Advisory Opinions of the International Court of Justice in Respect of Disputes

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This Article reimagines advisory opinions of the International Court of Justice as a means for the settlement of international disputes. It is established that the Court must decline to render an advisory opinion which relates to the main point of a pending bilateral dispute between States, one of which has not consented to the third-party settlement of that dispute. The Court has upheld this position, known as the Eastern Carelia *doctrine, since its 1950 advisory opinion in* Interpretation of Peace Treaties. *This Article argues that the Court should abandon the* Eastern Carelia *doctrine and start openly rendering advisory opinions that address the main points of pending bilateral disputes. To develop its principal argument, this Article shows that the* Eastern Carelia *doctrine stems from a misreading of judicial authority and lacks basis both in the legal framework governing the Court's advisory function, and in the principle of consent to third-party settlement that it purports to protect. This Article also discusses the implications of rendering advisory opinions in respect of disputes, by situating its main argument in the context of broader scholarly debates concerning the Court's judicial function and legitimacy, the promotion of the Court's dispute settlement role, and the legal effects of advisory opinions.*

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REIMAGINING ADVISORY OPINIONS WITHOUT *EASTERN CARELIA*

When, on September 3, 2018, oral statements began at the International Court of Justice (ICJ or "Court"), there was little doubt among the participants as to why the ICJ had been requested to give an advisory opinion concerning the decolonization of Mauritius. The General Assembly of the United Nations (U.N.) had asked the ICJ whether the decolonization of Mauritius had been lawfully completed in 1968 and what the legal consequences were of the continued administration of the Chagos Archipelago by the United Kingdom.[1] This case culminated Mauritius's attempts at settling the dispute with its former colonial power on sovereignty over Chagos. If not for the failure of such attempts, the ICJ would not have been asked for an advisory opinion.[2] However, States supporting the advisory request did not elaborate on the territorial dispute, but focused only on the apparently neutrally-formulated questions asked by the General Assembly.[3]

Chagos demonstrates that, as this Article explores, States can use the advisory procedure to obtain authoritative statements on pending disputes with other States that do not consent to binding third-party settlement.[4] States' reluctance to accept binding third-party settlement makes this use of the advisory procedure an increasingly realistic option in future inter-State dispute settlement. Because it has become common for States not to include compromissory clauses in multilateral treaties, or to draft them narrowly, States often can submit only limited aspects of wider disputes to third-party processes.[5] Aspects of such disputes that fall beyond the material scope of jurisdiction under

1. G.A. Res. 71/292, at 2 (June 22, 2017).

2. Introducing the request for advisory opinion before the General Assembly, the Congo stated that it was made "in pursuit of the effort . . . to allow [Mauritius] to exercise its full sovereignty over the Chagos Archipelago." *See* U.N. GAOR, 71st Sess., 88th plen. mtg. at 5, U.N. Doc. A/71/PV.88 (June 22, 2017).

3. Questions for advisory opinions generally relate to specific situations, but States tend to formulate them in a neutral way, so as not to assume their answer. For example, the *Western Sahara* advisory opinion concerned the specific situation arising from Spain's occupation of Western Sahara and Morocco's territorial claims over that land, but the ICJ was asked to elaborate on whether Western Sahara was *terra nullius* at the time of the Spanish colonization and, if not, what the ties were between Western Sahara and Morocco and the Mauritanian entity. *See infra* note 67 and accompanying text.

4. On *Chagos*, see *infra* notes 66–91 and accompanying text.

5. Lawrence Hill-Cawthorne, *International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study*, 68 INT'L & COMPAR. L.Q. 779, 780 (2019). *See generally* Filippo Fontanelli, *Once Burned, Twice Shy; The Use of Compromissory Clauses before the International Court of Justice and their Declining Popularity in New Treaties*, 104 RIVISTA DI DIRITTO INTERNAZIONALE 7 (2021).

the relevant compromissory clauses can remain causes of underlying political, military and economic tension. An example is the pending ICJ case between Ukraine and the Russian Federation[6] filed pursuant to the International Convention for the Suppression of the Financing of Terrorism (ICSFT)[7] and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),[8] concerning the lawfulness of Crimea's annexation and the Russian Federation's responsibility for alleged breaches of international humanitarian law in Eastern Ukraine.[9] A request for an advisory opinion to the ICJ could bring together different strands of the wider dispute between Ukraine and the Russian Federation stemming from the annexation of Crimea.

Advisory opinions can be, and have been, means of indirectly settling international disputes at the ICJ, but legal scholars have not studied them as such.[10] One can explain this lack of interest by reference to the established principle of ICJ procedure under which the Court may not render advisory opinions relating to disputes between States when one of the States has not accepted binding third-party settlement. In *Chagos*, one of Mauritius's main challenges was to

6. *See generally* Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Application Instituting Proceedings (Jan. 16, 2017), https://www.icj-cij.org/public/files/case-related/166/166-20170116-APP-01-00-EN.pdf [https://perma.cc/7E4H-ASGY].

7. *See generally* Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, T.I.A.S. No. 13075, 2178 U.N.T.S. 197.

8. *See generally* Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, T.I.A.S. No. 94-1120, 660 U.N.T.S. 195. At the time of writing, there is an additional case pending before the ICJ between Ukraine and the Russian Federation stemming from the latter's invasion of the former and filed under the 1948 Genocide Convention. The example made in the body of the text does not relate to this other pending case, nor does this article suggest that the advisory procedure would or should be a viable option to settle that dispute. Alongside the pending ICJ cases, Ukraine has filed a case against the Russian Federation before an arbitral tribunal constituted pursuant to Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS). This case also stems from the annexation of Crimea but differs from the earlier ICJ case in its subject-matter, which relates to rights under the law of the sea. *See* Coastal State Rts. in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), 2017-6 (Perm. Ct. Arb. 2019).

9. A similar example is the now concluded ICJ litigation between Qatar and the United Arab Emirates concerning alleged breaches of CERD. *See* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Preliminary Objections, Judgment, 2021 I.C.J. 71, ¶¶ 21, 26–30 (Feb. 4).

10. A recent exception is Contesse's article conceptualizing two models of advisory jurisdiction, under one of which, called "ruling through advice," international tribunals decide issues submitted to them. *See* Jorge Contesse, *The Rule of Advice in International Human Rights Law*, 115 AM. J. INT'L L. 367, 372–75 (2021).

persuade the ICJ to give the opinion requested, even if the United Kingdom had not agreed to settling the territorial dispute by binding third-party processes.

Article 96(1) of the U.N. Charter empowers the General Assembly and Security Council to request advisory opinions "on any legal question." Pursuant to Article 96(2), the General Assembly may authorize other U.N. organs or specialized agencies to request advisory opinions "on legal questions arising within the scope of their activities." However, under the Statute of the ICJ ("the Statute"),[11] the Court has discretion not to give an opinion, despite having jurisdiction to do so,[12] if there are "compelling reasons" to decline giving the opinion requested.[13] This discretion concerns the admissibility of requests for advisory opinions.[14] The Court has consistently held that a compelling reason not to give an advisory opinion is that to do so would amount to deciding the main point of a dispute in relation to which a State has not accepted binding third-party settlement. The ICJ has upheld this position, known as *Eastern Carelia* doctrine, since its 1950 advisory opinion in *Interpretation of Peace Treaties*.[15] The doctrine stems from a 1923 decision of the Court's predecessor, the Permanent Court of International Justice (PCIJ), under Article 14 of the

11. Under Art. 65(1), "[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." Statute of the International Court of Justice art. 65, ¶ 1, June 26, 1945, 33 U.S.T. 993 [hereinafter Statute of the ICJ].

12. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66, ¶ 14 (July 8); *see also* Pierre d'Argent, *Article 65*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1783, 1803 (Andreas Zimmermann & Christian Tams eds., 3rd ed. 2019); MALCOLM SHAW, 2 ROSENNE'S LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920–2015 1000 (5th ed. 2015); HUGH THIRLWAY, THE INTERNATIONAL COURT OF JUSTICE 67–70 (2016); GLEIDER I. HERNÁNDEZ, THE INTERNATIONAL COURT OF JUSTICE AND THE JUDICIAL FUNCTION 78–79 (2014).

13. *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 30 (July 22) [hereinafter Kosovo Opinion].

14. Under the headings of "discretion" and "admissibility," the ICJ may decide, respectively, not to give an advisory opinion or not to entertain the merits of a contentious case despite having jurisdiction to do so. *See* YUVAL SHANY, QUESTIONS OF JURISDICTION AND ADMISSIBILITY BEFORE INTERNATIONAL COURTS 137 (2015); *see also* Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989, Part Eleven*, 71 BRIT. Y.B. INT'L L. 71, 91–93 (2001).

15. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, 1950 I.C.J. 65, 71–72 (Mar. 30) [hereinafter Interpretation of Peace Treaties First Phase Opinion].

League of Nations Covenant ("Covenant").[16] The PCIJ refused to give an advisory opinion relating to a dispute between Finland and the Soviet Union in respect of which the latter had not accepted the PCIJ's contentious jurisdiction.[17] *Eastern Carelia* was only the PCIJ's fifth advisory opinion. Nevertheless, the PCIJ never declined to give any of its later twenty-one opinions, nor did it refer to *Eastern Carelia* for the proposition that the existence of a dispute to which an advisory opinion relates justifies not giving that opinion.

The ICJ first referred to *Eastern Carelia* for that proposition in *Interpretation of Peace Treaties*. In that advisory case, the General Assembly asked the Court whether disputes between, on one hand, Bulgaria, Hungary, and Romania, and, on the other hand, certain Allied Powers, required settlement under the procedures of the peace treaties between them. In assessing its discretion not to render the opinion requested, the ICJ stated:

> [The PCIJ] 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.[18]

This doctrine did not preclude the ICJ from giving an opinion in *Interpretation of Peace Treaties*. In the ICJ's view, the position of the parties to the disputes to which that opinion related "[could not] be in any way compromised by the answers that the Court may give to the Questions put to it."[19] Essentially, the *Eastern Carelia* doctrine, as adopted in *Interpretation of Peace Treaties*, was a means for the Court to balance two competing interests: on one hand, to refrain from deciding a dispute without consent; on the other hand, to render the opinion requested and support the General Assembly and Security Council in fulfilling their responsibilities under the Charter.

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16. *See generally* Status of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5 (July 23) [hereinafter Eastern Carelia Opinion]. The PCIJ was the predecessor of the ICJ, in operation between 1922 and 1946.

17. *Id.* at 28–29.

18. *Id.* at 72.

19. *Id. See also* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 30 (June 21) [hereinafter Namibia Opinion]. On the ICJ's misconstruction of *Eastern Carelia* in *Interpretation of Peace Treaties*, see *infra* notes 51–65 and accompanying text.

In *Western Sahara*, an advisory case broadly relating to a territorial dispute between Morocco and Spain, the Court seemed to refine the reading given in *Interpretation of Peace Treaties*.[20] The Court stated that a "decisive reason" for the PCIJ not to render the *Eastern Carelia* opinion was not that there was a dispute between Finland and the Soviet Union, but that the latter was not a member of the League of Nations.[21] Despite this clarification, the ICJ did not reject its earlier understanding of the doctrine. Instead, the Court summarized its approach under *Eastern Carelia* as entailing that:

> [i]n certain circumstances . . . 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.[22]

The Court has repeated this statement in subsequent advisory opinions when States raised non-consent to third-party settlement as a reason not to give the opinions requested.[23]

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20. *Western Sahara* also arose out of the decolonization process, much like *Chagos*. The General Assembly framed the question differently from *Chagos* by asking whether Western Sahara was *terra nullius* at the time of its colonization and, if not, what ties existed between Western Sahara, the Kingdom of Morocco, and the Mauritanian entity at that time. Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶¶ 1, 12 (Oct. 16) [hereinafter Western Sahara Opinion].

21. *Id.* ¶ 30; *see also* Namibia Opinion, *supra* note 19, at 150, 156 (separate opinion by Dillard, J.); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J 136, 260, ¶ 7 (July 9) [hereinafter Wall Opinion] (separate opinion by Owada, J.); Kosovo Opinion, *supra* note 13, at 482, ¶ 2 (separate opinion by Keith, J.); HERNÁNDEZ, *supra* note 12, at 175; MICHLA POMERANCE, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT IN THE LEAGUE AND U.N. ERAS 282–83 (1973); KENNETH KEITH, THE EXTENT OF THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 94 (1971); HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 352–53 (1982); Georges Abi-Saab, *On Discretion: Reflections on the Nature of the Consultative Function of the International Court of Justice*, *in* INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 36, 38–40 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999); ROBERT KOLB, THE ELGAR COMPANION TO THE INTERNATIONAL COURT OF JUSTICE 269–70 (2014).

22. Western Sahara Opinion, *supra* note 20, ¶ 33.

23. Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, 1989 I.C.J. 177, ¶ 38 (Dec. 15); Wall Opinion, *supra* note 21, ¶¶ 25–27, 46–50; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶¶ 85–90 (Feb. 25) [hereinafter Chagos Opinion].

Although the ICJ clarified in *Western Sahara* the narrow rationale on which *Eastern Carelia* had been decided, States have continued to rely on *Eastern Carelia* for the wider proposition that the Court should not render an advisory opinion if doing so would circumvent a State's lack of consent to binding third-party settlement of a

related dispute.[24] Judges[25] and writers alike[26] also refer to *Eastern Carelia* for that same broader proposition. Challenging this

24. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Verbatim Record, 34 (Feb. 23, 2004, 10 a.m.), https://www.icj-cij.org/public/files/case-related/131/131-20040223-ORA-01-00-BI.pdf [https://perma.cc/6TT5-VGJW] (Palestine); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Verbatim Record, 18 (Feb. 23, 2004, 3 p.m.), https://www.icj-cij.org/public/files/case-related/131/131-20040223-ORA-02-00-BI.pdf [https://perma.cc/S7BG-F6DZ] (South Africa); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Verbatim Record, 60 (Feb. 24, 2004, 10 a.m.), https://www.icj-cij.org/public/files/case-related/131/131-20040224-ORA-01-00-BI.pdf [https://perma.cc/AW3B-PY89] (Jordan); Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Verbatim Record, 8, 40–41, ¶¶ 11, 30–31 (Sept. 3, 2018, 3 p.m.), https://www.icj-cij.org/public/files/case-related/169/169-20180903-ORA-02-00-BI.pdf [https://perma.cc/98PV-NUMM] (U.K.); Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Verbatim Record, 58–61, (Sept. 4, 2018, 10 a.m.), https://www.icj-cij.org/public/files/case-related/169/169-20180904-ORA-01-00-BI.pdf [https://perma.cc/4DYE-UN63] (Australia); Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Verbatim Record, 41–42 (Sept. 4, 2018, 3 p.m.), https://www.icj-cij.org/public/files/case-related/169/169-20180904-ORA-02-00-BI.pdf [https://perma.cc/78D8-28QU] (Brazil); *id.* at 50 (Cyprus); Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Verbatim Record, 7 (Sept. 5, 2018, 10 a.m.), https://www.icj-cij.org/public/files/case-related/169/169-20180905-ORA-01-00-BI.pdf [https://perma.cc/UG6B-USMT] (U.S.); Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Verbatim Record, 11, 15–16, ¶¶ 13, 15–16 (Sept. 5, 2018, 3 p.m.), https://www.icj-cij.org/public/files/case-related/169/169-20180905-ORA-02-00-BI.pdf [https://perma.cc/G6UL-GBYX] (Israel); *id.* at 37–38, ¶ 19 (Nicaragua); Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Case No. 21, Verbatim Record, 5–6 (Sept. 3, 2014, 10 a.m.), https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/verbatims/ITLOS_PV14_C21_2_Rev.1_E.pdf [https://perma.cc/3T6X-AZBE] (Germany); *id.* at 35–36 (Spain). States find support for this position in writings that take stock of their inaccurate reading of *Eastern Carelia*. *See* Namibia Opinion, *supra* note 19, at 101, 102–03 (separate opinion by Padilla Nervo, J.); *id.* at 170, 172–73 (separate opinion by De Castro, J.); *see also* Manley O. Hudson, *Advisory Opinions of National and International Courts*, 36 HARV. L. REV. 970, 996 (1923–1924); Edvard Hambro, *The Authority of the Advisory Opinions of the International Court of Justice*, 3 INT'L & COMPAR. L.Q. 2, 11–13 (1954); Shabtai Rosenne, *On the Non-Use of the Advisory Competence of the International Court of Justice*, 39 BRIT. Y.B. INT'L L. 1, 30 n.2, 35, 45 (1963); Philippe V. Lalonde, *The Death of the Eastern Carelia Doctrine: Has Compulsory Jurisdiction Arrived in the World Court?*, 37 U. TORONTO FAC. L. REV. 80, 83–86 (1979); Stephen Schwebel, *Was the Capacity to Request an Advisory Opinion Wider in the Permanent Court of International Justice than it is in the International Court of Justice?*, 62 BRIT. Y.B. INT'L L. 77, 95–96 (1991); 40 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL – SESSION DE LUXEMBOURG 167 (1937) (Negulesco) [hereinafter ANNUAIRE].

25. *See, e.g.*, Interpretation of Peace Treaties First Phase Opinion, *supra* note 15, at 79, ¶¶ 3–6 (Mar. 30) (separate opinion by Azevedo, J.); *id.* at 89, ¶ 1 (dissenting opinion by Winiarski, J.); *id.* at 105, 108–11 (dissenting opinion by Krylov, J.); Wall Opinion, *supra* note 21, at 207, ¶¶ 8–13 (separate opinion by Higgins, J.); *id.* at 260, ¶¶ 6–13 (separate opinion by

established position, this Article argues that the ICJ should abandon the *Eastern Carelia* doctrine and openly give advisory opinions that address the main points of pending disputes, even if the relevant States have not accepted binding third-party settlement. By making this argument, this Article aims to provide the legal justification for reimagining advisory opinions as instruments to settle inter-State disputes. States accept third-party settlement by contentious jurisdiction with decreasing frequency, especially in the current time of challenges to multilateralism.[27] Reimagining advisory opinions as a means for dispute settlement offers a new safety valve for States to air their grievances against other States, which can further the maintenance of international peace and security by ensuring tensions between States are not left unaddressed.

Parts I through III develop this Article's argument that the ICJ should abandon the *Eastern Carelia* doctrine and openly render advisory opinions addressing the main points of bilateral disputes. The argument of Part I is threefold. First, the doctrine originates from the ICJ's misconstruction, in *Interpretation of Peace Treaties*, of the PCIJ's reasoning in *Eastern Carelia*; consequently, the doctrine lacks basis in judicial authority. Second, the Court's "broader framework" approach to deciding whether not to render advisory opinions on the basis of the *Eastern Carelia* doctrine is so ill-defined as to be empty in application. Under this approach, the Court renders advisory opinions relating to disputes so long as the questions asked in such opinions arise within a broader frame of reference of interest to the requesting organ.[28] This approach, on which earlier scholars have not elaborated, confers on the Court wide discretion to justify whichever decisions it wishes to make on its discretion to render the opinions requested.

Owada, J.); Chagos Opinion, *supra* note 23, at 142, ¶¶ 3–5 (declaration by Xue, V.P.); *id.* at 261, ¶¶ 1–2 (dissenting opinion by Donoghue, J.).

26. D'Argent, *supra* note 12, at 1806–07; SHAW, *supra* note 12, at 1011; Hernández, *supra* note 12, at 79–82; LAUTERPACHT, *supra* note 21, at 356–58; 1 HUGH THIRLWAY, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 843 (2013); 2 HUGH THIRLWAY, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 1723–25 (2013); POMERANCE, *supra* note 21, at 279–81; DHARMA PRATAP, THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT 154–69 (1972); KEITH, *supra* note 21, at 89–124. Dominicé wrote of advisory opinions in contentious cases other than inter-State disputes. *See* Chistian Dominicé, *Request for Advisory Opinions in Contentious Cases?, in* INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 91 (Laurence Boisson de Chazournes, Cesare P.R. Romano & Ruth McKenzie eds., 2002).

27. *See generally* Harlan G. Cohen, *Multilateralism's Life Cycle*, 112 AM. J. INT'L L. 47 (2018); James Crawford, *The Current Political Discourse Concerning International Law*, 81 MOD. L. REV. 1 (2018).

28. *See infra* notes 66–79 and accompanying text.

Alternative approaches, suggested from within the ICJ's bench, by Judge Donoghue, or in the literature, by Crespi Reghizzi and Pomerance, are problematic for the same reason.[29] Third, the *Eastern Carelia* doctrine is inconsistent with the increased importance of community interest in international law, as opposed to the bilateralism that still characterized international law when the ICJ first formulated the doctrine.

Part II argues that the doctrine lacks basis in the legal framework governing the ICJ's advisory jurisdiction. Under Article 14 of the Covenant, the PCIJ could render advisory opinions on any "dispute or question," but Article 96 of the Charter refers to advisory opinions as relating only to any "question." Although one may read this change to exclude advisory opinions in respect of disputes, the Charter's drafting history indicates the opposite. At the San Francisco Conference and in the preparatory works leading up to it, States expressly supported the exercise of advisory jurisdiction in respect of disputes. States iterated their support during the 1970–1974 review of the role of the Court, initiated by the U.N. Secretary-General to collect proposals for the Court's reform prompted by its light docket.[30]

Part III develops the novel argument that the *Eastern Carelia* doctrine finds no justification in consent to third-party settlement. Consent plays no role in the existence of advisory jurisdiction.[31] Under scholars' distinct notions of admissibility, one could not consider consent to be a matter of admissibility of advisory requests. Consent is also irrelevant for fact-finding in advisory cases, given the wide State participation and the U.N.'s logistical support. Moreover, consent is unrelated to the utility of and compliance with advisory opinions, primarily because of their lack of binding character. The *Eastern Carelia* doctrine thus lacks justification in the very principle that it is intended to protect.

Part IV discusses the implications of reimagining advisory opinions without the *Eastern Carelia* doctrine as a means of settling inter-State disputes. Part IV situates this Article's argument within broader scholarly debates on the Court's judicial function. Reimagining advisory opinions as a means of dispute settlement would enhance the legitimacy of the advisory function.[32] Some may raise legitimacy concerns stemming from consent, but consent-based critiques of legitimacy are outdated in appraising the exercise of the judicial function

29. *See infra* notes 76–79 and accompanying text.

30. *See infra* notes 94–162 and accompanying text.

31. *See infra* notes 173–208 and accompanying text.

32. *See infra* notes 209–224 and accompanying text.

in current international law. Giving advisory opinions in respect of disputes would also promote the ICJ's dispute settlement function and ensure the effectiveness of its exercise. Hill-Cawthorne's disaggregation of the disputes model, developed in the contentious context, could also apply in advisory cases: Settling disputes by advisory opinions can bring together discrete aspects of complex disputes, furthering their coherent and comprehensive settlement.[33] It may thus be possible to rebuild confidence in international adjudication at a time when States challenge multilateral processes. The ICJ's dispute settlement function could also be promoted by reexploring earlier suggestions for the Court's referral jurisdiction made by Gross, Sohn, and Strauss. Moreover, reimagining advisory opinions would ensure transparency in relation to the legal effects of advisory opinions. One could also ground this reimagination in the phenomenon, theorized by Contesse, of "ruling through advice," especially considering the recent decision of the Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) in *Mauritius/Maldives*.[34]

The final Part concludes.[35]

I. MISCONSTRUCTION AND MISAPPLICATION OF *EASTERN CARELIA* BY THE ICJ

In *Interpretation of Peace Treaties*, the ICJ first misconstrued the PCIJ's reasoning in *Eastern Carelia*. The resulting doctrine is built on shaky foundations and lacks the legal authority that is traditionally ascribed to it. Furthermore, the ICJ's application of the doctrine is problematic, owing to the emptiness of its "broader framework" approach and the outdated pre-eminence of bilateral interests consistent with that doctrine.

33. For Hill-Cawthorne's model, see *infra* notes 225–228 and accompanying text.

34. Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives), Case No. 28, Judgment of Jan. 28, 2021, ¶ 189, https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf [https://perma.cc/X6U6-J69N].

35. This article does not discuss the suggestion that the ICJ has no discretion to decline giving advisory opinions. *See generally* Robert Kolb, *De la Prétendue Discrétion de la Cour internationale de Justice de Refuser de Donner un Avis Consultatif*, 12 AFR. J. INT'L & COMPAR. L. 799 (2000). Moreover, this article does not discuss advisory opinions in the context of disputes arising in the U.N. employment context.

A. PCIJ's Reasoning in Eastern Carelia

In 1920, Finland and Soviet Russia concluded the Treaty of Dorpat ending the Russo-Finnish war.[36] Under Articles 10 and 11 of that treaty, Finland would withdraw its troops from the Carelian communes of Repola and Porajärvi, and the Soviet Union would guarantee certain rights of the inhabitants of these communes. The Soviets also made a Declaration, annexed to the Treaty, recognizing the Carelian people's right to self-determination and Eastern Carelia as an "autonomous territory united to Soviet Russia on a federal basis."[37] The Council of the League of Nations requested that the PCIJ give an advisory opinion on whether Articles 10 and 11 of the Treaty of Dorpat and the annexed Declaration created obligations for the Soviet Union.[38]

The Soviet Union was not a member of the League. Although the Soviet Union refused to participate in the proceedings, it sent the PCIJ a telegram formulating two objections to the exercise of advisory jurisdiction: First, the request concerned "an internal question affecting the Russian Federation;"[39] second, the request attempted to enforce "the article of the Covenant of the League relating to disputes between one of its Members and a non-participating State."[40] The second objection was based on Article 17 of the Covenant.[41] Under Article 17, if a dispute arose between a member and a non-member that "accept[ed] the obligations of membership in the League for the purposes of such dispute," the settlement of that dispute would take place pursuant to Articles 12 to 16 of the Covenant.[42] Article 14 provided that "[t]he [PCIJ] may . . . give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."[43]

The PCIJ stated that the "real question," namely whether Russia's Declaration "form[ed] part of the engagement" under the Treaty of Dorpat, was "a question of fact."[44] Commenting on whether

36. *See generally* Treaty Between the Republic of Finland and the Russian Socialist Federal Soviet Republic, Fin.-U.S.S.R., Oct. 14, 1920, 3 L.N.T.S. 5.

. 37. *Id*. at 77 (Declaration of the Russian Delegation with Regard to the Autonomy of Eastern Carelia).

38. *See* Eastern Carelia Opinion, *supra* note 16, at 8–9.

39. *Id.* at 13.

40. *Id.*

41. *Id.* at 13, 27.

42. *See* League of Nations Covenant art. 17.

43. *See id.* art. 14.

44. *See* Eastern Carelia Opinion, *supra* note 16, at 26.

advisory opinions could concern disputes between States that had not accepted the exercise of jurisdiction, the PCIJ stated that "[i]t [was] unnecessary . . . to deal with this topic."[45] The basis for the PCIJ's decision was that the Soviet Union was not a member of the League and thus had not accepted the League's procedures for the settlement of disputes. According to the PCIJ:

> As Russia is not a Member of the League of Nations, the case is one under Article 17 of the Covenant. . . . The submission . . . of a dispute between [States not Members of the League] and a Member of the League for solution according to the methods provided for in the Covenant, could take place only by virtue of their consent. Such consent, however, has never been given by Russia. . . . The [PCIJ] therefore finds it *impossible* to give its opinion on a dispute of this kind.[46]

The Court added that there were "other cogent reasons which render[ed] it *very inexpedient* that the [PCIJ] should attempt to deal with the present question."[47] Yet, the PCIJ only provided one reason, namely that lack of evidence due to the Soviet Union's non-participation made it difficult to decide what was essentially a "question of fact." The PCIJ first noted that it was "doubtful whether there would be available . . . materials sufficient . . . to arrive at any judicial conclusion upon the question of fact."[48] Upon recognizing that the question concerned "the main point of the controversy between Finland and Russia,"[49] which the ICJ later interpreted to mean that it could not give advisory opinions in respect of disputes, the PCIJ stated that such a question "can only be decided by an investigation into the facts underlying the case."[50]

B. Problems with the ICJ's Reading of Eastern Carelia

The reasoning in *Eastern Carelia* has significant limits that should have dissuaded the ICJ from using it to explain, in *Interpretation of Peace Treaties*, one of the grounds on which to decline giving advisory opinions.

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45. *Id.* at 27.

46. *Id.* at 27–28 (emphasis added).

47. *Id.* at 28 (emphasis added).

48. *Id.*

49. *Id.* at 28–29.

50. *Id.* at 29.

At the time of *Eastern Carelia*, the PCIJ would not have envisaged that the existence of an underlying dispute justified not giving advisory opinions, since this would have been inconsistent with Article 14 of the Covenant and its drafters' intention.[51] The legal basis of the *Eastern Carelia* decision not to give the opinion requested was the Soviet Union's refusal to accept the obligations of membership in the League for the purposes of settling its dispute with Finland under Article 17 of the Covenant.[52] Consent concerned not the PCIJ's exercise of advisory jurisdiction, but the Soviet Union's acceptance of obligations under the Covenant.[53] The ICJ seemed to recognize this aspect in *Interpretation of Peace Treaties* by stating that obtaining the consent of States involved in a dispute is not necessary to exercise advisory, as opposed to contentious, jurisdiction.[54] However, the Court added that "[t]here are certain limits . . . to [its] duty to reply to a Request for an Opinion"[55] and gave no guidance beyond stating that, under Article 65 of the Statute, it may "examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request."[56] It was in examining such circumstances that the ICJ distinguished *Eastern Carelia*. The Court created the doctrine in the context of delineating the acceptable scope of its discretion, although the PCIJ had originally formulated the underlying principle regarding whether it had jurisdiction to give the opinion requested.

Nothing in *Eastern Carelia* concerned the effect of the existence of a dispute on the exercise of advisory jurisdiction. In that opinion, the PCIJ first identified the problems posed by the Soviet Union's non-membership in the League and its unwillingness to accept temporarily the obligations of League membership by virtue of Article 17. Second, the PCIJ addressed the difficulty of obtaining sufficient evidence, and, when discussing the Russo-Finnish dispute, tied its

51. *See infra* notes 94–111 and accompanying text.

52. *See, e.g.*, Zeno Crespi Reghizzi, *The* Chagos *Advisory Opinion and the Principle of Consent to Adjudication*, *in* THE INTERNATIONAL COURT OF JUSTICE AND DECOLONISATION, NEW DIRECTIONS FROM THE CHAGOS ADVISORY OPINION 51, 54–55 (Thomas Burri & Jamie Trinidad eds., 2021).

53. Not all scholars understand the role of consent in *Eastern Carelia* as being unrelated to the Russo-Finnish dispute. For a recent misreading of the PCIJ's reasoning in *Eastern Carelia*, see Ksenia Polonskaya, *International Court of Justice: The Role of Consent in the Context of the Judicial Propriety Deconstructed in Light of* Chagos Archipelago, 18 L. & PRAC. INT'L CTS. & TRIBS. 189, 198–200 (2019).

54. Interpretation of Peace Treaties First Phase Opinion, *supra* note 15, at 71.

55. *Id.*

56. *Id.* at 72.

comments back to the "investigation into the facts underlying the case."[57] Because the PCIJ linked the dispute to matters of evidence, its comments on the existence of a dispute should be understood in connection with lack of access to evidence in possession of a non-member State party to a dispute, not as a standalone basis for not giving advisory opinions. This understanding is confirmed both by the lack of references in the Soviet Union's telegram to a dispute as a ground for not rendering the opinion requested and by the PCIJ's statement that it was unnecessary to examine the relevance of the existence of a bilateral dispute to the exercise of advisory jurisdiction.[58]

Even if the PCIJ were to be seen as hesitant about the effect of a dispute on the exercise of advisory jurisdiction, its analysis was at best unclear. The PCIJ stated that "other, cogent reasons" made it "very inexpedient"[59] to give the opinion requested.[60] The PCIJ did not elaborate further, but considerations of expediency seem not to go to the root of advisory jurisdiction, and, consequently, would not necessarily require declining to exercise advisory jurisdiction. Such considerations might instead warrant reformulating questions[61] or circumscribing the scope of a reply.[62] Examining *Eastern Carelia*, the ICJ in *Western Sahara* stated that "lack of consent of an interested State may render the giving of an advisory opinion *incompatible* with the Court's judicial character."[63] However, the Court misstated the effects of lack of consent by changing the notion of "inexpediency" into that, apparently graver, of "incompatibility." Even if one reads the decision in *Western Sahara* as simple development of an existing doctrine, instead of its misconstruction, it remains that the Court expressed no clear reason for such a development.

Because, in *Western Sahara*, the ICJ expressly recognized that the *Eastern Carelia* decision turned on the Soviet Union's non-membership in the League,[64] it had the opportunity to reconsider its misconstruction of *Eastern Carelia* in *Interpretation of Peace Treaties*. Nevertheless, the Court's approach was neither here nor there: It

57. Eastern Carelia Opinion, *supra* note 16, at 29.

58. For the Soviet Union's telegram, see *id.* at 12–14.

59. *Id.* at 28.

60. *Id.*

61. Kosovo Opinion, *supra* note 13, ¶¶ 49–56; Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, ¶¶ 34–36 (Dec. 20).

62. Chagos Opinion, *supra* note 23, ¶ 134.

63. Western Sahara Opinion, *supra* note 20, ¶ 33 (emphasis added).

64. *Id.* ¶ 30.

acknowledged that *Eastern Carelia*'s rationale concerned the very existence of advisory jurisdiction, but, instead of drawing the necessary inference that *Eastern Carelia* does not support declining an advisory opinion request on the ground that it relates to a bilateral dispute, the ICJ repeated the misconstruction espoused in *Interpretation of Peace Treaties*.

In *Western Sahara*, the Court also failed to recognize that the actual basis on which the PCIJ decided *Eastern Carelia*, namely the Soviet Union's refusal to consent to being bound by the obligations under Article 17 of the Covenant, has limited practical relevance in the U.N. system. At the time of *Eastern Carelia*, the League of Nations had fifty-two members. Numerous other States were not members of the League,[65] including crucial global players in the world of 1923 such as Germany, the Soviet Union, and the United States. Because of this limited membership, the PCIJ's approach in *Eastern Carelia* was justified. First, there could have been disputes between members and non-members on which the organs of the League could have requested advisory opinions. Second, the text of Article 17 suggested that the drafters of the Covenant were conscious of the possible effects of the League's limited membership. However, the concerns underlying the Article 17 mechanism do not apply in the context of global U.N. membership. Such concerns also do not apply in cases, such as *Wall*, in which a non-member of the U.N. seeks to obtain an advisory opinion despite the non-consent of a member. The non-consenting State would have already accepted the obligations of U.N. membership before an advisory opinion is requested, unlike the Soviet Union in *Eastern Carelia*.

C. Problems with the ICJ's Application of Eastern Carelia

In *Western Sahara*, the Court adopted its established approach to deciding whether a request for advisory opinion circumvents the principle of consent to third-party settlement. Yet, ascertaining whether a bilateral dispute exists within a broader framework is so ill-defined an approach that its practical application is empty. The *Eastern Carelia* doctrine also is a remnant of an outdated view of international law, where bilateralism overshadows community interest.

65. Including Afghanistan, Argentina, Bhutan, Ecuador, Egypt, Germany, Mexico, Mongolia, Nepal, Saudi Arabia, the Soviet Union, Turkey, and the United States.

1. Emptiness of the "Broader Framework" Approach

The *Eastern Carelia* doctrine, as misconstrued by the Court, raises the question of identifying the circumstances in which lack of consent renders giving advisory opinions incompatible with the Court's judicial character. Little clarification comes from the abstract example in *Western Sahara* of cases in which "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."[66] The Court would still have to decide, case by case, whether the circumstances are such that giving advisory opinions would have such an effect.

In practice, the Court's established approach to making such a decision is to ascertain whether bilateral disputes are located within a broader frame of reference. In *Western Sahara*, the ICJ found that the General Assembly's second question, which focused on the ties between Western Sahara and the Mauritanian entity, placed the case in a broader context than the narrower dispute between Morocco and Spain concerning sovereignty over that territory.[67] In the *Wall* opinion, the Court stated it did "not consider that the subject-matter of the General Assembly's request can be regarded as only a bilateral matter between Israel and Palestine,"[68] on grounds including the passing of resolutions on the situation in Palestine by the Assembly and Security Council. In *Chagos*, the Court located the General Assembly's request within a broader frame of reference because the purpose of the request was to assist the Assembly in discharging its duties under the Charter.[69]

Although these three cases were similar in that they all raised issues of self-determination and related obligations *erga omnes*,[70] *Western Sahara*, *Wall*, and *Chagos* also suggest that potentially unlimited grounds can justify a determination by the Court that bilateral disputes are located within a broader frame of reference. In these three cases, the Court used different reasons to locate the relevant disputes within their broader frames of reference: In *Western Sahara*, the focus was on the General Assembly's questions themselves; in *Wall*, the ICJ emphasized the earlier activities by the Assembly and the Security Council in relation to Palestine; in *Chagos*, the Court based its decision

66. Western Sahara Opinion, *supra* note 20, ¶ 33.

67. *Id.* ¶ 38.

68. Wall Opinion, *supra* note 21, ¶ 49.

69. Chagos Opinion, *supra* note 23, ¶¶ 86–87.

70. Obligations *erga omnes* are obligations owed to the international community as a whole. *See* Barcelona Traction, Light & Power Company, Limited (Belg. V. Spain), Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5).

on the purpose of the request and the requesting organ's responsibilities under the Charter.

Past advisory opinions suggest that the Court is likely to rely on numerous reasons, difficult to identify *a priori*, to establish a connection between a dispute and its broader context, so as to justify not declining to exercise advisory jurisdiction. Distinguishing advisory opinions on the basis of whether the requests seek the "legal evaluation of a dispute" or the "legal evaluation of a situation"[71] is similarly unhelpful. This distinction suffers from the same problem as the "broader framework" approach. Because of the vague contours of this distinction, the ICJ could classify a factual scenario both as a "dispute" or a "situation" depending on which suits the reasoning to reach the Court's desired outcome.[72] Being case-specific, the "broader framework" approach and the "dispute"/"situation" distinction might be consistent with the discretionary character of exercising advisory jurisdiction. Yet, it appears undesirable for such approaches to be so ill-defined in application as to remain effectively empty. It is the emptiness in applying these approaches that seems incompatible with the Court's judicial character, rather than anything inherent to exercising advisory jurisdiction in connection with a bilateral dispute.

The variety of ties between bilateral disputes and their broader frames of reference shows that such disputes do not arise in a vacuum but can always be situated in, or severed from, their wider context.[73] This exercise is one in which the Court is well-versed. While in advisory cases the ICJ has emphasized the existence of disputes within their broader contexts, in contentious cases the Court isolates the dispute in order to narrow the issues over which it can exercise jurisdiction.[74] The issue in advisory cases may be to determine how closely linked the dispute is to a broader frame of reference. In her declaration appended to the *Chagos* opinion, Judge Xue appeared to suggest a practical approach to making this determination by stating that the Mauritius-U.K. dispute was not only situated in the broader decolonization context, but that Mauritius's incomplete decolonization was the

71. Crespi Reghizzi, *supra* note 52, at 63–64.

72. Sienho Yee, *Notes on the International Court of Justice (Part 7)—The Upcoming* Separation of the Chagos Archipelago *Advisory Opinion: Between the Court's Participation in the U.N.'s Work on Decolonization and the Consent Principle in International Dispute Settlement*, 16 CHINESE J. INT'L L. 623, 635 (2017).

73. In relation to *Chagos*, *Wall*, and *Western Sahara*, see *supra* notes 67–70 and accompanying text.

74. U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, ¶¶ 36–37 (May 24); Certain Iranian Assets (Iran v. U.S.), Judgment, 2019 I.C.J. 7, ¶ 36 (Feb. 13).

very premise of that dispute.[75] This approach to identifying how closely a dispute is linked to its wider frame of reference might avoid the risk that any dispute may be situated within a wider context, resulting in a stricter application of the *Eastern Carelia* doctrine. However, Judge Xue's "very premise" approach yields the same results as the Court's "broader framework" approach, since in *Chagos* it led her to agree with the majority's decision on discretion.

Within the ICJ's bench, Judge Donoghue wrote the most compelling criticism of the Court's "broader framework" approach. Judge Donoghue appeared to suggest that, in deciding whether a request for an advisory opinion seeks to circumvent the principle of consent, the determining factor is the overlap between the subject-matter of that request and the subject-matter of the dispute to the settlement of which a party has not consented.[76] If the former and the latter overlap, the request seeks to circumvent the principle of consent, which justifies not exercising advisory jurisdiction in accordance with the *Eastern Carelia* doctrine. Similar to the ICJ's "broader framework" approach, Judge Donoghue's "subject-matter overlap" approach is also ill-defined: The Court may restrict or enlarge the focus, and thus the subject-matter, of a dispute to justify making the decision it ultimately wishes to reach, in a manner not dissimilar from situating a dispute within a broader context.

In his writings, Pomerance has suggested that the Court decides whether to render advisory opinions pursuant to a "duty to cooperate" doctrine.[77] This doctrine would be based on the organic relationship between the ICJ and the requesting U.N. organs, given the Court's status as the principal judicial organ of the U.N.[78] The limits of the Court's "duty to cooperate" seem as ill-defined as its "broader framework" approach and Judge Donoghue's "subject-matter overlap" approach. A supposed "duty to cooperate" could require the Court always to render the opinions requested. Pomerance himself raised this problem when, writing on the Court's dubious consideration of the *Eastern Carelia* doctrine in the *Wall* opinion, he suggested that one

75. Chagos Opinion, *supra* note 23, at 146, ¶ 18 (Feb. 25) (declaration by Xue, V.P.).

76. *Id.* at 263, ¶ 10 (dissenting opinion by Donoghue, J.); *see also* Crespi Reghizzi, *supra* note 52, at 62.

77. Michla Pomerance, *The Admission of Judges Ad Hoc in Advisory Proceedings: Some Reflections in the Light of the Namibia Case*, 67 AM. J. INT'L L. 446, 462 (1973); Michla Pomerance, *The ICJ's Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial*, 99 AM. J. INT'L L. 26, 30 (2005) [hereinafter Pomerance, *Advisory Jursdiction*]; *see also* Kenneth Keith, *The Advisory Jurisdiction of the International Court of Justice: Some Comparative Reflections*, 17 AUSTRALIAN Y.B. INT'L L. 39, 47 (1996).

78. U.N. Charter art. 92, ¶ 1.

could see the "duty to cooperate" doctrine as having become a "duty to cooperate at all costs" doctrine.[79]

2. Bilateralism over Community Interest

The Court's continued consideration of the *Eastern Carelia* doctrine harkens back to an outdated conception of the international legal order in which inter-State relationships were understood within the framework of bilateralism. This Westphalian conception of the international legal order persisted into the twentieth century, but its foundations in bilateralism slowly began to disappear when States created the League of Nations as the first general international organization.[80] The League was a permanent multilateral forum where States could discuss issues of common concern. Despite the League's failure, States did not reject multilateral processes. By adopting the Charter and creating the U.N. as the League's successor, States institutionalized their pursuit of community interest.[81] Although the Charter did not replace the former Westphalian system, it resulted in the idea of an international community becoming a reality, existing alongside a classic network of bilateral relationships.[82] New legal concepts emerged which emphasized communitarian aspects of international law, such as *jus cogens* and obligations *erga omnes*.[83] By calling into question established categories, especially sovereignty, the creation of a global governance system has consolidated the international legal order as post-Westphalian.[84]

Some scholars have criticized the ICJ's inability to adapt the judicial process to a world where bilateralism has given way to community interests. This criticism most recently arose in response to the Court's decisions that it lacked jurisdiction to decide the disputes concerning nuclear disarmament filed by the Marshall Islands against India, Pakistan and the United Kingdom, as no dispute existed between

79. Pomerance, *Advisory Jurisdiction*, *supra* note 77, at 40.

80. Multilateral processes of consultation to address certain limited matters of common interest already existed in the framework of the Concert of Europe. *See* Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT'L L. 20, 20–21 (1948).

81. Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217, 257–58 (1994); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 422 (1983).

82. One can trace the idea of an "international community" back to the writings of Gentili, Suarez, and Victoria. *See* Gross, *supra* note 80, at 31–32.

83. Richard A. Falk, *Toward Authoritativeness: The ICJ Ruling on Israel's Security Wall*, 99 AM. J. INT'L L. 42, 46 (2005).

84. *Id.*

the applicant and each respondent.[85] Paddeu argued that the disputes concerned obligations *erga omnes* and had arisen in a multilateral context, while the Court applied the approach to determining the existence of disputes arising in bilateral settings.[86] Proulx emphasized how the Court's decisions limit future claimants' access to justice where obligations *erga omnes* are involved.[87]

Similar criticism applies to advisory cases. One can doubt the relevance of the *Eastern Carelia* doctrine in this post-Westphalian legal order. Although inter-State dispute settlement continues to be conceived as a bilateral affair because of the centrality of consent, which the *Eastern Carelia* doctrine purports to uphold, legal concepts have evolved to ensure the protection of common interests. Chief among these concepts are obligations *erga omnes* and obligations *erga omnes partes*. Since the Court first referred to obligations *erga omnes* in *Barcelona Traction*,[88] non-injured States have filed several contentious cases for the protection of community values.[89] Obligations *erga omnes* have also been the focus of certain advisory proceedings. It appears significant that most advisory proceedings in which States invoked the *Eastern Carelia* doctrine related to disputes that also concerned alleged breaches of obligations *erga omnes*. *Western Sahara*, *Wall*, and *Chagos* all stemmed from underlying disputes

85. Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Judgment, 2016 I.C.J. 255, ¶ 54 (Oct. 5); Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pak.), Judgment, 2016 I.C.J. 552, ¶ 54 (Oct. 5); Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Judgment, 2016 I.C.J. 833, ¶ 58 (Oct. 5).

86. Federica I. Paddeu, *Multilateral Disputes in Bilateral Settings: International Practice Lags Behind Theory*, 76 CAMBRIDGE L.J. 1, 3–4 (2017).

87. Vincent-Joël Proulx, *The World Court's Jurisdictional Formalism and its Lost Market Share: The* Marshall Islands *Decisions and the Quest for a Suitable Dispute Settlement Forum for Multilateral Disputes*, 30 LEIDEN J. INT'L L. 925, 936 (2017).

88. Barcelona Traction, Light & Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶¶ 33–34 (Feb. 5).

89. *See generally* East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90 (June 5); Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422 (July 20); Whaling in the Antarctic (Austl. v. Japan: New Z.L. intervening), Judgment, 2014 I.C.J.226 (Mar. 31). Currently, a case is pending between The Gambia and Myanmar concerning alleged violations by the latter of its obligations *erga omnes* under the Genocide Convention. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Preliminary Objections, Judgment, ¶¶ 23–24, 100 (July 22, 2022), https://www.icj-cij.org/public/files/case-related/178/178-20220722-JUD-01-00-EN.pdf [https://perma.cc/JPX9-MKLT].

concerning alleged breaches of, *inter alia*, the right to self-determination.[90]

Invoking the *Eastern Carelia* doctrine could preclude protecting community interests. Although the PCIJ did not originally intend for the doctrine to have this effect, the ICJ formulated it when the institutionalized pursuit of community interest was in its early stages and no notion of obligations *erga omnes* had yet developed. Owing to its focus on consent, the *Eastern Carelia* doctrine gives preeminence to the interests of the disputing States over the interests of the international community in a manner reminiscent of the ICJ's approach in *South West Africa*.[91]

Because the Court has never declined to render an advisory opinion based on the *Eastern Carelia* doctrine, it might seem that the doctrine is no real obstacle to the realization of community interest. Although one may justifiably take such a view, it remains that the mere existence of the doctrine appears inconsistent with the current post-Westphalian international legal order. For as long as the *Eastern Carelia* doctrine exists, the ICJ may refuse to give advisory opinions concerning obligations *erga omnes*. This refusal would be reminiscent of the ICJ's decision in *South West Africa*, and, similar to *South West Africa*, would set back the protection of values shared by the international community and damage the ICJ's reputation as an international dispute settlement agency.

II. LEGAL FRAMEWORK GOVERNING THE ADVISORY FUNCTION

In addition to being a misconstruction of the PCIJ's reasoning, applied by an empty approach and inconsistent with a post-Westphalian view of the international community, the *Eastern Carelia* doctrine lacks basis in the legal framework governing the Court's advisory jurisdiction, as emerging from the *travaux préparatoires* of the Covenant, the Charter, and the Statute.[92]

90. The Court stated that the right to self-determination gives rise to an obligation *erga omnes* in *East Timor*. *See* Port. v. Austl., 1995 I.C.J. ¶ 29.

91. *See generally* South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Judgment, 1966 I.C.J. 6 (July 18).

92. *Travaux préparatoires* include the documents covering a treaty's drafting history. *See* Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331.

A. Article 14 of the Covenant and Article 65 of the PCIJ's Statute

Article 14 of the Covenant conferred on the PCIJ the power to give advisory opinions on "any dispute or question" referred to it by the Council or Assembly of the League.[93] The words "dispute or question" are significant for understanding the intention both of the drafters of the Covenant and of the drafters of the ICJ's Statute.[94]

The early drafts of the Covenant did not expressly envision that the PCIJ could render advisory opinions in respect of disputes. The first reference to advisory opinions was in Article 7 of the British Draft Convention of January 20, 1919, according to which "[w]here the Conference or the Council finds that . . . any particular question involved in the dispute can with advantage be referred to a court of international law, it may submit the dispute or the particular question accordingly."[95] Under this provision, a court could have given advisory opinions only in respect of disputes or questions involved in disputes. Originally, advisory opinions were intended as a means to facilitate the settlement of inter-State disputes. The addition of "questions" as the subject-matter of advisory opinions resulted from amendments to the British Draft Convention by the United Kingdom[96] and France.[97] While preserving the reference to "disputes," these amendments extended the scope of advisory jurisdiction to matters beyond those stemming from inter-State controversies, such as matters relating to the functioning of the League and the relationship with its members.

The first comprehensive draft of the Covenant, the Hurst-Miller draft of March 31, 1919, envisioned advisory opinions only on "any legal questions."[98] However, as the Hurst-Miller draft built on the British Draft Convention, "questions" was likely intended also to refer to disputes. Furthermore, a British proposal to the drafting committee submitted the day after the release of the Hurst-Miller draft provided for the future court's competence "to advise upon any dispute or

93. *See* League of Nations Covenant art. 14.

94. Although Pomerance suggested that the distinction between "question" and "dispute" was not discussed at all, his assessment does not seem to be convincing. *See* POMERANCE, *supra* note 21, at 9.

95. DAVID HUNTER MILLER, THE DRAFTING OF THE COVENANT 111 (1928). Pomerance also refers to a similar draft of 3 February 1919 by Italy. *See* POMERANCE, *supra* note 21, at 6.

96. MILLER, *supra* note 95, at 523.

97. *Id.* at 526.

98. *Id.* at 662.

question."[99] The drafting committee adopted the British proposal,[100] which remained intact in wording until adopted as Article 14 of the Covenant.[101]

The PCIJ Statute included no provisions on advisory jurisdiction. Possibly, the reason for this omission was Elihu Root's disapproval during the work of the 1920 Advisory Committee of Jurists of the very conferral of advisory jurisdiction on the PCIJ.[102] Nevertheless, since the PCIJ received sixteen requests for advisory opinions received after 1922, the 1929 revision of the PCIJ Statute resulted in the introduction of Articles 65–68 as new provisions governing advisory jurisdiction.[103] Article 65 did not distinguish between "questions" and "disputes," only referring to the former.[104] The absence of references to "disputes" might suggest that States conceived of the PCIJ's advisory jurisdiction as being somewhat limited with respect to disputes; this inference is further strengthened when considering that, not being created pursuant to the Covenant,[105] the PCIJ was not bound by Article 14. However, neither in 1920 nor in 1929 was it suggested that there were limits on the PCIJ's advisory jurisdiction with respect to disputes justifying the exercise of discretion not to give an advisory opinion.[106] In 1925, Hudson wrote that there was no exact distinction between "questions" and "disputes" as the two notions overlapped.[107] His view might have influenced the revision of the Statute.

The 1937 session of the Institut de Droit International considered Judge Negulesco's report on advisory opinions. Elaborating on

99. *Id.* at 670.

100. *Id.* at 676, 688.

101. *Id.* at 728.

102. 27th Meeting (Private), Held at the Peace Palace, the Hague, on July 19th, 1920, Procès-verbaux of the Proceedings of the Committee June 16th–July 24th, 1920 with Annexes, P.C.I.J., 579, 584 (1920).

103. *Minutes of the Conference Regarding the Revision of the Statute of the Permanent Court of International Justice and the Accession of the United States of America to the Protocol of Signature of that Statute*, League of Nations Doc. C.514M.173 1929 V, at 42–43 (1929). The Statute was revised on the basis of the proposals of the PCIJ's judges. *See generally Committee of Jurists on the Statute of the Permanent Court of International Justice*, League of Nations Doc. C.166M.66 1929 V (1929).

104. Statute and Rules of Court, 1940 P.C.I.J. (ser. D) No. 1, Fourth Edition, at 27.

105. Ole Spiermann, *Historical Introduction*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 92, 103–04 (Andreas Zimmermann & Christian J. Tams eds., 3d ed. 2019).

106. *See also Committee of Jurists*, *supra* note 103, at 11–12, 66–68.

107. Manley O. Hudson, *Les Avis Consultatifs de la Cour Permanente de Justice Internationale*, 8 RECUEIL DES COURS 341, 357–59 (1925).

his report during the debate, Judge Negulesco stated that, from the new provisions on advisory opinions in the PCIJ's Statute one should not infer that "il n'y a devant la Cour que des avis consultatifs et que la distinction entre les avis sur 'point' et les avis sur 'différend' doit disparaître. En effet, l'article 14 du Pacte, qui proclame l'existence de ces deux sortes d'avis, est incorporé dans le Statut de la Cour."[108]

This view was reflected in the decision, at the end of the debate, that the Institut's resolution on advisory opinions would not state that contentious proceedings were "en principe preferable" in respect of disputes.[109] There is no suggestion that, in adopting and revising the Statute, the drafters intended for the PCIJ to exercise its discretion not to give advisory opinions in respect of disputes.

The preparatory works of the 1936 Rules of Court confirm this assessment. At the meeting of March 7, 1935, Count Rostworowski proposed that the Rules provide for different procedures depending on whether advisory opinions concerned "questions" or "disputes."[110] Although other judges disagreed with his proposal,[111] nothing suggests that their disagreement resulted from supposed limits on the exercise of advisory jurisdiction in relation to "disputes."

The *travaux préparatoires* of Article 14 of the Covenant indicate not only that its drafters intended for the PCIJ to exercise advisory jurisdiction in respect of disputes, but also that advisory opinions were intended to be instruments to settle disputes. Although Articles 65–68 did not expressly refer to "disputes," their introduction into the Statute was not meant to limit the exercise of advisory jurisdiction, as supported by the contemporaneous opinions expressed by PCIJ judges.

The historical context of the interwar period, during which the League and PCIJ operated, supports the view that the PCIJ was to settle disputes by advisory opinion. The PCIJ was created as a response to the increased interconnectedness of States during the second industrial revolution, which, lacking a permanent supranational dispute

108. One should not infer from the PCIJ's Statute that "before the Court, there only are advisory opinions and that the distinction between opinions concerning a 'question' and opinions concerning a 'dispute' must disappear. In fact, Article 14 of the Covenant, which proclaims the existence of these two types of opinions, is incorporated into the Statute of the Court" (translated by the author). *See* 40 ANNUAIRE, *supra* note 24, at 167. Negulesco was deputy-judge until 1930 and judge between 1931 and the PCIJ's dissolution.

109. *Id.* at 170–82.

110. Elaboration of the Rules of Court of March 11th, 1936, 1936 P.C.I.J. (ser. D) No. 2, Third Addendum, at 408–15. The PCIJ's debates indicate that this different procedure would have concerned communications with States during the proceedings and the appointment of judges *ad hoc*.

111. *Id.* at 414.

settlement system, had already led to the Great War. The international court was created to provide States with a means for resolving their disputes peacefully.[112] To achieve this aim, it could have been sufficient to envisage that the PCIJ would have only contentious jurisdiction over bilateral disputes. However, advisory jurisdiction was the means to establish a connection between the League of Nations and the PCIJ itself.[113] Under Article 15 of the Covenant, the Council and the Assembly were responsible for ensuring the settlement of disputes "likely to lead to a rupture" by "full investigation and consideration."[114] Pursuant to Article 17 of the Covenant, this responsibility extended to disputes to which States not members of the League were parties. The historical and political context in which the PCIJ was instituted indicates that advisory jurisdiction was to facilitate the dispute settlement function of the League, which, not being a State, could not bring contentious matters to an international tribunal.

B. Article 96 of the Charter and Article 65 of the ICJ's Statute

Consistent with the position under the League framework, the States' views expressed during the San Francisco Conference and the 1970–74 review of the role of the Court confirm that they accepted the exercise of advisory jurisdiction in respect of disputes.

1. San Francisco Conference

Part of the Informal Inter-Allied Committee on the Future of the PCIJ ("Committee") supported the abolition of advisory jurisdiction. One of the reasons was that advisory opinions "might promote a tendency to avoid the final settlement of disputes by seeking opinions, and might lead to general pronouncements of law by the Court not (or not sufficiently) related to a particular issue or set of facts."[115] The Committee's 1943 report concluded, nonetheless, that it was desirable

112. *See generally* Malgosia Fitzmaurice & Christian J. Tams, *Introduction* to LEGACIES OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1, 1–2 (Christian J. Tams & Malgosia Fitzmaurice eds., 2013).

113. Marika Giles Samson & Douglas Guilfoyle, *The Permanent Court of International Justice and the "Invention" of International Advisory Jurisdiction*, *in* LEGACIES OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE 41, 41–42 (Christian J. Tams & Malgosia Fitzmaurice eds., 2013).

114. *See* League of Nations Covenant art. 15.

115. *Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice*, 39 AM. J. INT'L L. SUPPL. 1, ¶ 65 (1945).

for the future Court to exercise advisory jurisdiction when States wished to "ascertain their legal position without involving themselves in a judicial decision binding on them,"[116] or were already negotiating "the settlement of an outstanding issue,"[117] or wanted to avoid adversarial proceedings "where the existence of a 'friendly dispute' between them nevertheless require[d] some form of disposal by legal means."[118]

According to the Committee, unilateral requests for advisory opinions "could not be permitted, for, given the authoritative nature of the Court's pronouncements, ex parte applications would afford a means whereby the State concerned could indirectly impose a species of compulsory jurisdiction on the rest of the world."[119] The Committee suggested that "provided the necessary safeguards can be instituted, there would . . . be considerable advantage in permitting references on the part of two or more States acting in concert."[120] The Committee conceivably believed it unlikely that States would request advisory opinions without having disputes between them. Nevertheless, it was also conceivable that States acting in concert could request advisory opinions on disputes between one of them and a third State, which the Committee seemed not to consider. Similar to ex parte requests, this scenario could have created a "species of compulsory jurisdiction."[121] Despite this apparent oversight, nothing in its report suggests that the Committee envisaged that the future Court should not exercise advisory jurisdiction in respect of disputes. Rather, the report suggested that there should have been continuity between the exercise of advisory jurisdiction under Article 14 of the Covenant and under the constitutive instruments of the future Court.[122]

Following the 1944 Dumbarton Oaks Conference, a Committee of Jurists convened before the 1945 San Francisco Conference to discuss the judicial framework of the future organization and to consider proposals to amend the PCIJ's Statute. Mexico and Peru proposed that the future Court should have jurisdiction to render opinions

116. *Id.* ¶ 68(b).

117. *Id.* ¶ 68(c).

118. *Id.* ¶ 68(d).

119. *Id.* ¶ 71.

120. *Id.*

121. *Id.*

122. Riccardo Luzzatto, *La Competenza Consultiva della Corte Internazionale di Giustizia nella Risoluzione delle Controversie Internazionali*, 14 COMUNICAZIONI E STUDI 479, 489 (1975).

on "legal questions relating to other disputes."[123] Norway stated that advisory opinions should be given on "any legal question."[124] Despite not referring to "disputes," Norway added that the authority to request advisory opinions "must apply to legal questions arising out of any dispute," but added that the Security Council should be able to request advisory opinions unconnected with particular disputes.[125] The United Kingdom suggested that groups of States should be able to "obtain advice as to their legal position which would prevent an eventual dispute leading to litigation."[126] However, envisaging that advisory opinions could be a means to avoid litigation requires that there already be at least a concrete disagreement in fact or in law capable of leading to litigation.[127] The United States and Venezuela referred to advisory opinions on "questions" only, without elaborating.[128]

During the Committee's debates, Iraq's representative supported a compulsory jurisdiction system, failing which "he would favour as liberal provisions relating to advisory opinions as possible."[129] As compulsory jurisdiction would relate to disputes, one may reasonably infer that his intention was for disputes also to be the subject-matter of advisory opinions. Fitzmaurice repeated the British proposal and added that a State should not have "the right to ask an advisory opinion while its dispute was under consideration by the General

123. U.N. Conference on International Organization, *Official Comments Relating to the Statute of the Pro-posed International Court of Justice*, U.N. Doc. Jurist 1 G/1 (Apr. 4, 1945), *in* 14 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 387, 428, 446 (1945) (Peru at 428, Mexico at 446) [hereinafter UNITED NATIONS CONFERENCE].

124. *Id.* at 446–47 (Norway).

125. *Id.*

126. U.N. Conference on International Organization, *United Kingdom Proposals Regarding the Statute of the Permanent Court of International Justice,* U.N. Doc. Jurist 14 DP/4 (Apr. 10, 1945), *in* 14 UNITED NATIONS CONFERENCE, *supra* note 123, at 319.

127. On the similarity between "foreseeable" and "extant" disputes, see Charles De Visscher, *Les Avis Consultatifs de la Cour Permanente de Justice Internationale*, 26 RECUEIL DES COURS 1, 24 (1929).

128. U.N. Conference on International Organization, *The Statute of the Permanent Court of International Justice with Revisions Proposed by the United States*, U.N. Doc. Jurist 5 G/5 (Apr. 9, 1945), *in* 14 UNITED NATIONS CONFERENCE, *supra* note 123, at 345 (United States); U.N. Conference on International Organization, *Memorandum Presented by the Delegation of Venezuela on Bases for the Organization of the International Court of Justice*, U.N. Doc. Jurist 16 G/12 (Apr. 10, 1945), *in* 14 UNITED NATIONS CONFERENCE, *supra* note 123, at 373 (Venezuela).

129. U.N. Conference on International Organization, *Eighth Meeting*, U.N. Doc. Jurist 45 G/34 (Apr. 13, 1945), *in* 14 UNITED NATIONS CONFERENCE, *supra* note 123, at 178 (Iraq).

Assembly or Security Council."[130] Fitzmaurice seemed to presume that disputes could otherwise be the subject-matter of advisory opinions. Australia's representative took the same view, stating that advisory opinions could be requested on the "classes of question[s] . . . enumerated in Article 36,"[131] which included the existence of a fact that would constitute the breach of an international obligation and the nature or extent of reparation for that breach.

The Committee's final report did not explain why, distinct from Article 14 of the Covenant, Article 65 of the Draft Statute on advisory opinions did not distinguish between "questions" and "disputes."[132] The word "questions" is sufficiently broad to encompass "disputes,"[133] also considering that "questions" is qualified by the adjective "any."[134] The States' proposals and the Committee's debate suggest that the term "questions" should be interpreted to include "disputes," consistent with the position of the Inter-Allied Committee. This broad interpretation of "questions" is supported by later proposed amendments to the Draft Statute. According to Norway, the General Assembly may request opinions on any legal questions "arising in matters on which it has the right to make recommendations,"[135] which included inter-State disputes threatening international peace and security. Ecuador and Uruguay made proposals comparable to the earlier ones by Mexico and Peru.[136] By stating that "the Security Council shall avail itself . . . of the services of the Court in the settlement of

130. *Id.* at 183 (United Kingdom).

131. *Id.* at 182 (Australia).

132. U.N. Conference on International Organization, *Draft Report: Draft Statute of an International Court of Justice Provided for in Chapter VII of the Dumbarton Oaks Proposals*, U.N. Doc. Jurist 61 G/49 (Apr. 18, 1945), *in* 14 UNITED NATIONS CONFERENCE, *supra* note 123, at 614–15; U.N. Conference on International Organization, *Report on Draft of Statute of an International Court of Justice Referred to in Chapter VII of the Dumbarton Oaks Proposals*, U.N. Doc. Jurist 61 (Revised) G/49 (Apr. 20, 1945), *in* 14 UNITED NATIONS CONFERENCE, *supra* note 123, at 677–78.

133. Karin Oellers-Frahm, *Lawmaking through Advisory Opinions?*, 12 GERMAN L.J. 1033, 1034 (2011).

134. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, at 20 (May 28).

135. U.N. Conference on International Organization, *Amendments and Observations Submitted by the Norwegian Delegation*, U.N. Doc. 2 G/7(n)(1) (May 4, 1945), *in* 3 UNITED NATIONS CONFERENCE, *supra* note 123, at 365, 367.

136. U.N. Conference on International Organization, *Comments and Amendments: Ecuador*, U.N. Doc. 2 G/7(p) (May 1, 1945), *in* 3 UNITED NATIONS CONFERENCE, *supra* note 123, at 436 (Ecuador); U.N. Conference on International Organization, *New Uruguayan Proposals*, U.N. Doc. 2 G/7(a)(1) (May 5, 1945), *in* 3 UNITED NATIONS CONFERENCE, *supra* note 123, at 47 (Uruguay).

disputes of a legal character,"[137] Australia implicitly referred to requests for advisory opinions in respect of disputes.

During the work of Commission III (Security Council), the United Kingdom repeated its positions expressed at the Committee of Jurists. Discussing future Article 96 of the Charter,[138] the British delegate stated that it was desirable to allow the Council to request advisory opinions "not only on legal questions concerning disputes but also on any legal question within the competence of the Council."[139] This statement suggests that the issue was not whether the Council could request advisory opinions on "legal questions concerning disputes," but whether the Council could request such opinions on questions not arising in the context of disputes. The drafts of the Charter and Statute discussed at the subsequent meetings of Commission II (General Assembly)[140] and Commission IV (Judicial Organization)[141] referred only to opinions on "any legal question." This wording was later approved without discussion by the Advisory Committee of Jurists,[142] the Coordination Committee,[143] and the Plenary.[144]

The reason for not distinguishing between "questions" and "disputes" may seem unclear on the records of the San Francisco

137. U.N. Conference on International Organization, *Amendments Submitted on Behalf of Australia*, U.N. Doc. 2 G/14(1) (May 5, 1945), *in* 3 UNITED NATIONS CONFERENCE, *supra* note 123, at 551.

138. Under art. 96(1) of the Charter, "[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question." U.N. Charter art. 96, ¶ 1.

139. U.N. Conference on International Organization, *Summary Report of Eleventh Meeting of Committee III/2*, U.N. Doc. 674 III/2/24 (May 30, 1945), *in* 12 UNITED NATIONS CONFERENCE, *supra* note 123, at 96, 98.

140. U.N. Conference on International Organization, *Fourth Report of Subcommittee A*, U.N. Doc. 729 II/2/A/5 (June 1, 1945), *in* 9 UNITED NATIONS CONFERENCE, *supra* note 123, at 161, 363.

141. U.N. Conference on International Organization, *Summary Report of Sixteenth Meeting of Committee IV/1*, U.N. Doc. 714 IV/1/57 (May 31, 1945), *in* 13 UNITED NATIONS CONFERENCE, *supra* note 123, at 241.

142. U.N. Conference on International Organization, *Texts as Tentatively Approved by the Advisory Committee of Jurists at its Fifth Meeting*, U.N. Doc. WD 276 CO/65(2) (June 12, 1945), *in* 18 UNITED NATIONS CONFERENCE, *supra* note 123, at 316.

143. U.N. Conference on International Organization, *Texts as Tentatively Approved by the Advisory Committee of Jurists at its Sixth Meeting*, U.N. Doc. WD 287 CO/65(3) (June 13, 1945), *in* 18 UNITED NATIONS CONFERENCE, *supra* note 123, at 318.

144. U.N. Conference on International Organization, *Verbatim Minutes of the Ninth Plenary Session*, U.N. Doc. 1210 P/20 (June 27, 1945), *in* 1 UNITED NATIONS CONFERENCE, *supra* note 123, at 631.

Conference.[145] Although States did not provide an explicit reason, their statements imply that they intended for disputes to be a subject-matter of advisory opinions. Furthermore, no State expressly or impliedly commented that the future Court should decline to render advisory opinions in respect of disputes when States parties to those disputes have not consented to third-party settlement.

The creation of the ICJ took place in a historical and political context different from that in which the PCIJ was instituted: While the former was created after the Second World War and on the brink of decolonization, the latter was instituted after the Great War and in a world still dominated by colonial powers. Yet the objectives that led to creating the PCIJ were similar, if not even identical, to the aims inspiring the creation of the ICJ. Moreover, the U.N., like the League of Nations, cannot bring a contentious matter to the Court while having extensive responsibilities relating to the settlement of inter-State disputes.[146] Comparable to the PCIJ and the League, the context in which the ICJ was instituted suggests that advisory jurisdiction was to be the connection between the political and judicial organs of the U.N., allowing the latter to assist the former in discharging their dispute settlement and other responsibilities under the Charter. Unlike the PCIJ, which was not an organ of the League, the ICJ is the principal judicial organ of the U.N. While the PCIJ, like the ICJ, discharged a dispute settlement function, the inclusion of the Court as a full-fledged organ of the U.N. indicates that the ICJ was intended to assist the General Assembly and Security Council to a greater degree than the PCIJ was intended to assist the political organs of the League.

2. Review of the Role of the Court

Owing to the scarcity of cases on the ICJ's docket, in 1970 the General Assembly invited States to express their views on the role of the Court.[147] The U.N. Secretary-General invited comments on "permitting States to have the option of seeking an advisory opinion"

145. Schwebel, *supra* note 24, at 107; Pratap, *supra* note 24, at 42. Without further elaboration, d'Argent stated that disputes are unquestionably included in the notion of "legal questions." d'Argent, *supra* note 12, at 1798.

146. *See* Statute of the ICJ, *supra* note 11, art. 35.

147. G.A. Res. 2723 (XXV) (Dec. 15, 1970). For the Sixth Committee's reports, see Gen. Assembly, Rep. of the Sixth Comm., U.N. Doc. A/8238, ¶¶ 50–51 (Dec. 11, 1970); Gen. Assembly, Rep. of the Sixth Comm., U.N. Doc. A/8568, ¶¶ 45–46 (Dec. 10, 1971); Gen. Assembly, Rep. of the Sixth Comm., U.N. Doc. A/9846, ¶¶ 4–7 (Nov. 8, 1974). The review ended only in a General Assembly compromise resolution. *See also* G.A. Res. 3232 (XXIX) (Nov. 12, 1974).

without the intermediary of U.N. organs.[148] Although States could request advisory opinions on matters unrelated to disputes (such as the internal functioning of the U.N.), their views are indicative of their position on dispute settlement by way of advisory opinions.

Support for allowing States to refer their disputes to the Court for advisory opinions was widespread. For example, Laos stated that "the advisory procedure may be a means for the peaceful settlement of disputes."[149] Austria took the same view, adding that "[i]n case of a concrete dispute . . . a request for an advisory opinion should be subject to the consent of all the parties."[150] The United States, generally cautious on jurisdictional matters, even proposed to create a committee of the General Assembly having the "authority to seek an advisory opinion on behalf of two or more States who voluntarily agree to submit to the advisory jurisdiction of the Court with respect to a dispute between them."[151] Canada proposed a comparable mechanism.[152] Argentina, Denmark, and Finland made similar comments.[153] References to a consent requirement did not seem to concern consent to contentious jurisdiction, as under the *Eastern Carelia* doctrine, but rather concerned agreement with the requesting organ's decision to make a request.

Other States were more cautious. Madagascar was open to States requesting advisory opinions but stated that it was "essential to ensure that the Court is not placed in a position where it may prejudice the outcome of certain cases."[154] Belgium was also concerned that "requests for advisory opinions [on disputes] should be formulated in terms which would not prejudge the respective rights of the parties."[155] According to Turkey, there was merit in opening advisory jurisdiction to States, but only in respect of "general subjects relating to the

148. U.N. Secretary-General, *Review of the Role of the International Court of Justice*, ¶ 5, U.N. Doc. A/8382 (Sep. 15, 1971).

149. *Id.* ¶ 269 (Laos).

150. *Id.* ¶ 301 (Austria).

151. *Id.* ¶ 274 (United States).

152. *Id.* ¶ 292 (Canada).

153. *Id.* ¶ 265 (Cyprus); *id.* ¶ 270 (Denmark); *id.* ¶ 271 (Guatemala); *id.* ¶ 275 (Argentina); *id.* ¶ 277 (Finland); *id.* ¶ 299 (Iraq); U.N. Secretary-General, *Review of the Role of the International Court of Justice*, 5–6, U.N. Doc. A/8747 (Aug. 24, 1972) (Australia); *id.* at 12–13 (Colombia); *id.* at 17 (Kuwait).

154. U.N. Secretary-General, *supra* note 148, ¶ 293 (Madagascar).

155. *Id.* ¶ 305 (Belgium).

international legal order."[156] Although cautious, Belgium, Madagascar and Turkey in principle agreed that States should be able to request advisory opinions in respect of disputes to which they are parties. The United Kingdom doubted the suitability of requests by States for advisory opinions, but its doubts stemmed from the generic possibility that giving such opinions on disputes could "weaken the jurisdiction and authority of the Court."[157]

Only six out of thirty-eight respondents opposed requests for advisory opinions by States. According to Switzerland, "[a] State will not generally refer to the Court its doubts concerning a legal problem unless the question raised is of specific interest to that State and, consequently, unless it has a more or less direct connexion with an actual or latent dispute."[158] Brazil, Poland, and Senegal shared these concerns.[159] New Zealand asserted that the reason for allowing States to seek advisory opinions was "not apparent," possibly on account of negative effects on the ICJ's contentious jurisdiction.[160] Only France, indirectly, referred to the *Eastern Carelia* doctrine, noting that by "empowering States … to seek an advisory opinion from the Court, one would undoubtedly be failing to take into account the danger of a proliferation of attempts to circumvent the fundamental principle that no State may be subjected to international justice without its consent."[161]

Most responses approved of requests for advisory opinions by States, which included opinions on disputes. Some States commented that the ICJ should not give opinions on disputes without the consent of the States involved. These States may have meant that, if advisory opinions related to disputes, exercising advisory jurisdiction should be conditional on consent, similar to contentious jurisdiction. Yet, this view would subject advisory and contentious jurisdiction to the same requirement, by making the former dependent on consent to the latter

156. U.N. Secretary-General, *Review of the Role of the International Court of Justice: Addendum*, ¶¶ 14–15, U.N. Doc. A/8382/Add.3 (Nov. 10, 1971) (Turkey).

157. U.N. Secretary-General, *Review of the Role of the International Court of Justice: Addendum*, ¶¶ 16–17, U.N. Doc. A/8382/Add.1 (Sep. 30, 1971) (United Kingdom).

158. U.N. Secretary-General, *supra* note 148, ¶ 282 (Switzerland).

159. *Id.* ¶ 263 (Poland); U.N. Secretary-General, *supra* note 153, ¶ 4 (Brazil); U.N. Secretary-General, *supra* note 157, ¶ 10 (Senegal).

160. U.N. Secretary-General, *Review of the Role of the International Court of Justice: Addendum*, 4, U.N. Doc. A/8382/Add.4 (Nov. 12, 1971) (New Zealand).

161. U.N. Secretary-General, *supra* note 148, ¶ 298 (France). Côte d'Ivoire did not express any views on requests by States for advisory opinions. *See* U.N. Secretary-General, *Review of the Role of the International Court of Justice: Addendum*, ¶ 14, U.N. Doc. A/8382/Add.2 (Nov. 3, 1971) (Côte d'Ivoire).

ascertained on a request-by-request basis, inconsistent with the States' creation of two distinct kinds of jurisdiction.[162] These comments rather concern the requesting organs, which would have to ascertain the consent of the relevant States to making requests for advisory opinions on disputes. Although this view could also be reminiscent of the *Eastern Carelia* doctrine, accepting that the Assembly and Council may request advisory opinions on disputes also requires accepting that States could not, by withholding consent, prevent requests from being made. The opposite would result again in making the exercise of advisory jurisdiction conditional on the prerequisites applicable to contentious cases.

Although, in reviewing the Court's role, States showed openness towards advisory opinions on disputes, they expressed their views in the abstract. Conversely, in concrete advisory proceedings, States either support or distinguish *Eastern Carelia*. Views expressed in the abstract in favor of advisory opinions that concern bilateral disputes should be seen as reflecting States' intention more genuinely than self-interested comments in concrete cases.

III. IRRELEVANCE OF CONSENT TO THE ICJ'S ADVISORY FUNCTION

As the *Eastern Carelia* doctrine aims to avoid circumventing the principle of consent to binding third-party settlement, one may attempt to justify its existence based on that principle. However, consent is irrelevant to the Court's advisory function, and the *Eastern Carelia* doctrine therefore cannot be justified by reference to it. Consent to third-party settlement is irrelevant to matters of jurisdiction and admissibility in the advisory context, does not affect fact-finding in advisory proceedings, and has no bearing on issues of utility of and compliance with advisory opinions.

A. Jurisdiction

When considering the relevance of the consent of States to the ICJ's advisory jurisdiction, one should distinguish two facets of consent: consent to creating rules of international law through the conclusion of treaties, which is unrelated to the *Eastern Carelia* doctrine, and consent to third-party settlement, the circumvention of which the *Eastern Carelia* doctrine seeks to avoid. Only the former is relevant to the Court's advisory jurisdiction.

162. *See infra* notes 164–173 and accompanying text.

The ICJ would lack advisory jurisdiction but for the decision of the U.N.'s founding members to confer that jurisdiction on it, through Article 96 of the Charter and Article 65 of the Court's Statute. Through the adoption of the Charter, of which the ICJ's Statute is an integral part, States consented to the creation of rules of international law conferring advisory jurisdiction on the ICJ.[163] Thus understood, consent is relevant, and in fact indispensable, for the Court to have jurisdiction to render advisory opinions.

Conversely, it is beyond serious debate that consent to third-party settlement is unnecessary for the ICJ to have advisory jurisdiction. In the *Wall* advisory opinion, the Court stated that "lack of consent to the Court's contentious jurisdiction by interested States has no bearing on the Court's jurisdiction to give an advisory opinion."[164] One could go even further. The *Eastern Carelia* doctrine's emphasis on consent results in subjecting the Court's exercise of advisory jurisdiction to the same requirement for it to have contentious jurisdiction. Consent to third-party settlement is an obstacle to the very existence of advisory jurisdiction as a function distinct from the Court's power to decide contentious cases.

Under the *Eastern Carelia* doctrine, lack of jurisdiction over a contentious matter may determine the inadmissibility of a request for advisory opinion. If the conditions for exercising either type of jurisdiction could preclude the exercise of the other, the distinction between them could be greatly reduced.[165] In *Interpretation of Peace Treaties*, the ICJ distinguished the role of consent in contentious and advisory cases. According to the Court, in the former consent is a matter of jurisdiction, and in the latter a matter of judicial propriety.[166] This distinction is artificial in practice. Declining to exercise contentious jurisdiction for want of consent achieves the same result as refusing to exercise advisory jurisdiction because, as a matter of judicial propriety, a State involved in a dispute has not consented to the third-party settlement of that dispute. In both scenarios, the Court will not render the decision requested because of the absence of the same condition.

163. U.N. Charter art. 92.

164. Wall Opinion, *supra* note 21, ¶ 47; *see also* THIRLWAY, *supra* note 12, at 62.

165. According to Luzzatto, in respect of advisory jurisdiction, the issue is one of "inapplicabilità dei normali principi sulla giurisdizione della Corte in materia contenziosa" (*i.e.*, inapplicability of ordinary principles concerning the Court's contentious jurisdiction). Luzzatto, *supra* note 122, at 495.

166. Interpretation of Peace Treaties First Phase Opinion, *supra* note 15, at 71.

Moreover, classifying consent as pertaining to the admissibility of requests for advisory opinions is unconvincing, as argued below.[167]

Subjecting the ICJ's contentious jurisdiction and its exercise of advisory jurisdiction to the same requirement of consent, consistent with the *Eastern Carelia* doctrine, is also contrary to the intention of the drafters of the PCIJ's Statute. Article 36(3) of the PCIJ's Draft Statute prepared by the Advisory Committee of Jurists, which was a provision governing the PCIJ's jurisdiction, stated that "[w]hen it shall give an opinion upon a question which forms the subject of an existing dispute, [the PCIJ] shall do so under the same conditions as if the case had been actually submitted to it for decision."[168] The deletion of this draft provision by the First Committee of the Assembly of the League suggests that, conversely, the conditions for exercising advisory and contentious jurisdiction are not necessarily the same.[169] In the ICJ context, Article 68 of the Statute states that "[i]n the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable."[170] This provision may seem to justify having similar preconditions both to advisory and contentious jurisdiction, but Article 68 concerns the assimilation of the advisory procedure to the contentious one and does not, comparable to Article 36 of the PCIJ's Draft Statute, govern the Court's jurisdiction.[171] Article 68 may not justify assimilating the preconditions for exercising advisory and contentious jurisdiction, consistent with the *Eastern Carelia* doctrine.

The problematic relationship between contentious and advisory jurisdiction emerging from the *Eastern Carelia* doctrine could produce another oddity. The *Eastern Carelia* doctrine requires the ICJ to decline exercising advisory jurisdiction absent the consent to third-party settlement by a State involved in a dispute to which an advisory opinion relates. However, having given that consent could also justify declining to exercise advisory jurisdiction in instances where a pending or decided contentious case concerns the dispute to which an advisory opinion relates. This scenario is not merely theoretical. In the

167. *See infra* notes 176–189 and accompanying text.

168. 34th Meeting (Private), Held at the Peace Palace, the Hague, on July 24th, 1920, Procès-verbaux of the Proceedings of the Committee June 16th–July 24th, 1920 with Annexes, P.C.I.J., 689, 732 (1920).

169. Jean-Pierre Cot & Stephan Wittich, *Article 68*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1843, 1844 (Andreas Zimmermann et al. eds., 2019).

170. Statute of the ICJ, *supra* note 11, art. 68.

171. *See id.*

Chagos proceedings, some States argued that the Court should have declined to exercise advisory jurisdiction, because its opinion would have concerned matters already settled by the tribunal in the *Chagos Marine Protected Area Arbitration*.[172] In addition to stating that *res judicata* would not preclude rendering an advisory opinion, the Court suggested that the success of such arguments may depend on whether the subject-matters of contentious proceedings and of advisory requests overlap.[173] Consenting to third-party settlement may allow exercising advisory jurisdiction under the *Eastern Carelia* doctrine, but idiosyncratically, may also prevent that very exercise on other grounds of judicial propriety.

B. Admissibility

Under the *Eastern Carelia* doctrine, the ICJ considers the effect of lack of consent in relation to its discretion not to exercise advisory jurisdiction, which relates to the admissibility of advisory requests. However, it is unconvincing to see the consent of the States involved in a pending dispute as an issue of admissibility, as the *Eastern Carelia* doctrine requires.

Consent to third-party settlement is entrenched as a jurisdictional requirement in the contentious context. Even one who accepts that consent is irrelevant to advisory jurisdiction may be compelled to view it as relating to the admissibility of requests for advisory opinions. If consent is not a matter of jurisdiction, it *must* be one of admissibility. This view fails to consider that consent could be irrelevant both to the ICJ's advisory jurisdiction and to the admissibility of advisory requests. There are significant differences between contentious and advisory cases that justify the idea that consent, essential in the contentious context, may not raise issues of admissibility in the advisory context. Third-party settlement of inter-State disputes often imposes international obligations on States which, as entities *superiorem non recognoscentes*,[174] cannot be bound without consent. Advisory opinions impose no international obligations on States.[175] Moreover, the intended primary audience of advisory opinions is not States, from which consent to third-party settlement emanates, but the requesting

172. Chagos Opinion, *supra* note 23, ¶¶ 79–82.

173. *Id.* ¶ 81. The ICJ noted that "the issues that were determined by the Arbitral Tribunal in the *Arbitration regarding the Chagos Marine Protected Area* . . . are not the same as those that are before the Court in these proceedings."

174. TULLIO TREVES, DIRITTO INTERNAZIONALE – PROBLEMI FONDAMENTALI 53 (2005).

175. Interpretation of Peace Treaties First Phase Opinion, *supra* note 15, at 71.

U.N. organs, which cannot express consent to the settlement of inter-State disputes by binding third-party procedures.

It is also unpersuasive to see consent to third-party settlement as an issue of admissibility under certain established definitions of "admissibility." Typically, "admissibility" is a residual category defined by distinguishing it from questions of "jurisdiction," although there is no generally accepted definition of either concept.[176] Thirlway suggested that conditions emanating from the consent of the parties pertain to jurisdiction, while others would concern admissibility.[177] On this view, consent could not justify refusing to give advisory opinions as a matter of discretion, consistent with the *Eastern Carelia* doctrine. According to Shany, differentiating jurisdiction from admissibility requires assessing whether particular matters concern the delegation of powers to international tribunals to decide cases.[178] While jurisdiction covers matters concerning the delegation of *potestas decidendi*, admissibility is a residual category covering matters based on which a court may decline to exercise a power to decide duly conferred on it.[179] By consenting to settling a dispute before an international tribunal, States delegate to that tribunal the power to decide that dispute. On Shany's approach, consent raises issues of jurisdiction, not admissibility. Moreover, consent being categorized as an issue of jurisdiction can be understood, in the advisory context, not as consent to third-party settlement, but as consent to the creation of rules of international law conferring advisory jurisdiction on the Court. It is by creating those rules that States effected a delegation of powers to the ICJ, which Shany views as the defining characteristic of jurisdictional matters.

Amerasinghe suggested a different criterion to identify issues of admissibility. According to him, the distinguishing factor between jurisdiction and admissibility is that defects of jurisdiction may not be

176. Fitzmaurice did not seem to attempt expressly to distinguish objections to jurisdiction from objections of admissibility, likely on account of a pragmatic view that, whether the Court upheld either type of objection, the result would be that a case could not proceed to the merits. *See* Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951–4: Questions of Jurisdiction, Competence and Procedure*, 34 BRIT. Y.B. INT'L L. 1, 12–14, 21–22 (1958).

177. Hugh Thirlway, *The Law and Procedure of the International Court of Justice: 1960–1989, Part Two*, 61 BRIT. Y.B. INT'L L. 1, 114–15 (1990). For example, not being party to a treaty conferring jurisdiction on the ICJ would be a matter of jurisdiction, while the exhaustion of local remedies, when necessary, would be a matter of admissibility.

178. SHANY, *supra* note 14, at 129–47; Yuval Shany, *Jurisdiction and Admissibility*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 779, 787–88 (Cesare P.R. Romano, Karen J. Alter & Yuval Shany eds., 2014).

179. SHANY, *supra* note 14, at 129–47.

cured, while defects of admissibility could be waived by the parties.[180] Consent-based powers can be the subject of stipulations between the parties. Thus, under Amerasinghe's view, consent would relate to admissibility. Nonetheless, this classification is inconsistent with the ICJ's position that consent relates to its jurisdiction. In the 2008 *Croatia v. Serbia* judgment, the Court stated that:

> If the objection is a jurisdictional objection, then since the jurisdiction of the Court derives from the consent of the parties, this will most usually be because it has been shown that no such consent has been given by the objecting State to the settlement by the Court of the particular dispute.[181]

Amerasinghe's view is also contradicted by the ICJ's approach that certain defects of jurisdiction could be cured. In that same 2008 judgment, the ICJ found that lack of access to the Court, which can be seen as a matter of jurisdiction *ratione personae*, can be cured by a State becoming a party to the Statute after the institution of proceedings.[182] Considering consent as a matter of admissibility, consistent with the *Eastern Carelia* doctrine, could not be convincingly based on Amerasinghe's problematic definition of admissibility.

Shany seemed to suggest that the same concept of admissibility applied both in the contentious and advisory contexts. Conversely, Thirlway and Amerasinghe defined admissibility primarily by reference to contentious cases, without expressly extending their definitions to advisory opinions. Their views do not exclude that, although consent could not concern admissibility in contentious cases, it could raise issues of admissibility in advisory cases. The premise of this argument is that the distinction between the ICJ's contentious and advisory functions warrants distinct definitions of admissibility in the context of either function. Nevertheless, understanding consent as relating to the admissibility of requests for advisory opinions contradicts this premise. Far from building upon the distinction between the contentious and advisory functions, that understanding makes the exercise of both contentious and advisory jurisdiction subject to the same prerequisite of consent to third-party settlement.[183]

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180. CHITTHARANJAN F. AMERASINGHE, JURISDICTION OF INTERNATIONAL TRIBUNALS 191–92 (2003).

181. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Preliminary Objections, Judgment, 2008 I.C.J. 412, ¶ 120 (Nov. 18).

182. *Id.* ¶¶ 66, 86–87.

183. *See supra* notes 164–173 and accompanying text.

The *Eastern Carelia* doctrine's treatment of consent as a matter of admissibility could also seem justified because the ICJ considers consent in the context of admissibility under the *Monetary Gold* principle.[184] This justification is not persuasive. Under the *Monetary Gold* principle, the Court cannot decide the merits of contentious cases if the legal interests of States not before it "would not only be affected by a decision, but would form the very subject-matter of the decision."[185] The basis of the *Monetary Gold* principle is that, if the central issue before the Court is the legal position of a third State, "[t]he Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it."[186] Similar to the *Eastern Carelia* doctrine, the *Monetary Gold* principle prevents the Court from exercising jurisdiction it otherwise has in order to protect the role of consent to third-party settlement.

The *Monetary Gold* principle itself is open to criticism. Some scholars argue for limiting its application to exceptional circumstances,[187] while others propose its removal from the Court's jurisprudence.[188] In any event, the similarity between the role of consent under *Eastern Carelia* and *Monetary Gold* is only apparent. First, consent has a different function in contentious and advisory cases. While consent is a prerequisite for the ICJ to have contentious jurisdiction, the existence of advisory jurisdiction does not depend on it. As third States in contentious cases and participant States in advisory proceedings are not bound by the relevant decisions, *Eastern Carelia* and *Monetary Gold* both protect those States against authoritative, nonbinding decisions on their conduct. However, in relation to the Court's judicial function, the underlying values protected by *Eastern Carelia* and *Monetary Gold* are different: The latter safeguards a fundamental condition for the very existence of the Court's *potestas decidendi*, while the former ensures that the ICJ does not exercise advisory

184. On the link between *Eastern Carelia* and *Monetary Gold*, see SHANY, *supra* note 14, at 49.

185. Monetary Gold removed from Rome in 1943 (It. v. Fr., U.K. and U.S.), Judgment, 1954 I.C.J. 19, 32 (June 15).

186. *Id.* at 33.

187. Filippo Fontanelli, *Reflections on the Indispensable Party Principle in the Wake of the Judgment on Preliminary Objections in the* Norstar *Case*, 100 RIV. DIR. INTERNAZ. 112, 126 (2017).

188. Zachary Mollengarden & Noam Zamir, *The* Monetary Gold *Principle: Back to Basics*, 115 AM. J. INT'L L. 41, 41 (2021). *Contra* Ori Pomson, *Does the Monetary Gold Principle Apply to International Courts and Tribunals Generally?*, 10 J. INT'L DISP. SETTL. 88, 88 (2019); Tobias Thienel, *Third States and the Jurisdiction of the International Court of Justice: The* Monetary Gold *Principle*, 57 GERM. Y.B. INT'L L. 321, 352 (2014).

jurisdiction in circumstances in which it would be simply inappropriate to do so.

Second, consent under the *Monetary Gold* jurisprudence is different from consent under the *Eastern Carelia* doctrine. *Monetary Gold* focuses on the consent of third States that are not parties to the dispute before the Court.[189] *Monetary Gold* is thus consistent with the view, suggested by certain scholars, that the consent of the States parties to a dispute can only concern matters of jurisdiction. *Monetary Gold* makes the consent of a third State a consideration for the admissibility of the case between the States before the Court.[190] The *Eastern Carelia* doctrine focuses not on the consent of third States, but on the consent of the States parties to a dispute to which an advisory opinion relates. One could not justify the *Eastern Carelia* doctrine's classification of consent as an issue of admissibility by reference to its superficial similarity to the *Monetary Gold* principle.

C. Fact-Finding

Lack of consent to third-party settlement might seem negatively to impact fact-finding by the ICJ in advisory cases, which might justify upholding the *Eastern Carelia* doctrine on the grounds of difficulties in evidence-gathering. Presumably, States that have not accepted third-party settlement are unlikely to provide the Court with the evidence necessary to render advisory opinions relating to the disputes to which they are parties. Those States participate in advisory proceedings mainly to argue that the Court should not exercise its advisory jurisdiction, thus without touching on the substance of the requests.

The effect of this fact-finding problem is limited. It is the Court's established jurisprudence that difficulties in evidence-gathering in advisory proceedings are a separate basis for declining to exercise advisory jurisdiction. In *Western Sahara*, *Wall* and *Chagos*, certain States contended that the Court's lack of sufficient evidence to answer the questions asked constituted a reason not to exercise advisory jurisdiction.[191] In those cases, the Court examined this reason separately from issues relating to consent to third-party settlement. Assessing difficulties in fact-finding as relating to consent under the *Eastern Carelia* doctrine thus would be redundant.

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189. Mollengarden & Zamir, *supra* note 188, at 43.

190. Monetary Gold, 1954 I.C.J. at 32.

191. Western Sahara Opinion, *supra* note 20, ¶¶ 44–47; Wall Opinion, *supra* note 21, ¶¶ 47–50, 56–58; Chagos Opinion, *supra* note 23, ¶¶ 71–74, 85–90.

In practice, fact-finding in the advisory context is different from fact-finding in contentious cases. In its advisory opinions, the Court may include statements on facts from which those opinions originate, but in contrast to contentious cases, advisory opinions are framed in general terms and mainly aim to clarify the relevant legal framework for the benefit of the requesting organs. When exercising its advisory jurisdiction, the Court is not required, as is common in contentious cases, to make determinations of fact as a necessary precondition to finding whether States have breached their international obligations. Findings of fact may be useful, but are not necessary for the Court to render advisory opinions.

Past advisory cases relating to bilateral disputes have witnessed, alongside the participation of non-consenting States, the participation of States that would have consented to third-party settlement. In *Western Sahara*, Spain's non-acceptance of binding third-party settlement was countered by Morocco's willingness to consent to it.[192] Similarly, the United Kingdom's lack of consent in *Chagos* was met with Mauritius's eagerness to submit their territorial dispute to third-party settlement.[193] There has always been only one State in each advisory case that did not provide evidence because it had not consented to third-party settlement. Conversely, the consenting States have provided the Court with as much evidence as possible, both to avoid a decision by the Court not to exercise advisory jurisdiction on the ground of limited evidence, and to persuade the Court to answer the request in accordance with their views.[194] In past advisory proceedings, numerous States have appeared before the Court to present their positions on the procedure and substance of advisory requests. For example, thirty-one States and international organizations participated in the *Chagos* proceedings, and fifty States and international organizations participated in the *Wall* proceedings.[195] In light of the wide participation, the practical effect of one State not submitting evidence is even more limited and may not have any appreciable adverse effect on the ICJ's answers to the relevant advisory requests.

Although in principle, non-consenting States are unlikely to assist the Court in its fact-finding significantly, lack of assistance by such

192. Western Sahara Opinion, *supra* note 20, ¶ 26.

193. Chagos Opinion, *supra* note 23, ¶ 83.

194. In *Chagos*, Mauritius provided the Court with large volumes of documents relating to the substance of the request, divided into four separate volumes of annexes to its Written Statement. *See generally* Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Written Statement of Mauritius (Mar. 1, 2018), https://www.icj-cij.org/en/case/169/written-proceedings [https://perma.cc/P4W5-M72N].

195. Wall Opinion, *supra* note 21, ¶¶ 9, 12; Chagos Opinion, *supra* note 23, ¶¶ 9, 15, 23.

States is not a foregone conclusion. The attitude of the non-consenting State should be assessed case by case. In *Chagos*, the United Kingdom provided the Court with a sizeable volume of documents, despite appearing primarily to argue that the Court should have declined to exercise advisory jurisdiction on the basis of the *Eastern Carelia* doctrine.[196] Israel filed a comprehensive written statement in the *Wall* proceedings, although its main submission was that the Court should not have rendered the opinion requested.[197]

The impact of a non-consenting State not providing the Court with evidence is limited, also considering that in each advisory case, the U.N. Office of Legal Affairs provides the ICJ with a dossier of documents relevant to the pending request. The Court itself has described this dossier as "voluminous."[198] For example, in the *Wall* advisory proceedings, the dossier included detailed information on the route of the wall, its humanitarian implications and socio-economic impact on the Palestinian population, and several reports based on site visits.[199] Although Judge Buergenthal doubted the adequacy of the U.N. dossier for the purposes of giving the opinion requested,[200] he was the only judge to express reservations in that regard.

The view that lack of consent to third-party settlement could negatively impact fact-finding by the Court in advisory proceedings is unconvincing. The *Eastern Carelia* doctrine thus could not be justified by reference to the consequences that lack of consent might have on issues of evidence.

D. Utility and Compliance

Supporters of the *Eastern Carelia* doctrine may also argue that lack of consent negatively impacts compliance with the ICJ's advisory opinions and consequently their utility to the requesting organs. This argument, although intuitive, does not withstand scrutiny.

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196. *See generally* Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Written Statement of the United Kingdom (Feb. 27, 2018), https://www.icj-cij.org/en/case/169/written-proceedings [https://perma.cc/P4W5-M72N].

197. *See generally* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Written Statement of Israel (Jan. 30, 2004), https://www.icj-cij.org/public/files/case-related/131/1579.pdf [https://perma.cc/42VT-A7KR].

198. Wall Opinion, *supra* note 21, ¶ 57; Chagos Opinion, *supra* note 23, ¶73.

199. Wall Opinion, *supra* note 21, ¶ 57.

200. *Id.* at 240, ¶ 3 (declaration by Buergenthal, J.). To date, the Court has not published the dossiers in *Western Sahara* and *Chagos*.

Compliance relates to the relevant actors' willingness to comply with advisory opinions. Since advisory opinions are not binding,[201] no issue of compliance with them arises as a matter of strict legal principle. Nonetheless, one could assess whether, beyond what might be required by a legal obligation, the Court's determinations in its advisory opinions lead to changes in the international status quo in accordance with such determinations. In making this assessment, it is crucial to identify the relevant actors whose willingness to comply matters. For example, after the *Chagos* opinion, the General Assembly passed a resolution that, consistent with the ICJ's finding that the United Kingdom's continued administration of Chagos was unlawful, called for its end.[202] Assessing the Court's opinion from the perspective of the United Kingdom's lack of willingness to comply, whether with the ICJ's determinations or the General Assembly's resolution, would require concluding that there was low willingness to comply. Conversely, emphasizing the General Assembly's passing of its resolution calling for the end of the United Kingdom's administration of Chagos is an indication of willingness to comply.

If the actors whose willingness to comply matters were the States parties to a dispute, at least one of which had not consented to third-party settlement, low willingness to comply would follow nearly inevitably from lack of consent. There are two reasons why it is unconvincing to identify the relevant actors as the States parties to disputes to which opinions relate. First, those States have no obligation to comply with advisory opinions, which lack binding character.[203] Second, the Court directs advisory opinions not at States, but at the requesting organs, which thus are the actors from which one should expect any follow-up action based on the opinions.[204] Focus on the requesting organs as the actors from which willingness to comply can be expected indicates that consent to third-party settlement is irrelevant to assessing compliance with advisory opinions. The question may arise as to whether willingness to comply with advisory opinions should also be assessed by reference to the States' willingness to abide by the requesting organ's follow-up action, taken in accordance with an advisory opinion. This question simply rephrases the original question concerning whether States have an obligation to comply with the

201. Interpretation of Peace Treaties First Phase Opinion, *supra* note 15, at 71. States have an obligation to comply with the Court's decisions in contentious proceedings pursuant to Article 94(1) of the Charter of the U.N.

202. G.A. Res. 73/295 (May 24, 2019).

203. Interpretation of Peace Treaties First Phase Opinion, *supra* note 15, at 71.

204. *See* Tomer Broude, *The Legitimacy of the ICJ's Advisory Competence in the Shadow of the* Wall, 38 ISRAEL L. REV. 189, 193 (2005).

ICJ's advisory opinions themselves. As stated above, no such an obligation exists.

Writing on judicial lawmaking, Ginsburg stated that advisory opinions have not been successful when certain States have endeavored to impose externalities on other States.[205] In the advisory context, States do not face coordination problems, understood as the necessity to coordinate strategies to achieve their common interests.[206] Conversely, States face such problems in contentious cases, because in that context they have an interest in the ICJ providing guidance for subsequent behavior and, distinct from advisory cases, consent to the Court providing that guidance. States are less likely to comply with advisory opinions than they are with contentious judgments. This problem would not exist if one reimagines advisory opinions as a means of settling disputes, which on Ginsburg's view, raise coordination problems. The nonconsensual character of advisory cases would not prevent compliance with advisory opinions because lack of consent would not remove the coordination problem from which the relevant disputes stem.

Willingness to comply is also linked to the utility of advisory opinions. Advisory opinions are useful when the requesting organs can base their follow-up action on them, given the aims that those organs pursue when requesting advisory opinions. Such aims could include, implicitly or explicitly, facilitating the settlement of inter-State disputes. For instance, by requesting the *Chagos* advisory opinion, the General Assembly conceivably intended to promote the settlement of the territorial dispute between Mauritius and the United Kingdom. Not rendering advisory opinions on the basis of the *Eastern Carelia* doctrine, when the requesting organs expect the Court to help them facilitate the settlement of inter-State disputes, would result in advisory opinions failing to achieve the goal for which they were requested.

The Court itself has expressed awareness that its role in rendering advisory opinions is to participate in the activities of the wider U.N.[207] There is a functional relationship between the Court and the requesting organs. The ICJ's position is not dissimilar from that of the PCIJ in relation to the League organs. The PCIJ was expected to assist the Assembly and Council of the League with discharging their duty to prevent disputes from endangering international peace.

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205. Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 648 (2005).

206. Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1235 (2004).

207. Wall Opinion, *supra* note 21, ¶ 44; Chagos Opinion, *supra* note 23, ¶ 65.

Because the General Assembly, and especially the Security Council, have a comparable duty under the Charter,[208] the ICJ should render advisory opinions that assist the U.N. organs with discharging that duty. Refusing to render advisory opinions in the name of protecting the principle of consent, pursuant to the *Eastern Carelia* doctrine, would hinder the functional relationship between the Court and the requesting organs.

IV. ADVISORY OPINIONS REIMAGINED

Reimagining advisory jurisdiction without the *Eastern Carelia* doctrine would benefit the legitimacy of the advisory function, promote the Court's dispute settlement role, and better reflect the legal effects of advisory opinions.

A. Legitimacy of the Advisory Function

Abandoning the *Eastern Carelia* doctrine may raise questions of legitimacy, understood as the "right to rule."[209] Supporters of the *Eastern Carelia* doctrine may argue that giving advisory opinions in respect of disputes absent consent to third-party settlement undermines the legitimacy of the ICJ's advisory function, because doing so would erode the principle that the judicial settlement of international disputes is consent-based.[210] This argument stems from a superficial understanding of legitimacy. Abandoning the *Eastern Carelia* doctrine is unlikely to have adverse effects on the legitimacy of the ICJ's advisory

208. U.N. Charter arts. 11, 24.

209. *See generally* John Tasioulas, *The Legitimacy of International Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 97, 97–100 (Samantha Besson & John Tasioulas eds., 2010).

210. The comments in this Part concern the normative concept of legitimacy, namely "the right to rule according to predefined standards," not the sociological one, which is the "*perception*[] or *belief*[] that an institution has such a right to rule". Nonetheless, because normative and sociological legitimacy inform one another, the comments in this Part may inform the discourse on the sociological legitimacy of the exercise of advisory jurisdiction by the ICJ. On the difference between the two concepts of legitimacy, see Harlan Grant Cohen et al., *Legitimacy and International Courts – A Framework*, *in* LEGITIMACY AND INTERNATIONAL COURTS 1, 4 (Harlan Grant Cohen, Nienke Grossman, Andreas Follesdal & Geir Ulfstein eds., 2018); Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen, *International Court Authority in a Complex World*, *in* INTERNATIONAL COURT AUTHORITY 3, 7–11 (Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen eds., 2018).

function and may actually enhance it.[211] A detailed analysis of the standard to assess the legitimacy of the Court's advisory function is beyond the scope of this article, but some general comments on the role of consent to that assessment are warranted.

Legitimacy is audience-relative.[212] Insofar as they focus on showing that lack of legitimacy flows from lack of consent, consent-based critiques of the advisory function assume the relevant constituency to assess legitimacy is limited to the States involved in the disputes to which advisory proceedings may relate. However, the ICJ's constituency in the context of advisory proceedings is much larger, at least consisting of the international community of States represented in the U.N. organs authorized to request advisory opinions. The *Eastern Carelia* doctrine misrepresents the relevant constituency because it prioritizes the consent of the States parties to bilateral disputes, although advisory opinions may only be requested with the support of a majority of States in the requesting organ and irrespective of whether the States parties to bilateral disputes agree.[213] Such States need not even be represented in the requesting organs for advisory opinions to be requested in accordance with the procedures under the Charter. For example, South Africa was not a Security Council member when, on July 29, 1970, the Council passed the resolution requesting the *Namibia* advisory opinion.[214] Neither did South Africa exercise its right to participate in the Security Council's discussion under Article 31 of the Charter.[215] Abandoning the doctrine would recognize that the legitimacy of the Court's advisory function is independent of the consent of the States parties to the disputes to which advisory opinions relate.

More generally, consent-based critiques of the legitimacy of the advisory function suffer from the problems typical of the position that consent is necessary or sufficient for rules of international law to

211. Legitimacy and effectiveness are inter-related concepts. *See* Yuval Shany, *Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions*, *in* LEGITIMACY AND INTERNATIONAL COURTS 354, 363–70 (Harlan Grant Cohen, Nienke Grossman, Andreas Follesdal & Geir Ulfstein eds., 2018).

212. Andrei Marmor, *Authority of International Courts: Scope, Power, and Legitimacy*, *in* INTERNATIONAL COURT AUTHORITY, *supra* note 210, at 374, 378.

213. Certain advisory requests passed by slim majorities. The General Assembly requested the advisory opinion on the legality of the threat or use of nuclear weapons by seventy-eight votes in favor, forty-three against, and thirty-eight abstentions, and the one on Kosovo's declaration of independence with seventy-seven votes in favor, six against and seventy-four abstentions. *See* U.N. GAOR, 49th Sess., 90th mtg. at 35–36, U.N. Doc. A/49/PV.90 (Dec. 15, 1994); U.N. GAOR, 63rd Sess., 22nd mtg. at 10–11, U.N. Doc. A/63/PV.22 (Oct. 8, 2008).

214. S.C. Res. 284 (July 29, 1970).

215. U.N. SCOR, 25th Sess., 1550th mtg., U.N. Doc. S/PV.1550 (July 29, 1970).

be legitimate. These problems include the negative effects of power imbalance between States, which, also in the dispute settlement context, means that consent may be "less than substantially voluntary."[216] In contrast to the time when the Court formulated the doctrine, today's international community aspires to ideals of democracy and the rule of law.[217] Far from legitimating the exercise of advisory jurisdiction, consent to third-party settlement reduces the legitimacy of that exercise by protecting the interests of States that do not wish their potentially wrongful conduct to be subject to judicial scrutiny. Considering this aspect, it is not surprising that States that have invoked the *Eastern Carelia* doctrine in the past are the more powerful party in bilateral disputes that frequently involve States created during the decolonization process. Similarly, it is not surprising that the ICJ formulated the doctrine when the decolonization process was in its early stages. Holding on to *Eastern Carelia* would mean holding on to an outdated, and therefore less legitimate, view of the international community.

Whether the ICJ's advisory function is legitimate depends on one's notion of "right to rule" and standard for that right to obtain.[218] For the purpose of evaluating the *Eastern Carelia* doctrine, the criteria for assessing legitimacy would be independent of consent to third-party settlement, whichever notion or standard of legitimacy one should adopt. The input legitimacy of the advisory function falls to be assessed by reference to whether the ICJ has rendered its advisory opinions pursuant to established procedures.[219] This assessment requires considering the source of the Court's advisory jurisdiction and the conformity of the advisory procedure to accepted standards of fairness and due process.[220] Consent to third-party settlement is unrelated to either. First, the Court's advisory jurisdiction does not depend on that consent, but derives from the conferral under Article 96 of the

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216. Allen Buchanan, *The Legitimacy of International Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 79, 91 (Samantha Besson & Jong Tasioulas eds., 2010).

217. *Id.* at 93–94; Ingo Venzke, *International Courts' De Facto Authority and its Justification*, *in* INTERNATIONAL COURT AUTHORITY, *supra* note 210, at 391, 400–01; Kenneth Keith, *The International Rule of Law*, 28 LEIDEN J. INT' L. 403 (2015); *see also* Mortimer N.S. Sellers, *Democracy, Justice, and the Legitimacy of International Courts*, *in* LEGITIMACY AND INTERNATIONAL COURTS, *supra* note 210, at 338. *See generally* Robert McCorquodale, *Defining the Rule of Law: Defying Gravity?*, 65 INT'L & COMPAR. L.Q. 277 (2016).

218. Tasioulas, *supra* note 209, at 98.

219. Broude, *supra* note 204, at 194.

220. Rüdiger Wolfrum, *Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations*, *in* LEGITIMACY IN INTERNATIONAL LAW 1, 6 (Rüdiger Wolfrum & Volker Röben eds., 2008).

Charter.[221] Second, the refusal by a State to consent to third-party settlement does not prevent it from appearing before the Court in an advisory case concerning the dispute to which it is a party.[222] Whether a State takes advantage of its right to appear in advisory proceedings is a matter for its own choice, which does not affect the fairness of those proceedings.

The output legitimacy of the advisory function, which also relates to the substantive content of advisory opinions, depends on whether opinions achieve the concerns of their constituency.[223] Advisory requests can stem from the requesting organs' aim to facilitate the settlement of inter-State disputes, as was the case, for example, in *Chagos*. The *Eastern Carelia* doctrine could justify not giving advisory opinions in cases where the requesting organs intend on using them for that purpose. The doctrine would prevent the exercise of advisory jurisdiction by the ICJ from achieving the concerns of its constituency. In such cases, the *Eastern Carelia* doctrine would not enhance the legitimacy of the Court's advisory function, but, to the contrary, would reduce it.

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221. The advisory jurisdiction of ITLOS as a full tribunal is not expressly conferred under the United Nations Convention on the Law of the Sea. One may doubt ITLOS' assertion of advisory jurisdiction from an input legitimacy standpoint. *See* Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2015 I.T.L.O.S 4, ¶¶ 52–69; *see also* Massimo Lando, *The Advisory Jurisdiction of the International Tribunal for the Law of the Sea: Comments on the* Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, 29 LEIDEN J. INT'L L. 441, 458 (2016); Michael A. Becker*, Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, 109 AM. J. INT'L L. 851, 853 (2015); Tom Ruys & Anemoon Soete, *"Creeping" Advisory Jurisdiction of International Courts and Tribunals? The Case of the International Tribunal for the Law of the Sea*, 29 LEIDEN J. INT'L L. 155, 157 (2016).

222. The ICJ's practice is to give States parties to disputes longer time to make their submissions compared to other participants. *See, e.g.*, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Verbatim Record, 25–26 (Sept. 3, 2018, 10 a.m.), https://www.icj-cij.org/public/files/case-related/169/169-20180903-ORA-01-00-BI.pdf [https://perma.cc/7XW3-5CU4] (*Chagos* proceedings); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Verbatim Record, 15–16 (Feb. 23, 2004, 10 a.m.), https://www.icj-cij.org/public/files/case-related/131/131-20040223-ORA-01-00-BI.pdf [https://perma.cc/NGQ4-VRPM] (*Wall* proceedings).

223. Output legitimacy can be seen as co-extensive with the concept of effectiveness. *See* Broude, *supra* note 204, at 194, 206. On the effectiveness of the ICJ, see YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS 164–67 (2014). Helfer also assesses effectiveness by reference to a framework comparable to Shany's. *See* Laurence R. Helfer, *The Effectiveness of International Adjudicators*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 464–81 (Cesare P.R. Romano, Karen J. Alter & Yuval Shany eds., 2014).

B. Promoting the ICJ's Dispute Settlement Function

Reimagining advisory opinions as a means of dispute settlement would facilitate the performance of the ICJ's dispute settlement goal by bringing together distinct aspects of the same, broader disputes, rebuilding confidence in international adjudication at a time of crisis of multilateralism, and increase the feasibility of referral jurisdiction. The ICJ, by achieving its dispute settlement goal, would also enhance the output legitimacy of its advisory opinions.[224]

1. Aggregation of Disputes

A recent study examined the phenomenon of disaggregation of disputes by submitting narrow aspects of broader controversies to different international tribunals, depending on the titles of jurisdiction available.[225] The taxonomy could be extended to advisory opinions. There are three approaches to determine jurisdiction in cases of disaggregated disputes. First, under the severability approach, international tribunals isolate specific claims before them from broader disputes to find jurisdiction over those claims.[226] Second, the restrictive approach entails international tribunals considering specific claims as inseparable from broader disputes, resulting in lack of jurisdiction over such claims.[227] Third, international tribunals adopting the expansive approach assert jurisdiction over specific claims and also make determinations on other aspects of broader disputes.[228]

The territorial dispute over Chagos exemplifies the disaggregation phenomenon. The tribunal in the *Chagos Marine Protected Area Arbitration* adopted the restrictive approach by identifying the "real issue in the case" and, as a consequence, declined jurisdiction over one of Mauritius's submissions.[229] In the *Chagos* advisory proceedings, the ICJ considered whether the United Kingdom's non-consent to settling the territorial dispute by way of contentious proceedings was a basis for declining to give the opinion requested.[230] However, the Court adopted none of the disaggregation approaches set

224. SHANY, *supra* note 223, at 164–67.

225. Hill-Cawthorne, *supra* note 5, at 779.

226. *Id.* at 794–800.

227. *Id.* at 800–04.

228. *Id.* at 805–06.

229. *Id.* at 802. *See* Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Award, 162 I.L.R. 1, ¶ 220 (Perm. Ct. Arb. 2015).

230. Chagos Opinion, *supra* note 23, ¶¶ 83–91.

out above. As framed by the advisory opinion request from the General Assembly, *Chagos* did not concern a specific dispute within a broader framework, but rather the broader framework within which a specific dispute existed. The ICJ read the Assembly's question literally, without inquiry into the effects of a reply, shifting the focus of the opinion away from the specific territorial dispute.[231]

Requests for advisory opinions can be part of a wider litigation strategy aiming to disaggregate disputes. *Chagos* shows that, because the Court effectively decided a dispute as a result of its opinion, the current legal framework on discretion to decline to give advisory opinions already allows disputes to be disaggregated by means of advisory proceedings. The desirability of this phenomenon depends on the circumstances of each dispute, including whether disputes raise issues of concern to the international community. For example, it might be undesirable to request advisory opinions relating to disputes that are essentially bilateral and fall short of threatening international peace and security, especially if asserting advisory jurisdiction against the will of specific States could be perceived as justifying the backlash against international law or have the perverse effect of making settlement politically more difficult. Nevertheless, even in such cases, disaggregating disputes by means of advisory opinions could induce States to settle their differences eventually, instead of leaving them unresolved.

The consequences of advisory opinions on the settlement of disaggregated disputes also depend on the questions asked. Although the Court has suggested that advisory opinions may concern the compatibility of State conduct with international law,[232] requesting organs tend to avoid asking opinions on the main points in any underlying dispute, seeking instead to establish whether the conditions for deciding the main points are satisfied. Sponsoring States seeking to obtain requests for advisory opinions could avoid proposing that the requesting organs ask directly whether specific States are responsible for breaching their obligations under international law. Rather, sponsoring States could propose that advisory opinions focus on whether certain conditions to establish responsibility are met. These conditions may include the existence of a customary rule of international law alleged to have been breached or attribution. In territorial disputes, sponsoring States could focus on the validity of the legal title on which States base their territorial claims.

The attitude of the States involved in a dispute may be decisive in framing questions for an advisory opinion, especially if States agree

231. *See* ARTHUR SCHOPENHAUER, L'ARTE DI OTTENERE RAGIONE 29–31 (29th ed. 2006).

232. *See* Kosovo Opinion, *supra* note 13, ¶ 25.

in advance to accept the opinion and follow certain courses of action depending on its content. Opposition by the States in dispute could even result in questions so broad to encompass, intentionally or not, the main points of those disputes. In *Chagos*, the United Kingdom's blanket refusal to submit the territorial dispute to binding third-party settlement, coupled with the expectation that it would invoke the *Eastern Carelia* doctrine in the advisory proceedings, conceivably led to formulating the questions with the aim of giving the ICJ the cover necessary to exercise advisory jurisdiction. Flexibility in formulating questions for advisory opinions could lead to two distinct results. Limiting the scope of questions could contribute to the disaggregation phenomenon.[233] However, formulating broad questions could bring together several undecided aspects of a wider dispute composed of disparate legal controversies, thus aggregating, rather than disaggregating, that dispute, which may favor its more rapid settlement.

The premises for aggregating disputes by advisory opinions already exist. States seem, and perhaps intend, to show restraint by not framing questions as directly relating to the main points in pending disputes, for example by asking the ICJ to elaborate on the legal consequences of certain situations. In practice, States' restraint can result in conferring on the Court great latitude in formulating its replies. In the *Kosovo* opinion, the ICJ stated that it would not reformulate questions that are "narrow and specific,"[234] while the broadly formulated question in the *Wall* opinion allowed the Court to restrict or enlarge the scope of its reply as it considered appropriate.[235]

If advisory opinions were requested in respect of disputes, sponsoring States could shift their focus towards identifying the issues that need clarification, knowing that the replies to the questions asked would be used to facilitate the settlement of disputes. Non-sponsoring States could evaluate the requests on which they are to vote, considering how they may assist the settlement of those disputes. Moreover, the ICJ could tailor its replies to the purpose for which opinions are requested. This awareness can also determine a more transparent approach to advisory opinions, characterized by streamlined questions and focused answers capable of guiding specific action in the wake of advisory proceedings. As a consequence, aggregation of disputes would contribute to the achievement of the ICJ's dispute settlement goal.

233. *See supra* notes 225–228 and accompanying text.

234. Kosovo Opinion, *supra* note 13, ¶ 51.

235. Wall Opinion, *supra* note 21, ¶¶ 38–39.

2. Rebuilding Confidence in International Adjudication

Because it is premised on the States' unwillingness to consent more widely to the contentious jurisdiction of international tribunals, the disaggregation phenomenon indicates that States tend to lack confidence in international adjudication.[236] Unwillingness to resort to third-party settlement means that more disputes remain unresolved, which may generate threats to international peace and security. Deciding disputes by way of advisory opinions could alleviate the negative effects of simmering disputes between States, with positive effects on the legitimacy and effectiveness of the Court's advisory function.

The ICJ's docket is as busy as it has ever been, but intense activity is not necessarily indicative of confidence in the Court. States have long been averse to accepting the Court's jurisdiction. Writing in 2016, Merrills noted an increase in the number of States accepting the ICJ's jurisdiction under the optional clause,[237] which has marginally increased since then. Yet, States commonly make sweeping reservations to their optional clause declarations, substantially limiting their acceptance of compulsory jurisdiction.[238] The number of treaties that include ICJ compromissory clauses has also declined considerably. Moreover, recent compromissory clauses make access to the Court conditional upon not settling disputes by other means.[239]

Reluctance to accept jurisdiction can affect the settlement of inter-State disputes significantly. An example is the pending ICJ case between the Russian Federation and Ukraine under the ICSFT and CERD. The compromissory clauses of these treaties condition resorting to the Court on the failure of one or more other dispute settlement means. Nearly three years after Ukraine began the case, the Court

236. Campbell McLachlan, *The Assault on International Adjudication and the Limits of Withdrawal*, 68 INT'L & COMPAR. L. Q. 499, 511–12 (2019). *See generally* HAROLD KOH, THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW (2018).

237. Statute of the ICJ, *supra* note 11, art. 36(2). *See* John G. Merrills, *Recent Practice with Regard to the Optional Clause: An Assessment*, *in* THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 2015, 903, 904 (Giuliana Ziccardi Capaldo ed., 2016).

238. Dapo Akande, *Selection of the International Court of Justice as a Forum for Contentious and Advisory Proceedings (Including Jurisdiction)*, 7 J. INT'L DISP. SETTL. 320, 327–28 (2016).

239. *Id.* at 324–25; Christian Tams, *The Continued Relevance of Compromissory Clauses as a Source of ICJ Jurisdiction*, *in* A WISER CENTURY? JUDICIAL DISPUTE SETTLEMENT, DISARMAMENT AND THE LAWS OF WAR 100 YEARS AFTER THE SECOND PEACE CONFERENCE 461, 476–79 (Thomas Giegerich ed., 2009).

found that it had jurisdiction under both treaties.[240] The ICJ is unlikely to decide the merits any time soon. As the scope of the ICJ's jurisdiction *ratione materiae* is limited, Ukraine has not asked it to address alleged breaches of humanitarian law or Crimea's annexation, even if these issues loom in the background.[241] Because the Russian Federation has not accepted ICJ jurisdiction more broadly, aspects of the wider inter-State dispute are currently pending before ITLOS, arbitral tribunals constituted pursuant to Annex VII of the U.N. Convention on the Law of the Sea (UNCLOS), the European Court of Human Rights and investor-State international tribunals.[242]

Advisory opinions could be a more suitable catalyst for settling similarly complex disputes in which no title of jurisdiction allows applications with respect to some of the underlying issues, including those which may be of greatest importance to the States involved. The questions posed could be formulated sufficiently broadly to allow direct or indirect findings on the underlying questions. Imagine a hypothetical request to the Court for an advisory opinion on the legal consequences of the occupation of Crimea by the Russian Federation in 2014. Whether the ICJ should render an advisory opinion addressing an existing, concrete dispute is a question more vital to the international community, between respecting the sovereign interests of States and promoting the peaceful settlement of disputes. Because it can contribute to maintaining international peace, the latter seems to be preferable, especially at a time when a growing number of States openly attack multilateral institutions and processes.[243]

States could still perceive advisory opinions as encroaching upon their sovereign interests, which might determine a further decrease in their confidence in international judicial institutions. States could consider that abandoning the *Eastern Carelia* doctrine challenges their long-held prerogative to consent to their disputes being settled by way of international judicial process. From this perspective,

240. Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ. Fed.), Preliminary Objections, Judgment, 2019 I.C.J. 558, 560 (Nov. 8).

241. *Id.*

242. Hill-Cawthorne, *supra* note 5, at 785–91.

243. Crawford, *supra* note 27; *see also* Stefan Talmon, *The United States under President Trump: Gravedigger of International Law*, 18 CHINESE J. INT'L L. 645, 653–54 (2019). *See generally* Heike Krieger, *Populist Governments and International Law*, 30 EUR. J. INT'L L. 971 (2019). For the opposite view, see Dire Tladi, *Populism's Attack on Multilateralism and International Law: Much Ado About Nothing*, 19 CHINESE J. INT'L L. 369, 380–90 (2020).

it would be abandoning the *Eastern Carelia* doctrine that might damage the legitimacy of the Court's exercise of the advisory function. Yet, this view would build upon a superficial understanding of legitimacy and the role of consent in its assessment.

Moreover, it does not seem evident that exercising advisory jurisdiction in respect of disputes would decisively encourage States not to conclude treaties providing for ICJ dispute settlement and drafting increasingly complex compromissory clauses in multilateral agreements. Certain States might propose that future treaties include novel provisions aimed at facilitating requests for advisory opinions in relation to disputes on the interpretation or application of those treaties. More concerning is the possibility that States, acting individually, may withdraw or limit their acceptance of compulsory jurisdiction under the optional clause. Nonetheless, securing requests for advisory opinions from the competent organs is not simple, regardless of whether opinions in respect of disputes are openly acknowledged or not. Securing such requests would still require serious diplomatic effort and may necessitate civil society involvement. A sudden opening of the floodgates seems unlikely.

3. Advisory Jurisdiction as Referral Jurisdiction

The ICJ's dispute settlement function can also be promoted by envisaging advisory opinions as the product of referral jurisdiction. Reimagining advisory jurisdiction without the *Eastern Carelia* doctrine would provide States with the normative basis for implementation of referral jurisdiction at the Court.

States discussed proposals for referral jurisdiction during the review of the role of the Court.[244] Scholars also elaborated on such proposals. Sohn identified three possible mechanisms of referral jurisdiction: first, advisory requests by general or regional international organizations authorized by the General Assembly; second, advisory requests by States concerning disputes; third, advisory requests by domestic courts on points of international law.[245] Sohn focused his elaboration on the last of these mechanisms.[246] More recently, Strauss

244. See *supra* notes 127–131 and accompanying text.

245. Louis B. Sohn, *Broadening the Advisory Jurisdiction of the International Court of Justice*, 77 AM. J. INT'L L. 124, 125 (1983).

246. Schwebel and Rosenne also discussed this referral from domestic courts. *See generally,* Stephen Schwebel, *Preliminary Rulings by the International Court of Justice at the Instance of National Courts*, 28 VA. J. INT'L L. 495 (1988); Shabtai Rosenne, *Preliminary Rulings by the International Court of Justice at the Instance of National Courts: A Reply*, 29 VA. J. INT'L L. 401 (1989).

argued for a model of referral jurisdiction under which States can request advisory opinions in respect of disputes regardless of the consent of other States.[247] This mechanism would contribute to "cutting the Gordian knot" of global rule of law reform, namely the reluctance of powerful States to perceive that enhancing the rule-based international legal system is in their interest.[248] Strauss proposed creating a Judicial Commission that could refer disputes to the ICJ by way of advisory opinion at the instance of aggrieved States,[249] but recognized that the Court may struggle to render advisory opinions referred to it because of the *Eastern Carelia* doctrine.[250] He argued that the doctrine would not be an obstacle because, since advisory opinions are not binding, the Court would not impinge on sovereignty by exercising advisory jurisdiction in respect of disputes; regardless, sovereignty has been eroded so as to justify giving advisory opinions without the consent of the interest States.[251]

Strauss's argument is unconvincing because it does not address the underlying problems of the *Eastern Carelia* doctrine. The lack of binding force of advisory opinions alone cannot explain why the Court would exercise advisory jurisdiction in respect of disputes referred to it. The issue is one State's lack of consent to binding third-party settlement, which is different from that of the binding character of advisory opinions. Furthermore, advisory opinions have had lasting consequences for international law, despite their lack of binding character.[252] One could also doubt that the creation of a Judicial Commission by the General Assembly would be the most appropriate mechanism for referring advisory cases in respect of disputes to the ICJ.

Abandoning the *Eastern Carelia* doctrine would help the case for referral jurisdiction in respect of disputes by removing the basis on which the Court appears likely to decline to render advisory opinions referred to it. The Court's reluctance to exercise its discretion not to give the opinions requested could suggest that it would also be

247. Andrew Strauss, *Cutting the Gordian Knot: How and Why the United Nations Should Vest the International Court of Justice with Referral Jurisdiction*, 44 CORNELL INT'L L.J. 603, 607 (2011). Strauss was not the first scholar to propose this referral mechanism. *See* Leo Gross, *The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order*, 65 AM. J. INT'L L. 253, 320–22 (1971).

248. *See* Strauss, *supra* note 247, at 606–07.

249. *Id.*

250. *Id.* at 638.

251. *Id.* at 638–40.

252. *See infra* notes 257–269 and accompanying text.

reluctant not to give such opinions should a referral mechanism be implemented. Nevertheless, advisory opinions also relating to pending disputes are different from advisory opinions explicitly requested in respect of pending disputes. One should not expect the Court to approach matters of discretion similarly, because a referral mechanism would specifically aim to obtain third-party decisions on pending disputes, regardless of consent to binding third-party settlement. Moreover, the "broader framework" approach[253] seems unsuitable to justify giving advisory opinions referred to the Court in respect of disputes despite non-consent by the States party to those disputes. If disputes were referred for advisory opinions by the Court, there would be hardly any "broader framework" within which to situate those disputes to avoid not giving the opinions requested on the basis of the *Eastern Carelia* doctrine. The case for referral jurisdiction remains unconvincing for as long as that doctrine exists.

Beyond the *Eastern Carelia* doctrine, one could also doubt that creating a Judicial Commission is the most appropriate manner to implement a referral mechanism. A Judicial Commission could streamline decisions as to whether disputes are fit to be referred for advisory opinions. Questions nonetheless would arise concerning the Commission's composition, its likely politicization and the criteria pursuant to which it would refer disputes for advisory opinions.[254] These and comparable problems are likely to prevent the General Assembly from completing the process to create the proposed Commission. Nor could this process be successful at the Security Council because its Permanent Members would conceivably veto it. Assuming the abandonment of the *Eastern Carelia* doctrine, referral jurisdiction could be implemented without creating a Judicial Commission. The General Assembly could add to its role as requesting organ that of referring organ, which requires no changes in the current modus operandi of the U.N.'s political organs. The General Assembly could ensure that the disputes referred for advisory opinions raise matters not purely bilateral, but also for community interests,[255] which could justify referring disputes for decision without consent. This process is identical to how the General Assembly requested the *Wall* and *Chagos* advisory opinions, both concerning pending disputes in relation to which a State had not accepted binding third-party settlement. This process could be one of

253. *See supra* notes 66–79 and accompanying text.

254. Strauss did not set out which criteria these could be, only writing that "upon criteria of justiciability and standing established by the General Assembly, the Judicial Commission would refer the action to the Court for an advisory opinion." *See* Strauss, *supra* note 247, at 625.

255. *See supra* notes 80–91 and accompanying text.

informal referral, because it requires no formal changes in the current U.N. institutional structure.

Reimagining advisory opinions as means of dispute settlement would not achieve Strauss' aim of "cutting the Gordian knot" of global law reform, but would pursue the more immediate aim of promoting the ICJ's dispute settlement function. By rendering advisory opinions that settle disputes relating to community interests, the Court could further compliance with primary norms of relevance to the international community, such as *jus cogens* or obligations *erga omnes*, which it has already done regarding the right to self-determination in *Wall* and *Chagos*. The Court could thus discharge a more prominent function as guardian of the international community, which it has so far done reluctantly.[256] An informal referral mechanism would ensure that the ICJ's role as guardian of the international community is supported by the States requesting advisory opinions in respect of disputes.

C. Legal Effects of Advisory Opinions

Reimagining advisory opinions as means of dispute settlement would increase transparency as to their legal effects. Contesse's "ruling through advice" model of advisory jurisdiction provides a useful theoretical framework to understand such effects, but one should supplement it by reference to the implications of the recent judgment of ITLOS' Special Chamber in *Mauritius/Maldives*.

1. Transparency

The *Eastern Carelia* doctrine is premised on an artificial distinction between the legal effects of advisory opinions and their actual impact on the relevant States. Abandoning that doctrine would increase transparency as to those effects and their impact. In principle, advisory opinions are not binding. They do not formally impose obligations on States,[257] even if they relate to disputes. Most opinions are requested by the General Assembly, which cannot pass binding resolutions.[258] Conclusions of law reached in advisory opinions can acquire binding force only if the Security Council passes resolutions

256. *See generally* Gleider I. Hernández, *A Reluctant Guardian: The International Court of Justice and the Concept of "International Community"*, 83 BRIT. Y.B. INT'L L. 13 (2012).

257. Interpretation of Peace Treaties First Phase Opinion, *supra* note 15, at 71.

258. U.N. Charter art. 10.

relating to the subject-matter of those opinions.[259] The Security Council has only ever done so once, in the aftermath of the *Namibia* advisory opinion.[260]

The effects of some ICJ advisory opinions may be a matter of debate,[261] but several others have had long-lasting effects on inter-State relations, despite lacking binding character. For example, in *Reparation for Injuries*, the ICJ found that all States had an obligation to recognize the U.N.'s international legal personality, irrespective of being members,[262] and, in *Certain Expenses*, it sanctioned peacekeeping operations authorized by the General Assembly.[263] Advisory opinions on disputes, distinct from opinions on fundamental issues of international law, might entail more modest effects, since they would relate to situation-specific questions. As modest as such effects may be for the wider international community, they would conceivably be more pervasive, and even quasi-binding, for States involved in disputes to which advisory opinions relate.

Whether advisory opinions contribute to resolving an underlying dispute, thus having quasi-binding character, would likely depend on the attitude of the requesting organs, interested States and third States. In the case of disputes, the parties to it could agree in advance to use advisory opinions as bases for settling their controversies. In *Nationality Decrees*, the United Kingdom and France agreed that, if the PCIJ were to find that their dispute was not solely a matter of domestic jurisdiction, they would submit it to arbitration or judicial settlement.[264] Alternatively, States could agree to find negotiated solutions pursuant to advisory opinions on the substantive legal issues underlying their disputes. In *North Sea Continental Shelf*, the Court

259. U.N. Charter art. 25.

260. After the *Namibia* opinion, the Council adopted binding resolutions calling upon South Africa to "withdraw from the territory of Namibia" and demanding that it "make a solemn declaration that it will comply with . . . the advisory opinion of the [ICJ]." *See* S.C. Res. 301, ¶ 8 (Oct. 20, 1971); S.C. Res. 366, ¶ 3 (Dec . 17, 1974).

261. *See, e.g.*, Surabhi Ranganathan, *The ICJ's* Nuclear Weapons *Advisory Opinions (1996)*, *in* LANDMARK CASES IN PUBLIC INTERNATIONAL LAW 409, 430–33 (Eirik Bjørge & Cameron Miles eds., 2017).

262. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 185 (Apr. 11).

263. Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. 151, 163–65 (July 20); *see also* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 267–68 (4th ed. 2018); Thomas D. Grant & Rowan Nicholson, *The Early United Nations Advisory Opinions (1949–62)*, *in* LANDMARK CASES IN PUBLIC INTERNATIONAL LAW, *supra* note 261, at 221, 236–38.

264. Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 8 (Feb. 7).

was asked only to formulate the principles based on which the litigant States would have negotiated their continental shelf boundaries, creating a scenario in which the terms of a special agreement came close to converting a contentious case into an advisory one.[265]

Third States also may have a role to play, especially if advisory opinions recognized that they are obliged to follow a certain course of conduct in respect of the disputes to which those opinions relate. This was the case in the *Wall* opinion, in which the ICJ stated that third States were obliged not to recognize, aid or assist the unlawful situation created by the construction of the wall in the occupied Palestinian territory.[266] In the *Kosovo* opinion, a question was whether States were obliged not to recognize Kosovo, which the Court ultimately did not address.[267]

The view that advisory opinions have limited impact because they lack binding force is unpersuasive.[268] Although advisory opinions are not binding, they have legal effects insofar as they elaborate on questions of international law in a generalized way, thus potentially affecting the entire international community.[269] Abandoning the *Eastern Carelia* doctrine would openly recognize the legal effects that advisory opinions have in practice, which would promote transparency in relation to the results of the exercise of advisory jurisdiction. This increase in transparency could increase the output legitimacy of the Court's advisory function. Abandoning the *Eastern Carelia* doctrine could also avoid situations in which the ICJ or other international tribunals would have to justify upholding the lack of binding character of advisory opinions while recognizing the real-world effects of those opinions on the settlement of the underlying bilateral disputes. The problem of this dilemma is that it requires that international tribunals accept two mutually exclusive alternatives, reducing the cogency of the reasoning in their judicial decision. The Special Chamber in *Maldives/Mauritius* accepted in principle that the *Chagos* opinion was not binding, but, in a manner that appears inconsistent with that position, adopted the determinations of that opinion into its binding preliminary objections judgment.

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265. North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, 1969 I.C.J. 3, 6–7 (Feb. 20).

266. Wall Opinion, *supra* note 21, ¶ 159.

267. Kosovo Opinion, *supra* note 13, ¶ 51.

268. *See* Pratap, *supra* note 26, at 249–54.

269. Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Case No. 21, Advisory Opinion of Apr. 2, 2015, ITLOS Rep. 4, ¶ 1 (Decl. Cot).

Advisory opinions are authoritative statements of the law that can contribute greatly to shaping the shared expectations and understandings of States and other actors in the international community. Advisory pronouncements also exercise pressure on States to conduct themselves according to the law as stated, similar to judgments in contentious cases, which, despite being binding, are practically not more enforceable than advisory opinions. Accepting the exercise of advisory jurisdiction in respect of disputes, irrespective of consent, would not entail effects on States that do not, to an appreciable degree, already exist.

2. "Ruling Through Advice"

That advisory opinions are already dispute settlement means emerges from Contesse's model of advisory jurisdiction as "ruling through advice."[270] He wrote that, compared to its early advisory jurisprudence, the ICJ has recently been more willing to "engage with issues that could very well be addressed under the Court's contentious jurisdiction," as shown by its decisions in the *Wall* and *Chagos* advisory opinions.[271] Through its advisory opinions, the Court can actually rule, not merely opine, on legal matters,[272] in a way that may not be distinguishable from its contentious role.[273] Contesse also set out the factors that international tribunals consider in "modulating" their judicial function, meaning adjusting the intensity of the interaction with their constituents so that their decisions are more likely to be followed.[274] Among the contextual factors, political in character, he includes doctrines of deference and avoidance,[275] of which *Eastern Carelia* seems to be the main one. Contesse appears to accept that advisory opinions can be authoritative statements by which the Court decides disputes, but, to decide how "loudly to speak its advisory voice," the Court considers compliance-related implications from the perspective of the *Eastern Carelia* doctrine. Despite being defined as the exercise of advisory jurisdiction to decide legal matters, Contesse's "ruling through advice" model does not explain, first, how advisory opinions generate legal effects and, second, whether modulation by

270. *See* Contesse, *supra* note 10, at 372–75.

271. *Id.* at 373–74.

272. *Id.* at 374.

273. *Id.* at 372.

274. *Id.* at 378.

275. *Id.* at 380.

reference to doctrines of judicial deference and avoidance can promote compliance.

One could consider that advisory opinions generate legal effects through the informal mechanisms described above.[276] Such mechanisms include acceptance by relevant stakeholders, as in *Reparation for Injuries*, or pushing States to find negotiated solutions to the underlying disputes, as in *Nationality Decrees*. However, the recent ITLOS Special Chamber judgment in *Mauritius/Maldives* shows that there can be other, more formal mechanisms, rooted in the horizontal structure of the international dispute settlement system, for advisory opinions to generate legal effects. *Mauritius/Maldives* stemmed from Mauritius's request for maritime delimitation with Maldives, which presupposed Mauritian sovereignty over Chagos. The Maldives objected to the Special Chamber's jurisdiction on the ground that Mauritius was not sovereign over Chagos because of the existing territorial dispute with the United Kingdom. Commenting on the ICJ's *Chagos* advisory opinion, the Special Chamber held that "the decolonization and sovereignty of Mauritius, including the Chagos Archipelago, are inseparably related."[277] According to the Special Chamber, the Court's finding that the United Kingdom's continued administration of Chagos was unlawful has "unmistakable implications for the [United Kingdom's] claim to sovereignty over the Chagos Archipelago,"[278] including that "Mauritius' sovereignty over the Chagos Archipelago can be inferred from the ICJ's determinations."[279]

The Special Chamber's judgment is binding only on Maldives and Mauritius, but it would be naïve to accept that its legal effects are wholly limited by res judicata.[280] Although the ICJ had already recognized Mauritius's right to exercise sovereignty over Chagos, the Special Chamber's binding judgment endows that right with greater normativity, especially as the Special Chamber recognized that Mauritius has a right opposable *erga omnes*.[281] The judgment also is a statement, additional to the ICJ's determination in the *Chagos* opinion, which

276. *See supra* notes 261–267 and accompanying text.

277. Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives), Case No. 28, Judgment of Jan. 28, 2021, ¶ 189, https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf [https://perma.cc/X6U6-J69N].

278. *Id.* ¶ 173.

279. *Id.* ¶ 246.

280. Case Concerning the Continental Shelf (Libya/Malta), Judgment, 1984 I.C.J. 3, 148, ¶ 28 (Mar. 21) (dissenting opinion by Jennings, J.).

281. *See generally* Bruno Simma, *The Antarctic Treaty as a Treaty Providing for an "Objective Regime"*, 19 CORNELL INT'L L.J. 189 (1986).

Mauritius can invoke in multilateral fora to justify demanding the end of the United Kingdom's administration over Chagos. *Mauritius/Maldives* shows that States wishing to obtain a binding decision on a dispute that they cannot file as a contentious case because of non-consent of another State can seek to request an advisory opinion, only to file a case against a third State that requires deciding the main point of the dispute with the non-consenting State by reference to the determinations in that advisory opinion. *Mauritius/Maldives* suggests that one should develop Contesse's "ruling through advice" model based on the possible interaction of advisory determinations with later contentious decisions in order to explain how the ICJ can decide disputes by advisory opinion.

There also seems to be a link between the "ruling through advice" model and a mechanism of referral jurisdiction.[282] The very existence of that mechanism could enhance the binding character of advisory determinations in respect of disputes. The fact that advisory requests may come from the General Assembly as deliberate decisions to overcome a State's lack of consent to binding third-party settlement could confer greater normative weight to such advisory opinions, because such requests, in principle, should be supported by a majority of States. Because of the same reason, advisory opinions referred to the ICJ would benefit from higher democratic legitimacy, which likely could determine greater pull towards compliance.[283]

Contesse's model does not seem to explain whether modulation by reference to doctrines of judicial deference and avoidance can promote compliance. The ICJ likely formulated the *Eastern Carelia* doctrine while mindful of the States' reluctance to comply with advisory opinions concerning disputes in relation to which they had not accepted binding third-party settlement. However, the doctrine is a misreading of its original judicial authority and lacks basis both in the relevant legal framework and in the very principle of consent that it purports to protect. Abandoning the doctrine could promote the protection of community interests and the legitimacy of the ICJ's advisory function, and could be a way to address political and other tension between States to further international peace and security. The implication of Contesse's view that the ICJ should consider the *Eastern Carelia* doctrine in modulating its "advisory voice" appears misleading. That doctrine distorts the appreciation of the impact that the Court's advisory opinions can have on the settlement of international disputes that raise issues of interest to the wider international community. The Court should consider that the aims of international dispute settlement

282. *See supra* notes 244–256 and accompanying text.

283. *See supra* notes 209–223 and accompanying text.

are better served by modulating its "advisory voice" by reference to other factors, such as the degree to which its advisory opinions can contribute to the settlement of longstanding disputes and assert the primacy of community interests over the bilateral, likely parochial, concerns of States that are reluctant to accept binding third-party settlement.

ADVISORY OPINIONS BEYOND *EASTERN CARELIA*

It is time for the ICJ to move past *Eastern Carelia* and start giving advisory opinions in respect of disputes, regardless of whether States have accepted binding third-party settlement. The *Eastern Carelia* doctrine originated from the misconstruction by the ICJ, in *Interpretation of Peace Treaties*, of the PCIJ's reasoning in the namesake decision. Because of this misconstruction, the doctrine has no basis in the Court's jurisprudence. The Court's application of the doctrine depends on whether a bilateral dispute can be seen to exist within a broader framework. However, this approach is so ill-defined that the ICJ can always situate, or not situate, a dispute within some "broader framework," and no other suggested approaches seem to be sound alternatives to it. In addition to lacking basis in judicial authority, the *Eastern Carelia* doctrine is inconsistent with the rules governing the exercise of advisory jurisdiction. The drafters of the Covenant of the League, the Charter and the ICJ's Statute had envisaged for advisory opinions also to concern bilateral disputes, irrespective of whether the interested States had accepted third-party settlement.[284] States confirmed this position during the 1970–74 review of the role of the Court.[285] Despite the *Eastern Carelia* doctrine's lack of convincing legal basis, its supporters might argue that the doctrine is necessary to protect the principle of consent. This superficially persuasive argument is misleading. Consent to third-party settlement is irrelevant to the Court's jurisdiction in advisory cases and to the admissibility of requests for advisory opinions. Moreover, consent does not affect fact-finding by the Court in advisory proceedings. Questions of utility and compliance of advisory opinions are also unrelated to consent.

Simply considering that the Court has never declined to render an advisory opinion on the basis of the *Eastern Carelia* doctrine, despite being presented with good occasions to do so, is a reason at least to doubt its usefulness in the Court's advisory jurisprudence. The Court's endorsement of an empty "broader framework" approach, the application of which has deprived the *Eastern Carelia* doctrine of

284. *See supra* notes 93–146 and accompanying text.

285. *See supra* notes 147–162 and accompanying text.

significance, is further reason to move past the doctrine. The *Eastern Carelia* doctrine has become that antique piece of silverware that remains stored away most of the time, is displayed only on special occasions, is not even used and is stored back away as soon as the occasion has passed. Whether the ICJ will throw out that antique piece of silverware is a question that only time can answer. The Court is well known for not departing from its established jurisprudence unless "very particular" reasons require it.[286] The Court is unlikely to recant its adherence to the *Eastern Carelia* doctrine in the immediate future, although views to that effect might surface in the judges' individual opinions. The Court seems more likely either to continue upholding the current, empty version of the doctrine, or to draw subtly the inference it did not draw in *Western Sahara*, by clarifying the scope of the doctrine as one concerning not discretion, but the very existence of advisory jurisdiction. The latter course of action would greatly limit the scope of the *Eastern Carelia* doctrine, given the lack in the Charter of a system comparable to Article 17 of the Covenant and near-universal U.N. membership, thus practically abandoning the doctrine. Although the future of *Eastern Carelia* may not be bright, the doctrine will stick around for a while still. How long for is likely to depend on the support of States, or lack thereof, in future advisory proceedings, as well as on the ICJ's willingness to make a "courageous" decision.[287]

Beyond *Eastern Carelia* are cases in which the ICJ may openly give advisory opinions in respect of disputes. Doing so would enhance the legitimacy of the ICJ's exercise of advisory jurisdiction, promote the Court's dispute settlement function and further a better understanding of the legal effects of advisory opinions. Moving past *Eastern Carelia* does not mean that the ICJ may or should render advisory opinions in all requests relating to disputes. Disputes stem from particular facts, which, if contested, must first be established. The ICJ may refuse to give advisory opinions in such cases, or may limit the scope of its advisory opinions, leaving certain aspects of a dispute to be resolved by other, consent-based means. This refusal to render opinions, or to do so in a limited fashion, would anyway not be in the application of the *Eastern Carelia* doctrine.

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286. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Preliminary Objections, Judgment, 2008 I.C.J. 412, ¶ 104 (Nov. 18).

287. Sir Humphrey: "And if you want to be really sure that the Minister doesn't accept it, you must say the decision is 'courageous'." Bernard: "And that's worse than 'controversial'?" Sir Humphrey: "Oh, yes! 'Controversial' only means 'this will lose you votes.' 'Courageous' means 'this will lose you the election'!" *Yes, Minister! "The Right to Know"*, Season 1, Episode 6 (BBC television broadcast Mar. 31, 1980).