INTERNATIONAL LAW & NATIONAL SECURITY SAYING WHAT THE LAW IS: ARGUMENTS FOR AN ICJ THAT IS LESS DEFERENTIAL TO SECURITY COUNCIL AND GENERAL ASSEMBLY RESOLUTIONS By Mark Angebr*

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The United Nations (UN) system operates differently than the three branches of American government. Its political organs, the Security Council ("Council") and the General Assembly ("Assembly"), cannot make law. Its judicial organ, the International Court of Justice (ICJ), has no power of full-scale judicial review over the resolutions of the political organs. Instead of checks and balances, the United Nations Charter proposes a system of shared responsibility and common political agenda. Such intra-organizational cooperation may help advance United Nations policy, but it threatens the judicial independence of the ICJ. When the political organs pass resolutions that resemble legislation or contain interpretations of international law, the ICJ cannot maintain its institutional legitimacy without to some extent reviewing these legal interpretations in cases before it. This article explores the legal contours of ICJ review over the factual and legal determinations underlying Council and Assembly resolutions. This situation arises when the ICJ must rule, in accordance with international law, on a dispute that the Council or Assembly have already treated in their political processes. As the political organs flex their muscle with quasi-legislative and quasi-judicial resolutions, the ICJ must reassert itself by reviewing the legal and factual determinations underlying those resolutions in the course of deciding its cases.

The ICJ should not undermine the political organs' roles in maintaining international security, but at the same time it should not exhibit excessive deference to the judicial determinations of political processes. The political process is not suitable for adjudication of legal obligations under international law. That role should be left to the ICJ, which has the safeguards in place to ensure the proper adjudication of the rights and obligations of parties before it. An ICJ that is less deferent to the political agenda of the Council and Assembly will be more legitimate in the eyes of Member States. This increased legitimacy will provide a better enforcement mechanism against countries that violate international legal norms, and thus contribute to the healthy functioning of the United Nations system.

The ICJ is the "principal judicial organ" of the UN.¹ In addition to deciding contentious disputes between States, the ICJ possesses an advisory jurisdiction, under which it considers legal questions received from the Council and Assembly.² The UN Charter mandates that the ICJ decide these legal questions in accordance with international law.³ The ICJ's advisory jurisdiction has become a dustbin for intractable political and humanitarian conflicts that the political organs have failed to solve with their own resolutions. Therefore, to answer an advisory opinion request, the ICJ often deals with resolutions closely related to the underlying legal question. The Court should retain its legitimacy as a judicial organ, but nonetheless further the political goals of the larger UN system. It should scrutinize the legal determinations of the UN's political organs or risk lending its judicial imprimatur to decisions based on political, non-judicial processes.

The judicial autonomy and legitimacy of the ICJ are centrally important to the healthy functioning of the UN system. The structural principles embedded in the UN Charter mandate that the ICJ not cede control over judicial determinations to political organs guided by the national interests of its Member States. Consequently, the ICJ must reclaim its judicial independence in the exercise of its advisory jurisdiction by rehabilitating its fact-finding capabilities and ensuring the correct application of international law to the specific factual situation before it. Regardless of previous legal action taken by the political organs, the ICJ must bring to bear on international disputes the inherent advantage of the judicial process—namely, an adversarial process to find true facts and the ability to ensure the correct application of international law.

The ICJ's recent advisory opinion on Israel's construction of a security wall in the disputed West Bank illustrates the danger to the Court's institutional legitimacy posed by cases that the Council and Assembly have already dealt with in their political processes.⁴ In this opinion, the ICJ 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.⁵ However, Council and Assembly resolutions had already reached the same legal conclusion before the request for the advisory opinion. Just nineteen days before the submission of the advisory request, the Assembly passed Resolution 10/13, declaring the wall in violation of international law and ordering its removal.⁶ A lengthy dossier submitted with the advisory request formed the factual basis of the ICJ's decision. This dossier included relevant Council and Assembly resolutions, as well as UN-commissioned fact-finding reports. Aside from written statements mainly opposing the Court's exercise of jurisdiction, the ICJ did not gather evidence outside of this dossier. The Wall Opinion illustrates the risks 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 increase its fact-finding capacity so that it may act less like an appellate body and more like a trial court of first instance.

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Organizational Dynamic of the ICJ's Advisory Jurisdiction

The ICJ is largely modeled on its predecessor court, the Permanent Court of International Justice (PCIJ), established by the League of Nations.⁷ However, unlike the PCIJ, which was not formally part of the League of Nations, the ICJ is a principal organ of the UN as well as the UN's principal judicial organ.⁸ Only States may be parties in cases before the fifteen-member Court, though the State need not be a member of the UN in order to appear.⁹ Member States may request that the Court exercise jurisdiction over any dispute involving interpretation of a treaty or international law, or the "existence of any fact which, if established, would constitute a breach of an international obligation."¹⁰ Once jurisdiction has been established, the Court must decide disputes in accordance with international law, which is limited to international conventions, custom, and general principles of law.¹¹

The Assembly and the Council are authorized to submit advisory opinion requests to the ICJ on "any legal question," which the Court has broadly construed to include complex factual disputes or political issues.¹² The advisory opinion request must be "accompanied by all documents likely to throw light upon the question."13 The advisory opinion, while truly a peculiar notion to federal courts in the United States, is permitted in many U.S. courts.¹⁴ However, the advisory jurisdiction as exercised in the World Court differs from the practice in the United States of a state legislator requesting a court's opinion on the constitutionality of a proposed law.¹⁵ The ICJ's advisory opinions have often involved hotly debated political disputes¹⁶ and legal questions embedded in broader bilateral disputes.¹⁷ State consent, while required for the exercise of contentious jurisdiction, is not required for the ICJ to exercise advisory jurisdiction over a dispute.18

The ICJ's status as "principal judicial organ" of the UN has been characterized as an "organic link" to the shared goals of the UN system.¹⁹ The ICJ, like all other principal organs in the UN system, has a duty to further the purposes and principles of the UN These purposes are to "maintain peace and security," and "take collective measures for the prevention and removal of threats to the peace."²⁰ The advisory function of the ICJ, even more than its contentious jurisdiction, serves as a vehicle for the Court's participation in the "Purposes and Principles" of the UN Charter.²¹

Proponents of the advisory jurisdiction argue that by rendering advisory opinions, the Court is able to place another organ's operation upon a firm and secure foundation. Judge Bedjaoui has written that the Court's advisory function assists the political organs by taking into account "its preoccupations or difficulties and by selecting, from all possible interpretations of the Charter, the one which best serves the actions and objectives of the political organ concerned."²² In the Wall Opinion, the Court explained that its obligation to clarify a legal issue for the Assembly outweighed any concerns about the judicial propriety of adjudicating an ongoing political dispute and armed conflict between Israel and Palestine.²³ Accordingly, the Court stressed the organizational purpose of the advisory opinion: "The Court's Opinion is given not to the States, but to the organ which is entitled to request it.²⁴ The ICJ characterized the opinion as that which "the General Assembly deems of assistance to it in the proper exercise of its function.²⁵ Accordingly, 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.²⁶

The Court is strongly inclined to not only answer a request for an advisory opinion, but to facilitate the larger aims of the UN by arriving at a conclusion in line with the preference of the political organ.²⁷ 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."²⁸ The closer the institutional connection of the ICJ to the requesting organ, he argues, the greater the usefulness of that opinion to the operation of the requesting organ. However, the advisory function threatens the institutional legitimacy of the Court because it often resolves disputes without the consent of the relevant States,²⁹ and the political organ making the request has often already ruled on the issue.³⁰

Organizational theory helps to explain why the ICJ is not functioning as a check on the actions of the political organs in its advisory jurisdiction. By examining the benefits and drawbacks of coordination among organizations and within organizations, organizational theory predicts the most efficient modes of cooperation.³¹ Studies of coordination mechanisms within organizations suggest that the ICJ is likely motivated to undertake advisory opinions out of a fear of institutional isolation and marginalization.³² An organization might "seek[] to forestall or prevent future crisis which may imperil its success or even continuation."33 Because organizations have incentives to increase their authority and prestige, the Court is unlikely to decline the opportunity to contribute to the progress of international law by rendering an advisory opinion.³⁴ 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.³⁵ Similarly, the political organ will make the request as long as the perceived advantage to its operations outweighs any loss to its political autonomy.

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 main impediment to coordination between the ICJ and the political organ is the line between cooperation and competition. If the degree of interdependence is high, and the degree of antagonism is high, the result will be competition and conflict.³⁶ By contrast, if the degree of interdependence is high, and the degree of antagonism is low, the result will be cooperation. The ICJ has an incentive to reduce competition and increase smooth cooperation in order to avoid alienating the requesting organ and risking institutional isolation.

If we map the interaction of the ICJ and the Assembly in the Wall Opinion onto this organizational dynamic, we see a high level of interdependence due to their "organic link" and a low level of antagonism due to the Court's incentive to contribute to the shared goals of the UN as reflected in

the stated policy preference of the Assembly. The resultant "cooperation" between the two organs reduces the need for information processing and furthers the shared mission of the UN. By systematizing coordination through a process that provides the Court with "an exact statement of the question" as well as a "voluminous dossier"37 of documents "likely to throw light on the question,"38 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. In relying on the resolutions and factual studies made by the political organs, the likelihood that the Court will render an opinion in line with the policy preferences of the political organ is thus greater.

The results of such a model have been borne out in the Court's case law. In 1949, the Court held in an advisory opinion that South Africa had no legal obligation to place its mandate, South West Africa (now Namibia), under a trusteeship with the UN³⁹ The Assembly had advocated for South Africa's withdrawal from South West Africa, but the Court found in favor of South Africa's continued occupation. The opinion weakened the Court's credibility, especially among African nations.⁴⁰ The loss of political capital to the Assembly outweighed any potential benefit of further coordination with the Court on the issue, and, as a result, the Assembly never revisited the issue with the Court.

Then, in 1971, the Council requested an advisory opinion on the "legal consequences" of South Africa's continued presence in Namibia.41 The request was seen as an opportunity for the Court to "redeem its impaired image," since its advisory jurisdiction had been unused since 1962.42 The Council had in fact already passed Resolution 276, which strongly condemned the "illegal" presence of South Africa in Namibia.⁴³ The Court in this iteration of coordination produced an opinion in line with the clear political preference of the Council by holding that South Africa's presence in Namibia was illegal.⁴⁴ The Court's interaction with the Council was thus cooperative, and in rendering an opinion that mirrored the effect of the Council's resolution on the issue, the Court avoided conflict with the political organ. The Court consequently repaired its image and staved off institutional marginalization by indicating its willingness to cooperate with the political organs.

Although 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 organ, but there is little evidence that behaving in such a way increases in the long-term the number of advisory requests that the Court receives. If the Court were correct in the assumption that advisory opinions deferent 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 advisory opinions after the ICJ rendered a deferent advisory opinion. Although advisory requests two and four years later followed the deferent South West Africa opinion,

a statistical breakdown of the Court's advisory docket shows no long-term changes in the number of opinions rendered from its first opinion in 1947 to its last in 2004. The Court averages about four advisory opinions a decade. As of 2008, the Court has not received another advisory request since the Wall Opinion, and it would appear that the Court will have a below-average number of advisory opinions this decade, despite the accommodation it provided the Assembly in the cooperative Wall Opinion.

While the ICJ 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 Council or 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, that is, if the ICJ can help the organ 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 if it fears an opinion not in line with its political preferences, it can take steps to make known its preferences before the Court composes its opinion. Therefore, the political organ's perception of the ICJ's propensity to render an opinion not in line with the organ's political preference is just one of three factors that determine when the ICJ will be asked to exercise its advisory jurisdiction. The Court's fear of marginalization is thus overblown; the factors determining when the organs refer a dispute to its advisory jurisdiction depend more on the peculiar nature of the dispute itself than on the Court's perceived deference to the political will of the Council or Assembly. In other words, the Assembly's decision to refer to the ICJ the question of the legality of the wall in Palestine 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 Assembly in its advisory jurisdiction.

In light of the cost in loss of judicial autonomy and reduced institutional benefits, a new calculation shows that 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 line up with the political preferences of the requesting organ. The result of such an undertaking is more independent and legitimate advisory opinions. As more authoritative statements of the law, the opinions would provide a better enforcement mechanism against the political organs to police the behavior of States that have violated their legal obligations. By asserting its jurisdiction over fact-finding 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 organ 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 its political preference. A revitalized advisory jurisdiction could aid the political organs in providing another strong enforcement mechanism against States that violate international norms.

This model has the additional advantage of better serving the shared goals of the UN system. In reclaiming its judicial autonomy within its advisory jurisdiction, the Court is aiding the UN's settlement of international disputes "in conformity with the principles of justice and international law."45 In contrast, an opinion that reproduces the politically-determined legal conclusion of the requesting organ does not further this goal, because it abdicates judicial responsibility to a political organ.

THE ICJ'S REVIEW OF ASSEMBLY AND COUNCIL **Resolutions in the Exercise of its Advisory JURISDICTION**

The Charter contains no provisions directly addressing the ICJ's review, interpretation, or invalidation of Council and Assembly resolutions. The legal effects of these resolutions must therefore be interpreted from structural principles in the Charter, the competencies of the organs, and the case law of the ICJ. Although there is no hierarchical relation between any of the principal organs of the UN, the ICJ is the principal "judicial" organ,⁴⁶ and its primacy in that arena should privilege its legal determinations over those of the political organs. In exercising its jurisdiction, the ICJ cannot compromise its judicial character.⁴⁷ The Court cannot disregard the proprieties of judicial behavior, which under Article 39(2) of its Statute require jurisdiction over matters of international law.⁴⁸ Review of any resolutions interpreting international law is, therefore, incidental to this Charter-derived responsibility.

As long as the political organs do not extend their authority into quasi-judicial and quasi-legislative matters, the model of cooperation functions correctly. As Judge Ni in the Lockerbie 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."49

However, as the political organs have flexed their muscle 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 will continue to create legal norms through non-legal processes.

The bipolar world of the Cold War stymied the Charter's vision of an executive Security Council policing a new world order based on enforceable international norms.⁵⁰ The Council in that period, paralyzed by the static ideologies of a bilateral power structure, could not act on matters of importance because of the reciprocal veto.⁵¹ Although there are no formal checks and balances in the Charter, the Cold War veto served as an effective proxy.⁵² The demise of the Cold War witnessed a reinvigorated UN, as the Council reasserted its authority in areas of collective security.53 While the UN may now fulfill its intended role as sovereign over a new world order, there is no check on its power analogous to that of the reciprocal Cold War veto.

As the Charter contains no formal provisions for judicial review of the political organs' action,⁵⁴ the Council and the Assembly must engage in auto-interpretation of the validity

of their actions.55 The political organs must act within their competence as set forth in the Charter or risk the loss of institutional legitimacy and the cooperation of Member States.⁵⁶ The onus is on the political organs to police their own behavior, which is notoriously difficult for a political body that makes determinations according to the national interest of its members.57

> The political organs' relation to international law in carrying out their Charter-related duties is fundamentally different than that of the ICJ. The current President of the ICJ has characterized the political organs' decision-making process as decision not "according to the law," but decision "within the law."58 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."59 The political basis for their decision-making is appropriate when resolving political disputes but problematic when the organs act in a judicial or legislative capacity.60 There is a "dissonance between juridical decisions and political decisions in the international system" that renders the two forms of decision-making incompatible.⁶¹ Unlike the political process, the law is "primarily based on considerations of fairness and normative application of rules."62 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 U.N."63

> In contrast, the function of a political organ is to examine issues 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."64 Despite these differences in purpose and process, when a political organ of the UN applies an international norm to a specific factual situation, it is a "law-creative" act.65 Even if the members insist their resolution applies only to that one specific situation, the resolution has entered into the "stream of law" and considerations of equal treatment will favor the rule's application in equivalent situations.⁶⁶

> International acts of aggression are susceptible to political resolution by the political organs of the UN Situations such as Iraq's invasion of Kuwait in 1990 that lead to the First Gulf War are uniquely unsuited to legal resolution. Indeed, one of the purposes of the UN Charter is to facilitate prompt and effective action to counter threats to international security.⁶⁷ However, not only does the Assembly and Council counter security threats, but they also create legal obligations and interpret international law in passing their resolutions. As such, these resolutions deal with questions of law that should be "resolved through the normative application of rules."68 The normative application of rules requires procedural safeguards to apply the law correctly and to ensure the due process rights of affected parties. However, the political organs do not have procedural mechanisms to ensure due process of parties and the normative application of the law. 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 before it.

> 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 Council must adjudicate issues of law and fact without these procedural safeguards, it is 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 over the interpretation of treaties and not defer to the resolutions' factual and legal determinations. Such reconsideration of resolutions would bring the ICJ into more organizational conflict with the requesting organs, but it is necessary to ensure the due process rights of affected States and the correct application of international law.

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 UN.⁶⁹ The Belgian delegate proposed an amendment by which a Member State could ask the ICJ to rule on the legality of a Council or Assembly resolution.⁷⁰ 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.⁷¹ However, the significance of this rejection is unclear. Because the proposal was made in reference to the 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.72 In any case, the Belgian proposal has not ended the debate about the permissible scope of judicial review.

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" review of the legality of the resolution. This type of judicial review would examine whether the organ acted ultra vires, or beyond its power, and thus exceeded its competency as provided for 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.73 The uncertainty surrounding judicial review is well-illustrated by the Namibia case, where the Court considered two direct challenges to Assembly and Council resolutions.⁷⁴ After declaring that it "does not possess powers of judicial review," the ICJ proceeded to examine the competency of the political organs to pass the resolutions, and held that they "were adopted in conformity with the purposes and principles of the Charter."75

Full-scale judicial review should be distinguished from the review this article proposes of the political organs' resolutions in the exercise of the ICJ's 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 former is an assertion of the Court's jurisdiction over the interpretation of international law, while the latter is an inquiry into the Charterbased authority of the political organ to take action.

Nevertheless, both commentators and judges have promoted the concept of 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 simple pragmatic necessity. The ICJ has stated that once the political organ has requested an opinion, any limitations 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 logically correct way."76 Also, some form of judicial review is necessary to satisfy the exigencies of the judicial function. 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."77 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."78 As a result, the 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.

LEGAL EFFECTS OF RESOLUTIONS IN THE WALL OPINION

In reviewing the resolutions that form the basis of the Wall Opinion, the Court is engaging in a legal interpretation of the political organs' application of international law. This review differs from a political interpretation of the normative content of the resolution. The ICJ has no authority to reconsider the political content of the resolutions, because to do so would undermine its judicial character. If the Assembly or 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. The ICJ could not conduct such review without infringing 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, so as to fulfill its Charter-derived duty to decide disputes in accordance with international law.

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 Council had passed Resolution 446 declaring the Israeli settlements in the West Bank in violation of the Geneva Convention.⁷⁹ While there were undoubtedly overriding political considerations at play in Resolution 446, close examination of the language of Resolution 446 reveals a determination of illegality under the Geneva Conventions. Paragraph three of the resolution explicitly invokes Israel's responsibilities under the Geneva Conventions.⁸⁰ It proceeds to label Israel the "occupying power," thus mirroring the six provisions of Article 49 of the Geneva Convention, which all begin, "The Occupying Power...." The last sentence of paragraph three also shows that the court is relying on the Convention to establish the illegality of the settlements, because it imputes a violation to Israel that is a virtual transcription of Article 49 of the Convention.⁸¹ The Resolution, therefore, relies on a legal interpretation of an international treaty. Accordingly, the Charter mandates that the ICJ review this legal interpretation, and any reconsideration of the issue underlying Resolution 446 is incidental to its duty to decide the case according to international humanitarian law.

The ICJ's reconsideration of the factual and legal determinations underlying the Council and Assembly resolutions is not meant to undermine the institutional efficiency in allowing those political organs to react quickly to political crises. The speed necessary to react to certain situations of state aggression or humanitarian crises increases the need for the ICJ to act as a *post facto* corrective on any collateral legal determinations hastily made in the Council or Assembly's resolutions. This post facto reconsideration of the legal determinations contained in the political organs' resolutions, however, should not invalidate legal obligations placed on Member States bound by the Charter to follow Council directives.

CONCLUSION

A more active role for the ICJ in its advisory jurisdiction capacity will create short-term conflict with the political organs when it reconsiders the factual and legal determinations of Assembly and Council resolutions. However, the antagonism occasioned by this form of judicial review should evolve into a mutually beneficial relationship with the political organs. An advisory opinion that simply repackages the legal conclusions of the political organs will not serve as a deterrent to States who are in violation of their legal obligations. For an advisory opinion to have force independent of the political enforcement mechanisms of the Assembly or the Council, it must persuade by way of a convincing application of international law to a well-developed set of facts.

True participation in the "purposes and principles" of the UN Charter requires that the Court perform its Charterimposed duties to rule on claims "well-founded in fact and law."⁸² The Court contributes to the shared political goals of the UN not by ceding judicial responsibility to a political organ, but by fulfilling its Charter-derived role as the UN'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 developing areas of international human rights and international humanitarian law are detailed, fact-laden areas of law. If the Court is to develop the law in this growing area, it must shed its reluctance to properly develop the factual record. Refusal to find facts and review the legal conclusions of the political organs in this field of law will contribute to the ICJ's marginalization as an international tribunal. Specialized courts like the Human Rights Committee will take the lead in developing international human rights law because of their command of facts on both sides of the issue—humanitarian as well as security concerns.

This article has endeavored to prove that there is room to second-guess the political organs and 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 desire to remain institutionally relevant contributes to its overly deferent stance to the political organs, 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.

Endnotes

3 Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 UNT.S. 993 [hereinafter ICJ Statute].

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

5 Wall Opinion, 2004 I.C.J. at 201-02.

6 G.A. Res. 10/13, UN Doc. GA/RES/ES-10/13 (Oct. 27, 2004).

7 The ICJ Statute is "based upon the Statute of the Permanent Court of International Justice." UN Charter art. 92. The PCIJ was dissolved after it famously ignored Hitler's invasion into Poland and continued to decide cases. TERRY D. GILL, THE WORLD COURT AND HOW IT WORKS 8 (2003).

8 UN Charter arts. 7, 92. *See* Statute of the Permanent Court of International Justice arts. 1-6, Dec. 16, 1920, 6 L.N.T.S. 380 (1926).

9 See ICJ Statute, arts. 34, 35.

10 Id., art. 36, § 2.

11 Id., art. 38, § 1.

12 *Id.*, art. 65, ¶ 1. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Opinion), Advisory 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).

13 ICJ Statute, art. 65, ¶ 2.

14 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: Massachusetts, New Hampshire, Maine, Rhode Island, Florida, Georgia, Colorado, South Dakota, Alabama, Delaware, and North Carolina).

15 See, e.g., In re Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (Massachusetts senate requested opinion on constitutionality of bill which prohibits same-sex couples from entering into marriage).

16 See Legal Consequences for States of the Continued Presence of South Africa in Namibia (Namibia), Advisory Opinion, 1971 I.C.J. 16, 23 (June 21) (noting the political pressure surrounding South Africa's withdrawal from Namibia).

17 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Opinion), Advisory Opinion, 2004 I.C.J. 136, 158-59 (July 9) (conceding that the dispute involves a bilateral matter between Israel and Palestine).

18 See ICJ Statute, arts. 26, 68 (requiring that States consent in contentious matters and that ICJ consider principles of propriety for contentious matters when giving advisory opinion); see also Western Sahara, Advisory Opinion, 1975 I.C.J 12, 20 (Oct. 16) (noting that lack of State consent does not deprive ICJ of jurisdiction, but is consideration in determining propriety of rendering advisory opinion).

19 Mohamed Sameh M. Amr, The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations 49 (2003).

20 UN Charter art. 1.

21 Id.

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

23 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Opinion), Advisory Opinion, 2004 I.C.J. 136, 186 (July 9).

- 24 Id. at 187.
- 25 Id. at 159.
- 26 Id.

¹ UN Charter art. 92.

² *Id.*, ¶ 1.

27 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 UN's larger goals and render an opinion that will be of use to the requesting organ).

28 Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. 73, 78 (May 28) (Azevedo, J., concurring).

29 The advisory function's capacity to circumvent the principle of State consent has been a central concern for the ICJ. 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).

30 See Legal Consequences for States of the Continued Presence of South Africa in Namibia (Namibia), Advisory Opinion, 1971 I.C.J. 16, 45-58 (June 21) (noting Security Council Resolution 276 (1970), which determined that South Africa's continued presence in Namibia was illegal); see also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Opinion), Advisory Opinion, 2004 I.C.J. 136, 148-58 (July 9) (discussing previous Assembly and Council resolutions).

31 See David L. Rogers & David A. Whetten, Interorganizational COORDINATION 3 (1982); see also Arthur G. BEDEIAN, ORGANIZATIONS: Theory and Analysis 143-44 (1984).

32 DENNIS DIJKZEUL, THE MANAGEMENT OF MULTILATERAL ORGANIZATIONS 65 (1997).

33 ALJAGHOUB, supra note 27, at 75.

34 See BEDEIAN, supra note 31, at 110 (discussing formulation of goals such as authority and prestige).

35 See DIJKZEUL, supra note 32, at 65 (noting that "mutual adjustment implies the loss of autonomy" and this loss must be weighed against benefits of coordination).

36 Id. at 63.

37 See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Opinion), Advisory Opinion, 2004 I.C.J. 136, 161 (July 9) ("[T]he Court has at its disposal the Secretary General's report, as well as a voluminous dossier submitted by him to the Court.") .

38 ICJ Statute, art. 65.

39 See International Status of South West Africa, Advisory Opinion, 1950 I.C.J. 128, 143 (July 11).

40 See Legal Consequences for States of the Continued Presence of South Africa in Namibia (Namibia), Advisory Opinion, 1971 I.C.J. 16, 180 (June 21).

41 Id. at 3. See GA Res. 2372, UN GAOR, 22d Sess., Supp. No. 16A, UN Doc. A/6176/Add.l (June 12, 1968) (renaming of South West Africa "Namibia").

42 UN SCOR, 26th Sess., 1529th mtg. at 38-39, UN Doc. S/PV.1550, (29 July 1970) (Statement of Nepal).

43 S.C. Res. 276, § 2, UN Doc. S/RES/276 (Jan. 30, 1970).

44 See Namibia, 1971 I.C.J. at 65 ("The Court having arrived at the conclusion that the Mandate is terminated and that the presence of South Africa in South West Africa is illegal....").

45 UN Charter art. 1.

46 Id., art. 92.

47 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Opinion), Advisory 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").

48 ICJ Statute, art. 36(b).

49 Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), 1992 I.C.J. 22, 134 (Ni, J., declaration).

50 Roger D. Scott, Global Peace Norms and Creeping Interventionism, 154 MIL. L. REV. 27, 29 n.7 (1997) ("It is a common view that the UN Security

Council was rendered ineffective during the Cold War by discord among the permanent members.").

> 51 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).

> 52 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).

> 53 See Ian Johnston, US-UN Relations after Iraq: The End of the World (Order) as We Know it?, 15 EURO. J. INT'L L. 813, 813 (2004) (remarking on a reinvigorated UN in the post-Cold War era).

> 54 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 UN Charter directly addresses judicial review).

> 55 Keith Harper, Does the UN Security Council Have the Competence to Act as Court and Legislature?, 27 N.Y.U. J. INT'L & POL. 103, 105 (1994)(noting that UN organs determine their own competency).

> 56 Tania Vons, Closing the Gap Between the Legitimacy and Legality of Humanitarian Intervention: Lessons from East Timor and Kosovo, 7 UCLA J. INT'L L. & FOREIGN OFF. 31, 38 (2002) (explaining the gap between UN Charter-derived authority and Council action may undermine the Council's legitimacy and that of the UN body as a whole).

> 57 Therese O'Donnell, Naming and Shaming: The Sorry Tale of Security Council Resolution 1530, 17 EURO. J. INT'L L. 945, 960-61 (2004) (discussing the self-interest of Member States and the decreased legitimacy of Council action taken in that interest).

> 58 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).

> 59 Jost Delbrück, Functions and Powers: Article 24, in The Charter of THE UNITED NATIONS: A COMMENTARY 442, 447 (Bruno Simma et al. eds., 2002).

> 60 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 primarily in a judicial enterprise will resort to extra-legal criteria in its decision-making. See Higgins, supra note 58, at 15-16 (discussing the "substantial difference between the use, the employment of international law by the Security Council, on the one hand, and by a purely judicial body" like the ICJ).

61 Harper, supra note 55, at 133-34.

62 Id. at 137.

63 Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), 1992 I.C.J. 22, 166 (Weeramantry, J., dissenting).

64 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 there are no legal restrictions at all on Assembly and Council resolutions; rather, Member States may use non-legal criteria in reaching their decision.

65 Oscar Schachter, The Quasi-Judicial Role of the Security Council and the General Assembly, 58 AM. J. INT'L L. 960, 963 (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.").

66 Id. at 964.

67 UN Charter. art. 24.

68 Harper, supra note 55, at 139.

69 For a study of the UN Charter and the San Francisco Conference, see DJURA NUICIC, THE PROBLEM OF SOVEREIGNTY IN THE CHARTER AND IN THE Practice of the United Nations (1970).

70 UN Doc. 664, IV/2/33, 13 UNC.I.O. Docs. 47, 48 (1945).

71 Id. at 65.

72 Id. at 304.

73 AMR, *supra* note 19, at 304-309 (noting cases of explicit and implicit judicial review.).

74 Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, 1971 I.C.J. 16, 34 (June 21) (noting challenge to Council and Assembly resolutions).

75 Id. at 46.

76 Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 197, 217 (July 20) (Morelli, J., concurring).

77 Namibia, 1971 I.C.J. at 344 (Onyeama, J., concurring).

78 East Timor (Portugal v. Australia), 1995 I.C.J. 90, 424 (Skubiszewski, J., dissenting).

79 S.C. Res. 446, at 2, UN Doc. S/RES/446 (Mar. 22, 1979).

80 Id. at 3.

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

82 UN Charter pmbl.

