

Professor McWhinney, like Professor Dorsey, was a student of F.S.C. Northrop at Yale Law School in the years immediately following World War II. Professor Northrop believed that the method of dispute settlement embodied in the Statute of the International Court of Justice is a product of Western European culture and that this method is alien to the cultures of many peoples. Accordingly, Professor McWhinney finds, many countries originally shunned the International Court of Justice. Recently, however, Third World states, Communist states, and Japan have set aside their cultural differences and appealed to the Court in instances where their interests could be served.

WESTERN AND NON-WESTERN LEGAL CULTURES AND THE INTERNATIONAL COURT OF JUSTICE

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I. DORSEY'S "JURIS CULTURE:" THE INTELLECTUAL DEBTS TO NORTHROP

Gray Dorsey explains his special juridical concept of Jurisculture as indicating that "philosophies of society and law are to be considered not as pure idea systems, but as the ordering aspect of instances of organizing and maintaining human cooperation."¹ While expressly acknowledging the works of Julian Huxley, Teilhard de Chardin and Monod,² he calls for an evolutionary approach to the comparative, historical study of the processes of establishing and maintaining societies and legal systems as a basis for developing a new, politically viable World Law.

Dorsey was strongly influenced, as were many of his contemporaries at the Yale Law School in the immediate post-World War II years, by the

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1. Dorsey, *Toward World Perspectives of Philosophy of Law and Social Philosophy*, 1 ARCHIV FÜR RECHTS — UND SOZIALPHILOSOPHIE, SUPPLEMENTA 3 (1979).

2. *Id.*

teachings of Filmer Northrop. Northrop was a philosopher of the sciences who, though without formal legal training, was one of a distinguished group of non-legal scholars appointed to the Yale Law School Faculty during its "Golden Era" of the early 1930s through the 1950s. Northrop had originally been concerned with analytical logic, and his early works are in the logic of the sciences and the humanities.³ But his contact with foreign graduate students and teachers at Yale, an international legal center, made him sensitive to the cultural relativism of basic systems of reasoning and their underlying thought processes. Northrop pondered whether the particular form of scientific argumentation and demonstration that Western scientists like Newton and Einstein had developed was rooted in such a highly particularistic Western society that it created a threshold of general acculturation that non-Western students must cross before they can expect to replicate and extend similar scientific theories and experimentations.⁴ Northrop's interest in cultural anthropology and his personal and professional links to Sorokin, Kluckhohn, Hoebel, and others led him to pose similar questions regarding Western music and the arts. Northrop asked, for example, whether a Beethoven symphony is so peculiar to Western civilization in its structure, organization, and content that it would be inconceivable for it to have originated in a society other than late 18th and early 19th century Central Europe.

Northrop's purpose, in posing such questions, was no chauvinistic venture of vindicating Western values and policies at the expense of other cultures. Rather, his questions represented an enlightened attempt at building bridges between the different cultures. These bridges were a necessary pre-condition to establishing a viable system of World public order for the post-War era.⁵ Northrop was one of the first Western thinkers to acknowledge, thereby, the cultural relativism — what we might today, in latter-day legal parlance, call the "Eurocentrism" — of dominant theories of international law and organization of the late 1940s and early 1950s. This cultural relativism reflected the opinions and policy preferences of the main Western powers of the time.

3. See e.g., NORTHROP, *LOGIC OF THE SCIENCES AND THE HUMANITIES* (1947).

4. See e.g., Northrop, *The Complementary Emphases of Eastern Intuitive and Western Scientific Philosophy*, in *PHILOSOPHY: EAST AND WEST* (Moore, ed., 1944). See generally NORTHROP, *THE MEETING OF EAST AND WEST. AN INQUIRY CONCERNING WORLD UNDERSTANDING* (1950).

5. Northrop, *Naturalistic and Cultural Foundations for a More Effective International Law*, 59 *YALE LAW JOURNAL* 1430 (1950); and Northrop, *Contemporary Jurisprudence and International Law*, 61 *YALE LAW JOURNAL* 623 (1952).

Northrop's earliest readings introduced him to Ehrlich's concept of the community "living law."⁶ This living law underlay and provided a necessary corrective for the positive law state authority. Ehrlich had formulated his own theories in the special context of the multi-racial, ethnically-plural Austro-Hungarian Empire, where the Imperial (German) government, centered in Vienna, laid down its logical constructs in neat, rational, and uniform Civil Codes. The government then transported and applied these Codes to all the remote provinces of the far-flung Empire, societies that often differed radically in language, culture, and general socio-economic base from the Imperial model of Vienna.

Northrop attempted to apply Ehrlich's lesson to the task of elaborating and constructing a new, ethno-culturally more representative and inclusive, International Law that would supplement those "classical" doctrines, whose Western roots had been inherited from the pre-War era. His "The Meeting of East and West" is an ambitious essay examining the cultural-anthropological roots of basic legal concepts and processes. In its time, the essay was a necessary first step to synthesizing Western and non-Western ideas in post-War international law and organization. Northrop lacked training in foreign and comparative law, which could have helped him empirically demonstrate how General Principles of International Law common to all major cultures are induced from particular national legal systems' positive law (i.e., national civil codes, legislation and authoritative court decisions) for reconciling competing community claims.⁷ His attempt at a concrete field demonstration in the special context of the emerging new European Community movement of the early 1950s, is not wholly persuasive, although it provides intriguing and valuable inter-cultural, inter-systemic insights.⁸

II. CULTURAL RELATIVISM AND THE U.S. WORLD-RULE-OF-LAW CAMPAIGN

Northrop's insistence on the cultural relativism of legal concepts, processes, and institutions offered an alternative approach for building a viable system of World public order, to that projected by the U.S. State

6. EHRlich, GRUNDLEGUNG DER SOZIOLOGIE DES RECHTS (1913).

7. For an ambitious early venture at bi-systemic study and synthesis, see the investigations by Northrop's student Dorsey in Confucian Chinese, as well as Western, legal norms: Dorsey, *Two Objective Bases for a World-Wide Legal Order*, in IDEOLOGICAL DIFFERENCES AND WORLD ORDER (Northrop, ed.) (1949).

8. NORTHROP, EUROPEAN AND UNITED STATES FOREIGN POLICY (1954).

Department. A group of often highly idealistic special legal advisers, consultants, and international law professors had clustered around the U.S. Administration in the immediate post-War years. The original U.S. "grand design" was sketched out at Yalta and finalized at the San Francisco conference of the Spring of 1945. The San Francisco Conference drafted and then adopted the Charter of the United Nations. This Charter projected into the international community a constitutional-legal model of international organization that drew heavily upon the U.S. Constitution and upon the U.S.'s unique historical and constitutional experiences.

The "constitutionalizing" of the post-War system, in this way, was inspired by a generous vision of the need to submit international conflicts to rational and orderly processes of peaceful resolution. This resolution process is the stuff of the American legal system. Its outlook is not markedly different from that of the earlier European conceptions expressed in the two Hague Conferences and resultant Hague Conventions of 1899 and 1907, and in the League of Nations during the period between the two World Wars. The institutional and procedural specifics,⁹ however, elevated what were no more than examples of highly particularistic, Western (or simply American) constitutional usage to the status of general, intersystemic, "universal" constitutional norms. In any case, the Western powers would have to live gracefully with this after they lost their erstwhile automatic voting majority in the U.N. General Assembly, with the marked expansion in U.N. membership from 1955 onwards.

In the late 1940s and early 1950s, U.S. lawyers at inter-governmental legal negotiating conferences and at international scientific and professional-legal reunions began to insist on the inclusion of an express clause in the various charters they were drafting. The clause would provide for automatic reference to the International Court of Justice to resolve any disputes over the interpretations of the terms of an international treaty in which the U.S. becomes a party. This proposal reflected the emphasis that American Bar Association committees and the Washington-based World of Law movement¹⁰ gave to international adjudication and to

9. The emphasis, for example, upon a Parliamentary-style U.N. General Assembly, later to be augmented, in political-legal force and authority, by the U.S.-inspired "Uniting for Peace" gloss upon the original U.N. Charter text voted by the pro-Western General Assembly majority during the 1950 Korean War crisis.

10. See generally *THE FOUR STEPS AT ATHENS TOWARD WORLD PEACE THROUGH LAW* (World Peace through Law Centre, Washington, D.C. (1963)).

compulsory, third party-based international dispute settlement in general. Northrop politely countered this particular form of legal evangelism in support of the International Court. He suggested that judicial decision-making was an inherently Western approach to dispute settlement and was the product of factors intrinsic to Western legal culture and experience that were not necessarily replicated in other, non-Western societies. He might have added that such U.S. public enthusiasm abroad for the cause of the International Court¹¹ could not be expected to evoke any matching response in other, non-Western societies. Indeed, these non-Western societies often viewed the new, post-1946, International Court of Justice as a mere continuation of the Permanent Court of International Justice that existed during the period between the two World Wars. The only significant difference was the addition of the official U.S. presence and *imprimatur* to what had been, pre-War, a form of old Western European "family compact." They therefore saw the new Court as yet another instrument for maintaining Western political-legal influence and power in the main post-War international legal arena.

III. CHANGING IMAGES OF THE INTERNATIONAL COURT: THE "BLIGHT OF EUROCENTRISM"

In the early post-War era the new International Court of Justice remained, like the old Permanent Court of International Justice, (in terms of its client-states and, in necessary consequence, its causes) an essentially Western European or Western institution. This was understandable in light of some well-recognized historical factors.

Although the Soviet Union and Soviet bloc countries participated in the general work of the Court by nominating qualified judicial candidates (who were, then, always elected to the Court) they would not submit their own cases to the Court. Nor did they offer other states the opportunity of doing so through submission, in advance, to the Compulsory Jurisdiction of the Court under the Optional Clause. Old historical-legal traditions linger on in the Soviet Foreign Ministry, such is the conservative weight accorded to the old precedents and the old practice of earlier eras. The Soviet intellectual intransigence in relation to the *new* International Court probably dates back to Soviet experience with the *old* Court

11. This enthusiasm was hardly matched, incidentally, at the political level within the U.S. After World War II the U.S. did not choose to adhere strictly to the Compulsory Jurisdiction of the Court. Rather, the U.S. invoked the Optional Clause of the so-called Connally amendment, adopted in the U.S. Senate to limit its adherence.

in the *Eastern Carelia* affair of the early 1920s.¹² The Soviet attitude is reinforced by official Soviet awareness of the Soviet and Soviet bloc permanent minority voting situation in the *new* International Court, as in all the other post-1945 United Nations institutions and agencies.

Political realism is reinforced here by Soviet International law *doctrines*¹³ which emphasize that the United Nations Charter is not a Constitution but a limited treaty *inter partes*. Hence the U.N. Charter is to be interpreted, not in any broad, Marshallian, "constitutional" spirit, but in a restrictive, strict constructionist sense. It must be construed against any claimed exercise of legal power and authority, rather than in its favor, even in case of ambiguities. The Soviet judges on the *new* International Court have maintained this position of judicial self-restraint with impeccable consistency, in the full spirit in which the late Justice Felix Frankfurter of the U.S. Supreme Court would have approved. Ironically, they have maintained it despite obvious temptations to ideological point-taking, to the Soviet advantage, in particular cases.

As for the other main groups of non-Western states, (the Asian, African, "Third World" and other states) too many of these were preoccupied, in the immediate post-1945 era, with national self-determination and independence to be concerned with the refining of the legal processes of the International Court. The International Court was essentially ignored in favor of other, more politically profitable international arenas. The U.N. General Assembly became the most interesting of these. Its numbers expanded and became more representative after the 1955 "package deal" on membership had opened the doors.

The World Rule of Law evangelists in Washington had perhaps failed to accomplish one of their most obvious, prime duties: enlightening a new, non-Western state clientele on the new ideas, rampant in the major U.S. Law Schools, inspired by the Legal Realist movement from the 1930s onwards. These new ideas suggested powerfully that the Rule of Law need not be another convenient synonym for perpetuating the political-legal *status quo* of yesterday, and that the *rôle* of the lawyer and of the judge today consists not merely of mechanically restating the old law

12. *Status of Eastern Carelia, Advisory Opinion of 23 July 1923*, P.C.I.J. Series B., No. 5, p.7.

13. As to distinctive Soviet International Law *doctrines*, with special reference to the U.N. Charter and the Court, see generally, McWHINNEY, PEACEFUL COEXISTENCE AND SOVIET-WESTERN INTERNATIONAL LAW 52-71 (1964); CONFLICT AND COMPROMISE. INTERNATIONAL LAW AND WORLD ORDER IN A REVOLUTIONARY AGE 53-70 (1981); UNITED NATIONS LAW MAKING. CULTURAL AND IDEOLOGICAL RELATIVISM AND INTERNATIONAL LAW MAKING FOR AN ERA OF TRANSITION 55, 58, 84 (1984).

but also of assuming responsibility for imaginatively up-dating or re-writing it to correspond with new societal conditions and demands. Lack of awareness of the potentially dynamic, law-making *rôle* of the new International Court undoubtedly contributed in major measure to a general lack of interest in the Court in the immediate post-War era. This lack of interest was reflected in a marked decline in its work-load in comparison to the old, pre-War, Permanent Court, and also by a notable lack of participation, and excitement, in the triennial elections of the Court's judges.

All this was to change dramatically in 1966 with the announcement of the Court's 8-to-7 decision, *South West Africa. Second Phase*.¹⁴ This decision was rendered only on the second, tie-breaking vote of the Court's President, the Australian judge, Sir Percy Spender. The case extended back over a number of years, having been initiated by two African state plaintiffs, Ethiopia and Liberia. In 1962, they had succeeded in gaining by an 8-to-7 decision¹⁵ a Court ruling allowing them standing to argue that South Africa's program of Apartheid was incompatible with the old League of Nations Mandate (now United Nations Trust Territory) of South West Africa (Namibia). In 1966, the plaintiffs were in effect denied standing to receive judgment. Death, disease, and disablement led to the premature disappearance of the judges who almost certainly would have voted the other way. The lack of these judges, plus the rare tie-breaking vote of the President led to this fortuitous decision.

The Court's 1966 ruling was one that would have baffled the ingenuity of the Medieval Schoolmen.¹⁶ It also brought a torrent of criticism, in the U.N. General Assembly and elsewhere, that the Court had given a politically biased and prejudiced judgment — "a white man's decision, rendered by a white man's tribunal." Insufficient and incomplete doctrinal legal demonstrations in the Court's 1966 judgment combined to produce a strong reaction to the decision. First, the Court's opinion did not sufficiently reconcile in strict legal terms the 1966 judgment with the earlier 1962 decision. Second, the Court failed to provide policy justifications to support the decision, although the dissenting opinions, and especially the eloquent dissent of the U.S. judge, Philip Jessup¹⁷, raised

14. *South West Africa. Second Phase, Judgement*, I.C.J. Reports 1966, p.6.

15. *South West Africa, Preliminary Objections, Judgment*, I.C.J. Reports 1962, p. 319.

16. Analyzed by McWHINNEY in *THE WORLD COURT AND THE CONTEMPORARY INTERNATIONAL LAW-MAKING PROCESS* 17 (1979); and *THE INTERNATIONAL COURT OF JUSTICE AND THE WESTERN TRADITION OF INTERNATIONAL LAW* (the Paul Martin Lectures) 38-40, 68-72 (1987).

17. I.C.J. Reports 1966, p.6, at p. 323.

significant "policy" considerations that urged a more substantial response or counter by the Court majority. Third, a new awareness grew from the unexpected political attention directed to the Court in the first shock of the 1966 decision, that the Court had a Western or "European" majority dominant within its ranks at the time. There was, henceforward, a new political sophistication and attention to the regular elections of the Court judges; and this brought, in its turn, a new interest in judicial philosophy and competing theories of law and the legal process. More attention was paid to the legal values and value-preferences of candidates for judicial election. Finally, an increasing formalization and "regionalization" of the business of selection and allocation of judicial seats on the Court paralleled developments in electoral practice in other main United Nations arenas such as the Security Council, General Assembly, and International Law Commission.

The changes that all this produced in the Court were necessarily incremental, in view of the "staggered" system of elections to the Court. Only a third of the members of the Court retire or present themselves for re-election at the regular, three year intervals. In the long-run, in fact, no revolution occurred in the ethno-cultural composition or political-ideological make-up of the Court. The shift was one of degree only, and a modest shift at that. But it was symbolically important, and brought a new understanding on the part of both non-Western and Western states of the potentialities for changing International Law inherent in the Court's *rôle*. The possibility of change was especially promising if the Court invoked the more creative, policy-oriented, approaches dominant in post-War Western legal science and Western Law Schools.¹⁸ As a result of the changes, Third World states gained more confidence in the Court, manifested in the early 1980s by Third World states bringing cases before the Court, filling the erstwhile alarming gaps in the Court's docket.

By the same token, however, the Western states that had been near exclusive clients of the Court in the first several decades of the post-War era, began to doubt for political reasons the merits of judicial decision-making and judicial settlement of international disputes. These states

18. Manifested in the Court's own *volte face*, only five years after *South West Africa. Second Phase* of 1966, and this by overwhelming judicial majorities, in the *Namibia Advisory Opinion* ruling in 1971: *Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, p.16.

were reacting — in retrospect, it is clear, over-reacting — to what was often described in language startlingly reminiscent of some of the criticisms of the “New Deal” Roosevelt appointments to the United States Supreme Court, as a “politicisation” of the processes of selection of International Court judges. In fact, only one judicial seat seems to have been influenced, in the voting result, by Third World back-lash against the *South West Africa Second Phase* decision of 1966: the defeat of the distinguished Australian, U.N.-jurist, Sir Kenneth Bailey. Bailey was a candidate in late 1966 to succeed his fellow-countryman President Spender who had cast the decisive second, tie-breaking vote in that decision. But the succession to Spender’s seat remained within its own special, customarily-sanctioned “region,” as an English-language, Common Law, British Commonwealth seat. The successful candidate was an eminently well-qualified Nigerian jurist who also met all the relevant “regional” criteria.

The dissatisfaction of older Western European states was manifested, in the criticisms, *sotto voce*, in various Western European Foreign Ministries at the Special Opinions filed by non-Western European judges in *North Sea Continental Shelf* in 1969.¹⁹ This case was itself a Western European “family compact” type of dispute, (wholly *intra*-European Community, in fact) of the sort that used to be heard by the older Permanent Court in the era between the two Wars. The ultimate disillusionment in the Court by a Western state, however, was expressed by the United States Administration in the reaction to the various decisions — the preliminary, the jurisdictional, and the substantive — in *Nicaragua v. United States*.²⁰ In this case the U.S. complained that the Court was rendering “political” and not “legal” decisions.²¹ The U.S. State Department contended that the Court membership included judges to whom “highly sensitive intelligence” factual material (which the U.S. considered to be relevant to the U.S. case) could not be confided with trust.²² Strangely these complaints came from American jurists in the wake of more than half a century American Legal Realist teachings. The U.S. invoked the complaints as justification of its decision to withdraw from

19. *North Sea Continental Shelf, Judgment*, I.C.J. Reports 1969, p.3.

20. *Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America), Provisional Measures, Order of 10 May 1984*, I.C.J. Reports 1984, p.169; *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 1984, p.392; *Merits, Judgment*, I.C.J. Reports 1986, p.14.

21. *The International Court of Justice and the Western Tradition of International Law* (1987), p.111-117.

22. *Id.* at 120-123.

any further participation in *Nicaragua v. United States* while the Court was still hearing it, and henceforward to terminate U.S. acceptance of the Court's Compulsory Jurisdiction. In its new general policy of retreat from the Court, the U.S. Administration announced that it would eschew the full Bench of the court altogether, and use, instead, only five-member Special Chambers whose composition, according to the view of the Administration, it could control.²³

Actually, such complaints against the Court in *Nicaragua* and the implications of an anti-U.S., anti-Western bias ignore the obvious fact that the Court judgments in *Nicaragua* on the main substantive points, were all rendered by a 12-to-3 vote, with substantial representation of Western and Western-learning judges in the majorities.

IV. THE INTERNATIONALIZATION OF THE INTERNATIONAL COURT AND INTERNATIONAL LAW

A recent debate in Tokyo on the occasion of a French-Japanese Cultural Summit Reunion²⁴ throws into relief some of the central problems today for an institution — the International Court of Justice — and a process — the judicial settlement of disputes, and consequential judicial law-making — whose cultural-legal origins are unmistakably Western and whose main political-legal impulse, after 1945, was inspired by the U.S.

As is well known, Imperial Japan, during the *Meiji* era beginning in 1868, consciously decided, as act-of-will and act-of-state, to "receive" Western institutions, processes and principles, including law. After experimentation at various levels, including researches in the highest academic and University institutes, with various alternative Western legal models, principally French and German, the Japanese decided to opt in 1889 for an Imperial Constitution modelled after the German *Rechtsstaat*; and also, just before the end of the century and even before its official proclamation in Germany, for "reception" of the new German Civil Code (*Bürgerliches Gesetzbuch*) of 1900.

23. See *Delimitation of the Maritime Boundary in the Gulf of Main Area, Constitution of Chamber, Order of 20 January 1982*, I.C.J. Reports 1982, p.3: discussed in *THE INTERNATIONAL COURT OF JUSTICE AND THE WESTERN TRADITION OF INTERNATIONAL LAW* (1987), pp.89-93.

24. *Occidentalisation et Japonisation*, in *L'AVENIR DE LA CULTURE: SOMMET CULTUREL FRANCO-JAPONAIS 39-61* (1984). See, e.g., the echoes (unconsciously) of Filmer Northrop's earlier propositions on cultural particularism and distinctive national systems of reasoning and analysis, differentiating European and Asian approaches to the sciences. Kato Shuichi, *id.* at 55-6.

In the domain of International Law, after the inauguration of the *Meiji* era (1868-1912) and during the succeeding *Taisho* era (1912-26), there was a similar "reception" of Western law. That movement emphasized learning, faithfully, the positive law rules and theories of "classical" Western-based international law, and then simply applying them to actual events, as they arose, in international society. Really only after the beginning of the *Showa* era in 1926, did Japanese international law studies become established as a systematic juridical science in their own right, with a firm methodological foundation.²⁵ This was the result, principally, of the work of two very great scholars, Kisaburo Yokota and Ryoichi Taoka. Together, they built the scholastic foundation of modern international law studies in Japan, applying a precise positivist methodology based upon detailed historical analysis. Their approach is identified as historical positivism, although it bears obvious analogies to the method that Cardozo proposed for internal national law testing. Moreover, there are clear links to the first stages at least of that sociological inquiry in aid of law-making that is part of American sociological jurisprudence. The method employed by Yokota and Taoka emphasized clarifying the socio-historical circumstances in which a claimed existing norm of international law had been first formed. This clarification process was based on the premise that it was necessary to analyze the original social function of the norm in question and the limitation implied thereby on its practical operation.²⁶

Yokota traced the history of Japanese attitudes regarding international adjudication.²⁷ He found them to be originally, if briefly, highly sympathetic, reflecting the enlightened Western European and general Western liberal internationalist thinking in international law that was to culminate, at the close of the 19th century, in the establishment of the Permanent Court of Arbitration. During the period between the Russo-Japanese War of 1904-5 and World War II, however, Yokota found Japanese attitudes regarding international adjudication to be "negative, evasive and even antagonistic."²⁸ This negative attitude was a direct result of Japan's unhappy experience with the Permanent Court of Arbitration

25. Tabata, *The Late Professor Ryoichi Taoka: His Contributions to the Study of International Law*, 23 JAPANESE ANNUAL OF INTERNATIONAL LAW 1 (1985).

26. *Id.*

27. Yokota, *International Adjudication and Japan*, 17 JAPANESE ANNUAL OF INTERNATIONAL LAW 1 (1973).

28. *Id.*

and its decision of May 22, 1905, rendered in the so-called *House Tax* case.²⁹ Yokota was intellectually honest enough to acknowledge that the "marked tendency toward militarism appear[ing] since the Russo-Japanese War" was hostile to the idea of international adjudication, since it promoted opinion favoring the settlement of international disputes not by peaceful methods but by force.³⁰ Such a tendency toward force was not limited to Japanese society. Rather, it also existed in Western Europe at the same time. Perhaps this attitude reflected a general impatience with "classical" International Law. "Classical" International Law was viewed as consecrating the political-legal *status quo* and establishing well-nigh inoperable institutional and procedural obstacles to the *status quo*'s peaceful change so as to reflect new societal conditions in the World Community. Yokota and other Japanese jurists of his generation and general intellectual persuasion agreed, however, that World War II, in its cataclysmic break with the immediate historical past, through the agonies of military defeat and the atomic bombings of Hiroshima and Nagasaki, brought a complete about-face in Japanese attitudes to international adjudication. This radical change was evidenced by Japan's acceptance of the Compulsory Jurisdiction of the International Court under the Optional Clause in 1958 without substantial reservations. Thus, Japan has now become the "most advanced in the field of international adjudication, being ready to submit unconditionally all legal disputes to the I.C.J."³¹

This raises the question of the extent to which the new, post-World War II Japanese attitudes about the World Court and about international adjudication in general, reflect Japanese legal culture generally today or, in Ehrlich's terms as adopted by Northrop and applied to the international legal society, reflect contemporary (post-1945) Japanese community "living law." Perhaps, in contrast, the new attitudes simply project a highly sophisticated and intellectually eclectic Japanese legal *élite* which has "received" and itself adopted Western legal ideas on international law, much as the Imperial bureaucratic-legal *élite* "received" German constitutional law and then German Civil Law, by Imperial fiat, in the *Meiji* era. The answer to the question is important because it helps determine the intensity and durability, in key non-Western societies, of

29. This case involved the Japanese government's levying of taxes on the houses of foreigners living in the foreign concessions in Yokohama and Kobe.

30. *Id.* at 4.

31. *Id.* at 15.

the originally Western World Rule-of-Law concepts, as translated into the notion of an International Court-based system of peaceful settlement and conflicts resolution — this at a particular moment in history when some key Western societies, and most notably the United States under the Reagan Administration, are signalling their disenchantment with the Court and their retreat from the principle of international adjudication in general.

V. THE INTERNATIONALIZATION OF THE “LIVING LAW” IN THE GENERAL “RECEPTION” AND DIFFUSION OF WESTERN LEGAL INSTITUTIONS AND IDEAS

The French-Japanese Cultural Summit of 1984, already referred to, picked up the concept of “Occidentalization.” Its main protagonists had little difficulty in equating the concept in its particular space-time dimension, at the outset of the *Meiji* era, with “modernization.”³² The passage to Western law —in its substantive principles and also in its key institutions and processes — signified and also actively promoted the transition to a Western-style industrial society. Along with this transition came competition with its manufactured goods in World markets and, as the barriers to international trade were raised between the two World Wars, being drawn into conflict in pursuit of scarce raw materials and new outlets for industrial goods and services.

The alternative to an “Occidentalization” of Japanese culture in the continuing pursuit of the Modernization goal in the post-industrial society of today has been the new concept of “Japanization” which, with the threat of new forms of international economic Protectionism and the evident decline of the U.S. dollar and the U.S. trading position generally, may suggest a break with the key concepts of Japanese foreign and domestic policy since the inauguration of the new, U.S.-style constitution of 1946: a close political-military association with the U.S. and NATO countries in spite of, and compatibly with, Article 9 (“renunciation of War”) constitutional imperatives of the 1946 Constitution; a constitutional governmental system modelled, since 1946, on that of the United States and involving a massive “reception” of U.S. constitutional institutions, processes, and substantive ideas in direct replacement of the “received” German *Rechtsstaat* constitution of 1889; and close integration with the U.S. monetary and trading system.

32. Oe Kensaburo, *Occidentalisation et Japonisation*, *supra* note 24 at 43.

The current Japanese national judge on the International Court, U.S.-trained himself, was one of three dissenters (including the U.S. national judge) to the Court's 12-to-3 decision against the U.S. Government in *Nicaragua v. United States*.³³ Judge Oda's Dissenting Opinion, in its particular mode of reasoning and argumentation, embraces what, by now, has become a "classical" form of judicial self-restraint. This mode of judicial self-restraint was last substantially reproduced by Judge Fitzmaurice in his pained dissent in *Namibia*³⁴ to the Court's lop-sided majority reversal of the 1966 case, *South West Africa. Second Phase*.³⁵ The opinion could well have been written by a judge with a wholly Western legal culture embracing the particular logico-formal rationality that Max Weber thought was the *apogée* of Western legal development. Not surprisingly, perhaps, Judge Oda is joined in dissent by the British national judge, Sir Robert Jennings,³⁶ who writes a neo-positivist, technical legal opinion that avoids the substantive-law involvements (and perhaps the temptation to enter into the substantive-political merits of the case). The U.S. national judge³⁷ provides the remaining judicial dissent in *Nicaragua v. United States*.

Judge Oda offers an intellectually self-consistent and well-reasoned legal argument in support of his dissenting vote in *Nicaragua*. If the discourse is intrinsically Western legal positivism, it suggests that this particular Western law approach has already entered into Japanese legal discourse and become part of general Japanese legal culture. It was, after all, Judge Oda's distinguished predecessor, Judge Kotaro Tanaka, who made a point of defending the Court of the immediate post-*South West Africa. Second Phase*, 1966, period against charges of political bias.³⁸ In reaffirming his own neo-positivist conception that the "essence" of the Court's function is "legal and not political disputes,"³⁹ Judge Tanaka substantially echoed the *pre*-Legal Realist, Western positivist proposition of an absolute dichotomy between Law and Politics.⁴⁰

33. I.C.J. Reports 1986, p.14, at p.212 (dissenting opinion of Oda J.).

34. I.C.J. Reports 1971, p. 16, at p. 303 (dissenting opinion of Fitzmaurice J.).

35. I.C.J. Reports 1966, p.6.

36. I.C.J. Reports 1986, p.14, at p.528 (dissenting opinion of Jennings, J.).

37. *Id.* at 259 (dissenting opinion of Schwebel J.).

38. Tanaka, *The Character of World Law in the International Court of Justice*, 15 JAPANESE ANNUAL OF INTERNATIONAL LAW 1, 2-3 (1971).

39. *Id.* at 7-8.

40. See also in this context, the late distinguished jurist, Takeshi Minagawa, who (acknowledging the influence of the "classical" British jurist, J.L. Brierly), insisted that the International Court's "traditional modality of existence and functioning must be maintained and should be protected from

It may thus be possible to conclude that the Japanese "special legal community" has become sufficiently acculturated in basic Western (and U.S.) legal institutions such as judicial review (and the incidental possibilities and also the prudent limits of judicial policy-making), to make legal positivism not merely a "received" *Western* legal idea that a Western-trained Japanese national legal *élite* has taken up as a somewhat artificial intellectual-legal construct. Rather, by now legal positivism is a part of intrinsically *Japanese* legal thought-ways and processes that the general Japanese legal community (in the Universities, the civil service bureaucracy, the judiciary, and the practicing profession) has comprehended, accepted, and actively applied.

The Egyptian jurist, Boutros-Ghali,⁴¹ identifies an artificiality in the ideology of the 1946 Arab legal *élite* that favored a Western-style "rule of Law." He observed that "those ruling *élites* were impregnated with Western constitutionalism and believed that inter-Arab conflicts could be settled by an international judge,"⁴² rather than by the more pragmatic forms of political accommodation common to pre-Westernized Arab legal history. Such strictures would seem to apply to most properly, and to be limited to pre-democratic societies like the Arab states at the end of the War in 1945 and even to Egypt itself, which had then only recently become free from Imperial (British) political suzerainty. For those non-Western states that have successfully broken with an Imperial, Western past, the process of "reception" of foreign, Western laws (national and international), once imposed by dictate of Empire, can evolve into a voluntary, consensual acceptance. That is, it can involve a continuing creative developing of the original foreign law. The "receiving" society may thus give its own distinctive stamp to the "received" law, so that "received" law takes on its own independent character and personality in the new state. It may sometimes — as with the "reception" of U.S. con-

various pressures and challenges"; that "the task for the Court is to adjudicate in accordance with law (*secundum jus*), . . . that it cannot direct the adjustment of interests based upon the considerations, not of law, but of political expediency,' that its task is to interpret and apply, but not to create and modify, law." Discussed in Sato, *Review of Professor Takeshi Minagawa's KOKUSAIHO KENKYU with Some General Observations on his Contribution to the Science of International Law*, 15 HITOTSUBASHI JOURNAL OF LAW AND POLITICS 13, 25-26 (1987).

41. Boutros-Ghali, *The Arab League 1945-1970*, 25 REVUE EGYPTIENNE DE DROIT INTERNATIONAL 67 (1969).

42. *Id.* at 81. See also Ofosu-Amaah, *Regional Enforcement of International Obligations*, 47 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 80, 84 (1987).

stitutional ideas in Europe and Asia after 1945 — seem to become even more modern and functionally effective than its original model.

The Indian jurist, Anand,⁴³ responding to the current phenomenon of the legal Global Village and the increasing homogenization of an international legal *élite* through common exposure to education in the same World legal centers and by the same teachers, suggests — correctly I believe — that Western jurists may underestimate the capacities for imaginative assimilation, and for creative re-working in accord with new societal needs, of old, “classical,” Western-derived legal concepts and ideas.⁴⁴ Perhaps Western jurists are even unconsciously irritated that the “received,” originally Western, legal ideas are not immediately rejected after de-Colonization and Independence, but are, instead, re-thought and re-made in accord with those post-Colonial societies’ conceptions of their own national interest.⁴⁵ Julius Stone remarked sagely, in this context, that national interest, conventionally defined and applied,⁴⁶ would increasingly replace *a priori*, ethno-culturally based considerations in the development of distinctive national International Law policy positions.

These are the significant legal cross-currents of our times, countering the threatened fragmentation of “classical” International Law through its dispersal into a congeries of separate, “regional,” ethno-culturally based, particularist legal systems. These currents also suggest that the principle of international adjudication has, by now, acquired its own substantial non-Western legal base and support, in significant non-Western legal cultures. This support has reached the point where the principle of international adjudication is likely to survive politically any self-imposed retreat, temporary or long-range as the case may be, adopted by the U.S. Administration or other Western states in the first unhappy reaction to the International Court’s ruling in *Nicaragua v. United States*.⁴⁷

The community “living law,” identified by Ehrlich in municipal, na-

43. Anand, *Attitude of the New Asian-African Countries Towards the International Court of Justice*, STUDIES IN INTERNATIONAL ADJUDICATION 53 (1969); Anand, *Role of International Adjudication*, in THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 4 (Gross, ed. 1976).

44. Mentioning, in particular, Filmer Northrop, C.W. Jenks, Quincy Wright, and B.V.A. Röling; ANAND, THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 6 (Gross, ed. 1976).

45. Cf. Boutros-Ghali, as cited by Shihata, *The Attitude of the New States Towards the International Court of Justice*, 19 INTERNATIONAL ORGANIZATION 39 (1961).

46. Stone, *A Common Law for Mankind?*, 1 INTERNATIONAL STUDIES (New Delhi) 430 (1955-6); Lissitzyn, *International Law in a Divided World*, 542 INTERNATIONAL CONCILIATION 37 (1963); FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 302 (1964).

47. I.C.J. Reports 1986, p.14.

tional legal terms and transposed by Northrop to the World Community, is thus not to be conceived as a purely static sociological condition, fixed once and for all, in societal terms but as capable of continuing evolution in historical terms. "Received" foreign legal concepts, institutions, and processes, are capable — provided that the "receiving" legal *élite* is intellectually flexible and pragmatic, and provided that the "receiving" society is itself in continuing political, social, and economic development — of taking on an independent life of their own, the "received" positive law continually interacting with the society and shaping, in its turn, new societal attitudes and expectations in regard to the positive law for the future.
