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Northwestern University Law Review Vol. 103, No. 2

Comments

THE INTERNATIONAL COURT OF JUSTICE'S ADVISORY JURISDICTION AND THE REVIEW OF SECURITY COUNCIL AND GENERAL ASSEMBLY RESOLUTIONS

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INTRODUCTION

More than sixty years after the creation of the United Nations, the role of its International Court of Justice (ICJ) in exercising review over the factual and legal determinations of the other U.N. principal organs remains unclear. This problem arises when the ICJ must rule, in accordance with international law, on a dispute that the United Nations Security Council and General Assembly have already treated in their political processes. This Comment argues that the ICJ should not undermine the political organs' roles in maintaining international security, but should also avoid excessive

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deference to the legal and factual determinations of those bodies. Further, the ICJ's deference has decreased its legitimacy as an international tribunal. This decreased legitimacy is harmful to the United Nations, to the state parties appearing before it, and to the rule of international law itself.

In addition to deciding contentious disputes between states, the ICJ pronounces on legal questions submitted by the Security Council and the General Assembly in what is known as its "advisory jurisdiction."[1] These legal questions often grow out of conflicts that the Security Council and General Assembly have failed to solve in their political processes. Therefore, to answer an advisory opinion request, the ICJ often deals with Security Council or General Assembly resolutions closely related to the underlying legal question.

The ICJ's consideration of the other principal organs' resolutions during the exercise of its advisory jurisdiction provokes a host of questions: What authority do these resolutions possess? How much weight should the ICJ give to the resolutions' legal and factual determinations? Does the ICJ have the responsibility, or even the authority, to reconsider the factual bases of these resolutions and their legal conclusions? Should it? If the ICJ does reconsider the resolutions, does that action constitute judicial review? And is judicial review prohibited by the U.N. Charter?

In order to answer these questions, this Comment assumes that the judicial autonomy and legitimacy of the ICJ are centrally important to the healthy functioning of the U.N. system. The structural principles embedded in the U.N. Charter mandate that the ICJ not cede control over judicial determinations to political organs guided by the national interests of their member states. The ICJ must bring to bear on international disputes the inherent advantage of the judicial process—an adversarial process that finds true facts and ensures the correct application of international law. This Comment contends that the ICJ should reclaim its judicial independence by rehabilitating its factfinding capabilities and scrutinizing the legal determinations of the U.N. political organs. Otherwise, the ICJ risks lending its imprimatur to resolutions based on political, nonjudicial processes. The ICJ must, however, carefully circumscribe its review of the political organs' resolutions so as not to interfere with the Security Council and General Assembly's responsibility to maintain international security.

This Comment uses organizational theory to examine the ICJ's relation to the U.N. political organs in its advisory jurisdiction. The objective of organizational theory is to better understand the structures, functions, and properties of organizational systems. Organizational theory is especially helpful in the study of the U.N. system because it shows how and why the principal organs coordinate their activity to further the purposes and principles of the United Nations. In particular, this Comment uses organizational

[1] *See* U.N. Charter art. 96, para. 1 ("The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.").

theory to show how the ICJ endangers its institutional legitimacy by rendering advisory opinions on matters on which the General Assembly and Security Council have already ruled. Organizational theory also points to a different behavioral model, where the ICJ can be more assertive and less deferential to the political organs.

To illustrate the organizational and legal dynamic of the ICJ's advisory jurisdiction, this Comment examines at various points the ICJ's recent advisory opinion on Israel's construction of a security wall in the West Bank.[2] That opinion held that the wall violated international humanitarian law and international human rights law, and ordered Israel to remove the portions of the wall located in the West Bank.[3] However, the Security Council and General Assembly had already passed resolutions reaching the same conclusion before requesting the advisory opinion. Nineteen days before the submission of the advisory request, the General Assembly passed Resolution ES-10/13 declaring that the wall violated international law and ordering its removal.[4] A lengthy dossier submitted with the advisory request, comprising relevant Security Council and General Assembly resolutions, as well as U.N.-commissioned factfinding reports, formed the factual basis of the ICJ's decision.[5] The reliability of these reports sponsored by the General Assembly may be drawn into question.[6] Apart from compiling written statements that mainly opposed the court's exercise of jurisdiction, the ICJ did not gather evidence outside of this dossier. It is unsurprising that the ICJ, in relying on the same universe of facts that the General Assembly had when it passed Resolution ES-10/13, arrived at the same conclusion as the General Assembly regarding the illegality of the wall.

The *Wall Opinion* illustrates the risk to the court's institutional legitimacy—as well as to international law as a whole—when the ICJ defers to the factual and legal determinations of the political organs. If the ICJ is to expand its role in fact-intensive disputes such as those involving international human rights, it should bolster its factfinding capacity so that it may act less like an appellate body and more like a trial court of first instance.

Part I of this Comment examines how and why the ICJ has abdicated its judicial function in its advisory jurisdiction and why this is harmful to the United Nations, to litigants before it, and to international law as a whole. Using organizational theory, this Part focuses on the institutional structure of the United Nations to show that the ICJ coordinates its activity

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[2] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter *Wall Opinion*].

[3] *Id.* at 201–02.

[4] G.A. Res. ES-10/13, U.N. Doc. A/RES/ES-10/13 (Oct. 27, 2003).

[5] The Secretary General, *Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13*, U.N. Doc. A/ES-10/248 (Nov. 24, 2003) [hereinafter Report of the Secretary General].

[6] *See infra* Part III.A.

with the political organs in order to avoid institutional isolation and to reduce antagonism between the organs. While rendering an opinion in line with the political preference of the requesting organ is not in itself problematic, a practice of deferring to the political will of the other principal organs poses a threat to the court's legitimacy. The ideal interaction with the requesting organ should involve a certain amount of competition, which would bolster the autonomy of the court and the legitimacy of its decisions.

Part II discusses how the ICJ may assert its independence in the exercise of its advisory jurisdiction by reconsidering the legal effects of prior General Assembly and Security Council resolutions. Because the legal effects of these resolutions are often inextricably linked to the question pending before the court, a revitalized ICJ must know the legal parameters of this review. Because the U.N. Charter is silent on these legal effects, the parameters of this review must be drawn from structural principles underlying the distribution of responsibilities and competencies among the organs. The ICJ has a Charter-derived duty to exercise jurisdiction over the interpretation of international law, regardless of the legal determinations made in prior General Assembly or Security Council resolutions. In order to interpret international law, the ICJ must to some extent review these legal determinations. In addition, it is a practical reality that review of prior General Assembly and Security Council resolutions will take place as an incident to adjudication.

Part III examines how the ICJ may increase its judicial independence by examining the reliability of the political organs' factfinding. The political organs are ill-suited to the task of providing a balanced factual record for the court because they have incentives to pursue the national interests of their respective member states rather than to find true facts. This Part concludes that in order to correct these deficiencies—which produced deleterious effects on the legal reasoning of the *Wall Opinion*—the court should enlarge its factfinding capacity by tapping the unused potential of its evidentiary powers. In reestablishing control of the legal and factual determinations underlying the resolutions of the political organs, the ICJ will go a long way towards regaining its judicial independence.

I. THE ICJ'S ADVISORY JURISDICTION

A. The U.N. Charter and the Principal Organs

A traditional critique of international law is that it lacks an adequate enforcement mechanism to ensure state compliance with international norms.[7] The United Nations' predecessor, the League of Nations, lacked an

[7] Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentation?*, 25 MICH. J. INT'L L. 929, 931 (2004) (noting that international law has been criticized as "soft law" due to a lack of effective enforcement).

effective political organ to identify violations of international norms against aggression and coordinate collective action to ensure peace.[8] The failure of the League of Nations to prevent World War II influenced the formation of the United Nations and its distribution of responsibilities among the principal organs.[9]

The Security Council is an enforcement body with broad power to identify the existence of any threat to the peace, breach of the peace, or act of aggression.[10] In granting the Security Council "primary responsibility" for the maintenance of peace and security, the founders sought to ensure prompt and effective action by the United Nations against security threats.[11] The Security Council—with its broad grant of enforcement power—was to police this "new order" based on the rule of law.[12]

Chapter VII of the U.N. Charter authorizes the Security Council to police acts of aggression.[13] Security Council resolutions passed under chapter VII to maintain international peace and security are binding on member states.[14] Although some commentators have argued otherwise, it is generally acknowledged that the ICJ may not invalidate Security Council resolutions passed under chapter VII.[15] The Security Council also possesses recommendatory power under chapter VI to further the settlement of disputes between member states.[16] This recommendatory power stands in contrast to the binding nature of the Security Council's chapter VII enforcement authority to curb acts of aggression. Chapter VI of the Charter provides that legal disputes should be referred to the ICJ in accordance with

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[8] *See* Eric Stein, *The United Nations and the Enforcement of Peace*, 10 MICH. J. INT'L L. 304, 305 (1989) (tracing failure of League of Nations to lack of definitive norms on aggression and lack of effective enforcement).

[9] Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576, 584 (2003) ("The United Nations Charter is appropriately read, even now, as an attempt to overcome the failures of Woodrow Wilson's League of Nations and its covenant of inaction.").

[10] U.N. Charter art. 39.

[11] *Id.* art. 24, para. 1.

[12] *See* Thomas M. Franck & Faiza Patel, *U.N. Police Action in Lieu of War: "The Old Order Changeth"*, 85 AM. J. INT'L L. 63, 68–71 (1991) (discussing the "new order" and the Security Council's powers under the U.N. Charter).

[13] U.N. Charter ch. VII.

[14] *Id.* art. 25.

[15] *See* Babback Sabahi, *The ICJ's Authority to Invalidate the Security Council's Decisions Under Chapter VII: Legal Romanticism or the Rule of Law?*, 17 N.Y. INT'L L. REV. 1, 1 (2004) (arguing that the ICJ possesses the authority to invalidate the Security Council's resolutions under chapter VII of the U.N. Charter, but has so far abstained from exercising this power).

[16] U.N. Charter ch. VI (arts. 33–38).

the ICJ statute.[17] Critics remark that the Security Council has generally failed to refer disputes to the ICJ, instead deciding legal disputes itself.[18]

Unlike the Security Council, which has binding authority in areas of international security, the General Assembly's powers are largely recommendatory and investigatory. The Charter authorizes the General Assembly to debate questions relating to the "maintenance of international peace" and make recommendations to either member states or the Security Council.[19] The General Assembly may also make recommendations to promote international cooperation and "assist[] in the realization of human rights and fundamental freedoms."[20] The Charter does not mandate, however, that member states agree to carry out the recommendations of the General Assembly, as it does for decisions of the Security Council.

The General Assembly, in its ability to initiate studies and form committees, is legislative in nature. The Charter also entrusts the General Assembly with administrative oversight of the United Nations' budget and financial arrangements with the its specialized organs.[21] The Charter does not, however, vest the General Assembly with the authority to make law.[22]

The chairman of the U.N. conference at San Francisco[23] declared that the function of the General Assembly was to "establish the principles on which world peace and the ideal of solidarity" had to rest.[24] This essentially advisory role stood in contrast to that of the Security Council—to prevent breaches of world peace.[25] The founders of the United Nations intended the General Assembly to be a "creative body," while the Security Council stood as "an organ of action."[26] The General Assembly, however, has since transformed itself into a more active organ.[27] In 1950, the General Assembly passed the "Uniting for Peace" resolution, whereby it declared its authority to recommend the use of armed force if the Security Council failed to exercise its primary authority for the maintenance of world peace.[28] Although

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[17] *Id.* art. 36, para. 3.

[18] *See* Ernst-Ulrich Petersmann, *Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?*, 31 N.Y.U. J. INT'L L. & POL. 753, 783 (1999) (arguing that the Security Council should refer more international disputes to the ICJ).

[19] U.N. Charter art. 11, paras. 1–2.

[20] *Id.* art. 13, para. 1.

[21] *Id.* art. 17.

[22] Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 155 (2005) (noting that the General Assembly lacks authority to make law).

[23] Delegates of the League of Nations met in San Francisco in 1945 to draw up basic principles of the future United Nations. *See* A.S. MULLER, THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS 3 (1997).

[24] U.S. DEP'T OF STATE, THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO, CALIFORNIA, APRIL 25 TO JUNE 26, 1945: SELECTED DOCUMENTS 706 (1946).

[25] *Id.*

[26] *Id.*

[27] *See* HANS KELSEN, THE LAW OF THE UNITED NATIONS 206 (1964).

[28] G.A. Res. 377(V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775 (Nov. 3, 1950).

such an active role for the General Assembly arguably infringes on the Security Council's chapter VII duty to ensure collective security, neither the Security Council nor the ICJ has sought to curtail the General Assembly's authority in this area.[29]

The ICJ is largely modeled on its predecessor court, the Permanent Court of International Justice, established by the League of Nations in 1922.[30] Unlike the Permanent Court of International Justice, which was not formally part of the League of Nations, the ICJ is a principal organ of the United Nations as well as its principal judicial organ.[31]

The ICJ's two primary types of jurisdiction are "contentious jurisdiction" and "advisory jurisdiction." Contentious jurisdiction is based on the consent of the parties to be bound by the court's ruling.[32] The ICJ does not require that this consent be in any particular form; the court can even infer consent from the conduct of the parties.[33] Once the ICJ has established jurisdiction over state parties under its contentious jurisdiction, the court can rule on the legal rights of those state parties, but it cannot affect the rights of other states that are not party to the dispute. Only states can be parties in cases before the fifteen-member court, though a state need not be a U.N. member to appear.[34]

Member states may request that the court exercise jurisdiction over any dispute involving the interpretation of a treaty or international law, or the "existence of any fact which, if established, would constitute a breach of an international obligation."[35] In deciding cases under its contentious jurisdiction, the court must rule in accordance with international law. The statute establishing the court specifies that international law is limited to international conventions, international custom, and general principles of law "recognized by civilized nations."[36]

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[29] MULLER, *supra* note 23, at 45.

[30] The ICJ Statute is based upon the Statute of the Permanent Court of International Justice. U.N. Charter art. 92.

[31] *Id.* arts. 7, 92; *see* Protocol of Signature Relating to the Statute of the Permanent Court of International Justice Provided for by Article 14 of the Covenant of the League of Nations arts. 1–6, Dec. 16, 1920, 6 L.N.T.S. 380 (1921).

[32] Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (holding that the consent of the state parties to a dispute is the basis of the court's jurisdiction in contentious cases).

[33] Corfu Channel (UK v. Alb.), 1949 I.C.J. 4, 13–18 (Mar. 25) (inferring consent from the United Kingdom's application to the ICJ and subsequent actions by Albania indicating acceptance of jurisdiction).

[34] *See* Statute of the International Court of Justice arts. 34–35, June 26, 1945, 59 Stat. 1055, 3 Bevans 1153 [hereinafter ICJ Statute].

[35] *Id.* art. 36, para. 2.

[36] *Id.* art. 38, para. 1.

B. An Organizational Theory Analysis of the ICJ's Advisory Jurisdiction

1. Mechanics of the Advisory Jurisdiction.—In addition to its contentious jurisdiction, the ICJ possesses an advisory jurisdiction in which it entertains requests on legal questions submitted to it by the General Assembly or the Security Council.[37] The advisory opinion request must be "accompanied by all documents likely to throw light upon the question."[38] State consent, while required for the exercise of contentious jurisdiction, is not required for the court to exercise advisory jurisdiction.[39]

The ICJ has broadly construed its advisory jurisdiction to include complex factual disputes or political issues.[40] While prohibited in federal courts in the United States,[41] some American state courts permit advisory opinions,[42] where state legislators can request a judicial opinion on the constitutionality of a proposed law.[43] However, the advisory jurisdiction of the World Court differs from this practice in that ICJ advisory opinions have often involved hotly debated political disputes,[44] as well as legal questions embedded in broader bilateral disputes between nations.[45]

2. The ICJ's Deference to U.N. Political Organs.—Before explaining why the ICJ defers to the preferences of the political organs, it is useful to stress in what ways the ICJ's lack of independence and legitimacy harms the international community. First, a judicial body that is not following its charter and deciding cases according to international law is subverting the

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[37] *Id.* art. 65, para. 1.

[38] *Id.* art. 65, para. 2.

[39] *See id.* arts. 26, 68 (requiring that states consent in contentious matters and that the ICJ consider principles of propriety for contentious matters when giving advisory opinions); *see also* Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 20 (Oct. 16) (noting that lack of state consent does not deprive the ICJ of jurisdiction, but is considered when determining the propriety of rendering an advisory opinion).

[40] *See Wall Opinion*, 2004 I.C.J. 136, 153–54 (July 9) (noting that complex factual issues and political elements in advisory requests do not preclude exercise of advisory jurisdiction).

[41] Letter from Chief Justice John Jay and Associate Justices (July 20, 1793), *in* 3 JOHN JAY, CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 487, 487–89 (Henry P. Johnston, ed., New York, G.P. Putnam & Sons 1891).

[42] RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 98 (5th ed. 2003) (noting that eleven states permit their highest court to render advisory opinions).

[43] See, for example, *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004), where the Massachusetts Senate requested an opinion on the constitutionality of a bill that would prohibit same-sex couples from marrying.

[44] See 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, 23 (June 21) [hereinafter *Namibia*] (noting the political pressure surrounding South Africa's withdrawal from Namibia).

[45] *Wall Opinion*, 2004 I.C.J. at 158–59 (conceding that the dispute involves a bilateral matter between Israel and Palestine).

rule of international law. Even those who believe a delegitimized ICJ would be a net positive, whether from a law and economics point of view or even a general aversion to international law, must admit that a tribunal's failure to give fair judicial process and vindicate the rights of parties before it is problematic. Second, a delegitimized ICJ harms the long term effectiveness of the United Nations as a whole because that institution no longer has the force of law at its side. Further, because the ICJ is a principal organ of the United Nations, a corruption of the ICJ's core function is already a direct harm to the organization. Third, the ICJ's lack of independence is a blow to all international tribunals who seek state compliance with their decisions. While it is possible that some international tribunals could gain in prestige at the direct expense of the ICJ, it seems more likely that all boats will rise with the tide—other regional and regulatory tribunals will benefit from the positive example of international justice dispensed by the ICJ.

With these harms in mind, this Comment now turns to the institutional relationship of the principal organs of the United Nations and how this relationship affects the organs' behavior in the exercise of the ICJ's advisory jurisdiction. By virtue of the court's status as "principal judicial organ" of the United Nations, the ICJ shares the goals of the U.N. system.[46] Like all other principal organs in the U.N. system, the ICJ has a duty to further the purposes and principles of the United Nations, which are to "maintain international peace and security," and "take effective collective measures for the prevention and removal of threats to the peace."[47] The advisory function of the ICJ serves as a vehicle for the court's participation in the "Purposes and Principles" of the U.N. Charter.[48]

Proponents of the advisory jurisdiction argue that by rendering advisory opinions, the court can place another organ's operation upon a "firm and secure foundation."[49] Judge Bedjaoui has written that the court's advisory function takes into account the "the preoccupations and difficulties" of the political organs and selects the interpretation of the U.N. Charter "which best serves the actions and objectives of the political organ concerned."[50] For instance, in the *Wall Opinion*, the court explained that its obligation to clarify a legal issue for the General Assembly outweighed any concerns about the judicial propriety of adjudicating an ongoing political dispute and armed conflict between Israel and Palestine.[51] The court thus stressed the service it was providing to another U.N. organ, while deemphasizing the

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[46] MOHAMED SAMEH M. AMR, THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AS THE PRINCIPAL JUDICIAL ORGAN OF THE UNITED NATIONS 22 (2003).

[47] U.N. Charter art. 1, para. 4.

[48] *Id.* ch. 1.

[49] AMR, *supra* note 46, at 78 (quoting Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, 1982 I.C.J. 325, 347 (July 20)).

[50] MOHAMMED BEDJAOUI, THE NEW WORLD ORDER AND THE SECURITY COUNCIL: TESTING THE LEGALITY OF ITS ACTS 22 (1994).

[51] *Wall Opinion*, 2004 I.C.J. 136, 157–58 (July 9).

opinion's direct effect on Israel or Palestine: "The Court's Opinion is given not to the States, but to the organ which is entitled to request it."[52] The ICJ characterized the opinion as one that "the General Assembly deems of assistance to it in the proper exercise of its function."[53] The court placed the matter "in a much broader frame of reference than a bilateral dispute," as it was "of particularly acute concern to the United Nations."[54]

The court is strongly inclined to not only answer a request for an advisory opinion, but to facilitate the larger aims of the United Nations by arriving at a conclusion in line with the preferences of the political organs.[55] Judge Azevedo has stated that the court "must do its utmost to co-operate with the other organs with a view to attaining the aims and principles that have been set forth."[56] The closer the institutional connection of the ICJ to the requesting organ, the greater the usefulness of that opinion to the operation of the requesting organ.[57] However, the advisory function threatens the institutional legitimacy of the court because it often adjudicates disputes without the consent of the relevant states,[58] and the political organ making the request has often already ruled on the issue.[59]

3. Organizational Theory: Cooperation and Competition Within the U.N. System.—Organizational theory provides further illustration of why the ICJ's advisory jurisdiction is not functioning as a check on the actions of the political organs. By examining the benefits and drawbacks of coordination among and within organizations, organizational theory predicts the most efficient modes of cooperation.[60] Applying principles derived from studies of coordination mechanisms within organizations, it appears that the ICJ is likely motivated to undertake advisory opinions out of a fear of institutional isolation and marginalization.[61] An organization might "seek[] to

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[52] *Id.* at 158.

[53] *Id.* at 159.

[54] *Id.*

[55] *See* MAHASEN M. ALJAGHOUB, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT OF JUSTICE 1946–2005, at 76 (2006) (noting the ICJ's readiness to contribute to the United Nations' larger goals and render an opinion that will be of use to the requesting organ).

[56] Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania, Advisory Opinion, 1950 I.C.J. 79, 82 (Mar. 30) (separate opinion of Judge Azevedo).

[57] *See* ALJAGHOUB, *supra* note 55, at 79.

[58] The advisory function's capacity to circumvent the principle of state consent has been a central concern for advisory opinions. *See* Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 23–25 (Oct. 16) (discussing Spain's lack of consent to an adjudication with Morocco in an advisory jurisdiction context).

[59] *See Namibia*, 1971 I.C.J. 16, 45, 51 (June 21) (finding South Africa's continued presence in Namibia illegal); *see also Wall Opinion*, 2004 I.C.J. at 148–58 (discussing previous General Assembly and Security Council resolutions).

[60] *See* DAVID L. ROGERS & DAVID A. WHETTEN, INTERORGANIZATIONAL COORDINATION: THEORY, RESEARCH, AND IMPLEMENTATION 3 (1982); *see also* ARTHUR G. BEDEIAN, ORGANIZATIONS: THEORY AND ANALYSIS 143–44 (1984).

[61] DENNIS DIJKZEUL, THE MANAGEMENT OF MULTILATERAL ORGANIZATIONS 65 (1997).

forestall or prevent future crisis which may imperil its success or even continuation."[62] Because organizations have incentives to increase their authority and prestige,[63] the court is unlikely to decline the opportunity to contribute to the progress of international law by rendering an advisory opinion. Given the institutional incentives for rendering advisory opinions, the ICJ will continue to do so as long as the perceived benefits of cooperation outweigh the loss in judicial autonomy.[64] Similarly, the political organs will make requests as long as the perceived advantages to their respective operations outweigh any losses to their political autonomy.[65]

The ICJ's reliance on the political organs to enforce compliance with its decisions incentivizes the court not only to take on advisory opinions, but to give opinions in accordance with the political preferences of the requesting organ. The forms of interaction between the ICJ and the requesting organ can be mapped onto a "coordination matrix," in which the x-axis represents their degree of interdependence, and the y-axis represents their degree of antagonism.

The main impediment to coordination between the ICJ and the political organ is "the thin line between cooperation and competition."[66] If the degree of interdependence is high and the degree of antagonism is high, the result will be competition and conflict.[67] By contrast, if the degree of interdependence is high and the degree of antagonism is low, the result will be cooperation.[68] The ICJ has an incentive to reduce competition and increase smooth cooperation in order to avoid alienating the requesting organ and risking institutional isolation.

4. Coordination in ICJ Caselaw.—If we map the interaction of the ICJ and the General Assembly in the *Wall Opinion* onto this matrix, we see a high level of interdependence and a low level of antagonism. This low level of antagonism is due to the court's incentive to contribute to the shared goals of the United Nations, as reflected in the stated policy preference of the General Assembly. The resultant cooperation between the two organs furthers the shared mission of the United Nations. By systematizing coordination through a process that provides the court with "an exact state-

[62] ALJAGHOUB, *supra* note 55, at 75.

[63] *See* BEDEIAN, *supra* note 60, at 110 (discussing formulation of goals such as authority and prestige).

[64] *See* DIJKZEUL, *supra* note 61, at 65 (noting that "[m]utual adjustment implies the loss of autonomy" and that this fact must be weighed against the benefits of coordination).

[65] KENNETH JAMES KEITH, THE EXTENT OF THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 155 (1971) (suggesting that political organs may consider an advisory request as a commentary on their lack of competency to decide political issues).

[66] *Id.* at 65.

[67] *Id.* at 63.

[68] *Id.*

ment of the question" as well as a "voluminous dossier"[69] of documents "likely to throw light on the question,"[70] the court is unlikely to conduct its own investigation outside of the given universe of documents. From an organizational theory perspective, the court will not engage in its own extensive review of the background material and facts, because such a duplicative inquiry would bring the court into competition with the functioning of the requesting organ. Reliance on the resolutions and factual studies made by the political organs increases the likelihood that the court will render an opinion in line with the policy preferences of the political organ.

The results of such a model have been borne out in the court's caselaw. The League of Nations established a mandate system after World War I to administer former German colonies and certain Arabic-speaking territories of the defunct Turkish Empire.[71] Upon the demise of the League of Nations, the United Nations Charter provided for a trusteeship system modeled on that of the League's mandate system.[72] South Africa, however, refused to relinquish control to the United Nations over South West Africa.[73] Between 1949 and 1971, the ICJ issued four advisory opinions and two judgments regarding this dispute between South Africa and the United Nations over control of South West Africa. In a 1949 advisory opinion, the court held that South Africa had no legal obligation to place South West Africa—now Namibia—under a trusteeship with the United Nations.[74] The General Assembly advocated South Africa's withdrawal from South West Africa, and the court's opinion sided with South Africa, finding in favor of a continuation of the trusteeship agreement. The opinion weakened the court's credibility, especially among African nations. The coordination matrix in this iteration would show the court in competition and conflict with the General Assembly. The loss of political capital to the General Assembly outweighed any potential benefit of further coordination with the court on the issue, and as a result, the General Assembly never revisited the issue with the court.

Then in 1970, the Security Council took up the issue with the ICJ. The Security Council requested an advisory opinion on the legal consequences of South Africa's continued presence in Namibia.[75] The request was seen as

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[69] *See Wall Opinion*, 2004 I.C.J. 136, 161 (July 9) ("[T]he Court has at its disposal the report of the Secretary General, as well as a voluminous dossier submitted by him to the Court.").

[70] ICJ Statute, *supra* note 34, art. 65, para. 2.

[71] *See* League of Nations Covenant art. 22.

[72] U.N. Charter arts. 75–91.

[73] For a primer on the dispute, see generally SOUTH WEST AFRICA/NAMIBIA DISPUTE: DOCUMENTS AND SCHOLARLY WRITINGS ON THE CONTROVERSY BETWEEN SOUTH AFRICA AND THE UNITED NATIONS (John Dugard ed. 1973).

[74] *See* International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. 128, 143 (July 11).

[75] *See Namibia*, 1971 I.C.J. 16, 17 (June 21).

an opportunity for the court to "redeem its impaired image,"[76] because its advisory jurisdiction had gone unused since 1962. The Security Council had already passed Resolution 276, which strongly condemned the "illegal" presence of South Africa in Namibia.[77] In this iteration of coordination, the court cooperated with the Security Council by holding that South Africa's presence in Namibia was illegal—an opinion in line with the clear political preference of the Security Council.[78] In rendering a cooperative opinion that effectively mirrored the Security Council's resolution on the issue, the court avoided conflict with the political organ, repaired its image, and staved off institutional marginalization.

5. Fear of Institutional Isolation.—While this coordination effect has positive value as an explanation of the ICJ's behavior, it should not be seen as normative. The ICJ overestimates the institutional benefits it receives from such coordination. The fear of institutional isolation motivates the ICJ to defer to the political organs, but there is little evidence that behaving in such a way increases the frequency of advisory requests that the court receives in the long term. If the court were correct in the assumption that advisory opinions deferring to the preferences of the political organs lessen the court's marginalization and increase the volume of its advisory jurisdiction caseload, there would be an increase in the frequency of advisory opinions after the ICJ renders a deferential advisory opinion.

Although advisory requests followed two and then four years after the deferent South West Africa opinion, a statistical breakdown of the court's advisory docket shows no long-term changes in the frequency of opinions rendered from its first opinion in 1947 to its most recent in 2004. The court averages approximately four advisory opinions per decade. As of 2008, the court has not received another advisory request since the *Wall Opinion*. Furthermore, the court will likely have a below-average number of advisory opinions this decade, despite the accommodation it provided the General Assembly in the cooperative *Wall Opinion*.[79]

Interestingly, while the court is concerned about institutional marginalization and orders its behavior in rendering advisory opinions accordingly, the motivation of the political organs in requesting advisory opinions proves to be more complex. First, the Security Council or General Assembly may refer a dispute to the ICJ's advisory jurisdiction when the intractability of the dispute does not lend itself to political resolution. Second, a referral to the ICJ's advisory jurisdiction can take place if the particular dispute is susceptible to judicial resolution—if the ICJ can help the organ

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[76] U.N. SCOR, 26th Sess., 1550th mtg. at ¶ 83, U.N. Doc. S/PV.1550 (July 29, 1970) (Statement of Nepal).

[77] S.C. Res. 276, ¶ 2, U.N. Doc. S/RES/276 (Jan. 30, 1970).

[78] *See Namibia*, 1971 I.C.J. at 65 ("The Court [has] arrived at the conclusion that the Mandate has been terminated and that the presence of South Africa in South West Africa is illegal . . . .").

[79] The ICJ in its advisory jurisdiction heard three cases in the 1990s and five in the 1980s.

overcome a political impasse by settling a question of international law. Third, if the political organ doubts the utility of the advisory opinion it will receive, or fears an opinion not in line with its political preferences, it can take steps ex ante to make known its preferences before the court composes its opinion. Therefore, a political organ's perception of the ICJ's autonomy to render an opinion not in line with the organ's political preference is just one of three factors that may determine when the ICJ will be asked to exercise its advisory jurisdiction. Thus, the court's fear of marginalization is overblown; the factors determining when the other organs will refer a dispute to its advisory jurisdiction depend more on the peculiar nature of the dispute than on the court's perceived deference to the political will of the Security Council or General Assembly. In other words, the General Assembly's decision to refer the question of the legality of the wall in Palestine to the ICJ depended more on the exigencies of that particular situation—namely, the need for a legal and not political resolution—than on the ICJ's recent record of deference to the General Assembly in its advisory jurisdiction.

6. Towards a Revitalized Advisory Jurisdiction.—In light of the cost in loss of judicial autonomy and reduced institutional benefits, the court should defer less to the requesting organ. The court should thus be more competitive by undertaking its own factfinding and by rendering decisions that may not align with the political preferences of the requesting organ. The result of such an undertaking would be more independent and legitimate advisory opinions.

By asserting its jurisdiction over factfinding and legal interpretation, the ICJ would signal to the requesting organ that the function each organ was to perform had changed. In the long term, the functional differentiation of each organ would shift to accommodate the court's new role, and the organs could ultimately resume a cooperative interaction. The political organs would continue to request opinions because the benefit of receiving truly independent advisory opinions would outweigh the risk of an opinion not in line with their political preferences.

More authoritative statements of the law would provide a better enforcement mechanism for the political organs to police the behavior of states that have violated their legal obligations. Especially when an opinion is both a product of an independent court and in line with the political preference of the enforcing body—the General Assembly or the Security Council—those bodies will have a much stronger case for enforcement over nations that are in violation of international law.

While it is possible that advisory opinions not in line with the political preferences of the political organs will have even *less* enforcement value than those that are deferent to the political organs, this situation would only highlight that the political organs are not acting on firm legal footing. Consequently, when an ICJ advisory opinion proves the enforcing bodies' legal

position to be unfounded, that legal position will be less persuasive in the international community. Needless to say, if the ICJ can stop the political organs from enforcement actions over states that are based on incorrect interpretations of international law, that is a good thing. One would also hope that a particularly well-reasoned ICJ advisory opinion would persuade the political organs to adopt that position in enforcement actions against noncompliant states.

Of course, a revitalized advisory jurisdiction could potentially reduce the frequency of advisory opinion requests, even in the long term, if the political organs do not recognize the benefits of independent and legitimate advisory opinions. It is certainly possible that the political organs will simply stop using the advisory jurisdiction after they realize that the ICJ will no longer puppet their political positions before ever witnessing the positive effects of increased judicial independence. There is reason to believe, however, that the advisory jurisdiction will remain relevant to international dispute settlement, despite the misgivings of the political organs. First, there is the problem of state consent to contentious jurisdiction: the political organs may be forced to refer disputes to the advisory jurisdiction where states do not or cannot (in the case of the Palestinians on the West Bank) give consent to contentious jurisdiction. Second, the judicial independence of the ICJ will be even more important as states refuse to give their consent to contentious jurisdiction. After all, if Israel had felt that it would have gotten a fair shake at the ICJ, it might have cooperated with the court's proceedings. Third, the urgency of international crises may trump any political considerations relating to institutional organization issues. If the members of the General Assembly were to find themselves at a political impasse in a time of international crisis, a strong advisory opinion from the ICJ would be hard to overlook

This model for a revitalized advisory jurisdiction has the additional advantage of better serving the shared goals of the U.N. system. In reclaiming its judicial autonomy within its advisory jurisdiction, the court would aid the United Nations' settlement of international disputes "in conformity with the principles of justice and international law."[80] In contrast, an opinion that reproduces the politically determined legal conclusion of the requesting organ would not further this goal, because such an opinion abdicates judicial responsibility to the political organ.

II. THE ICJ'S REVIEW OF GENERAL ASSEMBLY AND SECURITY COUNCIL RESOLUTIONS IN THE EXERCISE OF ITS ADVISORY JURISDICTION

Any discussion of a less deferent ICJ requires an examination of how the ICJ should treat General Assembly and Security Council resolutions in

[80] U.N. Charter art. 1, para. 1.

the exercise of its advisory jurisdiction. In the exercise of its advisory jurisdiction, the ICJ will often encounter resolutions by the political organs that are inextricably linked with the legal question at the root of the case. Therefore, any argument urging a more independent role for the ICJ in its advisory jurisdiction must first characterize the legal effects of these resolutions and address how, as a legal matter, the ICJ must treat them in its decisional process. Only after these clarifications may this Comment address the ways in which the ICJ can increase its independence vis-à-vis the political organs through the reconsideration of both law and fact.

Unfortunately, the Charter contains no provisions directly addressing the ICJ's review, interpretation, or invalidation of Security Council and General Assembly resolutions. The legal effects of these resolutions must therefore be interpreted through the structural principles within the Charter, the authority and competencies of the organs, and the caselaw of the ICJ. Although there is no hierarchical relation between any of the principal organs of the United Nations, the ICJ is the principal "judicial" organ,[81] and its primacy in that arena should privilege its legal determinations over those of the political organs. This Part argues that the ICJ should not compromise its judicial character[82] by disregarding Article 36(2) of its Statute, which requires that the court exercise jurisdiction over matters of international law.[83] Review of any resolutions interpreting international law is incidental to this Charter-derived responsibility.

A. The Political Organs' Quasi-Judicial and Quasi-Legislative Resolutions

As Judge Ni in the *Nicaragua* case stated: "The Council has functions of a political nature assigned to it, whereas the court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events."[84] As long as the political organs do not extend their authority into judicial and legislative matters, the cooperation model may function correctly. However, as the political organs have flexed their muscles in the post-Cold War world, their functions have begun to overlap with those of the court. The court's judicial criteria provide a necessary complement to the political methods employed by the other organs. Without ICJ review, the political organs may continue to create legal norms through nonlegal processes.

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[81] U.N. Charter art. 92.

[82] *Wall Opinion*, 2004 I.C.J. 136, 161 (July 9) (stating that in exercising advisory jurisdiction, it is "necessary for [the ICJ] to give an opinion in conditions compatible with its judicial character" (internal quotation marks omitted)).

[83] ICJ Statute, *supra* note 34, art. 36(2)(b).

[84] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 435 (Nov. 26).

Historically, the bipolar world of the Cold War stymied the Charter's vision of a Security Council policing a new world order based on enforceable international norms.[85] Paralyzed by the static ideologies of a bilateral power structure, the court could not act on matters of importance because of the reciprocal veto.[86] Although there are no formal checks and balances in the Charter, the Cold War veto served as an effective proxy.[87] The end of the Cold War witnessed a reinvigorated United Nations, as the Security Council reasserted its authority in areas of collective security.[88] The United Nations may now fulfill its intended role as sovereign over a new world order because there is no check on its power analogous to that of the reciprocal Cold War veto.

The Charter contains no formal provisions for judicial review of the political organs' actions,[89] and therefore the Security Council and the General Assembly must engage in auto-interpretation of the validity of their actions.[90] The political organs must act within their competencies as set forth in the Charter or risk the loss of institutional legitimacy and the cooperation of member states.[91] The onus is on the political organs to police their own behavior, which is notoriously difficult for political bodies that make determinations according to the national interests of their members.[92]

The political organs' relation to international law in carrying out their Charter-related duties is fundamentally different from that of the ICJ. Unlike the political process, the law is "primarily based on considerations of

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[85] Roger D. Scott, *Getting Back to the Real United Nations: Global Peace Norms and Creeping Interventionism*, 154 MIL. L. REV. 27, 29 n.7 (1997) ("It is a common view that the U.N. Security Council was rendered ineffective during the Cold War by discord among the permanent members.").

[86] Aiyaz Husain, *The United States and the Failure of UN Collective Security: Palestine, Kashmir, and Indonesia, 1947–1948*, 101 AM. J. INT'L L. 581, 582 (2007) (noting the perpetual, reciprocal veto threats of either the United States or the Soviet Union in the Security Council).

[87] W. Michael Reisman, *The Constitutional Crisis in the UN*, 87 AM. J. INT'L L. 83, 84 (1993) (explaining that the reciprocal veto in the Cold War "created a system that was [the] functional equivalent" of checks and balances).

[88] *See* Ian Johnstone, *US-UN Relations After Iraq: The End of the World (Order) as We Know It?*, 15 EUR. J. INT'L L. 813, 813 (2004) (remarking on a reinvigorated United Nations in the post-Cold War era).

[89] Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT'L L.J. 1, 4 (1993) (explaining that no provision in the U.N. Charter directly addresses judicial review).

[90] Keith Harper, *Does the UN Security Council Have the Competence to Act as Court and Legislature?*, 27 N.Y.U. J. INT'L L. & POL. 103, 106 (1994) (noting that U.N. organs determine their own competency).

[91] Tania Voon, *Closing the Gap Between Legitimacy and Legality of Humanitarian Intervention: Lessons from East Timor and Kosovo*, 7 UCLA J. INT'L L. & FOREIGN AFF. 31, 38 (2002) (explaining that the gap between U.N. Charter-derived authority and Security Council action may undermine the Security Council's legitimacy and that of the United Nations as a whole).

[92] Therese O'Donnell, *Naming and Shaming: The Sorry Tale of Security Council Resolution 1530*, 17 EURO. J. INT'L L. 945, 960–61 (2006) (discussing the self-interest of member states and the decreased legitimacy of Security Council action taken in that interest).

fairness and normative application of rules."[93] Because the court uses legal concepts and legal methods of proof, its "tests of validity and the bases of its decisions are naturally not the same as they would be before a political or executive organ of the UN."[94]

In contrast, the function of the political organs is to examine questions in their political aspect, and it therefore "follows that the Members of such an organ . . . are legally entitled to base their arguments and their vote upon political considerations."[95] A former President of the ICJ characterized the political organs' decisionmaking process as one not "according *to* the law," but "*within* the law."[96] While Article 38 of the ICJ's Statute requires that it rely exclusively on international law when settling disputes, the political organs resolve disputes "primarily according to political criteria."[97] Political decisionmaking is appropriate when resolving political disputes but problematic when the organs act in a judicial or legislative capacity.[98] The resulting "dissonance between juridical decisions and political decisions in the international system" renders the two forms of decisionmaking incompatible.[99]

Despite these differences in purpose and process, when a political organ of the United Nations applies an international norm to a specific factual situation, it is a "law-creative" act.[100] Even if the members insist their resolution applies only to that single specific situation, the resolution has entered into the "stream of decisions" and considerations of equal treatment will favor the rule's application in equivalent situations.[101]

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[93] Harper, *supra* note 90, at 137.

[94] Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), 1992 I.C.J. 3, 56 (Apr. 14) (Weeramantry, J., dissenting).

[95] Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. 57, 61 (May 28). However, this is not to say that there are no legal restrictions at all on General Assembly and Security Council resolutions; rather, members may use nonlegal criteria in reaching their decision.

[96] Rosalyn Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 AM. J. INT'L L. 1, 16 (1970).

[97] Jost Delbrück, *Functions and Powers: Article 24*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 442, 447 (Bruno Simma et al. eds., 2002).

[98] This is not to suggest that the disputes the political organs consider cannot or should not have legal aspects, but rather that a political organ engaged in a primarily judicial enterprise will resort to extralegal criteria in its decisionmaking. *See* Higgins, *supra* note 96, at 15–16 (discussing the "substantial difference between the employment of international law by the Security Council, on the one hand, and by a purely judicial body" like the ICJ).

[99] Harper, *supra* note 90, at 133–34.

[100] Oscar Schachter, *The Quasi-Judicial Role of the Security Council and the General Assembly*, 58 AM. J. INT'L L. 960, 964 (1964) ("When an organ applies a Charter principle or any other rule of law to a particular set of facts, it is asserting, as a matter of logic, a new rule of a more specific character. This is a law-creative act . . . .").

[101] *Id.*

International acts of aggression are susceptible to political resolution by the political organs of the United Nations. Situations such as Iraq's invasion of Kuwait in 1990 that led to the First Gulf War are particularly unsuited to legal resolution. Indeed, one of the purposes of the U.N. Charter is to facilitate prompt and effective action to counter threats to international security.[102] However, not only do the General Assembly and Security Council counter security threats, they also create legal obligations and interpret international law by passing resolutions. As such, these resolutions deal with questions of law that should be "resolved through the normative application of rules."[103] This normative application requires procedural safeguards to ensure that the law is applied correctly and that due process rights of affected parties are upheld. The political organs, however, do not have such procedural safeguards. By contrast, the ICJ has twenty-six articles in its Statute concerning the procedural safeguards necessary to ensure the due process rights of the parties.

The political organs thus disregard the due process rights of affected parties when they pass resolutions that create legal obligations and foreclose possible legal defenses. When the Security Council adjudicates issues of law and fact without these procedural safeguards, it is far more likely to decide the issues in an arbitrary and capricious manner. Consequently, when confronted with the political organs' creation of legal obligations and clarification of international treaties, the ICJ should exercise its Charter-derived jurisdiction of international treaties and not defer to the factual and legal determinations in the resolutions. Such reconsideration of resolutions would bring the ICJ into more organizational conflict with the requesting organs, but it is necessary to ensure due process rights and the correct application of international law.

B. Uncertain Legal Status of Full-Scale Judicial Review

The issue of the ICJ's review of the legality of the political organs' resolutions was raised at the founding conference of the United Nations.[104] The Belgian delegate proposed an amendment by which a member state could ask the ICJ to rule on the legality of a Security Council or General Assembly resolution.[105] The conference rejected the amendment on the ground that the political organs were already required to act in accordance with the Charter, and judicial review would weaken or delay action by the political organs.[106] However, the significance of this rejection is unclear.[107]

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[102] U.N. Charter. art. 24.

[103] Harper, *supra* note 90, at 139–40.

[104] For a study of the U.N. Charter and the San Francisco Conference, see DJURA NINČIĆ, THE PROBLEM OF SOVEREIGNTY IN THE CHARTER AND IN THE PRACTICE OF THE UNITED NATIONS (1970).

[105] U.N. Doc. 661, IV/2/33, 13 U.N.C.I.O. Docs. 47, 48 (1945).

[106] *Id.* at 65.

Because the proposal was made in reference to the Security Council's non-binding, recommendatory power to settle disputes under Chapter VI of the Charter, the withdrawal of the proposal could mean that Belgium realized judicial review was unnecessary.[108] In any case, the Belgian proposal has not ended the debate about the permissible scope of judicial review.[109]

Judicial review may be used in different contexts, and it is important to note that the review envisioned in the Belgian proposal involved a constitutional type of review of a particular resolution's legality. This type of judicial review would examine whether the organ acted beyond its power, thus exceeding its competency as defined in the Charter. While the ICJ has never directly invalidated a resolution of the political organs, it has ruled on the authority of the organs to pass certain resolutions.[110]

The uncertainty surrounding judicial review is well illustrated by the *Namibia* case, where the court considered two direct challenges to General Assembly and Security Council resolutions.[111] After declaring that it "[did] not possess powers of judicial review," the ICJ proceeded to examine the political organs' competency to pass the resolutions, and held that they "were adopted in conformity with the purposes and principles of the Charter."[112]

Rather than full-scale judicial review, this Comment proposes something more modest: ICJ review of the political organs' resolutions through the exercise of its advisory jurisdiction. Reconsideration of a resolution's interpretation of international law differs from an examination of the political organ's Charter-derived authority to pass the resolution in the first place. The first is an assertion of the court's jurisdiction over interpretations of international law, while the second is an inquiry into the Charter-based authority of the political organ to take action.

Nevertheless, both commentators and judges have advocated judicial review, in whatever form, within the context of the ICJ's advisory jurisdiction. Due to the nature of the judicial inquiry in the advisory jurisdiction, some level of judicial review is a simple pragmatic necessity. The ICJ has stated that once the political organ has requested an opinion, any limitation on the "logical processes to be followed in answering it" would be "unacceptable because it would prevent the court from performing its task in a

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[107] AMR, *supra* note 46, at 304 (suggesting possible interpretations of the rejection of the Belgian proposal).

[108] *Id.*

[109] *Id.*; *see also* KEITH, *supra* note 65, at 87–88 (discussing judicial review); DHARMA PRATAP, THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT 142–46 (1972) (same).

[110] AMR, *supra* note 46, at 308–20 (noting cases of explicit and implicit judicial review).

[111] *Namibia*, 1971 I.C.J. 16, 34 (June 21) (discussing challenges to Security Council and General Assembly resolutions).

[112] *Id.* at 41.

logically correct way."[113] Also, some form of judicial review is necessary to satisfy the exigencies of judging. Judge Onyeama has stated, "I do not conceive it as compatible with the judicial function that the court will proceed to state the consequences of acts whose validity is assumed, without itself testing the lawfulness of the origin of those acts."[114] An inquiry into the lawfulness of the acts—their "legality, validity, and effect"—follows from the ICJ's function as the "principal judicial organ of the United Nations."[115] As a result, review of a resolution's legality in the ICJ's advisory jurisdiction is incidental to its judicial function of deciding the dispute in accordance with international law.

C. Legal Effects of Resolutions in the Wall Opinion

If the General Assembly or Security Council acts within its Charter-based authority in the area of collective security, and that action is based on political imperatives rather than legal interpretation, the ICJ should not review or invalidate the decision; such review would infringe on the political organs' responsibilities to maintain world peace. However, the ICJ can and should review the underlying legal determinations of the political organs' resolutions, in order to fulfill its Charter-derived duty to decide disputes in accordance with international law. By reviewing the resolutions that formed the basis of the *Wall Opinion*, the ICJ reviewed the political organs' application of international law. This type of review differs from an examination of the resolution's political content. The ICJ has no authority to reconsider the political content of the resolutions, because to do so would undermine its judicial character.

Part of the *Wall Opinion* involved an interpretation of whether Israel had violated the Geneva Conventions in transferring parts of its population into Palestinian territory. Prior to the referral of the dispute over the wall to the ICJ, the Security Council had passed Resolution 446, declaring the Israeli settlements in the West Bank to be in violation of the Geneva Conventions.[116] While there were undoubtedly political considerations at play in Resolution 446, close examination of the resolution reveals that it made a legal determination under the Geneva Conventions. Paragraph three of the resolution explicitly invoked Israel's responsibilities under the Geneva Conventions.[117] The resolution to label Israel the "occupying power" mirrored the six provisions of Article 49 of the Fourth Geneva Convention, which enumerate the responsibilities of "The Occupying Power." The last sentence of the Resolution's third paragraph also showed that the Security

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[113] Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 217 (July 20) (separate opinion of Judge Morelli).

[114] *Namibia*, 1971 I.C.J. at 144 (separate opinion of Judge Onyeama).

[115] East Timor (Port. v. Austrl.), 1995 I.C.J. 90, 165 (June 30) (Skubiszewski, J., dissenting).

[116] S.C. Res. 446, ¶ 2, U.N. Doc. S/RES/446 (Mar. 22, 1979).

[117] *Id.* ¶ 3.

Council relied the Convention to establish the illegality of the settlements, because it virtually transcribed Article 49.[118] The resolution, therefore, relied on a legal interpretation of an international treaty. Accordingly, the Charter mandates that the ICJ review this legal interpretation, and any reconsideration of the political issues underlying Resolution 446 is incidental to the court's duty to decide the case according to international law.

Aside from a Charter-derived duty to review the legal interpretation underlying the Security Council resolution, there is also a practical reason to engage in such action. In order to react in a timely fashion to international crises, the Security Council or General Assembly often pass resolutions quickly. The ICJ may thus act as an ex post corrective on any hasty legal determinations made in the Security Council or General Assembly's resolutions.

III. THE ICJ'S RECONSIDERATION OF FACT UNDERLYING SECURITY COUNCIL AND GENERAL ASSEMBLY RESOLUTIONS

This Comment has sought to establish that the ICJ should increase its independence by reconsidering any resolutions of the U.N. political organs containing interpretations of international law that are incidental to the question pending before the court. This reconsideration, it has been argued, is an essential step towards the revitalization of the ICJ's independence. A second essential step toward this goal is the reconsideration of facts underlying the resolutions of the political organs. Only after the ICJ reclaims its prerogative to address these facts and law can it regain legitimacy on the world stage.

The ICJ's need to conduct its own factual examination of the dispute stems in part from the pragmatic concern that law and fact are often indistinguishable.[119] For example, one jurist might approach the question of whether Israel transferred parts of its population into occupied territory in violation of the Geneva Conventions by exploring what affirmative steps Israel had taken—whether legislative, administrative, or purely physical—to transfer its population into the West Bank. Another jurist might explore the *travaux préparatoires*[120] of the Fourth Geneva Convention and the Rome Statute for an indication of what is meant by "transfer" in the two texts. That jurist might also consult literature about the manner in which drafting committees conduct negotiations on international conventions.

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[118] *Id.*; *see also* Geneva Convention Relative to the Treatment of Prisoners of War art. 49(6), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.").

[119] Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1770 (2003) (stating that "the concepts law" and "fact" do not denote distinct ontological or epistemological categories).

[120] "Preparatory work" refers to the official negotiating history of the treaty.

Both of these approaches involve the examination of facts that exist in the world—the actions and decrees of the Israeli government and Israeli military, the behavior of international drafting committees, and the debates surrounding the adoption of final textual provisions. However, they also involve traditional legal evidence such as treaties, legislative histories, and statutes. This legal evidence is a subset of a "larger category of factual decision-making."[121] This categorization flows from the recognition that the law is "something in the world, some part of reality—just like the reality being described by traditional factual questions."[122] Consequently, determining both legal and factual questions involves the same process—the weighing of evidence.

Factfinding as a mode of inquiry should therefore not be limited to certain types of facts, but should extend to any evidence appropriate and useful to piecing together a legally relevant "segment of reality."[123] If the court is to have a say in how international norms are created, it must therefore examine all manner of evidence—whether factual or legal—to arrive at a correct application of international law to an actual dispute.

A. The Reliability of General Assembly and Security Council Factfinding

Scholars have remarked that international political organizations, by definition, "striv[e] to maximize the power of nation states through whatever means are available . . . ."[124] The criteria used for decisionmaking in the international context are neither judicial nor legislative, but rather political. Governments take positions in international organizations "in accordance with their conceptions of national interest," and it is apparent that "these conceptions will embrace considerations based on ties of alliance, friendship or political bargaining."[125]

International political organizations are much more likely to spend resources on factfinding when the political benefits outweigh the costs of acquiring the information.[126] That is, a member state will investigate facts when such investigation is necessary to persuade other states of its position. Often, political expediency dictates that decisions be made without an adequate factual basis. For example, during the Six-Day War in Israel in 1967,

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[121] Allen & Pardo, *supra* note 119, at 1797.

[122] *Id.* at 1802.

[123] *Id.* at 1793.

[124] TAE JIN KAHNG, LAW, POLITICS, AND THE SECURITY COUNCIL 1 (1964).

[125] Schachter, *supra* note 100, at 962.

[126] *See* Michele Fratianni & John Pattison, *International Institutions and the Market for Information*, *in* THE POLITICAL ECONOMY OF INTERNATIONAL ORGANIZATIONS 101 (Roland Vaubel & Thomas D. Willett eds., 1991) (explaining that because information is a good, individuals will invest in it so long as the benefit derived from additional information exceeds the cost of acquiring it).

the Security Council passed a series of resolutions with little knowledge of how the conflict was progressing.[127]

The separation of factfinding from political decisionmaking theoretically provides many advantages, such as the appearance of unbiased investigators and professionals with experience in factfinding.[128] However, the results of factfinding missions may be predetermined and the factfinding committees can suffer from bias in favor of the countries that appointed them.[129] Factfinding missions are often created in response to political crises for the purpose of documenting human rights abuses that the political organs know, or are nearly certain, are occurring. Many commissions enter a country "knowing" there are human rights abuses, and their job is to document those abuses.[130] The point is not that these factfinding commissions do not perform their job adequately; rather, the organ requesting the commission often has a readily identifiable political purpose and the body fulfills that purpose.

The General Assembly has created many commissions and bodies whose mission is to investigate or document specific Israeli practices with regard to the Palestinian people. These bodies include the Register of Damages, whose explicit purpose is to document damage created by the wall in the West Bank;[131] the Committee on the Exercise of the Inalienable Rights of the Palestinian People;[132] and the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People.[133] The reports of the Inalienable Rights Committee and the Israeli Practices Committee were both annexed to the dossier submitted with the advisory request for the *Wall Opinion*.[134]

The general assessments contained in Security Council and General Assembly resolutions and reports, prepared for use in a political process, are unsuited for the detailed analysis required in the adjudication of human rights and security disputes. As Professor Teitelbaum points out, these resolutions and reports, as general assessments of a crisis, "should be a point of departure for States to resolve their disputes before the Court,

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[127] *See* ISTVAN S. POGANY, THE SECURITY COUNCIL AND THE ARAB-ISRAELI CONFLICT 86–114 (1984) (explaining the difficulties the Security Council in New York had in obtaining reliable information regarding the conflict in the Middle East).

[128] David Collins, *Institutionalized Fact-Finding at the WTO*, 27 U. PA. J. INT'L ECON. L. 367, 378 (2006) (noting a possible benefit of separating factfinding from the decisionmaking function).

[129] *Id.* at 380.

[130] David Weissbrodt & James McCarthy, *Fact-Finding by International Nongovernmental Human Rights Organizations*, 22 VA. J. INT'L L. 1, 14 (1981).

[131] Establishment of the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory, G.A. Res. 10/17, U.N. Doc. A/RES/ES-10/17 (Jan. 24, 2007).

[132] Report of the Secretary General, *supra* note 5, at 688.

[133] *Id.* at 794.

[134] *Id.* at 688, 794.

rather than as a substitute for the Court's fact-finding."[135] The court should have in place a mechanism to evaluate the reliability of U.N. reports if it is to use them at all. Fortunately, in the recent *Bosnia Genocide* case, the court articulated a method for evaluating the usefulness of UN reports:

> Their value depends, among other things, on: (1) the source of the item in evidence (for instance, partisan or neutral), (2) the process by which it has been generated (for instance, an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts).[136]

In the *Wall Opinion*, the ICJ failed to undertake such a vetting of the U.N. reports. The court quoted at length from the reports of the Inalienable Rights Committee and the Israeli Practices Committee without considering their source, the manner in which they were generated, or the possibility of bias.[137]

Consequently, the lack of adequate evidence before the court in the *Wall Opinion* stemmed both from the one-sidedness of the proffered evidence and the court's failure to scrutinize the provenance of the U.N.-generated reports.[138] Regardless of the competence or zeal of the factfinding mission employed by the political organ, that mission cannot correct large-scale imbalances in the political organs' view of the dispute.

B. ICJ Factfinding

The factfinding process of the political organs is unsuited to the needs of a judicial process. The political orientation of the organs does not produce the balanced set of facts that a judicial tribunal needs in order to weigh two conflicting positions during litigation. This problem is especially acute in an advisory jurisdiction that resembles a contentious dispute between two parties, because the requesting organ submits the relevant documents with the request. For this reason, the court should not limit itself to the universe of facts provided by the requesting organ, but should find facts independently.

1. Inadequate Factual Record in the Wall Opinion.—The court should not receive the determinations of the political organs in the same way that it would receive the factual determinations of a trial court. The

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[135] Ruth Teitelbaum, *Recent Fact-Finding Developments at the International Court of Justice*, 6 LAW & PRAC. INT'L TRIBUNALS 119, 152 (2007).

[136] Application on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007), at 81, *available at* http://www.icj-cij.org/docket/files/91/13685.pdf (last visited Apr. 14, 2009).

[137] *See Wall Opinion*, 2004 I.C.J. 136, 157 (July 9).

[138] Michla Pomerance, *The ICJ's Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial*, 99 AM. J. INT'L L. 26, 36 (2005) (noting ICJ's failure to examine provenance of reports and general lack of balance in factual basis of opinion).

political organs do not find facts through a judicial process, and the factual record submitted by the political organs cannot substitute for an adequate trial record.[139] Therefore, the ICJ should not rely solely on the dossier submitted with the advisory request to form the basis of the factual record. Without an adequate factual record, the ICJ in the *Wall Opinion* exhibited a tendency to rule on matters of law instead of delving into the facts.

For example, in the *Wall Opinion*, the court disposed of Israel's self-defense rationale in two paragraphs. The ICJ did not address whether the facts could establish a military necessity, but instead resolved the issue as a matter of law. The court in conclusory fashion limited self-defense under Article 51 of the Charter to situations of an attack of one "State against the other." The court then held that because Israel did not claim that the attacks against it were imputable to a foreign state, Article 51 was not available as a defense.[140] The court did not address whether the terrorist attacks against Israel rose to the level of an "armed attack" within the meaning of Article 51, or whether the right of self-defense extended to preventative, prophylactic measures such as the wall. Analysis of whether the terrorist attacks amounted to an "armed attack" would have required an in-depth inquiry into the nature and severity of those attacks. Likewise, a determination of the proportionality of the wall would have required a systematic review of the humanitarian and security concerns at each segment of the wall.[141]

Similarly, while there is little doubt that construction of the wall violated provisions of international humanitarian law, the opinion is notable for its lack of detailed analysis surrounding these violations. Judge Higgins, concurring, noted the majority opinion's "somewhat light treatment of international humanitarian law"[142] and the finding of violations "without any particular legal analysis."[143] The court did not address in detail whether actions taken by Israel occurred within the context of armed conflict, whether military necessity justified the wall at any specific segment, or why specific violations of humanitarian and human rights norms would result in the illegality of the entire barrier.

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[139] *Cf.* Teitelbaum, *supra* note 135, at 153 n.126 (explaining that in the *Congo v. Uganda* case the court relied upon the Porter Commission Report cataloguing human rights abuses as if the report were the record of a trial court).

[140] In his declaration, Judge Buergenthal found the court's interpretation problematic because Article 51 "does not make its exercise dependent upon an armed attack by another State." *Wall Opinion*, 2004 I.C.J. at 242 (declaration of Judge Buergenthal).

[141] The Israeli Supreme Court undertook this painstaking analysis, and while it did not conclude that the entire wall to the east of the West Bank was illegal, it ruled that modifications of certain portions of the route were necessary. *See* HCJ 2056/04 Beit Sourik Vill. Council v. Israel [2004] IsrSC 58(5) 807, *reprinted in* 43 I.L.M. 1099 (2004).

[142] *Wall Opinion*, 2004 I.C.J. at 213 (separate opinion of Judge Higgins).

[143] *Id.* at 218 ("[T]he Court's findings of law are notably general in character, saying remarkably little as concerns the application of specific provisions of the Hague Rules or the Fourth Geneva Convention along particular sections of the route of the wall.").

The court failed to enunciate why, based on both the humanitarian and security concerns posed by the wall at each segment, the entire wall was in violation of international humanitarian law norms. Judge Higgins remarked that it was inappropriate for the court to rule on international human rights law with so little factual detail, when such obligations "are monitored, in much greater detail, by a treaty body established for that purpose."[144] Namely, the International Covenant on Civil and Political Rights has formal criteria that specialized bodies like the Human Rights Committee examine in great detail when deciding international humanitarian law disputes. In the *Wall Opinion*, the court established violations of this important covenant in one sentence.[145] The U.N. Charter requires that the court, before ruling in favor of one party, must be satisfied that the "claim is well founded in fact and law."[146] Without the requisite factfinding and legal analysis in the *Wall Opinion*, the ICJ risked failing that test.

2. The ICJ's Unused Factfinding Tools.—The court's power to make factual determinations is "not merely derivative from its other powers: it is a basic part of the original purpose for an international court."[147] This original purpose is articulated in the jurisdictional statement of the Statute of the court. According to the Statute, the court has a responsibility to determine "the existence of any fact which, if established, would constitute a breach of an international obligation."[148] In the *Wall Opinion*, the ICJ stated that it was "not convinced" of Israel's security needs "from the material available to it."[149] However, this statement misconstrues the court's responsibility. Rather than ruling only on the "material available to it"—namely, the information provided in the Secretary-General's dossier—the Statute of the court requires that it investigate any facts tending to prove that Israel's security needs justified the building of the wall. The court's failure to undertake such investigation, and to instead rule only on the information provided in the dossier, should be seen as an abdication of judicial responsibility.[150]

Although the court has weathered criticism over its ability to handle complex factual situations, its poor performance is not due to any limitation in the court's Statute or its legal relation to the other principal organs. The ICJ has failed to take advantage of the procedural tools available to it, and this failure stems from its deference to the factfinding of the political organs, as well as its perceived inability to handle complex factual disputes. However, the court should reconsider its approach to factfinding. The

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144 *Id.* at 213.
145 *Id.* at 188 (majority opinion).
146 ICJ Statute, *supra* note 34, art. 53.
147 Keith Highet, *Evidence, the Court and the Nicaragua Case*, 81 AM. J. INT'L L. 1, 6 (1987).
148 ICJ Statute, *supra* note 34, art. 36(2)(c).
149 *Wall Opinion*, 2004 I.C.J. at 193.
150 *See id.* at 161–62.

court's "sweeping powers"[151] in the evaluation of any and all manner of evidence should enable it to make the requisite factual determinations in any given legal dispute. To those familiar with the common law system of evidence, the ICJ's system is notable for its absence of restrictions relative to the admissibility of evidence. The ICJ's evidentiary system resembles that of a civil law system, which places the judge at the center of factfinding and permits that judge to "demand from the parties any evidence she deems relevant." The French Civil Code, for example, gives the judge the authority to "undertake *sua sponte* any legally appropriate investigation."[152]

The ICJ, like a civil law judge, is an inquisitor vested with the authority to demand evidence from the parties to the dispute. Article 49 of the court's Statute permits it to "call upon agents to produce any document or to supply any explanations" at any time after the court is seized of the matter, whether before or after written and oral proceedings.[153] The court may also call witnesses or arrange for the testimony of experts pursuant to Articles 62(2) and 68 of its rules, although the court has not made use of this power during the exercise of its advisory jurisdiction.[154] Pursuant to Article 50 of its Statute, the court may entrust any body or commission to "carry[] out an enquiry" or give an expert opinion.[155] ICJ judges, however, have not made use of these evidentiary tools. Instead, they have refrained from any active investigatory role in shaping the record and satisfied themselves with the information presented in the written and oral proceedings under its contentious jurisdiction,[156] or, in its advisory jurisdiction, with the resolutions and reports contained in the request.

Although the court has generally not made use of its investigatory powers, it was commended once in the past for its handling of a complex factual dispute. In the *ELSI* case, the court examined a complex set of commercial and banking documents to rule against the United States in a dispute with Italy.[157] The court's handling of this case demonstrated that it could handle complex factual situations with an adequate factual record before it. The court's role under Article 36(2)(d) of its Statute is to determine

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[151] Highet, *supra* note 147, at 6.

[152] NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] art. 27 (Fr.) ("Le juge procède, *même d'office*, à toutes les investigations utiles." (emphasis added)).

[153] ICJ Statute, *supra* note 34, art. 49.

[154] *See* 3 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920–2005, at 1321–33 (4th ed. 2006).

[155] ICJ Statute, *supra* note 34, art. 50.

[156] In the *Corfu Channel* case, the ICJ required that an expert verify findings. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 15 (Mar. 25). The *Corfu Channel* case was the ICJ's first dispute, in 1949, and the court has not commissioned an expert panel since that case.

[157] Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, 203 (July 20). The United States alleged that ELSI, an American-owned corporation operating in Sicily, was prevented from declaring bankruptcy by Italian officials. The court rejected the claim, finding instead that ELSI had failed because of poor management decisions.

the existence of any fact that would constitute the breach of an international obligation. In order to fulfill its factfinding role, it is incumbent upon the court to call for witnesses, initiate factfinding commissions, and request expert opinions. The court also should scrutinize reports from the political organs, examine in detail the circumstances surrounding the reports, and in certain cases discard the reports if it finds bias.

The court's advisory jurisdiction, when used as a dispute settlement mechanism for a bilateral dispute, presents unique evidentiary problems because state consent or participation in the proceedings is not required. In the face of Israel's nonparticipation in the *Wall Opinion*, however, nothing in the court's Statute or its procedures prevented it from conducting its own factual investigation by using the sweeping evidentiary tools at its disposal.

CONCLUSION

A more active factfinding role for the ICJ in its advisory jurisdiction capacity would likely create short-term conflict with the political organs when the ICJ reconsiders the factual and legal determinations of General Assembly and Security Council resolutions. However, the antagonism occasioned by this reconsideration is likely to evolve into a mutually beneficial relationship between the ICJ and the political organs. Because the political organs are inclined to use the ICJ's advisory jurisdiction as an enforcement mechanism for noncompliant states, an advisory opinion that simply repackages the legal conclusions of the political organs will not serve as a deterrent to states who violate their legal obligations. For an advisory opinion to have force independent of the political enforcement mechanisms of the General Assembly and the Security Council, it must persuade by way of a convincing application of international law to well-developed facts.

True achievement of the U.N. Charter's "purposes and principles" requires that the court perform its Charter-imposed duty to rule on claims "well-founded in fact and law."[158] The court can contribute to the shared political goals of the United Nations not by ceding judicial responsibility to a political organ, but by fulfilling its role as the organization's principal judicial organ. The ICJ's reassertion of its role as principal judicial organ is necessary to ensure the rights of litigants and the normative application of law to factual disputes. The *Wall Opinion* illustrates how deference to the factual conclusions and political preferences of the requesting body may create an opinion that is not "well-founded in fact and law." As the political organs continue to request advisory opinions on divisive political disputes, the court should maintain its independence so as not to undermine its judicial legitimacy.

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[158] ICJ Statute, *supra* note 34, art. 53.

The developing areas of international human rights law and international humanitarian law are detailed, fact-laden areas of law. If the court is to develop the law in these growing areas, it must shed its reluctance to properly develop factual records. Refusal to find facts and review the legal conclusions of the political organs in these fields of law will lead to the very marginalization that this international tribunal fears.

There is room to second-guess the U.N. political organs while continuing to clarify legal questions in a way that does not compromise the court's judicial character or infringe on the duties of the political organs to maintain international peace and security. Although the court's deference to the political organs and its reluctance to find facts are motivated by a desire to remain institutionally relevant, the long-term effect of this behavior is further isolation. To remain relevant, the ICJ must do the opposite: aggressively review the factual and legal determinations of the political organs. An invigorated ICJ will strengthen the United Nations as an institution, maintain the rule of international law, and vindicate the rights of state parties before it.