

2010

Skeptical Internationalism: A Study of Whether International Law Is Law

Joshua Kleinfeld

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Joshua Kleinfeld, *Skeptical Internationalism: A Study of Whether International Law Is Law*, 78 Fordham L. Rev. 2451 (2010).

Available at: <https://ir.lawnet.fordham.edu/flr/vol78/iss5/11>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Skeptical Internationalism: A Study of Whether International Law Is Law

Cover Page Footnote

Research Fellow, Normative Orders Cluster of Excellence, Goethe University Frankfurt am Main. I would like to acknowledge the four judges who have done the most to show me the law as it is—the three for whom I’ve worked, Aharon Barak, Janice Rogers Brown, and J. Harvie Wilkinson III, and my father, Andrew J. Kleinfeld.

ARTICLE

SKEPTICAL INTERNATIONALISM: A STUDY OF WHETHER INTERNATIONAL LAW IS LAW

*Joshua Kleinfeld**

Should international law be understood as a form of law at all? The premise here is that if we are to get some purchase on that question, we should consult the experience of international law in operation. The analysis proceeds in two steps. First, the Article takes up the litigation connected to the Israeli/West Bank barrier, asking whether that case was or could have been addressed in such a way as to keep faith with minimal principles of legality. It wasn't, the Article finds, but it could have been. Second, the Article specifies four values that are constitutive elements of the experience of law as law: that law have the capacity to give rise to events in the world (law's efficacy); that it obligate as a matter of legitimate authority (law's normativity); that it obligate as a matter of moral rationality (normativity again); and that it maintain a character distinct from the political or partisan (law's objectivity). International law as seen in the Barrier case is then put to the test with respect to each of the four—and again the outcome is that nothing intrinsic to international law deprived it of the character of law, but that the courts and other institutions of the international system fell short of the law's promise. These conclusions suggest a position this Article terms "skeptical internationalism"—a position that affirms international law's project and doctrinal content, but is rebuttably skeptical of the courts and other institutions charged with interpreting that content and carrying that project out. The jurisprudential implications of such a view are explored.

* Research Fellow, Normative Orders Cluster of Excellence, Goethe University Frankfurt am Main. I would like to acknowledge the four judges who have done the most to show me the law as it is—the three for whom I've worked, Aharon Barak, Janice Rogers Brown, and J. Harvie Wilkinson III, and my father, Andrew J. Kleinfeld.

TABLE OF CONTENTS

INTRODUCTION: THE QUESTION AND THE CASE	2452
I. PRINCIPLES OF LEGALITY AND THE BARRIER BETWEEN ISRAEL AND	
THE WEST BANK	2461
A. <i>The International Court of Justice in the Barrier Case</i>	2461
1. Principles of Legality and Finding Facts	2464
2. Principles of Legality and Applying Law	2472
B. <i>The Israeli High Court of Justice in the Barrier Case</i>	2483
1. Principles of Legality and Finding Facts	2484
2. Principles of Legality and Applying Law	2486
C. <i>The Possibility of Law in the Barrier Case</i>	2492
1. The Opening Position	2492
2. Annexation	2494
3. Humanitarian Rights	2498
II. INTERNATIONAL LAW AND LAW'S SELF-CONSTITUTING VALUES ...	2501
A. <i>Efficacy</i>	2504
B. <i>Obligation</i>	2510
1. Law's Legitimate Authority	2513
2. Law's Moral Rationality	2520
C. <i>Objectivity</i>	2522
CONCLUSION: SKEPTICAL INTERNATIONALISM	2527

INTRODUCTION: THE QUESTION AND THE CASE

There is an intuition that international law is not actually law at all, that though it goes by the name of "law" it is in fact closer to politics, or moral exhortation, or aspiration, or pretense. The intuition is so magnetic that generations of jurisprudentialists, international lawyers, political philosophers, and political officials have felt its tug; it passes through them from Bentham and Austin to Kelsen and Hart,¹ from Oppenheim to

1. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 30–31, 117, 122–24, 171 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832) ("Laws properly so called are a species of *commands*" issued by a "sovereign" to a "subject" and backed by "the power of affecting others with evil or pain," while international law is only a species of "positive morality" set by the "opinions or sentiments current among nations."); JEREMY BENTHAM, *OF LAWS IN GENERAL* 16, 70 (H.L.A. Hart ed., Athlone Press 1970) (1782) ("[A] treaty made by one sovereign with another is not itself a law," though it has "an intimate connection" with the law, and may bind to some degree through "the force of the moral and religious sanctions."); H.L.A. HART, *THE CONCEPT OF LAW* 237 (2d ed. 1994) (grappling with what international is, and concluding finally that it is at least "'sufficiently analogous' to municipal law" to "make the lawyers' technique freely transferable from the one to the other" (citation omitted)); HANS KELSEN, *LAW AND PEACE IN INTERNATIONAL RELATIONS* 1, 52, 54–55 (1942) (arguing that it is "possible to interpret" international law as law, if only "primitive law," and that we should "choose this interpretation" in order "to make of international law a workable order for the promotion of peace"). What matters to me is not

Goldsmith and Posner,² and from Hobbes to Acheson, Kennan, and Dulles,³ among many others. The intuition takes voice in different ways, of course, as it wends through so many and such diverse theoretical conceptions of what law is and how international life works. But prior to all the theory is a certain original impulse of the mind in a particular direction. That original impulse is what I mean by “intuition.” Before the theorizing begins, and after it subsides, the intuition persists.

Naturally an intuition so powerful has spurred a great debate on the status of international law (more properly, *public* international law, but I will drop that qualifier from here on). Three distinct types of arguments recur in the debate—albeit in various formulations and often entwined. First is the argument from deduction: “All law is thus-and-so; therefore international law is (or is not) a part of it,” or “International law is such-and-such; therefore all law is (or is not) such-and-such too.”⁴ The problem with these arguments is that they require us to commit at the outset to some totalizing jurisprudential theory, from which an answer to the question of international law is supposed to follow just as a matter of *a priori* deduction. I doubt I’m alone in finding it all but impossible to come to my convictions about large social matters on that sort of basis. Second is the

so much the positions these or other theorists and officials staked out as the fact that they felt it necessary to engage the issue, that international law presented itself to them as a sort of problem.

2. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 201–02 (2005) (asking whether international law is “not law but politics” or “not law but morality” and concluding that “[i]t is politics, but a special kind of politics”); 1 LASSA OPPENHEIM, *INTERNATIONAL LAW* 12 (Ronald F. Roxburgh ed., 3d ed. 1920) (“The fact is that theorists only are divided concerning the character of the Law of Nations as real law. In practice International Law is constantly recognised as law.”).

3. See ANTHONY CLARK AREND, *PURSUING A JUST AND DURABLE PEACE: JOHN FOSTER DULLES AND INTERNATIONAL ORGANIZATION* 57 (1988) (“I confess to being one of those lawyers who do not regard ‘international law as law at all’ . . .” (emphasis omitted)) (quoting Letter from John Foster Dulles to Henry Luce 1–2 (Sept. 29, 1943) (on file with the Fordham Law Review)); PHILIP BOBBITT, *THE SHIELD OF ACHILLES* 653 (2002) (“Acheson accurately (I believe) represented the attitudes of many diplomats and officials that international law is little more than a pretentious irrelevance.”); THOMAS HOBBS, *LEVIATHAN* 90 (Richard Tuck ed., Cambridge 1996) (1651) (“[I]n all times, Kings, and Persons of Sovereign authority, because of their Independency, are in . . . a posture of War. . . . Where there is no common Power, there is no Law . . .”); GEORGE F. KENNAN, *AMERICAN DIPLOMACY, 1900–1950*, at 95 (1951) (challenging the theoretical and practical “deficiencies” of believing “that it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some system of legal rules and restraints”).

4. Compare AUSTIN, *supra* note 1, at 30–31, 122–24 (defining law as the “commands” of a “sovereign”—and thus excluding international law from the category), with W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC’Y INT’L L. PROC. 101, 107, 113 (1981) (defining international lawmaking as “any communication between elites and politically relevant groups which shapes wide expectations about appropriate future behavior”—and arguing that all lawmaking should be understood accordingly). The current debate concerning the legal status of customary international law also has a flavor of the deductive approach, insofar as it centers on whether customary international law is grounded in the sort of authority that makes for law in U.S. federal courts. See *infra* Part II.B.1.

argument from ideology: “International law promises to advance such important social goods,” we are told, “that it just *must* be law,” or the inverse, “International law threatens such dangerous consequences that it must *not* be law.”⁵ The problem here is that to accept any such argument, one must join one of the ideological sides—and join so thoroughly that one is prepared to treat the very word “law” as a political instrument, an honorific to bestow whenever doing so would give the ball a kick down the field in the next big game. Third is the argument from impatience: “We should just get over this debate about international law,” we are told. “The question is immature and we should grow out of it,” or “The question is malformed and we should transcend it.”⁶ But the intuition is too strong to set aside—and anyway, a strong intuition, like a perception, is not the kind of thing we can get over just because we are told we should.

Why not a case study? Why not come to grips with the intuition inductively and in a context? What the debate about international law’s character as law most conspicuously lacks is *specificity*. Always the mode of address is abstract, sweeping; international law (or some large chunk of it, like customary international law) comes in for judgment as a body and is measured as a body against some general account of what law is or what it is for. But the grist of persuasion in social matters is experience coupled with the kind of theory that helps illuminate experience, not theoretical or political claims of an abstract and categorical sort, and it is not very lawyerly of us to debate this issue with so little regard for the beautiful particularities of cases. The insights a case study yields are of uncertain general force; that is a disadvantage. One must attach provisos: *on the strength of this case*, the intuition is warranted or unwarranted *in these respects*. But the strength of a case study is the possibility of nuance and

5. Compare Harold Hongju Koh, *Is There a “New” New Haven School of International Law?*, 32 YALE J. INT’L L. 559, 563, 572 (2007) (embracing the New Haven School’s “policy-oriented jurisprudence” in which international law takes the shape necessary to promote “a public order of human dignity” (quoting W. Michael Reisman, *Theory About Law: Jurisprudence for a Free Society*, 108 YALE L.J. 935, 939 (1999))), with Jeremy Rabkin, *American Self-Defense Shouldn’t Be Too Distracted by International Law*, 30 HARV. J.L. & PUB. POL’Y 31, 31 (2006) (defending U.S. policies following September 11th on the grounds that “[i]nternational law in these areas is ‘law’ by courtesy or aspiration more than it is a reliable guide to actual international conduct”).

6. See, e.g., THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 6 (1995) [hereinafter FRANCK, FAIRNESS] (“The questions to which the international lawyer must now be prepared to respond, in this post-ontological era, are different from the traditional inquiry: whether international law is law. Instead, we are now asked: Is international law effective? Is it enforceable? Is it understood? And the most important question: Is international law fair?”). Note, however, that with respect to the use of force, Franck himself has written a pained acknowledgement of “the inability of any rule . . . to have much control over the behavior of states” and of international law as “always something of a cultural myth.” Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT’L L. 809, 836 (1970). It is a view he has recently affirmed. See Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT’L L. 607, 607 (2003) [hereinafter Franck, *What Happens Now?*]. I take it, then, that Franck is torn, which is interesting, coming from a voice of such importance.

surprise, and the opportunity to build reflections of a general nature up from a base in facts and events. What one needs is a fruitful case. In my view, a very fruitful case, an extraordinary case, is that of the Israeli Barrier in the West Bank.

Some eight years ago, during the height of the Second Intifada, Israel's government began to build a long "fence" or "wall" (which I'll call the "Barrier") within the Palestinian territory of the West Bank, thus separating the West Bank from Israel but also placing portions of the West Bank on the Israeli side of the line.⁷ Palestinian villages in the West Bank sued Israel in the Israeli High Court of Justice (a designation for Israel's Supreme Court) to have the construction enjoined. At the same time, Palestinian representatives and allies argued their cause before the United Nations' chief judicial organ, the International Court of Justice (ICJ), acting in its advisory capacity. The two cases involved essentially the same arguments and the same body of public international law. Palestinians claimed that building the Barrier past the Green Line (the armistice line establishing Israel's borders after the 1948 Arab-Israeli War) constituted an illegal annexation of Palestinian land.⁸ Additionally, Palestinians claimed that the Barrier infringed various rights enshrined in international humanitarian and human rights law.⁹ Israel claimed that the Barrier was a security measure and a legal, defensive response to Palestinian terrorism.¹⁰

7. The situation is so drenched in controversy that the very words used to describe it get caught up in the clash, and even my simple statement of the issue could be challenged. See Greg Myre, *In the Middle East, Even Words Go to War*, N.Y. TIMES, Aug. 3, 2003, § 4, at 3 (explaining that the Barrier is a "fence" for Israel and a "wall" for Palestinians, that the West Bank and Gaza Strip are "disputed territories" for Israel and "occupied territories" for Palestinians, and that Sharon stirred controversy among Israelis when he used the term "occupation" while Abbas stirred controversy among Palestinians when he used the term "terrorism"); see also THUCYDIDES, *THE PELOPONNESIAN WAR* § 3.82 (Richard Crawley trans., 1874), reprinted in *THE LANDMARK THUCYDIDES* (Robert B. Strassler ed., The Free Press 1996) ("So bloody was the march of the revolution . . . [that] [w]ords had to change their ordinary meaning and to take that which was now given them."). My aim in this Article with respect to language is neutrality, and failing that, fairness—though no doubt at times there will be reason for objection. I do think the term "Barrier" is neutral. Neither side favors it; it captures the structure's function—to bar; and it acknowledges that the structure at some places looks like a concrete wall, at others looks like a fence, and often most resembles an obstacle course, complete with trenches and electronic signals.

8. See Written Statement Submitted by Palestine, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 235–68 (Jan. 30, 2004) [hereinafter *Palestinian Statement to ICJ*], available at <http://www.icj-cij.org/docket/files/131/1555.pdf?PHPSESSID=ad0952b1d0bd2fd20e33586c37d6fcfa>. Here, and at moments throughout this Article, some general background on the Middle East conflict might come in handy. A good place to start is with the collection of primary source documents in *THE ISRAEL-ARAB READER: A DOCUMENTARY HISTORY OF THE MIDDLE EAST CONFLICT* (Walter Laqueur & Barry Rubin eds., Penguin Books 7th rev. ed. 2008).

9. See *Palestinian Statement to ICJ*, *supra* note 8, at 194–234.

10. See Letter from the Deputy Director General and Legal Advisor of the Ministry of Foreign Affairs, Together with the Written Statement of the Government of Israel, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, at i–ii (Jan. 29, 2004) [hereinafter *Israeli Statement to ICJ*], available at <http://www.icj-cij.org/docket/files/131/1579.pdf?PHPSESSID=cb6f3883704b0567d5ecd3a4c10ff67d>.

The two courts published their decisions a few days apart in the summer of 2004. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Legal Consequences)*,¹¹ the ICJ held fourteen to one that Israel had annexed Palestinian land by building the Barrier past the Green Line; that the Barrier violated an array of Palestinian human and humanitarian rights; and that Israel's security claims were meritless or inapplicable—all of which would have been a great victory for the Palestinians but for the nonbinding character of ICJ advisory opinions.¹² In *Beit Sourik Village Council v. The Government of Israel (Beit Sourik)*,¹³ the Israeli High Court held that the Barrier could legally be built past the Green Line because its purpose was to protect Israeli security rather than to annex Palestinian territory, but that the particular route the Barrier took burdened Palestinians to an unjustified degree, violating the principle of proportionality.¹⁴ The court ordered the Israeli military to reroute the Barrier such that, though it might run through the West Bank, it would not fall so heavily on Palestinians' way of life.¹⁵ This was only a partial Palestinian victory, but one with force: Israel's government responded to the ICJ with a denunciation and to its own court by uprooting and rerouting the Barrier.¹⁶

I was a summer law clerk working for Aharon Barak, Israel's former chief justice (formally "President of the Supreme Court of Israel"), when he wrote the Barrier opinion, and I was there in his chambers a week later when the ICJ published its opposing opinion. I've been cogitating on the case ever since, turning it over and over in my mind, not knowing at first what it represented that it should have such a grip on me. It took quite some time to see the reason. But what gradually became clear is that the Barrier case is perched just so as to push furiously against the intuition about whether international law is truly law. Part of the reason is easily stated: the case involves two peoples locked in the kind of conflict in which survival as a political community is on the line, and naturally we wonder whether it is possible or even desirable for such a conflict to be governed by law. The other part of the reason is not so easily stated; it has to do with what Israel stands for in the international sphere, and to see it clearly we need to take a step back. The last century has featured an

11. Advisory Opinion, 2004 I.C.J. 136 (July 9).

12. See *infra* Part I.A.2.

13. H CJ 2056/04 [2004] IsrSC 58(5) 807, translated in 43 I.L.M. 1099 (2004).

14. See *infra* Part I.B.2.

15. See *infra* Part I.B.2.

16. See Press Release, Isr. Ministry of Foreign Affairs (July 11, 2004), <http://www.mfa.gov.il/MFA/Government/Communiques/2004/Cabinet%20Communique%2011-July-2004>; Press Release, Isr. Ministry of Foreign Affairs, ICJ Advisory Opinion on Israel's Security Fence—Israeli Statement (July 9, 2004), <http://www.mfa.gov.il/MFA/About+the+Ministry/MFA+Spokesman/2004/Statement+on+ICJ+Advisory+Opinion+9-July-2004.htm>; Press Release, Isr. Ministry of Foreign Affairs, Unofficial Summary of State of Israel's Response Regarding the Security Fence (Feb. 28, 2005), <http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Summary%20of%20Israels%20Response%20regarding%20the%20Security%20Fence%2028-Feb-2005>.

extraordinary outpouring of passionate violence. The violence has centered on race and ethnicity, political ideology, and now religious ideology. Thucydides claimed that the elemental forces that move states in their relations toward one another are fear, interest, and honor;¹⁷ that great thesis has become part of the lore of international relations—and perhaps it once was so; perhaps it once described the world. But it does not describe our world. The forces that move nations in contemporary international life are identity, ideology, and passion. Israel, blazing with these forces, is the flashpoint and symbol of the age. That is why such a tiny country so rivets the attention of the contemporary world. And it is why Israel poses such a challenge for contemporary international law. Can the law govern such forces? Can it even withstand these forces, or will it get caught up in them, an instrument of political contention under a spurious legal surface? The Israeli Barrier is a good case study because it lies exactly at the point of our greatest hopes and greatest fears for an international condition that aspires to be an international legal order.

Thus the question in this Article is whether international law was law properly so called *in the Barrier case*. Part I focuses on the case, with a section on the ICJ's opinion, another on the Israeli High Court's opinion, and a third with my own analysis of the issues. Part I is thus doctrinal, but though doctrinal, it is also theoretical, asking at all points (*by means* of the doctrine, *through* the doctrine) whether the Barrier case was or could have been addressed in such a way as to keep faith with minimal principles of legality. Part II shifts the focus to the international legal system as a whole, asking whether that system has or could have the character of law, and calling in the Barrier case as a body of experience and evidence with which to get some purchase on that larger question. It is an inescapably theoretical question; to ask it is to ask after the nature of law itself, and there is no answering without setting forth, at least implicitly, some sort of position as to what law is—an uncomfortable and formidable prospect. The approach here is to revert to the skeptical intuition with which this Article began—the intuition that international law is not really law at all—probing that intuition so as to make the standards on which it is based explicit, and then building from those (now explicit) standards a theoretical framework against which the international legal system can be measured. There are, I will argue, four such standards, four grounds for doubting international law's character as law, and they make up the four sub-sections of Part II: doubts about international law's capacity to give rise to events in the world (law's efficacy); doubts about international law's capacity to obligate on grounds of legitimate authority (law's normativity); doubts about international law's capacity to obligate on grounds of moral rationality (law's normativity again); and doubts about international law's capacity to maintain a character distinct from politics (law's objectivity). The notion behind Part II is to ask whether these four components of the skeptical intuition about international

17. THUCYDIDES, *supra* note 7, § 1.76.

law are borne out in practice. And as there is a certain theoretical approach at work here, in Parts I and II both, I'd like now to state three premises concerning that approach.

First, the theoretical tradition of which this Article is a part is not *a priori* but what philosophers call *reconstructive*.¹⁸ The central idea is that the best way to understand the nature of law is to go to our experience of law. Certain beliefs and values are immanent in that experience—in the social practices and institutions that make up that experience—and one important task of social theory is to bring those beliefs and values to light, to reconstruct them. In the case at hand, where the question is whether an enterprise that purports to be law really is law, what we are after is the law's *self-constituting* values—the values in virtue of which an activity is a legal activity.¹⁹ And here I believe the skeptical intuition about international law has something important to teach us, for the intuition is like a channel into which our implicit beliefs and values about law as law are poured. The intuition, after all, is fundamentally *about* what law is—it consists in a skepticism about whether international law is law—and as the intuition is powerful and enduring and widely shared, and as it seems to be grounded in our experience of law in everyday life and our professional formation as lawyers, we may by understanding its component parts be able to get some purchase on what in practice we already take the law to be. Thus to probe the intuition is to bring our sense of law as law to self-consciousness. And once we have done that, we can begin to engage the skepticism toward international law more critically, accepting the intuition's implicit standards as to what law is but asking whether (and to what extent and in what ways) those standards are in fact unmet when one actually observes the international legal system in operation.

18. The root of this tradition—which is discussed at more length in the opening to Part II below—is an interpretation of the Hegelian contribution to social thought. See G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1820); G.W.F. HEGEL, *PHENOMENOLOGY OF SPIRIT* (A.V. Miller trans., Oxford Univ. Press 1977) (1807). Other touchstones (for me at least) are the phenomenological tradition in philosophy, Bernard Williams's example in moral thought, and Justice Cardozo's reflections on the nature of adjudication. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 10 (1921) ("What is it that I do when I decide a case?"); Bernard Williams, *Replies*, in *WORLD, MIND, AND ETHICS: ESSAYS ON THE ETHICAL PHILOSOPHY OF BERNARD WILLIAMS* 185, 217 (J.E.J. Altham & Ross Harrison eds., 1995) (discussing how the particularities of "psychological and social reality" can "remind one of the unreality and, worse, distorting quality" of a form of moral theory that "is frivolous, in not allowing for anyone's experience, including the author's own"); see also M. MERLEAU-PONTY, *PHENOMENOLOGY OF PERCEPTION*, at vii (Colin Smith trans., Routledge & Kegan Paul 1986) (1945) ("Phenomenology is . . . a philosophy for which the world is always 'already there' before reflection begins . . . [It] offers an account of space, time and the world as we 'live' them. It tries to give a direct description of our experience as it is . . ."). The common theme is that lived experience has the privileged place and conceptual reflection radiates out from that center.

19. See CHRISTINE M. KORSGAARD, *SELF-CONSTITUTION: AGENCY, IDENTITY, AND INTEGRITY* 32 (2009) ("[E]very object and activity is defined by certain standards that are both constitutive of it and normative for it. These standards are ones that the object or activity must at least try to meet, insofar as it is to be that object or activity at all.").

Second, the analysis of the Barrier case in Part I has got to be detailed, doctrinally exacting, because anything less will make it difficult to get a good read on either what the skeptical intuition amounts to (what implicit standards about law as law it implies) or whether it is warranted (when those standards are applied to international law). When a case first comes in the door, in my experience, it typically feels at the outset like a messy jumble of facts and arguments and points of law—call this stage one. Gradually the case sorts itself into a handful of distinct, comprehensible positions concerning a handful of distinct, well-formed legal issues—stage two. Decision cannot rightly come at this point, although much too often it does; this midpoint of analysis gives off, because it is shallow, a mirage of discretion, the appearance of a need for open-ended choice when in fact the law at this point has not yet had a chance to uncover its objectivity. To the extent the law has the capacity to render determinate answers to legal questions, stage two is too soon to find them. It is only in a third stage, when doctrine and argument are sifted, investigated, worked over the surface of the facts and then sifted and investigated again, that often enough it becomes clear that only one of the available positions is right or best. That move from stage two to stage three is what it means for a judge to shift from expressing a preference (what Richard Posner has called a “voting model” of judicial decision²⁰) to arriving at a conclusion. The Barrier case in this Article must serve as the grist of the analysis of whether international law is law properly so called. It cannot perform that function until we take it to stage three. And this same insistence on detail, necessary to getting the legal issues right, is also necessary from the standpoint of reconstructive social theory—for a case study in reconstructive social theory is not merely an example but the form in which theoretical knowledge comes (since that knowledge is thought to be embedded in facts and events). Thus as a matter of law and philosophy both, stick figures here just won’t do.

Third, it is of the utmost importance that we make a distinction between international courts and international law itself. If there is some shortcoming in the international legal system, that shortcoming might be located in either the law—the actual stuff of it, doctrine and sources and all the rest—or in the courts that fail to recognize and act on what international law requires. The distinction, I am well aware, runs against the grain, and has run against the grain ever since Holmes defined law as “prophecies of what the courts will do in fact, and nothing more pretentious.”²¹ There’s something in that definition, a sort of realist swagger, which cannot fail to impress and intimidate. But taken literally, it cannot be true—or one could never say (as we say all the time), “The court here got the law wrong.” America’s law schools are filled with professors who preach fervently some species of the doctrine of legal realism; many of them took up prestigious

20. Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 74 (2005).

21. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

clerkships when they finished law school, and one wonders what they saw in their year or two away that made them so insistent on the matter when they returned. Was it the law that was inconclusive, and thus made itself subject to judges' will, or was it the judges who were willful? Did the realist event—the realist moment, as it were—come in the privacy of legal research and writing, or did it come when the judges made up their minds and took a vote? Rarely is the question asked. The failure to ask it has deep roots, but it is a failure nonetheless. The distinction matters. It matters particularly in international law, where the application function is highly dispersed and the tribunals involved fundamentally different in construction.²²

Case studies can easily devolve into meditations (or worse, commentaries), but there are conclusions here. To judge by the ICJ's work in the Barrier case, the intuition that international law is not law properly so called is warranted. The manner of that court's work violated basic principles of legality, and its judgment ultimately was not enforceable, nor obligatory, nor objective. In fact, I think *Legal Consequences* cannot be considered an artifact of law at all, and I will ultimately argue that to cite it as legal authority is improper. But the Israeli High Court's work neither wholly supports nor wholly refutes the intuition. Its judgment was enforceable (was in fact enforced) and obligatory, but its analysis was so drenched in judicial subjectivity as to put the legal character of the work as a whole into question—a sort of quasi-law zone reminiscent of our more strained constitutional law opinions in the United States (which also tend to spur questions of whether the work was really law at all). And leaving those two courts aside, international law itself does *not* support the intuition. Even in dealing with a legal problem as intricate and novel as the Barrier, in a context as charged as Israel's, international law proves enforceable in the right circumstances, reasonably obligatory, and

22. The ICJ and Israeli High Court are a good example of just how differently constructed the tribunals applying international law can be. Israeli High Court judges are selected by a nine-person committee consisting of the chief justice, two other justices, and representatives from the legislature, executive, and bar; Israel's executive and legislature play no formal role beyond contributing representatives to the decision, and the judicial appointment lasts until mandatory (age-based) retirement. *See* Basic Law: The Judiciary §§ 4, 7, 1984, S.H. 78. The process aims at judicial independence, and to the extent a criticism is offered, insularity is the likely ground. By contrast, the ICJ's selection process starts with state-based "national groups," which select candidates according to various distributional rules (no two judges can be of the same nationality; each of the Security Council's five permanent members gets one judge on the court; and the UN's five regional blocs—Africa, Asia, Latin America, Eastern Europe, and Western Europe/other—divide up the remaining ten seats). The candidates then run for office in the General Assembly and Security Council, and those who win a bare majority in both bodies receive a nine-year term on the court and may stand for reelection when it expires. *See* Statute of the International Court of Justice arts. 3–4, 10, 13, June 26, 1945, 59 Stat. 1055, 3 Bevens 1153 [hereinafter Statute of ICJ]; SHABTAI ROSENNE, *THE WORLD COURT* 52–64 (4th ed. 1989). This process conceives of judges in a basically representative (in fact, national) capacity, and even its stated goal is to have "the main forms of civilization" and "principal legal systems of the world" represented. Statute of ICJ, *supra*, art. 9.

substantially objective. The stuff of law is in it. But the courts failed the promise of the law.

My thesis, then, is this: any general claim that international law either is or is not law properly so called is far too sweeping. International law in action is sometimes law, and sometimes not, and sometimes comes awfully close, depending on the particulars of case and court. What is needed as a matter of jurisprudence is *nuance*. And what is needed as a matter of jurisprudence and policy both is a distinction in the stance we take toward international law, on the one hand, and toward the courts and other institutions that interpret and apply international law, on the other. I call this position “skeptical internationalism”: it is a faithful friend to international law as a project and in doctrinal content, but rebuttably skeptical of the institutions charged with interpreting that content and carrying that project out.

In short, I see international law as a very good piece of music being played by some very bad orchestras. Our stance to it as lawyers should be neither crude rejection nor crude acceptance, but a studied insistence that international law as it is be brought closer to international law as it could be.

I. PRINCIPLES OF LEGALITY AND THE BARRIER BETWEEN ISRAEL AND THE WEST BANK

A. *The International Court of Justice in the Barrier Case*

We’ll get to the facts and law of the ICJ’s Barrier opinion in a moment. But there’s a question we should cover first, and it requires a bit of context.

In October 2003, Syria, representing the Arab Group and League of Arab States, sent a letter to the Security Council urging that it condemn Israel’s “expansionist conquest wall” as a violation of international law.²³ The Security Council met on October 14, heard statements, and took a vote: ten in favor (including permanent members Russia, China, and France), one against (the United States), and four abstaining (including the last of the permanent members, the United Kingdom).²⁴ The U.S. veto prevailed.

The next day, Syria brought the same request to the General Assembly, which (lest the Security Council’s prior vote block General Assembly action) invoked its “emergency special session” authority to take up the issue.²⁵ Meetings were held, statements heard; opposition to the Barrier

23. Letter Dated 9 October 2003 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/973 (Oct. 9, 2003).

24. U.N. SCOR, 58th Sess., 4842d mtg. at 2, U.N. Doc. S/PV.4842 (Oct. 14, 2003); U.N. SCOR, 58th Sess., 4841st mtg., U.N. Doc. S/PV.4841 (Oct. 14, 2003).

25. Under the UN Charter, “the General Assembly shall not make any recommendation” on a matter over which the Security Council “is exercising . . . the functions assigned to it in the present Charter.” U.N. Charter art. 12, para. 1. The emergency special session device was developed to overcome that constraint: “[I]f the Security Council, because of lack of

was intense and almost unanimous, with most of the talk pointed exclusively against Israel, although a few countries made mention of Palestinian wrongdoing as well.²⁶ (Diplomatically, this choice to wag the finger at both parties or just one appears to be the crucial thing—although I don't think it speaks much to what is legal, or very clearly to what is just.) In the end, the Assembly passed Resolution ES-10/13, “[d]emand[ing] that Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law.”²⁷ The vote was 144 to 4 (Israel, the United States, Micronesia, and the Marshall Islands), with 12 abstaining. The resolution also requested a report on the issue from the Secretary-General.²⁸ That came in November and stated that the Barrier “is in contradiction to international law,” “could damage the longer-term prospects for peace,” and “increases suffering among the Palestinian people.”²⁹

In December, the Arab Group and League of Arab States requested that the emergency special session resume and submitted a new draft resolution to the General Assembly for approval. This one denounced the Barrier in even stronger terms, stating that the Barrier amounts to “de facto annexation,” has a “devastating impact . . . on the Palestinian civilian population,” is regarded with “unanimous opposition by the international community,” and constitutes a “refus[al] to comply with international law.”³⁰ But the resolution also certified a question for the ICJ in its advisory capacity:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?³¹

unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security . . . the General Assembly shall consider the matter . . .” *Uniting for Peace*, G.A. Res. 377, ¶ 1, U.N. Doc. A/1775 (Nov. 3, 1950). For roughly the last thirty years, the General Assembly has used the device of the emergency special session exclusively to work around and against Security Council policy as to Israel. *See infra* note 33 and accompanying text.

26. U.N. GAOR, 10th Emergency Spec. Sess., 22d mtg., U.N. Doc. A/ES-10/PV.22 (Oct. 21, 2003); U.N. GAOR, 10th Emergency Spec. Sess., 21st mtg., U.N. Doc. A/ES-10/PV.21 (Oct. 20, 2003).

27. G.A. Res. ES-10/13, ¶ 1, U.N. Doc. A/RES/ES-10/13 (Oct. 21, 2003).

28. *Id.* ¶ 3.

29. The Secretary-General, *Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13*, ¶ 30, delivered to the General Assembly, U.N. Doc. A/ES-10/248 (Nov. 24, 2003) [hereinafter *Report Prepared Pursuant to ES-10/13*].

30. G.A. Res. ES-10/14, at 2–3, U.N. Doc. A/RES/ES-10/14 (Dec. 8, 2003).

31. *Id.* at 3. The phrasing alludes to the Security Council’s 1970 request for an advisory opinion on “the legal consequences for States of the continued presence of South Africa in Namibia.” S.C. Res. 284, ¶ 1, U.N. Doc. S/RES/284 (July 29, 1970).

The resolution passed with ninety in favor, eight against, and seventy-four abstaining³²—quite a divided vote, actually, with a strong flavor of the developing versus the developed world (try holding the list of states voting in favor up alongside the list of states in the G77 to see the match). But the developing world is numerous, and, with the resolution approved, the case came to the ICJ.

There are at least two possible interpretations of these events. One could think Israel encountered strong opposition because its conduct was patently illegal and unsupportable. Or one could see in these events evidence of an animus against Israel within the United Nations—and also evidence of a political strategy by the Barrier’s national opponents to enlist the various organs of the UN in the service of national goals, with an apparently warranted confidence that all those various organs would agree to be enlisted (except for the Security Council, and there only because of the United States). I think this latter view is correct: the tone of events, the situation’s legal complexity (the Barrier was not “patently” anything), the power and numbers of the Arab Group and League of Arab States (about twenty-two states, some with oil), the history connected to the General Assembly’s resolutions about Israel (every emergency special session resolution since 1982 has been directed against Israel),³³ and the advisory

32. U.N. GAOR, 10th Emergency Spec. Sess., 23d mtg., U.N. Doc. A/ES-10/PV.23 (Dec. 8, 2003).

33. The first resolution in the string declared that Israel “is not a peace-loving member state” and called for all member states “[t]o sever diplomatic, trade and cultural relations with Israel . . . in order totally to isolate it.” G.A. Res. ES-9/1, ¶¶ 11–13, U.N. Doc. A/RES/ES-9/1 (Feb. 5, 1982). Since then, and apart from a few nonsubstantive, procedural resolutions, a comprehensive review of the General Assembly’s emergency special session resolutions shows that every one has been directed wholly or mainly against Israel. *See* G.A. Res. ES-10/18, U.N. Doc. A/RES/ES-10/18 (Jan. 16, 2009) (demanding a ceasefire in Gaza and a withdrawal of Israeli forces); G.A. Res. ES-10/17, U.N. Doc. A/RES/ES-10/17 (Dec. 15, 2006) (setting up an administrative agency to keep records of damage caused by the Barrier); G.A. Res. ES-10/16, U.N. Doc. A/RES/ES-10/16 (Nov. 17, 2006) (condemning Israeli actions in the Gaza Strip (though also rocket fire from Gaza into Israel)); G.A. Res. ES-10/15, U.N. Doc. A/RES/ES-10/15 (July 20, 2004) (demanding Israeli compliance with the ICJ Barrier opinion); G.A. Res. ES-10/14, *supra* note 30 (condemning the Barrier); G.A. Res. ES-10/13, *supra* note 27 (same); G.A. Res. ES-10/12, at 1, U.N. Doc. A/RES/ES-10/12 (Sept. 19, 2003) (condemning Israeli “deportation[s]” and “extrajudicial killings” (though also “[c]ondemning the suicide bombings”)); G.A. Res. ES-10/11, at 2, U.N. Doc. A/RES/ES-10/11 (Aug. 5, 2002) (calling for an “end [to] the Israeli occupation”); G.A. Res. ES-10/10, at 1, U.N. Doc. A/RES/ES-10/10 (May 7, 2002) (denouncing Israeli human rights violations at the Jenin refugee camp); G.A. Res. ES-10/9, at 1, U.N. Doc. A/RES/ES-10/9 (Dec. 20, 2001) (denouncing Israeli violations of the Geneva Conventions during the Second Intifada); G.A. Res. ES-10/8, at 1, U.N. Doc. A/RES/ES-10/8 (Dec. 20, 2001) (emphasizing that the PLO is “the indispensable and legitimate party for peace”); G.A. Res. ES-10/7, at 1–2, U.N. Doc. A/RES/ES-10/7 (Oct. 20, 2000) (assigning responsibility for the Second Intifada to Sharon’s “provocative visit to Al-Haram Al-Sharif” and condemning the resulting “acts of violence,” especially “the excessive use of force by the Israeli forces against Palestinian civilians”); G.A. Res. ES-10/6, at 3, U.N. Doc. A/RES/ES-10/6 (Feb. 9, 1999) (noting “deterioration of the Middle East peace process as a result of the lack of compliance by the Government of Israel with the existing agreements” and demanding an end to “illegal Israeli activities”); G.A. Res. ES-10/5, at 1, U.N. Doc. A/RES/ES-10/5 (Mar. 17, 1998) (denouncing Israeli violations of the Geneva Conventions); G.A. Res. ES-10/4, at 2, U.N.

request itself (which stated that the Barrier was both wrong and illegal in the very request for legal advice on that point) strike me as decisive. Perhaps some readers will share this view; certainly some will not. But I don't mention the view to endorse it. I mention it to discount it.

It is tempting to view the partisan origins of the Barrier case in the UN as damning to the UN's court, presumptively undermining its claim to be doing law rather than the work of its side. But there is a certain naiveté in that view, and indeed something perfectly backwards about its logic. Most big public law cases have partisan origins. And every case presents itself to a court with at least two parties, who are types, who are symbols, who contend with each other amidst the passions inevitably kindled by the people and things they represent—officer and suspect, official and activist, executive and employee, on and on and on, and everywhere the fires of alliance and hostility, sympathy and indifference, and that most complex and powerful sentiment of all, identification. The question is not whether these forces are at work, but whether those entrusted with the law yield to them. The institutional setting of the United Nations in which the Barrier case took place may well have been imbalanced, but in the end, the ICJ was alone with the question of whether the Barrier was legal. That is a fair question, however it came to be asked, and there is no reason in principle why it could not be answered in accord with our expectations for law as law.

1. Principles of Legality and Finding Facts

Finding facts in the right way is part of what it means for a court to be engaged in the work of law as law. It is among the principles of legality—though it doesn't usually get its jurisprudential due. Scholarship and teaching typically focus on knotty (appellate) legal problems, or policy, or theory insofar as it falls on the "law" side of the "law/facts" distinction; indeed that very distinction can give the impression that fact-finding is a subordinate part of the legal enterprise, if a part of it at all. But actually, in most cases the law is pretty clear and what courts fundamentally exist *for*, their social function, is to resolve disputes of fact.³⁴ The power to make

Doc. A/RES/ES-10/4 (Nov. 13, 1997) (denouncing the settlements); G.A. Res. ES-10/3, at 1–2, U.N. Doc. A/RES/ES-10/3 (July 15, 1997) (same); G.A. Res. ES-10/2, at 2–3, U.N. Doc. A/RES/ES-10/2 (Apr. 25, 1997) (same); G.A. Res. ES-7/9, ¶ 1, U.N. Doc. A/RES/ES-7/9 (Sept. 24, 1982) (condemning "the criminal massacre of Palestinian and other civilians in Beirut"); G.A. Res. ES-7/8, U.N. Doc. A/RES/ES-7/8 (Aug. 19, 1982) (noting the "children victims of Israel's acts of aggression"); G.A. Res. ES-7/7, at 1, U.N. Doc. A/RES/ES-7/7 (Aug. 19, 1982) (attributing "the explosive situation in the Middle East" to "Israeli aggression"); G.A. Res. ES-7/6, U.N. Doc. A/RES/ES-7/6 (Aug. 19, 1982) (condemning Israeli military activities in Lebanon); G.A. Res. ES-7/5, U.N. Doc. A/RES/ES-7/5 (June 26, 1982) (same); G.A. Res. ES-7/4, ¶¶ 7–8, 11 U.N. Doc. A/RES/ES-7/4 (Apr. 28, 1982) (denouncing Israeli "[r]epressive measures," such as "[s]hooting and killing and wounding of worshippers," condemning the "misuse" by the United States of its veto power on Israel's behalf, and declaring again that Israel "is not a peace-loving Member State").

34. See 3 WILLIAM BLACKSTONE, COMMENTARIES *330 ("[E]xperience will abundantly sh[o]w, that above a hundred of our lawsuits arise from disputed facts, for one where the law

findings of fact in instances of dispute is scarcely less remarkable or distinctive than the power “to say what the law is.”³⁵ And not only do judicial opinions almost always include a statement of fact, but they could not imaginably do otherwise in most cases—which is to say that it is difficult to conceive of law in action without considering it in relation to facts (for it is intrinsic to the application function that little pictures of the world are contained within a structure of practical reason, and naturally an essential issue is the relationship of those pictures of the world to the world as it is). My point is not just that the factual aspect of the law deserves a greater share of attention, but that factuality is so much a part of the basic architecture of the legal enterprise that it should be regarded as having essential and not merely incidental significance in thinking about that enterprise’s nature.

Now, there is a great deal that might be said about factuality in the law, but three points are, in my view, at the root of the matter. First, it seems to be socially necessary to make certain claims of fact binding as a matter of law—that is, to *establish* facts, putting the authority of the law behind a declaration as to how the world is rather than an imperative as to what may or may not be done. This establishing is what it means for a court to “find” facts, and it is among courts’ most characteristic and essential functions. Second, the way a fact becomes binding as a matter of law (at least in the courtroom) is by partaking of the law’s process. A driver’s statement that he did not run the red light is a mere assertion; that same assertion, if certainly true and known to be true (say there was a video of the intersection) is a (mere) item of knowledge and truth about the world; but a jury’s finding that the driver did not run the red light, after the driver has become a defendant and the recording examined in court—that is a claim of fact with the mark of the law on it. Finally, there is a certain logical minimum to any such factual process in the law, at least insofar as the facts are disputed and the process is rational: the fact-finder must have the legal authority to establish facts; he or she or it must hear the claims of fact in question; and he or she or it must engage and decide among the competing claims on the basis of reason—that is, in light of arguments and evidence and the like, and with the kind of good faith that makes the scrutiny real rather than farce. That is to say that facts, to be part of the law’s process, must become the subject of *deliberation*—specifically, of the deliberative activity known as *adjudication*.³⁶

is doubted of.”). Though actually I am paraphrasing here a point from John Langbein—a point that has been a leitmotif of his career: “The main work of a legal system is deciding matters of past fact. . . . Was the traffic light red or green? Was it O.J. Simpson or somebody else who wielded the dagger? Find the facts and the law is usually easy.” John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1168 (1996).

35. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

36. Law is full of delegated fact-finding, of course, as with special masters, ERISA fiduciaries, or administrative agencies, but I do not think these special cases require altering the account just laid out. A delegatee may administer the factual process, provided it is still

In the Barrier case, there are basically two sets of factual questions—the first concerning the Barrier itself (how much land past the Green Line does it take? for what purpose? to what effect on the Palestinian people?) and the second concerning the security threat facing Israel (how substantial is it? where does it come from? can the Barrier temper it?). As to the Barrier itself, the ICJ states that, on the basis of the existing construction and planned route, “approximately 975 square kilometres (or 16.6 per cent of the West Bank) would . . . lie between the Green Line and the wall.”³⁷ That area, the ICJ says, is “home to 237,000 Palestinians,” who could come and go only through “access gates, which are opened infrequently and for short periods” and who would need “a permit or identity card issued by the Israeli authorities” to continue living there.³⁸ That same area, the ICJ explains, is also home to “nearly 320,000 Israeli settlers (of whom 178,000 in East Jerusalem),” and “it is apparent from an examination of the map . . . that the wall’s sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem).”³⁹ Those Israeli settlers would not need a permit to remain in the area, nor would other Israelis need a permit to move there. Finally, “[i]f the full wall were completed as planned, another 160,000 Palestinians would live in almost completely encircled communities” or “enclaves.”⁴⁰

As to facts about the security threat, there is something remarkable to report: the ICJ’s opinion makes almost no mention of Palestinian violence at all. The word “terrorism” (or its variants) is used five times in the (sixty-eight-page) opinion, four times in direct and once in indirect quotation—but never in the ICJ’s own mouth.⁴¹ Nor are related terms (“suicide bombing” and the like) ever used or discussed. Past instances of armed conflict in the region are so described as to eliminate any sense of aggression against Israel.⁴² And the opinion never states that Palestinian violence is illegal. Indeed, there is just one passage in which it is acknowledged that Palestinian violence, as a factual matter, exists:

The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens. The

the law’s process. The delegator (the court) typically retains the power of review, and with it the responsibility to ensure that the integrity of that process was preserved in the delegatee’s hands. And where that power is lacking, or review entirely supine, we would not say the facts were “found,” as a legal matter, at all.

37. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 170 (July 9).

38. *Id.* at 170–71.

39. *Id.* at 170, 183.

40. *Id.* at 170.

41. *Id.* at 157, 182, 187, 194.

42. See, e.g., *id.* at 165–66 (“The Arab population of Palestine and the Arab States rejected this plan [the 1947 UN resolution establishing a Jewish state], contending that it was unbalanced . . . ; armed conflict then broke out . . .”).

measures taken are bound nonetheless to remain in conformity with applicable international law.⁴³

But because these three sentences appear very near the last page of the opinion, where they can give rise to no further reasoning because all the facts have already been found and all the law already decided, and because the third sentence arrests the movement of the first two with the dumb force of a truism, the trio as a whole functions as the quintessential pro forma acknowledgement—a creature of political rhetoric whose purpose is not actually to acknowledge but only to stave off challenge.

Let's pause for a moment to register the enormity of these claims and omissions of fact. 16.6% of the West Bank would be, for the United States, a greater territorial area than the entire Atlantic seaboard, Maine to Florida, plus California.⁴⁴ The number of Palestinians involved (nearly 400,000) registers on the scale of natural disasters.⁴⁵ And that “sinuous route” around the settlements, together with requiring permits of the Palestinians (but not the Israelis) for the right to live in their homes, gives the whole affair the look of a land grab. At the same time, to effectively eliminate Palestinian violence from the law's factual understanding of the world in a case concerned with the Israeli/Palestinian conflict is simply staggering—like reality in a funhouse mirror, the law's picture of the world cleaved from the world as we know it. And of course the consequence is that one party's entire position (half the case really) goes up in smoke. Having recognized all this, however, we need to register quite another point: that these claims and omissions of fact never partook of the law's process. They are not legal facts—not a part or product of the law—at all.

The ICJ's fact-finding process (its process altogether, in fact) was, compared to most courtroom processes, unusually simple. It was not adversarial; Israel boycotted the proceedings except to submit a lengthy written statement describing the security threat and denying the ICJ's jurisdiction.⁴⁶ Beyond that, first, the court permitted written statements from member states and state organizations (e.g., the European Union and League of Arab States), as well as “Palestine” (via special observer status).⁴⁷ These were mostly position papers; the European Union's, for example, consisted of a one-page letter stating that an advisory opinion would be “inappropriate” because it would “not help . . . re-launch a political dialogue,” plus some annexed EU statements opposing the Barrier itself.⁴⁸ Second, the court held hearings for three days in February 2004, at

43. *Id.* at 195.

44. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, UNITED STATES SUMMARY: 2000: POPULATION AND HOUSING UNIT COUNTS 29 tbl.17 (2004), available at <http://www.census.gov/prod/cen2000/phc3-us-pt1.pdf>.

45. See *supra* notes 38, 40 and accompanying text.

46. See Israeli Statement to ICJ, *supra* note 10.

47. See Palestinian Statement to ICJ, *supra* note 8.

48. See Statement of Ireland on Behalf of the European Union, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Jan. 30, 2004), available at <http://www.icj-cij.org/docket/files/131/1615.pdf>.

which twenty-three speakers spoke, all opposed to the Barrier and most representing members of the League of Arab States.⁴⁹ Third, the court studied a map of the Barrier's route on the Israeli Ministry of Defence website.⁵⁰ Fourth, the Secretary-General's office sent the court a large dossier of background material, much of which wasn't factually oriented, but some of which was;⁵¹ the court in particular cited three UN human rights reports detailing the burdens that the Barrier imposed on the Palestinian people.⁵² And fifth, the Secretary-General's office sent two reports of its own, providing factual follow-ups to the General Assembly's two resolutions.⁵³ These two reports from the Secretary-General were overwhelmingly the most important items in the set for factual purposes. The ICJ states that, in describing the Barrier and its effects, it is "basing itself" on the two reports, and virtually every factual statement the ICJ makes with respect to annexation and security is referenced to the pair (including all factual statements discussed above, except for the remark about the Barrier's "sinuous route," which is attributed to a study of the map on the Israeli website).⁵⁴ The human rights reports are cited in the ICJ's discussion of human and humanitarian rights, but do not bear on the annexation and security issues.⁵⁵ And the various written and oral statements, including Israel's, have no perceptible effect on the ICJ's factual conclusions.

In light of this process, should we say that the material claims of fact were heard? I think this is a close call, but the record was certainly scant. All that mattered factually were the Secretary-General's two reports, one of

49. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 143–44 (July 9); Oral Statements, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Feb. 23–25, 2004), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=2>.

50. *Legal Consequences*, 2004 I.C.J. at 168.

51. Request for Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Dec. 8, 2003), available at <http://www.icj-cij.org/docket/files/131/1497.pdf> (including a dossier of documents from the Secretary-General).

52. *Legal Consequences*, 2004 I.C.J. at 190–91; U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *The Right to Food: Report by the Special Rapporteur, Jean Ziegler, Addendum: Mission to the Occupied Palestinian Territories*, U.N. Doc. E/CN.4/2004/10/Add.2 (Oct. 31, 2003) (prepared by Jean Ziegler); U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, On the Situation of Human Rights in the Palestinian Territories Occupied by Israel Since 1967*, U.N. Doc. E/CN.4/2004/6 (Sept. 8, 2003) (prepared by John Dugard); Special Comm. To Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, *Report of the Special Committee To Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, U.N. Doc. A/58/311 (Aug. 22, 2003).

53. See Written Statement of the Secretary-General of the United Nations Organization, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Jan. 29, 2004), available at <http://www.icj-cij.org/docket/files/131/1557.pdf>; *Report Prepared Pursuant to ES-10/13*, *supra* note 29.

54. *Legal Consequences*, 2004 I.C.J. at 168.

55. *Id.* at 190–91.

which did not mention the security threat at all and the other of which contained just three phrases about it: one stating that Israel began construction of the Barrier “[a]fter a sharp rise in Palestinian terror attacks in the spring of 2002”;⁵⁶ a second acknowledging “Israel’s right and duty to protect its people against terrorist attacks. . . . [But not] in a way that is in contradiction to international law” (perhaps the source of the ICJ’s similar formulation?);⁵⁷ and a third which, in summarizing Israel’s legal position, cited Israeli officials’ claim that “the Barrier has contributed to a significant decline in the number of attacks inside Israel.”⁵⁸ These three statements make for a thin record in a case that depended significantly on facts about security.⁵⁹

The next necessary element of legal fact-finding (given the framework laid out above) is engaging and deciding among competing claims of fact on the basis of reason, *adjudicating* the facts. This is where the really decisive problems with the ICJ’s work arise. Notice that in the description of the ICJ’s process above, there is no instance of an evidentiary hearing or documentary process in which anyone—a lawyer, a party, the judges themselves—put alleged facts to the test. The ICJ’s factual claims were not the conclusion of a process of scrutiny because there was no such process. Never was evidence taken, nor arguments as to how to interpret factual claims considered. Never were the Secretary-General’s factual claims reviewed, nor the possibility of review considered. Actually, only once in its opinion does the ICJ acknowledge directly the *existence* of a factual dispute (and having done so, the court moves on without comment).⁶⁰ In the end, there was only this: the Secretary-General stated facts, and the ICJ repeated them. I cannot discern a sense in which that repeating could be considered a deliberative act. What we have here, in effect, is an instance of pure executive fact-finding under a presumption of correctness so irrebuttable that the possibility of error and falsehood is never even considered. But that is not the law’s way of coming to its picture of the world. The ICJ’s facts were not adjudicated, but delivered.

There is one last issue concerning the legal character of the ICJ’s findings of fact: the issue of good faith. It is quite difficult to believe that the ICJ’s minimization of Israel’s factual claims could be innocent when the issue is

56. *Report Prepared Pursuant to ES-10/13*, *supra* note 29, ¶ 4.

57. *Id.* ¶ 30.

58. *Id.* Annex 1, ¶ 6.

59. The ICJ’s lone dissenter (and lone American), Judge Thomas Buergenthal, cited these factual shortcomings as the reason for his dissent: “I am compelled to vote against the Court’s findings on the merits because the Court did not have before it the requisite factual bases for its sweeping findings; it should therefore have declined to hear the case.” *Legal Consequences*, 2004 I.C.J. at 240 (Buergenthal, J., dissenting). Judges Pieter Kooijmans and Hisashi Owada sounded similar concerns in their concurrences, *id.* at 223 (separate opinion of Judge Kooijmans); *id.* at 268–69 (separate opinion of Judge Owada), though they still voted with the majority.

60. *Id.* at 182 (majority opinion) (“For its part, Israel has argued that the wall’s sole purpose is to enable it effectively to combat terrorist attacks launched from the West Bank. . . . [and] repeatedly stated that the Barrier is a temporary measure . . .”).

so obvious and the concealment so studied. Bad legal briefs often try to ignore the facts on the other side, of course, but judicial opinions are not supposed to do that precisely because they are not supposed to have a side. The minimization is fashioned just so as to undermine Israel's legal position down the line. (How could the claim that the Barrier was built to guard against terrorism get off the ground when terrorism has disappeared from the law's picture of the world?) And what is most sinister about the whole business is the sense of coordination within the UN's governing structure in the production of the distortion, with the General Assembly teeing up a loaded question for the Secretary-General to furnish with a partial account of facts for the ICJ to endorse without ever admitting the possibility of doubt or question⁶¹—as if pitcher, hitter, and umpire were all working together to produce a home run highlight for the nightly news. Few assertions of power are so profound as the ability of ruling bureaucracies to establish official pictures of the world that everyone knows are false. Now, I earlier counted good faith as a necessary component of the law's factual process because, without it, the appearance of hearing, engaging, and deciding among competing claims of fact on the basis of reason is just a sort of farce—the theater of process one finds in conditions of bias.⁶² If this jurisprudential thought is correct, and if the ICJ did indeed exhibit bad faith with regard to the facts in the Barrier case, that bad faith is a further reason to expel those facts from the law's estate.

My essential factual argument is now in view, but one further point is in order. I have so far been making a jurisprudential argument about the preconditions of *legal* fact-finding, and some readers may think, "Well, perhaps the ICJ's facts were lacking something from a procedural point of view, but they are nonetheless reliable as facts." This is a mistake; the procedural problems just discussed strike at accuracy as well as legality.

As to the security threat facing Israel, it is of course the case that one cannot omit crucial facts without distortion any more than one can misstate them without distortion. (Imagine a complaint alleging tortious battery while failing to mention that the fight was a boxing match and the plaintiff consented.) As to the hard, putatively objective facts about the Barrier and its effects (the quantity of land taken, the number of Palestinians affected, the administrative regime, etc.), the Israeli High Court directly contradicts the ICJ's claims.⁶³ It's not easy to know which court to believe, but the

61. See *supra* text accompanying notes 23–33.

62. See generally HARPER LEE, *TO KILL A MOCKINGBIRD* (1960) (telling the fictional but resonant and revealing story of a jury in the old South that convicts a black man of raping a white woman *after* the rape is proved in court to have been physically impossible). Courtroom process is not self-policing. All it takes to make a farce of it is a dash of hubris, a pinch of self-deception, and plenty of authority.

63. See HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Isr. [2004] IsrSC 58(5) 807, 860, *translated in* 43 I.L.M. 1099, 1127 (2004) (stating that the parts of the Barrier there challenged affect a total of 35,000 Palestinians and take 34,000 dunams (34 square kilometers) of the West Bank). *Beit Sourik* involved only a small portion of the total length of the Barrier, complicating the ICJ/Israeli High Court comparison. But a second major case

Israeli process was more substantial (as discussed below) and the disagreement itself should in any case give one pause. And as to the more subtle issue of the Barrier's "sinuous route" around the settlements, one can agree that that route is suspicious while still appreciating that it is not self-interpreting. Consider: If the Barrier were, as Israel claimed, based on security considerations alone with no territorial ambitions in the mix, would it follow the Green Line? Why? The Green Line is itself just a political line, with no relevance for the sorts of considerations (high ground, line of sight, etc.) at issue in a purely military operation.⁶⁴ Furthermore, even if the Israeli government regarded the settlements as wholly illegal (as I regard them, incidentally), it does not follow from their illegality that the Barrier could not protect them from violence. A government can protect its law-breaking citizens, and if Israel's government believed that the Barrier was necessary for that purpose, it could not reasonably build along the Green Line and leave the settlers out past it to take their chances.⁶⁵ The point here is not to deny that the Barrier was built around the settlements (that much is "apparent from an examination of the map") but just to show that the import of that fact is ambiguous enough that we could wish for a process in which alternative interpretations were brought to light and put to the test—and that the ICJ's leap from suspicion to condemnation was much too hasty. Actually, I suspect a lot of people wonder why Israel didn't just build along the Green Line, and a lot of doubts about the Barrier's legality rest (not unreasonably) on some form of the ICJ's suspicion that building a wall or fence between Israel and the West Bank that puts the settlements on the Israeli side of the line indicates a land grab. But there are good responses to that suspicion, and bad ones as well, and we should not in making a legal judgment as to facts treat the issue as if it were self-evident.

Thus the ICJ's omissions and interpretations and even hard claims of fact come in for challenge and doubt, until at some point the whole factual edifice the ICJ gives us starts to quake. Perhaps the Barrier really is temporary. Perhaps it really is annexationist. Based on what the ICJ gives us, we have finally no idea what the facts about the Barrier are. And that is

on the Barrier came to the Israeli court in 2005, and, seizing the opportunity to lodge its response to the ICJ, the Israeli court there directly challenged the ICJ's hard claims of fact—indeed by orders of magnitude, contending for example that the Barrier took 8300 dunams of agricultural land, rather than 100,000 as the ICJ had claimed—as well as the ICJ's factual omissions, interpretations, and process. H CJ 7957/04 *Mara'abe v. The Prime Minister of Isr.* [2005], translated in 45 I.L.M. 202, 226–32 (2006).

64. The point is stressed in *Beit Sourik*, IsrSC 58(5) at 831, translated in 43 I.L.M. at 1109.

65. The issue came up directly in the Israeli High Court's second major Barrier case in 2005, and the court—reasoning that the law of occupation requires occupiers to protect public safety, and that Israel's Basic Law requires the state to protect its citizens' lives—ruled “that the military commander is authorized to construct a separation fence in the *area* for the purpose of defending the lives and safety of the Israeli settlers in the *area*,” for “[t]he life of a person who is in the *area* illegally is not up for the taking,” and “[i]t is not relevant whatsoever to this conclusion to examine whether this settlement activity conforms to international law or defies it.” *Mara'abe*, 45 I.L.M. at 210.

exactly how we ought to feel, for the law's factual process aims generally at accuracy within the bounds of respect for individual rights, and we should not think we know the truth about a case when a court neglects that process so completely.

2. Principles of Legality and Applying Law

The Barrier case concerns basically three legal issues: annexation, human and humanitarian rights, and security. There is already a substantial body of literature about the ICJ's handling of these issues (particularly the latter two), the bulk of it critical, alleging serious error and bad judgment and, occasionally, cautious suggestions of judicial bias.⁶⁶ I don't wish to repeat all this previous work. My question is different: I would like to know whether, in interpreting and applying the law, the ICJ's work was sufficiently consistent with minimal principles of legality to be considered law properly so called. That there was error and bad judgment does not answer this question; a court's reasoning can go awry without obviating the legal character of its work, or every poor judgment would be an extralegal one. A different type of inquiry is needed. I'll argue that the ICJ's handling of annexation *does* conform to minimal principles of legality and should qualify as law properly so called (although, for reasons explained more fully in Part I.C, I think the conclusion is erroneous—again, not the same thing as nonlegal). The ICJ's handling of human and humanitarian rights should not qualify as law properly so called, although the issue is a close one. And its handling of security fell dramatically short of even minimal principles of legality.

The ICJ's central holding was that constructing the Barrier past the Green Line illegally annexed Palestinian land. The principle at work here is of course the principle of non-annexation—what the ICJ called the “customary rule” of “the inadmissibility of the acquisition of territory by war.”⁶⁷ That way of putting it is vague enough for misunderstanding, however, and a little explanation is in order here regarding both the content and foundations of this principle.

First, what is illegal under the principle is not to *take* territory by force but to *annex* territory by force (or threat of force)—that is, to take territory in perpetuity or under a claim of right, to take sovereignty. Second, although now customary, the prohibition is intricately and extensively grounded in text and treaty. Some explanation is necessary here. There was once something in international law called “the right of conquest”: a prince could expand his kingdom by conquering his neighbor, and not just expand literally, physically, in virtue of having taken the territory, but

66. See, e.g., Symposium, *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory*, 99 AM. J. INT'L L. 1 (2005); Symposium, *Domestic and International Judicial Review of the Construction of the Separation Barrier*, 38 ISR. L. REV. 6 (2005).

67. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 166, 182 (July 9).

legally, in that the conquest was understood to work a transfer of title.⁶⁸ At the heart of twentieth century international public law has been the rejection of the right of conquest—a rejection codified in the UN Charter’s “principle of . . . self-determination of peoples” and prohibition on “the threat or use of force against the territorial integrity or political independence of any state,” and in the several treaties concerning belligerent occupation (in fact, in the very idea of belligerent occupation, for if it were legal to take title by taking territory, then the practical power of controlling another’s territory would not usher in a state of occupation but an expanded kingdom).⁶⁹ But what replaced the right of conquest was not an absolute requirement that no state ever lay an unasked-for hand on another’s territory. Aggressive war to take territory is illegal, but some war (defensive war, for example) is legal, and to take an enemy’s territory in the course of fighting a legal war—to take and to hold it until the aggressor yields and the threat is subdued, as the allies took Germany and Japan in World War II, and as Israel on some views took the West Bank in the 1967 war—is both legal and a very important military goal, provided no assertions of sovereignty are involved.⁷⁰

What the ICJ should have said is that the UN Charter, along with other international instruments, locks into the bedrock of international law the principle that force cannot legally transfer title. That is what it means to

68. See generally SHARON KORMAN, *THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* (1996).

69. U.N. Charter art. 1, para. 2; *id.* art. 2, para. 4; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 47, Aug. 12, 1949, 6 U.S.T 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] (prohibiting “any annexation by the [occupying power] of the whole or part of the occupied territory”); EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 5 (1993) [hereinafter BENVENISTI, *LAW OF OCCUPATION*] (“The foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through the actual or threatened use of force.”); KORMAN, *supra* note 68, at 133 (“Two important developments have taken place in this century which have led to the renunciation or apparent renunciation by states of the right of conquest. The first is the unequivocal adoption by international society, after the First World War, of the principle of self-determination . . . and the second is the legal prohibition of the use of force by states . . .”). Note that Benvenisti locates the idea of self-determination and the renunciation of conquest much earlier than Korman, in the political ideas of the French Revolution and the legal developments of the nineteenth century, rather than in the two world wars. See Eyal Benvenisti, *The Origins of the Concept of Belligerent Occupation*, 26 *LAW & HIST. REV.* 621, 624–25 (2008).

70. See MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER* 222–23 (1994); 2 LASSA OPPENHEIM, *INTERNATIONAL LAW* 432 (Hersch Lauterpacht ed., 7th ed. 1952). There is controversy still about whether a state’s territory remains inviolable once it has engaged in aggressive war and been defeated by other states engaged in lawful war. For a comprehensive review of the arguments and a defense of the claim that international law does and should preserve aggressors’ territory intact (although permitting minor border adjustments for the sake of neighbors’ security), see KORMAN, *supra* note 68, at 199–234. As for the controversy about whether Israel’s conduct in 1967 was defensive, see YORAM DINSTEN, *WAR, AGGRESSION AND SELF-DEFENCE* 180–81 (1988) and THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 101–05 (2002).

say, as is certainly true, that Israel cannot use the Barrier to annex Palestinian territory in the West Bank. But having stated that legal rule, we must apply it, and there we come to a problem: Israel did not assert title or sovereignty over the parts of the West Bank to the west of the Barrier. On the contrary, Israel claimed (as the ICJ notes) that “the Barrier is a temporary measure”;⁷¹ that its “sole purpose is to enable [Israel] effectively to combat terrorist attacks”;⁷² that it “does not annex territories to the State of Israel”;⁷³ that it “is not a border and has no political significance”;⁷⁴ that it “does not change the legal status of the territory in any way”;⁷⁵ and that Israel stands “ready and able, at tremendous cost, to adjust or dismantle [it] if so required as part of a political settlement.”⁷⁶ With no claim of sovereignty, the ICJ needs to provide some sort of argument for why the Barrier amounts to an annexation anyway. And it does so—actually it provides three such arguments.

The first argument is basically a feint: at various points, the court suggests that the Occupation itself, Israel’s presence in the West Bank altogether, might be illegal.⁷⁷ The details of this position aren’t clear. One cannot tell whether the ICJ is implying that the Occupation was illegal when it began in 1967, or morphed into an annexation due to its singular length (forty-three years and counting!), or became illegal due to its connection with other annexationist conduct, such as the settlements.⁷⁸ One cannot tell, in fact, whether the ICJ really means the point at all, since it never goes quite so far as to state it directly. Under these circumstances, I think we can pass over this argument.

The second argument also does not receive the court’s full attention, though it is more firmly expressed (and in my view, quite a good argument): “The Court considers that the construction of the wall and its associated régime create a ‘fait accompli’ on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to de facto annexation.”⁷⁹ This is essentially an effects-based test for annexation; the

71. *Legal Consequences*, 2004 I.C.J. at 182.

72. *Id.*

73. *Id.* (quoting U.N. SCOR, 4841st mtg., *supra* note 24, at 10 (statement of Israel)).

74. *Id.* (quoting U.N. GAOR ES-10, 23d mtg., *supra* note 32, at 6 (statement of Israel)).

75. *Id.*

76. *Id.* (quoting U.N. SCOR, 4841st mtg., *supra* note 24, at 10 (statement of Israel)).

77. *See, e.g., id.* In fact, the ICJ’s Egyptian judge, Nabil Elaraby, said in a newspaper interview just before joining the court, “Israel is occupying Palestinian territory, and the occupation itself is against international law.” Aziza Sami, *Nabil Elaraby: A Law for All Nations*, AL-AHRAM WKLY. ONLINE, Aug. 16–22, 2001, <http://weekly.ahram.org.eg/2001/547/profile.htm>. Israel lodged a formal challenge with the ICJ to Elaraby’s participation in the case, but the court voted to keep him on board, thirteen to one. *See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Req. for Advisory Op.) (Order of Jan. 30, 2004) 5, available at <http://www.icj-cij.org/docket/files/131/1533.pdf>.

78. For general background on these issues, see THE ISRAEL-ARAB READER, *supra* note 8.

79. *Legal Consequences*, 2004 I.C.J. at 184.

suggestion is that the Barrier might change facts on the ground (demographics, for example, as Israelis move into and Palestinians move out of the West Bank land on the Israeli side of the Barrier) in such a way as to make a restoration of the Green Line untenable in the future. Facts on the ground in the region have crept into the law before—as, for example, with the Green Line itself, which was established on condition that it not “prejudice . . . future territorial settlements or boundary lines or . . . claims of either Party”⁸⁰ but which the ICJ vociferously treats as the legal limit of Israel’s territory. (The court shows no signs of seeing the irony.) But again, as a matter of assessing the ICJ’s work as the work of law, I think we must pass over this argument. Important questions like, “Is an effects-based approach to annexation correct?” and “Can the Barrier be enjoined on the grounds that it ‘could well’ become permanent?” received no attention. The ICJ’s whole focus was on the third argument.

The ICJ’s third and chief argument for thinking the Barrier constitutes an annexation has everything to do with the settlements. Actually, so much of the opinion concerns the settlements that the Barrier can start to seem like an afterthought. Page after page argues that the settlements violate the anti-annexation principle, various Security Council resolutions, and the Fourth Geneva Convention.⁸¹ The opinion climaxes with the sentence, “The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.”⁸² Immediately after this sentence, with nary an intervening word, we get the additional conclusion that the Barrier is also an illegal annexation.⁸³ But why isn’t that a *non sequitur*? In a key passage, the court tells us that “the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements,”⁸⁴ but what exactly does that mean? Are the settlements serving here as circumstantial evidence that the Barrier has an annexationist purpose? Or is it that the settlements are based on an annexationist policy in which the Barrier, in some sense, partakes? Or is the notion that the settlements

80. General Armistice Agreement, Isr.-Jordan, art. 6.9, Apr. 3, 1949, 42 U.N.T.S. 303.

81. The key Fourth Geneva provision is article 49, paragraph 6: “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.” Geneva Convention IV, *supra* note 69, art. 49, para. 6. Since 1971, Israel’s official position has been that the Fourth Geneva Convention does not apply *de jure* to the Occupied Territory (because the territory did not belong to a High Contracting Party prior to the occupation), but that Israel will apply the Convention’s humanitarian provisions *de facto*. See BENVENISTI, LAW OF OCCUPATION, *supra* note 69, at 109–12. Israel’s Supreme Court has for decades responded by holding the executive to its word on the Convention’s humanitarian provisions while avoiding the larger issue. See, e.g., HCJ 2056/04 Beit Sourik Vill. Council v. Gov’t of Isr. [2004] IsrSC 58(5) 807, 827, translated in 43 I.L.M. 1099, 1107–08 (2004). The UN Security Council, meanwhile, has stated unequivocally that the Convention does apply and that the settlements are illegal. S.C. Res. 465, U.N. Doc. S/RES/465 (Mar. 1, 1980); S.C. Res. 452, U.N. Doc. S/RES/452 (July 20, 1979); S.C. Res. 446, U.N. Doc. S/RES/446 (Mar. 22, 1979).

82. *Legal Consequences*, 2004 I.C.J. at 184.

83. *Id.*

84. *Id.*

constitute an annexation that the Barrier aids and abets to the extent it protects them?

I don't think the ICJ gives us the material to pin it down on this point, and that is a failure of rigor. But I take it that the basic thought is clear enough: the ICJ holds that the Barrier is illegal because the settlements are illegal, that *it* constitutes an annexation because it contributes to them and *they* constitute an annexation. Certainly one could raise objections to this argument. I will disagree with it later on—not because I think the settlements are legal (I do not), but because I don't think they are the main issue in evaluating the Barrier.⁸⁵ And one could wish for more rigor. But vagueness and even error notwithstanding, I do not think it can be maintained that this argument lacks the character of law. The holding concerning the settlements is reasoned, the sources of law legitimate. The connection between the settlements and the Barrier is legally vague, but not outrageous, as there is certainly a factual connection between the two. My question was never whether the ICJ's work is perfect, but whether it has an authentically legal character. On that level, I think the ICJ's work on this point succeeds.

We turn now, as did the ICJ, to the issue of human and humanitarian rights.⁸⁶ The ICJ begins its analysis by listing (depending on how one counts) eleven legal instruments, together with thirty provisions from those instruments, that in the court's view apply to the Barrier situation.⁸⁷ It then recounts some facts provided by the human rights rapporteurs on the hardships caused by the Barrier, and lists the rights therefore violated: that "private property" not be "confiscated" during occupation;⁸⁸ that "requisitions in kind . . . not be demanded" (except "for the needs of the army of occupation" and then be recompensed);⁸⁹ that "real or personal property" not be destroyed ("except where such destruction is rendered absolutely necessary by military operations");⁹⁰ that "everyone" has the right to "liberty of movement";⁹¹ and that "everyone" has the right to

85. See *infra* Part I.C.

86. Humanitarian law and human rights law are ordinarily independent bodies of law, the first regulating an army's manner of conducting war and treatment of foreign nationals during war (chiefly via the Hague Regulations and Geneva Conventions and Protocols) and the second regulating a government's treatment of everyone subject to its authority, including its own citizens (via a variety of other instruments and principles). The ICJ's decision to apply the two at the same time has sparked some controversy. See, e.g., Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119 (2005).

87. *Legal Consequences*, 2004 I.C.J. at 171–89.

88. Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 46, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Convention IV]; *Legal Consequences*, 2004 I.C.J. at 189.

89. Hague Convention IV, *supra* note 88, art. 52; *Legal Consequences*, 2004 I.C.J. at 189.

90. Geneva Convention IV, *supra* note 69, art. 53; *Legal Consequences*, 2004 I.C.J. at 189.

91. International Covenant on Civil and Political Rights art. 12, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171; *Legal Consequences*, 2004 I.C.J. at 189–92.

“work,” “the enjoyment of just and favourable conditions of work,” “an adequate standard of living,” “the enjoyment of the highest attainable standard of physical and mental health,” and “education.”⁹² Some of those provisions contain military qualifications (“except where such destruction is rendered absolutely necessary,” and the like), and the ICJ closes by stating that Israel’s security claims with regard to those provisions fail.⁹³

I mentioned earlier that error and bad judgment are not the sort of thing that ordinarily cost a court’s opinion the character of law. But while a court’s reasoning can go seriously awry without obviating that character, I take it that a failure to reason at all would obviate that character—for so long as our conception of the law has something to do with the exercise of public reason,⁹⁴ and the issue in view is not trivial or obvious, there must be an answer to the question: “What is the *ground* of the court’s decision?” “What is the court’s *argument*?” If, for example, a case presented the question, “May Congress employ the commerce power to establish a national definition of marriage overriding all contrary state definitions?” surely there would be a problem from the perspective of law as law with a one-word opinion stating simply “Yes” or “No.” The ICJ’s human and humanitarian rights analysis is not so egregious as that. But I believe it exhibits an elaborate form of the same problem, of a failure to enter the space of “giving and asking for reasons.”⁹⁵

It’s not easy to prove an absence. But one can ask the question this way: the ICJ’s discussion of human and humanitarian rights consists basically of two lists, one with the laws applicable, the other with the laws violated (as a matter of fact, the two read like lists in prose).⁹⁶ What bridges the gap between those two lists? What is the connective tissue between them? The answer, with respect to the confiscation, requisition, and destruction of private property (the humanitarian provisions), is: nothing. The court’s analysis on that point is a single sentence stating without elaboration that “[f]rom the information submitted . . . it appears that the construction of the

92. Convention on the Rights of the Child arts. 24, 27, 28, Nov. 20, 1989, 28 I.L.M. 1448; International Covenant on Economic, Social and Cultural Rights arts. 6–7, 11–14, Dec. 16, 1966, 993 U.N.T.S. 3; *Legal Consequences*, 2004 I.C.J. at 189–92. The ICJ also indicates that the Barrier might violate Palestinians’ right of access to holy places. *Id.* at 188–89.

93. *Legal Consequences*, 2004 I.C.J. at 187, 192–94 (quoting Geneva Convention IV, *supra* note 69, art. 53).

94. OWEN FISS, *THE LAW AS IT COULD BE*, at ix (2003) (“Law is an expression of public reason Judges are instruments of the law and embody that reason.”); JOHN RAWLS, *The Idea of Public Reason Revisited*, in *THE LAW OF PEOPLES* 129, 131–34 (1999) (“The idea of public reason, as I understand it, belongs to a conception of a well-ordered constitutional democratic society. . . . [T]he idea of public reason applies more strictly to judges than to others . . .”).

95. JÜRGEN HABERMAS, *From Kant to Hegel: On Robert Brandom’s Pragmatic Philosophy of Language*, in *TRUTH AND JUSTIFICATION* 131, 132 (Barbara Fultner ed. & trans., 2003) (“We are the beings whose essence it is to participate in the practice of ‘giving and asking for reasons.’” (quoting ROBERT B. BRANDOM, *MAKING IT EXPLICIT: REASONING, REPRESENTING, AND DISCURSIVE COMMITMENT* 5 (1994))).

96. See *supra* notes 87–93 and accompanying text.

wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention.”⁹⁷ What are those conditions? Why does the Barrier contravene them? There is simply silence.

Now, turning to the human rights provisions (freedom of movement, the right to work, etc.), the court does better. It prefaces its conclusions with some facts, at least, mentioning access gates with “restricted” opening hours, “serious repercussions for agricultural production,” “difficulties . . . regarding access to health services, educational establishments and primary sources of water,” and “businesses . . . shut down.”⁹⁸ But once these facts are recounted, the legal conclusion (that the Barrier violates the laundry list of rights the ICJ says it violates) is simply announced.⁹⁹ It is as though the legal conclusion were just immanent in the facts, such that merely to state the facts were to prove the conclusion—as if no actual *application* of law to facts were necessary at all.

A central issue, of course, is how security considerations might counterbalance these rights. The court takes this issue up only after stating which rights were violated (which seems odd), and indicates that, absent some express textual provision to the contrary, the rights in question are categorical (which seems unsound).¹⁰⁰ But that aside, we see here again the essential problem: “[T]he Court is not convinced,” we read, “that the destructions carried out . . . were rendered absolutely necessary by military operations.”¹⁰¹ Fine, but why? What made them unnecessary and what would have made them necessary? Not a word is said. “[T]he Court . . . is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives.”¹⁰² Again, why? How else might those objectives have been attained—or were they illegitimate objectives? Now I have no doubt that considered responses to these questions could be offered, but the point is that none *were* offered. In an ordinary legal opinion, stating the relevant law and facts begins the work, and a conclusion ends it, but the real action comes in the middle, when law and facts are interpreted, exegized together until at some point they connect and give a spark. In the ICJ’s opinion, that applicative center is gone; a circle of legal architecture stands ringed around nothing at all, and the conclusions, deprived of resultancy, rest only on authority.

The ICJ is not exclusively to blame here. Human rights law often involves such high degrees of abstraction that it is difficult to know how to apply it in a legally professional way (although the same cannot be said of

97. *Legal Consequences*, 2004 I.C.J. at 189.

98. *Id.* at 190–91.

99. *Id.* at 191–92.

100. *Id.* at 192–93.

101. *Id.* at 192.

102. *Id.* at 193.

humanitarian law).¹⁰³ Conditions of application, definitions, precedents from courts, constraining provisions from legislatures—the whole clickety-clack of legal technique—seem to fall away, until all that’s left is a list of positively valorized abstract nouns, as if one took the Declaration of Independence’s stirring invocation of “life, liberty, and the pursuit of happiness” (rather than the U.S. Constitution’s relatively specific imperatives) and said, “This is law. Now go apply it.” If human rights norms were rights-limiting rather than rights-expanding, we would not hesitate to regard them as void for vagueness. And perhaps the great, cloudy sweep of these abstractions is why one observes a certain carelessness in the way they’re handled even by their advocates. In the Barrier case, for example, it is striking to observe that some of the provisions on the ICJ’s “laws applicable” list disappear without explanation from the “laws violated” list and then reappear in the “security qualifications” list, as if the court kept losing track of which of the various overlapping provisions were in view (and of course, it’s not exactly normal to analyze thirty provisions of law at once).¹⁰⁴ If this is law, it is law with no tightness in the string at all. One can support human rights and human rights law, and reject rigid forms of relativism and sovereigntism root and branch, while still finding something absurd in the vague lists of pregnant abstractions that mark the human rights project at this time.¹⁰⁵

At this point, finally, fifty-nine pages into its sixty-eight-page opinion, the ICJ turns to Israel’s central claim: that it built the Barrier to defend itself against terrorism.¹⁰⁶ And before even taking up the arguments here, I would like to point out a problem from the perspective of law as law with waiting so long to give voice to one side’s case. There is of course the issue of minimization and bias; this sort of delay looks bad, and probably for good reason. But deeper than that, delay of this sort amounts to skirting the basic adjudicative problem of the case. At the very heart of the Barrier case—of the Israeli/Palestinian conflict, in fact—is the clash between the Palestinian claim to territory and the Israeli claim to security.¹⁰⁷ Just as the

103. See Curtis A. Bradley & Jack L. Goldsmith, Pinochet *and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2177, 2179 (1999) (remarking on the “profound uncertainty regarding the actual content of human rights norms,” while acknowledging that human rights law’s “aims . . . are often desirable” and “hard to disagree with . . . in the abstract”).

104. See *supra* notes 87–93, 100–02 and accompanying text.

105. In making this point, I wish to sound one note of caution: aspirational law expressed in terms of general principles is more common in Europe than in the United States. There seems to be a basic division over whether to express the law as principles, leaving it to the courts to derive rules in the course of application, or to express the law as rules and mechanisms, leaving it to the courts in application to identify the underlying principles. The first words of Germany’s constitution, for example, are, “Human dignity shall be inviolable.” GRUNDGESETZ [GG] [Constitution] art. 1(1) (F.R.G.). This is considered an intelligible statement of law. Perhaps, then, the moral abstraction of human rights discourse would not seem so strange to a European lawyer.

106. *Legal Consequences*, 2004 I.C.J. at 194.

107. See generally THE ISRAEL-ARAB READER, *supra* note 8; see also Israeli Statement to ICJ, *supra* note 10; Palestinian Statement to ICJ, *supra* note 8.

settlements are the context for the Palestinians' position, so terrorism is the context for Israel's. Just as the Barrier's route around the settlements is the best evidence for the Palestinian position, so the Barrier's timing, in the midst of the Second Intifada, is the best evidence for Israel's. Much of the complexity of the case comes from these two warring frames of reference, and a decent opinion on the lawfulness of the Barrier would *start* with that clash and take up the particular legal issues in light of it. That is to say, the structure of an opinion matters to its substance; cases present certain root adjudicative tasks that courts cannot evade consistently with performing their office as courts. To defer so much as addressing Israel's position until after the annexation and human and humanitarian rights analyses were concluded, in the mode of dispatching one last objection, was to shirk the business of adjudication itself.

Doctrinally, Israel's position rests in the main on Article 51 of the UN Charter: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations" ¹⁰⁸ The ICJ's response is simple and important—and not only for the Barrier case: "Article 51 of the Charter," it writes, "thus recognizes the existence of an inherent right of self-defence *in the case of armed attack by one State against another State*. However, Israel does not claim that the attacks against it are imputable to a foreign State. . . . Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case." ¹⁰⁹ In other words, there is no right of self-defense against non-state actors.

This position (which has a history in the ICJ) ¹¹⁰ is profoundly misguided. It does not make sense textually; Article 51 speaks only of "armed attack" not "armed attack *by a state*" (the "thus" in the passage just quoted appears to be entirely spurious). ¹¹¹ It does not make sense conceptually, since the root of the right to self-defense is the fact of an attack, not the source of an attack. ¹¹² (Could a state immediately threatened by a large *private* military force at its borders truly be required to lay supine?) It does not make sense

108. U.N. Charter art. 51.

109. *Legal Consequences*, 2004 I.C.J. at 194 (emphasis added).

110. The ICJ has, in a series of cases both before and after *Legal Consequences*, staked out a dramatically limited conception of the Article 51 right of national self-defense. See *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168 (Dec. 19); *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6); *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). There is a vast body of literature criticizing the ICJ on this point. Thomas Franck is particularly eloquent: "The consequence of this substantive rule [in the *Nicaragua* decision] appears to be that fire may be fought with water, but not with fire." Thomas M. Franck, *Some Observations on the ICJ's Procedural and Substantive Innovations*, 81 AM. J. INT'L L. 116, 120 (1987).

111. See Thomas M. Franck, Editorial Comment, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 840 (2001) ("[T]he language of Article 51 . . . in authorizing a victim state to act in self-defense, does not limit this 'inherent' right to attacks by another state.").

112. See *id.* ("[T]he right is expressly accorded in response to 'an armed attack' and not to any particular kind of attacker.").

historically, at least on a long view of history, since state-based political organization is just one of the ways communities have arranged themselves—a way some think is fading even now. And it does not make sense given current international conditions, with the rise of terrorist groups and other powerful non-state actors. International law no less than domestic law must outgrow the kind of willful formalism that leads a court to insist that the right of self-defense *just is* state-to-state, forever, no matter what the world is doing in the meantime.

Yet for all that, what we have here is so far only an egregious misjudgment, and I would not say it lacks the character of law but for two further factors.

First is internal inconsistency. Throughout this analysis, we have treated the occupied territory as a quasi-state and afforded it the legal incidents of statehood. Without that premise, it would make no sense to think of the occupied territory as *occupied*, as belonging in any legal sense to the Palestinian people (a state cannot occupy itself), and no sense to ask whether the Barrier annexes it (a state cannot annex itself). But if Palestine is a state for purposes of annexation, it must also be a state for purposes of armed attack. A court cannot say to defendant John Doe, “You owe the plaintiff damages, because the contract is valid,” and to plaintiff Richard Roe, “You do not owe goods, because the contract is invalid,” with the minimum of good faith and logic necessary for law to be law.

Second are two Security Council resolutions passed at the urging of the United States in the immediate aftermath of September 11th.¹¹³ Resolutions 1368 and 1373 both contain the verbal formula—the identification of “threats to international peace and security”—that puts the Security Council’s lawmaking authority under the Charter system at its highest pitch;¹¹⁴ Resolution 1373 in particular invokes the part of the Charter, Chapter 7, that endows the Security Council with the authority to act in a fully imperative, legislative mode even for nonconsenting member states.¹¹⁵ The resolutions, in other words, are as much like binding legislation as international law gets, and certainly constitute law for the international court. Having thus taken the mantle of lawmaking authority, the Council in both resolutions recognizes that the actions of nonstate terrorist organizations trigger “the inherent right of individual or collective self-defence as recognized by the Charter.”¹¹⁶ How is it then that the ICJ could pronounce something exactly contrary in stating that the right of self-

113. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001); S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

114. S.C. Res. 1373, *supra* note 113, ¶ 5; S.C. Res. 1368, *supra* note 113, ¶ 1.

115. S.C. Res. 1373, *supra* note 113, ¶ 10 (stating that the Security Council is herein “[a]cting under Chapter VII of the Charter of the United Nations” and issuing decisions as to what “all States *shall*” do (emphasis added)).

116. *Id.* ¶ 4; *see also* S.C. Res. 1368, *supra* note 113, ¶ 3. Franck too notes the distinctive, Chapter VII authority connected to Resolutions 1368 and 1373, and also argues that they dictate—indeed, that “[i]t is inconceivable” that they would not dictate—an Article 51 right of self-defense against nonstate actors. Franck, *supra* note 111, at 840.

defense applies only between states? There's really no answer to that question. The ICJ mentions the resolutions, but says that since "the threat which [Israel] regards as justifying the construction of the wall originates within" the occupied territory, where Israel "exercises control," the situation is "different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001)."¹¹⁷ But even if true (which is doubtful), that response does nothing to address the contradiction between the ICJ's view of Article 51 and the Security Council's ruling on it.

The jurisprudential point here is one Lon Fuller made in his now famous debate with H. L. A. Hart. Fuller was advancing the position that certain types of irrational or morally unsupportable conduct that purport to be law cannot be law properly so called.¹¹⁸ Many of his arguments concerned acts of a legislative or executive character (such as the famous inconsistent monarch), but he also spoke quite passionately to the work of courts, and gave a real-life example: there was a German soldier in the Nazi era, Fuller wrote, who told his wife in their home that he wished the attempt to assassinate Hitler had succeeded, and who, after she turned him in, was prosecuted under statutes requiring death or imprisonment for anyone who "publicly seeks to injure or destroy the will of the German people," or "publicly makes spiteful or provocative statements directed against . . . the leading personalities of the [German] nation" or who makes such remarks privately but "realized or should have realized they would reach the public."¹¹⁹ These are odious statutes, but their moral failings are a legislative issue, and not Fuller's point. His concern was the way in which the courts applied the statutes, and, after noting a variety of manipulations in this regard, what for him passed all bounds from the perspective of law as law was the court's treatment of the word "publicly." With respect to the first statute, the limitation was "generally disregarded."¹²⁰ With respect to the second, the court declared that the wife's act of informing on her husband made his remarks public—in which case, Fuller pointed out, "there is no such thing as a private utterance under this statute."¹²¹ Fuller concludes, "When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce . . . it is not hard for me, at least, to deny to it the name of law."¹²²

117. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 194 (July 9).

118. Law properly so called—or what I will later term "law's self-constituting values"—was, in my view, the subject of the Hart/Fuller debate. See *infra* notes 229–38 and accompanying text.

119. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 653–54 (1958) (translating Law of Aug. 17, 1938, RGBI. II 1939 at 1456; Law of Dec. 20, 1934, RGBI. I at 1269).

120. *Id.* at 654.

121. *Id.* at 655.

122. *Id.* at 660. Note the phrase, "calling itself law"—strongly but apparently unintentionally reminiscent of John Austin's phrase, "law properly so called." AUSTIN, *supra* note 1, at 10.

A “general disregard of the terms of the laws they purport to enforce” describes exactly, sadly, the ICJ’s handling of the right of self-defense, and Fuller’s conclusion—which is really in equal measure about the logic of an analysis and about the right way for lawyers to respond to egregious transgressions within their community—applies equally here.

B. *The Israeli High Court of Justice in the Barrier Case*

Let’s begin this section as we did the last: by asking whether the Barrier litigation’s institutional setting was imbalanced, and what it means for law as law if so. The run-up to the case was certainly less partisan in Israel than it had been in the ICJ. The injured Palestinians sued; the court seemed more to be looking over the executive’s shoulder than to be acting in concert with other branches of government to legitimate a common cause. And the tone of the court’s opinion was more balanced than the ICJ’s. But a closer look complicates the picture, for balanced or not in tone, one cannot read the Israeli court’s opinion without knowing past all doubt that the court *is* Israeli—that its judges are identifying members of Israeli society, alarmed and angry at Palestinian violence and united in certain assumptions about the things to which their country is entitled and to which the Palestinians are not entitled. Actually, watching the court in action as it interacts with the Israeli military and other segments of Israeli society in the case, one gets the distinct feeling of overhearing a conversation among Israel’s small elite about how to handle the Palestinian issue—with some voices more stern and others less so, but all using an Israeli “we” and a Palestinian “they.” “We are members of Israeli society,” Barak writes.¹²³ “Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror.”¹²⁴

How should a Palestinian living in the West Bank feel about those words? I don’t mean the question rhetorically: what is a reasonable stance toward a litigation setting that is *of* one of the two sides—either for a person who is of the other side or for a person who aspires to shed his identity enough to want most that law be law? My answer here is a version of the one I gave before with the ICJ: that there are serious problems of neutrality in real courts everywhere, and certainly in the international legal system we now occupy; that these problems run far deeper than we pretend, with forces more powerful than most anything else in the social world, forces of identity, ideology, and passion, beating on the law’s door; but that we should nonetheless be satisfied, and any sense of offense assuaged, if the question asked is answered in accord with legal principles.¹²⁵ If the question is also answered correctly, we should be quite satisfied indeed.

123. HCJ 2056/04 Beit Sourik Vill. Council v. Gov’t of Isr. [2004] IsrSC 58(5) 807, 861, translated in 43 I.L.M. 1099, 1128 (2004).

124. *Id.*

125. See *supra* pp. 2456–57, 2463–64.

1. Principles of Legality and Finding Facts

The Israeli High Court's fact-finding was, in my view, the pinnacle of the court's work in the Barrier case.¹²⁶ To begin with, the factual process was quite rigorous. It was multiply adversary, involving not only the West Bank petitioners and military defendants but also, importantly, the "Council for Peace and Security"—a society of Israeli reserve officers whose amicus briefs and affidavits argued that many of the changes sought by the Palestinian litigants would also make the Barrier more effective from a security point of view.¹²⁷ The court held seven factually intensive hearings over the course of three or four months, and also received a great variety of documentary evidence, including, at the court's request, detailed relief models and aerial photographs showing the Barrier's route and possible alternative routes.¹²⁸ (I remember vividly walking into Barak's chambers on my first day of work and looking with astonishment at all the maps and models.) The court also received statements from officers and workers who handled the details of the Barrier's construction.

A natural effect of this sort of process was a certain factual particularity in the court's reasoning. What was challenged in the case in Israel, litigiously speaking, was not the Barrier as a general policy but eight orders from the Israeli military for land seizures necessary to the Barrier's construction.¹²⁹ The court took up those orders one at a time, and much of its fact-finding and legal reasoning was done, not at the outset and about the Barrier as a whole, but about the particular conditions connected to each order—about this particular stretch where the Barrier shoots into Palestinian land to seize a useful hill, or that stretch where the Barrier comes right up next to some Palestinian homes, etc.¹³⁰ The particularity makes it difficult to generalize about the Israeli court's findings. Nonetheless, three basic factual positions come out clearly enough and are indispensable to understanding the case.

First, the court found that the Barrier's purpose was to protect Israeli security rather than "to draw a political border."¹³¹ Indeed, after the court sets out its legal position—that only security considerations may lawfully motivate either the decision to construct the Barrier or the decision as to its route; that no desire to redraw the border between Israel and Palestine may be part of the mix—the annexation issue is treated almost entirely as an issue of fact. And what facts were they that moved the court? That the

126. When Israel's Supreme Court sits as the High Court of Justice, it reviews administrative action directly and engages in fact-finding directly; there is no trial court. Also, like courts in the continental legal tradition, the Israeli court is an active participant in gathering facts rather than only an umpire of the parties' fact gathering.

127. *Beit Sourik*, IsrSC 58(5) at 823–25, translated in 43 I.L.M. at 1105–06. Amici participation is unusual in the Israeli High Court, but it was important in the Barrier case.

128. *Id.* at 823–27, translated in 43 I.L.M. at 1105–07.

129. *Id.* at 819–20, translated in 43 I.L.M. at 1102–03.

130. *Id.* at 846–60, translated in 43 I.L.M. at 1118–27.

131. *Id.* at 829, translated in 43 I.L.M. at 1108.

military commander could justify the Barrier's route in detail on the basis of security considerations alone; that no evidence was given to doubt his claim of a non-annexationist purpose; that the petitioners' Green Line argument ("if the fence was primarily motivated by security considerations, it would be constructed on the 'Green Line'") could not be right because "it is the security perspective—and not the political one—which must examine the route . . . without regard for the location of the Green Line"; and that the Council for Peace and Security, despite opposing the Barrier's route, never suggested the route was motivated by annexation and never recommended following the Green Line.¹³² The first of those reasons, I suspect, was the key. When the court scrutinized the Barrier's justification, piece by piece, step by step along the forty kilometers challenged in the case, two considerations kept coming up: topographical control and the need for a "security zone" between the Barrier and nearby Jewish areas (thus allowing response time should the Barrier be infiltrated). The court, as we will see, did not approve giving these considerations as much priority as the policymakers gave them, but it regarded them as "security considerations *par excellence*."¹³³

Second, the court found that the Barrier imposed grave burdens on the individual Palestinians and communities of Palestinians it touched. A good example, albeit one featuring the Barrier at its most severe, is the court's discussion of the village that gave the case its name, the village of Beit Sourik:

500 dunams [0.5 square kilometers] of the lands of the village of Beit Sourik will be directly damaged by the positioning of the obstacle. 6000 additional dunams [6 square kilometers] will remain beyond it (5000 dunams of which are cultivated land), including three greenhouses. Ten thousand trees will be uprooted and the inhabitants of the villages will be cut off from 25,000 . . . olive trees, 25,000 fruit trees and 5400 fig trees, as well as from many other agricultural crops.¹³⁴

The court insists on a broad understanding of this injury:

These numbers do not capture the severity of the damage. We must take into consideration the total consequences of the obstacle for the way of life in this area. The original route as determined in the order leaves the village of Beit Sourik bordered tightly by the obstacle on its west, south, and east sides. This is a veritable chokehold, which will severely stifle daily life.¹³⁵

Third, throughout the opinion is a sense of the harm done by Palestinian terrorism, a sense that takes voice in the court's opening lament: "[A] short time after the failure of the Camp David talks, the Israeli-Palestinian conflict reached new heights of violence."¹³⁶ In September 2000, "the

132. *Id.* at 831, translated in 43 I.L.M. at 1109.

133. *Id.* at 830, translated in 43 I.L.M. at 1109.

134. *Id.* at 855, translated in 43 I.L.M. at 1124.

135. *Id.*

136. *Id.* at 814, translated in 43 I.L.M. at 1099.

Palestinian side began a campaign of terror," which, by April 2004, included 780 attacks within Israel ("against citizens and soldiers, men and women, elderly and infants, regular citizens and public figures"), 8200 attacks in the West Bank, 900 Israeli dead, and 6000 Israeli injured ("some with serious wounds that have left them severely handicapped").¹³⁷ There are "many dead and wounded on the Palestinian side as well. Bereavement and pain wash over us."¹³⁸

From the standpoint of law properly so called, I can find nothing to fault and much to praise here. The material claims of fact were heard, scrutinized with care and in light of evidence, and adjudicated on the basis of articulated reasons. As to the Barrier's purpose, the conclusion may or may not be right—there's no way finally to know whether someone involved in authorizing the Barrier had annexation in mind—but it is certainly grounded, and substantiated enough that I think we should regard it as probable, though by no means certain. And as to the injuries in view on both the Palestinian and Israeli sides, the court displays both honesty and nuance—an important matter, because an obtuse view of the nature of the harm in stating the facts can easily distort the evaluation of the harm in applying the law. Part of the reason adjudication is an empathic and not merely an intellectual activity is that a court must understand what is at stake in a case to judge it well, and that understanding comes across, typically, in the description and characterization of facts.¹³⁹ Here, on the Israeli side, terrorism seems terrifying and abhorrent, as it should. On the Palestinian side, the court recognizes that what is at stake is not just property and convenience (which can be compensated and managed, and might seem trivial when weighed against Israeli lives) but something larger—that the sedimentary accumulation of individually minor injuries can collectively undermine a way of life. Finally, by setting up the facts in this way, the court engages without evasion in what I earlier called the "root adjudicative task" of the Barrier case, addressing itself right from the start to the clash between the Israeli claim to security and the Palestinian claim to territory and rights.¹⁴⁰ We have here an instance of international law in action that fully deserves the appellation "law."

2. Principles of Legality and Applying Law

The picture is darker when we turn to the Israeli court's legal analysis. And here, I would like to drop the practice (conceit, really) of speaking of

137. *Id.* at 814–15, translated in 43 I.L.M. at 1099.

138. *Id.* at 815, translated in 43 I.L.M. at 1100.

139. It's a little unclear when one crosses the line from taking note of bare facts about the world (e.g., "25,000 . . . olive trees, 25,000 fruit trees," *id.* at 855, translated in 43 I.L.M. at 1124) to characterizing those facts in a way that comes closer to applying law (e.g., "which will severely stifle daily life," *id.*). But I take it that both are part of the enterprise of description, of getting a good picture of the world inside the law, and so both fall generally under the category of fact.

140. *See supra* text accompanying notes 106–07.

the Israeli “court,” for the Barrier opinion, although the product of a three-justice panel, was less the work of a committee than the work of an individual—Aharon Barak—and my chief criticism of the opinion is that it bears the mark of his subjectivity too much.

Barak is a world-historic figure in law in our time; that more American lawyers don’t know of him testifies to an unfortunate provincialism in our field. Chief justice from 1995 through 2006, Barak is like John Marshall in that he created the institution of judicial review in Israel (and like John Marshall in that the move was not obviously authorized).¹⁴¹ He is like Earl Warren in that he led a rights revolution based on a powerful and proactive judiciary.¹⁴² And he is like Richard Posner in that he has been preternaturally prolific as a scholar both before and while being a judge, filling shelves with books and articles that touch almost every field of Israeli law.¹⁴³ His defenders say he is brilliant, and that he has done more than any other person in Israel to protect justice and individual rights against the pressures of violent conflict with the Palestinians and the religious conservatism of Israel’s powerful orthodox community.¹⁴⁴ His critics say he is very bright, but only appears brilliant, and blind to his own limitations has made Israel’s judiciary a society of philosopher-kings who mistake their own Left-liberal politics for justice and impose them against the will of a democratic people.¹⁴⁵ We know this debate from our own country, and it’s not necessary to get into it here, except to say that Barak was quite powerful for a long time—attorney general from 1975 to 1978, then associate justice on the Supreme Court until 1995, then chief—and in my view he became comfortable with the authority of his own sense of law and justice.

Barak’s legal analysis has two parts: one concerned with annexation (whether the military commander has, in Barak’s framework, the “authority to construct the fence” in the West Bank at all), and the other with humanitarian rights (whether the “route chosen for construction of the separation fence” within the West Bank imposes too heavily on the local

141. See generally Hillel Neuer, *Aharon Barak’s Revolution*, AZURE (Isr.), Winter 5758/1998, at 13.

142. *Id.*

143. His work in English or translated to English while serving as a justice includes, in addition to various articles, three books: AHARON BARAK, *JUDICIAL DISCRETION* (Yadin Kaufmann trans., 1989); AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* (Sari Bashi trans., 2005); AHARON BARAK, *THE JUDGE IN A DEMOCRACY* (2006) [hereinafter BARAK, *THE JUDGE IN A DEMOCRACY*]. Most of his scholarship is only in Hebrew.

144. See, e.g., Owen Fiss, *Law Is Everywhere*, 117 YALE L.J. 256 (2007) (an article-length, self-styled “tribute” to Barak).

145. See, e.g., ROBERT BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 111–34 (2003) (censuring Barak as the world’s most extreme judicial activist). Richard Posner’s view is more measured and more sensitive to the differences between the Israeli and U.S. political situations than Bork’s, but it comes to the same place. See Richard A. Posner, *Enlightened Despot*, NEW REPUBLIC, Apr. 23, 2007, at 53–56 (reviewing BARAK, *THE JUDGE IN A DEMOCRACY*, *supra* note 143).

population).¹⁴⁶ The first goes by fast—about three pages devoted, as we've seen, almost entirely to facts. Because of its factual rigor, I do not think this brief treatment of the annexation issue can be denied the status of law. But it is a little light. For one thing, Barak assumes that a purpose-based test of annexation is appropriate; he never takes up other possibilities. He also never considers the relationship between the Barrier and the settlements—which is not to say that he assumes the settlements to be legal (quite the opposite),¹⁴⁷ but that he assumes their legality to be a separate question from the Barrier's. Even if one agrees with that, as I do, it ought not to be an assumption. Now, it seems the plaintiffs in *Beit Sourik*, perhaps for strategic reasons, did not themselves focus on the annexation issue; Barak explains that, as the issue “did not receive full expression in the arguments before us . . . we too shall occupy ourselves [only] briefly” with it.¹⁴⁸ It must also be said that Barak seems to have had no fear of the issue; in the later, *Mara'abe* case on the Barrier, he discussed the annexation question and the connection between the settlements and the Barrier directly and at length (and again held the Barrier to be grounded in security concerns).¹⁴⁹ Given this litigation context and larger context, and again the factual rigor, it seems plain that the annexation analysis in *Beit Sourik* should be considered sufficient from the standpoint of law as law, if not wholly satisfying as an argument.

The remainder of the opinion is taken up with the derivation and application of the principle of proportionality. By “derivation” I mean that Barak went to some effort to justify selecting the principle of proportionality as the legal principle at issue—it did not come naturally from the facts and claims. “The general point of departure of all parties,” he begins, “is that Israel holds the area in belligerent occupation.”¹⁵⁰ That takes us to the 1907 Hague Regulations and the Fourth Geneva Convention, but rather than examine those two instruments' specific provisions, Barak argues that all humanitarian law's specific provisions “revolve around two central axes”¹⁵¹—security, on the one hand, and liberty on the other—between which “a proper balance must be found.”¹⁵² We have thus transitioned from an analysis of concrete textual provisions of law to a balancing cast in the most general possible terms. But we're not done yet:

146. HCJ 2056/04 *Beit Sourik Vill. Council v. Gov't of Isr.* [2004] IsrSC 58(5) 807, 828, 832, translated in 43 I.L.M. 1099, 1108, 1110 (2004).

147. *Id.* at 829, translated in 43 I.L.M. at 1108 (“[T]his Court [has] discussed whether it is possible to seize land in order to build a Jewish civilian town, when the purpose of the building of the town is not the security needs and defense of the area . . . but rather based upon a Zionist perspective of settling the entire land of Israel. This question was answered by this Court in the negative.”).

148. *Id.* at 828, translated in 43 I.L.M. at 1108.

149. HCJ 7957/04 *Mara'abe v. The Prime Minister of Isr.* [2005], translated in 45 I.L.M. 202, 238–40 (2006); see also *supra* note 65.

150. *Beit Sourik*, IsrSC 58(5) at 827, translated in 43 I.L.M. at 1107.

151. *Id.* at 833, translated in 43 I.L.M. at 1111 (citation omitted) (internal quotation marks omitted).

152. *Id.* at 836, translated in 43 I.L.M. at 1112.

Barak's next move is to posit proportionality as the universal principle of any such balancing. "The problem of balancing between security and liberty," he writes, "is not specific to the discretion of a military commander of an area under belligerent occupation."¹⁵³ No, it is "a general problem in the law," whose "solution is universal . . . found deep in the general principles of law."¹⁵⁴ What is that solution? "One of those foundational principles which balance between the legitimate objective and the means of achieving it is the principle of proportionality."¹⁵⁵ Barak goes on to cite various scholars who recognize proportionality to be "a general principle of international law"; various cases recognizing it to be "a general principle of Israeli administrative law"; and a series of cases (mostly his own) applying the principle to Israeli military action in the occupied territory.¹⁵⁶

Having thus derived the principle, it remains to apply it, and Barak does this step by step along the Barrier's route, taking up each of the eight seizure orders in turn. The analysis is complicated because the principle of proportionality has three subtests, but consistently the reasoning has this shape: Barak holds the challenged portion of the Barrier to be a "rational means" for realizing Israel's security objective (the first subtest); he holds it to be the "least injurious" means available for achieving that objective, in that "there is no alternate route that fulfills, to a similar extent, the security needs while causing lesser injury to the local inhabitants" (the second subtest); but then he holds it *not* to be a "proportionate means" for achieving that objective, in that the marginal cost to Israel of moving the Barrier away from Palestinian population centers is fairly small, while the marginal benefit of doing so for the local population is fairly great (the third subtest).¹⁵⁷ Barak holds, in other words, that the Barrier's route was rationally designed to protect Israeli life, that any change in its route would increase the risk to Israeli life, but—and the drama of this should not be overlooked—that the route must be changed anyway. We are at the marginal limit, but that doesn't matter: we must sacrifice some small degree of increased risk to Israelis for the sake of a large degree of increased liberty for Palestinians. To take again the village of Beit Sourik as an example, the harm done to the local population "is most severe. . . . Their way of life is completely undermined." And while there is some "security advantage achieved by the route," it is "in no way proportionate to the additional injury to the lives of the local inhabitants."¹⁵⁸ Therefore the

153. *Id.* at 836, translated in 43 I.L.M. at 1113.

154. *Id.*

155. *Id.* at 837, translated in 43 I.L.M. at 1113.

156. *Id.* at 827–28, 833–39, translated in 43 I.L.M. at 1107–08, 1111–14 (citations omitted) (internal quotation marks omitted). Note that administrative law in Israel is understood less as a body of regulation for administrative agencies than as a form of law regulating the executive generally, and thus governing the military. Israeli military action abroad is therefore doubly governed by international and administrative law.

157. *Id.* at 839–41, 849–50, translated in 43 I.L.M. at 1114–16, 1120–21.

158. *Id.* at 856, translated in 43 I.L.M. at 1124–25.

military commander “must create an arrangement which will avoid this severe injury to the local inhabitants, even at the cost of a certain reduction of the security demands.”¹⁵⁹

It’s striking how different Barak’s and the ICJ’s overall portraits of the Barrier’s construction end up being. With the ICJ, the picture showed an Israeli executive bent on surreptitious annexation, all shadows and false denials and smoke-filled rooms. With Barak, the picture is exactly reversed: we have a military commander so single-minded about Israeli security that nothing else (the Green Line, Palestinian local life, even annexation) really registers, someone who, while never malicious or irrational toward Palestinians, would always treat Israeli security as the trump card when put to the choice. Barak’s message to him was: Israeli security is not always the most important thing; reroute the Barrier so that losses and gains are more evenly balanced. Barak does not dictate the new route (that “is the military commander’s affair”¹⁶⁰), but he vetoes the route originally chosen and dictates the principle to govern a new one.

How should we regard this reasoning from the perspective of law properly so called? I take from it the sense of encountering, not law of an impersonal sort, but a man—a man with a sense of justice, but just a man. When Barak derived the principle of proportionality from the general foundations of all law, he was simply making a choice about what law to avail himself of. The principle didn’t come to him, carried along by the facts and claims, compelled by the Hague Regulations and Geneva Conventions. Barak squeezed the Regulations and Conventions until he had wrung from them their most general idea, and then set them aside, applying their general idea in place of their actual provisions. And of course, the principle of proportionality itself is a permissive thing, one that put Barak’s discretion at an apex and seems to have attracted him because it put his discretion at an apex.¹⁶¹ Balancing is the leitmotif of Barak’s jurisprudence, and surely balancing is, although always a little analytically unsatisfying, far too common in the law to be considered a major failing. But usually the balancing is unavoidable: in American constitutional jurisprudence, for example, the typical structure is that a plaintiff claims his rights were violated, the government admits burdening the rights but argues that it had good and legally sufficient reasons for doing so, and there seems

159. *Id.* at 856, translated in 43 I.L.M. at 1125.

160. *Id.*

161. See Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72, 72, 87, 136, 160–61 (2008) (arguing that proportionality analysis has emerged as “a dominant technique of rights adjudication” in courts throughout the world; that as a type of analysis it is “inescapably an exercise in applied constitutional (or international) lawmaking” requiring judges to reason and behave “as legislators do”; that “in every system examined . . . a court’s turn toward [proportionality analysis] generated processes that served to enhance, radically, the judiciary’s role in both lawmaking and constitutional development”; and that Barak’s *Beit Sourik* decision was an “unprecedented” instance of the technique at work).

nothing for it but to balance.¹⁶² Here Barak chose the analytical structure that would give him the freedom to balance, and one has the sense that he chose it because it would give him the freedom to balance. There is a chosenness to it all.

That is a complaint about the *selection* of the principle of proportionality. But a second complaint is that, in *applying* the principle of proportionality, no strict elements of law were in view to constrain the free play of Barak's sense of what was right or best.¹⁶³ In this respect, *Beit Sourik* has the same flavor as certain, particularly strained constitutional cases in the United States.¹⁶⁴ Once the most open-ended forms of balancing are set into motion, the sense of law as an enterprise in systematic interpretation, aspiring to objectivity, seems to fall away; law becomes judges—their beliefs and attitudes and sentiments—and we encounter unveiled the bare fact of their authority over us, which becomes in turn the law again and the scope and limits of our rights. I think it is discomfort with that bare fact of ruling and being ruled that spurs the effort to constrain the balancing at least a little, classifying the right in view as fundamental or not, the type of scrutiny as strict or not, etc. (though one wonders whether and to what extent these categories are window-dressing). But in *Beit Sourik*, the balancing isn't even putatively constrained. Barak simply took a look for himself at the liberty/security balance chosen for the Barrier and said in effect, "This is not good enough." I happen to agree that it was not good enough, but I cannot see how Barak's saying so could be thought an observer-independent result derived from something other than one particular judge's values.

I want to be careful not to overstate this point. There is much to admire in the decision and in the judge who made it. Nor do I think it dramatically lacking from the standpoint of law properly so called. The facts are truly impressive, and even the handling of proportionality is, if too subjective, not out in left field. But I never meant to imply that the law/non-law distinction is a digital, either/or distinction. A judicial decision can pass by degrees from law into non-law as any of a family of characteristics associated with law as law—none sufficient for the classification and perhaps none strictly necessary either—fall away, the threads of the juridical cut one by one.¹⁶⁵ In Barak's work, one very important thread, the objectivity thread, has been cut. The purpose of the next section is to see if

162. See, e.g., *Tennessee v. Garner*, 471 U.S. 1 (1985) (balancing to decide whether, under the Fourth Amendment, police may use deadly force to apprehend a fleeing suspect); *Dennis v. United States*, 341 U.S. 494 (1951) (balancing to decide whether, under the First Amendment, Congress may criminalize speech that aims at violent revolution). But see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 995, 1004 (1987) (arguing that balancing is not "inevitable" or "inescapable" and has "turned us away from the Constitution").

163. See Sweet & Matthews, *supra* note 161, at 72, 87, 136, 160–61.

164. I develop this comparison in the discussion of objectivity below. See *infra* Part II.C.

165. I develop this theoretical idea in the opening to Part II below. See *infra* text accompanying notes 198–203.

international law has the resources to reweave that thread, to reach generally the same conclusion about the Barrier—the conclusion is, I think, generally correct—but by means that are more analytically sound.

C. *The Possibility of Law in the Barrier Case*

I'd like now to propose a new analysis of the Barrier, one that is more faithful to the adjudicative enterprise than the ICJ's and more objective than Barak's. It is a doctrinal analysis, but the ultimate question in view is still jurisprudential—still whether international law in the Barrier case is (or rather, could be) law properly so called. For after one court's utter failure and another's partially unsatisfactory attempt, the lingering question is whether international law has the doctrinal resources to address the question of the Barrier in a sensible and reasonably objective way. One could imagine a body of law that is simply not up to the challenge of a really tough case—that runs dry, or offers only vague generalities (and therefore vast discretion), or (and I think this is a particular suspicion with international law) insists on such stupid, dangerous outcomes that policymakers are relieved when the judgment proves unenforceable. What I intend to show here is that, in the Barrier case, an analysis that comports with principles of legality was available and was sound.

1. The Opening Position

My starting point is that the Israeli/Palestinian situation of which the Barrier is a part is international in nature. A corollary is that the Palestinian territory east of the Green Line is tantamount to a state for purposes of legal analysis. I recognize that there is a certain temptation to “fudge” this assumption, to avoid a major controversy by means of some strategic vagueness. But without making some sort of commitment on this issue at the outset, no legal analysis can begin. If the territory is Israel's, international law simply does not apply (except for that part of international law—human rights law—concerned with a state's treatment of its own); there can be no question of annexation (a state cannot annex itself) and no law of occupation (a state cannot occupy itself).¹⁶⁶ If the territory is *not* Israel's, international law does apply, and we enter the world we have in fact occupied for the last forty years or so. In other words, we commit ourselves to a position on “Palestine” by the questions we ask and the law we use, whether we admit it or not, and on that level both the ICJ and Israeli High Court took out a position—just the one I've voiced—in the very structure of their analyses. And it is a reasonable position. The Palestinian West Bank, together with the Gaza Strip, has a different national identity than Israel, as everyone involved has recognized. Israeli and Palestinian leadership, together with influential third parties like the EU, the United States, and the Security Council, have committed themselves to a

166. See *supra* notes 68–70 and accompanying text.

“two-state solution.”¹⁶⁷ Security Council Resolutions have effectively stated that ultimate Palestinian sovereignty in the occupied territory is a matter of legal right; Israeli Supreme Court opinions have skirted very close to doing the same.¹⁶⁸ And finally, the only alternative is an Israeli dominance that only a few of the more radical voices in Israel and the United States believe tenable. Now, as a state in waiting, Palestine’s borders are disputed (perhaps most of all with regard to East Jerusalem); it is more clear that there should be a Palestine than that the Green Line should mark its extent. But with no other option available, and the acute legal and practical need for some sort of line, I think there is no alternative than to treat the Green Line as the presumptive border for purposes of analysis in the Barrier case.

A consequence of the situation’s international character is that the settlements are illegal. The Fourth Geneva Convention’s text is clear: “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”¹⁶⁹ And even if that text were unclear, or if Israel were to prevail on the question of its application, the provision does no more than specify a rule already implicit in the principle of non-annexation,¹⁷⁰ for moving civilian communities into occupied territory just is a method of annexing territory—which is why the Fourth Geneva Convention forbids it. In other words, so long as the territory east of the Green Line is Palestinian, there is no sense in which a legal regime based on non-annexation could permit the settlements. In my view, any adequate adjudication of the Barrier case must acknowledge the settlements’ illegality and address any connection between the Barrier and them.

A second consequence of the situation’s international character, however, is that the Palestinian violence involved in the Second Intifada triggers Israel’s right of self-defense under Article 51 of the UN Charter. That the violence constitutes a form of illegal terrorism is beyond doubt; one cannot target civilians with bombs and claim to be engaged in lawful resistance. And if the bare logic of self-defense in the world today did not make it clear that terrorism on such a scale can trigger Article 51, and if the Security Council’s two terrorism resolutions still left some room for doubt, still our

167. See, e.g., A Performance-Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, Letter Dated 7 May 2003 from the Secretary-General Addressed to the President of the Security Council, annex at 1–2, U.N. Doc. S/2003/529 (May 7, 2003) (proposing a “two state solution” based on Palestine ending “violence and terrorism” and Israel ending “settlement activity”). This proposal was endorsed by the Security Council in Resolution 1515. S.C. Res. 1515, U.N. Doc. S/RES/1515 (Nov. 19, 2003).

168. See *supra* notes 81, 147, 150 and accompanying text (bearing in mind that to apply the law of occupation is to hold that sovereignty belongs to the occupied, discussed *supra* notes 69–70 and accompanying text).

169. Geneva Convention IV, *supra* note 69, art. 49, para. 6. The question is not whether we as lawyers can find something indeterminate in even a statement like that. Language being what it is, of course we can. The question is whether it is a credit or a discredit to the profession when we do.

170. See *supra* notes 68–70, 81 and accompanying text.

opening premise was that the situation is international, which means that Palestinian violence is international violence—the very subject of Article 51.¹⁷¹ In other words, there are *two* underlying illegalities here, the settlements *and* terrorism. The Barrier is linked to both—a fact from which much of the case’s complexity comes—and I take it that any adequate adjudication of the case must deal frankly with the pair.

It follows—and if you hear a “therefore” here, you’re right, for I think there’s a certain logical necessity to this—that the Palestinian/Israeli situation at the time of the Second Intifada constituted a state of international armed conflict, or what international law used to call simply “war.” How could it be otherwise legally, when there is a level of violent conflict between two states sufficient to trigger the right of self-defense? And how could it be otherwise humanly, when approximately 9000 Palestinian attacks kill over 900 Israelis (and injure more than 6000) and Israeli counterattacks kill almost 5000 Palestinians?¹⁷² When I was working on the Barrier case, I vividly recall one Israeli friend exclaiming, “How could anyone think we are not at war when bombs are exploding every week in cafes in Tel Aviv?” A Palestinian could easily add, “How could anyone think we are not at war when Israeli missiles are rocketing into Palestinian apartment buildings in Gaza?” If we look at the facts of large-scale, organized violence, of blow and counterblow and a rising death toll, we cannot but call this war—or, again to be more technical, international armed conflict.

Identifying the Barrier’s context as one of international armed conflict is important. The choice between war and peace is a delta point in international law. Consequences flow from that choice.

2. Annexation

A state on the defensive side of international armed conflict acquires the right to take—not to *annex*, but as a military measure to *take*—the aggressor’s territory as part of the process of winning a lawful war.¹⁷³ The war context is why Israel building the Barrier within the West Bank is not like, say, the United States responding to illegal immigration by building a barrier within Mexico—why a lawyer for the Palestinian cause could not insist that Israel simply must stay on its side of the Green Line, full stop. The proper response to such an argument is that there are consequences to waging aggressive war; Israel was *prima facie* entitled to take control of

171. See *supra* text accompanying notes 108–17.

172. See HCJ 2056/04 Beit Sourik Vill. Council v. Gov’t of Isr. [2004] IsrSC 58(5) 807, 815, translated in 43 I.L.M. 1099, 1099–100 (2004) (listing the number of Palestinian attacks, Israeli deaths, and Israeli injuries between September 2000 and April 2004); B’Tselem: The Israeli Information Center for Human Rights in the Occupied Territories, Fatalities, <http://www.btselem.org/english/Statistics/Casualties.asp> (last visited Mar. 15, 2010) (listing the number of Palestinians and Israelis killed between September 2000 and December 2008).

173. See *supra* notes 68–70 and accompanying text.

Palestinian territory as part of its war effort. A lawyer for the Palestinian cause would have to shift his or her argument, contending not that Palestinian territory is inviolable, but that the Barrier's incursion should be understood as a form of annexation rather than as part of the war effort. And that brings us to the difficult question at the heart of the Barrier case: how do we tell the difference?

I am not aware of any existing legal test for identifying an annexation where the matter is unclear and in dispute. The Israeli High Court assumed a motive-based test.¹⁷⁴ The ICJ assumed an effects-based test (though it probably used a motive-based test in the end, inferring the Barrier's motive from the settlements).¹⁷⁵ But neither court cited grounds for its choice, or even seemed to recognize that it had made a choice, and the two tests are so speculative—the one requiring an inquiry into a government's corporate mens rea, the other a prediction about what the future will bring—as to be impossible to administer convincingly, which is a problem when courts are called on to resolve something as explosive as a border dispute. What's more, even if we could *know*, past all controversy, that a state lawfully engaged in defensive war took actions motivated by annexationist desires or certain to have an annexationist effect, we would have in my view insufficient reason to prohibit the conduct. Imagine that, just before D-Day, we had a recording of President Roosevelt telling General Eisenhower: "This is perfect. We invade, oust Hitler, and make Germany the forty-ninth state." Would the invasion therefore be illegal? No, because it would still be necessary to winning a legal war. The attempt later on to make Germany the forty-ninth state would be illegal, but not the invasion itself. Try another scenario: imagine that the United States, threatened by an imminent launch of Soviet nuclear weapons in Cuba, had invaded (with Security Council authorization, let's say—no question of the invasion's legality) and then held Cuba in a state of occupation. Imagine that, over time, Cuba and the United States became culturally and politically integrated, and eventually Cuba elected to become the fifty-first state. Would the initial invasion have therefore been illegal? No, because despite its annexationist effect, it was legitimate at the time undertaken for military reasons. In other words, not only are motive- and effects-based tests unconvincing in administration, but they are insufficient for identifying an annexation *even in principle*.

So there is a hole in international legal doctrine on this point—but it is not a big hole (annexations are usually pretty clear, and often announced as claims of right), and the challenge of filling it is just the usual, interstitial judicial business of crafting a legal test with which to apply a preexisting rule or principle. The proper test, I submit, is one based on military necessity. A necessity-based test would harmonize the application of the non-annexation principle with the general structure of the law governing

174. See *supra* notes 131–33, 146–49 and accompanying text.

175. See *supra* notes 79–84 and accompanying text.

combat, where “[t]hroughout the sets of specific rules . . . policies of military necessity and minimum destruction of values . . . recur continuously as basic themes.”¹⁷⁶ A necessity-based test would also square with general principles of the law of occupation, where the “general rule of conduct” is “to diminish the evils of war, as far as military requirements permit.”¹⁷⁷ Both bodies of law would favor a necessity-based test for more specific reasons as well. If we think of the Barrier as essentially a seizure of real property in the course of an occupation, the Fourth Geneva Convention’s specific provision prohibiting “[a]ny destruction by the Occupying Power of real or personal property . . . except where such destruction is rendered absolutely necessary by military operations” would apply.¹⁷⁸ And if we think of the Barrier instead as essentially a weapon deployed in combat (as I suggest below), a necessity-based test would again apply, for the principle of necessity is one of the three principles that traditionally regulate such uses of force.¹⁷⁹

Finally, what most recommends the necessity principle as the basis for our annexation test is that a body of doctrine has grown up around the principle that fits it out to serve what has been the basic purpose of law in this area since the Lieber Code: to enable military forces to fight effectively in pursuit of legitimate military goals while yet standing in the way of wanton inhumanity and cruelty.¹⁸⁰ The concern often raised with military necessity is that it might operate to permit as much as to restrain, morphing into what in international law is known as *Kriegsraison*—the doctrine, dominant in Germany at the time of the two World Wars, that “the necessities of war (*Kriegsraison*) override[] and render[] inoperative the ordinary laws and customs of war (*Kriegsmanier*),”¹⁸¹ or in effect that military expediency is a trump card and general permission. But the doctrinal tradition (admittedly not precedent in the strict sense) that has actually developed around the necessity principle, in cases involving individuals put on trial for war crimes who raise the claim of necessity in defense, is more restrained than that.¹⁸² Courts in those settings have, first, resisted definitions of necessity that would make the principle no more than

176. MCDUGAL & FELICIANO, *supra* note 70, at 521.

177. Hague Convention IV, *supra* note 88, pmbl.

178. Geneva Convention IV, *supra* note 69, art. 53.

179. *See infra* notes 191–92 and accompanying text.

180. FRANCIS LIEBER, U.S. WAR DEP’T, GENERAL ORDERS NO. 100: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD arts. 15–16 (1863) (“Military necessity admits of all direct destruction of life or limb of *armed enemies* Military necessity does not admit of cruelty . . .”).

181. MCDUGAL & FELICIANO, *supra* note 70, at 672.

182. *Id.* at 674–79 (discussing cases); Scott Horton, *Kriegsraison or Military Necessity? The Bush Administration’s Wilhelmine Attitude Towards the Conduct of War*, 30 FORDHAM INT’L L.J. 576, 589 (2007) (arguing that “[t]he Nuremberg and Tokyo Tribunals” sounded “the death knell of the doctrine of *Kriegsraison*” but that “[w]hat survived was a notion of military necessity close in spirit and letter to that originally articulated by Lieber” (citation omitted)).

“convenience, expediency, and interest”;¹⁸³ second, required that the military defendant’s decision have been based on a “reasonable appraisal of the features of a tactical situation”;¹⁸⁴ and third, approached the inquiry generally on the basis of “particular constellation[s] of facts.”¹⁸⁵ Now, if we were to think of the Barrier as itself a defendant in court, *prima facie* guilty of annexation but potentially justified under the defense of necessity (or if that is too fanciful, if we were to think of the military commander who decided to build the Barrier as the defendant), these three standards would dictate a factually intensive process, an objective reasonableness standard, and a requirement of restraint that could be met only for serious security threats—or, in other words, the ability to fight effectively, but only for legitimate military goals and without cruelty. And thus the purpose for which this body of law exists is met. Necessity in this case is not complete permission. It is *constrained* permission—the sort of constrained permission that makes the very notion of a body of law governing war a reasonable social ideal.

The rule, then, should be that where a state is lawfully engaged in international armed conflict and has seized or made use of enemy territory while making no claim of sovereign right to that territory, the seizure or use is non-annexationist to the extent objectively reasonable as a matter of military necessity. Or, to restate that rule with regard to the case at hand, building the Barrier was no annexation to the extent the Barrier was amenable at all points along its route to an objectively reasonable military justification.

I would like to highlight several consequences of this test.

First, assuming the Israeli High Court’s fact-finding was sound (as I think it was), building the Barrier within the West Bank was *not* an annexation—for the court’s primary finding was that the Barrier’s route was justified from a military point of view.¹⁸⁶ In fact, the first steps of my necessity-based analysis and the Israeli court’s motivation-based analysis are the same: both are fixed on whether the Barrier’s route makes sense in light of the military threat.¹⁸⁷ The difference is that the ultimate guesswork in the Israeli opinion—the inference that, because the Barrier was amenable to a military justification, it was constructed solely for a military purpose—is taken out of the equation. I think someone could reasonably suspect that a desire to annex parts of the West Bank influenced at least some of the Israeli officials who helped authorize the Barrier. But if a good faith fact-finder scrutinizes the evidence and determines that the Barrier was necessary on military grounds, and if the context was one of international armed conflict in which Israel acted under its right of self-defense and made

183. McDUGAL & FELICIANO, *supra* note 70, at 678.

184. *Id.* (emphasis added).

185. *Id.* at 675.

186. *See supra* text accompanying notes 131–33.

187. *See supra* text accompanying notes 131–33.

no claim of right to the parts of the West Bank it seized, that suspicion shouldn't matter.

Second, a test based on military necessity would *not* authorize building the settlements, for the settlements were not an act of self-defense in wartime.¹⁸⁸ It would, however, authorize building the Barrier around the settlements if necessary to protect the safety of the citizens living in them.¹⁸⁹ In other words, there is a subtle but important and, I think, sensible distinction here between building the Barrier, building the settlements, and protecting the settlements. The first and last are non-annexationist territorial incursions because they can be justified on grounds of military necessity; the second is an annexationist territorial incursion because it cannot. That the necessity-based test can make this distinction—that it can authorize the Barrier without thereby authorizing the settlements—is one of its strengths.

Third, a test based on military necessity would *not* permit treating the West Bank land between the Barrier and the Green Line as if it belonged to Israel. If, for example, Israel were to take advantage of the Barrier's protection to begin a new settlement in the West Bank, Palestinians should have the right to sue to enjoin the construction. The logic here is the same as the logic concerning the existing settlements: Israel might have a military justification for building the Barrier past the Green Line, but not for expanding civilian Israeli life into land that remains Palestinian as a matter of law.

Fourth, a test based on military necessity is self-limiting: territorial incursions based on military necessity become illegal when the necessity fades. A stable peace would give Palestinians the right to sue to have the Barrier torn down.

The question here finally, as this is a jurisprudential study, is whether the doctrinal hole in the part of international law governing annexation undermines the legal character of the Barrier case. The answer in my view is a clear no. Yes, there is a hole, but it is not the kind of chasm that threatens to open up a legal anarchy where there are no rules or principles or sources of law to serve as guides. The kind of interstitial doctrinal development called for here is part of the craft. And the development offered above—a legal test based on the principle of military necessity for the limited instances of an ambiguous seizure of land in the context of lawful armed conflict—is the right answer given the principles, analogues, and policies at work in this body of law.

3. Humanitarian Rights

The armed conflict context showed us *how* to ask about annexation; it can also show us how to ask about humanitarian rights. The key is the distinction, part of the architecture of international law today, between the

188. See *supra* notes 169–70 and accompanying text.

189. See *supra* note 65 and accompanying text.

jus ad bellum (the law governing the initiation of armed conflict) and the *jus in bello* (the law governing the conduct of armed conflict). *The jus ad bellum* starts from a position of peace; it asks questions about the legality of the resort to force, concerns issues like aggression and self-defense, and is at the center of the twentieth century's attempt to prohibit the unilateral initiation of force. *The jus in bello* starts from a position of war; it asks questions about whether the conflict is being conducted lawfully, concerns issues like the treatment of civilians and prisoners of war, and dates back to an era in which the law's humbler aspiration was not to prohibit war but only (as a classic nineteenth century treaty put it) to "alleviat[e] as much as possible the calamities of war."¹⁹⁰ If the Barrier was built in the context of international armed conflict, as we have established, then we are in the *jus in bello* category, and with that category comes a certain legal framework: the "basic international formula" of the *jus in bello* is that the use of force "must be necessary in the context, proportional to need, and capable of discriminating between combatant and noncombatant."¹⁹¹ *Necessity, proportionality, discrimination*—the three are a sort of mantra to military lawyers today.¹⁹² They are the foundation on which Palestinian rights claims can, with accuracy and a reasonable degree of objectivity, be set.

Barak's subjectivity, recall, took hold in two ways. The first had to do with what I called the *derivation* of the principle of proportionality—that is, with its selection as the applicable law in the Barrier case. In this regard, Barak took us on a legal odyssey from the specific provisions of the 1907 Hague Regulations and Fourth Geneva Convention, to the animating principle of all humanitarian law, to what he called a "general principle[]]" "found deep" in all law, before finally returning to the Barrier case with his principle in hand.¹⁹³ There was something forced about the whole business. But look above: there proportionality is, the second member of our trio, brought to the stage by the context of an international armed conflict and the legal framework that context compels—the applicable law no longer something we need to go off and find or forge in the deep tunnels of the law, but that comes to us, as it should, immanent in the factual and legal

190. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight para. 1, Nov. 29–Dec. 11, 1868, 138 Consol. T.S. 297 (the Declaration of St. Petersburg).

191. W. Michael Reisman, *The Tormented Conscience: Applying and Appraising Unauthorized Coercion*, 32 EMORY L.J. 499, 540–41 (1983); see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) arts. 35(2), 51(4), 51(5)(b), June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Geneva Protocol] (prohibiting the use of weapons that cause "unnecessary suffering"; attacks whose civilian cost is "excessive in relation to the concrete and direct military advantage anticipated"; and all "indiscriminate attacks," defined as those "of a nature to strike military objectives and civilians or civilian objects without distinction").

192. See, e.g., JUDGE-ADVOCATE GENERAL'S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 10–14 (John Rawcliffe & Jeannine Smith eds., 2006) (stating, for use by U.S. military lawyers, that the law of war rests on principles of necessity, proportionality, and discrimination).

193. See *supra* Part I.B.2.

setting of the case. Viewed from the standpoint of its context, the Barrier is essentially a defensive weapon deployed in war—a shield. The law that applies to it is the law that applies to any weapon so deployed. In other words, when the case's factual situation is understood as I think it must be—as international armed conflict, with the Barrier constituting a use of force within that conflict—it turns out that the selection of the principle of proportionality need not have been so subjective, so chosen. Along with necessity and discrimination, the principle of proportionality would have been clearly applicable law.

The second way in which Barak's subjectivity took hold had to do with the *application* of the principle of proportionality, which in Barak's hands involved a balancing analysis of a particularly discretionary and values-driven kind; it was never clear why someone couldn't strike the opposite balance with no worse claim to being legally correct.¹⁹⁴ And with that problem in mind, let's notice another: that the principle of proportionality is actually quite a poor fit for the concerns Barak voiced when he discussed the Palestinian situation. When Barak took up the Barrier's effect on the village of Beit Sourik, for example, his chief points were that villagers and especially farmers "will be cut off" from their lands and crops, and that the Barrier wraps around the village so tightly that it "stifle[s] daily life" ("a veritable chokehold").¹⁹⁵ He sounds these same points again and again throughout the analysis, and when he finally turns from examining the Barrier's individual parts to "look out over the proportionality of the entire route," we hear them one last time: the Barrier "separates the eight villages . . . from more than 30,000 dunams [30 square kilometers] of their lands," he writes, with particular "injury to the farmers," and it "strikes across the fabric of life of the entire population," often "pass[ing] right by their homes," "surround[ing] the village," or "affect[ing] the links between the local inhabitants and the urban centers."¹⁹⁶

The issue here is not disproportion. Nothing is compared. The issue here is the capacity of civilians to go about civilian life. "At the very heart of the law of armed conflict is the effort to protect noncombatants by insisting on maintaining the distinction between them and combatants."¹⁹⁷ That is, the issue here concerns the third member of our trio, the principle of discrimination, and not only is it more discerning than proportionality as to the real issues in this case, but it is more objective in application as well. The reason the Barrier had to be moved to unburden Palestinian interests wasn't some mysterious balancing of two great abstractions, security and

194. See *supra* Part I.B.2.

195. HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Isr. [2004] IsrSC 58(5) 807, 855, translated in 43 I.L.M. 1099, 1124 (2004).

196. *Id.* at 861, translated in 43 I.L.M. at 1127.

197. W. Michael Reisman, Editorial Comment, *Holding the Center of the Law of Armed Conflict*, 100 AM. J. INT'L L. 852, 856 (2006); see also Geneva Protocol, *supra* note 191, art. 48 ("[T]he Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.").

liberty, where, for this particular judge, liberty prevailed despite the gravest security interests at stake. The reason was that the Barrier's weight had to fall chiefly on those inclined to do harm to Israel, and so long as it was built along such a route as to press right up against homes and cut farmers off from crops and villagers off from urban centers and all the rest, its direction of effect was as much toward noncombatants as combatants. I earlier analogized the Barrier to a shield, and that analogy is useful as far as it goes, but the problem is that a shield does not harm third parties. The better metaphor is this: Imagine that you are locked in a house. There are people with you in the house who are violently disposed to you, and others who are not. It happens that all these people, violent and peaceful, are in one room of the house. You lock the door of that room from the outside. Was that a lawful act of self-defense? No, because it is not lawful to roll noncombatants in with combatants and treat them all alike.

The practical outcome of this analysis is almost identical to Barak's. I would find it legal to build the Barrier in the West Bank, but not to build it along a route that burdened ordinary Palestinian life so heavily. What I have changed is the legal foundation for that position. In my view, rather than grounding the annexation analysis in motive, Barak should have grounded it in military necessity, and rather than grounding the humanitarian judgment in proportionality and that in the general principles of all law, Barak should have grounded it in the law of war requirement that weapons discriminate between combatants and noncombatants.

II. INTERNATIONAL LAW AND LAW'S SELF-CONSTITUTING VALUES

We turn now from the question of whether the Barrier case had or could have had the character of law to whether international law in general has or could have that character. This, then, is where we begin building a theory of law against which international law can be measured. And as that is a formidable undertaking—though not as formidable in this instance as it might appear—it's important here at the outset to say a word about what this theory is and what it is not.

First, the idea here is not to take up the theoretical contentions of Hart and Raz and Dworkin and the other great figures of jurisprudence, borrowing a little here, critiquing a little there, eventually constructing a theory of the same kind as theirs but professedly a better version of the type. The idea here is rather to probe the intuition with which this Article began—the intuition that international law is not law properly so called—so as to specify that intuition's component parts, thus bringing to self-consciousness the view of law already implicit in our experience of law. In other words, I present below four constitutive values of law as law: *efficacy*, *the capacity to obligate on grounds of legitimate authority*, *the capacity to obligate on grounds of moral rationality*, and *objectivity*. My fundamental claim is that if you interrogate the intuition about international law doggedly enough, seeking out its premises and trying to state them in general form, these four values are what you will come to in the end. And

as the intuition is, to judge from its power over some centuries of inquiry and debate, deeply rooted in the experience of law and the social practices that go into forming that experience, there is reason to think a reconstructive engagement with the intuition has something to teach us about what law is—or at least, what in practice we take law to be. Now, there are things we might want from a definitive theory of law that just are not given by a theoretical approach of this kind; to specify the claims implicit in our experience of law is not to defend those claims. But this is not a definitive theory of law. And that is why the project here is not as ambitious as it might seem.

Second, each of the four categories of value just mentioned represents a *cluster* of ideas. As directions the intuition for law as law takes when put under scrutiny, there are different ways of thinking about each of the four and really no definitive vocabulary for the set. Efficacy is tied up with enforcement, sovereignty, law's actuality and power—its bindingness. Obligation is a matter of law's *normativity* (bindingness in another sense), with legitimate authority going to law's foundations, procedures, and location within constituted institutional structures, and moral rationality going to substantive justification, to justice, and to the exercise of public reason. And finally, objectivity could equally be thought of as law's *impersonality*, involving, among other things, the distinction between law and politics. In each case, I've tried to select some optimal label for the cluster—one that identifies the value the set is meant to serve (thus, for example, "legitimate authority" over "institutions and procedures"); one that is relatively accurate, inclusive, and fundamental (thus "efficacy" over "enforcement," for reasons I'll explain); and one that, where the choices are otherwise matched, is comparatively accessible (thus "obligation" over "normativity"). But it's important not to make too much of the labels. The test of a conceptual structure that aims to specify the contours of experience is that one recognizes oneself—one's own musings as to whether international law is law, one's own encounters with law's nature in other contexts—in at least some parts of the structure, that one sees where different kinds of concerns fit into the whole, where they go.

Third, as to how the four categories fit together, the theory here is *pluralistic* and *cumulative*—by which I mean that, when tasked with evaluating whether some act or text or institution or field of endeavor is of a basically legal character, all four factors contribute to an all-things-considered judgment, rather than any one factor (or subgroup of the four) having the status of necessary and sufficient condition.¹⁹⁸ Imagine, for example, that we were trying to determine whether the U.S. Supreme Court's decision in *Brown v. Board of Education*¹⁹⁹ should be regarded as basically legal or basically political in character. That determination would be, with regard to efficacy, quite mixed: the National Guard did escort

198. I'm grateful to Jörg Schaub for pointing out this assumption of my theoretical approach.

199. 347 U.S. 483 (1954).

those children to school, but it was a close call, and enforcement was delayed at the start (“with all deliberate speed”²⁰⁰) and touch and go for decades. As to obligation (of both kinds), there is no question: the decision was grounded in both the Court’s authority to interpret constitutional text and in moral imperatives of extraordinary force. Yet as to objectivity, few lawyers think *Brown* anything like the inevitable result of neutral legal principles and judicial craft. So what to think? A monistic view of law, prizing, say, objectivity above all else, would hold the decision simply to be politics. A monistic view focused wholly on normativity would regard it as unquestionably law. But a pluralistic, cumulative theory of the kind in view here acknowledges the ambiguity we actually experience in encountering that decision and others of its kind—decisions where perhaps the grade is a sort of “C” for efficacy, “As” for both forms of obligation, “F” for objectivity, and whether the whole should qualify as law or not is up for grabs.²⁰¹

Now, there’s room for further theoretical work here: it would be worthwhile to try to get a better sense of the relative weight these four factors should carry and a clearer idea of just where the law/non-law threshold should go. But the basic insight our intuition serves up—the insight that law as experienced is a matter of multiple values in combination, none of which is strictly necessary or sufficient by itself but which in combination get some act or artifact or enterprise over the law/non-law threshold—is a benefit of approaching legal theory in the way we have. A lot of purportedly legal acts have an ambivalence or a more-or-less quality to their character as law, and it’s good to have a conceptual framework for understanding that analog ambiguity.²⁰² A lot of legal theories exclude too much that ought to matter.²⁰³ And, in my view at least, it just isn’t plausible to regard any of the four factors as strictly necessary or strictly sufficient. If law must absolutely be efficacious, should we regard the prohibition on marijuana use in the United States today as non-law? If it were enough that law be efficacious, should we regard the conquistadors’ edicts regarding Native American land as law in the fullest sense? Our instinct for law is pluralistic and cumulative for a reason; there is nothing

200. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

201. I think this is the conception of law Lon Fuller was driving at when, in his reply to H.L.A. Hart, he said, “When we realize that order itself is something that must be worked for, it becomes apparent that the existence of a legal system, even a bad or evil legal system, is always a matter of degree. When we recognize this simple fact of everyday legal experience, . . .” Fuller, *supra* note 119, at 646.

202. A great deal of constitutional law seems to have this character. See *infra* notes 278–90 and accompanying text. Two vivid examples, among a near-limitless supply, are *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Wickard v. Filburn*, 317 U.S. 111 (1942).

203. Particularly problematic is the sort of theoretical position that excludes part of our experience of law by fiat, in virtue of an unjustified fidelity to some pieces of the whole and a blind spot for the rest—the kind of theory that, as Bernard Williams put it in the context of moral philosophy, is “frivolous, in not allowing for anyone’s experience, including the author’s own,” or “stupid” in holding up “an impoverished experience . . . as the rational norm.” Williams, *supra* note 18, at 217.

theoretically wrong with such a view; and the stricter views that prevail in jurisprudence today are not more sound than the one our experience of law teaches.

Fourth, the theoretical effort here is still empirical, still grounded in the Barrier case. The goal is not just to specify the claims implicit in our experience of law but to see, once those claims are clear, whether they are borne out in fact. There's no reason why the intuition against international law could not tell us something true about the nature of law, and false, or at least crude and partly false, about the status of international law. In fact, I think that's exactly what is going on here (as I argue below). And thus what I earlier called a *reconstructive* legal theory proves also to be a *critical* legal theory—one that, by identifying the standards that account for our judgments, renders those judgments more transparent and enables us to see whether the standards on which they rest are being correctly applied.²⁰⁴ This capacity to be critical is a major issue in the broader project of reconstructive social theory of which this Article is a part.²⁰⁵

Finally, there is one part of the instinct against international law that is prudential rather than jurisprudential, concerned not with whether international law is law but only with whether treating it as law is necessary and useful as a matter of power and interest. This prudential concern, though important for policy, just falls outside the study here. The omission is smaller than it might seem because the jurisprudential theory in this Article is so inclusive; concerns that might on some views be considered issues of prudence are here brought into the substance of law and covered under a different heading. For example, the thought that international institutions might not be trustworthy surfaces below in the discussions of legitimate authority and objectivity. The thought that international law might demand of us something unreasonable or dangerous is taken up here in the discussion of moral rationality. Still, there remains a core of prudential concern in this arena that is just asking a different question than mine, and which has to be set aside.

So: *efficacy*, *obligation as legitimate authority*, *obligation as moral rationality*, and *objectivity*—four parts to our experience of law as law, four questions about international law and courts. How should we answer those questions on the strength of the Barrier case?

A. *Efficacy*

The belief that law as law must be enforced, or at least enforceable, is extraordinarily powerful—the heart and soul of law on some accounts, and almost always the first thing said when conversation touches on the question of whether international law is law properly so called. What is the

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

205. See, e.g., AXEL HONNETH, *Reconstructive Social Criticism with a Genealogical Proviso: On the Idea of "Critique" in the Frankfurt School*, in *PATHOLOGIES OF REASON* 43 (James Ingram trans., 2009).

root of this belief? Surely not some consciously held theory of law; no theory is so widely believed. It is rather a felt sense that law as law stands in a special relationship to consequences in the world, that law must bridge the world of the hypothetical and the world of the actual in a way most forms of discourse (law is, after all, a form of discourse) do not. Law brings something about; that is why it is not just another sort of talk.²⁰⁶ *Actuality*, then, is one component of the enforcement intuition. But that can't be the whole story because a lot of talk brings something about and yet isn't what anyone would call "enforced" (consider the persuasive orator who moves people to act). The difference is that law *makes* its consequences come about, bringing them to pass in virtue of imperatives suffused with a certain sort of power—a quasi-causal power, not unlike what Hume, in speaking of the relationship of cause to effect, called the "power of production."²⁰⁷ In short, when the enforcement intuition is put under scrutiny, it proves to have two components—power and actuality—where the two stand in an ordered relationship such that the first is the ground for the second. Let us call the two together *efficacy*—the power to make actual. Embedded in our sense of law as law, surfacing in our doubts about the status of international law where unenforced or unenforceable, is an instinct for law's efficacy.²⁰⁸

Now, thus far I take it that we have been observing a certain necessary core to the enforcement intuition—the "making actual" or "efficacy" center—which seems to contain an important if extremely elusive element of truth. But around that core is an association or picture, which is only contingently related to the central insight, and which is likely to give rise to error in thinking about the enforcement of international law. It goes like this: the source of law's causal power is, of course, usually a government, which stands over the citizen and puts its power of sanction behind its own commands. It's easy to mistake this arrangement for enforcement itself and think that to have a governmental overlord is simply what enforcement means. This was Austin's error, and with respect to international law, it had a predictable consequence: Austin observed that there is no power and

206. This line of thought naturally brings to mind speech-acts (e.g., "I promise"), and there might be something fruitful in that direction. But I'm skeptical. Most legal consequences are not the act side of a speech-act. The better if stranger analogy might actually be to spells and incantations—utterances that are supposed to bring something about of their own power.

207. DAVID HUME, *A TREATISE OF HUMAN NATURE* 137 (The World Publ'g Co. 1962) (1739). Note that Hume was no friend to the notion of causality he captured with the phrase.

208. A blind spot for law as law's efficacy is the chief problem, in my view, with certain theoretical traditions—prominent in continental Europe, and sometimes associated with postmodernism—in which law is fundamentally a form of "discourse" whose distinguishing characteristic is how participants communicate with each other. See, e.g., Gunther Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems*, 45 *AM. J. COMP. L.* 149, 156–61, 164 (1997) (defending the legal character of transnational "*lex mercatoria*" because it is an "emerging global legal discourse" that defines itself with the law's "specialized binary code, legal/illegal"). On the other hand, a blind spot for most everything but efficacy has been a significant problem in the Anglo-American tradition.

no foreseeable arrangement of power in the world that could consistently make states, those sources of power, obey (which is still true), and concluded that a form of law without the power to make its imperatives actual isn't really law at all (which is still reasonable).²⁰⁹ But the arrangement on which Austin was fixated is only a *mechanism* by which the law's imperatives become actual—a means where efficacy is the end—and the key to understanding how enforcement functions in international law is to see that it is not the only one.

There are two basic facts regarding enforcement in the Barrier case. First, the ICJ ruled that Israel must move the Barrier out of the West Bank, and Israel refused. Granted, the ICJ's advisory opinion was formally nonbinding—nonbinding, that is, not *de facto* but *de jure*—but it was nonetheless a putatively authoritative statement of what was legal and illegal, and it was denounced and then ignored.²¹⁰ Second, the Israeli High Court applied exactly the same body of law to order that the Israeli government move the Barrier away from Palestinian communities—at great expense, in the middle of a war, in the setting of the war, at acknowledged risk to Israeli life—and the Israeli government complied.²¹¹ The question is: What model of international law's enforcement can make sense of these facts? Should we conclude that the enforcement part of the intuition against international law was borne out in the Barrier case or not?

Scholars in international law and international relations have been studying when and why states observe their international legal obligations for some time. A basic division in the field, crucial to understanding the Barrier case, is between those who approach states as unified entities that relate to the international system as corporate wholes and those who view states as disaggregated assemblages whose various domestic elements might relate to the international system in different ways.²¹² Another important distinction is between those who think compliance depends primarily on interest or power (states comply because they are self-seeking or coerced) and those who think it depends primarily on norms (states comply because they take themselves to be legitimately bound).²¹³

209. AUSTIN, *supra* note 1, at 30–31, 117, 122–24, 171. In my view, Austin was not wrong to insist that commands backed by power are an element in what law is. He was wrong to view that element as law's necessary and sufficient condition, and also wrong to associate such commands so indelibly with an "overlord" picture of state sovereignty.

210. *See supra* note 16. It's actually rather odd to think about how a court can definitively state that something is illegal without thereby ordering compliance.

211. *Id.*

212. *See* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1942–62 (2002) (surveying the various schools of thought on the issue); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1401–08 (1999) (same).

213. *See* Hathaway, *supra* note 212, at 1942–62; Koh, *supra* note 212, at 1401–08. Note that both types of position, and any other such position, take as a given that the law's imperatives must be made actual somehow, and proceed to debate the mechanism by which this might be done. Thus the entire field of inquiry falls into the philosophical framework I articulate above.

Austin's view above is implicitly corporatist and power-based; a state stands to the international system analogously to the way an individual stands to a weak state. But it is the opposite view, the disaggregating, normativist view—and particularly in this vein of thought the work of Oona Hathaway—that can make sense of enforcement in the Barrier case.²¹⁴

For about eight years, Hathaway has been developing and analyzing a large body of data about when states ratify and obey human rights treaties. What she has shown is counterintuitive and in equal parts cause for hope and disappointment. First the disappointment: joining human rights treaties neither strongly correlates with nor reliably brings about good human rights practices, and in fact sometimes correlates with and even helps bring about poor human rights practices.²¹⁵ It seems the most undemocratic, rights-violating states are often eager to join the treaties, but not to comply with them, while more democratic states are often reluctant to join, but likely to comply (and if necessary, improve) when they do.²¹⁶ In other words, “democratic and nondemocratic nations likely have entirely different commitment patterns,”²¹⁷ and the challenge that has occupied Hathaway for some years is to explain those patterns. With non-democracies, the explanation is relatively straightforward: since the treaties aren't externally enforced, joining and not complying enables them to realize the costless reputational benefits of human rights posturing.²¹⁸ With the democracies, the explanation is more complex, and I think it is fair to say that Hathaway's focus has sharpened over time. In 2002, she speculates rather briefly about the ways in which “domestic interest groups,” “courts,” and “news organizations” pressure democratic governments to live up to their international obligations.²¹⁹ In 2003, her focus is on “the internal enforcement process,” with stress on the “rule of law tradition.”²²⁰ By 2005, “domestic actors us[ing] the country's own legal system to enforce the terms of international legal agreements” is one of the “central ways in which treaties shape what countries do.”²²¹ And finally, in 2007, “the most

214. I focus on Hathaway because her studies distill what in my view is the essential point so clearly and so empirically. But there are other important “disaggregating, normativists” whose work could also illuminate the issues here—in particular, Anne-Marie Slaughter and Harold Koh. *See generally, e.g.,* Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995).

215. Hathaway, *supra* note 212, at 1935, 1940, 1976–2002.

216. *Id.*; *see also* Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1844–46, 1856 (2003). Afghanistan and Columbia, for example, promptly ratified the Convention Against Torture of 1987; Belgium and Iceland refused for a decade. *Id.* at 1822.

217. Hathaway, *supra* note 216, at 1856.

218. *See* Hathaway, *supra* note 212, at 2002–20.

219. *Id.* at 2019.

220. Hathaway, *supra* note 216, at 1834, 1837.

221. Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 473 (2005).

remarkable and least appreciated aspect of the growing reach of international law” is the way in which international law in democracies is “enforced by states *against themselves*,” meaning “enforced by domestic courts and political institutions that pressure their own government to live up to the promises it has made.”²²² The trend is instructive; Hathaway’s work as a body has a sort of emergent basic teaching. International obligations are effectively enforced when domestic courts regard them as law in a rule of law state.

Thus Hathaway comes by her own, highly empirical route to the distinction that in good measure drives this paper: the distinction between law and courts in the international system. What Hathaway shows is that the enforcement of international law is unintelligible without that distinction—that enforcement in no intrinsic way depends on international law’s character as *international* law, but on the institutional setting in which the law is applied. International law can be enforced even in tough circumstances, provided a domestic court in a rule of law democracy is doing the enforcing. The Barrier case exactly bears this model out. In fact, the case is almost like a controlled experiment. The law involved in the ICJ and Israeli High Court was the same.²²³ The government addressed and the relationship between that government and the international community were the same.²²⁴ The extent to which that government was subject to an external power that might force its hand was the same (or, if anything, greater in the situation where it didn’t comply than in the situation where it did).²²⁵ And the interests and cost-benefit calculus connected to the situation on the ground were basically the same.²²⁶ (Granted the burdens of the two courts’ rulings were different, but they were not radically different; the Palestinian side won and the Barrier had to be uprooted in both, and my sense is that, had the Israeli court ordered the Barrier pulled back all the way to the Green Line, the Israeli executive would have complied.) What changed in the main was the court issuing the judgment, and that made all the difference. Actually, I suspect that the type of law at issue—domestic, international, corporate, administrative, whatever—is really not that important a part of the enforcement story. International courts would have a tough time enforcing domestic law if it fell to them to do so, and domestic

222. Oona A. Hathaway, Hamdan v. Rumsfeld: *Domestic Enforcement of International Law*, in INTERNATIONAL LAW STORIES 229, 229, 260 (John E. Noyes et al. eds., 2007).

223. Contra those who argue that compliance turns on the normative force of legitimate and just international rules (rather than the institutional actor imposing the rule). See, e.g., FRANCK, FAIRNESS, *supra* note 6.

224. Contra those who argue that compliance turns on the persuasive links between a government and the international community with which it is bound up. See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995).

225. Contra those who argue that compliance turns on the coercive calculus of international power. See, e.g., HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (4th ed. 1967).

226. Contra those who argue that compliance turns on rational choice and national self-interest at the level of the state. See, e.g., GOLDSMITH & POSNER, *supra* note 2.

courts in democratic states enforce international law about as easily as they enforce similarly demanding domestic law.

The Barrier case can also clarify something in Hathaway's account, for while her analysis of enforcement is basically focused on norms (democratic, rule of law norms) rather than power or interest, she is never very clear about the character of the normativity at issue. But then, she didn't have in view the contrast between international and domestic courts' capacity for enforcement where *both* are addressing a democratic state. The relationship between a democratic government with a rule of law tradition and its own courts is different in kind from the relationship between such a government and international courts. In a rule of law democracy, that first relationship is all but sacred, and executive officials are extremely reluctant to cut the threads of the constitutional structure they are duty-bound to protect and in which their own legitimacy is bound up. But that second relationship is not sacred in the present order, and since an international court is not a part of the constitutional structure to which the executive is attached, and may furthermore issue judgments that encroach from the outside on the security and interests of the state to which the executive is constitutionally bound, defiance in no necessary way violates executive duty or undermines executive legitimacy.²²⁷ Norms are at the bottom of this, of course. Domestic courts lack both purse and sword just as international courts do, and their capacity to enforce international law is a product, not of power or interest crudely, but of the normative order of a democratic state.

Thus the skeptical intuition about international law's enforcement proves, not exactly wrong, but crude. It is reasonable to question whether something purporting to be law that has no power to bring about consequences in the world should really have the status of law. But international law in the Barrier case *had* that power when it was in the hands of the Israeli High Court, and lacked it when it was in the hands of the ICJ, and so there is nothing in principle about international law, nor even about international law in the practical arrangement of power in the world today, that should bar it from the law's estate. To the extent there is an enforcement problem in the international system—and there is one; the ICJ's impotence in the Barrier case is proof of that, as is Hathaway's record of treaty failure—it is a problem with the *mechanism* of international courts. Perhaps the problem also extends beyond international courts to external institutions in general (including foreign courts and the United

227. The international or quasi-international courts of the European Union might well be an exception—or are perhaps just an altogether different case—given the ways in which EU membership has revised member states' constitutions and constitutional character. *See, e.g.*, 1958 CONST. art. 88(1)–(7) (Fr.) (stating that France “shall participate in the European Union” and laying out governmental arrangements to that effect); GRUNDGESETZ [GG] [Constitution] art. 23(1)–(7) (F.R.G.) (stating that Germany “shall participate in the development of the European Union” and laying out governmental arrangements to that effect, including provision to “amend or supplement this Basic Law” where necessary to accommodate legal developments at the EU level).

Nations itself), for it is difficult to see how such institutions could stand toward the constitutionally responsible agents of a democratic state as those agents stand toward one another. But international law itself can and does have the power to make its imperatives actual in what I earlier called, in stating this Article's thesis, "the right circumstances."²²⁸ The right circumstances are those in which the law's agent is a domestic court in a rule of law state.

B. *Obligation*

The sense of law as law does not end with enforcement, or any thug's or tyrant's orders would be law in the fullest sense.²²⁹ Law properly so called carries with it a sense of obligation—the thing in virtue of which the law *deserves* to be followed, the "ought" of law rather than the "must." Thus we turn from actuality, the subject of the last section, to normativity, the subject of this one. And thus we come to the second piece of the intuition that international law is not law properly so called: doubts about whether international law is entirely obligatory.

The unitary concept of legal obligation has split into two distinct strains in our jurisprudential tradition—I suspect because the tradition has seen such titanic battles between moralists and antimoralists.²³⁰ One part of the thinking on obligation focuses on procedural and institutional foundations.²³¹ Of any claim to law, it asks: "Is this thing appropriately grounded? Was it made aright—passed by Congress and ratified by the President, promulgated by an agency after notice and comment, established as fact after both parties were heard, etc.? And did the maker act within its constituted institutional authority—according to Article I of the U.S. Constitution, or the agency's organic statute, or the court's rules of jurisdiction and standing, etc.?" There is a professionalized flavor to approaching obligation this way; that is part of the appeal. It is solid, technical, lawyerly; those uncomfortable approaching the concept of obligation in expressly moral terms, but not so crude as to equate law with force, here find a path to obligation through the gateway concept of legitimate authority. Now, there are moral standards of a certain sort at work here still. Legitimacy is finally a moral concept; if we ask whether

228. See *supra* p. 2460.

229. The classic statement of the point is Hart's: "Law surely is not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion." H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 603 (1958). Though it's telling that Hart speaks only of the gunman—the thug—and not the tyrant.

230. Compare RONALD DWORKIN, *JUSTICE IN ROBES* 14 (2006) ("A proposition of law is true . . . if it flows from principles of personal and political morality that provide the best interpretation of the other propositions of law generally treated as true in contemporary legal practice."), with RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 91 (1999) ("This chapter is about the infection of legal theory by moral theory . . .").

231. See, e.g., Hart, *supra* note 229, at 603 (arguing that "rules specifying the essential lawmaking procedures" are "at the root of a legal system").

some case or statute or executive decision was made aright long enough, we'll come in time to "We the People." And it is difficult even conceptually to see how the law could derive a capacity to obligate from procedures that are unsound and institutions that are unjust.²³² Nonetheless, the moral ideas here concern procedure, not substance; we do not ask whether the content of a case or statute or executive order is just or good on the way to deciding whether it is law. And even then, the technical questions hold the moral ones in abeyance.

The second approach to the concept of legal obligation focuses on substantive rationality and morality.²³³ Of any claim to law, it asks: "Is this minimally rational? Is it just? Does it conduce to the good?" My sense is that, despite some prominent contemporary proponents, this perspective is on the defensive nowadays. "Natural law" (one of the names for some of the views in this category) is in a state of embarrassment, and any expressly moral approach to the law can expect to be met in academic settings with skepticism and even mockery.²³⁴ The paradox is that, while a sort of positivism reigns when we talk theory, the moral perspective keeps winning the century's big battles in practice—though one wouldn't know it

232. That Hart seemed to think it could, or not to notice this feature of legitimacy, was in good measure what made his views so puzzling to Fuller. *See, e.g., Fuller, supra* note 119, at 632 ("[I]t is a cardinal virtue of Professor Hart's argument that it brings into the dispute the issue of fidelity to law," but "its chief defect," which "comes most prominently to the fore in his discussion of Gustav Radbruch and the Nazi regime," lies "in a failure to perceive and accept the implications that this enlargement of the frame of argument necessarily entails." (citing Hart, *supra* note 229, at 615–21)).

233. *See, e.g., id.* at 645 ("Law, considered merely as order, contains, then, its own implicit morality."). There is a connection here—in Fuller's thought and in what I myself mean by the category of "moral rationality"—between claims as to what is good and bad, or right and wrong, and the commitment to reason itself. This is a difficult issue, and one with an enormous history; it is something on which much of the tradition of practical philosophy is centered. But the essential thought is perhaps that morality is an organic product of reason, or form of reason, and that both morality and reason derive their capacity to obligate from the normative force of good reasons. In any case, there is no question that Fuller was thinking in this direction. *See, e.g., id.* at 636 ("[W]hen men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness . . .").

234. *See, e.g.,* Brian Leiter, In Praise of Realism (and Against 'Nonsense' Jurisprudence) 1 (Jan. 23, 2010) (unpublished article), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113461 ("Ronald Dworkin describes an approach to how courts should decide cases that he associates with Judge Richard Posner and Professor Cass Sunstein as 'a Chicago School of anti-theoretical, no-nonsense jurisprudence.' Since Professor Dworkin takes his own view of adjudication to be diametrically opposed to that of the Chicago School, it might seem fair, then, to describe Dworkin's own theory as an instance of 'pro-theoretical, nonsense jurisprudence.'" (quoting DWORKIN, *supra* note 230, at 50–51)). That thought (and tone) has a history in moral and legal philosophy. *See* RUDOLF CARNAP, THE UNITY OF SCIENCE 26 (M. Black trans., 1934) ("All statements belonging to . . . regulative Ethics . . . are in fact unverifiable and, therefore, unscientific. In the Viennese Circle [the movement now known as "logical positivism"], we are accustomed to describe such statements as nonsense . . ."); Jeremy Bentham, *Anarchical Fallacies*, in 'NONSENSE UPON STILTS': BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 46, 53 (Jeremy Waldron ed., 1987) ("*Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts.").

from the bravado of the losers. There may be no more significant contemporary development in international law than Nuremberg and the human rights tradition to which it gave rise, or in constitutional law than the broadening of due process in all its various forms (with incorporation via a concept of "fundamental rights" not to be overlooked), or in comparative law than the global rise of judicial review as an instrument of rights protection.²³⁵ The very structure of legal argument in a post-formalist era takes law's morality and rationality as premise, for every time we argue that a rule's application should be based on its reason ("This case shouldn't control that one, for the holding . . .") "This clause must apply here, for its purpose . . ."), and every time we favor or disfavor a position because it would give rise to welcome and sensible or absurd and incoherent results ("The case couldn't mean that, for if it did . . ." "The clause must mean this, for otherwise . . ."), we commit ourselves pre-theoretically, by virtue of our practice, to a morally and rationally laden conception of what law is. That is to say we lawyers *act* on the moral sense every time we go to work in the morning, and while our commitments in this regard are rarely in the foreground, they're always there, hovering in the background—the moral presence—and much of what we pretend is common sense, or sound "policy," or just good plain pragmatism, is in fact the moral sense operating within the zone of ordinary consensus.²³⁶

The partisans of one or the other of these two forms of obligation have been grappling and clawing at each other for generations now. Legal positivism is defined by the conflict.²³⁷ The Hart-Fuller debate is an entry in the conflict—best read, I would argue, as essentially a disagreement over the kind of obligation that can serve as a constitutive element in law properly so called.²³⁸ And lawyers and judges clash about whether the claims of justice or only the claims of a morally bare but procedurally legitimate positive law should direct decision.²³⁹ But why these constant

235. The first two are probably familiar; the last might not be, but it has indubitably taken place, with increasing recognition of its immense significance. See Martin Shapiro & Alec Stone, *The New Constitutional Politics of Europe*, 26 COMP. POL. STUD. 397, 397 (1994) ("Long considered a North American anomaly, constitutional judicial review is today a global phenomenon. Since 1945, Japan, India, the Philippines, Turkey, and more than a dozen polities in Western Europe and Latin America have established or reestablished constitutional courts with review powers The postcommunist regimes in the Czech Republic, Hungary, Poland, Slovakia, and Russia provide for the same.").

236. It is even so for the most spirited of our moral skeptics, lawyer-economists like Richard Posner, see *supra* note 230, for no one is more insistent that law serve some positively valorized end than they. And they know it, but would just rather not talk about things that way—as though having moral commitments were like having a tic or a blemish, something everyone sees but no one is so impolite as to mention. This is a complex tension in legal realism's spirit, which would require careful discussion.

237. HART, *supra* note 1, at 185–86 ("Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.").

238. See *supra* notes 118–22, 229, 231–33 and accompanying text.

239. The famous story to this effect has Judge Learned Hand wishing Justice Holmes good-bye with the words, "Do justice, sir, do justice," and Holmes answering, "That is not

efforts at exclusion? Why can't we ask that law as law be both legitimate and just—appreciating, in line with the reasonable pluralism discussed above, that a deficit in either is not necessarily fatal, and might be compensated with a surfeit of the other?²⁴⁰ Inclusiveness, in any case, is what the reconstructive approach would teach, for it is indubitably the case that our experience and intuitions serve up both forms of obligation. Inclusiveness makes good conceptual sense as well, for the capacity to generate an obligation is what we are ultimately after here, and obviously a norm might put us under a duty of obedience either because it is authoritative or because it is in the right. And inclusiveness also squares with tradition in political philosophy, where it is familiar ground to make a distinction between substantive and procedural justifications for, say, a democratic political order, or a conception of justice, or whatever else, and to insist on both.²⁴¹

So the question here is: How does international law in the Barrier case fare with regard to *both* forms of obligation? And is there, as we saw with enforcement, a distinction to be made with respect to obligation between international law and international courts?

1. Law's Legitimate Authority

As to the legitimacy and authority of the law applied in the Barrier case, the question is this: what are the foundations for the three legal principles properly at work in that case—non-annexation, national self-defense, and discrimination between combatants and noncombatants?²⁴² All three are considered principles of customary international law, and that is important because the foundations of customary international law have come in for serious challenge in recent years, starting with Curtis Bradley's and Jack Goldsmith's now-famous *Critique*.²⁴³ "By way of background," Bradley and Goldsmith state, "there are two principal sources of international law: treaties and CIL [customary international law]."²⁴⁴ The first are "express

my job. It is my job to apply the law." ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 6 (1990). But the controversy is so much in our blood that really just a list of names—Warren, Scalia, Reinhardt, Easterbrook—will call it to mind, like Homer's catalogue of ships.

240. See *supra* notes 198–203 and accompanying text. In a pluralistic and cumulative theory of the sort at work in this Article, a surfeit of any of law's constitutive values might compensate (at least in some measure) for a deficit in another—but that is doubly true here, where both legitimate authority and moral rationality serve the function of grounding law's normativity.

241. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 73–78 (rev. ed. 1999) (charting the relationship between "fair equality of opportunity" and "procedural justice"); MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 25 (1996) (critiquing the "procedural republic" of liberal thought for lacking a shared, substantive "conception of the good").

242. See *supra* Part I.C.

243. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

244. *Id.* at 817.

agreements among nations"; the second is "the law of the international community that 'results from a general and consistent practice of states followed by them from a sense of legal obligation.'"²⁴⁵ Now, there is an obvious positivistic attack on a mere "practice . . . followed . . . from a sense of legal obligation,"²⁴⁶ and Bradley and Goldsmith sound this attack at certain points: the notion of a "'transcendental body of law outside of any particular State,'"²⁴⁷ they write, unattached to any "particular sovereign authority"²⁴⁸ and applied "in the absence of statutory or constitutional authorization,"²⁴⁹ shows an "inattention to sources of authority [that] may seem odd to modern lawyers"²⁵⁰—and is, incidentally, "in tension with basic notions of American representative democracy."²⁵¹ Having sounded that positivist theme, however, Bradley and Goldsmith don't rest there; they don't depend on positivist theory alone. They depend on the fact that *Erie Railroad Co. v. Tompkins*²⁵² depended on positivist theory and imposed that theory on U.S. federal courts: If "[p]rior to *Erie*, federal courts applied a common law (which included CIL) that did not emanate from a particular sovereign authority," that way of "looking at law" was "overruled" by *Erie*'s "embrace of legal positivism"—indeed, "overruled" and "replaced" with the proposition that "'law in the sense in which courts speak of it today does not exist without some definite authority behind it'" and thus a "sovereign source for every rule of decision."²⁵³ The Bradley-Goldsmith achievement, as I read it, was to fuse a positivistic attack on customary international law with this reading of contemporary federal courts post-*Erie*.

The *Erie* half of this argument is outside my focus here, but the positivist argument is an important challenge to the type of international law at work in the *Barrier* case—and the lesson of the *Barrier* case is how much more complicated the issue is in practice than it might seem when Bradley and Goldsmith abstract from every particularity and take up "CIL" (the very label reflects the problem) at wholesale. The principle of non-annexation, for example, is a prime example of customary international law, but it is not uncodified and not ungrounded. It is rather polycodified and multiply grounded—and hence quite difficult to derive from any one definitive source of authority, unless it is the UN Charter, where the principle is not so

245. *Id.* at 817–18 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987)).

246. *Id.* at 818.

247. *Id.* at 823 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

248. *Id.* at 852.

249. *Id.* at 822 (citing Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1557 (1984)).

250. *Id.* at 823.

251. *Id.* at 857 (citing Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 718–23 (1986)).

252. 304 U.S. 64 (1938).

253. Bradley & Goldsmith, *supra* note 243, at 852 (quoting *Erie*, 304 U.S. at 79 (Brandeis, J.)).

much stated as it is a background part of understanding what is stated.²⁵⁴ The same is true of the right to national self-defense. The Charter refers to it, but in such a way that the prior and independent existence of the right is assumed (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence”²⁵⁵), rather like the U.S. Constitution refers to habeas corpus (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless”²⁵⁶). So is the Charter the source and authority for the right of national self-defense? Is the Constitution the source and authority for habeas corpus—or is it the habeas statute, or the Magna Carta, or simply the principle that the executive is under law? And if these questions are difficult to answer, can we honestly conclude from that difficulty that the rights in view therefore lack authority? Consider, finally, the last of our trio, the principle of discrimination. It is nowhere in the Charter and truly does seem to emanate from state practice and expectation. And yet it’s not just out there in the transcendent ether. It’s there in the First Geneva Protocol, and also there in the handbooks of U.S. military lawyers—who apply it, by the way, in the course of routine and consequential functions like reviewing plans for U.S. missile strikes in advance to make sure civilian and military targets are being adequately distinguished.²⁵⁷ The principle is not just talk. It appears to bind.

In the end, none of the major principles at work in the Barrier case are grounded in a way that would be satisfying to a strict positivist, and yet none of them seem to lack legal authority or legitimacy. The United States recently overthrew the government of Iraq; why would it have been shocking to propose making Iraq the fifty-first state? Because of the principle of non-annexation. The United States was attacked by Japan in 1941; why couldn’t the country have been legally required to do nothing in response? Because of the principle of national self-defense. And the United States is currently fighting al Qaeda in Afghanistan; why couldn’t we just firebomb any village in which the terrorists might be hiding? Because of the principle of discrimination. It is just untenable to suggest

254. See *supra* notes 68–70 and accompanying text. Note that customary international law isn’t necessarily (or even typically) *just* expectation and state practice; often it is codified in treaties but taken to apply beyond or exist before those treaties. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (1987) (“International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.”); see also *id.* § 102(3) cmts. f, h, i (stating that certain “multilateral agreements” or a “wide network of similar bilateral arrangements” can “constitute practice” and thus be treated as “codifying and developing customary law,” and citing the UN Charter’s provisions on the use of force as an example).

255. U.N. Charter art. 51.

256. U.S. CONST. art. I, § 9, cl. 2.

257. See *supra* notes 191–92, 197 and accompanying text. I’m grateful to Eric Jensen, former Legal Advisor to U.S. forces in Iraq and Bosnia and former Chief of International Law for the army’s Office of The Judge Advocate General, for the insight about ordinary military practice.

that there is no law here—and if that is so, perhaps we should revise our assumptions; perhaps we should regard positivism a little more skeptically, and customary law (international and otherwise) a little less skeptically, than we do. The positivist part of the Bradley-Goldsmith argument seems quite persuasive when taken in the abstract. But that’s the problem with taking it in the abstract. The foundations of the non-annexation, national self-defense, and discrimination principles are strange—I don’t deny that for an instant—but not strange in a way that deprives them of their authority as law.²⁵⁸

So much for the legitimate authority of the law at work in the Barrier case. What about the legitimate authority of the *courts* at work in that case—the ICJ and the Israeli High Court? Now, I would like to focus the discussion in a certain way here. The classic questions of authority and legitimacy with regard to courts have to do with jurisdiction and due process—a court’s right to hear a case and the fairness of its procedure for resolving the case. As to the first, the issue has not been taken up in this Article, although the literature on the case raises grave doubts concerning the ICJ’s jurisdiction (the Israeli court’s jurisdiction seems to have been unchallenged).²⁵⁹ As to the second, the issue has been examined in this Article with respect to fact-finding, and there the ICJ’s process proved

258. A caveat: the defense of customary law I have mounted here rests on appreciating the force of settled practice and expectations for practice, and on a recognition of the complicated ways in which practice and expectation find their way into more traditional, textual sources of law. It thus undergirds only the traditional approach to customary international law reflected in the *Third Restatement of Foreign Relations Law*: “Customary international law results from a general and consistent *practice* of states followed by them *from a sense of legal obligation*.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (emphasis added); see *supra* note 245 and accompanying text. Nothing in this argument supports the less restrained approach that would make customary law of sheer declaration, and indeed much of the analysis throughout this Article—concerning the disturbing character of many General Assembly resolutions and processes, or the puzzling aspects of some human rights claims, or the disingenuous commitment patterns of undemocratic states, or the deep failures in the ICJ’s own work—gives reason to view this latter approach with profound skepticism. See *supra* notes 23–33, 103–05, 216–17 and accompanying text; *infra* notes 263–71 and accompanying text; see also John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1199–201 (2007) (describing the two approaches). There’s a larger issue lurking here. The thrust of the jurisprudential and policy position that is skeptical internationalism is support for the substance and goals of international law together with skepticism toward international institutions. But those very institutions are sometimes lawmakers or law-interpreters, or they try to be, and so there is a need for principles by which to separate the wheat from the chaff in the body of material that aspires to shape the content of international law. This is a large task that belongs in another paper, but a focus on practice over simple declaration in the customary law context is a good start, and a sensitivity to the issue—with careful consideration in the course of any claim about the content of international law as to whether the materials supporting that claim can *properly* qualify as law—is indispensable. See *infra* Conclusion.

259. See generally, e.g., Michla Pomerance, *The ICJ’s Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial*, 99 AM. J. INT’L L. 26 (2005). This was also the focus of Israel’s written statement to the ICJ. See Israeli Statement to ICJ, *supra* note 10.

sublegal, while the Israeli High Court's showed international law at its best.²⁶⁰ But important as these questions are for thinking about the courts' legitimate authority in the Barrier case, I would like to set them aside; there is, I think, a deeper question here, one with more general significance for international law and the international legal system. It is a question of institutional good faith.

Law is an institutional phenomenon, and one of the least-remarked but most powerful parts of our expectations for law as law is that it be grounded in an institutional (usually governmental) setting. The character of this setting matters. One need not believe that law is what courts do to recognize that, in litigation, power over law is in courts' hands. So when we encounter a case in which the court's work falls so far from the mark as to traverse principles of legality, where that work is not just erroneous but outrageous, our question finally is whether the court that did the work is an institution we can trust.²⁶¹ We wonder whether the court is competent and impartial. Most of all, once we look beyond today's case to what we can expect tomorrow, we wonder whether the court is *structured* so as to be competent and impartial—a reliably trustworthy caretaker of the law. I indicated earlier that, even in the often technical inquiry into legitimate authority, certain broadly moral ideas about legitimacy itself are at the end of the line.²⁶² One of those ideas is that, if the decisions of our legal institutions are to have a claim on our allegiance on grounds of legitimate authority, those institutions must be so constructed as to assure us of some minimum of institutional good faith.

So: does the Barrier case have anything *structural/institutional* to teach us about the international legal system? I think there are two basic lessons. First, the ICJ has structural problems that call into question its capacity to be a trustworthy caretaker of international law. Second, those problems are not necessary or intrinsic features of the international legal system.

As to the ICJ, what we see in the Barrier case is how singularly unsuited that court is to perform one of the basic functions of a court in a majoritarian political structure: protecting the rights of unpopular minorities. The United Nations is, after all, apart from the Security Council, a profoundly majoritarian political structure. Each state gets one vote and one at least putatively equal voice, regardless of its size or power or wealth, regardless of whether it has any stake in or connection to the issue in view, and, crucially, regardless of whether it is a rights-respecting democracy or a tyranny or something in-between.²⁶³ An unpopular country

260. See *supra* Part I.A.1, B.1.

261. See generally, e.g., BUSH V. GORE: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed., 2002).

262. See *supra* text accompanying notes 231–32.

263. U.N. Charter art. 2, para. 1 (“The Organization is based on the principle of the sovereign equality of all its Members.”). There is now an important body of scholarship indicating that democracies do not make war upon each other (the pioneering paper was Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205 (1983)) and another indicating that democracies have a distinctive capacity to order their

in this political structure is bound to do badly, an unpopular country outnumbered by a passionate opposition very badly, and it really should come as no surprise that the politics of the Barrier case—the confident activism of the Arab Group and League of Arab States (a lesson in the voting imbalance when national or cultural groups concentrated in one state compete with national or cultural groups spanning many states) and the overwhelming support for that group's efforts within the General Assembly and Office of the Secretary-General—went as they did.²⁶⁴ But all that is just to say that the United Nations exhibits a feature of democratic governance familiar to any student of constitutional law—the problem of the discrete and insular minority—and the situation, exhibiting the familiar problem, calls for the familiar solution: a court with sufficient judicial independence to protect minority rights. We speak of the countermajoritarian *problem*, but this is the countermajoritarian *function*. Yet what we have with the ICJ and what we see in the Barrier case is a court structured not as a check upon majoritarian politics but as an extension of them.

The problem is a selection process ideally suited for capture by majorities in the General Assembly and Security Council and by national and regional state blocs. Candidates for the ICJ are selected by those national and regional state blocs, on the basis of distributional rules expressly concerned with cultural representation.²⁶⁵ The candidates then run for office in the General Assembly and Security Council; prevail if they receive a majority vote in both chambers; accede if they win election to nine-year terms of office; and then can stand for reelection when their terms expire.²⁶⁶ This is not a system suited to selecting legal experts and putting them in a position to neutrally apply the law. It is fundamentally a representative system, and the empirical evidence indicates that it functions like one. Elections are reportedly “highly politicized,” depend on the support of “influential states,” and (where reelection is at issue) “can focus on cases decided by the judge.”²⁶⁷ Even an ardent supporter remarks that it “goes without saying that the whole process of election is accompanied throughout by a considerable amount of diplomatic negotiation.”²⁶⁸ Quantitative study indicates that “national bias has an important influence on the decision making of the ICJ,” with judges voting for their home states “about 90 percent of the time,” or, where their home states are not involved, “states that are similar to their home states—along the dimensions of wealth,

international relations on the basis of law (discussed throughout Part II.A above). At some point, given these bodies of work, one cannot but question an international authority so structured as to make no distinction between types of regimes.

264. See *supra* notes 23–33, 61–62 and accompanying text.

265. See *supra* note 22.

266. See *supra* note 22.

267. Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271, 278–79 (2003).

268. ROSENNE, *supra* note 22, at 64.

culture, and political regime.”²⁶⁹ In short, a court constructed like the ICJ should be expected to behave just as the ICJ did in the Barrier case—as the greater UN’s agent. But that is also to say that there are structural reasons to believe the ICJ will not act on the basis of law when the political winds blow.

It seems to me that UN supporters owe skeptics an explanation of the problem of Israel—the problem Israel represents—for there is a larger question here about whether the United Nations as a whole has a flawed institutional structure.²⁷⁰ The UN’s history with respect to Israel is not an admirable one, and there has sometimes been in it a predatory quality of the sort one always sees when an individual faces a group that despises him or her within a larger group that doesn’t much care but would just as soon not be despised too.²⁷¹ Analytically what the Israeli example shows is that the function of protecting unpopular states within the United Nations has flowed to the one component of the UN apparatus that is fairly insulated from majoritarian politics: the permanent, veto-wielding membership of the Security Council. But the Council is not a legal institution, and its permanent members, understandably enough, use their vetoes chiefly in the service of their interests and allies rather than to make sure that international law is correctly interpreted and applied. Thus there seems to be no entity positioned to protect minority rights on the basis of law in the UN structure.

Turning to the Israeli High Court, we see another kind of structural problem: a national court adjudicating a dispute between its own nation and a foreign nation. One could imagine that this structural problem would render national courts, like the international court, incapable of serving as trustworthy caretakers of the law, at least in cases where significant matters of national interest or pride are on the line. And we saw how the Israeli

269. Eric A. Posner & Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 624 (2005). It would be interesting to see whether the judges also tend to favor states that are popular within the general UN culture—something the Posner-Figueiredo study didn’t take up, but that the analysis here suggests.

270. Thomas Franck, for example, defending the UN system against Bush Administration critics, remarks that “[a]t the cutting edge of U.S. policymaking today are persons who have never forgiven the United Nations for the General Assembly’s 1975 resolution equating Zionism with racism and who . . . see the Organization as the implacable foe of Israel and the United States.” Franck, *What Happens Now?*, *supra* note 6, at 610. That characterization seems basically correct, if a little tendentious. But then, having made it, never in the article does Franck answer his opponents’ concerns; never does he defend the UN’s conduct toward Israel (or the United States) as right, and never does he offer a way of relating to the organization, a coming to terms with it, if that conduct is wrong. He just goes on to other matters. *Id.* at 617–18. But then there is no real joinder in the debate. And it is not as though the concerns are just about the past or come just from the Right. *See, e.g.*, Vaclav Havel, Op-Ed., *A Table for Tyrants*, N.Y. TIMES, May 11, 2009, at A23 (condemning as “farce” the General Assembly’s process for electing states to the Human Rights Council, and charging that the result is a Council run by “human rights abusers” and a betrayal of “victims of human rights abuses”).

271. *See supra* note 33 and accompanying text.

court unmistakably identified with its own.²⁷² But for all that, and in a setting that must have burned at least as hot in Israel as it did in the UN, the Israeli High Court decided *for* the Palestinian side where that side had the better legal claim. The Barrier case is just one piece of evidence, of course. But what it suggests is that, although there is a structural problem with national courts adjudicating international disputes, there is also a structural solution—the apparatus of judicial independence and the independent judiciary’s familiar habit of holding its own government to account—and that solution is enough for fair decision making even in situations that test the limits of realistic judicial forbearance. So it is not true that the international system has no institutions that can serve as trustworthy caretakers of the law. In domestic settings, there is a realistic prospect of the usual courage of an independent court.

2. Law’s Moral Rationality

The next question is whether international law in the Barrier case proved obligatory from the standpoint of moral good sense. Though almost never expressed directly, I believe that some version of this question is the single most powerful factor spurring American skepticism toward the international legal system. It looms behind the doubts that are voiced, the great unspoken question: can we regard the international legal system’s claims as obligatory in safety? About fifteen years ago, the ICJ addressed in its advisory capacity the question of whether “the threat or use of nuclear weapons” necessarily violates international law.²⁷³ To its credit, the court did not state that it does: “[T]he Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance”²⁷⁴ But the vote was a tie.²⁷⁵ Imagine, then, that the court had ruled the nuclear threat illegal—during the Cold War, let’s say, rather than just after—and imagine that the United States, regarding that interpretation of international law as obligatory, had dismantled its nuclear arsenal although the USSR had not. There is at least a serious argument that that act of compliance would have led to a nuclear weapon being used (the theory of mutual assured destruction being that the reciprocal threat of nuclear weapons prevents their use). Or imagine that the Allies in World War II, taking the principle of discrimination to heart (and assuming that the principle had been thought applicable at the time), had not bombed German or Japanese cities—and thus, it is conceivable, lost the war to the Axis powers. Imagine, in short, that international law ordered consequences we could never accept—like losing when it matters. Or, to reverse the perspective, consider the fact that the 1999 NATO bombings in Serbia and Kosovo, an effort to prevent genocide, are widely

272. See *supra* text accompanying notes 123–24.

273. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 226 (July 8).

274. *Id.* at 266.

275. *Id.*

considered among legal experts, “illegal but, in the circumstances, the right thing to do.”²⁷⁶ What makes the international law of war unique is that, in certain situations, a wrong answer threatens consequences more grave than almost anything else the law might bring about. International law, no less than constitutional law, is not a suicide pact. Though its project is a moral one, sovereignty, in the final analysis, is a moral project too—not when exploited as the claim to be free from all duty, but as the right of a people to do what it must to live, and the duty of its leaders to do what they must for their people.

Now, how does international law in the Barrier case fare when this concern is brought into view? The answer requires that we again distinguish between international law and international courts. No one who believes his country to be basically worthwhile and who suspects it to be out of fashion could endorse subjecting it to the ICJ when the stakes are high. In the Barrier case, there is no reason to think the ICJ’s ruling would have changed (and the opinion gives no doctrinal basis for a change) if Israel had shown that, but for the Barrier, terrorists would likely explode a suitcase nuclear weapon in Tel Aviv. And perhaps there is a lesson in that—perhaps judges ought to be exposed to the society in which the consequences of their ruling will fall, as a control on the indifferent, the frivolous, and the rigid, and an assurance that decision is taken only in conditions of full investment. That would be another reason to give pride of place in international law to domestic courts. In any case, the ICJ’s work in the Barrier case shows badly with respect to the creation of a moral obligation to obey.

International law itself, by contrast, shows quite well, and the Israeli High Court’s ruling nearly as well. Under both, international law imposed on Israel some measure of sacrifice (the Barrier could not be quite so effective as it might have been had Palestinian rights counted for nothing at all) and some measure of sacrifice on the Palestinian side as well (imposing a degree of territorial burden for the sake of Israel’s security). But in neither case is the sacrifice so great that a supporter of either Israel or Palestine who is also committed to fairness should wish the judgment otherwise. Think of it this way: Did the participation of the ICJ in the Barrier case bring about any of the things we might value international law *for*? No. Did the participation of the Israeli High Court applying the same body of law? Yes, and had the Israeli court proceeded under a slightly different analysis, the contribution could have been greater still. I can think of no clearer way to demonstrate the basic point that, in the Barrier case, international law shows enough moral good sense to deserve our respect.

It is tempting to leave it there, but one final caveat. On what I take to be a correct reading of international law, the Barrier must remain temporary whatever happens in the years ahead: the Palestinian people retain the right

276. W. Michael Reisman, Editorial Comment, *Assessing Claims To Revise the Law of War*, 97 AM. J. INT’L L. 82, 89 (2003) (citation omitted).

to enjoin Israeli expansion into the territory between the Green Line and the Barrier, and, if the military threat should fade, to demand that the Barrier be torn down. But that also means that the Barrier cannot be an instrument of closure in the Israeli/Palestinian dispute. Is that for the best? The United States and other countries are currently invested in the notion of an Israeli/Palestinian “peace process.” The premise of that process is that differences can be negotiated and a border one day settled by political agreement.²⁷⁷ What if that premise is false? Some people assume, insist, that conciliation just *must* be achieved, that anger must be overcome and neighbors embrace, taking it as an article of faith that these things are possible the way a faith healer believes he can cure cancer with prayer. One can hope. But if the hope should fail, the Barrier could become a *substitute* for agreement, a settling of the matter for better or worse, one that might block physically an anger that cannot be extinguished—and if in that case the Barrier were to become a border, settled enough to bring stability, we could not sensibly wish the situation disturbed even if illegal and historically unjust. Nations’ borders have never been, in the final analysis, entirely a matter of law.

Now, in sounding this possibility, I do not want to be too dire. A political settlement in the Middle East might prove to be possible, and if it does, international law’s refusal to let the Barrier settle the matter will be a good thing, an affirmation that force does not draw borders. Even if a political settlement should prove impossible, international law might surprise us with its flexibility; perhaps it could take into account changed conditions sufficiently to let an effective physical solution to the conflict stand. My point is only that international law’s moral good sense, even in the Barrier case, is not without ambiguity.

* * *

International law in the Barrier case, then, proves *reasonably* obligatory, but not perfectly so; it gives cause for support and also cause for doubt. The ICJ’s decision was lacking from the standpoint of legitimate authority and also from the standpoint of moral rationality. But the Israeli High Court’s showed better along both lines, and international law itself better still—and even so there were ambiguities, reasons not to unequivocally endorse what international law had to offer. On the whole, international law in the Barrier case, properly interpreted and applied, strikes me as obligatory. But there are no unqualified answers here.

C. Objectivity

Another part of the skeptical intuition toward international law is the sense that it falls too much on the politics side of the law/politics distinction

277. See Joshua Kleinfeld, *The Problem with “Peace-Process” Politics*, NAT’L REV. ONLINE, Aug. 13, 2002, <http://www.nationalreview.com/comment/comment-kleinfeld081302.asp>.

to truly qualify as law—and now we are in a thicket, for there is little in jurisprudence more elusive than that distinction, if it exists, which some doubt. At the same time, the law/politics distinction is an important part of the felt experience of law as law and a component of the intuition about international law, which means there is no avoiding it given the project at hand. We can get some purchase on the issue, I submit, by means of the concept of legal *objectivity*, as developed and contrasted with the concepts of the *partisan* and the *political* in Richard Posner's Supreme Court Foreword, *A Political Court*—an article that, in probing constitutional adjudication in the Supreme Court, in my view probes the nature of law itself.²⁷⁸

The question Posner took up in his Foreword was “whether when deciding constitutional cases the Court should be regarded as essentially a political body (which is not to say that it is a *party* animal—‘political’ does not equal ‘partisan,’ as I will explain), exercising discretion comparable in breadth to that of a legislature.”²⁷⁹ Much is said in that way of framing the question. Already we can see what it means for a court to be “essentially . . . political”: it is to exercise discretion of legislative breadth.²⁸⁰ And already we are given a useful distinction between being political and partisan: the latter, Posner explains, is to be “emotionally and intellectually tied to a particular political party,” such that one's factional loyalties determine the outcome of cases; the former is merely to be engaged (perhaps inevitably) in the business of resolving cases according to as open-ended and discretionary a mix of considerations, moral, prudential, and otherwise, as also determines legislative choices.²⁸¹ In *Roper v. Simmons*,²⁸² for example, where the U.S. Supreme Court held unconstitutional the execution of those under eighteen, the Court

was not interpreting a directive text, hewing to a convincing historical understanding of the Constitution, or employing apolitical principles of *stare decisis* or common law adjudication. It was doing what a legislature asked to allow the execution of seventeen-year-old murderers would be doing: making a political judgment.²⁸³

278. Posner, *supra* note 20. There's a tendency in American legal culture to take up great questions of jurisprudence in the context of constitutional law—no surprise that we should find it here. No surprise as well that certain doubts about whether international law is really law should also surface in the constitutional law context. There are (as I've remarked a few times already) parallels between international and constitutional law on this score; the two tend to disappoint our expectations for law as law in similar ways. See *supra* pp. 2460, 2491, 2502–03, 2517–18; see also Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1792 (2009) (defending the thesis that “constitutional law in fact shares all of the features that are supposed to make international law so dubious”).

279. Posner, *supra* note 20, at 39.

280. *Id.*

281. *Id.* at 75–76. I take it that “partisan” is a subcategory of “political” in this scheme; a partisan court is also a political court, but a political court is not necessarily a partisan one.

282. 543 U.S. 551 (2005).

283. Posner, *supra* note 20, at 46–47.

The point holds for most of the Court's constitutional docket, even for "the most celebrated constitutional decision of modern times, *Brown v. Board of Education*," which, "[o]n strictly legal grounds, . . . could have been decided the other way."²⁸⁴

What is the alternative to a political court? What would be a nonpolitical—an essentially legal—court? Posner never answers that question directly in the article, and his own beliefs on the matter (in light of his oeuvre on the whole) are complicated and skeptical,²⁸⁵ but one can infer from the article the *conceptual* alternative to a political court. "A court is supposed to be tethered to authoritative texts, such as constitutional and statutory provisions, and to previous judicial decisions," Posner writes; only a legislature—and this is its distinctive mark—"can roam free."²⁸⁶ Elsewhere, he states: "Almost a quarter century as a federal appellate judge has convinced me that it is rarely possible to say with a straight face of a Supreme Court constitutional decision that it was decided correctly or incorrectly."²⁸⁷ Elsewhere again: "Nonpartisanship," as opposed to political neutrality, may only be "a halting first step toward objectivity," but it is at least "an attainable ideal."²⁸⁸ The constant in all this is the longing for a universe of correct and incorrect legal answers, for a court engaged in discovering rather than imposing legal meaning, and for a kind of law that, though it might not speak for itself, without judges' help, nonetheless takes pride of place against the judges who announce it. In a word, the hallmark of a nonpolitical court is *objectivity*. To be sure, this is not the hard objectivity of formal logic and mathematics, where every answer is true or false and there is no room for the virtue (a traditional lawyer's virtue) of judgment. Posner derides the view "that the typical case the Supreme Court agrees to decide is a complex puzzle that would take even very bright people a long time to solve, like designing an airplane" (for "[i]ndeterminacy . . . is not the same thing as complexity" and thus "politics" not the same thing as "science").²⁸⁹ Rather, the objectivity of a nonpolitical court is the soft objectivity of a legal claim that any reasonable lawyer would think best, and of a judicial impersonality that aspires to make judges "just the medium through which law speaks . . . the oracles of the law, in Blackstone's phrase."²⁹⁰

284. *Id.* at 47 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)). J. Harvie Wilkinson strikes a similar mood in his critique of the Rehnquist Court's split-the-difference approach to constitutional adjudication: "Splitting constitutional differences is . . . likely to be grounded in policy and wisdom," but a more formal methodology "matters supremely in the law, if it is not to become the kissing cousin of politics." J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STAN. L. REV. 1969, 1989, 1991 (2006).

285. See generally, e.g., RICHARD A. POSNER, *OVERCOMING LAW* (1995).

286. Posner, *supra* note 20, at 40.

287. *Id.*

288. *Id.* at 75–76.

289. *Id.* at 63–64.

290. *Id.* at 76.

It's not necessary in this Article to defend Posner's view of constitutional adjudication in the Supreme Court. I just want to borrow his concepts: that a "political" court is one exercising discretion of legislative breadth; that a "partisan" court is one loyal to a particular political faction; and that a nonpolitical court, a court engaged in what can unabashedly be called "law," is at least in some sense and to some degree objective. My question here is whether international law in the Barrier case proved to be partisan, political, or objective.

I find it almost impossible to review the ICJ's work in the Barrier case without suspecting the court of an ideological commitment to the Palestinian (and General Assembly) cause—without suspecting it, that is, of precisely what Posner meant by *partisanship*. But judicial partisanship is a weighty accusation to make and a difficult one to prove, and it can be a mark of maturity in the law to resist that sort of thing. Aharon Barak would have us resist it. With a knowing and deliberate naiveté, he acknowledges nothing but the juridical surface, insisting that the differences between his court's decision and the ICJ's arose straightforwardly from their different factual foundations—an unremarkable disagreement among professionals.²⁹¹ There's something dignified about this sort of forbearance; a distinguished constitutionalist once said to me, "Barak does not think the ICJ is anti-Israel and I cannot help thinking it is. But that is why he is a great man." And of course, much that is disturbing in the ICJ's opinion—the failure to scrutinize claims of fact or reason about claims of law, the crusading tone, the sense of being recruited to a cause²⁹²—is deniable or amenable to a more or less innocent interpretation.

Yet much as we might hesitate to fling the accusation of judicial partisanship recklessly and in anger, we also should not play the fool, and in this case, there are two factors that *warrant* a negative conclusion. First, the factual grounds for Israel's security claims were concealed, and concealed by means of a process that violated elementary principles of legality.²⁹³ There is (as another justice on Israel's High Court put it) an "ignoring" of Palestinian violence, "a silence that the reader cannot help noticing—a foreign and strange silence."²⁹⁴ Second, the legal conditions

291. See H CJ 7957/04 Mara'abe v. Prime Minister of Isr. [2005], translated in 45 I.L.M. 202, 226 (2006) ("The main difference between the two judgments [*Beit Sourik* and *Legal Consequences*] stems primarily from the difference in the factual basis upon which each court made its decision. Once again, the simple truth is proven: the facts lie at the foundation of the law, and the law arises from the facts (*ex facto jus oritur*).").

292. See *supra* Part I.A.

293. See *supra* Part I.A.1, especially the text accompanying notes 61–62.

294. Mara'abe, 45 I.L.M. at 244–45 (Cheshin, Vice President, concurring). The rest of the concurrence is also lovely (Mishaël Cheshin, now retired, was the Israeli court's most noted stylist) and resonates in theme with this paper: "[W]hen I was a young student," he writes, "Public International Law was not seen . . . as worthy of the title 'law', and the institutions of the international community, including the International Court of Justice, received the same treatment. The years passed, and public international law got stronger and began to stand on its own two feet as a legal system . . ." But in the ICJ's work on the

for asserting a right of national self-defense were manipulated, and the manner of that manipulation again violated elementary principles of legality.²⁹⁵ Where calm reason shows a court to have behaved in ways that both undermine the character of law as law and can only be rationally interpreted as serving the interests of a political faction or party to the case, it is no service to the law to excuse the court. Barak is like a judicial Don Quixote, refusing to see the homeliness in his plain mistress. But don't Cervantes's readers know the joke and get to laugh? In the end, the Barrier case in the ICJ's hands was not law but politics by other means—and it is not finally a mark of greatness to pretend otherwise.

Turning now to the Israeli High Court of Justice and Barak's own opinion on the Barrier, the conclusion is quite different. What finally makes Barak's achievement significant is not that he ignored the partisanship in the ICJ's work, but that he rose above partisanship in his own. His Barrier opinion neither championed Israel's interests nor indulged the contrarian temptation to prove his own virtue by championing the interests of Israel's opponent. Barak rose above the partisanship of *having* allies and opponents, in a situation that would strain a saint's capacity for fairness. That was dignified. But although nonpartisan, Barak's work was political in exactly the sense Posner uses the term when he speaks of "exercising discretion comparable in breadth to that of a legislature."²⁹⁶ Both the selection and application of the principle of proportionality were acts of essentially untethered choice, acts that left the universe of determinate legal answers far behind and that reflected Barak's judicial personality rather than something that could reliably be expected of another judge no less skillful and no less fair.²⁹⁷ In the end, what the principle of proportionality amounted to in Barak's hands was a legally decorous way of saying: Is this the right thing to do? Is it worth it? Or to put the point differently, Barak's judgment call was much like the one a legislature would have made in deciding how to route the Barrier. "Strip *Roper v. Simmons* of its fig leaves," Posner wrote, "and you reveal a naked political judgment."²⁹⁸ I would not go quite that far here. But close.

Yet political as the Barrier *courts* were, the *law* was not. A judicial decision can be political because of its nature or because of the judges who decided it; the problem can be a vice of professional character or an incompleteness in the system. I do not think there is an incompleteness in the system in the Barrier case. There is *law* here; the *stuff* of objectivity is here. If one accepts the opening position that the Israeli/Palestinian situation is international in nature, that a sustained, violent, territorial dispute between two international entities qualifies as armed conflict, and

Barrier, "I could not discover those distinguishing marks which turn a document into a legal opinion or a judgment of a court." *Id.* at 244–45.

295. See *supra* text accompanying notes 108–17.

296. *Supra* note 279 and accompanying text.

297. See *supra* notes 150–59, 161–64 and accompanying text.

298. Posner, *supra* note 20, at 90.

that the Israeli High Court's fact-finding was sound, it follows as a matter of law that: (1) building the Barrier within the West Bank was militarily necessary and therefore not an annexation, but, on the same legal grounds, (2) the Barrier was subject to, and violated, the requirement that weapons used in wartime discriminate between combatants and noncombatants. Or so I have argued.²⁹⁹ The objectivity here is "soft," of course; it is not like the objectivity of mathematics. But there are grounds on which to stand and say, "This ruling, and no other, should as a matter of law carry the day." It is no small victory for international law that it can provide such a ruling in even as novel, intricate, and fraught a situation as the Barrier case.

I am aware, of course, that even a hint of objectivism about the law (and, with it, essentialism about the law/politics distinction) runs contrary to deep currents in contemporary legal thought. But I do not mean to suggest that every legal question has a determinate answer—only that many do, and that in the remainder, objectivity in the next case can be the output of a good legal opinion in this one. That is, objectivity is something that we as lawyers should aspire to bring about, and can bring about through norms of legal craftsmanship and an extreme but not impossible degree of self-restraint, which in ideal form would become a sort of judicial self-abnegation, or if that is too much, a multiple empathy so inclusive that the self would dissolve in it. I also do not mean to suggest a rigid distinction between law and politics, as if the two were made of different substances, like history and physics. Law is frozen politics, the network of political settlements of the past that, having been integrated with other such settlements, determinately answers a surprising number of questions, and creates a backdrop from which we can snatch a little social peace out of what would otherwise be perpetual and limitless dispute. Finally, I submit that there is something cavalier about disdaining the aspiration to legal objectivity altogether. It is a false sophistication, which does not comport with the experience of most law most of the time, and which robs law of its social function—to render our communal life a little more detached and decent, to give us a little shelter from the political struggle. Law at its best is a counterpolitical force.

The conclusion, then, is that the courts that contended with the Barrier case were political, but that international law itself need not be. The problem is not in the doctrine but in the application function. In a word, it is a problem of personnel. And on a personal note, that has been the conclusion of my experience of domestic law as well—a conclusion I never anticipated, never dreamed could be true. It is the judges that fail us.

CONCLUSION: SKEPTICAL INTERNATIONALISM

Nothing intrinsic to international law deprives it of the character of law. In operation it can and often does fail of its promise, but the failure is with the courts charged with interpreting and applying the law, not with the law

299. See *supra* Part I.C.

itself. That, anyway, is what this Article's analysis of the law and courts at work in the Barrier case suggests. I would like now to draw some broader conclusions from that analysis, but a caveat—connected to this Article's extensive reliance on a single case—is in order first.

One basic line of discussion in this Article has focused on the operation of international law and the international legal system; the other basic line of discussion has focused on philosophical issues about law itself. Drawing so heavily on a single case seems to me to do no great harm to the philosophical side of the analysis; that stands or falls on its theoretical merit, and there's no particular problem (and in my view some virtue) with its touching off from a close engagement with a case. But as to general claims about international law and the international legal system, drawing so heavily on one case is a *substantial* limitation, and indeed, the very features that make this particular case so interesting—its high stakes and its peculiar grip on ideological and identity-based passion³⁰⁰—may also make it an unduly difficult test for the international legal system today. Perhaps that system would show better with almost any other issue; perhaps the Israeli/Palestinian conflict is just too much for it in the present order of things. In any case, I take it that this Article can only be suggestive on the international side of the analysis. That said, I'd like now to make one broad point about jurisprudence and offer one broad proposal about international law and the international legal system.

First the jurisprudence. To ask the question this Article asks—whether international law is law properly so called—is to subscribe by implication to a certain view of law itself. There is no question that the agencies of international law, like the ICJ, are constituted bodies purportedly and officially engaged in the work of law. To imply that their work might not be law despite its formal trappings is to say that the formal trappings of the law are not enough, that what we think of as “law” is more complicated than simply the observation that a court or legislature is speaking. Law is activity under a certain set of values, and to the extent those values are absent, the activity is not law at all—that is, not just *bad* law, but, because values are constitutive of the kind of thing law is, *non-law*. Philosophers have developed the notion of “thick ethical concepts” to talk about terms that break the boundary between facts and values—concepts like “cruel” or “brave” that can be wielded correctly in description only if one first takes up an evaluative point of view.³⁰¹ The term “law” is like those thick ethical concepts. One could say the same thing about “democracy” or “art.” The social world just seems to generate these kinds of mutually evaluative and descriptive ontological objects.

For what is the alternative? One would have to think that anything a judge does under the mantle of his office is law just because a judge is

300. See *supra* pp. 2456–57.

301. See HILARY PUTNAM, THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS 28–45 (2002).

doing it. But if a judge issued a ruling that was a sheer act of will—utterly without legal foundations, ungrounded in any procedural context, impossible to enforce, and irrational besides—could anyone really claim that ruling to be an act or artifact of law? People like Hart think it muddies the waters to define law with moral values inside—but what about the non-moral values, like efficacy, or the quasi-moral ones, like objectivity? To my mind, when an activity that pretends to law falls below some floor with respect to law’s constitutive values, it simply becomes an activity of a different sort, no more law than is a tennis game in which the players happen to be judges. Christine Korsgaard calls this sort of phenomenon “self-constitution” and associates it with normativity itself.³⁰² Surely it is something like this that Lon Fuller had in mind when he described law as “an object of human striving” rather than “a datum projecting itself into human experience” and wrote that “[i]f laws, even bad laws, have a claim to our respect, then law must represent some general direction of human effort that we can understand and describe, and that we can approve in principle even at the moment when it seems to us to miss its mark.”³⁰³ In any case, these implications are fused with the very question that has spurred this study.

If this is true, then sometimes (no doubt rarely) an act or artifact or enterprise that purports to be law, and comes clothed in the law’s formal trappings, will prove upon scrutiny to be something else—and that means something for how we as a legal community should *receive* that act or artifact or enterprise. For example, certain attempts within the United Nations to alter the content of customary international law by aspirational declaration alone should in my view be observed under a different category than “law” and treated with some skepticism.³⁰⁴ Or to take an example close to home, I submit that the ICJ’s Barrier opinion, not exhibiting the features necessary to law as law, is not law, and thus cannot be treated as a legal source. In other words, given the analysis defended above—that the ICJ’s Barrier opinion cut so many of the threads that bound it to the sphere of law as to pass out of that sphere altogether—it simply follows that the opinion cannot serve as legal authority. It is therefore improper to cite the opinion as support for any claim as to what the content of international law is. And while I think this conclusion has a certain logical necessity, I also think it is healthy for the legal community to hold seriously errant courts to account in this way—for when judges transgress their duties, there are very few tools available with which to contain and repair the damage done or to sanction and deter the wrong. *Our* duty to the law, as a legal community,

302. KORSGAARD, *supra* note 19, at 28, 32 (explaining at the level of metaphysics what it means for a thing’s “teleological organization” to give rise to self-constituting “normative standards”—that is, “standards that apply to a thing simply in virtue of its being the kind of thing that it is”—and likewise what it means for an activity’s “directed” character to give rise to “constitutive principles” such that “if you are not guided by the principle, you are not performing the activity at all”).

303. See Fuller, *supra* note 119, at 632, 646.

304. See *supra* note 258.

requires that we not be too deferential to seriously irresponsible judges. Now, were the ICJ's decision compulsory rather than advisory, were it binding as a formal matter, a different conclusion might be warranted; that situation would raise issues not addressed here. But the ICJ's opinion *was* advisory, which means any power it has depends on its ability to gain entrée into the evolving canon of international public law. It is both logical and reasonable to deny it that.

Now for the broad (suggestive) proposal as to the international legal system as a whole. The proposal touches off from the observation of the gap between international law as it is and international law as it could be, between the potential of the law and the failures of the courts. "Skeptical internationalism" names a stance toward the international legal system. It is skeptical in that it rejects the sort of boosterism one finds among certain ardent international law activists, who often seem taken with the international system more because of the things it says about itself than how it functions, and who seem to treat the United Nations and its organs as sources of super-legitimacy and to identify the cosmopolitan project with the project of morality itself. The system in operation is much too ugly and much too troubled for all that, and the skeptic notices the failings and doesn't hold his tongue. But skeptical internationalism is internationalist in that it regards the aspiration to order international life by law in such a way that certain wrongs of the past become less likely to recur as both magnificent and not consistently unrealistic—and therefore as deserving our fidelity. If we believe that legitimate state power is power under law, the corollary should be that there are certain things governments should not be allowed to do anywhere, to anyone. And much of the doctrinal material international law has developed to that end is sound and can be a source of justice.

In short, the skeptical internationalist is a skeptic toward international institutions but a friend to international law itself. The message, in effect, is, "True faith, false church." With that message, the shadow over one corner of the international legal system darkens, but over another corner lifts.