Reports 2019, 95 (266, para. 21).

“may give”, the ICJ cannot decide freely to give or deny requested advisory opinions. Instead, from the ICJ’s status as an organ of the UN follows a duty to comply with the request for an advisory opinion, unless “compelling”, i.e., imperative reasons prohibit the Court from giving the requested opinion.

3. **The ICJ must protect its “judicial function” from harm:** The Court has identified the protection of its judicial function as one of the most important “compelling reason” for refusing requests for advisory opinions. Under its Eastern Carelia doctrine, the ICJ has held that giving an advisory opinion on a question which forms the subject-matter of an inter-state dispute without the consent of the disputing states may be prejudicial to its judicial function.
4. **The ICJ has not one but many judicial functions:** The ICJ, just like all other international courts and tribunals, has not one, but many judicial functions, including the function to settle international disputes, the function to stabilize normative expectations, the function to concretize and develop the law, and the function to control the behavior of the law’s addressees.
5. **Advisory opinions on inter-state disputes do not circumvent the principle of consensual dispute settlement**: The principle of consensual dispute settlement protects states from being subject to the exercise of jurisdiction by an international court or tribunal. However, advisory opinions do not constitute such an exercise of jurisdiction, as they do not have binding force and do not become *res judicata*.
6. **The Eastern Carelia doctrine is premised on the de-facto effects of ICJ advisory opinions:** The Eastern Carelia doctrine and the Monetary Gold doctrine share certain similarities. Both doctrines insert a consent requirement of a third or affected state into the Court’s jurisdictional framework and both doctrines justify this supplementary consent requirement with the need to protect the Court’s judicial function. Since judgments are not binding for third parties and since advisory opinions are not binding at all, the Court’s concern can only be justified by reference to the *de facto* legal effects of these judicial pronouncements. There is, however, a crucial difference between the two doctrines: In the case of the advisory jurisdiction, the ICJ, as a UN organ, has a duty to support the requesting organ’s activities by giving the requested advisory opinion.
7. **The ICJ does not openly recognize its power to use its advisory opinions to settle inter-state disputes**: While the ICJ has dramatically

reduced the scope of its Eastern Carelia doctrine, the Court continues to pay lip service to it by repeating its core tenet that a state may not be forced to have its disputes settled by judicial means without its consent. The ICJ thus denies that its advisory procedure may be used to address matters which form the subject-matter of inter-state disputes. However, in the application of this doctrine, the Court uses ill-defined terms such as “broader frame of reference” and relies on the request’s object and purpose even where the submitted questions are identical to the subject-matter of the underlying inter-state dispute, thereby depriving the doctrine of any real meaning. Considering the aforementioned, the Court should be open to the idea that UN organs could request advisory opinions specifically with the intention to use the opinion to settle inter-state disputes.

8. **The Court has two options: Abandoning the Eastern Carelia doctrine or strengthening it:** The best way forward for the Court would be to abandon the Eastern Carelia doctrine altogether and openly allow authorized organs to request advisory opinions on any legal question, irrespective if the legal question concerns an inter-state dispute. Another option would be to strengthen the Eastern Carelia doctrine by giving up on the “broader frame of reference” standard and go back to the Court’s initial approach in the *Peace Treaties* advisory opinion, in which the Court compared the questions submitted by the authorized organ with the subject-matter of the pending inter-state dispute.