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## The World Court's Advisory Function: "Not Legally Well-founded"

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## THE WORLD COURT'S ADVISORY FUNCTION: "NOT LEGALLY WELL-FOUNDED"

David L. Breau\*

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### INTRODUCTION

In the summer of 2004, the International Court of Justice ("ICJ") issued an advisory opinion declaring that the security barrier<sup>1</sup> Israel began constructing in late 2002 violates international law.<sup>2</sup> The negative reaction to the Barrier Opinion has been substantial. Criticisms have been leveled at, among other things, the Court's propriety in deciding the case on the merits,<sup>3</sup> its conclusion that the United Nations Charter's

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<sup>1</sup>Although this article uses the more neutral terms "barrier" or "security barrier," the term used to describe the system of fences, ditches, sensors, and walls that Israel has constructed has itself become highly politicized. *See infra*. Note 56. Supporters prefer the term "security fence" while detractors use terms such as "wall," "separation wall," or even "conquest wall." *See, e.g.*, Letter Dated 1 October 2003 from the Permanent Observer of Palestine to the United Nations Addressed to the Secretary General, U.N. GAOR, 58th Sess., U.N. Doc. A/58/399 (2003) (repeatedly using the term "conquest wall"). This letter was included in the Secretary General's submissions to the Court and is discussed below in Part III.

<sup>2</sup>Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 43 I.L.M. 1009 (July 9) [hereinafter "Barrier Opinion"].

<sup>3</sup>Michla Pomerance, *The ICJ's Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial*, 99 AM. J. INT'L L. 26 (2005).

self-defense provisions are inapplicable,<sup>4</sup> its factual findings with respect to Israeli security and Palestinian terrorism,<sup>5</sup> and its cursory treatment of international humanitarian law.<sup>6</sup> Even those who consider the Court's decision correct have expressed concern that the opinion supporting the decision is "not legally well-founded."<sup>7</sup>

The International Court of Justice was created in the aftermath of World War II with the hope that it would provide countries with an effective forum to settle their differences so that they would not resort to military measures. As the judicial organ of the United Nations, the ICJ was intended to function as a "Supreme Court of the Nations."<sup>8</sup> For several reasons this moniker is inapt. The ICJ is not supreme above nations: countries need not consent to the ICJ's jurisdiction, and occasionally countries that have agreed *ex ante* to the ICJ's jurisdiction have subsequently refused to comply with an adverse decision.<sup>9</sup> Nor is the ICJ supreme above other courts; the ICJ is simultaneously a court of first instance and a court of last resort. There are no courts below it that are bound by its rulings on matters of law, nor are there courts above it that are limited to the ICJ's findings of fact in a particular case.

This latter point—that the ICJ is a single court operating alone, rather than a full-fledged judicial system with a hierarchy of courts—

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<sup>4</sup> Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT'L L. 62 (2005).

<sup>5</sup> Geoffrey R. Watson, *The "Wall" Decisions in Legal and Political Context*, 99 AM. J. INT'L L. 6, 25 (2005); Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 AM. J. INT'L L. 52 (2005).

<sup>6</sup> See generally David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AM. J. INT'L L. 88 (2005).

<sup>7</sup> These views are discussed below in Part III.

<sup>8</sup> This term is borrowed from MICHLA POMERANCE, *THE UNITED STATES AND THE WORLD COURT AS A "SUPREME COURT OF THE NATIONS:" DREAMS, ILLUSIONS AND DISILLUSION* (Kluwer Law International) (1996).

<sup>9</sup> See Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 38–42 (2005) (describing examples of noncompliance with the ICJ by Albania, France Iceland, India, Iran, Serbia, and the United States); Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1310 (2004) (noting instances of noncompliance with the ICJ).

helps explain the shortcomings of the ICJ in exercising its advisory function. The entire judicial organ of the United Nations is a single court that is institutionally close to the legislative organ, the often highly-politicized General Assembly. The lack of separation between the judicial and legislative organs is especially apparent when an advisory opinion is requested by the General Assembly itself, as was the case with the Barrier Opinion. Accordingly, the Barrier Opinion is an apt example of the deficiencies inherent in the ICJ's advisory function, not only because it is the most recent advisory opinion issued by the ICJ, but also because it combines "the most objectionable features of previous abuse of the advisory function" in a single case.<sup>10</sup>

### I. THE LEAST DANGEROUS BRANCH

Alexander Hamilton called the judicial branch of the United States government the "least dangerous" branch because federal courts are unable to enforce their own decisions.<sup>11</sup> Rather, the judiciary must rely on the executive to carry out its orders, and in the unlikely event that the President chose not to enforce a court's decision, there is little the court could do about it.<sup>12</sup> Casual observers of the interaction between the three branches of government assume the judiciary has "the last word" on a given legal issue; in reality, "it is the executive that effectively has the last word on most controversies through its power to execute or decline to execute . . . judgments."<sup>13</sup> The idea that courts could be ignored was probably of more concern to judges 200 years ago than

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<sup>10</sup> Pomerance, *supra* note 3, at 31.

<sup>11</sup> THE FEDERALIST NO. 78 (Alexander Hamilton). Hamilton also considered the judiciary to be "the weakest of the three departments of power" because it can never "attack," that is, it can only exercise power in response to a case voluntarily brought before it, whereas the legislature and the executive can exercise their power without regard to the independent actions of others. *Id.*

<sup>12</sup> Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L. J. 217, 223 (1994).

<sup>13</sup> *Id.*

today,<sup>14</sup> but the Supreme Court still recognizes that it ultimately depends on the executive branch for enforcement of its orders.<sup>15</sup>

The realization that the executive can simply ignore court decisions is quite startling. However, it has virtually never done so<sup>16</sup> because there exists a powerful non-legal check on the executive.<sup>17</sup> The public outcry and the resulting legislative response would be too painful politically, so the argument goes, if the President simply chose to ignore a court order.<sup>18</sup> So while the President may be legally free to ignore the courts, such a course of action would be politically unwise. However, the virtual certainty of a severe adverse political reaction begs the question: why do federal courts enjoy such political support? After all, the federal judiciary is often unpopular.<sup>19</sup> The recently ascendant

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<sup>14</sup> In the first few decades after the ratification of the Constitution of the United States, the possibility that the executive branch might not comply with a Supreme Court ruling weighed on the Justices' minds, especially in politically charged cases. For example, when deciding the landmark *Marbury v. Madison* decision, Chief Justice Marshall was well-aware that the Republican President Thomas Jefferson would likely ignore an order in favor of the Federalist-appointed Marbury. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 40–41 (2002). Nearly thirty years later, President Andrew Jackson refused to use federal troops to enforce the Court's order in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (invalidating a Georgia state criminal conviction). In response to that decision, Jackson is purported to have said, "Well, John Marshall has made his decision, now let him enforce it." Louis Fisher, *Indian Religious Freedom: To Litigate or Legislate?*, 26 AM. INDIAN L. REV. 1, 5 (2001). Perhaps the most well-known instance of executive noncompliance occurred during the Civil War, when President Lincoln completely ignored a writ of habeas corpus issued by Chief Justice Taney in *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861), although for a variety of reasons, there was little public outcry over Lincoln's actions. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 44–45 (1998).

<sup>15</sup> See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992) (observing that the Court "cannot independently coerce obedience to its decrees").

<sup>16</sup> See CHERMERINSKY, *supra* note 14.

<sup>17</sup> Paulsen, *supra* note 12, at 301.

<sup>18</sup> *Id.* at 302.

<sup>19</sup> For example, after the Supreme Court handed down its decision in *Kelo v. New London*, 125 S. Ct. 2655 (2005), allowing the use of eminent domain to take the homes of several long-time residents for an economic revitalization plan, some suggested that the same method of property acquisition be turned

rallying cry that “activist judges” are an evil to be eradicated indicates that there are sizeable constituencies that might support a President who would eviscerate federal judges’ power.<sup>20</sup> The Supreme Court dealt severe blows to several of the current administration’s policies,<sup>21</sup> yet it is doubtful that the President ever seriously considers ignoring rulings of either the Supreme Court or lower courts. Rather, non-compliance with domestic courts is viewed as a nonviable strategy<sup>22</sup> in part because federal courts have generally taken care to issue legally well-founded judgments and to refrain from deciding disputes that are inappropriate for judicial resolution.<sup>23</sup>

An institution can be said to be legitimate if there exists “the belief in the binding nature of an institution’s decisions, even when one disagrees with them.”<sup>24</sup> Federal judges are vigilant about preserving the

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against the justices. See Benjamin Weyl, *Activist Tries a Grab for Jurist’s Property*, L.A. TIMES, June 30, 2005, at A10 (describing an activist’s apparently serious suggestion that the city of Weare, New Hampshire use eminent domain to acquire Justice Souter’s vacation home in order to build a new hotel).

<sup>20</sup> Ruth Marcus, Editorial, *Booting the Bench: There’s New Ferocity in Talk of Firing Activist Judges*, WASH. POST, Apr. 11, 2005, at A19; see also, e.g., Steve King, Letter to the Editor, *Activist Judges Need to be Shown Door*, AUGUSTA CHRON., Apr. 27, 2005, at A04 (“[The judiciary] needs to read the U.S. Constitution, and put away the Communist Manifesto, because Karl Marx was not one of our Founding Fathers.”); Debbie Salituro, Letter to the Editor, *Activist Judge Who Ignored Voters’ Will Should Be Removed*, STATESMAN J. (Salem, Or.), Oct. 19, 2005, at 4C (“This . . . voter is sick and tired of activist judges pushing forward the agendas of small, boisterous special-interest groups.”).

<sup>21</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (8-1 plurality decision against the Bush administration’s contention that it could detain citizens captured as “enemy combatants” indefinitely without charge).

<sup>22</sup> Non-compliance with the ICJ, however, has been viewed as a viable strategy by a not insignificant handful of countries, including the United States. Posner & Yoo, *supra* note 9, at 38–41; Ginsburg & McAdams, *supra* note 9, at 1310.

<sup>23</sup> E.g., *Powell v. McCormack*, 395 U.S. 486 (1969) (declining to reach the merits of the case because the issues raised were more suited to resolution by the political branches).

<sup>24</sup> John C. Yoo, *In Defense of the Court’s Legitimacy*, 68 U. CHI. L. REV. 775, 777 (2001). I am only concerned here with what Yoo calls a “sociological” definition of legitimacy, because the issue for the ICJ is “whether people [and

judiciary's political capital because they realize that it exists only so long as the judicial branch is perceived as legitimate.<sup>25</sup> As Justice O'Connor stated in *Planned Parenthood v. Casey*,<sup>26</sup> "the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."<sup>27</sup> Despite almost two centuries of a nearly perfect record of executive compliance with the decisions of federal courts, Justice O'Connor's observation highlights the Supreme Court's continued recognition that the preservation of its power may be easily undermined by unprincipled decisions.<sup>28</sup>

The ICJ would do well to note that the United States Supreme Court—arguably the world's most powerful court—takes such care to maintain its legitimacy.<sup>29</sup> Like domestic courts, the ICJ has "neither force nor will, but merely judgment."<sup>30</sup> Domestically, however, the entire apparatus of the executive branch, with its police forces and regulatory agencies, stands ready to enforce court orders. The federal judiciary of the United States has built up a deep reservoir of authority capable of carrying it through an occasional crisis of legitimacy

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hence nations] will think the Court's decision[s are] . . . legitimate, and as a result will obey [them]." *Id.* Others have called this "political capital." *See, e.g.,* Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1450 (2000) ("One element of political capital might be the likelihood that people will follow the Court's decisions and treat them as binding law, especially in controversial cases.").

<sup>25</sup> *See* RICHARD A. POSNER, *OVERCOMING LAW* 243 (1995) ("The Court's survival and flourishing depend on the political acceptability of its results").

<sup>26</sup> 505 U.S. 833 (1992).

<sup>27</sup> *Id.* at 866.

<sup>28</sup> *See id.* at 865–66 ("The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures").

<sup>29</sup> Justice O'Connor's opinion for the Court in *Casey* explains why the Court must take care to preserve its institutional legitimacy, especially when deciding politically contentious cases. *See id.* at 864–69.

<sup>30</sup> THE FEDERALIST NO. 78 (Alexander Hamilton). Of course, Hamilton was referring to the judicial branch defined by the not-yet-ratified Constitution of the United States.

engendered by a decision that is perceived to be politically motivated.<sup>31</sup> The absence of an executive organ in the United Nations means that compliance with the ICJ is left to the litigants' good faith.<sup>32</sup> An ICJ opinion that is perceived as motivated by something other than legal principle can cause an immediate loss of legitimacy for the ICJ because the opinion will simply be ignored.<sup>33</sup> For example, despite the considerable pressure exerted on Israel,<sup>34</sup> the ICJ's order to dismantle the

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<sup>31</sup> For example, the decision in *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), which effectively decided the 2000 presidential election, "left a large segment of society feeling as if the election came down to a vote of five to four, on partisan grounds." See Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 297 & n.362 (2002) (noting survey results after the decision that 37% of Americans believed the decision to be "based on partisan politics"). Nevertheless, "[t]he Court's ability to command obedience remains largely unaffected by *Bush v. Gore*." Balkin, *supra* note 24, at 1450.

<sup>32</sup> The Security Council has some enforcement capability at its disposal, but the permanent members' veto power combined with the fact that the Security Council has requested only two advisory opinions in nearly 60 years indicates that its role in this regard may be limited.

<sup>33</sup> Although this is certainly true for advisory opinions, contentious cases are often ignored by the parties subject to an adverse decision. Posner & Yoo, *supra* note 9, at 38–42.

<sup>34</sup> The United Nations General Assembly voted 150-6 with 10 abstentions to demand that Israel comply with the Barrier Opinion. G.A. Res. ES-10/15, U.N. GAOR, 10th Emer. Spec. Sess., 27th mtg., at 6, U.N. Doc. A/ES-10/PV.27 (2004). To be sure, there could conceivably have been more pressure on Israel to comply had the United States voted in favor of the resolution. But such pressure would not be strictly political—the United States gives about \$4 billion in foreign aid to Israel and guarantees about \$10 billion in loans, and the United States has threatened Israel with financial consequences in the past. See, e.g., Mary Curtius, *After Clash On Israel, Support Grows On Aid To Republics*, BOSTON GLOBE, Mar. 22, 1992, at 21 (noting President Bush's "refus[al] to support Israel's request for \$10 billion in loan guarantees" because of continued settlement construction in the West Bank). In addition, the United States has criticized Israel's security barrier on other occasions. See, e.g., Greg Myre, *Israelis to Extend Barrier Deeper Into the West Bank*, N.Y. TIMES, June 15, 2004, at A11 (noting that American officials had expressed "concern" about the

barrier has yet to be carried out.<sup>35</sup> A further consequence of the ICJ's ephemeral authority is that, as a U.N. organ, any significant erosion of the ICJ's legitimacy undermines the standing of the United Nations—an entity whose influence over sovereign states' behavior is already far from assured.<sup>36</sup>

International judicial bodies such as the ICJ have the potential to strengthen the mechanisms for ensuring compliance with international legal norms. Generally, the only source of power for courts, whether domestic or international, is "the soundness in law of their opinions."<sup>37</sup> For the ICJ, the absence of an executive increases the risk that decisions that are not considered legitimate will be ignored. In turn, when ICJ decisions are more often seen as politically motivated rather than "legally principled,"<sup>38</sup> the ICJ's ability to influence the development of international law is undermined.<sup>39</sup> This puts the ICJ at risk of

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barrier's route). The point, however, is that at international level, political pressure may not be sufficient to compel compliance with ICJ decisions.

<sup>35</sup> See Dan Izenberg, *State: ICJ Fence Ruling 'Biased'*, JERUSALEM POST, Feb. 23, 2005. (Although the Israeli Supreme Court asked the government to respond to the Barrier Opinion, it is highly unlikely that the ICJ's order to stop construction and dismantle the security barrier will cause Israel to do so).

<sup>36</sup> See, e.g., TIMOTHY L.H. MCCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW 69–78 (1996) (describing the difficulties that the International Atomic Energy Agency had ensuring Iraq's compliance with the Nuclear Non-Proliferation Treaty during the years leading up to Israel's bombing of Osiraq on June 7, 1981); Kretzmer, *supra* note 6, at 102 (observing that "international mechanisms for ensuring compliance with norms of [international humanitarian law] have always been extremely weak"); cf. Casey, 505 U.S. at 868. ("If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible."); MICHLA POMERANCE, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT IN THE LEAGUE AND U.N. ERAS 26 n.87 (1973) (noting that the "organic connection" between the PCIJ and the League of Nations meant that the prestige of the PCIJ was dependent on the League's credibility and authority and recommending a severing of this connection between the ICJ and the U.N.).

<sup>37</sup> Kretzmer, *supra* note 6, at 102.

<sup>38</sup> Casey, 505 U.S. at 866.

<sup>39</sup> Cf. Kretzmer, *supra* note 6, at 102 (making a similar argument with respect to the International Criminal Court).

becoming—if it is not already—the “least dangerous” institution in the international legal order.

Despite the ramifications for the ICJ and its effectiveness as an institution, it would be naïve to expect a particular judge or group of judges to render “legally principled” decisions in a particular case because of some abstract notion of the importance of preserving institutional legitimacy. Conflicting ideologies and political pressures will often be too powerful to resist, even for the most principled judge. Instead, for a judicial institution to issue “legally principled” decisions in case after case, it must develop a structure and procedures to provide judges with the tools to resist such pressures.

A mechanism that contributes much towards this end is the socialization of judges that comes from the interactions between courts in a hierarchical judicial system. In addition to the obvious fact that appellate review serves to correct the mistaken judgments of lower courts, the prospective effect on a judge’s decision-making process of an appellate body waiting to review each and every opinion cannot be underestimated. Judges like to be affirmed, not reversed—they want to get it right the first time.<sup>40</sup> In a three-tiered system like the United States federal judiciary, this dynamic exists between both between the district courts and the appeals courts, and between the appeals courts and the Supreme Court.

This pressure that appellate courts exert on lower court judges is not the whole picture. Automatic review of district court judgments by appellate courts certainly casts a shadow over district judges’ decisions. But appellate decisions are likely to be final—the Supreme Court has rejected over 98% of all petitions for certiorari filed in recent years.<sup>41</sup> And of course, the Supreme Court itself has no court waiting to review

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<sup>40</sup> For example, Judge Posner “speak[s] from experience” when he notes that “[j]udges don’t like to be reversed.” POSNER, *supra* note 25, at 118.

<sup>41</sup> There were 7,814 Supreme Court filings in the 2003 Term, of which 91 cases were heard. In the prior term, there were 8,255 filings and 84 cases argued. U.S. SUP. CT., 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9 (2005), available at <http://uscourts.gov/ttb/jan05ttb/2004/index.html> (last visited February 27, 2006).

its rulings.<sup>42</sup> Yet actual or effective finality does not generally lead Supreme Court or appellate judges to disregard legal principles and decide cases based on personal preferences or political predilections.<sup>43</sup> This may be partly explained by the fact that federal appellate judges and Supreme Court justices are highly qualified and conscientious in fulfilling their judicial duties. There is no reason to believe that the same is not true of ICJ judges.<sup>44</sup> Unlike ICJ opinions, however, federal appellate and Supreme Court decisions are subject to a sort of indirect review—either on remand to a lower court or on subsequent appeals in the same case. In fact, some complex cases traverse up to the Supreme Court and back to the district court multiple times during the litigation.<sup>45</sup> At every level, each opinion is written by a judge who is quite conscious of the fact that the opinion will be reviewed or applied by another court in a later stage of litigation.

This “conversation” between the various tiers of courts in the federal judicial system helps to ensure that the opinion that forms each judge’s monologue is a “legally principled” decision in its own right. The ICJ, however, has no other courts to “converse” with during the process of rendering a decision. As noted above, it is both a court of first

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<sup>42</sup> Supreme Court decisions are overruled by legislation, but this is rare. POSNER, *supra* note 25, at 118 n.18. As such, a jurisdiction’s highest court “does not have the final word because it is correct, but is nevertheless correct because it has the final word.” *Charles Reinhart Co. v. Winiemko*, 513 N.W.2d 773, 790 (Mich. 1994) (Brickley, J., dissenting).

<sup>43</sup> To be sure, in politically and socially contentious cases, the votes of Supreme Court justices may be based more on policy preferences than on dispassionate legal reasoning. H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS* 2 - 4 (2002). Nevertheless, the vast majority of opinions issued to justify the decisions of the justices are largely based on legal—not policy—grounds.

<sup>44</sup> See Richard A. Falk, *Toward Authoritativeness: The ICJ Ruling on Israel’s Security Wall*, 99 AM. J. INT’L L. 42, 46 (2005) (noting the “high stature of the jurists on the [ICJ] at present”).

<sup>45</sup> For example, by the time the Federal Circuit Court of Appeals decided *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 344 F.3d 1359 (Fed. Cir. 2003), the case had been heard three times by a three-judge appellate panel, reviewed once by the entire Federal Circuit sitting *en banc*, and twice by the Supreme Court.

instance and a court of last resort.<sup>46</sup> The absence of a hierarchical judicial system and the resultant lack of review by other courts contribute to two significant problems. First, as discussed in Part III, the flat institutional structure increases the risk that ICJ judges will succumb to pressures from outside entities.<sup>47</sup> The susceptibility to political influence is especially acute when the ICJ is exercising its advisory function because of the Court's institutional proximity to the bodies that request those opinions, most notably the United Nations General Assembly. Second, as explained in Part II, because the ICJ is not divided into several layers of courts that can separate the fact-finding function from the application of the law to those facts, the ICJ must undertake the difficult task of simultaneously investigating facts while formulating the oftentimes novel standards used to adjudicate the legal significance of those facts.<sup>48</sup>

## II. THE ICJ AND THE GENERAL ASSEMBLY: TOO CLOSE FOR COMFORT

Advisory opinions come to the ICJ by request of other United Nations organs,<sup>49</sup> and the General Assembly makes such requests far

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<sup>46</sup> See *supra* text accompanying note 9. The U.S. Supreme Court's exclusive original jurisdiction to hear cases between two states is somewhat similar to the ICJ's role in contentious cases. Such original-jurisdiction cases often involve the same kinds of issues heard in the ICJ, such as disputes over boundaries or water rights. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 650–51 & n.15 (2003). There are two notable differences, however. First, states can be sued without their consent. See *Virginia v. West Virginia*, 206 U.S. 290, 319 (1907) (holding that a state's sovereign immunity does not extend to suits brought by other states). Second, the U.S. Supreme Court always appoints a special master to conduct any necessary fact-finding because it recognizes that it is ill-equipped to sit as a trial court. CHERMERINSKY, *supra*, at 649. The ICJ also has the authority to appoint a special master for fact-finding, but it rarely does so. Wedgwood, *supra* note 5, at 53 & n.10; see also *infra* notes 90–94 and accompanying text.

<sup>47</sup> See *infra* Part III.

<sup>48</sup> See *infra* Part III.

<sup>49</sup> U.N. CHARTER art. 96, ¶ 1.

more frequently than any other body.<sup>50</sup> Just as compliance with ICJ judgments depends on the Court's perceived legitimacy, the extent to which the General Assembly itself is viewed as credible is a factor impacting the level of compliance with its own resolutions.<sup>51</sup> Not surprisingly, the General Assembly's credibility improves when it acts with "objectivity, reliability, and restraint," whereas it is damaged when it issues resolutions that are "biased, arbitrary, and intemperate."<sup>52</sup> Especially when the motivations of the General Assembly are closer to the latter than the former, the ICJ's own legitimacy is adversely affected when it appears to simply "rubber stamp" the General Assembly's position on a particular issue.<sup>53</sup>

The General Assembly has a long history of bias in its response to the Arab-Israeli conflict, caused in part by a substantial bloc of nations that have always voted against Israel and are likely to continue to do so.<sup>54</sup> The resolution requesting an advisory opinion from the ICJ on the security barrier—"far from being legally neutral"—was no exception.<sup>55</sup> For example, the resolution refers to the security barrier as "the wall" rather than using the less contentious term "barrier," let alone the more physically accurate term "fence."<sup>56</sup> In addition, the resolution calls the

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<sup>50</sup> The ICJ has issued twenty-five advisory opinions, fifteen of which were requested by the General Assembly. No other U.N. organ has requested more than two advisory opinions.

<sup>51</sup> BLAINE SLOAN, UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS IN OUR CHANGING WORLD 117-18 (1991).

<sup>52</sup> *Id.* at 117.

<sup>53</sup> *Cf.* RICHARD FALK, REVIVING THE WORLD COURT 169 (1986) (noting that the 1962 *Certain Expenses* advisory opinion "appeared to be . . . 'a rubber stamp' for the [General] Assembly").

<sup>54</sup> *See generally* ANTI-DEFAMATION LEAGUE, ANTI-ISRAEL BIAS AT THE U.N. (noting many instances of apparent bias at the United Nations against Israel), at [http://www.adl.org/international/2004-09\\_un\\_ant\\_israel\\_bias.pdf](http://www.adl.org/international/2004-09_un_ant_israel_bias.pdf) (last visited February 27, 2006).

<sup>55</sup> Barrier Opinion, *supra* note 2, at 1, Separate Opinion of Judge Kooijmans, ¶¶ 25, 26; *see also* Pomerance, *supra* note 3, at 31 & n.32 (internal quotations omitted).

<sup>56</sup> The choice of terminology has long been a significant issue in the Arab-Israeli conflict. Just as Palestinian supporters prefer the term "wall" because it implies an imposing permanent structure, Israel's supporters prefer the term "fence" because it implies the opposite. Nevertheless, when completed, approximately

territory in question the “Occupied Palestinian Territory” rather than using the more geographically descriptive term “West Bank,”<sup>57</sup> and it makes no mention of the wider context that, at least arguably, lead to the barrier’s construction—that since September, 2000, Palestinian terrorists have killed over 900 Israelis, including 400 civilians killed and 5,000 civilians injured “by suicide bombers who easily crossed over the Green Line from the West Bank”<sup>58</sup> to intentionally target public buses,<sup>59</sup> cafes,<sup>60</sup> and nightclubs<sup>61</sup> in pre-1967 Israel.

Any court must be vigilant to maintain its independence from the political branches of government if it is to maintain its credibility as a judicial body.<sup>62</sup> This is especially true for the ICJ when an advisory

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6% of the security barrier will be a concrete wall, which according to Israel was built only in areas where snipers have targeted Israeli homes and cars. The other 94% consists of two parallel chain link *fences* equipped with electronic sensors and separated by a ditch and barbed wire. This structure is certainly more imposing than a suburban backyard fence, but to call it a “wall” could be considered inaccurate. Given that “wall” is the term favored by Israel’s ideological opponents, its use by the General Assembly, and especially by the ICJ, is arguably quite biased.

<sup>57</sup> Barrier Opinion, *supra* note 2, at ¶ 1. “Occupied Palestinian Territory” is generally the term favored by Palestinian supporters. Conversely, Palestinians could rightly accuse the General Assembly of bias if it referred to the West Bank as “Judea and Samaria,” the biblical names for the West Bank used by many Israelis.

<sup>58</sup> Wedgwood, *supra* note 5, at 55.

<sup>59</sup> E.g., Etgar Lefkovits, *19 Killed in Jerusalem Bus Bombing*, JERUSALEM POST, June 19, 2002, at 1.

<sup>60</sup> E.g., Charles A. Radin, *13 Israelis Killed in Bus Stop, Cafe Blasts*, BOSTON GLOBE, Sept. 10, 2003, at A1.

<sup>61</sup> E.g., Phil Reeves & Eric Silver, *Suicide Bomber Kills 17 in Attack Outside Tel Aviv Disco*, INDEPENDENT (London), June 2, 2001, at 1.

<sup>62</sup> Unlike domestic courts, the ICJ must also take care to maintain its independence from individual states, and some commentators have applauded the ICJ’s independence from powerful nations such as the United States. *See, e.g.*, Falk, *supra* note 44, at 45. While the ICJ should be independent from particular states, when it comes to the ICJ’s advisory function, it is independence *from the General Assembly* that is critical to maintaining the legitimacy of the ICJ when exercising its advisory function. As such, the debate regarding the independence of international tribunals from state entities misses

opinion is requested by the General Assembly because the risk that the ICJ will find itself deciding cases on political, rather than legal, grounds is especially high. The ICJ has noted that it should abstain when "giving an advisory opinion [is] incompatible with the Court's judicial character."<sup>63</sup> In theory, upon each request for an advisory opinion, the ICJ must satisfy itself that it has jurisdiction and should not abstain for reasons of propriety, regardless of whether any interested parties object or refuse to appear.<sup>64</sup> In practice, however, this requirement has become nothing more than an "arid formalism"—the ICJ has never abstained from giving an advisory opinion and often seems to "rubber stamp" the General Assembly's position.<sup>65</sup> Rather than a duty to abstain, the ICJ has

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the point entirely. See, e.g., Posner & Yoo, *supra* note 9, at 7 (arguing that "independence [from states] prevents international tribunals from being effective" in part because states are unwilling to submit to compulsory jurisdiction if they perceive the judges as beyond their control); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 902 (2005) ("Can dependent judges really contribute more to the global rule of law or to international cooperation than their independent brethren? We doubt it, and Posner and Yoo have not shown it.").

<sup>63</sup> Barrier Opinion, *supra* note 2, at ¶ 47; see also MICHLA POMERANCE, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT IN THE LEAGUE AND U.N. ERAS 26 n.87 (1973) (noting that the "organic connection" between the PCIJ and the League of Nations meant that the prestige of the PCIJ was dependent on the League's credibility and authority and recommending a severing of this connection between the ICJ and the U.N.).

<sup>64</sup> GBENGA ODUNTAN, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE (1945–1996), at 107 (1999); see also, e.g., Barrier Opinion, *supra* note 2, at ¶ 45 ("[T]he Court . . . [must] satisfy itself, each time it is seised of a request for an opinion, as to the propriety of the exercise of its judicial function.").

<sup>65</sup> Cf. FALK, *supra* note 53, at 169 (1986) (noting that the 1962 *Certain Expenses* advisory opinion "appeared to be . . . 'a rubber stamp' for the [General] Assembly"). In *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 1996 I.C.J. 235, ¶ 14, the ICJ found that it had no jurisdiction to hear the case because the question, asked by the World Health Organization, was beyond the competence of the requesting organ. Only once, in *Status of Eastern Carelia*, 1923 P.C.I.J. (ser. B) No. 5 (July 23), did the Permanent Court of International Justice, the ICJ's predecessor, abstain from hearing a case for reasons of propriety because the Soviet Union objected to the proceedings and

developed a “duty to cooperate at all costs” with the General Assembly. This has blurred the line between the political machinations of the General Assembly and the legal function of the ICJ and “calls into question the judicial nature of the advisory role.”<sup>66</sup>

Since the drafting of the U.N. Charter, countries have been concerned about the need to prevent the advisory function from being used to circumvent a state's refusal to consent to the Court's jurisdiction.<sup>67</sup> The ICJ has previously distinguished between legal controversies that arise “during the proceedings of the General Assembly” and cases that arise “independently in bilateral relations.”<sup>68</sup> That distinction led the Court to recognize that when an advisory opinion arises out of a bilateral dispute, “the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character.”<sup>69</sup> The Court explained that it should refrain from giving an advisory opinion “when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.”<sup>70</sup>

In the Barrier Opinion, however, the Court pays lip service to its prior prudential advice. The Court brushed off concerns about backdoor jurisdiction by noting that it “does not consider that the subject matter of the General Assembly's request . . . as only a bilateral matter between Israel and Palestine.”<sup>71</sup> But the fact that other states and the General

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was not a member of the League of Nations. POMERANCE, *supra* note 36, at 65–69.

<sup>66</sup> Pomerance, *supra* note 3, at 40–41. This duty to cooperate developed early. In one of its first advisory opinions, the Court stated that the request for an advisory opinion “in principle, should not be refused.” Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, 1950 I.C.J. at 71 (Mar. 30) [hereinafter *Peace Treaties*].

<sup>67</sup> See POMERANCE, *supra* note 3, at 26 n.86 (discussing concerns voiced prior to the San Francisco Conference of the need “to avoid a species of indirect compulsory jurisdiction”).

<sup>68</sup> Western Sahara, 1975 I.C.J. 12, at 25 ¶ 34.

<sup>69</sup> *Peace Treaties*, *supra* note 66, at 71.

<sup>70</sup> Western Sahara, 1975 I.C.J. 12, at 25 ¶ 32–33, *quoted by* Barrier Opinion, *supra* note 2, at ¶ 47.

<sup>71</sup> Barrier Opinion, *supra* note 2, at ¶¶ 47–49.

Assembly are interested in the conflict between Israel and Palestine does not explain why the dispute should be adjudicated by the Court when one of the disputants does not consent to the Court's jurisdiction. Moreover, it certainly does not render the dispute one that arose "during the proceedings of the General Assembly."<sup>72</sup>

The legality of the security barrier's construction is inextricably entangled with the ongoing dispute between Israel and the Palestinians. The Oslo Accords were a bilateral agreement finalized in 1993 between Israel and the Palestine Liberation Organization ("PLO") whereby Israel would cede territory to the Palestinian Authority ("PA") to create a Palestinian state, and the PLO would recognize Israel's right to exist within secure and recognized borders.<sup>73</sup> Israel began constructing the barrier in late 2002 after two years of unremitting terrorist attacks originating from PA controlled areas of the West Bank<sup>74</sup> that immediately followed the collapse of the bilateral framework created by the Oslo Accords.<sup>75</sup> Furthermore, the General Assembly has repeatedly called for Israel and Palestine to resolve the conflict through "bilateral negotiations."<sup>76</sup> In a classic understatement, the Court recognized that Israel and Palestine "have expressed radically divergent views."<sup>77</sup> But despite decades of conflict and failed negotiation attempts the Court

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<sup>72</sup> Western Sahara, 1975 I.C.J. 12, at 25 ¶ 34.

<sup>73</sup> The PLO was created in 1964 by the Arab League under the leadership of Egyptian President Gamal Abdul-Nasser to engage in violent acts against Israel without precipitating a direct confrontation between Israel and its neighbors. BARUCH KIMMERLING & JOEL S. MIGDAL, *THE PALESTINIAN PEOPLE* 248 (2003).

<sup>74</sup> See *supra* notes 58-61 and accompanying text.

<sup>75</sup> Even for those who argue that terrorist attacks are merely a pretense to justify the barrier's construction, the dispute's bilateral nature remains unchanged.

<sup>76</sup> Immediately preceding the request for an advisory opinion, the General Assembly expressed its concern that the construction of the barrier could "prejudge future negotiations." G.A. Res. ES-10/13, U.N. GAOR, 10th Emer. Spec. Sess., 22d plen. mtg., Agenda item 5, at 1, U.N. Doc. A/RES/ES-10/13 (2003); see also G.A. Res. 51/29, U.N. GAOR, 51st sess., agenda item 33, U.N. Doc. A/RES/51/29 (1996) (supporting, among other things, the "bilateral negotiations" started at Madrid in 1991, where the Oslo process was initiated).

<sup>77</sup> Barrier Opinion, *supra* note 2, at ¶ 48.

found that the dispute concerning the barrier's legality did not arise "independently in bilateral relations."<sup>78</sup>

The ICJ cites the *Peace Treaties* and *Western Sahara* advisory opinions to support its refusal to decline to hear the case for reasons of propriety, stating that no country "can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take."<sup>79</sup> The United Nations, however, had already decided its "course of action" when the General Assembly declared the security barrier "in contradiction to relevant provisions of international law" two months *before* asking the ICJ whether the security barrier violates international law.<sup>80</sup> While it is true that no state can prevent the Court from giving an advisory opinion, it does not follow that the Court must answer every question posed to it by the General Assembly. The ICJ's justification that "it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly"<sup>81</sup> hardly seems consistent with the proscription that "the Court . . . [must] satisfy itself, each time it is seized of a request for an opinion, as to the propriety of the exercise of its judicial function."<sup>82</sup>

Given that Israel's opponents are generally able to muster a majority for General Assembly resolutions condemning Israel,<sup>83</sup> and that the General Assembly has a long history of singling out Israel for

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<sup>78</sup> Barrier Opinion, *supra* note 2, at ¶ 47, quoting *Peace Treaties*, *supra* note 66; see also Pomerance, *supra* note 3, at 34 (criticizing the Court for its characterization of the conflict as merely "radically divergent views").

<sup>79</sup> Barrier Opinion, *supra* note 2, at ¶ 47.

<sup>80</sup> The General Assembly had declared in Resolution ES-10/13 that the security barrier was "in contradiction to relevant provisions of international law" before asking the ICJ for its opinion on the barrier's legality. Pomerance, *supra* note 3, at 31. The General Assembly's practice of first answering the question and then asking the ICJ for an advisory opinion "is not consonant with the judicial character and independence of the Court." STEPHEN M. SCHWEBEL, JUSTICE IN INTERNATIONAL LAW 20 (1994).

<sup>81</sup> Barrier Opinion, *supra* note 2, at ¶ 61.

<sup>82</sup> *Id.* at 22 ¶ 45.

<sup>83</sup> See *supra* note 54 and accompanying text.

rebuke<sup>84</sup> and excluding it from participation in various U.N. functions,<sup>85</sup> the ICJ ought to be especially vigilant to decide for itself the propriety of answering a request from the General Assembly for an advisory opinion on matters related to Israel. At the very least, the one-sided language of the General Assembly's request should have caused the ICJ to "raise a suspicious judicial eyebrow."<sup>86</sup> In *Reviving the World Court*, Richard Falk observes "part of what makes a judgment finally acceptable is the belief by the losing side that it unqualifiedly has had its full day in court."<sup>87</sup> Unfortunately, the ICJ appears unconcerned about such limitations on its advisory function. "The notion of judicial caution implicit in . . . proceedings before the Permanent Court of International Justice was an apt acknowledgment of these limits, perhaps too easily

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<sup>84</sup> An especially egregious example is General Assembly Resolution 3379, passed in 1975, declaring that "Zionism is a form of racism and racial discrimination," thus making Zionism the only nationalist movement thus classified. G.A. Res. 3379, U.N. GAOR, 30th Sess., 2400th plen. mtg. at 83-84 (1975). The resolution was repealed in 1991, but all 19 Arab member states either voted against repeal or were absent. That Israel has always been *persona non grata* at the United Nations leads to the cynical view among some Israeli policymakers that the General Assembly "is nothing other than the executive committee of the Third World dictatorships." Dan Izenberg, *Avineri: UN is Part of Problem, Not Part of Solution*, JERUSALEM POST, Sept. 5, 2001, at 2 (quoting Israel Foreign Ministry Director-General Shlomo Avineri).

<sup>85</sup> Israel has never served on the Security Council, and an Israeli judge has never sat on the ICJ because only countries that are members of a regional group may participate in these bodies. Regional groups are organized on the basis of geography, and the Asian Group has never permitted Israel to become a member. HUMAN RIGHTS WATCH, WORLD REPORT 2001: ISRAEL, THE OCCUPIED WEST BANK AND GAZA STRIP, AND PALESTINIAN AUTHORITY TERRITORIES: THE ROLE OF THE INTERNATIONAL COMMUNITY (2001), available at <http://www.hrw.org/wr2k1/mideast/israel3.html> (last visited February 27, 2006). However, in May 2000, the West European and Others Group (WEOG), which is the only non-geographically based group, allowed Israel to join, albeit on a conditional basis that requires renewal every four years. *Id.*; see also ANTI-DEFAMATION LEAGUE, *supra* note 54, at 8 (noting that Israel has traditionally been excluded from the regional groups and has only recently been accepted as a temporary member of the WEOG).

<sup>86</sup> TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting).

<sup>87</sup> FALK, *supra* note 53, at 33.

ignored by the [ICJ] in the more difficult—that is, more politicized—environment of its operations.”<sup>88</sup>

### III. DIVISION OF LABOR: FINDINGS OF FACT AND QUESTIONS OF LAW

In the United States federal legal system, another element of the “conversation” between courts<sup>89</sup> is that different courts are presumed to have different levels of competence with respect to making findings of fact as compared with reaching conclusions of law. While an appellate court reviews *de novo* a lower court’s conclusions of law, it must accept a lower court’s findings of fact unless they are clearly erroneous.<sup>90</sup> This division of labor has existed since the nation’s founding,<sup>91</sup> and the Supreme Court has given the rationale that “trial judges have the unique opportunity to consider the evidence in the living courtroom context while appellate judges see only the cold paper record.”<sup>92</sup> For the rare instances when a case is heard by the Supreme Court on original jurisdiction, the Court appoints a special master to conduct any necessary fact finding because it is unwieldy and impractical for nine justices to sit as a trial court.<sup>93</sup> The Court then reviews the record developed by the special master as it would review a record developed by a lower court in a case heard in the usual manner.

In cases with straightforward facts about which the parties agree, as well as in cases with complex disputed facts but well-settled legal standards, the division of labor between trial courts and appellate courts is less significant than it is for cases with disputed facts that also involve

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<sup>88</sup> *Id.* at 32 n. 10.

<sup>89</sup> See *supra* notes 40–48 and accompanying text.

<sup>90</sup> *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 948 (1995).

<sup>91</sup> The differing standards of review for factual and legal findings stems from the Seventh Amendment’s proscription that “no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.” U.S. CONST. amend. VII; see also *Gasperini v. Ctr. for Humanities, Inc.* 518 U.S. 415, 438 (1996) (discussing the development of Seventh Amendment jurisprudence).

<sup>92</sup> *Id.* at 438 (citations omitted).

<sup>93</sup> CHEMERINSKY, *supra* note 46, at 649.

novel legal questions. While the appellate function is important in either circumstance, when both the facts and the law are at issue, a trial court must undertake the difficult task of developing an effective general legal standard while simultaneously uncovering the facts to which that legal standard must be applied. In such cases, the quality control provided by appellate review is most apparent. Precisely because an appellate court only has access to the "cold paper record," it is sufficiently separate from the underlying factual dispute to more objectively analyze any novel legal questions. With this distance, appellate courts can better formulate the relevant legal test and remand to the trial court to conduct a more focused factual inquiry with that test in mind.<sup>94</sup>

It is essential that the fact-finder not also have the final word on questions of law, especially when novel legal issues are raised. First, litigants uninformed by the applicable legal standards will have difficulty presenting a court with the information it needs to resolve the dispute. The difficulty for the court is then compounded because legal standards cannot be adequately applied to resolve a dispute if the court lacks a detailed factual record. The Barrier Opinion suffers from the latter problem far more than the former, and others have pointed out the opinion's many omissions and the Court's "apparent inability to grapple with complex fact patterns associated with armed conflict."<sup>95</sup> The discussion below focuses on the ICJ's nearly exclusive reliance on the dossier provided by the Secretary General in lieu of conducting an independent factual investigation and explains how this reliance may

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<sup>94</sup> The Supreme Court has overruled appeals courts that intrude upon trial courts' find-finding capacity. To be sure, the Supreme Court itself has ignored these boundaries but has been harshly criticized by dissenting justices for doing so. *Compare* *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) ("If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings."), *with* *Great Atl. & Pac. Tea Co. v. Fed. Trade Comm'n*, 440 U.S. 69, 86 (1979) (Marshall, J., dissenting in part) ("Having formulated a new legal standard, the Court then applies it here in the first instance rather than remanding the case . . . . Given the numerous ambiguities in the record, I believe the Court thereby improperly arrogates to itself the role of the trier of fact.").

<sup>95</sup> Murphy, Pomerance, and Wedgwood all discuss the Court's poor fact-finding. Murphy, *supra* note 4, at 62-63; Pomerance, *supra* note 3, at 37-38; Wedgwood, *supra* note 5, at 53-54.

have lead to the Court's inaccurate assessment of Israel's security needs.<sup>96</sup> Then, Part IV discusses how the Court's failure to inquire into the facts may have led to the questionable holding that Article 51 of the United Nations Charter is inapplicable and argues that the Barrier Opinion is better understood as a contentious case in disguise.

*A. The Secretary General's Dossier*

The ICJ limited its factual investigation to a collection of eighty-eight "dossiers" submitted by the U.N. Secretary General.<sup>97</sup> While one might presume that United Nations' extensive involvement with the Israel-Palestine conflict renders such evidence sufficient,<sup>98</sup> a closer examination of the dossiers' contents reveals that they contain little that could be called "evidence," and even that small amount is generally one-sided.<sup>99</sup> Of the eighty-eight dossiers, thirty-two are General Assembly resolutions, draft resolutions, and verbatim meeting records,<sup>100</sup> twenty-two are similar Security Council materials,<sup>101</sup> and an additional fourteen dossiers consist of treaties and other general documents such as the

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<sup>96</sup> See discussion *infra* Parts V.A.–B.

<sup>97</sup> Barrier Opinion, *supra* note 2, at ¶ 57. The ICJ also stated that "many other documents issued by the Israeli Government . . . are in the public domain." *Id.* The opinion, however, does not appear to make use of any of this information in reaching its conclusions. Wedgwood, *supra* note 5, at 53; see also *infra* note 141.

<sup>98</sup> The ICJ itself made such an argument. Barrier Opinion, *supra* note 2, at ¶¶ 55–58.

<sup>99</sup> Imagine an analogous domestic situation: if a United States federal court limited its fact finding in a politically-charged case to a report submitted by the Bush White House, and the Republican-controlled Congress had already taken an official position about the case, one could hardly expect the opinion to be viewed as well founded, especially if the court's opinion just happened to agree with Congress' position.

<sup>100</sup> Introductory Note and List of Contents of the Dossier prepared by the Secretariat of the United Nations, available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (last visited February 27, 2006) [hereinafter "Dossier"]. The relevant materials are Nos. 1–23, 40–42, 78–83 and are referenced on pages 7–8, 9–10, and 13.

<sup>101</sup> *Id.* at 9, 10, and 13. The relevant materials are Nos. 24–39, 43–47, 84.

Fourth Geneva Convention, the Hague Convention, and the Oslo Accords.<sup>102</sup> Of the remaining twenty dossiers, eight are reports by various specialized U.N. organs, seven are letters from various U.N. representatives,<sup>103</sup> and five are reports produced by the Secretary General.<sup>104</sup>

As a preliminary point, the Court ought to have been skeptical about the objectivity of the 32 dossiers containing General Assembly records. Regardless of whether this advisory opinion is better viewed as a contentious case between Israel and Palestine,<sup>105</sup> it is apparent that Israel and the General Assembly took opposite positions in that Israel objected to the General Assembly's decision to request the opinion.<sup>106</sup> In light of this conflict, the Court ought to have been concerned that thirty-two dossiers—over one third of the materials—consisted of General Assembly resolutions and meeting records. This fact may partially explain why the Barrier Opinion is in general agreement with the General Assembly's previously stated position on the security barrier.<sup>107</sup> In addition, the twenty-two dossiers of Security Council records do not seem relevant to the question of the security barrier's legality. Although construction of the barrier did not begin until 2002, thirteen of the Security Council resolutions submitted in the dossiers were adopted prior to 2002.<sup>108</sup> The ICJ's characterization of such resolutions and other documents as "evidence"<sup>109</sup> undermines the ICJ's assessment that it had a "voluminous" amount of evidence of the barrier's "humanitarian and socio-economic impact on the Palestinian population."<sup>110</sup> Moreover, as is discussed below, the remaining dossiers could hardly be said to satisfy the Court's fact-finding obligations.

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<sup>102</sup> *Id.* at 11–12. The relevant materials are Nos. 57–70.

<sup>103</sup> *Id.* at 12–13. The relevant materials are Nos. 71–77 and are discussed below in Part IV.

<sup>104</sup> *Id.* at 10. The relevant materials are Nos. 48–52.

<sup>105</sup> See *infra* Part III.

<sup>106</sup> Pomerance, *supra* note 3, at 34.

<sup>107</sup> See Pomerance, *supra* note 3, at 31.

<sup>108</sup> In addition, although Security Council resolutions are binding, they are not considered to be "determinative legal judgments" on a given issue. Otherwise, the ICJ would be superfluous. MCCORMACK, *supra* note 36, at 24–26.

<sup>109</sup> The treaty materials comprise nearly 400 pages of the 1152 pages of dossiers.

<sup>110</sup> Barrier Opinion, *supra* note 2, at ¶ 57.

The eight dossiers produced by specialized U.N. organs are authored by entities that can hardly be said to be neutral with respect to the Arab-Israeli conflict and are telling for what they omit. Four of these dossiers consist of a report by the Mission to the Humanitarian and Emergency Policy Group ("HEPG") of the Local Aid Coordination Committee entitled "The Impact of Israel's Separation Barrier on Affected West Bank Communities."<sup>111</sup> Two dossiers are reports from Special Rapporteurs of the U.N. Commission on Human Rights ("CHR").<sup>112</sup> One dossier is a report from the U.N. Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories (Israeli Practices Committee),<sup>113</sup> and one is an excerpt from the Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People ("CEIPP").<sup>114</sup>

It is interesting to note both the track record of the authors of these dossiers as well as the fact that these reports were included while others were not. First, the HEPG reports on the impact of the security barrier on Palestinian communities demonstrate the noticeable absence of an analogous report submitted to the ICJ concerning the impact of Palestinian suicide bombers on Israeli communities. Second, the CHR has recently been the subject of much criticism for its generally anti-Israel bias: over 25 percent of its resolutions solely reference Israel, while none refer to such notorious human rights violators as Libya<sup>115</sup> and Syria.<sup>116</sup> In fact, such abuses contributed to the Secretary General's

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<sup>111</sup> Dossier, *supra* note 100, at 14. The relevant materials are Nos. 85–88.

<sup>112</sup> *Id.* at 11. The relevant materials are Nos. 55–56.

<sup>113</sup> *Id.* The relevant material is No. 53.

<sup>114</sup> *Id.* The relevant material is No. 54.

<sup>115</sup> See Letter from Kenneth Roth, Executive Director, Human Rights Watch, to Thabo Mbeki, President, South Africa (Aug. 6, 2002) (objecting to Libya's appointment to CHR chair because of its "long record of human rights abuse"), available at <http://www.hrw.org/press/2002/08/mbekiltr0806.pdf> (last visited February 27, 2006).

<sup>116</sup> See HUMAN RIGHTS WATCH, WORLD REPORT 2003 (detailing Syria's many human rights violations), available at <http://www.hrw.org/wr2k3/mideast7.html> (last visited February 27, 2005).

recent recommendation that the CHR be abolished.<sup>117</sup> Third, the Israeli Practices Committee is comprised of three member states, Sri Lanka, Malaysia, and Senegal, and the report was the product of the Committee's 12 day visit to Egypt, Jordan, and Syria.<sup>118</sup> First, it is difficult to comprehend what the Israeli Practices Committee could have learned about Israeli practices by visiting Egypt, Jordan, and Syria. Second, although the report claims balance by noting that its 31 interviews included meetings with "representatives of Israeli [non-governmental organizations ("NGOs")]," a quick scan of the NGO list indicates that the small handful of Israeli representatives were from organizations such as B'Tselem, the Israeli Committee Against House Demolition, and the Public Committee Against Torture in Israel.<sup>119</sup> These NGOs are avowedly partisan. One can hardly expect a report based on information they provided to contain a balanced presentation of the relevant evidence—let alone to express Israel's official position—concerning the security barrier's legality.

Finally, regarding the CEIPP report, it is sufficient to note that one of its early actions was to recommend that November 29th be declared an annual "International Day of Solidarity with the Palestinian People."<sup>120</sup> On that day in 1947, the General Assembly approved Resolution 181 partitioning Palestine into two states, one Jewish and the other Palestinian. Given the unanimous rejection of that resolution by the Arab states, November 29 is an odd date to choose for an anniversary that is essentially dedicated to highlighting Israel's misdeeds. As with the reports discussed above, while the CEIPP report may provide the ICJ

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<sup>117</sup> Specifically, the Secretary General suggested replacing the CHR with a new Human Rights Council. The Secretary General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 181–83, U.N. Doc. A/59/2005 (Mar. 21, 2005). The Secretary General explained that "the Commission's capacity to perform its tasks has been increasingly undermined by its declining credibility and professionalism. In particular, States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. As a result, a credibility deficit has developed . . . ." *Id.* at ¶ 182.

<sup>118</sup> See Report of the Special Comm. to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, at 2, U.N. Doc. A/58/311 (Aug. 22, 2003).

<sup>119</sup> See *id.* at 26.

<sup>120</sup> See G. A. Res. 32/40 B (Dec. 2, 1977).

with useful information, the fact that there are no counterbalancing reports representing Israel's views is highly problematic.<sup>121</sup>

The Court's failure to question the dossiers' sufficiency is especially egregious, given that it describes "the purported harm to Palestinians without describing one terrorist act against Israelis which preceded the fence's construction."<sup>122</sup> As a result of this imbalance, several of the Judges filed separate opinions expressing concern about the Court's failure to inquire into the "Israeli side of the picture."<sup>123</sup> That the Court chose to proceed as if "the facts do not matter"<sup>124</sup> is made even more apparent by the cursory treatment of Israel's security concerns.

### *B. The ICJ Assessment of Israel's Security Concerns*

The remaining seven dossiers in the Secretary General's submission to the ICJ that have not yet been discussed are letters submitted by the U.N. Representatives for Palestine, Syria, Malaysia, Iran, and Kuwait,<sup>125</sup> all of whom make no effort to hide their disdain for Israel.<sup>126</sup> More relevant for the sufficiency of the ICJ's fact-finding, the

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<sup>121</sup> See Barrier Opinion, *supra* note 2, Separate Opinion of Judge Owada [hereinafter Owada Opinion], at ¶ 23–26 (observing that "the Israeli construction of the wall has not come about in a vacuum" and expressing concern that "material on this point from the Israeli side is not available").

<sup>122</sup> Anne Bayefsky, One Small Step, Address before the United Nations conference on Confronting Anti-Semitism: Education for Tolerance and Understanding (June 21, 2004), available at WALL ST. J. OPINION J., <http://www.opinionjournal.com/extra/?id=110005245> (last visited February 27, 2006), quoted in Pomerance, *supra* note 3, at 36 n.60.

<sup>123</sup> See, e.g., Owada Opinion, *supra* note 121, at ¶ 22; see also Barrier Opinion, *supra* note 2, Declaration of Judge Buergenthal [hereinafter "Buergenthal Declaration"], at ¶ 7 ("[T]he Court fails to address any facts or evidence specifically rebutting Israel's claim of military exigencies or requirements of national security."); Wedgwood, *supra* note 5, at 54 & n.16 (citing the Owada Opinion and the Buergenthal Declaration, as well as the Separate Opinion of Judge Higgins and the Written Statement of the United States).

<sup>124</sup> See Wedgwood, *supra* note 5, at 54.

<sup>125</sup> See Dossier, *supra* note 100, Nos. 71–77.

<sup>126</sup> Mahathir bin Mohamad, Opening Speech at the Tenth Session of the Organization of the Islamic Conference (Oct. 16, 2003), available at

only two letters that contain actual substantive information about the construction of the barrier are from the Permanent Observer of Palestine.<sup>127</sup> However, both letters are more accurately characterized as partisan arguments rather than as independent evidence. For example, the first begins by stating that “Israel, the *occupying Power*, continues to plan and erect the *conquest wall* that it has been *illegally* building in the *Occupied Palestinian Territory*, including East Jerusalem,”<sup>128</sup> while the second informs the Secretary General that the Barrier is being constructed as “part and parcel of the Israeli Government’s *expansionist designs* throughout the *Occupied Palestinian Territory* . . . that have been affected . . . by Israel’s *incessant settlement colonialism*.”<sup>129</sup>

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<http://www.smh.com.au/articles/2003/10/20/1066502121884.html> (last visited Feb. 27, 2006). In his opening speech at the Tenth Session of the Organization of the Islamic Conference on October 16, 2003, Malaysian President Mahathir bin Mohamad stated that many Muslims believe that they “will forever be oppressed and dominated by the Europeans and the Jews.” *Id.* He advocated “devise[ing] . . . a strategy that can win [Muslims] final victory” in Palestine, and to learn from the Jews’ experience: “The Europeans killed 6 million Jews out of 12 million. But today the Jews rule this world by proxy. They get others to fight and die for them.” *Id.*; see also BUREAU OF NEAR EASTERN AFFAIRS, U.S. DEP’T OF STATE, BACKGROUND NOTE: SYRIA (Oct. 2005), <http://www.state.gov/r/pa/ei/bgn/3580.htm> (last visited Feb. 27, 2006) (Israel and Syria have been officially in a state of war for several decades.); Anne Penketh, *Iran’s Leader Says Jewish State ‘Should Be Wiped From Map’*, INDEPENDENT (London), Oct. 27, 2005, available at [http://news.independent.co.uk/world/middle\\_east/article322539.ece](http://news.independent.co.uk/world/middle_east/article322539.ece) (last visited Feb. 27, 2006) (reporting that Iranian President Mahmoud Ahmadinejad has recently called for Israel to be “wiped off the map”); BUREAU OF NEAR EASTERN AFFAIRS, U.S. DEP’T OF STATE, BACKGROUND NOTE: IRAN (Aug. 2005) [hereinafter “U.S. DEP’T OF STATE, BACKGROUND NOTE: IRAN”], <http://www.state.gov/r/pa/ei/bgn/5314.htm> (last visited Feb. 27, 2006) (noting that Iran has for years funded Hamas, Hezbollah, and other groups that are “violently opposed to the Arab-Israeli peace process”).

<sup>127</sup> See Dossier, *supra* note 100, Nos. 71 & 72. Four other letters are merely requests to resume the Tenth Emergency Special Session, and the fifth is a proposal for a draft resolution declaring that the security barrier violates international law. *Id.* Nos. 73–77.

<sup>128</sup> *Id.* No. 71 (emphasis added).

<sup>129</sup> *Id.* No. 72 (emphasis added).

The letters' conclusory language and repeated references to "colonialism" and "the conquest wall" are not evidence. These references are arguments that might fairly be included in a nation's statements to the Court but which have no place in the Secretary General's submissions. If such views are to be included, it would seem reasonable for the dossiers to contain letters from Israel's U.N. Representative as well. For example, in a letter to the Security Council dated one week after the letters described above, Israel's U.N. Representative states that

On Saturday, 4 October 2003, at approximately 2.20 p.m. (local time), on the eve of Yom Kippur, the holiest day of the Jewish calendar, a Palestinian suicide bomber from the West Bank town of Jenin perpetrated a massacre in a crowded beachfront restaurant in the port city of Haifa in northern Israel. The powerful explosion ripped through the restaurant, killing 19 civilians including three children and a baby girl, and wounding 60 others, dozens seriously.<sup>130</sup>

Such a letter would presumably have been useful to the ICJ, especially since it describes the kind of activity that Israel claims the security barrier is designed to prevent—a suicide bombing in Haifa, a city within the Green Line, that Israel believes was carried out by a Palestinian from Jenin, a refugee camp in the West Bank. In fact, Judge Buergenthal decided not to sign on to the Court's *dispositif* precisely because "the nature of these cross-Green Line attacks and their impact on Israel and its population are never really seriously examined by the Court."<sup>131</sup>

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<sup>130</sup> Identical letters dated 8 October 2003 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. GAOR, 58th Sess., U.N. Doc. A/58/424, S/2003/972 (October 9, 2003).

<sup>131</sup> Buergenthal Declaration, *supra* note 123, at ¶ 3.

#### IV. SHIFTING THE BURDEN OF PROOF

Notwithstanding the Court's exclusive reliance on the Secretary General's dossiers despite their complete exclusion of readily available evidence about Israel's security concerns, Richard Falk and others blame Israel for the Court's failure to balance the harms caused by the security barrier's construction with Israel's security needs.<sup>132</sup> Nothing more could be expected of the ICJ, these commentators argue, because Israel "forfeited the opportunity to present its security rationale" behind the security barrier's construction.<sup>133</sup> In his separate opinion, Judge Kooijmans alludes to Israel's "obligation" to provide the Court with evidence in its defense, noting that "Israel's argument that the Court does not have at its disposal the necessary evidentiary material . . . does not hold water, as this obligation is to an important degree *in the hands of Israel as a party to the dispute*."<sup>134</sup> Judge Kooijmans' choice of words is a telling indicator of the real, as opposed to formal, procedural posture of the case. First, he considers Israel to be "a party to the dispute" despite the fact that there are no parties to advisory opinions. Second, he views the production of evidentiary material in support of Israel's position as being "in the hands of Israel"<sup>135</sup> rather than in the hands of the U.N. Secretary General, whose function was to provide the Court with background information to enable it to reach a decision. As was discussed above, the Secretary General could easily have provided the ICJ with evidence of Israel's security concerns, and the ICJ should have questioned the Secretary General's failure to do so.

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<sup>132</sup> See Falk, *supra* note 44, at 47; see also, Ardi Imseis, *Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion*, 99 AM. J. INT'L L. 102, 104 n.8 (2005) (expressly "not criticizing" the ICJ's exclusive reliance on the Secretary General's dossier); Iain Scobbie, *Words My Mother Never Taught Me—"In Defense of the International Court"*, 99 AM. J. INT'L L. 76, 79 (2005) (noting that "Israel, it should be recalled, had declined to address" the merits of the case).

<sup>133</sup> Falk, *supra* note 44, at 47.

<sup>134</sup> Barrier Opinion, *supra* note 2, Separate Opinion of Judge Kooijmans, 43 I.L.M. at 1071, ¶ 28 (emphasis added) [hereinafter Kooijmans Opinion]; see also Imseis, *supra* note 132, at 104 n.8 (quoting Judge Kooijmans' opinion approvingly).

<sup>135</sup> Kooijmans Opinion, *supra* note 134.

Israel's refusal to address the merits of the case indirectly led the Court to conclude that Israel could not invoke the self-defense provision in Article 51 of the U.N. Charter to justify construction of the barrier.<sup>136</sup> Without citing precedent, the Court held that Article 51 recognizes a State's right of self-defense against armed attacks only if those attacks "are imputable to a foreign State."<sup>137</sup> Therefore, because "Israel does not claim that the attacks against it are imputable to a foreign State," the Court concluded that "Article 51 has no relevance in this case."<sup>138</sup> Interestingly, the Court does not say that the attacks against Israel are in fact not imputable to a foreign State, but merely that "Israel *does not claim* that the attacks against it are imputable to a foreign State."<sup>139</sup>

When a court bases a legal conclusion on what a party does *not* claim, the clear implication is that that party bore the burden of proof with respect to that legal issue. The formal lack of an obligation to argue the case on the merits is undermined by the *de facto* argue-or-lose choice placed upon Israel by the ICJ's failure to conduct an independent fact-finding inquiry. Here, had the Court cared to investigate, it might have discovered that Israel does claim that the attacks against it are imputable to a foreign state. Although the Court noted that many Israeli Government documents about Israel's security problems are in the public domain,<sup>140</sup> its conclusions about the inapplicability of Article 51 ignore publicly available sources that provide detailed allegations of Israel's claims regarding foreign involvement in Palestinian terrorism.<sup>141</sup> The

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<sup>136</sup> Others have also criticized the Court's conclusion regarding the inapplicability of Article 51. Murphy, *supra* note 4, at 63–70; Wedgwood, *supra* note 5, at 57, 61.

<sup>137</sup> Barrier Opinion, *supra* note 2, at ¶ 139.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* (emphasis added).

<sup>140</sup> Barrier Opinion, *supra* note 2, at ¶ 57; *see also supra* note 97.

<sup>141</sup> *E.g.*, ISRAEL MINISTRY OF FOREIGN AFFAIRS, IRAN AND SYRIA AS STRATEGIC SUPPORT FOR PALESTINIAN TERRORISM (Sept. 30, 2002), *available at* [http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2002/9/](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/9/) (last visited February 27, 2006) (detailed allegations of Iranian and Syrian support of Palestinian terrorist groups); ISRAEL MINISTRY OF FOREIGN AFFAIRS, IRAQI SUPPORT FOR AND ENCOURAGEMENT OF PALESTINIAN TERRORISM (Sept. 30, 2002), *available at* [http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2002/9/](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/9/) (last visited

Barrier Opinion has borne out the fears of the delegates to the San Francisco Conference that the ICJ's advisory function would be used to cast a nonconsenting state as a *de facto* defendant.<sup>142</sup>

Richard Falk's praise of the Barrier Opinion seems to ignore his own assertion that "the effort to cast a state in the role of *de facto* defendant, without acquiring its genuine consent to the proceedings, is hazardous for the Court['s] . . . growth as an institution."<sup>143</sup> When the right not to appear exists in name only, ICJ advisory opinions lose a crucial aspect of "what makes a judgment finally acceptable,"

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February 27, 2006) (detailed allegations of Iraqi support of Palestinian terrorism); U.S. DEP'T OF STATE, BACKGROUND NOTE: IRAN, *supra* note 126, available at <http://www.state.gov/r/pa/ei/bgn/5314.htm> ("Iran backs Hizballah, Hamas, the Palestinian Islamic Jihad, and the Popular Front for the Liberation of Palestine-General Command—all groups violently opposed to the Arab-Israeli peace process."); see also Douglas Frantz & James Risen, *A Secret Iran-Arafat Connection Is Seen Fueling the Mideast Fire*, N.Y. TIMES, Mar. 24, 2002, at A1 ("American and Israeli intelligence officials have concluded that Yasir Arafat has forged a new alliance with Iran that involves Iranian shipments of heavy weapons and millions of dollars to Palestinian groups that are waging guerrilla war against Israel."); Susan Sachs, *Islamic Jihad founder admits funding by Iran*, NEWSDAY (New York), Apr. 11, 1993, at p.14 ("In a late-night interview with Newsday last week in his modern office in the Syrian capital, [Islamic] Jihad founder Fathi Shikaki said Iranian money has been flowing regularly to the group since the beginning of the Palestinian uprising against Israeli rule in December, 1987.").

<sup>142</sup> See POMERANCE, *supra* note 36, at 26 n.86 (discussing concerns voiced prior to the San Francisco Conference of the need "to avoid a species of indirect compulsory jurisdiction").

<sup>143</sup> FALK, *supra* note 53, at 32 n.10. Falk dismisses the possibility that the Barrier Opinion's conclusory analysis will adversely impact the credibility of the ICJ. Instead, in analysis that is nearly as cursory as the Court's, he argues that the Court's "virtual unanimity" should dispel any such concerns about a loss of credibility, pointing to the "depth and breadth of this consensus" at least eight times in his ten page article. See, e.g., Falk, *supra* note 44, at 43 ("[W]hat constitutes a sufficiency of evidence is . . . a subjective judgment, but the agreement of fourteen of fifteen judges . . . seems significant."); *id.* at 45 (Despite the suggestion that the ICJ should have exercised its discretion to refuse to answer the request for an advisory opinion . . . , the virtual unanimity of the Court . . . gives great weight to the assertion that an advisory opinion on these matters deserves to be treated with the greatest possible respect.").

specifically, “the belief by the losing side that it unqualifiedly has had its full day in court.”<sup>144</sup> Judge Kooijmans, Falk, and the Court itself should not blame Israel for the Court’s own failure to demand that the General Assembly provide it with a balanced presentation of facts or, alternatively, for the court’s failure to appoint a special master to conduct an independent investigation.<sup>145</sup>

Much of the ICJ’s failure to conduct a suitable factual investigation stems in part from the flat institutional structure that requires a single court to simultaneously investigate complex facts while formulating standards with which to decide novel legal questions.<sup>146</sup> Although the structure of the U.S. federal judiciary serves as a useful comparison,<sup>147</sup> there are international tribunals that are structured in a way that could be emulated by the ICJ. For example, the ICJ could establish separate trial-level and appellate panels, similar to the highly-regarded WTO dispute settlement model, whose rate of compliance is exceptional.<sup>148</sup> In the near term, a less drastic change would be to more regularly make use of existing procedures to appoint an independent special master.<sup>149</sup> Had it done so in the Barrier Opinion, the Court might very well have reached an identical conclusion about the security barrier’s legality. However, the likelihood of compliance would have been

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<sup>144</sup> FALK, *supra* note 53, at 33.

<sup>145</sup> See Wedgwood, *supra* note 5, at 53–54 (suggesting that the Court make use of its ability to appoint a special master to conduct factual investigations).

<sup>146</sup> See *supra* text accompanying note 48.

<sup>147</sup> See *supra* Part III.

<sup>148</sup> The compliance rate for WTO decisions is 80%, which is quite remarkable for an international court. In fact, there is not a single WTO case in which a small developing country could not induce compliance from a developed country. The few cases of non-compliance involved disputes between large countries, such as between Brazil and Canada. Unlike the ICJ, the WTO jurisdiction is compulsory. Of course, it may be that part of the reason countries are willing to submit to such jurisdiction is that the WTO Appellate Body is perceived as credible and unbiased.

<sup>149</sup> Wedgwood, *supra* note 5, at 53–54 (suggesting that the Court use its authority to appoint a special master).

greater, and “the humanitarian needs of the Palestinian people would have been better served” because “the Opinion would have had the credibility . . . it [currently] lacks.”<sup>150</sup>

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<sup>150</sup> Buergenthal Declaration, *supra* note 123, ¶ 3, at 1078.