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# Cutting the Gordian Knot: How and Why the United Nations Should Vest the International Court of Justice with Referral Jurisdiction

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# Cutting the Gordian Knot: How and Why the United Nations Should Vest the International Court of Justice with Referral Jurisdiction

Andrew Strauss<sup>†</sup>

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## Abstract

The International Court of Justice—the global system's oldest and most venerable tribunal—has failed to meet its full potential. This is in large measure due to the requirement that the Court may only assert jurisdiction over states with their consent, which is often withheld. To help

correct for this failure, this article proposes that the Court be given a *referral jurisdiction*. Referral jurisdiction would empower the Court to issue advisory opinions on interstate disputes without the requirement of state consent. Standing in the way of nonconsent-based jurisdiction, however, is the problem of the *Gordian Knot*: The world's most powerful countries who are best able to lead or block expansion of the Court's jurisdiction have historically perceived their advantage to lie more with political muscle than expanded judicial process. Today, their power to block is manifest in the ability of each of the permanent five members of the United Nations Security Council to veto amendments to the treaty creating the Court. This article, however, suggests that there is a solution to the Gordian Knot problem. It proposes a legal strategy that would allow the United Nations General Assembly to establish referral jurisdiction without a treaty amendment. Having cut the Gordian Knot, this article goes on to make the case for referral jurisdiction. Specifically, it argues that (1) the proposal for referral jurisdiction is legal under the Charter of the United Nations, the Statute of the International Court of Justice, and other general principles of international law; (2) referral jurisdiction would further compliance with international law; and (3) its implementation would institutionally strengthen the Court. This article concludes by suggesting that the rise of many newly industrializing countries that may be willing to spearhead jurisdictional expansion portends new possibilities for cutting the Gordian Knot and, in the process, unleashing a promising era of global rule of law reform.

*Alexander [the Great]. . . requested to see the [Gordian Knot], and, when it was shown him, not being able to find the ends of the cords, which were hidden within the knots, he put a forced interpretation on the oracle, and cut the cords with his sword; and thus, when the involutions were opened out, discovered the ends concealed in them.*

– Justin<sup>1</sup>

## Introduction

Despite widespread agreement that reform of the global institutional architecture is desirable, attaining it has been elusive. Typical of the unfortunate demise of past reform efforts was Secretary-General Kofi Annan's largely stymied project to spearhead a post-millennial transformation of the United Nations.<sup>2</sup> Similar recent defeats of initiatives to strengthen the specialized regimes established to meet the apocalyptic threats of global warming and nuclear weapons also stand as ominous reminders of the difficulties of reform.<sup>3</sup> A key reason for the nonemergence of a more func-

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1. JUSTIN, CORNELIUS NEPOS, AND EUTROPIUS 97 (John Shelby Watson trans., London, Henry G. Bohn 1853).

2. See The Secretary-General, *In Larger Freedom: Towards Development, Security, and Human Rights for All*, U.N. Doc. A/59/2005 (Mar. 21, 2005) (laying out former Secretary General Kofi Annan's post-millennial reform agenda).

3. See generally James Traub, *At the World's Summit: How Will Leading Nations Lead?*, POL'Y ANALYSIS BRIEF (The Stanley Found., Muscatine, Iowa), June 2009, at 8-10, available at <http://www.stanleyfoundation.org/resources.cfm?id=388> (discussing

tional global system of governance has been ambivalence, or even hostility, from the most powerful countries of the world, particularly the five permanent members on the United Nations Security Council. While it would be an oversimplification to lay complete responsibility for the general inertia regarding reform at their feet, the reality is that powerful countries are generally best positioned to lead or block initiatives.

That the global powers-that-be would have a desultory record in leading the world toward a more functional system of global governance might not have been apparent to an observer caught up in the inaugural optimism of the post-World War II order. In the war's immediate aftermath, the United States led the way toward the creation of a rule-based international system. If biased in favor of the powerful, the new global institutions—the United Nations, the International Court of Justice, the Bretton Woods Institutions, and the GATT—also held the promise of potential evolution toward an effective law-based international system. While powerful countries in the period since the dawn of the Cold War have led certain global rule of law advances, mostly in the area of trade, their commitment to the promise has not been sustained. The one great exception was the creation of the International Criminal Court. Even this innovation, however, despite being promoted by leading members of the global community, had to overcome both passive and active opposition from three of the five permanent members of the United Nations Security Council.<sup>4</sup>

The reasons why powerful countries have tended not to support efforts to make the international legal system more effective are complex. The weight of historical habit, the interests of elites, mistrust born of specific conflicts, and insular and other cultural attitudes have all played a role. Of greatest importance, however, is the fact that the powerful dominate the present global system and, consequently, do not tend to perceive replacing that system with one that is more rule-based to be in their interest.

This is the Gordian Knot of global rule of law reform. Those who could most easily lead a transition to a more law-based international system often see themselves as having the biggest stake in the current configuration of power. Developing strategies for cutting this Gordian Knot calls for the attention of those who think about advancing international rule of law. In this Article I will answer this call with a study of the International Court of Justice, the international system's most venerable standing court and the only one with a pedigree dating back to the League of Nations.

This Article is divided into two parts. Part One explains how the problem of the Gordian Knot has worked to frustrate the expansion of the

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impediments to reform of the global climate change and nuclear weapons proliferation regimes).

4. See ERIC K. LEONARD, *THE ONSET OF GLOBAL GOVERNANCE: INTERNATIONAL RELATIONS THEORY AND THE INTERNATIONAL CRIMINAL COURT* 95-100 (2005) (chronicling the British and French support for the International Criminal Court, the American and Chinese opposition to it, and the Russian decision to vote for, but not subsequently ratify, the Rome Statute creating that court).

Court's jurisdiction and concludes by proposing how the General Assembly can cut that Knot to initiate what I call *referral jurisdiction*. Such jurisdiction would allow aggrieved states to seek the Court's advisory opinion regarding their allegations against other states without the jurisdictional consent of those states. Part Two of this Article shifts gears to make the supporting legal and political case for referral jurisdiction. Because available theory does not offer a distinct model for explaining how an incremental expansion of the Court's advisory jurisdiction would further compliance with international law and strengthen the Court, this Part presents such customized theory.

To develop these themes, in Section I of Part One, I describe the extent to which the Court's jurisdiction is limited by the requirement of state consent and how this limitation prevents the Court from living up to a judicial potential unique among the international system's tribunals. In Section II, I apply the Gordian Knot thesis to the problem of expanding the Court's jurisdiction with a recounting of how the great powers have historically thwarted the universalization of the Court's jurisdiction. As I will detail, the great powers at the time of the Permanent Court of International Justice's founding after World War I opposed universalizing its jurisdiction, just as they did the jurisdiction of its successor, the International Court of Justice, after World War II. In both instances, the less powerful countries, unable to cut the Gordian Knot, were forced to accede to the great powers. During the Court's formative years, however, the great powers were not challenged by the less powerful countries to acquiesce to jurisdictional reform, as those from the developing world perceived the Court to be neither adequately representative of their societies nor sensitive to their perspectives.

Today, the Court again enjoys broad-based support among the less powerful countries of the world. The timing is therefore opportune for expanding its jurisdiction. To take advantage of this opportunity, a way must be found to cut the Gordian Knot of what history suggests will be opposition from the great powers. In Section III, I propose a way this can be done. Namely, I will explain how the Knot, as currently configured, ties up jurisdictional reform because each of the five permanent powers on the United Nations Security Council may veto an amendment of the Court's statute expanding its jurisdiction. There is a viable way, however, for the United Nations General Assembly to bypass the Security Council and create referral jurisdiction. As I will detail, the General Assembly can create a Judicial Commission under Article 22 of the Charter, and under Article 96 it can empower that Commission to refer to the Court requests of aggrieved states for advisory opinions.

In Section I of Part Two, I make the doctrinal case that my proposal for referral jurisdiction is legal under the Charter of the United Nations, the Statute of the International Court of Justice, and other general principles of international law. In Section II, I make the case that referral jurisdiction would improve compliance generally with international law. To support this contention, I employ three of the predominate descriptive theories of

international law compliance (transnational legal process theory, Thomas Franck's legitimacy theory, and rationalist compliance theory) to predict the salutary effect that referral jurisdiction would have on international law compliance. Finally, in Section III, I make the case that the response of states to the Court's foray beyond the realm of consensual jurisdiction would institutionally strengthen, rather than weaken, the Court.

## Part One: The International Court of Justice and the Problem of the Gordian Knot

### I. The International Court of Justice, Its Importance, and Jurisdictional Limitations

#### A. The Court and Its Unique Importance

In terms of status and hold on the public imagination, the International Court of Justice is the closest institution that the international community has to a high court. With its membership universal and its competence not limited to a particular subject area, the Court today hears disputes involving both developed and developing countries from East and West, North and South.<sup>5</sup> The subject matter of its judgments transcends conflicts traditionally deemed suitable for judicial settlement and includes some of the global community's most contentious issues, such as the use of force and self-defense, the legality of nuclear weapons and nuclear testing, self-determination of peoples, environmental liability, human rights, and genocide.<sup>6</sup>

Yet the Court does not stand alone on the international judicial landscape. It now shares that panorama with a proliferation of specialized international tribunals. For instance, Europe,<sup>7</sup> the Americas,<sup>8</sup> and Africa,<sup>9</sup> all have human rights courts, which have been complimented by a plethora of war crimes tribunals, the most important of which is the International Criminal Court.<sup>10</sup> Various international tribunals have also come to play a major role in resolving international trade disputes. The capstone of the international trading system is the World Trade Organization's Dispute Set-

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5. See International Court of Justice, *List of Cases Referred to the Court Since 1946*, <http://www.icj-cij.org/docket/index.php?p1=3&p2=2> (last visited Sept. 1, 2011) (containing a complete list of cases referred to the Court in its over half century of existence).

6. *Id.*

7. See Convention for the Protection of Human Rights and Fundamental Freedoms art. 19, Nov. 4, 1950, 213 U.N.T.S. 221.

8. See Organization of American States, American Convention on Human Rights art. 33, Nov. 21, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (*entered into force* July 18, 1978).

9. See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (*entered into force* Jan. 25, 2004). This court is the newest of the regional human rights courts. It delivered its first judgment in 2009.

10. See Rome Statute of the International Criminal Court art. 1, Jul. 17, 1998, 2187 U.N.T.S. 3, 90 (*entered into force* Jul. 1, 2002) [hereinafter Rome Statute].

tlement Body with its panels and Appellate Body.<sup>11</sup> In addition, several regional trade courts are active. The jurisdiction of the European Union's European Court of Justice extends to trade disputes and much more.<sup>12</sup> The North American Free Trade Agreement establishes a range of tribunals to deal with specific trade and other matters.<sup>13</sup> ASEAN,<sup>14</sup> the African Union,<sup>15</sup> and MERCOSUR<sup>16</sup> all have institutional machinery to settle trade disputes. This machinery, at least to some extent, relies on adjudication, as do many of the numerous bilateral free trade agreements between states. Other international regimes, such as The Law of the Sea Treaty, have established international tribunals to adjudicate disputes within their subject matter areas.<sup>17</sup>

While these specialized tribunals have an important place in the international judicial system, they are no substitute for the unique role played by the International Court of Justice. Except within Europe, the specialized tribunals are largely limited to adjudicating either trade or human rights/criminal matters, and there is little prospect for the creation of courts with alternative mandates.<sup>18</sup> Thus, for the foreseeable future, specialized international tribunals are unlikely to contribute to resolving conflicts in such vital areas of global concern as security and the environment.

Moreover, the International Court of Justice is uniquely positioned to bring coherence to what has developed into an ad hoc system of overlapping tribunals. One reason jurisdictional boundaries of tribunals overlap is that the mandates of the regimes they serve overlap. For example, the United States, Mexico, and Canada are members of both NAFTA and the

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11. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

12. See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 (*entered into force* Dec. 1, 2009). The European Court of Justice's mandate is to interpret the law of the European Union generally.

13. See North American Free Trade Agreement, U.S.-Can.-Mex., arts. 1115-38 (Settlement of Disputes Between a Party and an Investor of Another Party), 1901-11 (Dispute Settlement in Antidumping/Countervailing Duty Matters), 2003-22 (Institutional Agreements and Dispute Settlement Procedures), Dec. 17, 1992, 32 I.L.M. 289 (*entered into force* Jan. 1, 1994).

14. See Charter of the Association of Southeast Asian Nations arts. 22-27, *opened for signature* Nov. 20, 2007, available at <http://www.aseansec.org/publications/ASEAN-Charter.pdf> (*entered into force* Dec. 15, 2008).

15. See Constitutive Act of the African Union arts. 13-15, Jul. 11, 2000, OAU Doc. CAB/LEG/23.15 (*entered into force* May 26, 2001), available at [http://www.africa-union.org/root/au/Aboutau/Constitutive\\_Act\\_en.htm#Article33](http://www.africa-union.org/root/au/Aboutau/Constitutive_Act_en.htm#Article33).

16. See Treaty of Asunción [a.k.a. MERCOSUL/MERCOSUR] arts. 9-13, Mar. 26, 1991, 30 I.L.M. 1041.

17. See, e.g., Third United Nations Convention on the Law of the Sea, Annex VI, Dec. 9, 1984, 1833 U.N.T.S. 3, available at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/annex6.htm](http://www.un.org/depts/los/convention_agreements/texts/unclos/annex6.htm).

18. For a comprehensive listing of tribunals as well as compliance and oversight bodies, see Project on International Courts and Tribunals, *The Project on International Courts and Tribunals: International Judiciary in Context*, [http://www.pict-pcti.org/publications/synoptic\\_chart/synop\\_c4.pdf](http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf).



World Trade Organization, each of which independently oversees the regulation of trade relations and has its own trade tribunals.

Lines of authority among tribunals of regimes with seemingly unrelated mandates can also overlap because the facts and law presented by cases in the real world do not always conform to jurisdictional boundaries. For example, the Dispute Resolution Body of the World Trade Organization would have jurisdiction to hold that international trade law either allows or disallows bans on the importation of foreign products manufactured in ways that contribute disproportionately to global warming.<sup>19</sup> Though promulgated by a trade tribunal, such a decision would obviously have significant environmental implications.

Such jurisdictional overlap threatens the coherence of the international judicial system because, as Cesare Romano has pointed out, it makes it more likely that tribunals will inconsistently interpret the same international norms.<sup>20</sup> To the extent that specialized tribunals are to proliferate, this incoherence will be aggravated. As the only court of general jurisdiction, universal membership, and pedigree, and whose decisions are already regarded as deserving of special deference by specialized tribunals,<sup>21</sup> the International Court of Justice is best positioned to settle the law in the face of divergence among tribunals.

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19. Tribunals of the WTO and its predecessor, the GATT, have decided cases that implicate the legality of environmental measures. See, e.g., Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/RW (Oct. 22, 2001); Appellate Body Report, *United States—Import Prohibition on Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998); GATT Panel Report, *United States—Restrictions on Imports of Tuna*, DS29/R (June 16, 1994), BISD 39S/155, unadopted; GATT Panel Report, *United States—Restrictions on Imports of Tuna*, DS21/R (Sept. 3, 1991), BISD 39S/155, unadopted. For a discussion specifically of the legality under international trade law of an import ban on products manufactured in ways that contribute disproportionately to global warming, see GARY CLYDE HUFBAUER, STEVE CHARNOVITZ & JISUN KIM, *GLOBAL WARMING AND THE WORLD TRADING SYSTEM* 31-64 (2009), available at [http://www.piie.com/publications/chapters\\_preview/4280/02iie4280.pdf](http://www.piie.com/publications/chapters_preview/4280/02iie4280.pdf).

20. Cesare P.R. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 N.Y.U. J. INT'L L. & POL. 791, 798, 838-44 (2007) (providing examples of international tribunals inconsistently interpreting norms and examples of the same disputes being litigated in multiple forums). But see Jonathan Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101, 347 (1998) (concluding that while dangers exist, the coherence of the international system does not appear to be significantly threatened). For further discussion, see Symposium, *The Proliferation of International Tribunals: Piecing Together the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999).

21. See, e.g., Tullio Treves, *Advisory Opinions of the International Court of Justice on Questions Raised by Other International Tribunals*, in MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 220-21 (Jochen A. Frowein & Rüdiger Wolfrum eds., 2000) (documenting reliance on the Court's decisions by specialized tribunals); see also Address of H.E. Gilbert Guillaume, President of the International Court of Justice, to the General Assembly of the United Nations, U.N. GAOR, 55th Sess., 41st plen. mtg., at 6-7, U.N. Doc. A/55/PV.41 (Oct. 26, 2000), available at <http://www.un.org/documents/ga/docs/55/pv/a55p41.pdf> [hereinafter Guillaume Address] (arguing that the Court is best positioned to resolve conflicting interpretations of international law among specialized tribunals).

## B. A Potential Unrealized: The Court and Its Jurisdictional Limits

Despite the Court's unique importance, it is not reaching its full potential to contribute to improving the international legal system that we will explore in Part II. The most significant barrier to the Court fulfilling this potential is its relatively limited availability. Notwithstanding a significant increase in the Court's popularity over the past two decades,<sup>22</sup> more often than not a state with a grievance against another state cannot get a hearing before the Court because of restrictions on the Court's ability to exercise jurisdiction.

The Court can only exercise binding jurisdiction over states that have consented to jurisdiction. Under the "optional clause" of Article 36(2) of its Statute, the Court can exercise so-called *compulsory jurisdiction* over a respondent in a particular case only if that state has prospectively consented to this jurisdiction.<sup>23</sup> To manifest such consent the state must have submitted a declaration accepting the compulsory jurisdiction of the Court for the kind of dispute being litigated.<sup>24</sup> In addition, the applicant state must also have accepted in its own declaration that, in accordance with the *rule of reciprocity*, it would itself be subject to the Court's jurisdiction were it to be sued in a case of a similar nature.<sup>25</sup> In theory, the Article 36(2) optional clause imbues the Court with the ability to exercise universal jurisdiction, but in practice, roughly two-thirds of the world's countries do not currently accept the Court's compulsory jurisdiction.<sup>26</sup>

Lacking the ability to assert compulsory jurisdiction, the Court can exercise binding jurisdiction if the disputing parties agree ad hoc to refer a matter to it,<sup>27</sup> or if the parties have a dispute under a treaty that provides for dispute resolution by the Court.<sup>28</sup> While countries do at times agree ad hoc to submit to the Court's jurisdiction (particularly with regard to border disputes)<sup>29</sup> and a number of treaties, especially older ones, contain provi-

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22. One-third of the judgments handed down in the Court's sixty-year history have been delivered in the past decade. See Address of H.E. Rosalyn Higgins, President of the International Court of Justice, to the General Assembly of the United Nations 7 (Nov. 1, 2007), <http://www.icj-cij.org/presscom/files/7/14117.pdf>.

23. Annex to the U.N. Charter, Statute of the International Court of Justice art. 36, para. 2, Oct. 24, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevens 1179 [hereinafter ICJ Statute].

24. *Id.*

25. *Id.* For a more detailed explanation of how the rule of reciprocity has been interpreted by the Court to work in practice, see generally Edith Brown Weiss, *Reciprocity and the Optional Clause*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 82 (Lori Fisler Damrosch ed., 1987).

26. As of May 2011, sixty-six countries have declarations recognizing the compulsory jurisdiction of the International Court of Justice. See International Court of Justice, *List of Declarations Recognizing the Court's Jurisdiction as Compulsory*, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>.

27. ICJ Statute, *supra* note 23, art. 36, para. 1.

28. *Id.*

29. See International Court of Justice, *supra* note 5 (listing the cases that have been referred to the Court). For a recent case involving a jointly submitted maritime boundary dispute, see, e.g., *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay./Sing.)*, 2008 I.C.J. 12 (May 23).

sions providing for dispute resolution by the Court,<sup>30</sup> most disputing countries do not go to the Court, and most treaties do not have provisions for dispute resolution before the Court.<sup>31</sup>

Finally, despite the absence of explicit authority in the Court's Statute, the Court has accepted jurisdiction under the doctrine of *forum prorogatum*. This doctrine holds that states can imply their consent to jurisdiction by responsively pleading to claims against them without contesting jurisdiction. *Forum prorogatum*, however, has only been the basis for jurisdiction on rare occasions.<sup>32</sup>

Absent state consent, the only alternative for calling the Court into service is by recourse to its advisory (i.e. nonbinding) jurisdiction.<sup>33</sup> States, however, cannot request advisory opinions. Only the United Nations General Assembly, the Security Council, or other organs of the United Nations or specialized agencies empowered by the General Assembly to request advisory opinions have that ability.<sup>34</sup> In theory, the General Assembly or Security Council could request that the Court weigh in on interstate disputes (often referred to by commentators as *quasi-contentious* cases). In practice, however, because the internal political barriers to Assembly or Council approval of such requests are formidable,<sup>35</sup> the General Assembly has only asked the Court to weigh in on interstate disputes

30. Presently 268 treaties provide for dispute resolution by the Court. The subject matter prescribed by those treaties is varied, but among the most common kinds of treaties are those related to friendship, commerce and navigation, air transport, and consular relations. Many of these 268 treaties have so-called compromissory clauses mandating dispute resolution by the Court; but the trend is towards providing that parties may, as one among other alternatives, opt into having their treaty disputes resolved by the Court. For a comprehensive listing of treaties that provide for dispute resolution by the Court, see International Court of Justice, *List of Treaties with Clauses Relating to the Jurisdiction of the Court*, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=4> (last visited May 22, 2011).

31. The relatively limited number of treaties with compromissory clauses providing for dispute resolution by the Court (see *id.*) is but a fraction of the tens of thousands of treaties in force. See MARK WESTON JANIS, *INTERNATIONAL LAW* 12, n.4 (5th ed. 2008) (reporting that 44,499 treaties were registered with the United Nations as of 2007).

32. See, e.g., *Haya de la Torre Case*, 1951 I.C.J. 71, 78 (June 13).

33. ICJ Statute, *supra* note 23, art. 65.

34. Article 96, paragraph 1 of the United Nations Charter provides that "[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question." Article 96, paragraph 2 provides that "[o]ther organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities." U.N. Charter art. 96, paras. 1-2. Nineteen bodies are currently authorized by the General Assembly to request advisory opinions. See International Court of Justice, *Organs and Agencies of the United Nations Authorized to Request Advisory Opinions*, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2&p3=1> (last visited May 22, 2011).

35. See, e.g., TERRY D. GILL, *ROSENNE'S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 235 (6th ed. 2003) ("It is quite clear that the modern political organs encounter great difficulties in mustering the majority to support a request for an advisory opinion, especially as an incident in the settlement of a political dispute of which they are seised.")

on four occasions,<sup>36</sup> and the Security Council has only made one such request.<sup>37</sup> Instead, the advisory process has primarily been used to clarify matters of internal United Nations governance.<sup>38</sup>

## II. Overcoming the Court's Limited Jurisdiction: The Difficulty of Cutting the Gordian Knot

The limitations on the Court's jurisdiction did not come about by accident. Rather, they are an example of the Gordian Knot phenomenon at work. To understand the importance of this phenomenon for jurisdictional reform, I will now turn to chronicling the great powers' history of successfully thwarting efforts to universalize the Court's jurisdiction. Drawing from this history, I conclude that the great powers will likely be similarly predisposed to thwart such initiatives in the future.

### A. The League of Nations and the Creation of the Permanent Court of International Justice

#### 1. *The Creation of the Permanent Court*

The International Court of Justice's history begins with the founding of its predecessor, the Permanent Court of International Justice,<sup>39</sup> as part of the grand attempt to create a new global order following the horrors of World War I. Five of the six great powers of the day—Britain, France, Italy, Japan, and most importantly, the United States (represented personally by President Woodrow Wilson)—took the lead in negotiations at Versailles over the shape of this order.<sup>40</sup> Only the newly communist Russia was left out of the planning.<sup>41</sup> To be sure, significant differences of opinion emerged within and between the powers over how to advance their ambitious project, including the extent to which they should cede national autonomy to the cause of effective governance. At the end of the day, however, notwithstanding the high-mindedness of individual statesmen, tradi-

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36. See *infra* notes 149, 151-153 and accompanying text (identifying quasi-contentious cases referred to the Court by the General Assembly). See *infra* notes 150, 152-153 (qualifying cases that do not technically involve two "states").

37. See *infra* note 150 (identifying the quasi-contentious case referred to the Court by the Security Council and explaining why that case technically does not involve two states).

38. See MICHLA POMERANCE, *THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT IN THE LEAGUE AND U.N.* ERAS 172 (1973) [hereinafter POMERANCE, *ADVISORY FUNCTION*] (observing that interstate disputes have constituted a large proportion of the proposed matters that the General Assembly has decided not to refer to the Court for advisory opinions).

39. For a classic and comprehensive history of the Permanent Court of International Justice, see generally MANLEY O. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-1942: A TREATISE* (1943).

40. For a chronicling of the negotiations, see generally MARGARET MACMILLAN, *PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD* (2001) (focusing especially on the diplomatic interactions of the so-called *big three*: Woodrow Wilson of the United States, David Lloyd George of Great Britain, and Georges Clemenceau of France).

41. See *id.* at 82.

tional *raison d'état* won out over any meaningful sacrifice of national power.

For example, while the political heart of the new order, the League of Nations, allowed every member a vote in an Assembly, a Council that required unanimity on almost all matters of importance dominated as the preserve of the great powers.<sup>42</sup> In a similar vein, the League oversaw a *mandate system* to provide a path toward self-determination for the colonial territories of the war-defeated powers. The victorious powers, however, maintained their empires, and, in some cases, expanded them at the expense of the vanquished.<sup>43</sup> For our purposes, the most important example of the great powers' reluctance to cede national autonomy was their refusal to accept a Permanent Court of International Justice that could exercise nonconsent-based compulsory jurisdiction.

The story of the negotiations over this new court begins with the mandate in Article 14 of the Covenant of the League of Nations that the League Council formulate plans for a permanent international court.<sup>44</sup> In February of 1920, the League Council assigned an independent committee of legal experts, the Advisory Committee of Jurists, the task of drafting a treaty for the Permanent Court.<sup>45</sup> Perhaps taking its internationalist mandate too much at face value, the Committee included compulsory jurisdiction in its scheme for the Permanent Court.<sup>46</sup>

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42. League of Nations Covenant arts. 3-5, 15. For further discussion, see generally CHARLES HOWARD-ELLIS, *THE ORIGIN, STRUCTURE & WORKING OF THE LEAGUE OF NATIONS* 122-63 (1929).

43. See generally MACMILLAN, *supra* note 40, at 98-109.

44. Article 14 of the Covenant of the League of Nations provided that "[t]he Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." League of Nations Covenant art. 14. For a more detailed account of the negotiations for the Permanent Court, see HUDSON, *supra* note 39, at 93-129. See also MICHAEL DUNNE, *THE UNITED STATES AND THE WORLD COURT, 1920-1935*, at 17-46 (1988) (detailing the role played by the United States in the negotiations for the Permanent Court); Lorna Lloyd, "A Springboard for the Future": A Historical Examination of Britain's Role in Shaping the Optional Clause of the Permanent Court of International Justice, 79 AM. J. INT'L L. 28 (1985) (focusing especially on Britain's role in the negotiations over compulsory jurisdiction); Maria Vogiatzi, *The Historical Evolution of the Optional Clause*, 2 NON-STATE ACTORS & INT'L L. 41, 46-72 (2002) (recounting the dynamics of the Permanent Court negotiations specifically over compulsory jurisdiction).

45. See LEAGUE OF NATIONS, *Extract From the Procès-Verbal of the Fourth Meeting of the Second Session of the Council of the League of Nations*, in DOCUMENTS CONCERNING THE ACTION TAKEN BY THE COUNCIL OF THE LEAGUE OF NATIONS UNDER ARTICLE 14 OF THE COVENANT AND THE ADOPTION BY THE ASSEMBLY OF THE STATUTE OF THE PERMANENT COURT 8, 11 (1921) [hereinafter DOCUMENTS CONCERNING THE ACTION TAKEN BY THE COUNCIL] (reporting on the approval of the formation of the Advisory Committee and of its membership).

46. Before the final vote on the draft statute as a whole, one member of the Committee, Mineichiro Adatci of Japan, stated for the record his opposition to compulsory jurisdiction, yet he joined with his colleagues in unanimously approving the draft statute. See PERMANENT COURT OF INTERNATIONAL JUSTICE, ADVISORY COMMITTEE OF JURISTS, 31ST Meeting (Private), Held at the Peace Palace, the Hague, on July 22nd, 1920, in PROCÈS-

Upon receiving the Committee's draft Statute for the Permanent Court, the four great powers holding permanent seats on the League Council—Great Britain, France, Italy, and Japan—all opposed its provisions for compulsory jurisdiction.<sup>47</sup> They were firm in their determination to maintain the autonomy that had been associated with the traditional voluntary nature of arbitration. Under their sway, the Council oversaw the substitution of amendments that eliminated compulsory jurisdiction and then referred the amended draft to the League Assembly for consideration in its first session.<sup>48</sup>

The stage was set for a confrontation in the Assembly between many of the less powerful countries who perceived compulsory jurisdiction as a legal counterweight to military and economic might and the great powers unwilling to circumscribe an arena of advantage. The Assembly delegated consideration of the draft Statute to the Third (Legal and Constitutional) Committee, which, in turn, charged a small subcommittee with working out a recommendation to be considered by the Assembly plenary.<sup>49</sup> Steadfast in their opposition to compulsory jurisdiction and willing to hold ratification of the Statute hostage to its defeat, the powers, in subcommittee deliberations, would agree only to the Optional Clause allowing for countries to submit to compulsory jurisdiction voluntarily.<sup>50</sup>

In December 1920, the debate moved to the Assembly plenary, where the less powerful countries made clear in speech after speech their strong support for compulsory jurisdiction.<sup>51</sup> The powers' refusal to yield and the need for their agreement forced the less powerful countries to reluctantly accept that the fight for compulsory jurisdiction was lost.<sup>52</sup> Henri Lafontaine of Belgium expressed the frustrations of many when he declared resentfully that "a minority of delegations has once more paralysed the will

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VERBAUX OF THE PROCEEDINGS OF THE COMMITTEE, JUNE 16TH-JULY 24TH 1920, WITH ANNEXES 645, 651-52 (1920) (documenting the Committee vote approving the Permanent Court draft statute).

47. See Lloyd, *supra* note 44, at 37-38 (discussing the opposition of Britain, Italy, and Japan to compulsory jurisdiction); Vogiatzi, *supra* note 44, at 60-63 (discussing French opposition to compulsory jurisdiction).

48. LEAGUE OF NATIONS, *Report Presented by the French Representative, M. Léon Bourgeois and Adopted by the Council of the League of Nations at its Meeting at Brussels on October 27th, 1920*, in DOCUMENTS CONCERNING THE ACTION TAKEN BY THE COUNCIL, *supra* note 45, at 45-48.

49. See generally PERMANENT COURT OF INTERNATIONAL JUSTICE, *Minutes of the Third Committee, Third Meeting, Held on November 24th, 1920, at 4 p.m.*, in LEAGUE OF NATIONS, THE RECORDS OF THE FIRST ASSEMBLY, MEETINGS OF THE COMMITTEES I, at 284, 284-90 (1920) [hereinafter RECORDS OF THE FIRST ASSEMBLY].

50. PERMANENT COURT OF INTERNATIONAL JUSTICE, *Annex 14*, in RECORDS OF THE FIRST ASSEMBLY, *supra* note 49, at 313; PERMANENT COURT OF INTERNATIONAL JUSTICE, *Annex 16a*, in RECORDS OF THE FIRST ASSEMBLY, *supra* note 49, at 566, 576. For further explanation of the *Optional Clause*, see *supra* notes 23-26 and accompanying text.

51. See LEAGUE OF NATIONS, *First Assembly, Twentieth Plenary Meeting, Monday, December 13th, 1920, at 10 a.m.*, in DOCUMENTS CONCERNING THE ACTION TAKEN BY THE COUNCIL, *supra* note 45, at 225-38.

52. *Id.* at 232; LEAGUE OF NATIONS, *First Assembly, Twenty-First Plenary Meeting, Monday, December 13th, 1920, at 4 p.m.*, in DOCUMENTS CONCERNING THE ACTION TAKEN BY THE COUNCIL, *supra* note 45, at 240-66 (1921).

of the majority.”<sup>53</sup> The Statute, without compulsory jurisdiction, was then opened for state signature on December 16, 1920, and went into force on September 1, 1921.<sup>54</sup>

A system allowing states to petition the Court for advisory opinions without the consent of respondent states (similar to what this article will propose) might have been promoted as a more generally acceptable alternative to compulsory jurisdiction. Such a proposal, however, did not receive any serious consideration at the time.<sup>55</sup> In fact, while the Covenant’s Article 14 mandate specifically provided that the Permanent Court be able to “give an advisory opinion on any dispute or question referred to it by the Council or the Assembly,”<sup>56</sup> the Third Committee excised implementing language in the Advisory Committee’s draft before referring it to the League Assembly.<sup>57</sup> Consequently, until the parties amended the Statute in 1939, the Permanent Court was forced to improvise a mechanism in its own rules for implementing Article 14’s advisory mandate.<sup>58</sup>

## 2. *The Soviet Union and the United States*

Even this great power-driven voluntarist system of jurisdiction was ultimately considered too much of an infringement upon autonomy for the two powers that never acceded to the Permanent Court Statute: the Soviet Union and the United States. As the newly communist odd-person-out among the powers, the Soviet Union did not join the League of Nations until 1934<sup>59</sup> and never considered joining the Permanent Court.

For its part, the United States Senate famously rejected membership in the League of Nations in 1920. This rejection was mainly over concerns about sovereignty and that American power was inadequately reflected in the League structure.<sup>60</sup> Encouraged on by both Democratic and Republi-

53. LEAGUE OF NATIONS, *First Assembly, Twentieth Plenary Meeting, Monday, December 13th, 1920, at 10 a.m.*, in DOCUMENTS CONCERNING THE ACTION TAKEN BY THE COUNCIL, *supra* note 45, at 232.

54. Statute of the Permanent Court of International Justice, Dec. 13, 1920, 1926 P.C.I.J. (ser. D) No. 1.

55. *But see* MAHASEN M. ALJAGHOUB, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT OF JUSTICE 1946-2005, at 32 n.140 (2006) (reporting that Argentina and the International Labour Organization made proposals providing for states to agree *mutually* to submit their disputes to the advisory jurisdiction of the Permanent Court).

56. League of Nations Covenant art. 14. For the full text of Article 14, see *supra* note 44.

57. See POMERANCE, ADVISORY FUNCTION, *supra* note 38, at 10-14 (discussing the circumstances surrounding the elimination of the Advisory Committee of Jurists’ draft provisions regarding advisory jurisdiction).

58. See Statute and Rules of Court, 1940 P.C.I.J. (ser. D.) No.1 (4th ed.), at 27-28, available at [http://www.icj-cij.org/pcij/serie\\_D/D\\_01\\_4e\\_edition.pdf](http://www.icj-cij.org/pcij/serie_D/D_01_4e_edition.pdf) (containing the addition of Chapter IV governing Advisory Opinions).

59. The Soviet Union was subsequently expelled from the League in 1939 in response to its invasion of Finland. LEAGUE OF NATIONS, *107th Session of the Council, Second Meeting, Held on Thursday, December 14th, 1939, at 4 p.m.*, in 20 LEAGUE OF NATIONS OFFICIAL JOURNAL 506-08 (1939).

60. See generally THOMAS J. KNOCK, TO END ALL WARS: WOODROW WILSON AND THE QUEST FOR A NEW WORLD ORDER 246-70 (1992) (detailing the history of the Senate battle for ratification of the League Covenant).

can pro-court forces, however, the United States long considered separately joining the Permanent Court.<sup>61</sup> Since the United States did not intend to accept optional clause jurisdiction,<sup>62</sup> it would only be subject to binding judgments that it consented to. Thus, the long and acrimonious debate over Senate ratification came to center on advisory opinions, which could be triggered by international referral of the League Council or Assembly. To eliminate the potential that such advisory opinions might be rendered over U.S. objections, the Senate added the so-called *fifth reservation*<sup>63</sup> to its January 1926 resolution of accession.

By providing in part that the Permanent Court could not “without the consent of the United States entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest,”<sup>64</sup> the U.S. was asserting a unilateral right to veto any request for an advisory opinion that in its own judgment might impact upon its interests. When the Conference of Signatories to the Statute met in September 1926, the Conference decided that the United States should be offered the same rights to vote on advisory requests as members of the Council or the Assembly but that it should not be granted exceptional powers.<sup>65</sup> In November, President Coolidge responded to the Conference decision by refusing to send the treaty back to the Senate with a *request for modification*.<sup>66</sup> Despite then elder statesman Elihu Root’s admirable efforts beginning in 1929 to work out a compromise, ascendant America’s great power impulses were simply too strong. Accession to the Permanent Court died its final death in the Senate in 1935.<sup>67</sup>

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61. See MICHLA POMERANCE, *THE UNITED STATES AND THE WORLD COURT AS A ‘SUPREME COURT OF THE NATIONS’: DREAMS, ILLUSIONS AND DISILLUSION* 84 (1996) [hereinafter *SUPREME COURT OF THE NATIONS*].

62. See *id.* at 80–81 (recounting U.S. Secretary of State Charles Evans Hughes’s decision to rule out acceptance of optional clause jurisdiction).

63. See *SUPREME COURT OF THE NATIONS*, *supra* note 61, at 101–02. The *fifth reservation* was in addition to four fairly unnoteworthy reservations that Secretary of State Charles Evans Hughes had previously drafted and submitted to the Senate. See *id.* at 80.

64. 67 CONG. REC. 2,656–57 (1926). The full text of the fifth reservation required as conditions of U.S. accession, “[t]hat the Court shall not render any advisory opinion except publicly after due notice to all States adhering to the Court and to all interested states and after public hearing or opportunity for hearing given to any State concerned; nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest.” *Id.*

65. *Minutes of the Conference of States Signatories of the Protocol of Signature of the Permanent Court of International Justice*, League of Nations Doc. V. Legal 1926. V. 26, at 77. The Assembly never requested an advisory opinion of the Permanent Court. By the time of the Conference, the Council had requested thirteen opinions, always doing so by a unanimous vote. To the extent that the Permanent Court would not render an advisory opinion absent such unanimity, the Conference’s offer of equal treatment gave the United States its sought-for ability to veto a request for an advisory opinion. The problem from the United States’ point of view was that the practice of unanimity was not clearly the result of a legal requirement and could possibly be dispensed with. For further related discussion, see *infra* notes 145–191 and accompanying text.

66. *SUPREME COURT OF THE NATIONS*, *supra* note 61, at 107.

67. For a description of Root’s efforts and the final defeat of accession in the U.S. Senate, see *id.* at 108–32.



## B. The United Nations and the Creation of the International Court of Justice

Following the ruins of the Second World War, the United States came of age as the world's undisputed superpower, and the Soviet Union emerged as a geopolitical colossus in its own right. The jurisdictional Gordian Knot problem played out again in the desire of each to ensure that visionary plans for a new world order did not materially impinge upon its national powers. In particular, internationalist presidents Franklin Roosevelt and Harry Truman promoted the United Nations as a more muscular version of the League of Nations.<sup>68</sup> But in doing so, these men and their fellow American post-war planners were careful not to compromise the United States' own prerogatives as a great power. For example, the Security Council of the new United Nations was to have a much greater ability than the League Council to enforce the law against countries endangering international peace and security, but the United States would have a veto on that Council.<sup>69</sup>

That this was non-negotiable was made graphically clear at the final U.N. negotiating conference in San Francisco. There, delegate and Senate Foreign Relations Committee Chair Tom Connally responded to representatives of less powerful nations opposing the veto by tearing up the draft United Nations Charter and proclaiming, "[y]ou may go home from San Francisco, if you wish, and report that you have defeated the veto. . . . But you can also say, 'We tore up the charter.'"<sup>70</sup> The Soviet Union, as the other emerging superpower, also made clear that the nonexistence of a veto was a deal breaker.<sup>71</sup>

In negotiations over the institution that would succeed the Permanent Court, the issue of compulsory jurisdiction again emerged as a major source of contention. The four attending powers at the Dumbarton Oaks Conference in 1944 (the United States, the Soviet Union, the United Kingdom, and China) agreed that a Committee of Jurists would prepare a draft statute for what was to become the International Court of Justice.<sup>72</sup> Unlike the autonomous Committee of Jurists that had self-confidently proffered a court with compulsory jurisdiction in 1920, the new Committee of Jurists was to be a more closely controlled panel of government representatives.<sup>73</sup> And the United States, as the most powerful country, ensured its own spe-

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68. For a very good recounting of how Roosevelt and Truman advanced the United Nations project, see generally STEPHEN C. SCHLESINGER, *ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS* (2003).

69. Pursuant to Article 27 of the United Nations Charter, the five permanent members of the Security Council may veto non-procedural matters. U.N. Charter art. 27, para. 3.

70. See STANLEY MEISLER, *UNITED NATIONS: THE FIRST FIFTY YEARS 18-19* (1995).

71. In fact, the Soviet Union took the ultimately unsuccessful position that even the determination of whether to place a dispute on the Security Council's agenda for discussion should be subject to the veto. See *id.* at 10-18.

72. ROBERT C. HILDERBRAND, *DUMBARTON OAKS: THE ORIGINS OF THE UNITED NATIONS AND THE SEARCH FOR POSTWAR SECURITY* 116 (1990).

73. *Id.*

cial influence over the Committee by securing the chairmanship for the American representative, State Department Legal Advisor Green Hackworth.<sup>74</sup>

All of the countries intended to be original signatories to the United Nations Charter and Court Statute were represented on the Committee. The diplomatic battles within the Committee largely picked up where they had left off in the 1920s, with the less powerful states again advocating for compulsory jurisdiction. This time, it was the two most powerful post-war countries, the United States and the Soviet Union, who saw themselves as having the greatest stake in staving off a transition to universal compulsory jurisdiction.<sup>75</sup>

Faced in the Committee with the unyielding demands of the less powerful countries, Hackworth tried to persuade them to relent by proclaiming with a pretense of disinterest that the opposition of the Soviet Union could imperil the success of the negotiations.<sup>76</sup> Unable to derail compulsory jurisdiction then and there, he maneuvered to defer the issue to the potentially more congenial San Francisco Conference where draft language allowing alternatively for compulsory jurisdiction or a continuation of the optional clause would be presented.<sup>77</sup> At San Francisco, the United States and the Soviet Union ultimately prevailed. They did so, however, only by taking full responsibility for their positions and warning that the Court project depended upon rejection of compulsory jurisdiction.<sup>78</sup>

The United States and the Soviet Union were more conciliatory on the issue of advisory jurisdiction. Although the United States in particular had initially argued for denying the General Assembly the power possessed by the League Assembly to request advisory opinions, it eventually relented and even reluctantly agreed<sup>79</sup> to empower the General Assembly to authorize other organs of the United Nations to request such opinions.<sup>80</sup>

### C. The International Court of Justice and the Failure of Past Jurisdictional Reform Initiatives

The vision of a Court with expanded jurisdiction did not disappear with its inception. Rather, jurisdictional proposals and initiatives continued for many years after. In particular, various Secretaries-General made the case repeatedly that the General Assembly should use its Article 96(2)

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74. *See id.*

75. *Id.* at 120.

76. *See* SUPREME COURT OF THE NATIONS, *supra* note 61, at 157.

77. *Id.* at 156.

78. *Id.* at 158-65.

79. *See* ALJAGHOUB, *supra* note 55, at 29-30. The United States did, however, manage to derail an additional proposal to allow disputing states to agree to request advisory opinions. Fifteenth Meeting of Committee IV/1, Doc. 701, 13 U.N. CONF. DOC. 235 (1945); *see also* ALJAGHOUB, *supra* note 55, at 32 (reporting on Britain's suggestion at the San Francisco conference that disputing states be allowed to jointly request advisory opinions and Belgium's proposal that states be able to unilaterally request advisory opinions with the support of the Security Council).

80. *See supra* note 34 and accompanying text discussing the authority to request advisory opinions under Article 96 of the United Nations Charter.

powers to authorize the Secretary-General to request advisory opinions.<sup>81</sup> States, non-governmental organizations, and scholars proposed other ideas for expanding the advisory jurisdiction of the Court by way of either amending the Court's Statute, expanding Article 96(2) authorizations, promulgating new dispute resolution treaties, or establishing a committee of the General Assembly similar to the Judicial Commission that will be proposed in the next section of this Article.<sup>82</sup> For example, some suggested that public international and regional organizations (in addition to the specialized U.N. agencies authorized pursuant to Article 96 paragraph 2)<sup>83</sup> be empowered to request advisory opinions.<sup>84</sup> Proposals that states

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81. In 1950 the Secretary-General, Trygve Lie, concluded in a report that the General Assembly could not legally authorize the new Human Rights Committee to request advisory opinions from the Court. He instead suggested that the Secretary-General should be so authorized. See U.N. Econ. & Soc. Council, ¶ 19, U.N. Doc. E/1732 (June 26, 1950). In 1955, Secretary-General Dag Hammarskjöld renewed the suggestion that the Secretary-General be empowered to request advisory opinions. See *The Secretary-General, Working Paper: Judicial Review of the United Nations Administrative Tribunal Judgments*, U.N. Doc. A/AC.78/L.1 and Corr.1 (Mar. 22, 1955). In 1992, Secretary-General Dr. Boutros-Ghali in his major reform proposal, *Agenda for Peace*, also recommended that the Secretary-General be authorized to request advisory opinions. The Secretary-General, *An Agenda for Peace*, ¶ 19, U.N. Doc. A/47/277, S/24111 (June 17, 1992). The General Assembly took no position on the Secretary-General's proposal that he be authorized to request advisory opinions. See G.A. Res. 47/120, U.N. Doc. A/Res/47/120 (Feb. 10, 1993). For further discussion, see GILL, *supra* note 35, at 23; Stephen Schwebel, *Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice*, 78 AM. J. INT'L L. 869 (1984).

82. See, e.g., CLARENCE WILFRED JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 160-61 (1964); LUCIUS C. CALLISCH, *Reference Procedures and the International Court of Justice*, in 2 *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 572 (Leo Gross ed., 1976); Paul Szasz, *Enhancing the Advisory Competence of the World Court*, in 2 *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE*, *supra*, at 499, 524-28.

83. See *supra* note 34 and accompanying text (discussing the General Assembly's Article 96(2) authority to empower organs of the United Nations and specialized agencies to request advisory opinions).

84. Distinguished associations of international lawyers proposed that such organizations be empowered to request advisory opinions. See INTERNATIONAL LAW ASSOCIATION, *REPORT OF THE FORTY-SEVENTH CONFERENCE HELD AT DUBROVNIK*, at viii (1956); Resolution of the Institute of International Law, *reprinted in* Manley O. Hudson, *The Thirty-Third Year of the World Court*, 49 AM. J. INT'L L. 1, 14-16 (1955); see also Report on Steps that Might be Taken by the General Assembly to Enhance the Effectiveness of the International Court of Justice, in REPORT OF THE AMERICAN BRANCH COMMITTEE OF THE INTERNATIONAL LAW ASSOCIATION 142, 156-58 (1971-72). The United States Senate also approved a resolution on the Court that included a provision endorsing the empowerment of regional organizations to request advisory opinions. See S. Res. 76, 93d Cong. (1974) [hereinafter Senate Resolution 76]. Several countries also voiced support for the idea in response to a 1970 General Assembly Resolution inviting states to submit their views of the role of the Court. See *The Secretary-General, Review of the Role of the International Court of Justice*, ¶¶ 90-101, delivered to the General Assembly, U.N. Doc. A/8382 (Sept. 15, 1971) [hereinafter Secretary-General's Report]; see also Special Comm. on the Charter of the U.N. and on the Strengthening of the Role of the Organization, *Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization*, ¶ 97, U.N. Doc. A/32/33 (1977). For further discussion by commentators, see Heribert Golsong, *Role and Functioning of the International Court of Justice: Proposals Recently Made on the Subject*, in 31 ZEITSCHRIFT FÜR AUSLÄNDISCHES OFFENTLICHES RECHT UND VOLKERRECHT 673, 681-82 (1971); Leo Gross, *The International Court of Justice: Consideration of Requirements for Enhancing Its Role in the Interna-*

with disputes be given the option to jointly submit their disputes to the Court for advisory opinions<sup>85</sup> and proposals that national courts<sup>86</sup> and other international tribunals<sup>87</sup> be allowed to submit questions of international law to the Court for advisory opinions also gained a measure of currency. So did two proposals by Professor Louis Sohn for expanding the ability of the Court to exercise compulsory jurisdiction. The first of Professor Sohn's proposals was that willing countries enter into special dispute resolution treaties. These treaties would oblige them to accept the compulsory jurisdiction of the Court for agreed upon classes of disputes.<sup>88</sup> The second was that willing countries enter into a treaty accepting as binding Security Council and General Assembly recommendations to adjudicate specific classes of cases before the Court.<sup>89</sup>

Despite their abundance and variety, all of these jurisdictional initiatives were doomed to failure during the Court's formative period as a result of a political dynamic more nuanced than the previous great power diktats. Resistance from the western powers was, in fact, tempered by their perception that the Court was a useful Cold War ally.<sup>90</sup> While it seems unlikely that the most powerful of the western countries could have actually

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*tional Legal Order*, in 1 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 22, 43 (Leo Gross ed., 1976); Szasz, *supra* note 82, at 514-16.

85. See, e.g., Senate Resolution 76, *supra* note 84; Szasz, *supra* note 82, at 516-19.

86. The proposal that national courts be allowed to submit questions of international law to the Court for advisory opinions enjoyed brief currency in the United States, garnering the support of the American Bar Association. See *Proceedings of the 1982 Mid-year Meeting of the House of Delegates*, 107 Ann. Rep. A.B.A. 273, 277 (1982). In addition, the United States House of Representatives even approved a resolution asking the President to explore the feasibility of the proposal. See H.R. Con. Res. 86, 97th Cong. (1982). The proposal also enjoyed considerable support among members of the Court and other leading international lawyers of the day. See, e.g., JENKS, *supra* note 82, at 161, 166-68; PHILIP C. JESSUP, THE PRICE OF INTERNATIONAL JUSTICE 67-71 (1971); Leo Gross, *The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order*, 65 AM. J. INT'L L. 253, 308-13 (1971); Stephen Schwebel, *Preliminary Rulings by the International Court of Justice at the Instance of National Courts*, 28 VA. J. INT'L L. 495 (1988); Louis B. Sohn, Comment, *Broadening the Advisory Jurisdiction of the International Court of Justice*, 77 AM. J. INT'L L. 124 (1983). For a skeptical view of the proposal, see Callisch, *supra* note 82, at 572-609; Shabtai Rosenne, *Preliminary Rulings by the International Court of Justice at the Instance of National Courts: A Reply*, 29 VA. J. INT'L L. 401 (1989).

87. For example, presidents of the Court endorsed the idea of allowing other international tribunals to submit advisory questions to the Court in their annual addresses to the General Assembly. See Address by H.E. Judge Stephen M. Schwebel, President of the International Court of Justice, to the General Assembly of the United Nations, U.N. GAOR, 54th Sess., 39th plen. mtg. at 1, 3-4, U.N. Doc. A/54/PV.39 (Oct. 26, 1999), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/862/45/PDF/N9986245.pdf?OpenElement>; Guillaume Address, *supra* note 21. But see Treves, *supra* note 21, at 225-231 (critiquing President Schwebel's proposal that the Court resolve conflicts among international tribunals as unnecessary and likely to become politicized).

88. See INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-FIRST CONFERENCE HELD AT TOKYO 84-87 (1964).

89. *Id.* at 92-95.

90. See, e.g., Eric Posner, *The Decline of the International Court of Justice*, in INTERNATIONAL CONFLICT RESOLUTION 111 (Stefan Voigt, Max Albert, Dieter Schimidtchen eds., 2006) (ascribing the perception of the Court as sympathetic to the West's interests to the composition of the Court's bench).

brought themselves to acquiesce to jurisdictional reform, we will never know definitively because the question was never forced by the less powerful countries.

This is largely because many in the developing world felt that the Court's composition did not adequately represent the planet's non-western social systems and that much of the law applied by the Court was a relic of the colonial past.<sup>91</sup> These perceptions were powerfully reinforced in the minds of many by the Court's 1966 *South West Africa, Second Phase* decision.<sup>92</sup> Having been years in the offing and the subject of unusual attention, the Court's decision that Ethiopia and Liberia did not have proper standing to challenge South Africa's racist rule of what is today Namibia was regarded by many as symbolic of the Court's lack of regard for the non-western world.<sup>93</sup>

The composition of the Court's judges, however, gradually came to more accurately reflect the diversity of the world's peoples.<sup>94</sup> This led to corresponding changes in style, jurisprudence, and ultimately perceptions of the Court. The culmination was the 1984 *Nicaragua* decision that, in holding the United States liable for illegally using force,<sup>95</sup> signaled the passing of an era that in the words of Thomas Franck was "mourned by some, celebrated by others, but doubted by none."<sup>96</sup>

Today, most of the world's countries have come to perceive themselves as having a stake in a Court that is now truly planetary, and if the history of the founding of the two courts is a guide, many of these countries will be predisposed to look with favor upon a proposal to universalize the Court's advisory jurisdiction.<sup>97</sup> Broken out in detail, a core of sixty-six countries,<sup>98</sup> over one-third of the total, already accept the compulsory jurisdiction of the Court and would likely see themselves as standing mostly to gain from extending the Court's advisory jurisdiction to all countries. But-tressing this base, approximately seventy-two percent of the countries of

91. Such perceptions were revealed, for example, in the General Assembly's 1972 Special Committee on Friendly Relations' deliberations over whether to recommend expansion of the Court's jurisdiction. See generally Gross, *supra* note 84, at 22-23; see also Secretary-General's Report, *supra* note 84, ¶¶ 42-68 (summarizing the views of states on the reasons for their disinclination to resort to the Court).

92. *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Second Phase, Judgment, 1966 I.C.J. 6 (July 18).

93. See Andronico O. Adede, *Judicial Settlement in Perspective*, in *THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS* 47, 51 (A.S. Muller et al. eds., 1997).

94. See International Court of Justice, *The Court*, <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2&PHPSESSID=2bbd6d465eacd6692712a0b9868151cd> (last visited May 27, 2011) (listing current and former judges with nationalities).

95. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) [hereinafter *Nicaragua*]. For further discussion of the *Nicaragua* case and its implications for the Court, see *infra* notes 238-246 and accompanying text.

96. Thomas Franck, *Reviving the World Court*, 63 N.Y.U. L. REV. 1391, 1393 (1988) (book review).

97. See GILL, *supra* note 35, at 236-37 (describing the extent to which countries around the world have been participating in litigation before the Court).

98. See *supra* note 26.

the world are small-to-midsized developing countries with a tendency to perceive themselves as vulnerable to the political caprice of the powerful.<sup>99</sup> Finally, many small and midsized developed countries also feel a similar vulnerability and, as at the founding of the two courts, they would likely again view an expansion of the Court's realm of law as consistent with their interests.

Paradoxically, now that the political potential for reform is present, the initiatives are not. Ironically, the very popularity of the Court and its corresponding increase in caseload has made its supporters less concerned with manufacturing business for it.<sup>100</sup> Instead, the imagination of the international community has been captured by what had previously seemed the more attainable alternative of establishing specialized tribunals.<sup>101</sup> As the historical review suggests, however, the present is an opportune time to redirect our attention to defining a proposal that can cut the Gordian Knot, and it is to that task that I will now turn.

### III. Cutting the Gordian Knot: The Proposal for Referral Jurisdiction

On first blush, even with the support of the less powerful countries, the same Gordian Knot problem that worked to defeat the compulsory jurisdiction of the Permanent Court after World War I and the International Court of Justice after World War II would appear to doom present day efforts to grant states universal access to the Court's jurisdiction. Certainly, the rules for amending the Court Statute do not give cause for optimism. Article 69 of that Statute incorporates by reference the amendment provisions of Articles 108 and 109 of the United Nations Charter.<sup>102</sup> In addition to requiring approval by two-thirds of the United Nations General Assembly and ratification by two-thirds of the members of the United Nations,<sup>103</sup> these articles provide that a proposed amendment can be vetoed by any one of the permanent five members on the Security Council.<sup>104</sup> As with the powers in the past, most of the permanent members of

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99. Of the 193 countries in the United Nations, 139 are identified by the International Monetary Fund as having "developing economies." See INTERNATIONAL MONETARY FUND, WORLD ECONOMIC OUTLOOK: CRISIS AND RECOVERY 184 (Apr. 2009), available at <http://www.imf.org/external/pubs/ft/weo/2009/01/weodata/groups.htm#oem>. Nine members of the United Nations are not included in the International Monetary Fund's classification.

100. See, e.g., Treves, *supra* note 21, at 219 (observing that because the Court has recently been particularly busy, "[t]he need for more cases does not seem to be as vital anymore," and that "[t]his explains why proposals for entrusting to the Court a task in solving problems in international law arising before domestic courts have been almost forgotten.").

101. See, e.g., *supra* notes 7-17 and accompanying text (identifying a number of the specialized international tribunals that now exist).

102. ICJ Statute, *supra* note 23, art. 69.

103. U.N. Charter arts. 108-09. Article 108 provides for amendment of the Charter without the convening of a conference. Article 109 provides that a Charter review conference can be called into session by a two-thirds vote of the General Assembly and an affirmative vote of any nine members of the fifteen-member Security Council.

104. *Id.*

the Council are unlikely to support expanding the Court's jurisdiction, and almost certainly at least one would cast a dissenting veto. Any hope that proclivities might now be different is tempered by the fact that presently all of the permanent members (except for Great Britain) are declining to accept the compulsory jurisdiction of the Court under the optional clause.<sup>105</sup>

Once again, it would seem that those powerful countries most predisposed to perceive their prerogatives of power as circumscribed by the universalization of the Court's jurisdiction are also best positioned to block a universalization initiative. But what if there was a legally valid way for the General Assembly to universalize the Court's advisory jurisdiction without the need to amend the Court's statute? In the General Assembly today, after all, each of the 193 United Nations members have an equal vote.<sup>106</sup> Consequently, the overwhelming majority of countries that are not among the power elite predominate. A discerning reading of the United Nations Charter reveals that the General Assembly by either a majority or two-thirds vote<sup>107</sup> does, in fact, have the power to vest the Court with what I am calling *referral jurisdiction* over interstate disputes. The Assembly has the authority to establish a *Judicial Commission*, which could request advisory opinions on behalf of aggrieved states.<sup>108</sup> That authority derives from the combined force of two articles of the United Nations Charter. The first is Article 22, which authorizes the Assembly to establish subsidiary organs "as it deems necessary for the performance of

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105. France withdrew from the Court's compulsory jurisdiction following the Court's indication of provisional measures in the *Nuclear Test Case*. See Jean Charpentier, *Pratique Française Concernant du Droit International*, 20 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 1027, 1051 (1974). The United States likewise withdrew after the Court ruled that it had jurisdiction in the *Nicaragua* case. See Letter from George P. Schultz, Secretary of State of the United States of America, to Javier Perez de Cuellar, Secretary-General of the United Nations (Oct. 7, 1985), reprinted in 24 I.L.M. 1742 (1985). The acceptance of the Court's compulsory jurisdiction by the Chinese nationalist regime was repudiated by the communist government in 1972. See U.N. GAOR, 28th Sess., Supp. No. 5 at 1, U.N. Doc. A/9005 (1973). Russia never accepted the compulsory jurisdiction of the Court. For reference to the listing of countries accepting the compulsory jurisdiction of the Court, see *supra* note 26.

106. See U.N. Charter art. 9, para. 1, art. 18, para. 1. See also United Nations, *Functions and Powers of the General Assembly of the United Nations*, <http://www.un.org/en/ga/about/background.shtml>.

107. The requisite vote depends upon whether, under Article 18 of the United Nations Charter, establishment of the to-be-proposed Judicial Commission should be regarded as an "important question" requiring a two-thirds vote, as opposed to a majority vote, of the Assembly. While Article 18 identifies certain voting matters as important questions, the Assembly can also decide (by majority vote) to consider other questions to be important questions. See U.N. Charter art. 18, paras. 2-3. There is, however, little precedent as to which other questions generally qualify. In particular, the requisite vote required to establish Article 22 subsidiary organs is unclear since most have been approved by consensus. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 429 (Bruno Simma et al. eds., 2d ed. 2002) [hereinafter Simma].

108. For past works discussing the establishment of a committee as a vehicle for referring cases to the Court, see *supra* note 82.

its functions.”<sup>109</sup> The second is Article 96(2), which, as previously discussed, provides that the Assembly may empower organs of the United Nations to “request advisory opinions of the Court on legal questions that arise within the scope of their activities.”<sup>110</sup> The Court has held that Article 96 limits the questions organs can ask of it to those clearly within their programmatic mandates.<sup>111</sup> However, as will be discussed in detail in Part Two, Section I.A, if the programmatic mandate of the organ created under Article 22 is precisely to request advisory opinions on behalf of states, the organ may request opinions on questions put to it by states on any otherwise justiciable legal disputes without a subject matter limitation.

In creating the Judicial Commission, the Assembly should provide that it be carefully tailored to accomplish its referral mission. The Assembly should make the Judicial Commission structurally independent and prescribe that it be staffed by international law experts. In cases where Article 36 jurisdiction exists,<sup>112</sup> states would have the ability to choose between initiating a contentious action, which would be binding, or a referral action, which would be advisory. Any state wishing to pursue a referral action would petition the Judicial Commission, and, upon criteria of justiciability and standing established by the General Assembly, the Judicial Commission would refer the action to the Court for an advisory opinion.<sup>113</sup> So as not to overtax its political or material resources, the Court could establish its own additional criteria for hearing disputes. Further, the Court could exercise its discretion under Article 65 of its Statute not to hear a dispute that it felt would challenge its institutional capacity to play a constructive role.<sup>114</sup> In particular, so as to respond to the greatest needs and promote coherence in the international system, the Court could accept

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109. U.N. Charter art. 22 (“The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.”).

110. *See supra* note 34.

111. *See Legality of the Threat or Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 66, 76-77 (July 8) (finding that the World Health Organization was not authorized to request an advisory opinion on the legality of the use of nuclear weapons because the subject matter was not “within the scope of [the] activities” of the organization).

112. *See supra* notes 23-31 and accompanying text.

113. Before the 1998 addition of Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Convention provided for a similar kind of referral system, whereby petitioners would file complaints with the European Commission on Human Rights, and the Commission would determine whether to refer the matter to the European Court of Human Rights. For further discussion, see Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 *DUKE J. COMP. & INT’L L.* 95, 99-105 (2003).

114. Article 65 of the Court’s Statute provides that “[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.” ICJ Statute, *supra* note 23, art. 65. The first reference to the word “may” in Article 65 has always been interpreted to mean that the Court has the discretion not to comply with a request for an advisory opinion. *See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, 19 (May 28); *Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania*, Advisory Opinion, 1950 I.C.J. 65, 71-72 (Mar. 30) [hereinafter *Peace Treaties*].



cases specifically for which either no other international forum was available or multiple forums had come to inconsistent conclusions.

In order to coherently integrate this expansion of the Court's ambit into the structure of the international system, the Security Council could play a gatekeeper role. The Council has primary responsibility for international peace and security under the United Nations Charter.<sup>115</sup> As such, it could be permitted to intercede to secure a deferral of the Judicial Commission's referral. This would help fulfill the U.N. Charter's vision of the Security Council and Court working in tandem as provided, for example, in the Article 36(3) exhortation that when recommending dispute resolution methods, the Security Council should as a general rule refer disputing parties to the International Court of Justice,<sup>116</sup> and the Article 94(2) provision for the Security Council to enforce opinions of the Court.<sup>117</sup>

This scheme, on the one hand, gives the Council the flexibility to defer cases when their going forward would be unhelpful to its own efforts or might otherwise interfere with the political resolution of a conflict. On the other hand, this plan also gives the Council the ability to use the Court's opinions to buttress its legally principled positions or, if necessary, to seek institutional cover by deferring to the rulings of the more politically insulated Court. While allowing for political interference in the international judicial system does not accord with our accepted understanding of blind justice, it does accord with the practical realities of an international system that is not yet capable of wholly grounding the judicial process in the independent application of law.

This scheme giving the Security Council the ability to delay cases is analogous to the Security Council deferral mechanism created by the parties to the Rome Statute establishing the International Criminal Court.<sup>118</sup> Of critical importance to the integrity of this system is that the procedure does not allow permanent members to suspend cases, including those involving review of their own actions, without the requisite supermajority vote of nine of the fifteen members of the Council.<sup>119</sup> This is because a resolution of the Council would be necessary to delay a case, and a veto can only block a resolution, not affirmatively secure its passage.<sup>120</sup>

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115. U.N. Charter art. 24, para. 1.

116. U.N. Charter art. 36, para. 3.

117. U.N. Charter art. 94, para. 2.

118. Article 16 of the Rome Statute provides that "[n]o investigation or prosecution may be commenced or proceeded with under the Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions." Rome Statute, *supra* note 10, art. 16. For further discussion, see Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 95, 103 (2006) (considering the extent to which the Security Council under Article 16 of the Rome Statute has the authority to immunize defendants from prosecution by the International Criminal Court).

119. U.N. Charter art. 27.

120. U.N. Charter art. 27, para. 3. The Security Council has the authority under the Charter to request an advisory opinion (*see supra* note 34 and accompanying text), but such a request is most likely subject to a veto as a *non-procedural matter* under Article

## Part Two: The Case for Referral Jurisdiction

### I. The Doctrinal Case for Referral Jurisdiction

Before all else, the case for referral jurisdiction depends upon its legality, and, in fact, for the referral initiative to be realized, it would have to pass legal muster with the Court itself. In particular, the Court would be presented with two questions regarding authority that I will discuss in order: (1) does the United Nations General Assembly have the authority under Articles 22 and 96 to create a subsidiary organ capable of requesting advisory opinions; and (2) does the Court in its own right have the authority to render advisory opinions on disputes between states without their consent?

#### A. The Propriety of the Judicial Commission Under Article 22 and Article 96 of the United Nations Charter

The Court's precedent supports the proposition that the General Assembly has the authority to create a subsidiary organ, the primary purpose of which is to request advisory opinions of the Court. In 1950, the General Assembly created an internal United Nations court—the United Nations Administrative Tribunal—to adjudicate the United Nations' disputes with its staff.<sup>121</sup> In an attempt to enhance the legitimacy of the Administrative Tribunal process, the General Assembly in 1955 established an additional organ, the Committee on Applications for Review of Administrative Tribunal Judgments, to refer judgments of the Administrative Tribunal to the International Court of Justice for review under the Court's advisory powers.<sup>122</sup> Under G.A. Resolution 957(X), a staff member party to the dispute, the Secretary-General, or a member state could request that the Committee ask the Court for an advisory opinion.<sup>123</sup> If, upon review, the Committee found a substantial basis for objecting to the Tribunal's judgment, it was to refer the matter to the Court.<sup>124</sup> In certain respects, the Committee review system established by G.A. Resolution 957(X) pushed the legal envelop further than would the proposed Judicial Commission, as it provided that the Court's advisory judgments be accepted as binding by the United Nations,<sup>125</sup> and it allowed non-states (U.N. staff members) access to the Court as litigants.<sup>126</sup> In more than forty years in existence, the Committee referred three cases to the

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27(3) by one of the five permanent members of the Security Council. As already mentioned, the Security Council has only requested a quasi-contentious advisory opinion on one occasion. See *supra* note 37 and accompanying text; *infra* note 150.

121. Statute of the Administrative Tribunal of the United Nations, U.N. Doc. AT/11/Rev.4 (Oct. 3, 1972). In addition to ruling on disputes between the United Nations and its staff members, the Tribunal's mandate also included adjudging disputes between certain other U.N. bodies and their staffs.

122. G.A. Res. 957(X), ¶ 4, U.N. GAOR, 10th Sess., Supp. No. 19, U.N. Doc. A/3116 (Nov. 8, 1955) [hereinafter G.A. Resolution 957(X)].

123. *Id.* ¶ 1.

124. *Id.* ¶ 2.

125. *Id.* ¶ 3.

126. *Id.* ¶ 1.

Court.<sup>127</sup>

In the first of these cases, *Application for the Review of Judgment No. 158 of the United Nations Administrative Tribunal*,<sup>128</sup> the Court validated the legality of the Committee under Articles 22 and 96. At the time of its creation, some states had contended that the Committee's mandate to play a role in the process of adjudicating United Nations staff conflicts was not related to a function of the General Assembly.<sup>129</sup> This, according to those states, meant that under Article 22 the Committee was not a subsidiary organ "necessary for the performance of [the General Assembly's] functions" and, therefore, that it should not be entitled to request advisory opinions under Article 96.<sup>130</sup> In a similar vein, state opponents of establishing the Committee had contended that the Committee would not have activities of its own (separate from requesting advisory opinions) that might qualify it as an organ authorized under Article 96 "to request advisory opinions on legal questions arising *within the scope of its activities*."<sup>131</sup>

1. *The General Assembly's Establishment of the Proposed Judicial Commission Would be Valid Under Article 22 of the United Nations Charter*

Responding to the first contention, the Court found that pursuant to Article 101, staff relations were, in fact, within the purview of the General Assembly,<sup>132</sup> but that the legality of the Committee did not hinge on such a finding of explicit institutional mandate. Because Article 22 specifically bestows broad discretion upon the General Assembly to establish subsidiary organs as *it deems necessary* to the performance of its functions, the Court reasoned that "to place a restrictive interpretation on the power of the General Assembly to establish subsidiary organs would run contrary to the clear intention of the Charter."<sup>133</sup>

Consistent with this reasoning, the General Assembly has the discretion to create the Judicial Commission to exercise a referral function similar to that of the Committee. In fact, the subject matter of the Judicial Commission's referrals would be more clearly within the purview of the General Assembly than are staff disputes—a subject about which the U.N. Charter is silent. Under Chapters IV and VI of the Charter, the General

127. The Committee was abolished in 1996. For a recounting of the circumstances of its abolition, see Virginia Morris & M.-Christiane Bourloyannis-Vraïlas, *Current Developments: The Work of the Sixth Committee at the Fiftieth Session of the UN General Assembly*, 90 AM. J. INT'L L. 491, 493-94 (1996).

128. *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, 1973 I.C.J. 166 (July 12), [hereinafter Judgment No. 158].

129. *Id.* at 173-75.

130. *Id.* at 172. See *supra* note 109 for the text of Article 22.

131. Judgment No. 158, *supra* note 128 (emphasis added). See *supra* note 34 for the text of Article 96.

132. Judgment No. 158, *supra* note 128, at 173. Article 101 provides that "[t]he staff shall be appointed by the Secretary-General under regulations established by the General Assembly." U.N. Charter art. 101, para. 1.

133. Judgment No. 158, *supra* note 128, at 172.

Assembly is authorized to discuss and make recommendations regarding disputes between countries.<sup>134</sup> Accordingly, the Court has affirmed the Assembly's authority to request advisory opinions related to such interstate disputes on four occasions.<sup>135</sup> While the General Assembly is prohibited by Article 12 from making recommendations regarding disputes the Security Council is involved with (unless invited to do so by the Council),<sup>136</sup> the Court has found Article 12 not to be so broad as to prohibit the Assembly from requesting advisory opinions regarding such disputes.<sup>137</sup> Thus, the Judicial Commission's delegated function of requesting advisory opinions regarding disputes between countries would not run afoul of Article 12, even if the Security Council was involved with the dispute. In fact, the referral jurisdiction proposal's provision for Security Council deferrals of advisory requests makes the workings of the Judicial Commission even more deferential of the Security Council's Article 12 prerogatives than required.<sup>138</sup>

## 2. *The Proposed Judicial Commission's Request of Advisory Opinions Would be Warranted Under Article 96 of the United Nations Charter*

The Court similarly disagreed with the second contention: that because the Committee lacked an activity other than requesting advisory opinions, it was incapable under Article 96 of requesting opinions "on legal questions arising within the scope of [its] activities." The Court reiterated that the Charter does not limit the General Assembly's discretion over the nature of the subsidiary organs it establishes.<sup>139</sup> It emphasized, however, that its conclusion was not dependent upon this discretion because the Committee's purpose of screening requests for advisory opinions gave it a function, though "admittedly a narrow one," beyond that of requesting advisory opinions.<sup>140</sup>

As with the Committee, the proposed Judicial Commission has a

134. U.N. Charter arts. 10-15, 35.

135. See *infra* notes 149, 151-179 and accompanying text (identifying and discussing quasi-contentious cases referred to the Court by the General Assembly.)

136. Article 12 of the United Nations Charter provides that "[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests." U.N. Charter art. 12, para. 1.

137. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 148-50 (July 9) [hereinafter *Israeli Wall*] (holding that a request for an advisory opinion is not a recommendation under Article 12 and affirming the practice of "the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security"); *accord* *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, at 16-17 (July 22, 2010), *available* at <http://www.icj-cij.org/docket/files/141/15987.pdf> [hereinafter *Kosovo*].

138. For the description of the Security Council deferral mechanism, see *supra* notes 115-120 and accompanying text.

139. Judgment No. 158, *supra* note 128, at 172-75.

140. *Id.* at 174.

screening purpose beyond that of only requesting advisory opinions,<sup>141</sup> but the Commission's legality does not depend upon its exercise of this screening function. As the Court made clear in *Review of Judgment No. 158*, the General Assembly has the discretion to establish the Judicial Commission to request advisory opinions regardless of the narrowness of its mandate.<sup>142</sup>

The plain language of the Charter and the Court's decision in *Review of Judgment No. 158* leave little doubt as to the legality of the Judicial Commission. In light, however, of the Security Council's successful assertion of its own expansive powers to establish judicial organs, to the extent that any doubt does persist, it would have to be resolved in favor of such a prerogative for the General Assembly. The Security Council established the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda to try individuals for war crimes without any explicit charter-based authority to establish courts generally,<sup>143</sup> much less novel war crimes tribunals. The General Assembly's establishment of a commission to refer cases to the existing *principal judicial organ of the United Nations*<sup>144</sup> would be quite modest by comparison.

#### B. The Legality of the Court Opining on the Behavior of States Without Their Consent

The major legal concern that a proposal to universalize the Court's advisory jurisdiction raises does not relate to the validity of the Judicial Commission under Articles 22 and 96. Rather, it relates to the more fundamental question of the legality of the Court opining on the behavior of states without their consent. In 1923, the Council of the League of Nations asked the Permanent Court for an advisory opinion regarding a Soviet-

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141. See *supra* note 113 and accompanying text.

142. In addition to the scope of their activities requirement, Article 96 also specifies that the questions referred to the Court for advisory opinions be "legal matters." The propriety of the Court rendering advisory judgments in quasi-contentious cases has been challenged as raising political rather than legal questions, as have cases arising under Article 36(2), which gives the Court jurisdiction "in all legal disputes." Finding it impossible to distinguish in practice between political and legal matters, the Court has never refused to accept a case on the bases that it was political in nature. See, e.g., Kosovo, *supra* note 137, at 12 ("A question which expressly asks the Court whether or not a particular action is compatible with international law certainly appears to be a legal question.").

143. See generally, Alfred P. Rubin, *An International Criminal Tribunal for Former Yugoslavia?*, 6 PACE INT'L L. REV. 7 (1994) (questioning the authority of the Security Council to establish a judicial institution which threatens the internal operation of a state). But see Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995) (upholding the authority of the Security Council to have established the International Criminal Tribunal for the Former Yugoslavia).

144. U.N. Charter art. 92 ("The International Court of Justice shall be the principal judicial organ of the United Nations."). For reference to Court decisions interpreting the implications of the Court's status as the *principal judicial organ*, see *infra* note 183 and accompanying text.

Finnish dispute over the legal status of Eastern Carelia.<sup>145</sup> The Soviet Union vociferously objected to the Permanent Court issuing such an opinion, in part, on the grounds that to do so without its consent would violate its independence. The Permanent Court agreed.<sup>146</sup> Ever since, countries opposing the issuing of advisory opinions regarding their disputes with other countries have relied on the *Eastern Carelia* opinion.<sup>147</sup> They cite the opinion as authority for the proposition that affected states must specifically consent to any judicial proceeding, including even those of an advisory nature.<sup>148</sup>

The Permanent Court holding, however, is not so broad as to require consent generally today in advisory cases implicating disputes between countries. Beginning in 1950, as previously mentioned, on five occasions (regarding human rights in Eastern Europe,<sup>149</sup> the South African occupation of Namibia,<sup>150</sup> self-determination in the Western Sahara,<sup>151</sup> the Israeli construction of a wall in the Palestinian territories,<sup>152</sup> and the Kosovar declaration of independence<sup>153</sup>) either the General Assembly or the Security Council has requested that the Court render quasi-contentious advisory opinions. In not one of these cases did the Court interpret the *Eastern Carelia* precedent to preclude it from rendering an advisory opinion. The Court always found that it had jurisdiction regardless of state consent, or

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145. See Request from the Council of the League of Nations to the Permanent Court of International Justice for an Advisory Opinion on the Status of Eastern Carelia, 1923 P.C.I.J. (ser. B) No. 5, at 6 (Apr. 27), available at [http://www.icj-cij.org/pcij/serie\\_B/B\\_05/Statut\\_de\\_la\\_Carelie\\_orientale\\_Avis\\_consultatif\\_1.pdf](http://www.icj-cij.org/pcij/serie_B/B_05/Statut_de_la_Carelie_orientale_Avis_consultatif_1.pdf).

146. Status of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5, at 27 (July 23) [hereinafter *Eastern Carelia*].

147. See, e.g., *infra* notes 149–173 and accompanying text.

148. See, e.g., Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶ 28 (Oct. 16) [hereinafter *Western Sahara*].

149. See *Peace Treaties*, *supra* note 114.

150. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, 24 (June 21) [hereinafter *Namibia*]. The *Namibia* opinion was one of four advisory opinions that the Court issued regarding South Africa's exercise of political control over Namibia between 1950 and 1971. The opinion referenced here is the only one that raises the relevant issue of quasi-contentious advisory jurisdiction. Because Namibia, one of the interested parties impacted by the decision, was considered a *territory* rather than a state at the time of the decision, the case is not technically quasi-contentious, but I have included it, as the Court's analysis is directly relevant. For a discussion of a related contentious case involving Namibia, see *supra* note 92 and accompanying text.

151. See *Western Sahara*, *supra* note 148.

152. See *Israeli Wall*, *supra* note 137. Because one of the interested parties impacted by the *Israeli Wall* decision, the *entity* of Palestine, was not as of the time of the decision generally recognized as a state, *Israeli Wall* does not technically qualify as a quasi-contentious dispute between two *states*. I have, nevertheless, included the decision in my discussion, as the Court's analysis is directly relevant.

153. See *Kosovo*, *supra* note 137. As with *Namibia* and *Israeli Wall* (discussed *supra* note 150 and *supra* note 152), one of the parties impacted by the *Kosovo* decision, in this case the *entity* of Kosovo, was not generally recognized as a state. In fact, whether it should be recognized as such was potentially at stake in the decision itself. As with *Namibia* and *Israeli Wall*, I have included the decision in the discussion because the Court's analysis is directly relevant.

lack thereof, and in then considering whether as a matter of discretion it should render an advisory opinion, the Court consistently decided that it should (except for the *Namibia* case in which it ended its analysis with acceptance of jurisdiction).

I will now proceed to explain the Court's rationale for finding that it had jurisdiction in these cases, and how that rationale supports the validity of the Court's exercising of referral jurisdiction regardless of state consent. I will then conclude this Subsection with an explanation of why the Court has chosen to exercise its discretion in favor of rendering decisions in the above cases and why it should likewise exercise its discretion to accept referrals from the proposed Judicial Commission regardless of state consent.

### 1. *The Court's Jurisdiction to Render Opinions in Quasi-Contentious Cases*

The reasoning behind the Court's consistent determination that it has had jurisdiction to render opinions in quasi-contentious advisory cases is grounded in two lines of analysis. The first is that international law's requirement of consent to judicial process does not apply to proceedings that result in advisory, as opposed to binding, opinions. The second is that, even were the requirement of consent to apply to advisory opinions, states have effectively consented to the advisory jurisdiction of the Court by virtue of their all but universal accession to the United Nations Charter and Statute of the Court.

#### a) There is no Requirement of Consent to Advisory Proceedings

The first line of analysis, articulated initially in the *Peace Treaties* case, is that "the well established principle of international law" requiring consent to contentious judicial proceedings does not apply to opinions that are merely advisory.<sup>154</sup> The Court does not explain how this conclusion is consistent with the *Eastern Carelia* holding requiring consent to an advisory opinion. Nevertheless, because the context of the two cases is quite different, their seemingly divergent holdings are, in fact, reconcilable. The League Covenant was the centerpiece of a grand plan to establish an integrated system of peaceful dispute resolution. In joining the League, countries agreed to submit their disputes either to arbitration, judicial settlement (including settlement by the Permanent Court), or to an enquiry by the League Council (of which advisory opinions came to be a component part).<sup>155</sup> For Russia to stand outside of the League system, therefore, was to definitively stand outside a voluntary system, which included in its scheme that disputes be subject to advisory opinions.

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154. *Peace Treaties*, *supra* note 114, at 71.

155. League of Nations Covenant arts. 12-16. The Covenant provided that countries would not go to war against any country complying with the League's dispute resolution provisions, and any country not doing so will "be deemed to have committed an act of war against all other Members of the League." *Id.* art. 16. For further discussion, see FRANCIS PAUL WALTERS, A HISTORY OF THE LEAGUE OF NATIONS 41-61 (1952).

International law, however, has evolved. The United Nations processes today are not fully voluntary. Instead of focusing on dispute resolution mechanisms for members, the Charter creates more muscular political organs, especially the Security Council with its legal authority to impose settlements.<sup>156</sup> Advisory opinions are now only one of a variety of options for maintaining international peace and security at the disposal of a more legally powerful organization. By having not joined the United Nations at the time of the *Peace Treaties* decision in 1950,<sup>157</sup> Bulgaria, Hungary, and Romania had, therefore, only avoided incurring any obligation of their own to cooperate with the organization. They had no basis for interfering with the organization's independent authority under its charter to request advisory opinions.

Although the *Peace Treaties* decision clearly establishes the power of the Court to render duly requested advisory opinions over the objections of states, there is one complication. The decision leaves ambiguous the issue of whether or not there are jurisdictional limits as to whom those opinions must be directed and the ends they must serve. The Court begins the sentence that creates the ambiguity by broadly proclaiming that “[i]t follows [from advisory opinions not having binding force] that no state . . . can prevent the giving of an Advisory Opinion.”<sup>158</sup> It concludes, however, with the qualifying clause, “which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take.”<sup>159</sup> What happens if the opinion is not for the United Nations' own internal use? Can the Court's advisory opinion also be sought if not for the specific ends of informing the United Nations?

This is a key question for our purposes because providing a mechanism for the Court to issue quasi-contentious advisory opinions at the instigation of complaining countries rather than the United Nations is at the core of this Article's proposal for referral jurisdiction. Fortunately, the Court in subsequent cases moves away from language implying that its advisory jurisdiction in quasi-contentious cases is solely limited to answering requests for opinions by United Nations organs as to the course of action they should take. While the *Namibia* decision also associated the Court's jurisdiction to issue advisory opinions regarding country disputes with a United Nations organ seeking the opinion “with reference to its own

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156. See *infra* notes 224-226 (referencing the Security Council's power to impose settlements). Under the League Covenant, settlement by reference to the Council of the League was only one of the dispute resolution options available at the discretion of the parties. See League of Nations Covenant arts. 12, 15. The League Council, unlike the United Nations Security Council, only had authority to recommend enforcement measures to other members of the League of Nations. See League of Nations Covenant art. 16.

157. See G.A. Res. 995(X), U.N. Doc. A/RES/995(X) (Dec. 14, 1955) (authorizing the 1955 admission of Bulgaria, Hungary, and Romania to the United Nations).

158. *Peace Treaties*, *supra* note 114, at 27.

159. *Id.* The court continues in a similar vein in the succeeding sentence: “The Court's Opinion is given not to the States, but to the organ which is entitled to request it.” *Id.*



decisions,”<sup>160</sup> this is in contrast to the more recent *Western Sahara*, *Israeli Wall*, and *Kosovo* decisions.

In *Western Sahara* the Court quoted the ambiguous sentence referred to above from *Peace Treaties*. It then, however, implied its understanding of the sentence’s meaning by concluding without reference to any jurisdictional restrictions that “[t]he Court . . . affirmed in this pronouncement that its competence to give an opinion did not depend on the consent of the interested States, even when the case concerned a legal question actually pending between them.”<sup>161</sup> Similarly, in the *Israeli Wall* opinion, the Court quoted the ambiguous sentence from *Peace Treaties* as support for its categorical observation that “the lack of consent to the Court’s contentious jurisdiction by interested States has *no bearing* on the Court’s jurisdiction to give an advisory opinion” (emphasis added).<sup>162</sup> Finally, *Kosovo* provides the Court’s clearest indication that jurisdiction in quasi-contentious cases has no relationship to the purpose of the requested opinion. In accepting jurisdiction in that case, the Court did not mention the ambiguous sentence in *Peace Treaties* nor even, for that matter, the *Eastern Carelia* decision itself.<sup>163</sup>

The most plausible reading of the Charter of the United Nations and Statute of the Court supports this understanding that the Court’s exercise of advisory jurisdiction in quasi-contentious cases is not restricted to rendering opinions advising United Nations organs on their own course of action. Nowhere in either document is there a requirement that an advisory opinion must be for the internal use of the organ requesting the opinion. Article 96 of the Charter specifies the circumstances under which advisory opinions may be requested. The only limitations that it places are that if requested by the General Assembly or the Security Council, the request be “on any legal question.” If requested by another organ or specialized agency, the organ or agency must be “so authorized by the General Assembly,” and the request must be “on a legal question arising within the scope of [the organ’s or agency’s] activities.”<sup>164</sup> Only a very expansive interpretation of these provisions could see in them a requirement that advisory opinions may only be requested by the requesting body for its internal use. Likewise, Article 65 of the Court’s Statute, which authorizes it to give advisory opinions, does not restrict the purposes to which those decisions may be put. Its only restrictions are that the opinion must be on a “legal question” and at the request of those so “authorized by or in accordance with the Charter of the United Nations.”<sup>165</sup>

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160. *Namibia*, *supra* note 150, at 24.

161. *Western Sahara*, *supra* note 148, at 24.

162. *Israeli Wall*, *supra* note 137, at 157-58.

163. *See Kosovo*, *supra* note 137.

164. U.N. Charter art. 96. For the full text of Article 96, see *supra* note 34.

165. ICJ Statute, *supra* note 23, art. 65. For the full text of Article 65, paragraph 1, see *supra* note 114.

b) States Have Consented to the Court's Advisory Jurisdiction by Virtue of their Accession to the United Nations Charter and the Court Statute

In the end, it may not matter whether the Court can issue non-binding opinions regarding interstate disputes without state consent. This is because unlike Bulgaria, Hungary, and Romania at the time of *Peace Treaties* in 1950, states today have given their consent by virtually universally acceding to the United Nations Charter and the Court Statute.<sup>166</sup> As previously discussed, states have specifically granted the General Assembly and the Security Council the right to request advisory opinions in Article 96(1) of the United Nations Charter,<sup>167</sup> and they have specifically granted the Court the power to render such opinions in Article 65 of the Court's Statute.<sup>168</sup>

The argument that states have consented to the Court's advisory jurisdiction is its central justification for accepting jurisdiction in both *Namibia*<sup>169</sup> and *Western Sahara*.<sup>170</sup> The *Eastern Carelia* decision itself gives the argument particular force because the Permanent Court maintained that if Russia had consented to the Court's advisory jurisdiction "once and for all" by joining the League,<sup>171</sup> the results in the case would likely have been different.<sup>172</sup>

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166. Today, all internationally recognized states (except for the state of the Vatican City) are full members of the United Nations. Only state-like entities whose statehood is for some reason contested have been denied full membership in the organization. For example, because the People's Republic of China, with its capital in Beijing, and the Republic of China, with its capital in Taipei, have each traditionally maintained that there is only one state of China, only the Beijing regime is currently accredited to represent China.

167. U.N. Charter art. 96, para. 1. For the full text of Article 96, see *supra* note 34.

168. ICJ Statute, *supra* note 23, art. 65. For the full text of Article 65, paragraph 1, see *supra* note 114.

169. *Namibia*, *supra* note 150, at 23–24. "However, [*Eastern Carelia*] is not relevant, as it differs from the present [case]. For instance, one of the states concerned was not at the time a Member of the League of Nations and did not appear before the Permanent Court. South Africa, as a Member of the United Nations, is bound by Article 96 of the Charter, which empowers the Security Council to request advisory opinions on any legal question." *Id.* at 23.

170. *Western Sahara*, *supra* note 148, at 23–24. "In [*Eastern Carelia*] one of the States concerned was neither a party to the Statute of the Permanent Court nor, at the time, a Member of the League of Nations, and lack of competence of the League to deal with a dispute involving non-member states which refused its intervention was a decisive reason for the Court's declining to give an answer. In the present case, Spain is a Member of the United Nations and has accepted the provisions of the Charter and Statute; it has thereby given in general its consent to the exercise by the Court of its advisory jurisdiction." *Id.*

171. See *supra* note 59 and accompanying text (discussing Russian/Soviet membership in the League of Nations).

172. *Eastern Carelia*, *supra* note 146, at 27. The Court in *Peace Treaties* does not rely upon consent by virtue of acceding to the United Nations Charter, presumably because the states objecting to the Court's jurisdiction (Bulgaria, Hungary and Romania) were not yet members of the United Nations in 1950. The Court also avoids the argument in the *Israeli Wall* case, probably because an interested, though non-objecting party, Palestine, was not generally considered a state and was not a member of the United Nations. Similarly, in the *Kosovo* case, Kosovo, whose declaration of independence was at issue,

Thus, states, in acceding to the Charter, have not only consented to allow the Security Council and the General Assembly to seek advisory opinions under Article 96(1). They have also consented to Article 96(2), which would allow the Judicial Commission as an “other organ of the United Nations so authorized by the General Assembly” to similarly request advisory opinions of the Court.<sup>173</sup>

## 2. *The Court’s Exercise of Judicial Discretion in Quasi-Contentious Advisory Cases*

While the Court may have jurisdiction to render advisory opinions upon referral of the proposed Judicial Commission, the Court could refuse to exercise this jurisdiction. Article 65 of the Court’s Statute provides that the Court “may” give advisory opinions, and, as previously noted, the Court has repeatedly held that the word “may” in Article 65 means that it has discretion to decline to give an advisory opinion.<sup>174</sup> How then should the Court exercise its discretion to answer the Judicial Commission’s advisory referrals of cases involving disputes between states?

### a) That an Advisory Opinion be Intended for the Internal Use of the Requesting Organ Has Been a Relevant Factor in the Court’s Exercise of Discretion

Although there may be no jurisdictional requirement that advisory opinions be intended for the internal use of the organ requesting the opinion, that they be for that purpose has been a clear factor in the Court’s exercise of its discretion. Though the Court did not consider the purpose of the request in either *Peace Treaties* or *Namibia*,<sup>175</sup> its decision to render advisory opinions in the *Western Sahara*, *Israeli Wall*, and *Kosovo* cases turned primarily on the fact that the opinions were to be used internally by the requesting U.N. organ.

In *Western Sahara*, the Court asserted that “the lack of consent of an interested state may render the giving of an advisory opinion incompatible with the Court’s judicial character.”<sup>176</sup> However, it agreed to render the opinion in the case because “the object of the request” was “to obtain from the Court an opinion which the General Assembly deem[ed] of assistance to it for the proper exercise of its function.”<sup>177</sup> In the *Israeli Wall* decision,

was not a member of the United Nations. See *supra* note 166 for a discussion of statehood and its relationship to United Nations membership.

173. U.N. Charter art. 96, para. 2. See *supra* note 34 for the full text of Article 96.

174. ICJ Statute, *supra* note 23, art. 65. See *supra* note 114 for the text of Article 65 and cases maintaining that the Court has discretion to decline giving advisory opinions.

175. In *Peace Treaties*, the Court decided to exercise its discretion to render an advisory opinion over the objections of interested states because the matter at issue was procedural and did not go to the merits of the dispute. *Peace Treaties*, *supra* note 114, at 70. In *Namibia*, once the Court determined that it had jurisdiction, it did not consider using its discretion to refuse to give the advisory opinion. *Namibia*, *supra* note 150, at 27.

176. *Western Sahara*, *supra* note 148, at 25.

177. *Id.* at 25, 27.

the Court, reiterating that the purpose of the request is relevant to the Court's discretion rather than its jurisdiction, concluded that "[g]iven the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court's view that the construction of the wall must be deemed to be directly of concern to the United Nations."<sup>178</sup> Finally, in the *Kosovo* decision, the Court made clear as part of its discretionary analysis that advisory opinions are "not a form of judicial recourse for States but the means by which [requesting organs] may obtain the Court's opinion in order to assist them in their activities."<sup>179</sup>

b) The Court Should Exercise Its Discretion in Favor of Accepting Referrals from the Judicial Commission

Because determining what constitutes a proper purpose is within the Court's discretion, the Court is free to depart from its position that the purpose of an advisory opinion should be to inform the United Nations. The establishment of the Judicial Commission by the General Assembly would be a change in circumstances that would give the Court very strong process and substantive reasons to answer the call of the Commission to deliver advisory opinions.

Regarding process, while there is not yet a well-settled doctrine of separation of powers in the international system,<sup>180</sup> the General Assembly, as the closest equivalent to a popular branch of international governance, is entitled to a certain deference by the Court. Surely, if the Assembly's almost-universal country membership<sup>181</sup> were to decide *intra vires* upon a process whereby that same membership could secure advisory rulings on interstate disputes, then that decision should be accorded significant weight. And closer to home, the Court should be influenced as well by its own constitutional role as the "principal judicial organ of the United Nations."<sup>182</sup> As the Court itself has repeatedly acknowledged, this status under the Charter implies an obligation to cooperate with the General Assembly and the Security Council such that only *compelling reasons* should lead it to refuse to render opinions.<sup>183</sup>

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178. *Israeli Wall*, *supra* note 137, at 159.

179. *Kosovo*, *supra* note 137, at 14.

180. Attempting to conceptualize the nature and extent of *separation of powers* in the international system has, nevertheless, been a subject of keen interest to academic commentators. For a recent and very interesting edited volume whose authors explore this and related topics in global constitutionalism, see *RULING THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE* (Jeffrey Dunoff & Joel Trachtman eds., 2009).

181. *See supra* note 166 (discussing the extent of the United Nations' membership).

182. *See supra* note 144.

183. *Kosovo*, *supra* note 137, at 13; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, 1999 I.C.J. 62, 78-79 (Apr. 29); *Israeli Wall*, *supra* note 137, at 156; *Judgments of the Administrative Tribunal of the International Labour Organization Upon Complaints Made Against the U.N.E.S.C.O.*, 1956 I.C.J. 77, 86 (Oct. 23); *Peace Treaties*, *supra* note 114, at 71.

Regarding substance, the Court has never explicitly connected the dots as to why an opinion on a dispute between countries addressed to a United Nations organ should be consistent with *judicial propriety* while an opinion offered for the purpose of directly furthering dispute resolution should not. The Court's implicit rationale, drawn from the original concerns in *Eastern Carelia*, however, is that to engage directly in dispute resolution without explicit consent—even in an advisory capacity—improperly impinges upon state sovereignty, while merely giving advice to a U.N. organ does not. The sovereignty concern, however, at least when applied to accepting referrals from the proposed Judicial Commission, is ill-founded.

First, the rendering of an advisory opinion to states, even without their consent, does not impinge upon the realm of protected sovereignty as that realm is understood today.<sup>184</sup> One must draw a distinction between binding decisions, which encroach upon states' autonomy by requiring them to act in accordance with the decisions, and mere advisory opinions, which do not. If advisory opinions are to be considered an improper infringement on state sovereignty, then so should commentary on state behavior rendered by other agencies of international officialdom, such as the United Nations Human Rights Council<sup>185</sup> and the United Nations Secretary-General.<sup>186</sup> That state behavior is subject to international scrutiny has gradually become accepted in international law.<sup>187</sup> For the Court to imply a contrary notion in its exercise of discretion would unnecessarily cast doubt

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184. In fact, even in its own time, the *Eastern Carelia* decision's extreme deference to sovereignty was highly contested. The opinion was decided by only a seven to four majority. It was strongly criticized in the League Council, see League of Nations, Twenty-Sixth Session of the Council, Nineteenth Meeting, held at Geneva on Thursday, September 27, 1923, at 3:30 p.m., in 4 League of Nations O.J. 1335-37, and by commentators of the day, see, for example, ANTONIO SANCHEZ DE BUSTAMANTE, *THE WORLD COURT* 278-79 (Elizabeth F. Read, trans.1925) and KARL STRUPP, *LA QUESTION CARÉLIENNE ET LE DROIT DES GENS* (1924).

185. The Human Rights Council was created in 2006 by the General Assembly with a mandate to make recommendations concerning situations of human rights violations. See G.A. Res. 60/251, ¶. 5(f), (i), U.N. Doc. A/RES/60/251 (Apr. 3, 2006). For background on the Human Rights Council, see Ved P. Nanda, 2006 Myres S. McDougal Distinguished Lecture: The Protection of Human Rights Under International Law: Will the U.N. Human Rights Council and the Emerging New Norm "Responsibility to Protect" Make a Difference?, in 35 *DENV. J. INT'L L. & POL'Y* 353, 357-65 (2007).

186. The Secretary-General routinely expresses opinions on matters of global concern, including the conduct of states. See, e.g., David E. Sanger & Thom Shanker, *U.S. Pressures North Korea After Sinking Of South's Ship*, N.Y. TIMES, May 25, 2010, at A4 (discussing the Secretary-General's criticism of North Korea over alleged attack on South Korean warship). The Secretary-General's authority to comment is derived from his intrinsic powers as the Chief Administrative Officer of the United Nations under Charter Article 97 and, more specifically, from his Article 99 authority to bring matters to the attention of the Security Council. See Simma, *supra* note 107, at 1195-96, 1217-30; see also STEPHEN SCHWEBEL, *THE SECRETARY-GENERAL OF THE UNITED NATIONS, HIS POLITICAL POWERS AND PRACTICE* 24-26 (1952).

187. See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 229-49 (1995) (discussing in various contexts the "systematic review and assessment" by international organizations of state compliance with treaty obligations).

on the normative foundations of a promising new class of international compliance mechanisms.

Even if advisory opinions were not deemed safely outside the conceptual boundaries of what remains of sovereignty in today's world, the Court has good reason to push those boundaries when exercising its discretion. The late Jonathan Charney, writing in the *American Journal of International Law*, captured the essence of why sovereignty is problematic and contested today:

Complete autonomy may have been acceptable in the past when no state could take actions that would threaten the international community as a whole. Today, the enormous destructive potential of some activities and the precarious condition of some objects of international concern make full autonomy undesirable, if not potentially catastrophic.<sup>188</sup>

To the extent that Charney's perspective is correct, then by conceptually sheltering sovereignty, the Court would be doing no service to the global order. Even to the extent, however, that sovereignty may retain some normative validity, its future as a practical matter is imperiled by autonomous social and economic forces larger than the issue of whether the Court were to accept referrals from the Judicial Commission. In a concession to the practical realities of an interdependent world, sovereignty today is by necessity honored in the breach in many areas of global social life,<sup>189</sup> including specifically the area of dispute resolution.<sup>190</sup>

As we have seen, even the Court itself has agreed, over the protests of affected states, to all five of the General Assembly and Security Council requests for quasi-contentious advisory opinions. The Court's rationale that the opinions are to U.N. organs for their own use rather than to the

188. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 530 (1993).

189. Since the time of Charney's writing, the acceleration of economic and social globalization has, if anything, expanded the institutional spheres in which states no longer exercise many of the traditional prerogatives of sovereignty. A great deal of academic effort has gone into attempting to both assess and critique the areas in which sovereignty is in decline. For some of the most important works, see STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999) (arguing that differences in power and interests rather than respect for sovereignty best explain state behavior); RE-ENVISIONING SOVEREIGNTY: THE END OF WESTPHALIA? (Trudy Jacobsen et al. eds., 2008) (analyzing the challenges to traditional sovereignty emerging from use of force to protect human rights, norms relating to governance, the war on terror, economic globalization, the natural environment, and changes in strategic thinking); STATE SOVEREIGNTY AND INTERNATIONAL GOVERNANCE (Gerald Kreijen et al. eds., 2002) (presenting a variety of contexts in which the traditional prerogatives of states are being challenged by contemporary problems); BENN STEIL & MANUEL HINDS, *MONEY, MARKETS, AND SOVEREIGNTY* (2009) (discussing the tension between globalization and sovereign control of monetary and financial policy); SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* (1996) (exploring the challenge posed by non-state actors to economic sovereignty); *THE GREENING OF SOVEREIGNTY IN WORLD POLITICS* (Karen T. Liftin ed., 1998) (discussing the tension between traditional notions of sovereignty and the need for international cooperation to protect the global environment).

190. See *infra* notes 250-251 and accompanying text (explaining that lack of consent is no longer a bar to the jurisdiction of many of the international system's specialized tribunals).

disputing parties is a distinction without a practical difference, as the legal and political implications of an advisory opinion are the same regardless of the origins of the request. If anything, an advisory process open to all countries would be, if not more respectful of state autonomy, then at least equally respectful of state autonomy. As matters now stand, the General Assembly and Security Council determinations of which conflicts get hearings before the Court are clearly political.<sup>191</sup> As a tribunal dedicated to equal justice, the Court would have good reason to exercise its discretion in favor of hearing referrals from a Judicial Commission that is staffed by independent international civil servants whose decision-making is based on clear legal criteria.

## II. The Case that the Introduction of Referral Jurisdiction Will Improve Compliance with International Law

I have suggested in Part One that referral jurisdiction would improve the functioning of the international legal system, but how exactly would it do so, and are there persuasive arguments against universalizing the Court's advisory jurisdiction? In this Section II of Part Two, I will make the case that referral jurisdiction would improve state compliance with international law. Following in Section III, I will rebut what I believe to be the most important objection to the practical functioning of referral jurisdiction, namely that states will disregard and ultimately discard international tribunals that exercise their powers without state consent.

One of the principle performance criteria by which any legal system should be judged is the extent to which it promotes compliance with the law. Achieving compliance is a particular challenge in the international system where there is no sovereign authority capable of enforcing its law directly on states. In the 19th century, the legal philosopher John Austin, best known for criticizing international law's lack of enforceability,<sup>192</sup> nevertheless offered what has, over time, been the most general and widely accepted description of how international law compliance is achieved. Austin's characterization of compliance, which I will refer to as the *court of international opinion model*,<sup>193</sup> depicts a state system of peer pressure analogous to the systems that emerge in human societies that lack formal insti-

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191. See generally Michla Pomerance, *The Advisory Role of the International Court of Justice and its 'Judicial' Character: Past and Future Prisms*, in THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS, *supra* note 93, at 294-96 (describing the politicization of the process of requesting an advisory opinion in the General Assembly).

192. Austin argued that because international law is not enforceable in the same way as domestic law, it is not really law, but rather a system of "positive morality." JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 208 (Weidenfeld & Nicolson 1954) (1832).

193. In his own original presentation of the model, Austin described the duties that international law imposes as being enforced "by fear on the part of sovereigns of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected." *Id.*

tutions of law.<sup>194</sup> The phenomenon of states collectively passing informal judgment on the behavior of other states has been variously described by many post-Austinian commentators, but all share in common the idea that if a state violates international law, the other states will take notice and initiate various individual or collective actions to punish that state.<sup>195</sup> While the 20th century saw the rudiments of a supernational political structure begin to emerge, mostly in the form of subject-specific international regimes such as the World Trade Organization and the World Health Organization,<sup>196</sup> Austin's court of international opinion model is still a generally accurate description of the dynamics of compliance among states who, even today, answer to no supreme authority.

Our question is whether, in this still largely Austinian international system, referral jurisdiction would improve law compliance. For those who draw their primary understanding of law by analogy to domestic systems, it might seem intuitive that substituting access to a real court for the ersatz court of international opinion would promote legal compliance. The international system, however, is deceptively different from national law systems, and domestic institutions cannot be simply transplanted to the international order with the expectation that they will function in the same way. Even the binding opinions of international courts cannot be enforced as straightforwardly as those of domestic courts that operate as adjuncts of states with centralized enforcement systems. Because of the unique political constraints of the international system, however, we can only cut the Gordian Knot so far as to expand the advisory jurisdiction of the Court, and we are limited to doing so in an ad hoc way, rather than as part of a comprehensive scheme to rationalize the global justice system.

To answer then what turns out to be the complex question of whether the Court's exercise of referral jurisdiction is likely to improve international compliance, the analytical tools of modern compliance theory are helpful. While such theory is primarily intended to be descriptive of how the present international system secures compliance, we can employ it for our speculative purpose of predicting whether compliance would be

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194. See MICHAEL BARKUM, *LAW WITHOUT SANCTIONS: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY* (1968) (analogizing the processes of the international legal system to those of societies with no system of centralized governance).

195. See, e.g., Anthony D'Amato, *Is International Law Really Law?*, 79 NW. U. L. REV. 1293, 1298 (1984) (arguing that international law is still law despite its lack of centralized enforcement because in the international system "the social-disapproval factor operates as a sanction."); Richard Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*, 32 TEMP. L. Q. 295 (1959) (distinguishing between enforcement in vertical legal systems of domestic orders that have the ability to compel obedience to their commands and enforcement in the horizontal international legal system in which there is no centralized authority to enforce commands); LOUIS HENKIN, *HOW NATIONS BEHAVE* 26, 52-56 (2d ed. 1979) (characterizing international law's horizontal enforcement mechanism as being "in the reactions of other nations").

196. See *supra* notes 7-17 and accompanying text and *infra* notes 250-251 for a partial listing of subject-specific regimes and the dispute resolution bodies associated with them.



improved by the International Court of Justice substituting more often for the court of international opinion.

Three branches of compliance theory are particularly useful for this purpose. The first, transnational legal process theory, helps explain why reliance on the court of international opinion serves to frustrate the emergence of a global culture of law compliance and why substituting reliance on the International Court of Justice would serve to nurture such a culture. The second, Thomas Franck's specific application of legitimacy theory to the international system, is helpful for understanding why the indeterminacy of international law undermines compliance and why supplanting the judgments of the court of international opinion with those of the International Court of Justice would help make international law less indeterminate. Finally, rationalist, or instrumentalist, compliance theory is most helpful in explaining why the inability of the court of international opinion to reliably identify law breakers diminishes the incentive of countries to obey international law and why increased reliance on the more reliable International Court of Justice would strengthen countries' incentive to obey the law.

#### A. Transnational Legal Process Theory and the Culture of Global Law Compliance

Transnational legal process theorists attempt to explain obedience to international law by looking to how international norms become internalized within nations so that they comply voluntarily.<sup>197</sup> Harold Koh, one of the most influential transnational legal process theorists,<sup>198</sup> distinguishes between *legal internalization*, whereby international norms become officially binding and enforceable within a country's domestic legal system, and *social and political internalization*, whereby a country's political elite as well as its general public respectively come to believe that international

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197. See generally Harold Hongju Koh, The 1994 Roscoe Pound Lecture: Transnational Legal Process, Lecture at the University of Nebraska College of Law (Oct. 28, 1994), in 75 NEB. L. REV. 181 (1996).

198. In addition to Koh's scholarship, several works of other theorists have contributed to the development of the transnational legal process school. See, e.g., ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE (1968) (laying the theoretical foundation for the development of the transnational legal process school); ROGER FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW 141-62 (1981) (discussing the process whereby the internalization of international law within national bureaucracies leads states to comply with international law); Johanna van Sambeek & Mireille Hector, *Disseminating of IHL at the Domestic Level: The Experiences of the Netherlands Red Cross*, in MAKING THE VOICE OF HUMANITY HEARD 385-97 (L. Lijnzaad et al. eds., 2004) (attempting to demonstrate a correlation between the domestic dissemination of knowledge about international humanitarian law and enhanced compliance); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 935 (2002) (evaluating the "liberal" claim that domestic interest groups can successfully pressure their governments to conform to treaty-created international human rights obligations). For a concise but highly informative study of the transnational legal process movement, see Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334 (1999).

norms should be followed as a matter of right.<sup>199</sup>

To the extent that international law generally becomes socially and politically internalized within a state, that state's general compliance is likely to improve. How much this internalization process occurs within any given state is heavily influenced by global social forces. Just as someone is likely to develop very different personal predilections toward following traffic laws depending upon whether her driving ethos was shaped by life in Rome or Singapore, so too participants in the international community are influenced by that community's general compliance culture.<sup>200</sup> At present, the global culture of compliance leaves considerable room for improvement. An important move in the direction of this improvement would be to reduce reliance on the court of international opinion in favor of the International Court of Justice.

That countries in their role as judges of the court of international opinion are observably biased toward their own political interests and those of their allies undermines the development of a healthy culture of law compliance. After all, individuals will not internalize an ethos of respect for an international legal system that they perceive is not deserving of such respect. To the extent then that the institutionally independent International Court of Justice<sup>201</sup> more often substitutes for the court of international opinion, the reputation of the international system for dispensing impartial justice would likely improve and along with it the necessary preconditions for a culture of global law compliance.

#### B. Thomas Franck's Legitimacy Theory and the Role of Indeterminacy in Undermining Law Compliance

Thomas Franck, blending positivist and normative methodological traditions, examined compliance with international law through the lens of legitimacy theory.<sup>202</sup> Franck argued that to the extent that nations accept international rules as legitimate or normatively valid, they will be more likely to obey them, or in his terms, the rules will have more *compliance pull*.<sup>203</sup> Franck described four barometers of a norm's legitimacy.<sup>204</sup> Of

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199. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2656-57 (1997).

200. See generally LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 49-51 (1995) (discussing the various forces that mold the "international culture of compliance").

201. Judicial independence is one of the core principles to which the Court's Statute is dedicated. See ICJ Statute, *supra* note 23, arts. 4-20.

202. See generally THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990). Drawing on what he generally categorizes as the three main branches of domestic legitimacy theory (Weberian, Habermasian, and Marxist), Franck offers a working definition of legitimacy adapted to the international system as "a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process." *Id.* at 24; see also *id.* at 17-18.

203. *Id.* at 24-26.

particular relevance for our purposes is its rule clarity, or *determinacy*.<sup>205</sup> Franck explained that the more indeterminate or ambiguous a rule, “the less compliance pull it is likely to exert” because “obviously a rule that cannot be understood is unlikely to be obeyed.”<sup>206</sup> Even if a rule is understandable in a general sense, to the extent that countries can plausibly justify behavior in accordance with inconsistent interpretations of it, the rule will lose its ability to influence them.

One of the great deficiencies of the court of international opinion is that it promotes such indeterminacy. This is because, in addition to their bias discussed above, the court of international opinion’s country members have a tendency to remain inscrutably silent in the face of a legal dispute. Alternatively, if they do happen to find their magisterial voices, they are likely to contradict one another, and often with political statements that lack legal character.

Even in the domestic context, relying on the vagaries of public opinion to determine judicial outcomes unsettles legal norms. This was, for example, the case in ancient Athens during the classical period, when popular juries that could number in the hundreds, or sometimes even thousands, confused standards of social conduct by capriciously applying the Athenian Legal Code.<sup>207</sup> At least in Athens, however, jurors had a defined legal code to work from. In the international system, the law to be applied is itself often ill-defined.

Treaties and customary international law are generally considered the two primary sources of international law.<sup>208</sup> While treaties, like all written documents, can be construed in different ways, their settled text, like the Athenian Legal Code, provides some level of constraint on plausible interpretations. Customary international law, on the other hand, is famously amorphous.<sup>209</sup> According to traditional doctrine, customary

204. See *id.* Franck’s four barometers of a norm’s legitimacy are: its rule clarity or determinacy (Chapters 4, 5 & 6); its symbolic validation by rituals and pedigree (Chapters 7 & 8); its validation by coherence (Chapters 9 & 10); and its conformity with the normative hierarchy of secondary rules that define the international system’s right process (Chapter 11).

205. *Id.* at chs. 4-6.

206. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 56 (1992) [hereinafter Franck, *Emerging Right*].

207. See MATTHEW R. CHRIST, *THE LITIGIOUS ATHENIAN* 19-21, 40-42 (1998) (describing how rhetoric influenced Athenian juries).

208. See, e.g., ICJ Statute, *supra* note 23, art. 38(1)(a)-(b) (listing international conventions (treaties) as first and customary international law as second among the sources of international law that the Court’s Statute authorizes the Court to apply).

209. For example, in a well-known article J. Patrick Kelly concludes:

[Customary international law (“CIL”)] survives only because nations and theorists mean radically different things when they use the term. For some scholars, CIL is consent-based, for others it is consensus-based. Some scholars argue that CIL is an unconscious, slow process that generates a shared conviction of obligation. Other scholars and nations see custom as a dynamic process that can change rapidly or even instantly. CIL serves and can be manipulated by many masters because its elements, state practice and *opinio juris*, have no ascertainable meaning and are routinely ignored.

international law is created when states act (*state practice*) out of a sense of legal obligation (*opinio juris*).<sup>210</sup> This simple formula belies uncertainty over exactly which normative standards should be given the status of customary international law. To take just one example of the considerable doctrinal disorder that exists regarding state practice, there is no clear agreement on how many states need to engage in what sort of practice and for how long for that practice to qualify as a *custom*.<sup>211</sup> Similar doctrinal confusion complicates the determination of what constitutes *opinio juris*.<sup>212</sup> There is even basic disagreement over the extent to which traditional state practice and *opinio juris* remain the elements of custom.<sup>213</sup>

The result of filtering normative rays that are obscure at inception through the court of international opinion's interpretive fog is to produce only a dim silhouette of law. And as Franck's explanation of the relationship between determinacy and compliance makes clear, such legal opacity is a formula for frustrating the good intentions of those who wish to ascertain and abide by the law and facilitating the bad intentions of those who wish to obfuscate and disregard it.

In contrast, enhanced reliance on the International Court of Justice could help settle customary international law as well as international law in general. Because the International Court of Justice issues formal written opinions that elaborate with specificity upon its understanding of the law, it can help to flesh out the meaning of vague and indeterminate laws.<sup>214</sup> Of course, the specialized tribunals of the international system can also

J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 458-59 (2000).

210. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4-11 (4th ed. 1990).

211. Compare, e.g., ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 87-90 (1971) (arguing that only physical acts of states, as opposed to state protests and other official statements, constitute state practice) with Maarten Bos, *The Recognized Manifestations of International Law: A New Theory of "Sources"*, 20 GERMAN Y.B. INT'L L. 9, 30-33 (1977) (arguing that self-interested acts of states—including physical acts—in violation of established norms of international law do not constitute state practice).

212. Compare, e.g., I.C. MacGibbon, *The Scope of Acquiescence in International Law*, 31 BRIT. Y.B. INT'L L. 143, 145-46 (1954) (arguing that a state's failure to protest arguably illegal actions of other states indicates acceptance of the actions as legal) with D'AMATO, *supra* note 211, at 68-70 (arguing that a state's failure to protest another state's act does not indicate acceptance of the act as legal).

213. See, e.g., Bin Cheng, *United Nations Resolutions in Outer Space: "Instant" Customary Law*, 5 INDIAN J. INT'L L. 23 (1965) (arguing that United Nations General Assembly resolutions should be considered the equivalent of state practice and *opinio juris* and, therefore, constitute binding customary law).

214. Professor Franck provides, by way of illustration, two instances of the Court performing this law-settling role with regard to treaty interpretation:

[T]he International Court of Justice, in interpreting Article 83(1) of the [Law of the Sea] Convention . . . , has taken a highly indeterminate text—one that calls for "an equitable solution" in apportioning an undersea coastal shelf among neighboring states—and has rendered it increasingly determinate. So, too, as a result of litigation between Finland and Denmark currently before the Court, will we "discover" whether a tall, self-propelled oil rig constitutes a "vessel" under the right of unimpeded passage through straits as established by the Law of the Sea Convention.

help settle the law.<sup>215</sup> As discussed in Part One, Section I,<sup>216</sup> however, in many cases no tribunal has authority to exercise jurisdiction. Also, when conflicting judgments of specialized tribunals fail to settle the law, the International Court of Justice is best positioned to assume the role of settler of last resort.<sup>217</sup>

### C. Rationalist Compliance Theory and the Costs of Noncompliance

In the tradition of Thomas Hobbes, who argued that nations, inhabiting a *state of nature*, only follow the law of nations when it serves their self-interest,<sup>218</sup> rationalist (or instrumentalist) compliance theorists<sup>219</sup> employ the tools of cost-benefit analysis<sup>220</sup> and other related implements of economics<sup>221</sup> to explain obedience to international law. Unlike the transnational legal process school and the Franckian legitimacy theory, both of which emphasize normativity, rationalist compliance theorists attempt to demonstrate theoretically and empirically that nations follow international rules based on calculated, if complex, perceptions that the benefits of compliance outweigh the costs of noncompliance.

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Franck, *Emerging Right*, *supra* note 206, at 56-57.

215. In addition to tribunals, organizations that help settle customary international law by precisely codifying its content in written documents are also part of the international system. The most important of these organizations is the International Law Commission, a committee of experts established by the United Nations General Assembly in 1947. See International Law Commission, *Introduction*, <http://www.un.org/law/ilc/> (last visited May 30, 2011). While the International Law Commission and other codification organizations have contributed to defining customary international law, because the scope of their work and status potential is limited, they are no substitute for expanding the jurisdiction of the Court.

216. See *supra* note 18 and accompanying text.

217. Even acting in an advisory capacity, the Court is capable of playing the role of *settler of last resort*. As is fairly typical of international tribunals, the Court's Statute provides that even its decisions in contentious cases are only binding between the parties to the dispute. ICJ Statute, *supra* note 23, art. 59. Rather than being technically binding, therefore, all Court opinions—both advisory and contentious—are highly influential as to what the law is, and, therefore, how it should be interpreted by tribunals in subsequent cases.

218. See generally THOMAS HOBBS, *LEVIATHAN* 94-110 (Oxford University Press 1965) (1651).

219. In recent years there has been a proliferation of scholarship in this area. For some of the more influential works from a variety of subdisciplines and perspectives, see JACK L. GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008); Kenneth W. Abbott, *The Trading Nation's Dilemma: The Functions of the Law of International Trade*, 26 HARV. INT'L L.J. 501 (1985); Jeffrey Dunoff & Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflicts*, 93 AM. J. INT'L L. 394 (1999); Duncan Snidal, *The Game Theory of International Politics*, 38 WORLD POL. 226 (1985).

220. See, e.g., Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002) [hereinafter Guzman, *Compliance-Based Theory*] (employing cost-benefit analysis to explain compliance with international law).

221. Primary among these is game theory, which uses applied mathematics to attempt to explain the strategic choices that actors make in an environment where outcomes are dependent upon decisions made by others. See generally JOEL P. TRACHTMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* (2008) (applying principles of game theory to international law).

The international community can only impose costs for noncompliance with international law—either through moral censure and the concomitant loss of reputation<sup>222</sup> or through the imposition of formal sanctions—to the extent it can identify wrongdoers. From the point of view of potential wrongdoers, the lower the likelihood that the international community will impose those costs, the lower the incentive to comply with the law. Here again, the court of international opinion falls short. The same institutional deficiencies (countries as judges remaining silent, contradicting one another, and issuing non-legal and politically biased statements) that hinder that *court's* ability to speak clearly as to the content of international law also hinder its ability to render *verdicts* that unequivocally convict the guilty and exonerate the innocent. Because advisory judgments of the International Court of Justice could identify more clearly the extent to which parties are in the legal right as well as the nature and extent of the remedy owed, their greater availability has the potential to deter the illegal behavior of *rationaly self-interested* states.

Of course, such states, *rationaly* calculating the benefits to be gained versus the costs to be incurred by flouting international law, will factor as costless an advisory opinion that carries with it no enforcement, no matter how clear that opinion may be. Thus, the unique way in which the international system, lacking sovereign means of enforcement, would give effect to a Court judgment that is by its own terms merely advisory requires some explanation.

An advisory opinion vindicating a state's position would stand above the maelstrom of conflicting partisan claims. As an authoritative statement of law by the international system's most venerable tribunal, the opinion would serve as a normative polestar for the international community. In the subsequent dynamics of dispute disposition between the parties, the opinion's moral weight and diplomatic impact would advantage the winner. Even the implicit or explicit threat that a wronged state may seek out an opinion of the Court could encourage law-breaking states to settle on favorable terms, or at least terms where the law's role relative to diplomatic or military power is enhanced.

The universalization of the Court's advisory jurisdiction could have a particular impact in the area of international peace and security where the proliferation of advisory opinions could complement the work of the Security Council. In coming to inform the Council with some regularity as to the law in peace and security related disputes, the Court would put normative pressure on the Council to take measures consistent with that law.<sup>223</sup>

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222. See Guzman, *Compliance-Based Theory*, *supra* note 220, at 1847–51 (discussing the nature and compliance implications of the reputational costs that can be imposed on states for violating international law).

223. As discussed in Part I, Section I, the Charter authorizes the Security Council to request quasi-contentious advisory opinions of the Court (see *supra* note 34 and accompanying text), but it has done so on only one occasion (see *supra* note 150). By replacing General Assembly or Security Council politics (including the veto) with regularized legal procedures for initiating quasi-contentious advisory opinions, my proposal would ensure that such opinions play a more regular role in Security Council decision-making.

In taking such measures, the moral force of the Court's authority would buttress the legitimacy of the Council's actions. Additionally, if the Council went so far as to formally adopt the Court's judgments as its own Article 39 determinations,<sup>224</sup> they would be binding on the parties pursuant to Article 25 and Article 48.<sup>225</sup> Once so adopted, the Council would have the legal authority under Articles 41 and 42 of the Charter to take measures to enforce the Court's opinions.<sup>226</sup>

### III. The Case that the Introduction of Referral Jurisdiction Will Strengthen Rather than Weaken the International Court of Justice

If advancing the rule of international law is referral jurisdiction's great benefit to the global legal system, are there also ways its introduction could harm that system or the Court specifically? Many who support the international law project would answer in the affirmative. To their minds, states in a weak international system with limited enforcement powers will disregard and ultimately discard international institutions that exercise powers without state acquiescence.<sup>227</sup> With regard specifically to the International Court of Justice, they worry that expanding its jurisdiction outside the realm of consent would cause its delicately maintained influence to collapse under the weight of political opposition. The Court's formal authority, they believe, must be conservatively aligned with the realities of a global system in which sovereign states continue to hold the

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As detailed in Part I, Section III (see *supra* notes 115-120 and accompanying text) under the proposal, the requisite nine member majority of the Security Council could secure a deferral of the Judicial Commission's referral if a case going forward would interfere with the Council's own efforts or might otherwise be unhelpful to the political resolution of a conflict.

224. Article 39 of the United Nations Charter provides that "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain and restore international peace and security." U.N. Charter art. 39.

225. Article 25 of the United Nations Charter provides that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." U.N. Charter art. 25. Article 48, paragraph 1 provides that "[t]he action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all of the Members of the United Nations or by some of them, as the Security Council may determine." U.N. Charter art. 91 para. 1.

226. Article 41 provides that "[t]he Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions." U.N. Charter art. 41. Article 42 provides that the Security Council may use armed force to "maintain or restore international peace and security" should it consider that the "measures provided for in Article 41 would be inadequate or have proved to be inadequate." U.N. Charter art. 42.

227. See, e.g., Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1834 (2002) (arguing that it is possible to make "substantive rules or review mechanisms too constraining of sovereignty and precipitat[e] a backlash by governments").

ultimate power.<sup>228</sup> But would states actually have the motivation and the ability to undermine the Court in response to the expansion of the Court's advisory powers? This is an important question because it goes to the capability of the international system to develop beyond power politics. The General Assembly may cut the Gordian Knot to create referral jurisdiction, but would that lead the Court to ruin?

#### A. The Court's Soft Power

In terms of motivation, at least some states will be unhappy, at least some of the time, with the Court's exercise of referral jurisdiction. Typically, states do not appreciate adverse decisions. This is all the more true when those decisions impact upon matters that states perceive to involve vital national interests that they have not consented to being adjudicated in the first place. States, however, have notoriously short memories when it comes to imperatives of interests. In fact, history tells us that unhappy subjects of adverse decisions will overcome their hard feelings when they themselves find it advantageous to resort to the Court.<sup>229</sup>

Of course, individual states or even a group of states might find themselves more enduringly opposed to a more jurisdictionally ubiquitous Court that they view as implacably antagonistic to their interests. Pariah states, whose behavior is fundamentally outside of global norms, would fit this bill, but so would powerful states who, as the Gordian Knot discussion suggests, might perceive their advantage to lie more with political muscle

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228. Thus, for example, shortly after the Court decided the highly contentious *Nicaragua* case over a strongly voiced American protest that it had not consented to the Court's jurisdiction (see *supra* note 95 and *infra* notes 238-246 and accompanying text), Jonathan Charney lamented that the Court was not "strong enough to entertain this type of case," and that the decision "would threaten its institutional underpinnings." Jonathan Charney, *Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS*, *supra* note 25, at 305; see also Gary L. Scott & Craig L. Carr, *The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause*, 81 *AM. J. INT'L L.* 57, 66 (1987) (asserting that "United States prestige may suffer somewhat" from its behavior in the *Nicaragua* case, but the Court "is far more vulnerable to the effects of defiance of its compulsory jurisdiction and of its judgments."); cf. Gill, *supra* note 35, at 142 (discussing South Africa's reaction to the *Namibia* case—see *supra* notes 150, 160, 169, and 175 and accompanying text—and concluding that it "demonstrates the inherent limitations of the judicial process . . . in the absence of the real consent of the parties concerned").

229. For example, despite considerable anger over its loss in the *Nicaragua* case, (see *infra* notes 238-243 and accompanying text) the United States sought the Court's relief in an action against Italy only four years later. See *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15 (July 20). This principle of what might be called *strategic exigency* holds true generally across international institutions. For example, the George W. Bush administration, stung by the impending refusal of the Security Council to authorize its invasion of Iraq, vowed to make the United Nations irrelevant. Less than nine months later, however, it returned to the Security Council seeking support for Resolution 1511 legitimizing its post-invasion occupation. See John F. Burns & Thom Shanker, *U.S. Officials Fashion Legal Basis to Keep Force in Iraq*, *N.Y. TIMES*, Mar. 26, 2004, at A10. If the US could now secure a diplomatically helpful advisory judgment of the Court regarding Iran's pursuit of nuclear technology, its temptation to do so despite any misgiving about referral jurisdiction would likewise be extremely strong.



than judicial process.<sup>230</sup>

Understandably, the potential for the Court to garner such powerful enemies can be intimidating to those concerned with its future well-being. Despite powerful states' outsized influence in global economic, military, and diplomatic affairs, they cannot, however, single-handedly or even jointly cripple the Court. The reason why lies in the nature of the Court's power, which can be most easily understood with the help of Joseph Nye's useful application of legitimacy theory.<sup>231</sup> For Nye, political power can either be based upon legitimacy factors such as the attractiveness of values, which he calls soft power,<sup>232</sup> or upon military and economic might, which he calls hard power.<sup>233</sup> An institution that employs soft power relies upon its ability to voluntarily encourage rather than coerce behavior. For example, unlike military dictators who may use the threat of violence to enforce their rule, the power today of most spiritual authorities lies primarily in a belief among followers in their virtue and the virtue of their message.

The Court's power is soft power. It has no army—not even an army of bureaucrats—to enforce its decisions, and it has no economic resources beyond its own small budget. Its only power comes from the international community's willingness to respect its judgments out of a belief in its moral authority as a fair and independent tribunal<sup>234</sup> of United Nations-appointed judges of high moral character and recognized competence in international law<sup>235</sup> representing the main forms of civilization.<sup>236</sup>

#### B. The Power of Soft Power

To undermine the Court's soft power, its foes must somehow reduce the international community's general acceptance of its moral authority. As it turns out, hard power tools of military and economic might are not well adapted to accomplishing this objective.

The use of military force against the Court would be so counter-productive to state efforts to neutralize the Court's soft power that it is very difficult even to imagine such an attempt. Such force would actually increase the visibility and probably the standing of the Court, while doing

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230. At least that is the assessment of United States interests one prominent Court observer came to when she wrote: "it should be frankly acknowledged, [that the Court plenum] is no longer a hospitable arena for either dispute-settlement or law development [for the United States]," and that "[i]t is not in the U.S. interest to expose itself to the possibility of judicial censure nor to have questionable processes of norm-formation endowed with added force and legitimacy by means of judicial sanction." SUPREME COURT OF THE NATIONS, *supra* note 61, at 407.

231. For further discussion of legitimacy theory in international law, particularly as applied by Thomas Franck, see *supra* notes 202-206 and accompanying text.

232. JOSEPH S. NYE, *THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPER-POWER CAN'T GO IT ALONE* 8-9 (2002). For Nye's most recent elaboration of his soft power theory, see generally JOSEPH S. NYE, *THE FUTURE OF POWER* (2011); see also JOSEPH S. NYE, *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* (2005).

233. NYE, *THE PARADOX OF AMERICAN POWER*, *supra* note 232.

234. See *supra* note 201.

235. See ICJ Statute, *supra* note 23, art 2.

236. *Id.* at art. 9.

more than any adverse advisory opinion to damage the legitimacy of an attacking state's legal position and general reputation. The use of economic coercion is a similar non-starter. A country cannot sever economic relations with, or use trade sanctions against, a judicial body. Countries could refuse to contribute financially to the Court, but this would be difficult as its funding comes through the United Nations general budget<sup>237</sup> and other countries, if committed, could always make up the difference.

Antagonistic countries might more plausibly attempt to employ their soft power to counter the Court. They could refuse to appear before the Court, disregard its decisions, and wage a propaganda assault on the Court's legitimacy. If history is any guide, however, these three tactics, as with use of force, are likely to backfire and enhance the credibility of the Court at the expense of such countries and the legitimacy of their legal position.

Illustrative of the deficiency of this soft power strategy is the 1986 *Nicaragua* case<sup>238</sup> in which the Court ruled that the United States had violated international law by supporting and engaging in military action against Nicaragua.<sup>239</sup> Unhappy that the Court had taken the case, and even more unhappy with its eventual holding, the United States employed all three soft power tactics. First, following acceptance of jurisdiction, the United States refused to participate in the merits phase of the proceeding<sup>240</sup> and even revoked its longstanding agreement to be subject to the Court's compulsory jurisdiction.<sup>241</sup> Then, after the Court proceeded to rule against it, the United States refused to comply with the Court's judgment.<sup>242</sup> Finally, the U.S. waged a propaganda assault on the Court's credibility, indicative of which were the comments of then-United States United

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237. *Id.* at art. 33.

238. *Nicaragua*, *supra* note 95.

239. *Id.*

240. The United States is not alone in refusing to participate in various phases of contentious Court cases. See *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3 (May 24) (Iran refusing to participate in the case); *Aegean Sea Continental Shelf* (Greece v. Turk.), 1978 I.C.J. 3 (Dec. 19) (Turkey refusing to participate in the interim measures and jurisdiction phases of the case); *Fisheries Jurisdiction* (U.K. v. Ice.), 1974 I.C.J. 3 (July 25) (Iceland refusing to participate in the case); *Fisheries Jurisdiction* (F.R.G. v. Ice.), 1974 I.C.J. 175 (July 25) (Iceland refusing to participate in the case); *Nuclear Tests* (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20) (France refusing to participate in the case); *Nottebohm Case* (Liech. v. Guat.) (Preliminary Objection), 1953 I.C.J. 111 (Nov. 18) (Guatemala refusing to participate in the preliminary objection phase of the case); *Anglo-Iranian Oil Co.* (U.K. v. Iran), Order (Interim Measures of Protection), 1951 I.C.J. 89 (July 5) (Iran refusing to participate in the provisional measures phase of the case); *Corfu Channel* (U.K. v. Alb.), Merits, 1949 I.C.J. 4 (Apr. 9) (Albania refusing to participate in the case).

241. For further discussion, see *supra* note 105.

242. Following the Nicaraguan election of the Washington-leaning Chamorro government in 1991, the United States and Nicaragua reached a negotiated accommodation. See *Discontinuance by Nicaragua of Case Against the United States*, 86 AM. J. INT'L L. 173-74 (1991). For an informative recounting of the Nicaragua litigation story, see Mary Ellen O'Connell, *The Nicaragua Case: Preserving World Peace and the World Court*, in *INTERNATIONAL LAW STORIES* (John E. Noyes, Laura A. Dickenson & Mark Janis eds., 2007).

Nations Ambassador Jean Kirkpatrick: "The court, quite frankly, is not what its name suggests, an international court of justice. It's a semi-legal, semi-judicial, semi-political body which nations sometimes accept and sometimes don't."<sup>243</sup>

Many commentators at the time predicted that the Court would be significantly harmed by the soft power plays of the world's mightiest country.<sup>244</sup> Instead, the tribunal's own prominence rose considerably. Most tellingly, a court that adjudicated fifty-three contentious cases in the forty-one years prior to delivering the *Nicaragua* opinion has adjudicated sixty-eight such cases in the only twenty-four years since that opinion.<sup>245</sup> In contrast, indicative of the damage that the Reagan administration's actions against the Court did to the reputation of the United States and the legitimacy of its legal position, in 1986 the United Nations General Assembly voted 94 to 3 to rebuke the U.S. for its failure to comply with the Court's decision.<sup>246</sup>

Soft power strategies are no more likely to be successfully employed by countries who would today attempt to counter referral jurisdiction. In fact, because states are neither legally obliged to appear in advisory cases<sup>247</sup> nor to comply with advisory judgments,<sup>248</sup> the spurning of the Court's advisory processes is not a direct challenge to the Court's authority.

### C. The International Community and the Court

If states, even powerful states, acting on their own cannot defeat the Court's soft power, and it is only the international community of states generally that can withdraw the support that empowers the Court, the question becomes whether the international community would withdraw that support in response to referral jurisdiction. Because the Court serves

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243. Howard N. Meyer, *When the Pope Rebuked the U.S. at the World Court*, BALTIMORE SUN, Mar. 18, 1997, available at [http://articles.baltimoresun.com/1997-03-18/news/1997077033\\_1\\_court-jurisdiction-world-court-nicaragua/2](http://articles.baltimoresun.com/1997-03-18/news/1997077033_1_court-jurisdiction-world-court-nicaragua/2).

244. See *supra* note 228.

245. This represents an increase in average contentious cases per year from 1.3 prior to the *Nicaragua* case to 2.8 after that case. See International Court of Justice, *List of Cases Referred to the Court Since 1946 by Date of Introduction*, <http://www.icj-cij.org/docket/index.php?p1=3&p2=2> (last visited August 1, 2010).

246. G.A. Res. 41/31, U.N. Doc. A/RES/41/53 (Nov. 3, 1986). The U.S. refusal to participate in the merits phase of the case may also have been counterproductive to its interest in influencing the Court's final opinion. See Charney, *supra* note 228, at 291 ("While the Court did take into account unofficial communications from the United States on the facts and the law, it did so in limited ways. The result appears to be that the United States view of the case was not adequately considered by the Court and the resulting adverse findings appear to be an unfortunate product, at least in part, of the non-participation of the United States in the merits phase of the case.")

247. States are also not legally obligated to appear in contentious cases. See *Nuclear Tests (N.Z. v. Fr.)*, Order (Interim Measures of Protection), 1973 I.C.J. 135, 153 (June 22) (Gros, J., dissenting) (arguing that there is no duty for states to appear before the Court). But see Gerald Fitzmaurice, *The Problem of the Non-Appearing Defendant Government*, in 51 BRIT. Y.B. INT'L L. 89 (1982) (arguing that states do have a legal obligation to participate in proceedings of the Court).

248. See, e.g., *Peace Treaties*, *supra* note 114, at 71 (affirming that because the Court's reply is of an *advisory character*, "it has no binding force").

the international community's interests by promoting law compliance and contributing to dispute resolution, the community will be predisposed to continue its support so long as the Court does not offend against its sensibilities.

What then would so offend? To start with, states generally *would not* be offended by the mere exercise of non-consensual referral jurisdiction (as fearful supporters of the Court might assume). After all, the requisite majority<sup>249</sup> of states that voted for referral jurisdiction in the General Assembly presumably would not turn against the Court for doing what they authorized it to do, and even many states that voted in the opposition would accept the appropriateness of the Court exercising jurisdiction in accord with the Assembly's mandate. More fundamentally, the exercise of nonconsensual jurisdiction no longer goes against the grain of states' embedded sense of right order. Of course no state wants to be the unwilling subject of a critical opinion, but in the interest of building a functional legal system, states in more and more institutional contexts have come to accept that lack of consent should not be a bar to international jurisdiction. For example, the Inter-American Court of Human Rights employs a system of advisory jurisdiction almost identical to the one being proposed in this Article,<sup>250</sup> and even compulsory binding jurisdiction is the order of the day at many of the international system's specialized tribunals.<sup>251</sup>

Though states generally will not be inclined to turn against the Court just for exercising referral jurisdiction, they will have expectations that the Court will have to meet to maintain its good standing. Those expectations are the same ones that all communities have for all courts. As institutions

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249. See *supra* note 107 and accompanying text.

250. Pursuant to the American Convention on Human Rights, a state member of the Organization of American States may request an advisory opinion regarding any treaty that concerns the protection of human rights in the Americas. American Convention on Human Rights art. 64, *supra* note 8. While in theory the Inter-American Court renders advisory opinions only on abstract questions of law, in practice it reviews state conduct. For example, upon the application of Mexico, the Inter-American Court rendered two advisory judgments concerning practices of the United States (a member of the Organization of American States but not a party to the American Convention). The first concerned the rights of undocumented workers in foreign countries. See *Judicial Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. C) No. 18 (Sept. 17, 2003). The second concerned requirements of the Vienna Convention on Consular Relations that states inform foreign nationals of their right to contact their national consulate upon arrest. See *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16 (Oct. 1, 1999).

251. The systems of dispute resolution of both the World Trade Organization (formerly, the GATT) (see *supra* note 11) and the European Court of Human Rights (see *supra* note 7) evolved from consent-based to compulsory. Other present day compulsory systems include: the European Union's European Court of Justice (see *supra* note 12), the Caribbean Court of Justice, the Court of the European Free Trade Agreement, the Court of Justice for the Common Market of Eastern and Southern Africa, the Court of Justice of the Economic Community of West Africa, the Court of Justice of the Andean Community, the MERCOSUR Permanent Review Tribunal (see *supra* note 16), the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court (see *supra* note 10). For further discussion, see Romano, *supra* note 20, at 803-34.

designed to apply systematically abstract legal concepts to concrete cases, courts are expected to justify their decisions with persuasive legal reasoning, be judicially independent and impartial, and not to stray from the normative and political center of gravity. Whether the Court will competently justify its legal conclusions and maintain its independence depends upon an unknown: the future performance of its judges. Certainly, fulfilling such expectations is well within the capability of the Court's highly competent bench. That the Court not stray from the normative and political center of gravity, however, requires some additional explanation.

While international law reflects the norms of the community of states that prescribes it, in everyday practice that community's identification with those norms varies with political considerations. There is, however, a range of legitimate interpretations of the law as well as acceptable options for adjusting the scope of rulings that allow the Court to avoid issuing opinions that put it in danger of alienating itself from a critical mass of the international community. Because of the still common misperception of law as an exact science, it is important to point out that such strategic agility does not imply a lack of judicial integrity. Rather, it is a practice generally understood among sophisticated legal observers as necessary to maintain core political support.<sup>252</sup> As is the case with expectations regarding the quality of the Court's legal reasoning and its independence and impartiality, the future performance of the Court's judges cannot be predicted with any certainty. Still, in the past the Court has shown itself quite adept at maintaining its balance within the normative and political center of gravity.

If referral jurisdiction is unlikely to cause the community of states to withdraw its support, the advent of such jurisdiction actually holds the promise that the Court's supporting constituency can be expanded to include the broader global community of citizens. Presently, the Court is largely a diplomats' court, with most non-foreign policy professionals unaware of its existence, much less its jurisprudence. Thrust into the limelight with greater frequency by a more regular disposition of high profile cases, the Court could come, as Richard Falk has advocated, to "persuade a non-professional audience of individuals about global policy that in the Court's

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252. That courts do not apply the law in a strictly mechanical way is well accepted today and has been the focus of a tremendous amount of theoretical scholarship. While a full discussion of this topic is well beyond the subject matter of this article, for two classic works of the legal realism school maintaining that there exists a range of legitimate interpretations of the law, see JOHN DEWEY, *MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS* (1941), and Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897). For one of the most well-known works contending that courts properly account for the general will of the community in their judicial decision-making, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962). The International Court of Justice itself is experienced and competent in making strategic judicial decisions. See, e.g., W.M. Reisman, *The Enforcement of International Judgments*, 63 AM. J. INT'L L. 1, 3-4 (1969) (observing that when states have been likely to impugn its judgments, the Court has formulated issues restrictively, issued final judgments "almost Delphic in ambiguity," or "not infrequently disseised itself of jurisdiction").

view deserves respect.”<sup>253</sup> The Court would then be institutionally strengthened as governments who might otherwise be inclined to disregard it would have the force of citizen opinion to contend with.

## Conclusion

In the proceeding pages, I have described how the General Assembly can cut the Gordian Knot to initiate referral jurisdiction. I have also made the case that the Court's exercise of such jurisdiction would be legal, would further compliance with international law, and would strengthen, rather than weaken, the Court. What I have not discussed are the implementation matters that would need to be addressed if referral jurisdiction is to become reality. While a thorough examination of implementation issues is beyond the subject matter of this article, two concerns are of particular importance and should be briefly mentioned.

The first has to do with the host of issues pertaining to adapting quasi-contentious cases to the advisory process. While the mechanics of such adaptation present some complex issues, the Court has already encountered and developed a template for dealing with them in the five previously discussed quasi-contentious cases it has decided at the request of the General Assembly or Security Council.<sup>254</sup> Based on the Court's Statute and Rules, which contemplate the Court utilizing contentious procedures to the extent applicable in quasi-contentious advisory cases, the Court has largely assimilated such cases into the contentious process.<sup>255</sup>

The most institutionally challenging adaptation issue raised by referral jurisdiction is what to do in the event that a relevant party chooses not to appear. While non-appearance is probably more likely in referral jurisdiction proceedings where acquiescence to jurisdiction is lacking, states in consent-based contentious cases have at times chosen not to appear. As we have already observed, the United States did this during the merits phase of the *Nicaragua* case.<sup>256</sup> Despite the challenges it presents, non-appear-

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253. RICHARD A. FALK, *REVIVING THE WORLD COURT* 191 (1986).

254. See *supra* notes 149, 151-153 (identifying quasi-contentious cases referred to the Court by the General Assembly) and *supra* note 150 (identifying the quasi-contentious case referred to the Court by the Security Council).

255. Article 68 of the Court's Statute provides that “[i]n the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.” ICJ Statute, *supra* note 23, art. 68. Article 102, paragraph 2 of the Court's Rules provides that “[t]he Court shall also be guided by the provisions of the Statute and of these Rules which apply in contentious cases to the extent to which it recognizes them to be applicable. For this purpose, it shall above all consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States.” International Court of Justice, Rules of Court art. 102, para. 2, as amended Sept. 29, 2005, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0>.

256. See *supra* note 240 and accompanying text (discussing the U.S. refusal to participate in the merits phase of the *Nicaragua* case and identifying other instances of states refusing to participate in proceedings before the Court). See also *supra* note 247 (documenting that states are not legally obligated to participate in contentious cases).

ance has never precluded the Court from deciding a case.<sup>257</sup> Article 53 of the Court's statute provides that a party's failure to appear does not preclude the continuation of proceedings so long as the Court is able to "satisfy itself" that a claim "is well founded in fact and law."<sup>258</sup> The Court has always so satisfied itself, and typically it has done so with the informal help of non-appearing parties who, despite their non-cooperative postures, want the Court to understand their positions.<sup>259</sup>

The second concern regards institutional capacity. Although referral jurisdiction has the potential to significantly increase the Court's caseload, the Court could likely accommodate this increase as it has accommodated increases in the past. As previously discussed, the Court's docket has grown significantly in the last quarter century,<sup>260</sup> and the Court has adapted by employing judicial clerks and introducing several initiatives to expedite the disposition of cases.<sup>261</sup> If referral jurisdiction made it necessary, a good deal more could be done.<sup>262</sup> To the extent that greater productivity depends in particular upon greater resources, provisions for additional funding could be included in the General Assembly proposal for referral jurisdiction.<sup>263</sup>

Certainly, there is an upper limit beyond which a bench composed of fifteen judges cannot be stretched. Given the number of cases that might plausibly emanate from the Court's relatively small pool of potential state litigants, referral jurisdiction is unlikely, however, to challenge that limit. A comparison to national high courts makes this clear. The Court currently has seventeen pending cases on its docket. Meanwhile, the United States Supreme Court issues formal signed opinions in about 80 cases a

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257. See generally GILL, *supra* note 35, at 78-79.

258. Article 53, paragraph 1 provides that "[w]henver one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim." Article 53, paragraph 2 provides that "[t]he Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law." ICJ Statute, *supra* note 23. The Court has made it clear that it would decline to accept an advisory case in which it believed that a lack of cooperation from relevant states would preclude it from ascertaining the necessary information to make a proper decision. See, e.g., *Israeli Wall*, *supra* note 137, at 161-62.

259. See GILL, *supra* note 35, at 78-79.

260. See *supra* notes 22, 245 and accompanying text.

261. See generally GILL, *supra* note 35, at 21-22 (discussing the implementation of recommendations designed to streamline pleadings, oral arguments, and Court deliberations relating to preliminary objections).

262. See generally *Report of the Study Group (composed of Professors Bowett and Crawford and Sir Ian Sinclair and Sir Arthur Watts) established by the British Institute of International and Comparative Law as a Contribution to the U.N. Decade of International Law*, in *THE INTERNATIONAL COURT OF JUSTICE, PROCESS, PRACTICE AND PROCEDURE* 27-84 (Derek Bowett et al. eds., 1997) (suggesting ways in which the Court could deal with a larger caseload).

263. United Nations funding of the Court has increased moderately in recent years. Nevertheless, as presidents of the Court have repeatedly emphasized in their annual addresses to the General Assembly the resources available to the Court have been extremely modest compared to national high courts. See generally GILL, *supra* note 35, at 241.

year, and that number has been far higher in the past.<sup>264</sup> Other national high courts exhibit similar figures for cases heard annually, and the famously overstretched European Court of Human Rights has thousands of cases pending.<sup>265</sup>

If the Court did reach its absolute limit, it could use its Article 65 discretion to turn cases away, but the hope would be that the international community would respond with sufficient judicial-capacity building before that became necessary. In the final analysis, Stephen Schwebel most likely got it correct when he wrote as a judge on the Court that “like other human institutions, the Court is responsive to demands made upon it. Should more cases be submitted to it, it is doubtless that the Court would rise to the challenge of dealing with them.”<sup>266</sup>

The advent of referral jurisdiction would require working through many other implementation questions. None are without answers, however, and the effort would be well rewarded because expanding the jurisdiction of the Court would be an important advance towards a more law-based international system. The Court, however, is only one component of that system. In the absence of overarching, system-wide reform, achieving a global order where law reigns supreme would require a range of complementary initiatives.

Conceptualizing such initiatives provides an agenda for future academic research. This research should examine how these initiatives could best be accomplished. For example, how can the Gordian Knot be cut to unleash reform? The strategy I suggest of the General Assembly establishing a Judicial Commission only applies to universalizing the Court’s advisory jurisdiction. Other initiatives would require their own particular solutions to the Gordian Knot problem. And, of course, despite the inclination of the powerful to reinforce the status quo, not every barrier to achieving rule of law reform is one of great power opposition. Thus, part of the strategic thinking that needs to be done is to identify strategies that can enjoy the support of the most powerful countries.

Research on complimentary initiatives should also work through the systemic implications of suggested reforms. As we have seen to be the case with referral jurisdiction, independent changes to specific governance institutions can impact the global system as a whole. The nature of this impact is often not straightforward. At this point in history, a global order that is partially based on raw power politics and partially based on rule of

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264. See Linda Greenhouse, *Dwindling Docket Mystifies Supreme Court*, N.Y. TIMES, Dec. 7, 2006, available at <http://www.nytimes.com/2006/12/07/washington/07scotus.html?pagewanted=2>. The comparison to national high courts is not perfect. Unlike national high courts, issues of fact do come before the Court, lengthening its proceedings. These proceedings, however, are quite streamlined and should not be confused with the kinds of full trials that would be familiar in national trial courts.

265. See E. Andrew Drzemczewski, Remarks at the American University, Washington College of Law Conference: Advocacy Before Regional Human Rights Bodies: A Cross-Regional Agenda (Oct. 20, 2008), in 59 AM. U. L. REV. 163, 247 (2009).

266. Stephen Schwebel, *Widening the Advisory Jurisdiction of the International Court*, 33 CATH. U. L. REV. 355 (1984).



law introduces contradictions and anomalies that must be unraveled. Once unraveled, navigating these contradictions, as we did in giving the Security Council the ability to interfere in the judicial referral process, is necessary to the viability of reform proposals.

All of the above suggests a challenging research agenda. Conceptualizing reform, however, is only the first step towards implementation. To be realized, all reform requires political initiative. The proposal for referral jurisdiction awaits such an initiative, and the changing dynamics of the global system are encouraging that one could be successful. The world today is becoming increasingly multipolar,<sup>267</sup> and the emergence of newly industrializing countries such as Turkey, Brazil, Indonesia, and South Africa as able and potentially willing to spearhead such a project<sup>268</sup> portends new possibilities for cutting the Gordian Knot and, in the process, unleashing a promising era of global rule of law reform.

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267. For a discussion of the trend towards multipolarity, see generally FAREED ZAKARIA, *THE POST-AMERICA WORLD* (2008).

268. See Stewart Patrick, *Irresponsible Stakeholders?: The Difficulty of Integrating Rising Powers*, *FOREIGN AFF.*, Nov.-Dec. 2010, at 44 (chronicling the rise of newly assertive non-western powers).