

COMMENTS

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POLEMIC IN THE INTERNATIONAL COURT OF JUSTICE

I. INTRODUCTION

Jurisprudence, used as a technical term, has two meanings of equal currency, referring both to a philosophy of law and a science which "treats of the principles of positive law and legal relations."¹ These meanings are vastly different in import. "Philosophy" suggests speculation and ideology, while "science" suggests fact and functionalism. Jurisprudence, like any discipline of observation and conclusion, can be a very useful tool in the legal analysis of one's own work and the work of others. The science, with its clear sight and objective standards, is obviously more dependable than the polemics of philosophy, and therefore the sole approach to be used in situations that demand objectivity. If any area of jurisprudence demands this objectivity, it is the area of judicial decision. It is the premise of this Comment that much of what is written about legal judgments, and often the judgments themselves, contain so much polemic that they sometimes produce results contrary to a primary function of legal systems, the settlement of disputes. This is an especially critical problem in the international sphere, where the tendency to mix fact and polemic often detracts from the legal justifications of a particular dispute's resolution.

The most recent decision of the International Court of Justice, the 1974 *Icelandic Fisheries Cases*²—the actions of the United Kingdom and the Federal Republic of Germany against Iceland for the unilateral extension of Icelandic coastal fisheries jurisdiction³—will be used to illustrate the confusion of fact with polemic. That Court divided, not over the finding for Applicants, but over the techniques that should have been used to reach that finding. There were several lesser issues of fact and law, but the major controversy was one of approach. While most jurisprudential questions can be stated in terms of objective criteria, debate can often degenerate to philo-

1. BLACK'S LAW DICTIONARY 992 (4th rev. ed. 1968).

2. Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), [1974] I.C.J. 3; Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), [1974] I.C.J. 175. An edited copy of the Judgments may be found in 13 INT'L LEGAL MAT'LS 1049-114 (1974).

3. For the background of the dispute see Evans, *Judicial Decisions, Jurisdiction of the International Court of Justice under compromissory clause in exchange of notes*, 67 AM. J. INT'L L. 547, 563 (1973); Tiewul, *The Fisheries Jurisdiction Cases (1973) and the Ghost of Rebus Sic Stantibus*, 6 N.Y.U.J. INT'L L. & POL. 455 (1973); 7 VAND. J. TRANSNAT'L L. 512 (1973).

sophical argumentation, *i.e.* position statements. Polemic questions of what might be called judicial style should be left in chambers and not written into the decisions of a world court. The intention of this Comment is not to malign jurisprudence, but to attempt to serve as a gadfly with the hope of provoking a more rigorous use of this important discipline. The presentation will consist of a brief historical background of western jurisprudence, followed by an analysis of the major points of contention in the Icelandic Fisheries decisions, closing with some speculation as to the causes and consequences of the use of polemic in and by a world court.⁴

II. HISTORY

Although jurisprudence has long been the most abstruse and complex of the social disciplines—a sort of practical man's metaphysics—areas of general agreement, or schools, have been demarcated by jurists. Traditionally, there have been four basic divisions (although countless subdivisions are possible): natural-law, historical, formalist or analytic and realist schools.⁵

The natural-law or philosophical school has been the most long-lived and influential historically, although it seems to have fewer adherents today. From Aristotle to the present, the search for a complete system of legal and ethical concepts that mirror man's assumedly rational nature⁶ has been a Holy Grail that has tempted many. However, absolute justice in the abstract has often proven such a pliable concept that vastly different positions have found shelter under its umbrella. Both democracy and dictatorship have been justified in its name with equal conviction.⁷

The historical school, originally a German conceptualization of the *Volksgeist*, or spirit of the people, was in conscious opposition to natural law.⁸ Both anti-rational and anti-abstractionist, the

4. In response to the possible charge that this condemnation of polemic is itself very argumentative, the reply can only be that all attempts to insure dispassionate analysis have been made, and that student comments are not judicial decrees; they cannot coerce compliance.

5. J. ROSENBERG, JEROME FRANK: JURIST AND PHILOSOPHER 1 (1970).

6. *Id.* at 1-2.

7. J. FRANK, COURTS ON TRIAL 348 (1950).

8. An extensive outline of the historical school, its roots and branches, can be found in a three-part article by Dean Roscoe Pound, *Fifty Years of Jurisprudence*, 50 HARV. L. REV. 557 (1937), 51 HARV. L. REV. 444, 777 (1938). This article also touches upon the other schools of jurisprudence, including realism. However, considering the debate between Pound and the proponents of realism (see notes 22 & 23 *infra*), the section might be read with some scepticism.

school modeled itself not after man's natural reason but after his social institutions. Although it was the dominant school of the nineteenth century, the historical school is now of more interest to historians than to legal scholars.⁹

Both the natural-law and historical schools were dedicated to drafting the ideal body of laws, independent of experience. In the early twentieth century, however, there arose a new body of jurisprudence, oriented toward analyzing the law not as it ought to be but as it is.¹⁰ Of course, as there had been no agreement as to what the law ought to be, neither has there been agreement as to what it is. Under the influence of John Austin, law and morality were severed and logic became the life of the law. This formalistic view of law dominated Anglo-American thought for 50 years,¹¹ until it was challenged by a spawn of the infant social sciences, legal realism. Youngest of the jurisprudential schools, legal realism holds that "the life of the law has not been logic; it has been experience."¹²

The division of jurisprudence into various schools is most helpful in the study of law for it necessitates approaching the subject from different points of view. Historically, however, these schools have been seen by many jurists as competitors, each striving for victory over the others. In contrast to the constructive objectivity of the scientific approach, this competition has been primarily destructive. The attempt of each school to discredit all others has tended to undermine respect for law in general.

At present, formalism and realism comprise the most active jurisprudential schools;¹³ the dialogue between them will serve as the focus of this article. The formalistic viewpoint is rooted in John Austin's analytical positivism,¹⁴ which separated ethical, social and political questions from the study of law.¹⁵ The main function of

9. J. ROSENBERG, *supra* note 5, at 2.

10. *Id.* at 2.

11. J. STONE, *THE PROVINCE AND FUNCTION OF LAW* 3 (1950).

12. O.W. HOLMES, *THE COMMON LAW* 1 (1881).

13. A revival of natural law was heralded by some in the late 1950's, bringing ethics back into what they felt, in realism, was an overly scientific approach. Hall, *The Present Position of Jurisprudence in the United States*, 44 VA. L. REV. 321, 323 (1958). This seems a very narrow view of the realistic approach—which attempts to incorporate all social disciplines, including ethics, into a coherent whole. The inclusion of ethical considerations in jurisprudence is not necessarily a return to natural law (at the expense of legal realism) as realism utilizes the abstract approach for analysis only.

14. J. STONE, *supra* note 11, at 55.

15. Bodenheim, *Analytical Positivism, Legal Realism, and the Future of Legal*

jurisprudence, according to Austin, was the abstraction of principles, notions and distinctions which were common to developed systems of law.¹⁶ Although its principles of analysis were derived in part from the concepts of Hobbes and Bentham,¹⁷ its method remained strictly logical, describing an internally consistent closed system which is enacted or "posited" by a political authority. With the exception of the United States, the birthplace of realism, analytical formalism is still the dominant jurisprudential school in England and the former British Empire.¹⁸ In the United States, formalistic analysis was initially embraced by many distinguished legal scholars, including Dean Langdell and Professor Beale of Harvard.¹⁹ Speaking for realism was their contemporary, Oliver Wendell Holmes, Jr., who characterized a workable legal system based totally on logic as a myth. He declared that "the logical method and form flatter that longing for certainty and for repose which is in every human mind."²⁰ The controversy between adherents of the two schools simmered within the American legal establishment for a quarter of a century before boiling into direct confrontation.²¹ In 1931 Dean Pound published a criticism of realism as he saw it,²² to which Karl Llewellyn and Jerome Frank responded in the best apologist tradition, alleging misrepresentation and misunderstanding.²³ Pound's attack allowed realism to state its case. Since then realism has been seen by most as coming to the fore in the United States. It has recently been said, "realism is dead, we all are realists now,"²⁴ and that, in fact, America is in a post-realist period.²⁵ It is true that

Method, 44 VA. L. REV. 365, 367-69 (1958).

16. *Id.* at 368.

17. Pound, *supra* note 8, 50 HARV. L. REV. at 582.

18. E. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 84 (1953).

19. J. ROSENBERG, *supra* note 5, at 3.

20. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897). Holmes "helped undermine the conception that law can be worked out, like pure geometry, from axioms and corollaries." J. ROSENBERG, *supra* note 5, at 21.

21. It was a most confusing confrontation. The confusion was largely created by the technique of laying out an opponent's position in one's own terms, then quickly destroying the strawman. Compounding the distortion was the unhappy fact that self-definition was often speculative and hasty. W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 74, 379-80 (1973).

22. Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931). Pound was not a true formalist, but the founder of "sociological jurisprudence," which rejected realism as too radical. J. ROSENBERG, *supra* note 5, at 7, 10.

23. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

24. W. TWINING, *supra* note 21, at 382.

25. Hall, *supra* note 13, at 325.

today there are few jurists who would call themselves realists. But this was true even in the 1930's. The power of realism lies in its approach, not in adherence to an historically established set of tenets.²⁶ Although Llewellyn and Frank are no longer alive, their interdisciplinary outlook and sceptical rigor generated what is still one of the most productive jurisprudential approaches.

While the United States and Britain are solidly under the influence of realistic and formalistic approaches respectively, the debate remains active in the rest of the world community and within the International Court of Justice.²⁷ In so recent a decision as the *North Sea Continental Shelf Cases*,²⁸ analysts of the Court were able to find support for both formalist and realist positions.²⁹ The realist position, however, now seems to be gaining support in the I.C.J. As in the United States, this evolution has been laid to the advent of the social sciences:

[T]he Judges now being elected, and likely to be in the future, come from a generation of legal scholars which recognizes the significance of functional and sociological approaches, and as such are determined to bring the Court and the law they are called upon to apply up-to-date and suitable for the mid-century world³⁰

III. THE JUDGMENT

A. Approach

Neither realism nor formalism is guilty of the excesses that the other ascribes to it; realism is not rabidly illogical, nor is formalism the ivory tower of reaction. In fact, there is evidence to show that these positions are closer together than they have ever been.³¹ However, a series of generalizations about both sides³² will be

26. W. TWING, *supra* note 21, at 382.

27. The I.C.J. is here taken as a representative of the world legal community. 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, 325-26 (1971).

28. [1969] I.C.J. 3.

29. Gross, *supra* note 27, at 268.

30. Green, *The United Nations, South West Africa and the World Court*, 7 INDIAN J. INT'L L. 491, 522 (1967), *quoted in* Gross, *supra* note 27, at 267-68.

31. Bodenheimer, *supra* note 15, at 365.

32. Realism propounds: (1) law in flux and judicial creation of law; (2) law as a means to social ends and not as an end in itself, *i.e.* judging law by both purpose and effect; (3) society in flux, usually at a faster rate than law, implying the constant need for re-examination; (4) the temporary divorce of "Is" and "Ought" for study purposes, *i.e.* the scientific approach; (5) distrust of traditional legal rules and concepts as able descriptions of what courts or people actually do; and (6) distrust of traditional rules of judicial decision-

provisionally accepted by this Comment as the basic assumptions of its analysis, until conclusions can be reached by empirical means. Without empirical foundation, the most impeccably reasoned argument of student or Judge may be without referent, and thus without persuasive force.

B. Analysis

It is a premise of this Comment that the majority and dissent in the *Icelandic Fisheries Cases* follow the outlines of realism and formalism, respectively.³³ There are five major points of conflict within the decision. That is to say, there are five issues over which the majority and dissent clash.³⁴ They are, in order of treatment: (1)

making (paper rules), *i.e.* subjection of these rules to critical scrutiny. Llewellyn, *supra* note 23, at 1236-37. This seems to be a fairly rigorous, though artificial, listing of common positions, taken from the realists of Llewellyn's day. Few of them viewed themselves as belonging to any school and several were offended at inclusion, but Llewellyn has not seriously misrepresented anyone, noting, in fact, this anti-group attitude. Less rigorous is a list of the views of the formalists who view the law, according to a leading American proponent, Professor J. Beale, as "UNIFORM, GENERAL, CONTINUOUS, EQUAL, CERTAIN, PURE." J. ROSENBERG, *supra* note 5, at 17. No champion of formalism could be found to attempt a detailed self-definition, perhaps because of this (attributed) preference for general over specific analysis. Militant generality can be seen in the dissenting opinion of Judge Ignacio-Pinto:

Perhaps some might even say that the classic conception of international law to which I declare allegiance is out-dated; but for myself, I do not fear to continue to respect the classic norms of that law.

Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), [1974] I.C.J. 175, 210. Judge Ignacio-Pinto, however, is not too specific about the nature of these norms.

33. The concurring and dissenting opinions will be treated as united fronts, except where otherwise noted. Likewise, the United Kingdom and Federal Republic decisions will be treated as fundamentally similar, except on the issue of compensation and where otherwise noted.

34. All of these issues concern the Judgments or their effects. The United Kingdom Judgment runs as follows:

THE COURT,

by ten votes to four,

(1) finds that the Regulations concerning the Fishery Limits off Iceland promulgated by the Government of Iceland on 14 July 1972 and constituting a unilateral extension of the exclusive fishing rights of Iceland to 50 nautical miles from the baselines specified therein are not opposable to the Government of the United Kingdom;

(2) finds that, in consequence, the Government of Iceland is not entitled unilaterally to exclude United Kingdom fishing vessels 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, or unilaterally to impose restrictions on the activities of those vessels in such areas;

by ten votes to four,

(3) holds that the Government of Iceland and the Government of the United Kingdom are under mutual obligations to undertake negotiations in good faith for the equitable solution of their differences concerning their respective fishery rights in the areas specified in subparagraph 2;

(4) holds that in these negotiations the Parties are to take into account, *inter alia*:

(a) that in the distribution of the fishing resources in the areas specified in

the legality of Iceland's extension of control of coastal fishing areas under international law; (2) the relevance of questions of preferential treatment and fisheries conservation; (3) the Court's imposition of a duty to negotiate upon the parties; (4) the Applicant's claim for damages caused by Iceland's assertion of the fisheries extension; and (5) the effect of this decision on the contemporaneous Law of the Sea Conference. By issue, the dissent and majority strong points will be analyzed, indicating which seems most persuasive; that is to say, which relies less on polemic over fact—which is less polarizing.

1. LEGALITY OF THE EXTENSION

The first point to be considered is one of the most central—the duty of the I.C.J. to decide that the fifty-mile extension of jurisdiction over fisheries from baselines around the coast of Iceland is

subparagraph 2 Iceland is entitled to a preferential share to the extent of the special dependence of its people upon the fisheries in the seas around its coasts for their livelihood and economic development;

(b) that by reason of its fishing activities in the areas specified in subparagraph 2, the United Kingdom also has established rights in the fishery resources of the said areas on which elements of its people depend for their livelihood and economic well-being;

(c) the obligation to pay due regard to the interests of other States in the conservation and equitable exploitation of these resources;

(d) that the above-mentioned rights of Iceland and of the United Kingdom should each be given effect to the extent compatible with the conservation and development of the fishery resources in the areas specified in subparagraph 2 and with the interests of other States in their conservation and equitable exploitation;

(e) their obligation to keep under review those resources and to examine together, in light of scientific and other available information, such measures as may be required for the conservation and development, and equitable exploitation, of those resources, making use of the machinery established by the North-East Atlantic Fisheries Convention or such other means as may be agreed upon as a result of international negotiations.

Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), [1974] I.C.J. 3, 34. The Federal Republic Judgment has one additional paragraph:

by ten votes to four,

(5) finds that it is unable to accede to the fourth submission of the Federal Republic of Germany.

Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), [1974] I.C.J. 175, 206. The fourth submission concerned a request for compensation for interference with the operations of German fishing vessels by Icelandic patrol boats.

Present and participating in the proceedings were: *President Lachs*; *Judges* (Majority) Forster, Bengzon, Dillard, de Castro, Morozov, Jiménez de Aréchaga, Sir Humphrey Waldock, Nagendra Singh, Ruda; (Dissent) Gros, Petren, Onyeama, Ignacio-Pinto; and *Registrar Aquirone*. All judges except Morozov wrote separate opinions.

"without foundation in international law and is invalid."³⁵ The argument put forth by the dissent is that the issue, as defined by the parties,³⁶ is binding upon the Court. The Court should serve, so this argument goes, as a sort of Delphic Oracle, only answering questions that are put to it. If it fails to answer these questions, which comprise the matter at issue, the Court is not fulfilling its proper function.³⁷ This appears to be a classic formalist position, a conviction

35. Subparagraph (a) of the conclusion of the United Kingdom Memorial and subparagraph 1 of the conclusion of the Federal Republic Memorial. The United Kingdom Memorial on the merits was concluded as follows:

. . . the Government of the United Kingdom submit to the Court that the Court should adjudge and declare:

(a) that the claim by Iceland to be entitled to a zone of exclusive fisheries jurisdiction extending 50 nautical miles from baselines around the coast of Iceland is without foundation in international law and is invalid;

(b) that, as against the United Kingdom, Iceland is not entitled unilaterally to assert an exclusive fisheries jurisdiction beyond the limits agreed to in the Exchange of Notes of 1961;

(c) that Iceland is not entitled unilaterally to exclude British fishing vessels from the area of the high seas beyond the limits agreed to in the Exchange of Notes of 1961 or unilaterally to impose restrictions on the activities of such vessels in that area;

(d) that activities by the Government of Iceland such as are referred to in Part V of this Memorial, that is to say, interference by force or the threat of force with British fishing vessels operating in the said area of the high seas, are unlawful and that Iceland is under an obligation to make compensation therefore to the United Kingdom (the form and amount of such compensation to be assessed, failing agreement between the Parties, in such manner as the Court may indicate); and

(e) that, to the extent that a need is asserted on conservation grounds, supported by properly attested scientific evidence, for the introduction of restrictions on fishing activities in the said area of the high seas, Iceland and the United Kingdom are under a duty to examine together in good faith (either bilaterally or together with other interested States and either by new arrangements or through already existing machinery for international collaboration in these matters such as the North-East Atlantic Fisheries Commission) the existence and extent of that need and similarly to negotiate for the establishment of such a régime for the fisheries of the area as, having due regard to the interests of other States, will ensure for Iceland, in respect of any such restrictions that are shown to be needed as aforesaid, a preferential position consistent with its position as a State specially dependent on those fisheries and as will also ensure for the United Kingdom a position consistent with its traditional interest and acquired rights in and current dependency on these fisheries.

Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), [1974] I.C.J. 3, 7.

The Federal Republic Memorial's conclusion is essentially similar, except for numbering versus lettering of the paragraphs. Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), [1974] I.C.J. 175, 179.

36. The United Kingdom and the Federal Republic had all the input, as Iceland did not participate. "Iceland has not taken part in any phase of the present proceedings." Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), [1974] I.C.J. 3, 8.

37. [I]t is particularly necessary to satisfy oneself that the Court is passing

that the legal frame of question-and-answer not only meets the needs of the parties, but is in fact the only viable method of decision-making, and that the findings of the Court are dictated by the expectations of the parties.

The majority held, in contrast, that the Court is in fact master of its own jurisdiction and not controlled by the parties,³⁸ in line with Article 36 of the Statute of the Court. The formalist position is certainly guaranteed to satisfy at least one side; but it allows the Court no room to exercise judicial notice of any matter not specifically brought to its attention. The majority, when concluding that the state of international law did not yield a definitive statement on the fifty-mile limit, noted that a solidification of the law in a time of social flux would do the parties more harm than good,³⁹ by forcing them to a stasis while the other countries remained flexible. This is the orthodox realist position, that justice in any judicial decision can only be obtained by considering all the elements of the situation, including the consequences of the decision. The majority finds support in the Statute of the I.C.J., Article 53, which allows the Court to consider all relevant rules of international law. Article 53 sets a tone of judicial inquiry outside of the boundaries of the Applicant's pleadings. This authorization, coupled with the United Kingdom's reply to the Court that its request to declare the extension against international law *per se* could be severed from its Memorial without injustice, presents the more plausible rationale of the two. The Federal Republic was not as congenial as the United Kingdom, and did not agree to any such severance.

2. CONSERVATION AND PREFERENTIAL RIGHTS

The second point of conflict, which overlaps the first, concerns subparagraph (4) of the Judgment, which deals with the finding of

upon a dispute which has been defined as justiciable by Iceland and the United Kingdom, and not some other dispute constructed during consideration of the case by the Court.

Id. at 126 (Gros, J., dissenting).

38. "[T]he Court, as a master of its own jurisdiction, is not controlled by the position taken by the Applicants, but is compelled to inquire into the scope of its own jurisdiction" *Id.* at 63 (Dillard, J., concurring).

39. "[T]he Judgment . . . does not preclude the Parties from benefiting from any subsequent developments in the pertinent rules of international law." Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), [1974] I.C.J. 175, 216 (declaration of Nagen-dra Singh, J.).

preferential rights and need for conservation.⁴⁰ The dissent argued that the Court should not have avoided Applicants' primary pleading. Furthermore, it should not have considered the outside information on preferences and conservation, as the Applicants nowhere sought a decision on these matters; and thus they were not at issue.⁴¹ This is a weak argument, considering subparagraph (e) of the United Kingdom's and subparagraph (3) of the Federal Republic's Memorials,⁴² which make these very assertions. The dissent's stronger argument is that, regardless of the memorials of the parties, the subject-matter jurisdiction of the Court arose from the 1961 Exchange of Notes,⁴³ and the boundaries defined by these notes do not include these issues.⁴⁴

This argument does not center on Applicants' desires, but illustrates the basic formalist-realist dichotomy. The formalists usually look at the structure of the decision, concerned with whether it addresses the issues in a traditional manner and whether the procedural essentials are being observed. The realists see the decision's consequences as more crucial, emphasizing ends as much as means.⁴⁵ The end sought here is the settlement of this dispute and

40. See notes 34-35 *supra*.

41. It should be observed that the Applicant has nowhere sought a decision from the Court on a dispute between itself and Iceland on the subject of the preferential rights of the coastal State, the conservation of fish species, or historic rights Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), [1974] I.C.J. 175, 208 (declaration of Ignacio-Pinto, J.). "[I]t is my view that the Court settled an issue on which the Parties were not in dispute." Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), [1974] I.C.J. 3, 164 (Onyeama, J., dissenting).

42. See note 35 *supra*.

43. "[I]t is the 1961 treaty which determines what the subject-matter of the justiciable dispute is" Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), [1974] I.C.J. 3, 127 (Gros, J., dissenting).

44. The 1961 Exchange of Notes contained the following provision: ". . . in case of a dispute relating to [an extension of the fishery jurisdiction of Iceland], the matter shall, at the request of either Party, be referred to the International Court of Justice." In his dissenting opinion, Judge Gros stated:

I cannot accept the argument that a form of words as precise as 'dispute in relation to the extension of fisheries jurisdiction' can be interpreted as impliedly including any connected question . . . if the other Party refused to make that question the subject of the agreement itself. The 1961 agreement only contemplated one sort of dispute as justiciable, namely the extension of Iceland's fisheries jurisdiction.

Id. at 127-28.

45. It [the Court] was not compelled to refer to preferential rights and conservation needs. This I take to be a question of judicial discretion and even prudence. But all this does not entail the consequence that it is *precluded* from dealing with the dispute on the broader grounds so earnestly sought by the Applicant. To read the Exchange of Notes of 1961 otherwise, that is to say, in a too restrictive fashion,

the bringing together of the parties.⁴⁶ As a matter of policy, if the United Kingdom and the Federal Republic want to stipulate to the preferential rights of Iceland, in an apparent attempt to negotiate, then should the Court not aid them, if its function is the settlement of disputes? The realist position here seems the more justifiable, as long as the balance of ends and means is maintained.

As to the jurisdictional argument that these questions are ancillary,⁴⁷ the majority reasoning is based on both the history of the dispute,⁴⁸ which indicates the parties were concerned with these issues throughout negotiations, and in the 1961 Exchange of Notes,⁴⁹ which is not a narrowly drafted document. Between the two, dissent and majority, the latter's arguments are more persuasive; the dissent has previously stipulated that the Exchange of Notes can be used to define jurisdiction, and the boundaries of a "dispute in relation to the extension of fisheries jurisdiction around Iceland" are broad enough to include all the issues of the controversy. Here the passion of logical positivists, as Austin's followers came to be called, for defining their terms shows weakness when used as a base in a formalist jurisprudential system. The positivist tendency is to narrow all issues to their bare bones, believing impassionately in the maxim that simplicity means clarity and clarity means accuracy.⁵⁰ The dissent has given the 1961 Exchange of Notes

may have sufficed to decide the immediate issue between the Parties but, in my view, it would not have sufficiently sufficed to *resolve* the dispute by recognizing the interests of *both* Parties and supplying guides for their future conduct

Id. at 66 (Dillard, J., concurring).

46. "[T]he settlement of a dispute . . . is the ultimate objective of all adjudication as well as of the United Nations Charter and the Court" *Id.* at 42 (declaration of Nagen-dra Singh, J.).

47. "[A]ll the other points in the submissions are only ancillary or consequential to this primary claim" that the extension has no basis in international law. *Id.* at 36 (declaration of Ignacio-Pinto, J.).

48. In the light of the negotiations between the Parties . . . it seems evident that the dispute between the Parties includes disagreements as to the extent and scope of their respective rights in the fishery resources and the adequacy of measures to conserve them. It must therefore be concluded that those disagreements are an element of the 'dispute in relation to the extension of fisheries jurisdiction around Iceland.'

Id. at 21.

49. The weakness . . . in the argument which would deny the Court jurisdictional power to respond to this issue is rooted in a too simplistic concept of the nature of the dispute [T]he dispute covered in the Exchange of Notes is not of [such a] clearly delineated character.

Id. at 66 (Dillard, J., concurring).

50. For an introduction to the theories of recent logical positivists see A.J. AYER, LAN-

the narrowest possible construction, and seems to have done so incorrectly.⁵¹

3. DUTY TO NEGOTIATE

The next point of conflict is the duty to negotiate,⁵² which the dissent argues is futile and irrelevant. Their argument has several parts. First, the 1973 Exchange of Notes⁵³ between the United Kingdom and Iceland has made the Court's order to negotiate moot in that case and thus, the Court should not be making ineffective gestures.⁵⁴ Second, any bilateral duty to negotiate in a situation which is essentially multilateral is totally without effect, especially in light of the Icelandic agreement with the European Economic Community to negotiate fisheries rights with the European nations as a group.⁵⁵ This second argument presents the dichotomy, often espoused by the majority, of immediate resolution versus future consequences,⁵⁶ but with a twist. This time the dissenting judges

GUAGE, TRUTH AND LOGIC (2d ed. 1952); LOGICAL POSITIVISM (A.J. Ayer ed. 1959); LOGIC AND LANGUAGE (A. Flew ed. 1951).

51. This is in sharp contrast to the distributive justice (as opposed to corrective or remedial justice) advocated by Judge Dillard, Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), [1974] I.C.J. 3, 70, which appears to be the broadest interpretation possible. Often the best course is avoidance of rigid construction rules of any sort.

52. The question has been raised whether the Court has jurisdiction to pronounce upon certain matters referred to the Court in the last paragraph of the Applicant's final submissions . . . to the effect that the parties are under a duty to examine together the existence and extent of the need for restrictions of fishing activities in Icelandic waters on conservation grounds and to negotiate for the establishment of such a régime as will, *inter alia*, ensure for Iceland a preferential position consistent with its position as a State specially dependent on its fisheries.

Id. at 20.

53. The Exchange of Notes of 1973 included a catch limit, areas of permitted fishing, and expiration date of 13 November 1975. No such agreement was negotiated with the Federal Republic. Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), [1974] I.C.J. 3, 17; Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), [1974] I.C.J. 175, 188.

54. "The conclusion of the interim agreement has therefore had the effect of rendering the Application of the United Kingdom without object so far as the period covered by the agreement is concerned." Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), [1974] I.C.J. 3, 157 (Petrén, J., dissenting).

55. By finding, in the Judgment, that there is a bilateral obligation to negotiate concerning 'respective' rights of a bilateral character, when Iceland has accepted a multilateral obligation to negotiate on much wider bases in institutions and international bodies which do not come within the purview of the Court's jurisdiction, the Court has formulated an obligation which is devoid of all useful application.

Id. at 141 (Gros, J., dissenting).

56. "The Court must take into account the situation which will result from the delivery

are the ones who most effectively consider future consequences. Here, the realist approach is professed more effectively than it is practiced. However, the actions of the parties have reinforced the majority's decision. Iceland and the United Kingdom have come to an agreement which gives breathing space for negotiating a permanent settlement. Should the parties not reach that settlement by November of 1975, the authority of the Judgment can be brought to bear. The Court, as an extension of the United Nations and an instrument of Article 33 of the United Nations Charter, is a tool for settling disputes. The fact that occurrences have lessened the Court's direct influence over events is no sign that its purpose is unachieved. The basis of the Court's jurisdiction to impose this requirement to negotiate depends upon the nature of the dispute, the nature of the applicable law,⁵⁷ and past fisheries treaties.⁵⁸ This broad base securely supports the majority position.

4. QUESTIONS OF COMPENSATION

The next issue is that of Iceland's duty to pay damages for losses it caused Applicants by enforcing the extension. Although the United Kingdom chose to drop subparagraph (d) from its Memorial as a negotiating concession,⁵⁹ the Federal Republic retained its basically identical subparagraph (4),⁶⁰ which was rejected in subparagraph (5) of the majority decision.⁶¹ The dissent argued that since

of its judgment." Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), [1974] I.C.J. 175, 202.

57. [I]t would appear that in this particular case negotiations appear necessary and flow from the nature of the dispute, which is confined to the same fishing grounds and relates to issues and problems which best lend themselves to settlement by negotiation. Again, negotiations are also indicated by the nature of the law which has to be applied, whether it be the treaty of 1961 with its six months' notice in the compromissory clause provided ostensibly for negotiations or whether it be reliance on considerations of equity.

Id. at 214 (declaration of Nagendra Singh).

58. It is not here suggested that each of these (bilateral and multilateral fishing) agreements resulted from the application of a *prior* duty to negotiate. Yet clearly each was the consequence of an imperatively felt need to engage in negotiations in order to accommodate the conflicting rights of parties.

Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), [1974] I.C.J. 3, 68 (Dillard, J., concurring).

59. [I]n view of the conclusion of the interim agreement constituted by the Exchange of Notes of 13 November 1973 referred to above, the Government of the United Kingdom had decided not to pursue submission (d) of the Memorial.

Id. at 7.

60. See note 35 *supra*.

61. See note 34 *supra*.

the issue was placed before it, the Court should have granted relief.⁶² The majority found that the Federal Republic presented insufficient evidence to substantiate a general finding for an unspecified wrong.⁶³ However, the implications of this decision seem ill-considered by the majority.⁶⁴ As Judge Petré points out in his dissent,⁶⁵ the status of this claim has been left in limbo as far as both parties are concerned. The Federal Republic has no guidelines with which to redraft its claim, and no specific limit of time for resubmission; little chance of reconciliation can come of this situation. Here again, the decision appears more doctrinaire than reasoned.

5. JUDICIAL LAWMAKING

Finally we come to the dissent's charge that the Court is engaging in judicial lawmaking. Although the Court would have made a much more explicit statement on the state of international law in this area by deciding whether the extension was in violation of international law *per se*, the dissent charges that the Court's action will unduly influence the outcome of the Conference on the Law of the Sea.⁶⁶ The premise of that charge seems to be that since roughly half

62. If, as I believe, the Court has jurisdiction to entertain the claim for compensation, I consider its reasons for rejecting the claim wholly inadequate [T]he Federal Republic of Germany was not asking for quantified compensation but for a declaration of principle

Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), [1974] I.C.J. 175, 250 (Onyeama, J., dissenting).

63. The majority found that:

In order to award compensation the Court can only act with reference to a concrete submission as to the existence and the amount of each head of damage. . . . In these circumstances, the Court is prevented from making an all-embracing finding of liability which would cover matters as to which it has only limited information and slender evidence.

Id. at 204-05.

Judge Gros was more consistent with the minority position as a whole, however: It is therefore because the fourth submission of the Federal Republic fell outside the subject matter of the compromissory clause, and therefore of the Court's jurisdiction, that it should have been rejected in the Judgment, and not by means of an argument based on the way in which the submission was presented.

Id. at 237. Judge Petré agrees with Judge Gros on this point, noting that: "I . . . consider that the Federal Republic's compensation claim does not fall within the scope of the jurisdictional clause of the 1961 agreement." *Id.* at 243.

64. See notes 55 & 56 *supra*.

65. Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), [1974] I.C.J. 175, 243. Instead of dismissing, the Court could have called for more information under Article 57 of the Rules of the Court. *Id.* at 250 (Onyeama, J., dissenting).

66. [I]t causes me some concern also that the majority of the Court seems to have adopted the position which is apparent in the present Judgment with the

of the United Nations membership ascribes to limits of 12 miles or less, the I.C.J.'s holding that 12 miles is not a binding standard in international law implies that some wider limit, *e.g.*, 50 or even 200 miles, is the rule. This argument ignores the fact that the Court found that there was no rule at all,⁶⁷ but found instead confusion as to the present state of the law.⁶⁸ At most, the majority holding that the Icelandic extension of jurisdiction is not opposable to the United Kingdom and the Federal Republic—but not illegal *per se*—implies that 50 miles is only an enforceable limit against those with no established rights.⁶⁹ It seems reasonable to say that the question is still undecided, and no specific limit will be standard until the Conference reaches an agreement, perhaps in Geneva. Although realism is not averse to judicial law-making,⁷⁰ the majority does not play a legislative role in this decision. In such a controversial area of the law, such caution seems well advised.

intention of pointing the way for the participants in the Conference on the Law of the Sea now sitting in Caracas.

Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), [1974] I.C.J. 3, 37 (declaration of Ignacio-Pinto, J.).

67. Judges Dillard and de Castro reject the "no law" or vacuum theory, on the grounds it might allow a country to assert any distance they please (much as the CEP countries have done).

The defeatist idea that the determination of fisheries jurisdiction zones is a question of municipal law, within the national competence of each State, must be rejected. It is contrary to the principle of the freedom of the high seas
Id. at 96 (Separate Opinion of de Castro, J.). They choose, however, to be satisfied with a separate opinion in this matter and to vote with the majority on the grounds that the nature of customary international law in this area makes it unnecessary to hold the extension without foundation *ipso jure*; that to hold the extension not opposable to the Applicants is sufficient. Judge Dillard, *id.* at 60, distinguishes between a no-rule concept as in the Case of the S.S. "Lotus", [1927] P.C.I.J., ser. A, No. 10, and an exception to the norms in special circumstances as in the (Anglo-Norwegian) Fisheries Case, [1951] I.C.J. 116, indicating the latter precedent applies in this case.

68. If the dissent is arguing that confusion was the result the Court desired the Conference on the Law of the Sea to reach, then the majority might seem to have been successful, as the Conference adjourned without agreement.

69. 'Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.'

Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), [1974] I.C.J. 3, 22 *quoting* (Anglo-Norwegian) Fisheries Case, [1951] I.C.J. 116, 132.

70. "[A] possibility or even a probability of changes in law or situations in the future could not prevent the Court from rendering Judgment today." Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), [1974] I.C.J. 175, 216 (declaration of Nagendra Singh, J.).

IV. CRITICISMS AND CONCLUSIONS

A. Criticisms

Scholars have expressed the conviction that as the Court has become more progressive, it has in fact retrogressed in terms of world authority.⁷¹ Looking back to the time when the Permanent Court of International Justice reigned as *the* international tribunal, handled a relatively large number of cases, and was bound into the world political system by a series of binding compulsory jurisdiction agreements,⁷² one can see the International Court of Justice as a ghost, an overrated advisory committee, seldom used, even by the organizations of its parent, the United Nations.⁷³ In taking judicial notice of the disparate elements of international law, while emphasizing its uniformities, the realists have acted contrary to what the formalists feel would best serve the interests of international law. As Leo Gross notes in his article on the I.C.J.:

The proper rôle for the Court lies in promoting unification in the interpretation and application of international law, both customary and conventional, and contributing thereby to the rule of law and greater integration of the international society.⁷⁴

This argument has a great deal of force if one accepts the premise that the decline of the Court's influence is due to its having left the paths of traditional legal formalism.

This is not to say that either formalists or realists are arguing for the I.C.J. to influence all aspects of international affairs, but that "generally the legal aspects of disputes should be resolved by legal procedures (adjudication or arbitration) and the political aspects by political procedures."⁷⁵

The reality of international relations clearly shows that the legal ways of peacefully settling international disputes are unacceptable for the solution of disputes arising out of contradictions between blocs (Nixon's proposal to refer the Berlin question to the

71. Gross, *supra* note 27, at 259.

72. Out of 130 parties to the Statute of the Court, only 46 have accepted compulsory jurisdiction. Out of 54 members of the League of Nations, 38 accepted compulsory jurisdiction. *Id.* at 262.

73. *Id.* at 266-67.

74. *Id.* at 259.

75. Address by Milan Bulajic, *World Peace and Peaceful Settlement of International Disputes*, WORLD PEACE THROUGH LAW, THE ATHENS WORLD CONFERENCE 157, 161 (1964), quoting Consensus of Lagos XV, Consensus of Rome, II/B [hereinafter cited as WORLD PEACE].

International Court of Justice), or disputes arising out of the elimination of colonialism.⁷⁶

The realists are equally vehement in their assertion that the Court has not gone far enough in its evolution. They point to legal inflexibility as the major problem of the Court in a rapidly changing world that responds more to political influences than to legal ones. As one commentator has stated, "It does not help that the application of a legal rule is legally impeccable if it is politically impossible."⁷⁷ Realists see their approach as the more flexible and therefore the more conciliatory of the two, and warn that if the dictates of realism are not followed, the Court will generally be the worse for it:

[I]f they do not [bring the Court and the law up to date], then there is the danger that the Court and the world will split into two different schools of international law to the disadvantage of both and the further collapse of the rule of law.⁷⁸

This prophesy echoes the conviction of arbitration experts that the most accurate statement of any dispute is a compromise, due to the tendency of both sides to over-emphasize the points most favorable to their own case, while ignoring points favorable to the other side.⁷⁹

B. Conclusions

The need for compromise in modern international law seems critical. If realist jurisprudence could accomplish the difficult task of bringing the alienated CEP countries⁸⁰ back into the sphere of international law through compromise, that alone might prove its worth.⁸¹ The reluctance of newly liberated nations to accept a body of law, which they had no part in creating, is understandable. The

76. *Id.* at 160.

77. Gross, *supra* note 27, at 267.

78. Green, *supra* note 30.

79. Any notion or opinion which postulates extreme positions—whatever may be the underlying purpose or motive—is incompatible and irreconcilable with the idea of securing the recognition and adequate legal protection of all the legitimate interests involved.

Garcia, *Report on Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens—Reparation of the Injury*, [1961] 2 Y.B. INT'L L. COMM'N Add. 1, at 46, U.N. Doc. A/CN. 4/Ser. A Add. 1/46 (1961).

80. Although sometimes arranged in different order elsewhere, the initials CEP are used here to indicate Chile, Equator, Peru and all other countries that have enforced a 200 mile coastal limit.

81. 1 S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 15 (1961).

present law makes few distinctions between developed and developing countries, distinctions which the newer countries feel are essential to participation in the international legal system.⁸² The most viable position undoubtedly lies between the two extremes. For example, the dissenting opinions of Judge Gros in the *Icelandic Fisheries Cases* are often more empirically rigorous than the opinions of the realists. Judge Dillard, in turn, shows a good example to the formalists, carefully reviewing and refuting their arguments in a fair manner. However, elsewhere in the decision high polemic appears to be the rule.⁸³

The tendency to characterize the actions of others in polemic rather than objective terms is not confined to this court. Jurisprudents in general seem to indulge this tendency, often to the detriment of the Court.

A tribunal which boldly strikes out in new directions will be accused of lack of predictability, but a tribunal which applies the law as it finds it, and fosters "stability of law and predictability of outcome" of international litigation may "fall soon into disuse and sterility."⁸⁴

Or, to put it more simply, "One may either hullo on the inevitable, and be called a bloodthirsty progressive; or one may try to gain time and be called a bloodthirsty reactionary."⁸⁵ Although some blame can be laid on others in this matter, the Court has a responsibility to do as much as possible to aid its own image. The question of the Court's image is a critical one to the future of international law, with the I.C.J. as *the* principal judicial organ. Its self-described task is to "ensure respect for international law."⁸⁶ It can do this not only by its decisions but by its demeanor.⁸⁷

Jurisprudential combativeness seems to have been taken for granted as an inevitable and necessary element of the science. But today this attitude seems self-indulgent, and, at this stage of the world's development, impossible to sustain. The sources of this fallacy of necessity are multiple. One is a misunderstanding of the basic nature of the division of jurisprudence into schools. The var-

82. *WORLD PEACE*, *supra* note 75, at 163.

83. Especially polemical were the dissent of Judge Ignacio-Pinto and the joint separate opinion of Judges Forster, Bengzon, Jimenez de Arechaga, Nagendra Singh and Ruda.

84. *GROSS*, *supra* note 27, at 254.

85. *D. SAYERS, GAUDY NIGHT* 339 (1936).

86. *Corfu Channel Case*, [1949] I.C.J. 1, 35.

87. *S. ROSENNE*, *supra* note 81, at 47.

ious jurisprudential theories should not be viewed as in opposition simply because they are looking at different aspects of law. None tries to explain fully what law is, but each speaks with a different emphasis. To quote William Twining:

At the root of such misunderstandings has been the tendency to treat all legal theories as comparables, because they fall within the sphere of 'jurisprudence.'⁸⁸

Realism is concerned with the problems of adaptation to changed conditions, while formalism struggles with the problems of unification of the law. The idea of form versus function is a destructive dichotomy, as both are essential. The whole realistic reaction against formalism in America was originally a reaction against how the law was being taught in the United States. Langdell, the father of American legal education and the case method, had selected one necessary element of a successful lawyer and treated it as if it were the only one.⁸⁹ But regardless of original motives, in the polemic that raged in the U.S. legal establishment of the 1930's, both sides seemed to advertise themselves as the be-all and end-all, and totally rejected the validity of the other position. This, very possibly, is happening in the International Court of Justice.

Another source of the fallacy of necessity is a self-indulgent attitude on the part of many jurists, who fail to discipline themselves to objectivity:

Of all legal subjects, jurisprudence is the most susceptible to controversy; juristic controversies are prone to be inconclusive and unsatisfactory; of juristic controversies, that surrounding realism had more than its share of slovenly scholarship, silly misunderstandings and jejune polemics.⁹⁰

While the reasons for this are complex,⁹¹ it is a sad fact that "writers

88. W. TWINING, *supra* note 21, at 172.

89. *Id.* at 18.

90. *Id.* at 80.

91. Llewellyn's view was that:

... (a) jurists are mostly lawyers, so trained in the rhetoric of controversy, with: (i) its selective, favorable posing of issues, and (ii) its selection, coloring, argumentative arrangement of facts, and (iii) its use of epithet and innuendo, and (iv) its typical complete distortion of the advocate's vision, once he has taken a case, so that he ceases to even take in any possibility which would work against him (as especially in the prevalent 'romantic' type of advocacy) that, (b) it has proved necessary to police their work as advocates by (i) forcing them to define issues by a careful system of phrased pleading, served back and forth with opportunity for answer, under the supervision of a responsible and authoritative tribunal, and (ii) limiting their argu-

. . . profess various jurisprudential faiths which have come into labels, . . . labels which seem to have become rather more combative than descriptive."⁹² Affecting both their self-image and their view of others, it is this kind of labeling which often polarizes what otherwise could be productive discussion.

It seems obvious that a new orientation is necessary. Warring jurisprudential disciplines must be reconciled. It has already been noted that the two disciplines of realism and formalism have grown closer together during the past few years. Most of this rapprochement has been on the part of analytical formalism, evidenced by a semantic and conceptual scepticism;⁹³ no longer is the possibility of a consistent legal system without input from other disciplines taken for granted. Now, it is realism that must make the gesture of reconciliation. It has always been formalism which has feared legal chaos, perhaps overly so, while realism accepted it as a fact.⁹⁴ This realistic attitude of cynical observation can no longer be of service; "realism is hard work."⁹⁵ "One of the main lessons to be drawn from the story of the realist movement is that it is easy to ignore or to underestimate the difficulties, theoretical and practical, of sustained interdisciplinary work."⁹⁶

In terms of classical realism, the fact-scepticism of Jerome Frank must be exchanged for the rule-scepticism of Llewellyn.⁹⁷ Fact-scepticism accepts and analyzes the personal element in judicial decision-making without presenting an outline for achieving a true science of decision, *i.e.* a theory which incorporates the infor-

ments to issues so drawn, and (iii) confining the 'facts' to which they can resort to a record, and (iv) barring guilt by association, or by imputation, or without proof of particular offense etc., yet. (c) in Jurisprudence every man (i) states his own issue, misstates the other man's issue, beclouds the or-any issue, evades the or-any issue, etc., uncontrolled by procedure or by answer, or by authority (and cases where a jurisprude has stated an issue fairly are museum-pieces), and (ii) uses his rhetoric also without control, and (iii) is free to dream up 'facts' even by anonymous imputation, and (iv) consequently always rides his strawman down.

(d) Whereas in law one party always loses, or each must yield something, in Jurisprudence there is thus Triumphant Victory for All. This makes for comfort, if not for light.

W. TWING, *supra* note 21, at 379-80.

92. Llewellyn, *One "Realist's" View of Natural Law for Judges*, 15 NOTRE DAME LAW J. 8 (1939).

93. Bodenheimer, *supra* note 15, at 371.

94. *Id.* at 375.

95. W. TWING, *supra* note 21, at 59.

96. *Id.* at 386-87.

97. J. ROSENBERG, *supra* note 5, at 14.

mal sources of law. Frank argued that “a definition of law in terms of rules obfuscates clear thinking about law,”⁹⁸ and that “the major cause of legal uncertainty [is] not that of rule but of fact.”⁹⁹ However, fact-scepticism was more concerned with the personal interaction in a local trial court. In the rarified atmosphere of the I.C.J., where much of the pleading is done at some distance, the rule-scepticism search for principles of decision behind the “paper rules” of a court is a valid one.¹⁰⁰

Until these problems are faced, by both realism and formalism, petty bickering will stifle the true growth of international law, especially in the world court. As Judge Gros stated in his dissenting opinion, “[t]he real task of the Court is still to ‘decide in accordance with international law such disputes as are submitted to it.’”¹⁰¹ Ignoring the formalist overtones, this general statement underlines the role of the I.C.J. in the world community—developing a unified body of international law that is broadly acceptable. Combining this broad acceptability with rigorous empiricism is a difficult goal—one most worthy of achievement.

Timothy C. Mack

98. *Id.* at 21.

99. *Id.* at 24-25.

100. *Id.* at 14.

101. Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), [1974] I.C.J. 175, 238 (Gros, J., dissenting).