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# The Jurisprudence of Judge Hardy Cross Dillard

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# THE JURISPRUDENCE OF JUDGE HARDY CROSS DILLARD*

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> The language of [the] judicial decision is mainly the language of logic . . . . [But] [b]ehind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.[1]

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* The author wishes to thank Judge Hardy Cross Dillard whose willingness to discuss his jurisprudence and his role on the International Court of Justice made this article a pleasure to write. For recent reflections by Judge Dillard about his term on the Court, see Dillard, *The World Court: Reflections of a Professor Turned Judge*, 27 AM. U. L. REV. 205 (1978).

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1. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465-66 (1897).

## I. INTRODUCTION

When Hardy Cross Dillard retired in 1968 as Dean of the University of Virginia School of Law, the *Virginia Law Review* published numerous tributes to his successful career as a scholar, professor, government advisor, and dean.[2] Hardy Dillard was then 66 years old. Referring to his "extraordinary grace and felicity in style,"[3] his friends Myres McDougal and Harold Lasswell noted that "the initiatives of Dean Dillard are more likely to mark the beginning than the end of an era."[4] In assessing Dean Dillard's contribution to legal education and jurisprudence, they observed with some degree of foresight that "[t]he largest community in which Dean Dillard would locate, and make inquiry about law, is . . . the community of the whole of mankind."[5]

On February 6, 1970, Hardy Cross Dillard became a Member of the International Court of Justice at The Hague, replacing Judge Philip C. Jessup whose nine-year term had expired. As the "principal judicial organ"[6] of the United Nations, the Court is intended to represent "the main forms of civilization and of the principal legal systems of the world."[7] Particular judges are selected as individuals rather than as national representatives, and the nominating process operates within the national groups of the Permanent Court of Arbitration.[8] Although these nominating

2. 54 VA. L. REV. 583 (1968); *see* McDougal & Lasswell, *In Dedication to Dean Dillard: Man of Depth and Style, id.* at 585. Under the rules at the University of Virginia, all administrators retire at 65, but professors may continue to teach until they reach 70. After retiring as Dean, Judge Dillard continued to serve as a professor until he assumed his position on the International Court of Justice in 1970.

3. *Id.* at 586.

4. *Id.* at 594.

5. *Id.* at 590.

6. The International Court of Justice will hereinafter be referred to as "the Court." This article will not focus upon the institutional details of the Court since there are numerous references available covering this subject. *See generally* E. DEUTSCH, AN INTERNATIONAL RULE OF LAW (1977); F. GRIEVES, SUPRANATIONALISM AND INTERNATIONAL ADJUDICATION 82-117 (1969); 1 & 2 SH. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT (1965); SH. ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS (1962) [hereinafter cited as THE WORLD COURT]. For a thorough assessment of the Court's activities, see 1 & 2 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE (L. Gross ed. 1976). *See also* Lillich & White, *The Deliberative Process of the International Court of Justice: A Preliminary Critique and Some Possible Reforms,* 70 AM. J. INT'L L. 28 (1976).

7. I.C.J. STAT. art. 9.

8. For a more detailed treatment of this nominating process, see Golden,

groups operate almost exclusively within a domestic context, a candidate for membership on the Court must obtain an absolute majority of votes in both the General Assembly and the Security Council.[9] The professional qualifications of judges are set forth in article 2 of the Statute of the International Court of Justice. "The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law."[10] In assuming his position on the Court, Judge Dillard thus fulfilled the McDougal-Lasswell prediction.

The purpose of this article is to provide a critical assessment of Judge Dillard's performance during his tenure on the International Court of Justice. Much of this article will be "jurisprudential" in scope, endeavoring to examine developments in international legal theory and international organizations during the past two decades and to assess recent decisions written by the Court. The approach will in part be an institutional one, taking into consideration the ability of an individual member of the Court to shape decisional outcomes of an international body which must resolve contentious litigation and render advisory opinions within the structure of a small group decision-making process substantially different from that of United States domestic courts.[11] Yet, the thoroughness of such an approach is necessarily limited by the peculiar characteristics of the Court as an *international* judicial body representing the "principal legal systems of the world" and also functioning as "the only principal organ of the United Nations which is composed of individuals not directly representing States."[12] The focus, then,

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*National Groups and the Nomination of Judges of the International Court of Justice: A Preliminary Report,* 9 INT'L LAW. 333 (1975).

9. *Id.* at 333, 337.

10. I.C.J. STAT. art. 2.

11. The term "small group decision-making process" encompasses a number of psychological, judgmental, historical, and developmental variables which relate to the way a party functions in a decision-making context. Such factors may involve a judge's background, his sense of timing in intervening in a discussion, his assumptions about a problem, his ability to understand key issues, his "irascibility quotient," and his capacity to make emotional as well as intellectual appeals. Assessment of these and other factors is intended to provide an evaluation of a judge's overall performance. I am indebted to Professor G. Edward White of the University of Virginia School of Law for having suggested this mode of analysis.

12. THE WORLD COURT, *supra* note 6, at 125.

will be primarily personal—an attempt to evaluate Judge Dillard's "official" opinions in light of the corpus of his jurisprudence written during his years as law professor and dean. The inquiry will focus especially upon the relationship between theory and practice, between professor and practitioner, keeping in mind Judge Dillard's observation that "a judge must find a solution for every difficulty, whereas a professor must find a difficulty for every solution."[13]

Such an approach obviously runs several risks. As Lasswell and McDougal remarked in their *Dedication* to Dean Dillard,

> It would do violence to fact, and possibly to Dean Dillard's sensitivities to suggest that he has ever purported explicitly to project a comprehensive theory about law. He has many time expressed wariness about pretentious and over-elaborate systems, and he would probably regard any effort to impose a programatic framework upon his expressed insights as an obnoxious form of intellectual hubris.[14]

This "disclaimer" notwithstanding, Judge Dillard has contributed substantially to modern international legal jurisprudence. To refrain from trying to identify consistent or disparate strains of analysis in his work would be tantamount to ignoring the presence of systematic thought. The risk comes in having to draw conclusions and advance generalizations about a living jurist's intellectual habits and biases without making his jurisprudence seem rigid.

## II. INTERNATIONAL LEGAL JURISPRUDENCE

International law like domestic law must confront challenges to the nature and scope of obligation. Law in general may be conceived of in a functional capacity, providing what Roscoe Pound called the "every-day agency of social control."[15] Law can only serve that function by dealing with questions which "arise *within* some system of law (municipal or international) and are settled by reference to the rules or principles of that system."[16] Thus, a given legal system disposes of legal problems by reference to accepted rules, sanctions, and orders which are commonly recognized as binding upon the system's participants. The most obvious distinction between domestic and international legal systems is the rele-

13. Dillard, *The World Court—An Inside View*, 1973 PROC. AM. SOC'Y INT'L L. 296, 297.

14. McDougal & Lasswell, *supra* note 2, at 587.

15. Pound, *Philosophical Theory and International Law*, in 1 BIBLIOTHECA VISSERIANA 71, 80 (1923).

16. H.L.A. HART, THE CONCEPT OF LAW 211 (1961).

vant *factual* background out of which particular rules, sanctions, and orders emerge. According to H.L.A. Hart, "the factual background to international law is so different from that of municipal law, [that] there is neither a similar necessity for sanctions (desirable though it may be that international law should be supported by them) nor a similar prospect of their safe and efficacious use."[17] This jurisprudential theory presupposes that the sociological, political, and economic facts of a given social order govern the extent to which a legal organization will manifest primary rules of behavior, a basic rule of recognition, secondary rules of recognition, rules of change, and rules of dispute adjudication. Having acknowledged that between the nineteenth and twentieth centuries a "profound change took place in the facts to which international law was to be applied,"[18] Pound characterized the relationship between the facts of international law and philosophical theory as follows:

> The facts of an international law that must govern peoples, not personal sovereigns, that must deal with large indeterminate groups, swayed in varying proportion by all the conflicting elements that enter into public opinion for the time being, not with individual men or with small, continuous cohesive groups of individuals, demand a theory that shall grow out of these facts and interpret them for us in terms of effective effort toward perceived ends, as the law-of-nature theory grew out of and interpreted the facts creatively and toward ends which it pictured.[19]

International law thus resembles a regime of primary rules in which, because of the fact that the process of achieving consensus or acceptance among states is much slower than in the municipal context, a fundamental rule of recognition is regarded as a "luxury."[20] Once it is recognized that international law need not contain a rule of recognition elaborating the basis of obligation within a state's sytem, the objection that international law is not law at all becomes invalid. The political facts involved dictate that

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17. *Id.* at 214.

18. Pound, *supra* note 15, at 78.

19. *Id.* at 75-76. As an example of the type of international law he envisions, Pound refers to the system created by Hugo Grotius:

> Much of the strength of Grotius' international law, which enabled it to become a real body of living law so quickly, was in this: that it grew out of and grew up with the political facts of the time and its fundamental conception was an accurate reflection of an existing political system which was developing as the law was doing and at the same time.

*Id.* at 76.

20. H.L.A. HART, *supra* note 16, at 229.

international law resembles less a system of law embracing *both* rules of recognition and primary rules of conduct than an evolving set of rules. Realization of this feature helps diminish the apparent contradiction between the absolute sovereignty of nations and the concept of a binding international obligation. The identification and articulation of common values in the municipal setting proceeds in a much more certain and reliable fashion, with the resulting legal system reflecting silent salient shared values. Such identification and articulation is generally more contentious in the international spectrum, and any resulting rules are apt to represent hard-won temporary compromises rather than time-tested fundamental bases of agreement.[21] The search for the sources of international law, then, becomes a quest for the definition and delineation of the stage of development of that set of operative rules at a particular point in time.

The jurisprudential approach outlined above resembles that of the positivist school of thinking in which rules are generated on the basis of observing state practices rather than beginning from a teleological or norm-oriented perspective associated with natural law.[22] In his 1963 Presidential Address to the American Society of International Law entitled *Conflict and Change: The Role of Law,* Judge Dillard described law as "a mediating device capable, when properly understood and wisely applied, of reconciling the claims of the old order under pressures from the new."[23] He characterized Pound as "plead[ing] for a conception of the legal order as a

21. One recent example of the difficulty in arriving at commonly shared perceptions about the validity of emergent norms in international law is the debate over expropriation standards. *See, e.g.*, Leigh & Sandler, Dunhill: *Toward a Reconsideration of* Sabbatino, 16 VA. J. INT'L L. 685, 697-709 (1976). *But see* Rabinowitz, *Viva* Sabbatino, 17 VA. J. INT'L L. 697, 716-24 (1977).

22. L. KOLAKOWSKI, POSITIVIST PHILOSOPHY FROM HUME TO THE VIENNA CIRCLE (1972). Kolakowski defines positivism as

> [a] certain philosophical attitude to human knowledge; strictly speaking, it does not prejudge questions about how men arrive at knowledge—neither the psychological nor historical foundations of knowledge. But it is a collection of rules and evaluative criteria referring to human knowledge: it tells us what kind of contents in our statements about the world deserve the name of knowledge and supplies us with norms that make it possible to distinguish between that which may and that which may not reasonably be asked. Thus positivism is a normative attitude, regulating how we are to use such terms as "knowledge," "science," "cognition," and "information."

*Id.* at 10-11.

23. Dillard, *Conflict and Change: The Role of Law,* 1963 PROC. AM. SOC'Y INT'L L. 50, 50-51.

process and not a mere condition"[24] to be accepted uncritically and stated that

> Pound expressed the view forty years ago that international law should be realistic, creative and axiologically oriented; that it should take account of social psychology, economics and sociology as well as politics, and that it should furnish a functional critique in terms of social ends rather than in terms of the norms of law themselves.[25]

Thus, Judge Dillard places some credence in the "policy oriented" approach concerning the role of law, which he sees as essential to accommodate changes in the international arena.[26] Judge Dillard recognizes that outside of the municipal context, the ability to agree upon rules which validate certain behavior among states is more difficult to achieve. While adopting Hart's view that fundamental rules relating to behavior must be "open-textured" or flexible enough to be given content in actual practice, he observes that the source of international law is much broader, but implies that the boundaries are not so elastic as to make their identification impossible:

> The question of the validating agency, the dictionary, must of course be the world community; nor does this mean that "anything goes" if you can get by with it. Quite to the contrary, it only means that in the international sphere, as in less developed societies, the role of the court and jury as a "dictionary" is displaced by more protean and formless agencies.[27]

From this perspective, even the nature of validation in international law occupies a different position than in the domestic context: "Law does not exhaust its function merely by settling disputes. It has an 'order-creating' or 'constitutive' function as well; it performs this function by fashioning new patterns of relations."[28]

## III. Influences on Judge Dillard's Jurisprudence

### A. *American Legal Realism*

Hardy Dillard "quit" international law at the end of the Second

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24. *Id.* at 51.
25. *Id.*
26. For an example of the policy-oriented approach applied, see McDougal, Lasswell & Chen, *Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry*, 63 Am. J. Int'l L. 237 (1969).
27. Dillard, *supra* note 23, at 55.
28. *Id.* at 62.

World War in order to pursue his studies of jurisprudence.[29] "I became fascinated with jurisprudence, and that's what I taught both [at Virginia] and at Columbia, but I kept a finger in the international field because I also gave annually a seminar on law and foreign policy."[30] At the time of his appointment to the Court, Hardy Dillard considered himself more of a jurist than an international lawyer: "I became intrigued by the ferment that was going on with the American Legal Realist movement. I read deeply into Roscoe Pound, Morris Cohen . . . . In my Hague Lectures I drew on Pound quite a bit."[31] This fascination with jurisprudence came early in Judge Dillard's career when, as a student at the University of Virginia, he accidentally discovered Roscoe Pound's essay, *Mechanical Jurisprudence,*[32] while browsing through the library. His Hague Lectures, written in 1957 and entitled "Some Aspects of Law and Diplomacy,"[33] reflect Pound's influence and present an analysis of social conflict in terms of law's concern "with the clash of actual or potential interests."[34] The analysis went beyond simple identification of rights and obligations and was "concerned with the creation of a whole welter of relations and with so ordering these relations as to minimize friction and promote order."[35] The main value of law in this complex ordering process lies not in its predictability, its ability to yield certainty in the untangling of what Judge Dillard refers to as "fusses,"[36] but rather in its ability to create order by revealing the issues, values, policy choices, and likely impact involved in specified outcomes. Contrasting "law" with "diplomacy," he suggests that the major weakness of the former is that it is imposed on the parties, while diplomacy is not. Law, however, eliminates the necessity of good faith, while diplo-

29. Interview with Judge Hardy Cross Dillard, in Charlottesville, Virginia (Sept. 27, 1977) [hereinafter cited as Interview I]. The interviews cited in this article were tape recorded, and are on file at the University of Virginia Law Library. Judge Dillard's interview remarks which are included herein have been slightly edited for purposes of preparing them for publication.

30. *Id.*

31. *Id.*

32. Pound, *Mechanical Jurisprudence,* 8 COL. L. REV. 605 (1908).

33. Dillard, *Some Aspects of Law and Diplomacy,* 91 RECUEIL DES COURS 449 (Neth. 1957).

34. *Id.* at 457.

35. *Id.* at 466.

36. Judge Dillard refers to this notion that law is primarily concerned with imposing restraints on conduct as the "Fuss Fallacy." Book Review, 18 VA. J. INT'L L. 181, 189-90 (1977). *See also* Dillard, *supra* note 33, at 498.

macy's major weakness is its reliance on good faith.[37]

The tension arising from the law-diplomacy dichotomy may be found in the need to reconcile the view that rigid, obligation-creating and, therefore, adjudicable standards are needed to manage all types of disputes, with the attitude that too much insistence upon legal codification stifles flexibility and creative, negotiated dispute settlement. "I tend to be somewhat conservative. I'm not a conservative about law as a method for absorbing conflict. I am conservative about third party judgment as necessarily being the best way to settle [it]. I don't necessarily relate law and third party judgment."[38] The drawbacks of imposed legal settlements, especially in international disputes, stem from both the view that the body imposing the solution may be too remotely related to the factual, historical, or political context to appreciate important subtleties and nuances[39] and the inescapable fact that international legal standards are frequently perceived to be vague or lacking in authority.[40] From the standpoint of the International Court of Justice, institutional confidence would appear to be a function of its ability not only to resolve fundamental disagreements but also to effectuate results which serve as "diplomatic" resolutions of tough cases and as legitimizing decisions nurturing its own authority and credibility.[41] Because application of legal standards alone will not solve all contentious cases, Judge Dillard recommends an interlocking of law and diplomacy whereby law serves as an "ordering" device[42] which helps in dispute settlement and at the same time leaves room for the parties themselves to play a major role in the final determination.[43]

The value of legal realism lies in its explicit rejection of mechanical jurisprudence and its positivist[44] espousal of the notion that

37. Dillard, *supra* note 33, at 514.

38. Interview with Judge Hardy Cross Dillard, in Charlottesville, Virginia (March 25, 1978) [hereinafter cited as Interview II]. *See also* Dillard, *supra* note 33, at 523.

39. *See* Western Sahara Advisory Opinion [1975] I.C.J. 1, 116 (opinion of Judge Dillard).

40. Dillard, *supra* note 33, at 515-16.

41. *Id.* at 520. An analogous decision in United States jurisprudence would obviously be Chief Justice Marshall's opinion in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), where the Court essentially staked out the limits of its own authority by imposing limits on the scope of its own jurisdiction. *See also* Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

42. Dillard, *supra* note 33, at 533.

43. *See* Fisheries Jurisdiction Case, [1974] I.C.J. 3, 53 (opinion of Judge Dillard).

44. L. KOLAKOWSKI, *supra* note 22, at 10-11.

legal principles are not derivable solely from "a brooding omnipresence in the sky."[45] Positivism had its influence on international law as well, with "[p]ositivist international lawyers [seeking] to find by observation laws of development of an ordering of international relations, to verify these laws of historical and analytical investigation and to deduce their logical consequences in the form of legal rules."[46] Positivism and its subsequent adoption by the American legal realists led to a decline in the nineteenth century attitude of historical and metaphysical determinism and to a greater recognition of the "role which human initiative may play in the building of institutions and the shaping of human events."[47] When viewed as part of a fallible process of trial and error, law and legal *method* become more scientific in nature, not in the sense of "reveal[ing] infallible truths about the nature of being but schematiz[ing] actual experience in a way that makes possible its technical exploitation."[48]

### *B. The Policy-Oriented Approach to Law*

In an article entitled *The Policy-Oriented Approach to Law,*[49] Judge Dillard reviewed the perspective on law most characteristically associated with the endeavors of Myres McDougal, Harold Lasswell, and their various associates at the Yale Law School. This approach "attempts to weld 'law,' 'science,' and 'policy' into a

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45. The phrase comes from Justice Holmes' dissent in Southern Pac. Co. v. Jensen, 244 U.S. 205, 218, 222 (1917). *See also* Black & White Taxicab & Transfer Co. v. Brown v. Yellow Taxicab & Transfer Co., 276 U.S. 518, 532 (1928) (Holmes, J., dissenting); Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370 (1910) (Holmes, J., dissenting).

46. Pound, *supra* note 15, at 87.

47. *Id.* at 89. According to Pound this understanding was one of the consequences of World War I. The British philosopher Sir Karl Popper has also emphasized a similar understanding, namely, that we are responsible for our own destinies:

> [P]roblems connected with the uncertainty of the human factor must force the Utopianist, whether he likes it or not, to try to control the human factor by institutional means, and to extend his programme so as to embrace not only the transformation of society, according to plan, but also the transformation of man. "The political problem, therefore, is to *organize human impulses* in such a way that they will direct their energy to the right strategic points, and steer the total process of development in the desired direction."

K. POPPER, THE POVERTY OF HISTORICISM 69-70 (1961) (quoting K. MANNHEIM, MAN AND SOCIETY 199 (1949)).

48. L. KOLAKOWSKI, *supra* note 22, at 33.

49. Dillard, *The Policy-Oriented Approach to Law,* 40 VA. Q. REV. 626 (1964).

comprehensive system reflecting not a casual symbiosis but a realistic method of inquiry and analysis."[50] The McDougal-Lasswell approach begins by identifying and analyzing the process by which authoritative decision-making is achieved, and a central feature of this method is the requirement—completely antipathetical to natural law theory—that the goal values of a system be made wholly explicit from the outset. "[I]n simplest form the McDougal-Lasswell decision theory postulates that rational decision requires the performance of five intellectual tasks: clarification of goals, description of past trends, analysis of conditions affecting past trends, projection of future trends, and invention and evaluation of policy alternatives."[51] Judge Dillard is undoubtedly sympathetic to the policy-oriented approach to law, since he sees it as both a continuation of Pound's theory of social interests and an offshoot of pragmatism and the American legal realist movement. He recognizes, however, that "it goes beyond American Legal Realism in many respects, including its comprehensive framework, its franker vocalizing and use of values, its more expansive concept of law as fashioned by all of officialdom instead of courts, legislators, and administrators, and in its linguistic assumptions."[52]

Judge Dillard admittedly locates himself within the American realist movement in espousing an approach to law in which biases and value judgments are placed openly on the table for all to judge. His review of Corbin's *The Law of Contracts,* for example, illustrates his recognition of a telelogical or purposive aspect of law, and yet this purposive element must be identified for all to see, removed from any claim of *a priori* validity.[53] Thus, Judge Dillard is able to praise Corbin for his "patient genius" and his congeniality to the realist movement while castigating Williston for the "allegedly cramping effect of his logically constructed system:"[54]

> The anti-pragmatist will suggest that it is impossible to tell how a rule works without some notion of what it is working toward, *i.e.,* without some notion of end or purpose. How is this end to be determined? The answer, however stated, requires a value judgment which is no less real and pervasive because too often ignored.[55]

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50. *Id.* at 627.
51. Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell,* 54 VA. L. REV. 622, 672 (1968).
52. Dillard, *supra* note 49, at 631.
53. Book Review, 5 J. LEGAL EDUC. 387 (1953).
54. *Id.* at 388.
55. *Id.* at 389.

Judge Dillard obviously accepts much that is common to pragmatism, realism, and the McDougal-Lasswell method, and his views can hardly be characterized as belonging primarily to any one school of thought.

Both McDougal and Lasswell apparently would claim Judge Dillard as a member of their camp. Citations to their work in Judge Dillard's publications are intended to show how closely Judge Dillard shares their view that law is value-oriented and that basic goal values should be clarified and implemented: Judge Dillard "unhesitatingly proclaims the need for the postulation, as contrasted with the derivation, of a comprehensive set of goal values, and he explicitly joins with the present writers in recommending postulation of the basic goal values of human dignity."[56] While this analysis may be technically correct, McDougal and Lasswell considerably overstate the point, since Judge Dillard would join a number of critics of the policy-oriented approach who maintain that for instances of practical adjudication it becomes unwieldy:

> The trouble with [McDougal's] approach is that it's simply too global, and his rhetoric is a little too incomprehensible to busy people who have to argue and decide cases. But he's right in the sense that he insists that you keep alive the ultimate aims and purposes. Of course, he wants to combine a sort of natural law concept, namely that the ends or purposes are important, with a scientific concept so that you should bring to bear in trying to decide *everything,* all the evidence of any kind bearing on every issue.[57]

Although recognizing that McDougal himself would deny the presence of natural law in his theory, Judge Dillard explains his own relationship to natural law theory in terms of the intersection between natural and positive law:

> I have always viewed natural law in the context of what I referred to in my lectures as "the intersection concept." When describing these inherently vague standards, it seems to me that one must look to the purpose or object of the particular pronouncement in question, whether it is a municipal ordinance, a legislative statute, or a constitutional provision. After ascertaining as closely as possible the object or purpose of the pronouncement, one must then determine empirically whether any evidence exists of that object or purpose which is teleological . . . . I say that the moment that that analysis is begun and some standard is sought, then natural law is infusing itself into the body of the positive law . . . . [The ultimate question

56. McDougal & Lasswell, *supra* note 2, at 592.
57. Interview II, *supra* note 38.

> thus is] what is positive law? [One cannot] assume that positive law is simply a closed book with rigid rules. Viewed realistically, then, these standards of the positive law are infused with meaning by looking to what the natural law advocates would insist is "object and purpose . . . ." It is not as if an antinomy exists between natural law and positive law. The natural law is a sort of midwife helping to determine the nature of the positive law. It is reason tempering fiat.[58]

Hardy Dillard's jurisprudence is thus an eclectic blend of pragmatism, positivism, legal realism, and policy-orientation with elements of natural law being infused to assist in giving content to the law's "object and purpose." In a 1941 review of Fuller's *The Law in Quest of Itself,* Judge Dillard described the natural law adherents as claiming a monopoly on the "ought" questions, while the realists would deny both the importance and "pervasive existence" of the "ought."[59] Judge Dillard has always praised the need for "legal imagination,"[60] and his refusal to accept any one school of jurisprudence has prevented his approach to legal controversies from becoming rigid or facile. Recognizing that jurisprudence involves the task of "exploring and classifying the concepts and relations internal to law,"[61] he notes that law is useful to modern man because it provides a sense of security, yet the reemergence of natural law concepts has led to a revived interest in the so-called fundamental principles on which that security is based.

Typical of Judge Dillard's style is an anecdote which he recites frequently and which he attributes to *The New Yorker.* "Between scepticism on the one hand and dogmatism on the other hand, there is a middle way, which is our way—open-minded certainty."[62] For a judge, open-minded certainty represents an attitude combining scholarly questioning of alternatives and rationales with the realization that eventually decisions have to be made and the luxury of scholarly endeavors must yield to the pressures of decision-making. "I've always felt that there were two things that helped intellectually to gain a mastery of material. One is to press back for assumptions, and the other is to push forward to consequences, in order to see what the result is likely to be."[63] From

58. *Id.*
59. Book Review, 27 VA. L. REV. 568, 570 (1941).
60. Dillard, *Commentary,* 21 U. MIAMI L. REV. 532, 533 (1967).
61. Book Review, 38 VA. L. REV. 703, 703 n.2 (1952).
62. Dillard, *supra* note 60, at 532.
63. Interview II, *supra* note 38.

a practical perspective, the ability to digest a tremendous volume of material, to ask the proper questions of counsel—especially when the documentation frequently runs into the tens of thousands of pages—has proved a major difficulty for an individual judge on the International Court of Justice working without clerks or secretarial assistance. In the *Advisory Opinion on South West Africa (Namibia),*[64] for example, Judge Dillard attempted to circumvent the mountains of compiled documents by asking one question to counsel for South Africa: "Does not the theory of your case lead to the conclusion that South Africa is legally privileged to annex South West Africa if it chooses to do so?"[65] The counsel responded that it did, and for Judge Dillard, that answer "came close to the heart of the case."[66] His question had asked for an explanation of both the assumptions behind and the consequences of South Africa's position.

Similarly, in the *Cod War Cases,*[67] which involved the unilateral extension of fishing rights by Iceland and the contravention of a treaty with Great Britain and West Germany, Great Britain maintained that Iceland's actions violated international law. In probing the nature of the three submissions by Great Britain,[68] Judge Dillard asked Great Britain's counsel whether it was necessary to decide the first submission before being able to reach the other two. Counsel responded in the negative, and Judge Dillard found that he did not have to belabor the first submission. Judge Dillard later stated:

> I was trying to reconcile two things. As Pound's famous statement suggests, the fundamental problem of law is to reconcile the conflicting needs of stability and change. Law must be stable, yet it can not stand still. At this juncture there is a little creative role for the judge. It seemed to me to be freezing things too much to respond to that first submission in view of the many changes that were going on at that time. Another big problem with Pound discusses in his *Introduction to the Philosophy of Law*—which I practically committed to memory—is a problem that confronts the Court that people do not seem to talk about. The problem is more conspicious in international than in national litigation, and is this:

64. [1971] I.C.J. 9.

65. Interview I, *supra* note 29.

66. *Id.*

67. Fisheries Jurisdiction Case [1974] I.C.J. 3, 60 (Fisheries Jurisdiction Case, opinion of Judge Dillard).

68. The submissions may be found in Fisheries Jurisdiction Case, Judgment [1974] I.C.J. at 16.

> how to reconcile the need for generality . . . with the need to take into account the particular . . . . In the *Cod War Cases*, we had created in effect a classification. Iceland was especially dependent upon fisheries, so we took that into account by giving her preferential rights, as opposed to those nations which did not already have treaty rights . . . . Here we had a general rule, and yet we filled the particularities of that problem . . . by giving her something as well. Such a resolution would never have occurred to me if I had not had a jurisprudential background.[69]

This concern with the creation of a sense of harmony between the general and the particular is an inescapable aspect of international adjudication and dispute settlement. Not only are the prevailing norms themselves often unclear, but all too frequently the facts from which any such norms must be derived are either incapable of precise delineation or too complex to assimilate intelligently. "In the national domain, you have 200 million people in the United States. Their similarities are more important than their differences . . . . With [the international scene], it's the other way around."[70] Although generalities such as freedom of the seas, free transit, and innocent passage do exist and apply universally without reference to any particularities, one cannot go very long in judicial adjudication without having to accommodate emerging particularities.

## IV. The Contemporary Jurisprudence of the Court

Many of the jurisprudential concerns of the various "schools" discussed in this article have played a role in the jurisprudence of the International Court of Justice. In his dissenting opinion in the *South West Africa Cases,*[71] Judge Tanaka noted that particular facts relating to the parties involved should be given as much consideration as any statutory pronouncement. "We, therefore, must recognize that social and individual necessity constitutes one of the guiding factors for the development of law by the way of interpretation as well as legislation."[72] In his view, the gulf between the majority and the minority on the Court could be "attributed to the difference between two methods of interpretation: teleological or sociological and conceptual or formalistic."[73] The distinction

69. Interview I, *supra* note 29.
70. *Id.*
71. [1966] I.C.J. 7, 250.
72. *Id.* at 277.
73. *Id.* at 278.

between the two approaches involves the willingness of a judge to extrapolate an applicable norm from a set of factual conditions, taking into consideration previous precedents and future outcomes. The positivists seem to have been more cautious in contexts involving the possible creation of norms, whereas the sociological school has been less reluctant to engage in such innovation. John Dugard has recently observed this jurisprudential "schism" on the Court and has characterized it as follows:

> Two main jurisprudential approaches have surfaced in the recent judgments and opinions of the Court—the positivist (or formalist) and the teleological (or sociological). Positivists see international law as a body of rules to which States have consented and stress State sovereignty as the cornerstone of the international legal order. As a consequence, they adopt a highly cautious approach to judicial innovation and to the creation of new rules of customary law. Opposed to this school are those who emphasize the community interest over State sovereignty, and who are prepared to accept the innovative role of the judge and the accelerated growth of custom in an interdependent world . . . . In the field of treaty interpretation this group is often described as the teleological school, for it seeks to give maximum effect to the object and purpose of treaties.[74]

It is apparent that Judge Dillard's conception of natural law intersecting with positive law places him in both the formalist and sociological schools of thought. Institutionally, however, one might imagine that the positivists would play a more dominant role on a court in which contentious cases are often of high political salience and the majority of the judges are drawn from domestic experience, such as elective office or service in foreign affairs where political inputs are generally significant in dispute settlement.[75] If the facts involved in international adjudication are so diverse and complex, reflecting numerous national traditions and customs, then a court composed of judges coming from different historical, cultural, and legal backgrounds can hardly be expected to forge decisions which are of uniform application, acceptability, and persuasiveness to all nations in the world:

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74. Dugard, *The Nuclear Tests Cases and the South West Africa Cases: Some Realism About the International Judicial Decision,* 16 VA. J. INT'L L. 463, 495 (1976) (footnote omitted).

75. Both the South West Africa Cases and the Nuclear Tests Cases can be considered more "realistic" in the sense of representing outcomes consonant with the realist position. *Id.* at 491. Judge Dillard remarks that he is probably more of a professor than most international lawyers. Interview I, *supra* note 29. For a comprehensive curriculum vitae of Judge Dillard, see [1975-1976] I.C.J.Y.B. 19.

> The many intangibles that contribute to a nation's style and stance, that give to its expressions of policy and purpose their peculiar tone and flavor are too often ignored by those who measure significance only in terms of concrete decisions and specific issues. The exhibited habits of thought of decision makers may transcend in importance the decision itself.[76]

On the basis of these factors alone decisions from the International Court of Justice could be expected to turn on relatively narrow, unadventurous, and, to the extent possible, noncontroversial or nonideological considerations. Since the process of norm acceptance in international law is much slower than the institutional assimilation possible in most domestic arenas, one could further predict a greater tendency on the part of states to employ the Court's adjudicatory capacities. At the same time, where norms are vague or merely nascent, the relative uncertainty as to outcome undoubtedly accounts for what one author calls the Court's "august indolence."[77]

## V. Membership on the International Court of Justice

This section will explore Judge Dillard's perceptions of the institutional features of the Court with a view toward evaluating the Court as an international decision-making body and examining the degree to which the Court's physical structure influences its jurisprudential results.

### *A. Appointment*

With characteristic modesty, Judge Dillard claims that his appointment to the International Court of Justice came as a total surprise to him, as he had, in fact, been recommending two other candidates. Although he attributes his appointment to having been President of and active in the American Society of International Law for several years, he confesses that he had to "bone up" quite a bit before joining the Court.[78] At the time of his appointment in February 1970, however, the Court had been fairly inactive. Judge Dillard is quite fond of recounting the article in the *Richmond Times-Dispatch* which greeted his arrival at the Twenty-fifth Opening Session of the Court:

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76. Dillard, *Minds and Moods,* 44 Va. Q. Rev. 51, 59 (1968).

77. Claude, *States and the World Court: The Politics of Neglect,* 11 Va. J. Int'l L. 344, 344 (1971).

78. Interview I, *supra* note 29.

> Prestige Ranks High, Influence Low as World Court Opens 25th Session
>
> The Judgeships are considered prime plums. They pay a tax-free salary. The job is a prestigious, luxurious, sinecure which displeases activists like Philip C. Jessup (who preceded Hardy C. Dillard) but pleases the elderly and the infirm who often populate the Court.[79]

The underutilization of the Court's resources has, nonetheless, continued to be an embarrassment throughout Judge Dillard's term as a judge, and the criticisms have continued to grow at an unfortunate rate.

### *B. Criticism of the Court*

One recent study of the Court's effectiveness asserted that the Court "attracts scholarly attention primarily for its inactivity."[80] The authors appeared to condemn the Court when they added that it "cannot be credited with directly settling any of the disputes dealing with the East-West conflict, decolonization, or control over natural resources environmental concerns. The majority of the disputes on which the Court has made merit or nonmerit judgments have been localized and peripheral to major international problems."[81] This assessment certainly expects too much from an international organ consisting of fifteen fallible judges. It has been suggested that "[t]he proper role for the Court lies in promoting unification in the interpretation and application of international law . . . and contributing thereby to the rule of law and greater integration of the international society."[82] Compared with the present docket congestion of the United States Supreme Court, the twenty-six judgments and fourteen advisory opinions of the International Court of Justice in thirty years is a pitifully small number of judicial decisions. On the other hand, considering the rate of change in the post-World War II era and the severe stress encountered on all fronts, economic, political, and social,[83] a "world" court can hardly be expected to locate generally accepted norms and practices which can be invoked to dispose of hotly contested political controversies.

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79. *Reported in* Dillard, *supra* note 13, at 299.

80. J. GAMBLE & D. FISCHER, THE INTERNATIONAL COURT OF JUSTICE 1 (1976).

81. *Id.* at 72.

82. Gross, *The International Court of Justice: Consideration of Requirements for Enhancing Its Role in the International Legal Order*, 65 AM. J. INT'L L. 253, 259 (1971).

83. *See generally* A. BUCHAN, THE END OF THE POSTWAR ERA (1974).

The Court, then, seems to function within the confines of two sets of constraints which make the "judicial activism" of the United States Supreme Court under Chief Justice Warren[84] an improbable model for the International Court of Justice to follow. First, institutional constraints in the organization and operation of the Court are present which tend to inhibit the type of decision-making which is characteristic of many common law countries. Second, jurisprudential constraints exist which, due to the nature of the facts presented before the Court in its contentious cases and advisory opinions, tend to give the Court a "positivist" slant, at least insofar as the judges are inclined to be fairly cautious in their decisions.

### 1. Institutional Constraints

A tendency of many critics of the Court has been to chastise it for having failed to accomplish the impossible. For example, Eberhard Deutsch has remarked that "[i]t should be borne in mind that the Court has never yet decided a case which has saved the United Nations from getting into a Third World War, nor did it stop the Second."[85] Yet this habit of mind, whether prompted by scholarly reflection or ideological concern, fails to reflect on the true nature of the Court, its purposes, and its inherent limitations:

> [I]t must be recalled that cases before the ICJ are more likely to be deeply rooted in history than is true in the national domain and furthermore the Court, except to a very limited extent (as in the ICAO case), is not an appellate court but both a court of first instance and a final court. This means, of course, that it must grapple with basic facts uninformed by the sifting and distilling process which progress through lower courts provides. The structured process helps to lift out for emphasis and discussion those facts deemed most compelling.[86]

The fact that the Court also lacks a readily identifiable constituency not only helps to explain the reluctance of the Court to enunciate bold normative pronouncements on international legal issues, but also means that any legitimizing function that the Court can play in gathering support for a controversial decision is

84. *See, e.g.,* Kurland, *1970 Term: Notes on the Emergence of the Burger Court,* 1971 SUP. CT. REV. 265, 298-305.

85. Deutsch, *The International Court of Justice,* 5 CORNELL INT'L L.J. 35, 41 (1972).

86. Dillard, *supra* note 13, at 303-04.

consequently minimized.[87]

Three years after his appointment to the Court, Judge Dillard publicly remarked that he had come to "appreciate the virtues of the system," noting that the Court's various internal structural procedures "draw on both the common and civil law systems and thus reveal both the strength and weakness which compromises so frequently manifest."[88] The physical processes of judicial decision-making tend to reinforce the Court's unwillingness to render decisions swollen with dicta, although the various sequential stages during which an opinion or a dissent is forged unquestionably help facilitate an overall consensus which compensates to some degree for the different legal and cultural backgrounds of the judges.[89] From an institutional standpoint, although the actual size of the Court would seem to facilitate effective small group decision-making, nothing in the drafting process of the Court is comparable to the reportedly candid discussions which occur during the United States Supreme Court's weekly conferences.[90] In fact, the current process of reaching a decision is calculated to minimize the interpersonal contact characteristic of effective small group decision-making.

Life at The Hague for the typical judge on the Court seems to be a decidedly lonesome existence.[91] Not only is there very little fraternization among judges and members of their families, but the intellectual process demanded in hearing cases and deciding them is a similarly solitary endeavor. Language barriers notwithstanding, Judge Dillard has observed that once the President of the Court has circulated a list of the "issues" to be considered in deciding a particular case, the first step in the decision-making process—the preparation of the individual judge's Private Note—"may have the tendency, since it is committed to writing, of psychologically freezing the point of view it expresses."[92] The chance of any serious interchange among judges after the Notes

87. The ability of an international court to marshall such support is obviously limited. The United States Supreme Court, for example, has a much narrower constituency to which it can appeal. Chief Justice Warren's majority opinion in Brown v. Board of Education, 347 U.S. 483 (1954), represented not only a "legal" decision but was explicitly presented so as to appeal to the populace at large. Many national newspapers, for example, printed the opinion in its entirety.

88. Dillard, *supra* note 13, at 301.

89. *Id.* at 303.

90. *See* J. WILKINSON, SERVING JUSTICE 40-42 (1974).

91. Interview I, *supra* note 29.

92. Dillard, *supra* note 13, at 302.

have been written is further undermined by the fact that "they are distributed anonymously, in order, presumably, to minimize the potential influence of one judge on another."[93] Although a consensus may appear to result from this institutional procedure designed to accommodate fifteen judges of varying backgrounds, the opportunity for an effective yet nondivisive dissent or qualified concurrence is reduced, creating a "peculiar dilemma for a judge who may wish to avoid weakening the majority opinion but may yet wince at some of the reasons advanced in support of it."[94] Once the Private Notes have been circulated, most of the formal "debating" as to issues and positions has been finished. Although the next step includes a series of deliberations, these too are structured with each judge defending or modifying his Private Note, the authorship of which is now obvious. Thus, the bulk of the decision-making is a function of penmanship with very little opportunity for personal exchanges which can be so effective in the traditional small group decision-making context.[95]

Final opinions by the Court are written by members of the Drafting Committee, which is elected by secret ballot and whose members remain anonymous. The forging of a Drafting Committee opinion is a difficult process, since it requires accommodation of many views and issues typically present in a majority position.[96]

> When reviewing our operative clauses, each judge is supposed to state whether he agrees with the judgment. A judge can not abstain . . . . This makes for a little dilemma sometimes if a judge agrees with the result but does not altogether agree with the rationale. A judge in that situation will write an individual opinion . . . . For my part, I have tried not to be a "nitpicker," and if I could go along with the majority and support not only the judgment but also the reasoning . . . I would do it. Dissenting, however, is a different matter. Your target in dissent really is, I think, the sophisticated "Court watchers."[97]

Although opportunity for criticism of the Drafting Committee's initial opinion is possible, no evidence exists that such criticism produces substantial change in individual judges' attitudes. Similarly, there have been indications that even in joint dissents after the dissenters had discussed things among themselves, the actual

93. *Id.*
94. *Id.* at 303.
95. *See id.* at 302 n.7.
96. Interview I, *supra* note 29.
97. *Id.*

written opinion with a joint effort in which individual judges divided up particular aspects of the opinion.[98]

After Private Notes are circulated, the Court meets again and individual judges can present oral defenses of their opinions. This stage is probably the closest a judge comes to revising his views, although the psychological impact of having already written something can be inhibiting. At this stage, a majority becomes apparent, and a Drafting Committee is elected. Once this Committee reports back to the full Court with a draft opinion, it is read aloud and any dissents must then be announced. No changes in views are allowed, and the Committee meets again to prepare a second and ordinarily final draft in light of the comments of all the judges, dissenters included.[99]

The practice of the Drafting Committee, including its membership, is a "deep, dark secret." The members usually meet around a big table using headphones for interpretation whenever necessary. Yet, even at this final period very little "hard bargaining" or tradeoffs are made.

> Brandeis once said of Justice Day that he could never be persuaded by anyone but himself. It's a little bit like that with us too. You don't sway these fellows much. They're all independently minded . . . . I have changed a nuance here or there . . . . It's a tortured, a lonely job . . . . You are not quite sure you are right. In the *Western Sahara Case* . . . I was awfully uncertain because it was so deeply rooted in history . . . . I was sure I was right on one point, but I was not sure that I had enough feel for the history of it to be sure that I was fair.[100]

It is frequently difficult to guess from results alone the nature of the debates which may have occurred among the judges. For example, a judge may not feel the need to write a separate opinion because the majority opinion already reflects his views, either because he actually sat on the Drafting Committee or because in the course of submitting written and oral comments on three Draft Opinions of the Drafting Committee, he discovers that his views have been accepted.[101]

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98. *Id.*

99. *Id.*

100. *Id.*

101. The possibility for modification of individual judges' views, however, can evolve during the several stages in which a case is presented. See, for example, the Fisheries Jurisdiction Cases, in which Judge Dillard submitted no separate opinions. Those cases involved three stages. First, the Request for Interim Measures of Protection resulting in Orders of the Court in 1972. Federal Republic of

In discussing his views on the overall structure of the Court's decision-making process, Judge Dillard observes that "the kind of exchange of views *required* by the Court's process of decision-making tends inevitably to dampen, by mutual exposure, the pull of nationalistic and idealistic affinities."[102] The fear of many states that nationalistic biases of judges on the Court will play a major role in final outcomes[103] helps to account for the structural rigidities in the Court's operations, reinforcing its tendency to adopt a cautious approach. No evidence exists, however, that this cautiousness and serious concern for avoiding nationalist bias has increased the willingness of states to bring cases before the Court. Supporters of Court reform might reevaluate whether elimination of many of these structural requirements, affording more candid exchanges between judges, would have any impact whatever on the Court's future docket. If not, then nationalist bias merely prevents a more robust airing of the issues before the Court in a given case. Members of the Court themselves have criticized this process, especially the speed with which the Private Notes are written. "We should have discussed the issues more. In our recent revision of internal judicial practice we have changed this, but we have not yet put it into practice."[104]

### 2. Jurisprudential Constraints

The jurisprudential constraints facing the Court are a function of both the factual nature of international law and the structure of the Court itself. It is virtually impossible to determine whether these constraints dictate the structure and, if so, to what degree. The picture which emerges is one of a cautious Court in contradistinction to the United Nations, of which it is the principal judicial organ. The overall view of the Court is one of a positivist-oriented

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Germany v. Iceland, Interim Order, [1972] I.C.J. 35; United Kingdom v. Iceland, Interim Order, [1972] I.C.J. 17. Occasionally these orders can be very complicated, with individual judges writing separate and dissenting opinions. Second, the judgments of the Court on Jurisdictional Issues may provide another occasion, *see, e.g.*, Federal Republic of Germany v. Iceland, [1973] I.C.J. 45; United Kingdom v. Iceland, [1973] I.C.J. 3, with the final occasion being the judgments on the merits, *see* Federal Republic of Germany v. Iceland, Judgment, [1974] I.C.J. 175; United Kingdom v. Iceland, [1974] I.C.J. 3. *See also* Aegean Sea Continental Shelf, Interim Protection Order [1976] I.C.J. 3.

102. Dillard, *supra* note 13, at 304 (emphasis added).

103. For an analysis of nationalist influences in the nominating process for membership on the Court, see Golden, *supra* note 8.

104. Interview I, *supra* note 29.

adjudicatory group in which final outcomes are often the products of difficult compromises. The curious result, however, is that the Court's critics both fear the likelihood of the Court rendering politically controversial decisions and chastise it for its positivistic caution. Ironically, those structures intended to relieve the former fear are among the chief causes of the latter's shortcoming, if a cautious approach can be so viewed. One creative by-product of the criticisms leveled at the Court is that it becomes directly involved in one of the central questions in contemporary international jurisprudence—how fast or how slow should normative change be? The final effect is to place the Court at the very center of this current tension in world affairs. Jurisprudential questions involving not merely Pound's social interest theory but what might be called a societal interest theory emerge and become overtly politicized. As Pound once wrote in the early twenties,

> International law was born of juristic speculation and became a reality because that speculation gave men something by which to make and shape international legal institutions and a belief that they could make and shape them effectively. Juristic pessimism has given us instead an international regime of conferences, proceeding by a method of bargain, establishing nothing certainly and giving results which are confessedly as temporary as they are usually arbitrary. No conference can do more than it pictures itself able to do. We may at times build better than we know, but not better than we believe.[105]

The salient question for the future of the Court is whether it helps to shape these events or is, in the end, shaped by them.

## VI. THE DILLARD OPINIONS

A principal thesis of this article has been that because of the historical, cultural, political, and legal facts which make up the subject matter of international law, rapid jurisprudential development on the basis of a consensus of shared values is an unlikely phenomenon. This is not to say that international law is more static than municipal law, but simply to recognize that it does not change as rapidly. One might even say that major changes, once recognized, undergo a long gestation period in which a slow, frequently tedious, process of "legitimizing" takes place until eventually a new aspect of customary international law has been recognized. A recent example of this ferment and legitimization process

105. Pound, *supra* note 15, at 88.

is the decade-old search by the United Nations Law of the Sea Conference for a viable regime for exploitation of deep seabed resources.[106]

Through its settlement of contentious cases and its advisory opinions, the International Court of Justice can serve not only in this legitimizing capacity which recognizes and solidifies an international consensus, but can also contribute to the gradual emergence of a new norm. Thus, as the Court said with regard to the ten-mile rule for bays in the *Anglo-Norwegian Fisheries* case,

> [T]he Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law.[107]

As Judge Dillard remarked in the *Fisheries Jurisdiction Case,* "The authority of the International Court of Justice is sometimes invoked in support of a quasi-universalist, as opposed to a consensus theory of customary international law."[108] The earlier sections of this article, however, developed the view that constraints of both an institutional nature as well as of a jurisprudential nature limited the likelihood of the Court's rendering teleologically oriented or "quasi-universalist" decisions. Judging from Hardy Dillard's pre-Court writings and observations, we would expect to find him approaching cases from the perspective of the legal realist, yet not totally ignoring the natural law elements, the "object and purpose" features, pertinent in a given consideration. Our inquiry will now turn to an assessment of his official views as a member of the Court.

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106. *See* Conant & Conant, *Resource Development and the Seabed Regime of UNCLOS III: A Suggestion for Compromise,* 18 VA. J. INT'L L. 61 (1977); Moore, *In Search of Common Nodules at UNCLOS III,* 18 VA. J. INT'L L. 1 (1977); Smith, *The Seabed Negotiation and the Law of the Sea Conference—Ready for a Divorce?,* 18 VA. J. INT'L L. 43 (1977).

107. [1951] I.C.J. 116, 131.

108. [1974] I.C.J. at 58.

### *A. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*[109]

The first opinion written by Judge Dillard was a separate opinion in the *Namibia* case in which he accepted the Court's reasoning as to the illegality of South Africa's annexation of South West Africa. For Judge Dillard the problem was one yielding to a logical solution. South Africa had contended "that no legal provision prevents its annexing South West Africa" in spite of the lapsing of the Mandate.[110] Yet Judge Dillard was persuaded by the Court's 1950 Advisory Opinion which was repeated with approval in the 1962 Judgement: "The authority which the Union government exercises over the Territory is based on the Mandate. If the Mandate lapsed, as the Union government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified."[111] More than logic, however, dictated the result, since both the historical assumptions on which the Mandate system was founded[112] as well as recent political action by the United Nations[113] were explicit in articulating the view that the conflict was between South Africa and the United Nations system as a whole: "The insistent and reiterated efforts of the United Nations to negotiate with South Africa represented something more than the expression of General Assembly political action. It represented a sense of continuity in the international community's concept of South Africa's obligations and the responsibilities incumbent on the United Nations."[114] The Security Council's Resolution 276[115] simply converted the General Assembly's recommendation into "a binding decision operative as against non-consenting States."[116]

The thrust of Judge Dillard's opinion was two-fold. First, he was deeply concerned that the action taken by the General Assembly and implicitly before the Court through its consideration of Reso-

109. [1971] I.C.J. 16.
110. *Id.* at 159.
111. *Id.* at 158.
112. *See* the League of Nations publication, THE MANDATES SYSTEM: ORIGIN, PRINCIPLES, APPLICATION, *quoted in* Admissibility of Hearings of Petitioners, I.C.J. Pleadings, 28-35 (1971).
113. *See, e.g.*, 21 U.N. GAOR (1448th plen. mtg.) 4-5, U.N. Doc. A/PV. 1448 (1966).
114. [1971] I.C.J. at 161.
115. 25 U.N. SCOR (1529th mtg.) 1, U.N. Doc. S/INF/25 (1970).
116. [1971] I.C.J. at 164.

lution 276, would be viewed as motivated purely by ideologies, steeped in politics rather than legal reasoning:

> General Assembly Resolution 2145 (XXI) was a political decision with far reaching practical implications. But it was not an arbitrary exercise of political power outside a legal frame of reference. Its endowment of supervisory power over the Mandate had been confirmed by the jurisprudence of this Court and the scope of that power, as indicated in the Opinion, included the power ultimately to terminate for material breach.[117]

Clearly Judge Dillard was marshalling the evidence to legitimate the legal norms underlying a rather controversial yet carefully considered political act of power. His goal was institutional legitimacy for the historical relevance of the Mandate, for the General Assembly, for the Security Council, and for the Court itself since each of these factors had already been of importance in U.N. deliberations on the subject. In a Court without a firm *stare decisis* background, Judge Dillard's opinion may be seen as legitimizing the sources of decision-making at the level of the Court in the light of United Nations actions which were controversial and politically motivated: "A court can hardly be expected to pronounce upon legal consequences unless the resolutions from which the legal consequences flow were themselves free of legal conclusions affecting the consequences."[118] Realizing that the request for an advisory opinion on Namibia would embroil the Court in the heart of a heated debate, he was careful to avoid subjecting the Court's response to political attack as well:

> [W]hen these organs [of the United Nations] do see fit to ask for an advisory opinion, they must expect the Court to act in strict accordance with its judicial function. This function precludes it from accepting, without any inquiry whatever, a legal conclusion which itself conditions the nature and scope of the legal consequences flowing from it. It would be otherwise if the resolution requesting an opinion were legally neutral as in the three previous requests for advisory opinions bearing on the Mandate.[119]

Because a view of the Court as a dependent *political,* rather than independent judicial, arm of the United Nations would serve to reduce its effectiveness substantially,[120] Judge Dillard felt the need

117. *Id.* at 168.
118. *Id.* at 151.
119. *Id.*
120. The Court's failure, however, to rule on the issue of the compatibility of apartheid with the U.N. Mandate for South West Africa in the South West Africa

to "fortify" his conclusions with "data of an historical, legal and logical character *in addition to that supplied in the opinion.*"[121]

The second thrust of his opinion lies in the directions both of legitimizing and mollifying. Whereas one aspect of legitimacy was in a global context, a second aspect of legitimacy had to do with an individual nation, South Africa, which was bearing the full force and scrutiny of what appeared to be the entire United Nations system. Judge Dillard rejected the majority's position that South Africa should be denied a judge *ad hoc* for the proceedings before the Court.[122] Knowing in advance of the United Nations'

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Cases, [1966] I.C.J. 1, has prompted one commentator to note that the Court's behavior "exposed [it] to widespread vilification and abuse." Dugard, *supra* note 74, at 464.

121. [1971] I.C.J. at 162 (emphasis added). He went on to add:

> The records tracing the history of the mandates system are comprehensive and have been the subject of elaborate analysis in the three previous Advisory Opinions and the two Judgments rendered throughout the long history of the controversy over South Africa's administration of the Mandate. Much depends on the way these records and events are viewed. My own reading leads me to believe that the legal power to "revoke" the Mandate for a material breach was inherent in the system . . . .

*Id.*

122. An assessment of the admission of *ad hoc* judges may be found in Pomerance, *The Admission of Judges Ad Hoc in Advisory Proceedings: Some Reflections in the Light of the Namibia Case,* 67 AM. J. INT'L L. 446 (1973). Pomerance notes that while one group of the judges would have granted South Africa's application for a judge *ad hoc* on grounds of law *and* equity, Judge Dillard, relying solely on art. 68 of the Court's statute, would have allowed the admission on equity alone. *Id.* at 459. The author suggests two reasons for the Court's denial of admission: First, this "restrictive approach . . . undoubtedly accords with long-standing academic criticism of [the *ad hoc* judge] as an undesirable vestige of the concept of arbitration grafted onto the Court and detracting from that body's role as an international 'magistrature.'" *Id.* at 462. Second, Pomerance suggests that the Court has developed a general policy as to advisory opinions whereby:

> in contrast to the PCIJ, the present Court has tended to ignore and isolate the quasi-contentious elements involved in advisory opinions and to view all requests in a strictly formalistic light as matters concerning solely the requesting organ and the Court. This tendency of the ICJ has gone hand in hand with the enunciation of a new doctrine, based on the organic relationship between the Court and the UN and involving a duty to cooperate with UN organs barring compelling countervailing reasons.

*Id.* Although this theory, if correct, would not serve to "legitimize" decisions by the Court in the sense of isolating them from political criticism, there is a degree to which a formalistic approach can, by narrowing an issue, prevent it from becoming over-politicized. In other words, although the Court may feel some duty as the U.N.'s "principal judicial organ," a formalistic approach may help defuse

political condemnation of South Africa's efforts to annex South West Africa, Judge Dillard felt that in such a highly charged political atmosphere, permitting a judge *ad hoc* might rebut any impression that parties were "ganging up" on South Africa:

> Since the interests of South Africa were so critically involved the appointment of a judge *ad hoc* would have assured the Court that those interests would have been viewed through the perspective of one thoroughly familiar with them. Furthermore should the Opinion of the Court have been unfavourable to the interests of South Africa, the presence on the Court of a judge *ad hoc,* even in a dissenting capacity, would have added rather than detracted from the probative value of the Opinion.[123]

Toward the end of his opinion, Judge Dillard remarked that "the great learning and consummate skill brought to bear on the issues by the representatives of South Africa were in the highest tradition of the legal profession."[124]

The majority's opinion in the *Namibia* case has been described as adopting a "dynamic, teleological approach."[125] Judge Dillard's separate opinion, however, might also be called "dynamic," representing a blend of both legal realism and "object and purpose" analysis. It came to grips with the political reality of the Namibian question, and at the same time attempted to legitimize the Court's handling of the situation, at least in the eyes of the world community and to whatever degree possible, South Africa's as well. He noted the difficulties which arise "when obligations originally assumed [*i.e.,* the Mandate] are disrupted by the happening of unexpected events" like World War II, the death of the League of Nations, and the birth of the United Nations.[126] Changed circumstances, however, are an insufficient reason for failure to grapple with the situation, and actually provide the historical, political, and practical rationale for interpreting the Mandate in terms of both context and "object and purpose":

> [W]henever a long-term engagement . . . is so interrupted, emphasis in attempting a reasonable interpretation and construction

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broadly enunciated political norms, thereby exercising a restraining influence on the U.N. itself.

123. [1971] I.C.J. at 153.

124. *Id.* at 168.

125. Dugard, *supra* note 74, at 476. *See generally* Dugard, *The Opinion on South West Africa ("Namibia"): The Teleologists Triumph,* 88 S. AFR. L.J. 460 (1971).

126. [1971] I.C.J. at 157.

> of its meaning and the obligations it imposes shifts from a textual analysis to one which stresses the object and purpose of the engagement in light of the total context in which the engagement was located. This generalization can be amply supported by recourse to "the general principles of law recognized by civilized nations" as revealed in the application of doctrines of impossibility and frustration to long-term engagements.[127]

In summary, Judge Dillard's opinion in the *Namibia* case can be classified as neither teleological nor positivist but a blend of the two which corrects what may be perceived as an imbalance in the majority's reasoning.

### B. *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*[128]

In the *ICAO* opinion, the Court dealt with an appeal by India from the International Civil Aviation Organization's decision that Indian aircraft flying over Pakistan were in violation of the Convention on International Civil Aviation[129] and the International Air Services Transit Agreement.[130] India maintained in its Application that "[t]he Council has no jurisdiction to handle the matters presented by the Respondent [Pakistan] in its Application and Complaint, as the Convention and the Transit Agreement have been terminated or suspended as between the two States,"[131] and in its Memorial that "[t]he manner and method employed by the Council in reaching its decision render the decision improper, unfair and prejudicial to India and bad in law."[132] Pakistan argued that the Court lacked competence and jurisdiction to hear India's appeal from the adverse ICAO decision. The Court, however, rejected Pakistan's contention, and by a fourteen-to-two vote held that the ICAO Council could entertain Pakistan's initial complaint against India and that India's appeal against the Council's jurisdiction should be rejected.

One of the central questions in international law is the "maximum area of autonomy" which the system's rules allow to individual States.[133] A schizophrenic tension exists to the extent

127. *Id. See also id.* at 158.
128. [1972] I.C.J. 46.
129. Dec. 7, 1944, 59 Stat. 1516, T.I.A.S. No. 469, 15 U.N.T.S. 295.
130. Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 84 U.N.T.S. 389.
131. [1972] I.C.J. at 49.
132. *Id.*
133. H.L.A. HART, *supra* note 16, at 218.

that the current system conceives of its member states as both simultaneously sovereign and subject to legal constraints. Judge Dillard, writing an independent opinion in the *ICAO* case, characterizes the jurisdictional issue at stake in terms of this tension.

Pakistan had requested the Council to condemn India's suspension of flights of its aircraft over Indian territory as creating "injustice, hardship, loss and injury to Pakistan."[134] As in the *Namibia* case, Judge Dillard sought his answer by consideration of the logical elements of the controversy and the sources of the legal rights underlying the presence or absence of the Council's jurisdiction. Early in the opinion, he noted that "[a]s a general rule any organ endowed with jurisdictional power has the right *in the first place* to determine the extent of its jurisdiction. This clearly applies in the absence of a clause *contraire* and it is particularly applicable to a pre-established international institution."[135] India's conception of the problem was seen in logical terms which were intended to maximize her sovereign prerogatives at the expense of any recognized international obligation under the Convention or Transit agreement: "Her chain of reasoning appeared to be: (1) *All* questions of termination or suspension lie *dehors* the treaty; (2) The jurisdiction of the ICAO Council lies *within* the treaty; therefore (3) The Council of the ICAO has no jurisdiction to handle the disagreement."[136] The difficulty, however, lay with India's initial premise, containing what Judge Dillard termed "the hidden assumption that all questions of termination or suspension lie 'dehors' the treaty *irrespective of any terms of the treaty*. Because this assumption is questionable, India's premise was too sweeping and, in the context of the present case, it therefore

134. [1972] I.C.J. at 102.

135. *Id.* at 101.

136. *Id.* at 104. Judge Dillard characterized India's main contention as follows:

> In denying that the Council had jurisdiction India's principal contention (presented with great thoroughness, force and ingenuity) was that any disagreement relating to the termination or suspension of a treaty lies *completely dehors* the treaty. (*Dehors*-the-treaty theory.) Inasmuch as it lies *dehors* the treaty it *cannot* relate to any disagreement over the interpretation or application *of* the treaty. Supplementing the *dehors*-the-treaty theory was a logically distinct yet related theory viz., the "non-existing" treaty theory. This was revealed in the repeated assertion that "to interpret or apply" presupposes the continued existence of something to interpret or apply—an assertion which reverberated throughout the Memorial, Reply and oral argument.

*Id.* at 103.

begged the central question."[137]

India had suspended unilaterally the application of the Convention and Transit agreement which contained the relevant provisions guaranteeing dispute settlement in such cases by ICAO Council adjudication. Furthermore, India invoked a second assumption in addition to the "dehors/within the treaty" concept intended to block the Council's jurisdiction: "[t]hat 'inherent limitations' on the Council's jurisdiction inhibit it from considering questions of 'substantive' international law under which the suspension was effected."[138] Only a court of competent jurisdiction could handle such matters, and India challenged the Council's competence. In short, India attempted to knit together a logical jurisdictional argument utilizing the particular facts of the case and distinguishing the treaty's "operation" from its "application" to "an existing state of affairs."[139] The argument was self-defeating, however, since it was precisely that disagreement over the interpretation and application of the Convention and Transit agreement which justified the Council's jurisdiction *ab initio*.[140] What defeated the logic of India's claims, however, was the failure of her first premises. Judge Dillard stated:

> When India ratified the Convention, she freely consented to the right of all other parties to invoke Chapter XVIII of the Convention. She cannot unilaterally derogate from that right without demonstrating that her consent was void *ab initio* or that the disagreement was of such a character as to fall entirely outside the category of disagreements embraced in Article 84. She did not address herself to the former and her attempt to justify the latter was, of course, disputed by Pakistan.[141]

In reaching this result, Judge Dillard drew on logic,[142] contemporary municipal practices relating to contract interpreation,[143] as well as current states' practices by which the international community validly created an organ with adjudicative powers and responsibilities. Again, by stressing that "[t]his power was exercised with the consent of all contracting States,"[144] his opinion

137. *Id.* at 104.
138. *Id.*
139. *Id.* at 106.
140. *Id.* at 109.
141. *Id.* at 114.
142. *Id.* at 95.
143. *Id.* at 107.
144. *Id.* at 105.

served to legitimize the outcome within a functioning system or regime for third-party judgment. As a matter of emphasis, however, the outcome turned on logical questions, partly because India phrased the questions in that manner, but also because the interpretation was relatively settled and noncontroversial.

That the *ICAO* case did not involve the need for an "intersection" between positive and "object and purpose" law was clear from one of Judge Dillard's footnotes:

> The "jurisprudential" point might be mentioned . . . that multilateral treaties establishing functioning institutions frequently contain articles that represent ideals and aspirations which, being hortatory, are not considered to be binding except by those who seek to apply them to the other fellow. On the other hand there are other articles which are generally recognized as imposing definite legal obligations. The point at which the former merge into the latter constitutes one of the most delicate and difficult problems of law and especially so in the international arena where generally accepted *objective* criteria for determining the meaning of language in light of aroused expectations are more difficult to ascertain and apply than in domestic jurisdictions. Nevertheless the problem of determining, within the context of a specific controversy, which articles are and which are not, legally binding cannot be altogether avoided without indulging in the twin assumptions that law is a "brooding omnipresence in the sky" (an extreme natural law tenet) or that the language of law is at once self revealing and self contained, a proposition which all modern scholars concerned with linguistic analysis and communication theory reject. Happily, considerations of this kind are not required in the present controversy since it is unnecessary to invoke the vaguer norms of the Convention and Transit agreement in order to demonstrate that the jurisdiction of the ICAO Council is keyed to very specific provisions involving legal obligations of one kind or another, which it may be the duty of the Council to consider.[145]

Unlike the *Namibia* and *Nuclear Tests* cases,[146] the need for "object and purpose" analysis here was virtually nonexistent. The Court was not concerned with political questions in which the Court's action or inaction would give impetus to an emerging international norm or prevent such norm from evolving. Here the facts and customs were clear and the case was not "hard." Thus, Judge Dillard's result was neither teleological nor positive, but rather was "reasoned."

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145. *Id.* at 107-08 n.1.

146. *See* Part VI A *supra;* Part VI C *infra.*

### C. *Nuclear Tests Cases*

In the *Nuclear Tests Cases,* Australia and New Zealand challenged the legality of French atmospheric tests in the South Pacific. The Court initially sought to have the proceedings "addressed to the questions of the jurisdiction of the Court to entertain the dispute, and of the admissibility of the Application[s]."[147] France, however, refused to participate in any of the proceedings before the Court and continued to conduct the tests, indicating by official communique that it would "'be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed.'"[148] In short, the French government indicated rather bluntly that it would end the atmospheric tests as requested—but according to its own testing schedule. The Court considered the French position as voiding the presence of any controversy and concluded that "the dispute having disappeared, the claim advanced by Australia no longer has any object. It follows that any further finding would have no *raison d'être.*"[149]

The Court in the *Nuclear Tests Cases* used a procedural technicality to escape having to make an adjudication, the outcome sanctioned by what Dugard calls a "positivist" majority.[150] Judges Onyeama, Dillard, Arechaga and Waldock wrote a joint dissenting opinion. Although particular portions of that dissent can not be attributed exclusively to any of the four judges, Judge Dillard has commented on his own reasons for dissenting:

> I simply could not take what the majority had done. The majority had said that the case had become moot because of certain statements of the President of France and the Secretary of Defense of France . . . . Although France walked out of the Court, she was, in effect, challenging the jurisdiction of the Court, and Australia and New Zealand wanted to establish our jurisdiction so that they could get on to the merits. Also, they wanted to establish that the issue was justiciable . . . . We dissenters said that what Australia and New Zealand were after was a kind of declaratory judgment.

147. New Zealand v. France, Request for the Indication of Interim Measures of Protection, [1973] I.C.J. 135, 142; Australia v. France, Request for the Indication of Interim Measures of Protection, [1973] I.C.J. 99, 106.

148. New Zealand v. France, Judgment, [1974] I.C.J. 457, 469; Australia v. France, Judgment, [1974] I.C.J. 253, 265.

149. New Zealand v. France, Judgment, [1974] I.C.J. at 476; Australia v. France, Judgment, [1974] I.C.J. at 271.

150. Dugard, *supra* note 74, at 496.

> Although ultimately on international law, that would be a decision upon the merits.[151]

The main objection of the judges in dissent was to the determination that the case was moot before deciding the initial jurisdictional question. Judge Dillard was further troubled by the fact that Australia and New Zealand never had an opportunity to argue the mootness point, and noted that

> only a handful of judges had decided it had become moot. The other judges . . . thought the case was too political in the first place and was not justiciable. They had not decided that it had *become* moot, but that they wanted to terminate it. So they joined in the majority for the conclusion, but for entirely different reasons.[152]

A distinct difference existed between declaring the question moot and deciding *ab initio* that the case was too political for the Court to hear.

In light of his own procedural observations, Judge Dillard wanted to prevent what he thought was a hasty disposal of the whole issue. Although the question undoubtedly had a political aspect, the Court still had a role to play, and the nature of his dissent was directed toward retaining the Court's jurisdiction in a case as politically salient as the *Namibia* opinion.[153] Without reading too much into his position, it appears that he felt that the Court was denying itself the opportunity to contribute a legal precedent in an area of law which was in a state of flux. As the joint dissent made clear,

> [T]he present case . . . concerns the continuing applicability of a potentially evolving customary international law, elaborated at numerous points in the Memorial and oral arguments. Whether all or any of the contentions of the Applicant could or would not be vindicated at the stage of the merits is irrelevant to the central issue that they are not manifestly frivolous or vexatious but are attended by legal consequences in which the Applicant has a legal interest. In the language of the *Northern Cameroons* case, a judgment dealing with them would have "continuing applicability." Issues of both fact and law remain to be clarified and resolved.[154]

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151. Interview I, *supra* note 29.

152. *Id.; see* Rubin, *The International Legal Effects of Unilateral Declaration,* 71 AM. J. INT'L L. 1, 1 n.3 (1977).

153. One might distinguish the two cases on the basis that one was a contentious proceeding while the other was an advisory opinion.

154. New Zealand v. France, Judgment, [1974] I.C.J. at 504 (joint dissenting opinion); Australia v. France, Judgment, [1974] I.C.J. at 321 (joint dissenting opinion).

As between the Parties, a declaratory judgment "would have given [them] certainty as to their legal relations."[155] Having isolated and articulated the legal issues involved, Judge Dillard would have diminished the readiness of certain members of the Court to dismiss the case, essentially for political reasons. In contrast to the *Namibia* case, in the *Nuclear Tests Cases,* a positivist majority was categorically abstaining from dealing with a legal problem of "continuing applicability," and Judge Dillard would have adopted a less one-sided view. In the *Namibia* case, the Court expressed a greater "liberality in developing its general construction of the Charter and the Covenant. It similarly gave a broad interpretation to the Security Council's resolutions, providing them with far-reaching effects."[156] Emphasizing that the *Namibian* solution was of unique applicability,[157] Judge Dillard wanted to limit these far-reaching effects. In the *Nuclear Tests Cases* his goal was exactly the reverse.

### *D. Fisheries Jurisdiction Case*[158]

The dispute between the United Kingdom and Iceland concentrated on Iceland's unilateral extension of its exclusive fishing rights and the exclusion of the United Kingdom from "areas between the fishery limits agreed to in the Exchange of Notes of 11 March 1961 and the limits specified in the Icelandic Regulations of 14 July 1972."[159] The United Kingdom's first submission to the Court was that Iceland's unilateral actions were contrary to international law *ipso jure* and *erga omnes.* A second, more cautious approach by the United Kingdom suggested that Iceland had breached the Exchange of Notes of 1961 which the Court had previously pronounced to be an effective treaty.[160] In a ten-to-four decision, the Court found that the government of Iceland could not make such a unilateral extension so as to ignore the Exchange of Notes of 11 March 1961, and required that the two governments be "under mutual obligations to undertake negotiations in good

155. New Zealand v. France, Judgment, [1974] I.C.J. at 503 (joint dissenting opinion); Australia v. France, Judgment, [1974] I.C.J. at 320 (joint dissenting opinion).

156. Brown, *The 1971 I.C.J. Advisory Opinion on South West Africa (Namibia),* 5 VAND. J. TRANSNAT'L L. 213, 240 (1971).

157. [1971] I.C.J. 163 (opinion of Judge Dillard).

158. Judgment, [1974] I.C.J. 3.

159. *Id.* at 34.

160. *Id.* at 54.

faith for the equitable solution of their differences concerning their respective fishery rights . . . ."[161] The Court essentially rejected Iceland's contention that its unilateral extension could be justified by the doctrine of fundamental change in circumstances.[162]

In his separate opinion, Judge Dillard began by recognizing the presence of both a *general* problem and a *particular* context.[163] He was aware that at the time the case was presented, the Third Conference on the Law of the Sea would shortly be considering the same *general* controversies. This fact, he suggests, was one of the "unarticulated" reasons for the Court's reluctance to pronounce on the United Kingdom's first submission, since some judges undoubtedly feared that "it would be *imprudent* for the Court to attempt to pronounce on the issue of a 'fixed' limit for the extension of fisheries jurisdiction when the issue was in a state of such acknowledged political and legal flux."[164] Furthermore, a general suspicion existed that a positivist-type "head count" would be "so charged with uncertainty" in presenting the state of customary international law that any definitive pronouncement would appear "tenuous."[165] The Court's dilemma, as Judge Dillard posed it, was one of resolving the "complex jurisprudential problem of knowing how best to reconcile the need for general norms in the interest of some degree of predictability versus the need to avoid them in the interest of the particularistic and individualistic nature of the

161. *Id.* at 34.

162. *See* Tiewul, *The Fisheries Jurisdiction Cases (1973) and the Ghost of Rebus Sic Stantibus,* 6 N.Y.U. J. INT'L L. & POL. 455 (1973).

163. United Kingdom v. Iceland, [1974] I.C.J. at 53.

164. *Id.* at 56. Judge Dillard also advanced two other reasons:

> First, there was the notion that the state of customary international law in 1972 with respect to unilateral extensions of fishery jurisdiction was so charged with uncertainty, viewed simply as a kind of "head count" analysis of State practice, as to make tenuous any definitive pronouncement on this issue.
>
> Second, there was the deeper notion, keyed to the evolutionary character of customary international law which would deny that it can or should be captured in the classical formula of repetitive usage coupled with *opinio juris,* instead of recognizing that it is the product of a continuing process of claim and counter-claim in the context of specific disputes. This concept would render intellectually suspect any definitive pronouncement on the "12-mile rule" *erga omnes,* which, because of its too generalized nature, tended to ignore the many variables that give content to customary international law and condition its application.

*Id.*

165. *Id.*

subject-matter to which the norms are applicable."[166] The problem required the Court to pass on an essentially equitable consideration, the outcome of which would affect the distributive allocation of scarce fishing resources. Judge Dillard, remarking that the whole problem more closely resembled distributive rather than corrective justice,[167] stated that "[t]he problem may well call for the application of flexible standards instead of fixed rules."[168]

The Court, in this instance, avoided the request by the United Kingdom to adopt a broad, "quasi-universalist" theory of customary international law.[169] In requiring continued good faith negotiations between the parties, the Court refrained from imposing an artificial uniformity upon a difficult, fact-specific controversy.[170] In the absence of any shared international norm or standard, principles of equality and equity, generally applied, do not yield sufficiently precise or particular criteria for unambiguous distributions of scarce resources.[171] The presence of distributive justice concerns alone did not mean that the Court could not become involved in helping resolve the conflict as to the scarce resources:

> [C]onsiderations of a practical, political and psychological nature dictate that this function is best done at the outset by the parties themselves or better still by other bodies specially qualified to assess the conflicting interests, the relevant scientific factors, the values involved, and the continuing need for revising the *regime* in light of changing conditions. The Court's role is best limited to providing legal guide-lines which may *facilitate* the establishment of the system and in the event of a subsequent dispute, to help redress disturbances to it.[172]

The Court carved out a limited role for itself, not because the issues were political or involved allocation of exhaustible resources,

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166. *Id.* at 61.
167. *Id.* at 70, 71 n.1.
168. *Id.* at 61.
169. *Id.* at 60 n.1.
170. *Id.* at 61. Judge Dillard refers to C. DE VISSCHER'S THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 154 n.38 (Corbett trans. 1957) which cites the following passage from Brierly's 1936 Hague Lectures:

> Uniformity is good only when it is convenient, that is to say when it simplifies the task in hand; it is bad when it results from an artificial assimilation of dissimilar cases . . . . The nature of international society does not merely make it difficult to develop rules of international law of general application, it sometimes makes them undesirable.

Brierly, *Regles Generales du Droit de la Paix*, 58 RECUEIL DES COURS 1, A-18 (1936).
171. Book Review, *supra* note 36, at 182.
172. [1974] I.C.J. at 71.

but because the standards were unclear, evolving, and complicated. One could only imagine the handicap under which future law of the sea conferences would have labored had the Court attempted to generate a comprehensive regime for fishery resources. For Judge Dillard, the solution was a matter of resolving the "particular" so as not to handicap the future crystallization of the "general."

### *E. Western Sahara*[173]

The *Western Sahara* case required consideration of historical factors relating to the decolonization practice which traced their origins back to the ninth century, yet the outcome of the controversy more precisely involved what Judge Dillard sees as one of the main problems of the future, the legal effect of United Nations General Assembly resolutions. Although not legislation, these declarations do have "a law-making aspect to them . . . with overwhelming majorities. Does this not have a generating effect in creating law?"[174] Insofar as the status of the Western Sahara and its nomadic tribes were concerned, the United Nations had made repeated resolutions calling for decolonization by Spain and self-determination in this area, and Judge Dillard "thought that that had a legitimate role to play in determining whether or not the Western Sahara shouldn't have a voice."[175]

The Court's advisory opinion sought to answer two legal questions: first, whether the Western Sahara at the time it was colonized by Spain belonged to no one (*terra nullius*), and second, if the Western Sahara was not *terra nullius*, whether legal ties existed between this territory, the Kingdom of Morocco, and the Mauritanian entity?[176] The Court unanimously declared that the Western Sahara was not *terra nullius* at the time of its colonization, and that there were

> legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. [The materials reviewed by the Court] equally show the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity . . . and the territory of Western Sahara.[177]

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173. [1975] I.C.J. 12.
174. Interview I, *supra* note 29.
175. *Id.*
176. [1975] I.C.J. at 14.
177. *Id.* at 68.

The questions confronting the Court, however, were not exclusively of a legal nature and susceptible to a concrete answer "based on law."[178] Any answer provided by the Court in its advisory opinion would be primarily of historical and political significance, but the presence of numerous General Assembly resolutions concerning decolonization had the effect of creating a legal context for the Court's consideration of the problem. On this point, Judge Dillard felt that "the cumulative impact of many resolutions when similar in content, voted for by overwhelming majorities and frequently repeated over a period of time may give rise to a general *opinio juris* and thus constitute a norm of customary international law."[179] The Court, then, through its own pronouncements was helping to establish such a norm in its explicit recognition of the General Assembly's law-creating powers.

Judge Dillard's separate opinion primarily examined the nature of the *legal* ties between the Sultan and the chiefs of the nomadic tribes wandering throughout the Western Sahara. The presence or absence of such ties was a critical factor in the ability of the Court to determine the present status of the nomads. The concept of a legal tie in terms of traditional western standards implying notions of sovereignty, obligation, and the view of laws as orders backed by officially enforceable threats, however, was inapplicable to the relationship between the tribes and the Sultan and Ma ul-'Aineen or the Emir of the Adras. In resolving the nature of the legal ties in the Western Sahara, Judge Dillard emphasized the need for a "broader approach" unlike that commonly accepted in "post-Reformation western oriented societies":

> Concepts of this kind are not applicable to a society, such as prevailed in the Sahara, in which a distinction between *modes* of authority are not sharply delineated and are not part of the consciousness of people. It is artificial, therefore, to say that a tie is not "legal" merely because it fails to qualify as one in which a sense of obligation is owed vertically to the secular power of someone with authority. The manifestation of power is neither secular nor religious since the distinction, itself, has little meaning.
>
> The important thing is that the tribes criss-crossing in the Western Sahara felt themselves to be a part of a larger whole, while also claiming rights in the territory focused on the intermittent possession of water-holes, burial grounds and grazing pastures. All this should suffice to characterize ties as being legal once we rid our-

178. *Id.* at 117.
179. *Id.* at 121.

> selves of the preconceptions which identify "legal" with deference to mere secular authority.[180]

In conclusion, Judge Dillard remarked that the outcome depended upon actual consultation with the members of the tribes themselves: "The bigger reality lies in the possible sense of unity and belonging which the people themselves feel with respect to their own or neighbouring territories. This can only be adequately determined by consulting them one way or another."[181]

The significance of Judge Dillard's views in this advisory opinion lies in his conception of the proper sources of international law. If Hart is correct in maintaining that the form of international law resembles a regime or system of primary rules, then it is clear that the rules involved in this opinion are extremely primitive. Whether the matter of decolonization itself could be considered a *legal* question depended upon the acceptance of General Assembly resolutions as having legal consequences and the Court's willingness to consider them as having law-creating consequences. Actual resolution of concrete problems in light of this norm required, however, a more positivistic inquiry into the habits, customs, and claims of tribal societies. Not only did the Court's advisory opinion sanction norm creation by the General Assembly's basically political action, thereby recognizing the problem as one having *legal* significance, but the Court also legitimized the status of the tribes themselves as critical actors in the eventual tailoring of the more *general* norm to their *particular* circumstances.

## VII. Final Observations and Conclusion

On February 9, 1979, a new judge assumed the vacancy on the Court created by the expiration of Judge Dillard's term. During the

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180. *Id.* at 125-26.

181. *Id.* at 126. In his Hague Lectures, Judge Dillard also recognized that aspects of "historical relativism" had a role to play in the analysis of particular disputes:

> Under this view international law is equated with "primitive" law, and hence what is needed is patience, the long view and the realization that, as primitive societies gradually evolved to maturity so will the modern state system. "Time" will come to the rescue of law. This view emphasizes the fact that the modern state, based on the concept of a single sovereign commanding the fused loyalty of people inhabiting a determinate piece of territory is, after all, only a few hundred years old. Made possible by the gradual erosion of feudalism and born of the turbulent Reformation it is only natural that it should suffer the growing pains so normal to youth.

Dillard, *supra* note 33, at 467.

past nine years, the Court has not been particularly active, but virtually all of Judge Dillard's official writings as a member of the Court have either looked toward insulating the Court's decision-making authority from political criticism when a norm has been too broadly enunciated, or toward prodding the Court to take a more norm-creating posture. Although he acknowledged that some reason exists for concern regarding the Court's modest docket, he adds that much of the criticism concerning the docket comes from improper comparisons with the old Permanent Court of International Justice, in which a heavier docket included most of the contentious cases related to World War I peace treaties and related disputes. With regard to an individual State's reluctance to come before the Court, he noted:

> I have sympathy for the nation State that is a little reluctant to trust a court of fifteen judges, . . . not because some of them are foreigners . . . but because they do not cumulatively have enough wisdom, perhaps, to understand the dimensions of the problem that is worrying the nation State . . . . It's a question of the human equation.[182]

Over twenty years ago, then Professor Dillard characterized the reluctance—"overreluctance" as he then termed it—of nations to agree in advance to submission of disputes to the Court as depending upon the ability to understand "the limits of the judicial process in the context of a society which provides no constitutional devices adequate to supplement the work of the Court and to provide measures for controlling—at a remote stage—the incidences of its judgments."[183]

This judicial process, dealing as it must with unsettled issues and complicated facts in the international arena, must develop a statesman-like approach to dispute settlement in general, and must utilize the ordering, rule-creating process of international law in particular. The problem is one similar to that faced by Chief Justice John Marshall, whose Court not only had to settle concrete cases, but had to do so in a fashion which gradually solidified its own institutional legitimacy.[184] The International Court of Justice faces a more complicated institutional problem, since its own jurisdiction in any case depends upon the individual nations' consent. The opinions surveyed in this article demonstrate the wide latitude the Court has in the area of articulating its own concept of norma-

182. Interview II, *supra* note 38.
183. Dillard, *supra* note 33, at 496.
184. *See generally* G. WHITE, THE AMERICAN LEGAL TRADITION 7-34 (1976).

tive international law. At the same time, however, opinions such as those dealing with Namibia and the French nuclear tests illustrate the varying degree to which members of the Court are willing to articulate broad norms, or, instead, render decisions on relatively narrow, noncontroversial grounds. Although law clearly helps to shape the values and produce the sense of cohesion necessary for effective social organization, in the international context, this process is more difficult to sustain. In his Hague Lectures, Judge Dillard characterized the international community as one which made this rule-enunciating or "ordering" process particularly complicated: "The international system is hardly a society, much less a community, and, in any event, within the confines of the society the sense of cohesion is so weak and the sharing of common values so limited, that law cannot be expected to operate effectively."[185] For precisely these reasons, Judge Dillard would have the Court stay out of areas of distributive justice.[186] Although in his Hague Lectures he noted that "[t]he power of the Court increases in direct proportion as the norms increase in generality,"[187] his tenure on the Court has shown that norms stated too broadly can, by virtue of the lack of any international consensus, serve to undermine states' respect for the Court as a judicial institution. As the survey of his opinions demonstrates, his role has been to push for broad normative statements when the facts of a case so allow and to restrict those norms in situations where a Court-articulated general standard might reduce the flexibility of future parties in fashioning a more consensus-based norm in light of their own particular experiences.

Judge Dillard misses the "roving room" of the classroom,[188] and the business of being a judge has necessarily curbed his ability to do as much reading as he would prefer. Nonetheless, serving on the Court has provided him with an opportunity as a professor-turned-judge to apply his jurisprudential theories to concrete cases of importance to people throughout the world. As this article has shown, Hardy Dillard's jurisprudential habits of mind have stayed with him throughout his career, shaping his understanding of the facts and thereby infusing his decisions with the "intersection concept"—the hybrid jurisprudence blending positivism with "object and purpose" analysis. The International Court of Justice shares

185. Dillard, *supra* note 33, at 469.
186. Interview II, *supra* note 38.
187. Dillard, *supra* note 33, at 485.
188. Interview I, *supra* note 29.

many similarities with the nascent United States Supreme Court, the most visible being its caution in treating cases so as to preserve and, if possible, to further its own jurisdictional legitimacy in the international community. To this end, Judge Dillard would urge an expansion of the Court's current jurisdiction in order to permit it to hear questions presented by multinational corporations and international organizations. He further wishes the Court to exercise a greater "monitoring" practice, going beyond simply settling disputes after they have arisen. Finally, he favors the use of declaratory judgments by the Court where it can exercise leadership in determining the direction and content of the norms of international law.[189] In short, Judge Dillard has, both as professor and judge, remained faithful to the approach to law espoused by Roscoe Pound—"a functional critique of international law in terms of [its] social ends."[190] At the same time, his professional career embodies those attributes which Pound felt were necessary for the future development of international legal standards: the mastery of existing legal materials, philosophical vision, and juristic faith.[191]

189. Interview I, *supra* note 29.
190. Pound, *supra* note 175, at 89.
191. *Id.* at 90.