The Style of Judgment in the International Court of Justice

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The style of judgment[1] is a very important aspect of the functioning of a court of justice. The judgment has much to do with the acceptance of the court. By reading the judgments of a court, persons interested in its functioning can themselves judge whether the court is performing its functions properly. The mere issue of decisions can never enable an independent observer to cast a critical eye on the workings of the court. Reading the written justification of a decision gives the observer the opportunity to understand why a decision has been made, and consequently why, even if considered wrong, it should nevertheless be put into effect.

The style of a judgment has much to do with the reader's appreciation of the justification which that judgment depicts. By "style" one means to include not only those canons of good style which one considers in literature, such as language, sentence structure, tone and so on, but also such things as the method of argument used and the subject matter which it is thought proper to include. An example would be the very obvious difference between the judgment in the British House of Lords and the French *Cour de Cassation*; the former will include a great deal of material which would be regarded as improper in the latter, and its structure will be far less stringent than that of its continental equivalent.

In considering the judgments of the International Court of Justice one is therefore interested to see firstly what style it actually employs and secondly whether this style enhances the judgment in the eyes of its observers and leads to its greater acceptance. One would, of course, expect some eclecticism in the method adopted by the International Court as its standard of justification. Over the years since the foundation of the Permanent Court of International Justice the judgments of the Court have shown some changes. The style of dissenting and separate opinions has shown even more.

What makes a judgment convincing? What is the sort of reasoning which persuades reasonable men? The traditional dominance of logic in European systems of philosophy would at first suggest that the reasoning of a judgment must conform to the standards of formal logic. In France, where the love of logic and the influence of Descartes dominate, the judgments come closest to this ideal. But theorists of French law, such as Gény, of Common Law, such as Cardozo and Stone, and of German law such as Esser,[2] have demonstrated beyond doubt that systematic deduction has not been the basic method of reasoning in those legal systems. If we cannot use the canons of formal logic to evaluate judicial reasoning, what standards must we use?

Recent debate in philosophy and jurisprudence has shown great interest in the reviving study of non-stringent reasoning. The German jurist, Viehweg,[3] and the Belgian philosopher Perelman,[4] have done much to popularise the Aristotelian theory of "rhetoric", an old classical and mediaeval study dealing with argument which is not formally logical and is judged not by its conformity to rules of logic but by its "persuasiveness". The test of "persuasiveness", of course, directs attention to the concept of the audience. Perelman has spent most time examining this feature,[5] but both theorists are clear that judicial reasoning, and in fact juristic reasoning in general, most resembles rhetorical reasoning of Aristotelian tradition than the formal stringent reasoning of Descartes and modern logic. The types of arguments which these theorists would regard as typical of "the new rhetoric" would be such arguments as the argument from authority, the argument of analogy, the argument of causality, the argument of progress, the argument of waste.

The failure of judgments to measure up to the canons of formal logic has long been recognised by Common Law jurisprudential thinkers. In recent years many have suggested that Common Law judgments do in fact resemble much more closely the style of rhetorical argument described by Viehweg and Perelman.[6] This could be said also of judgments of the International Court. The doctrine of precedent, for example, is a very clear example of what Perelman calls "the argument from authority". It is, of course, a key technique of any legal system, though perhaps most consciously so in the Common Law system.

In this article it will be suggested that there are two interesting kinds of approach in considering the style of judgment in the International Court of Justice. In the first place it would be worthwhile to see whether in fact judgments of the International Court do really resemble rhetorical reasoning and conform more closely to it than other forms of argument. If we come to the conclusion that it does, it will then be interesting to consider who makes up the "audience" of the International Court of Justice because, as mentioned above, "audience" is a key concept in rhetorical reasoning and the rhetor's understanding of his audience and his matching of the argument to it is a crucial test of his persuasiveness.

The Structure of Judgments of the International Court of Justice

A distinguishing point of non-systematic argumentation is the use of various arguments of which no single one is convincing but whose cumulation convinces the addressee. The strength of the reasoning derives from this cumulation: the various arguments strengthen the general effect like "the legs of a chair"[7] or "the threads of a piece of stuff".[8] That this kind of reasoning is current in the International Court is recognized in the following words of Judge Tanaka:

> "To reach a conclusion there may be found many concurrent reasons upon which a decision of the Court can be based. Some of them may be more immediate, essential and straightforward than others which are of indirect and subsidiary importance and serve simply to corroborate the principle reasons."[9]

To take any lengthy judgment from the International Court of Justice is to demonstrate the validity of this point. Whereas the draftsman of a judgment of the *Cour de Cassation* will laboriously seek to exclude any secondary argument, and to place the whole weight of the decision on one chain of

reasoning, the International Court has very rarely done so. This is, of course, a wise precaution, for the International Court of Justice cannot rely on the acceptance of one single method of justification.

One example will suffice to illustrate how complex the structure of an International Court argument may become. In the *Continental Shelf Case*[10] for example, the Judges took care to rebut Germany's argument that the States whose Continental shelves were adjacent had to "apportion" the area between them. It was, the Court said, a question of delimiting adjacent areas already owned by the respective states, not constituting shares of a previously undivided unit. Whether or not the 1958 Convention applied made no difference in this respect (paragraphs 18 to 20). The Court also rejected the Danish/Netherlands argument that the "equidistance—special circumstances" rule was mandatory for Germany irrespective of Germany's relationship to the Convention (paragraphs 21 to 29). The Court then went on to speak in terms which more strictly conform with traditional canons of "logic"; for example, it said that the equidistance rule could not be regarded as *a priori* inherent in the concept of "Continental Shelf" (paragraphs 39 to 46). The Court further went on to examine the historical evolution of the rules concerning the delimitation of the Continental Shelf (paragraphs 47 to 55). A further argument adduced against the use of the equidistance rule was the practical effect which its application would have in the present case of distorting the appropriate rules of division.

Space does not permit us here to enter into a more detailed analysis of the Court's argument, but it should be clear even from this short description that the Court has sought to persuade us of the rightness of its decision by all sorts of considerations including arguments of common sense, history, practicality, "logic" and fairness.

Many other judgments of the Court could be shown to have the same kind of multiplicity of arguments.

Particular Rhetorical Arguments

If it is considered that the *structure* of arguments in the International Court of Justice is basically that of rhetorical reasoning, it should also be possible to isolate examples of particular rhetorical arguments in those of judgments. Such examples can be detected and a few examples may be given.

One example would be the *argumentum ex concessis* (*petitio principii*) which is a technique consisting of compelling one's opponent into a stance of contradiction with one of his own statements or his own conduct. Consider these two arguments from the International Court:

"Thus, by South Africa's own admission, supervision and accountability were the essence of the Mandate . . ."[11]

". . . there are . . . grounds upon which it can be maintained that the corporate veil must be lifted .... It would certainly seem that whoever else can adopt such an attitude it cannot be Spain—that Spain is indeed precluded from doing so, — because it is precisely Spain which in relation to the Barcelona Traction Company maintains that the Canadian nationality of the Company *by incorporation* is conclusive, and that its corporate veil cannot be lifted in order to take account of the non-Canadian shareholders lying behind it. Yet, paradoxically, that is just what Spain has sought to maintain in relation to Sidro-Sofina, — but not Barcelona."[12]

Another example would be the *argumentum ad hominem* the technique in which the rhetor uses an argument which is persuasive for his particular

audience or a particular part of his audience, though perhaps not convincing in a general way. Consider the following example by Judge Mbanefo:

"If the view expressed in the Judgment was what the Principal Allied and Associated Powers had in mind when they set up the mandates system and agreed to Article 7 (2) of the Mandate for South West Africa then the operation would appear to look like a form of chicanery practised on mankind in the name of civilization . . . a subterfuge intended to avoid, through its operation, the appearance of taking enemy territory as spoils of war. I do not, however, believe that this was so and for that reason, I feel I cannot associate myself with the Court's interpretation for the Mandate."[13]

"It would be incompatible with the principle of good faith to suppose that the mandatory Powers (including the Respondent) having voluntarily accepted the system did not intend really to co-operate for its complete success by respecting the principle of judicial protection embodied in it."[14]

Another example offered by Perelman of a typical rhetorical argument is that in which the rhetor plays on the contrast of appearance and reality. Consider the following two arguments taken from the Court's jurisprudence:

". . . It is not in my opinion possible to regard instruments drawn up in emergency circumstances for the protection of property in contemplation of war, and of a singularly predatory enemy (I am of course speaking of the nazified Reich, not of Germany or Germans under any normal circumstances) in the same light as instruments entered into at other times and in the ordinary way of business . . . . Outside of a mediaeval disputation, if ever there was a case for having regard to the reality rather than the form, this is surely it."[15]

"International law, being primarily based upon the general principles of law and justice, is unfettered by technicalities and formalistic considerations which are often given importance in municipal law . . . It is the reality which counts more than the appearance. It is the equitable interest which matters rather than the legal interest. In other words it is the substance which carries weight on the international plane rather than the form."[16]

It would be technically possible to analyse the Court's judgments in detail picking out specific examples of rhetorical techniques of persuasion. For present purposes it is sufficient to suggest that the similarity is close enough to warrant our investigating further the important concept of "audience".

The Audience of the International Court of Justice

Perelman emphasizes that "the audience" is vital for the development of rhetorical argumentation. By audience he means not only listeners to oral presentation, but also the readers or addressees of written argumentation. The audience determines the nature and quality of the reasoning, for the arguer quickly grasps that the argument which he finds most convincing may not necessarily best persuade his audience.

It is important for a Court to convince its audience that its decision is right, or at any rate, that it ought to be complied with. If it does not, its functioning may be seriously affected because litigants may avoid taking their cases to it; thus in some jurisdictions commercial cases are most often taken to arbitration and the normal court system avoided, while all international lawyers are aware of the partial boycott of the International Court by the Afro-Asian states.

The arguer therefore must take particular account of the individual qualities and sensitivities of his audience.

For historical reasons a dominant trend in Western thought has been the prominence of logic. At least since the work of Descartes respectable argument has been clothed in the terms of formal logical technique, even where this

was not in fact the real basis of the argument and even to some extent distorted it. This is particularly true of juristic argumentation. For reasons which have to do with the function of the legal system and the type of problems which will need to be solved, formal argument in the categories of logic is a minor part of judicial argumentation. But because the dominant intellectual fashion, in Descartes' words, was to "take well nigh for false everything which was only plausible", judges of the Civil Law systems of Western Europe often tortured their judgments into the forms of stringent reasoning.

This tendency was of course far more marked on the Continent than in the Common Law system, where a certain scepticism about the place of logic in developing the law has always been present. Continental legal theorists were much more deeply influenced by the prominence of logic in the philosophy of their times. The typical French judgment, for example, became a single chain of propositions, pared down to minimal form, terminating in a conclusion which should be "logically inevitable". A similar, if not quite so rigid, concern with the forms of logic is seen in the judgments of other Continental systems. The Austrian, Reut-Nicolussi, for example, found it self-evident that a deviation from strict syllogistic thinking in international law led to partiality and "false" decisions.[17] But although the degree of emphasis varied between European systems, it was nonetheless true that when judges from Western legal systems sought to persuade, they had to put their arguments into logical terminology, even when this obscured the real nature of their reasoning.

Naturally, the judges of the International Court wrote their judgments in much the form that they were used to in the courts of their own country. European judges were during the history of the Permanent Court by far the most influential: it is hardly surprising that the Court's judgments of that time are interlarded with logical terms which would appeal to a European audience.

But as Perelman points out, when one addresses a composite audience embracing people differing in character, loyalties, and functions[18] it is necessary to use a multiplicity of arguments; an argument which wins over one group may not be convincing to another. In particular the orator must be wary of arguments which will alienate parts of his audience, rendering them either bored or hostile.

Who makes up the audience of the International Court of Justice? Perelman defines an audience as "the ensemble of those whom the speaker wishes to influence by his argumentation".[19] Among those who would count for the International Court of Justice would be the litigants, the professional legal elite (academics and lawyers concerned with international law), national governments (who of course are also potential litigants) and the various national populations, or at any rate, the educated and concerned sections of the population.

Since the inception of the Permanent Court this audience has changed.

The creators of the Permanent Court of International Justice, the "Principal Allied and Associated Powers", were in effect the traditional wielders of power in international society at that time, the Western European nations (with, of course, the notable exception of Germany). At the outbreak of the First World War they already shared certain values which could form the basis of an international jurisprudence.

The elements of juristic unity which can be seen in retrospect were at that time by no means self-evident. The Common Law countries very seriously considered whether their conception of law would be suppressed because continental countries would have a majority in the Court.[20] Comparative law was in its infancy and the similarity of justificatory methods and functional solutions in Western legal systems not then understood. Studies of the heritage of Western law as a whole hardly existed.[21] It was a deed based on faith rather than reason to found a court on the basis of the classical theories of international law and a shared conviction of the importance of courts to conflict resolution.

By its work the Permanent Court improved its acceptability which had not initially been really wholehearted for any part of its audience. It used the traditional techniques of European legal systems; it built on shared values eg good faith (*Polish Upper Silesia (German Interests) Case*),[22] world peace (*Mossul Case*).[23] It was also able to use commonly known languages: French or English was part of the education of every cultivated European, just as very many themes and concepts from their literature had entered into a common culture. Christian dogma, theology, philosophy and the most important thinkers of politics and science were studied everywhere; the plays of Shakespeare, Molière and Goethe were known from one end of Europe to the other. Voltaire and Homer, for example, were cited by English judges in English decisions.[24]

The Permanent Court also used the pseudo-logical form of judicial reasoning which was generally in use in European legal systems eg it employed the "Attendu que . . ." style of reasoning for court orders and the language of its judgments was liberally sprinkled with logical formulae.

Even in cases in which the Permanent Court made use of other types of argument easily identified as "rhetorical" arguments, this could not endanger the Court's acceptability: such arguments were not customary in the courts of certain European countries (eg France, Sweden) but they were nevertheless so common in other forms of official communication and in daily life that their inconspicuous entry into international jurisprudence caused no shock, and in other countries, eg especially Common Law countries, they had always been a basic technique, even if not always recognised as such. Thus the rhetorical argument *petitio principii*, an argument recognised in all legal systems, was used in the *Advisory Opinion on the Jurisdiction of the Courts of Danzig*;[25] in interpreting the provisions of the Treaty of Versailles in the *Wimbledon* Case the argument *a contrario* was used[26] and so on.

But the arguments of the Court in general were specially directed to a European audience. African, Asian and most Islamic peoples were not of interest to the Court during this period. They were with a few exceptions (eg Ethiopia, Liberia, Turkey, Japan) not even members of the League. They were therefore not regarded as important to the work of the International Court and were not counted as part of its audience.

By the time the new Court was founded in 1945 many changes had occurred. The degree of interest and the power of the founders of the old Court had changed: the new interest and strength of the United States and the USSR had an effect on the Court. Their legal systems derived from Western sources but were laced through with many new threads. The International Court could weave in these new threads because the language, modes of thought

and philosophy of the new judges introduced no extraordinary novelty.[27]

The contemporary crisis in the acceptance of the International Court is however not caused by North American or Russian attitudes. It has arisen with the emergence of the "Third World". It is the attitude of this important part of the audience which is crucial for the future acceptance of the Court.

The new states have become a collective wielder of power in international society. Alone they have little influence. Together they exercise political pressure on the old wielders of power. Through the United Nations, in which they are probably better organised than they could organise themselves, they have achieved an effective influence on the Court. Their methods are various: they have prevented the election of certain judicial candidates (eg, De Visscher,[28] Sir Kenneth Bailey[29]); they have changed the composition of the Court (from 0 to 3 African judges); they have violently attacked the International Court.[30] By hindering the sending of work to the International Court (especially through the decreasing number of applications for advisory opinions from the General Assembly) they have threatened the vital existence of the Court. It can hardly be doubted that the request for an advisory opinion concerning Namibia was considered to be a kind of "last chance" for the Court to prove itself.[31]

It is not surprising that this great change in the last fifteen years of the power and interests has affected the International Court. The threat to the Court results from the Court's lack of rapport with this new audience. Its justifications continue now as before to be addressed to a cultivated European audience. Not only were the new states disappointed with the result of the *South West Africa Case*; they found so very little force of conviction in the majority justification of that decision that they are unwilling to accept the court's work in other areas. There is little real contact of minds.

There are of course other important reasons for this indifference by the new States: belief that their interests are not protected by contemporary international law; preference perhaps for other non-legal methods for the solution of conflicts in international and external politics. But the Court's failure to carry conviction is not to be undervalued; especially since in this area remedies could be found. Consideration of material interests cannot in any case be fully severed from the question of persuasive technique:

> "Experience has shown that Governments as a rule reconcile themselves to the fact that their case has not been successful—provided the defeat is accompanied by the conviction that their argument was considered in all its relevant aspects. On the other hand, however fully they may comply with an adverse decision, they do not find it easy to accept it as expressive of justice—or of law—if they feel that their argument was treated summarily, that it was misunderstood, or that dialectics have usurped the place of judicial reasoning. Any such impression, if lasting, is bound to affect adversely the cause of international justice."[32]

Disinclination to trust one's interests to a Court which acts on quite different presuppositions and whose conceptual language is foreign to the litigant in question is readily understandable.

If the Court is to consider the peoples of Afro-Asian countries as part of the audience to be convinced, attention will have to be paid to their particular characteristics.

Firstly, it should be noted that the speech and methods of reasoning of the Western world are possessed by only a very small elite within the new states. The general culture on which the Permanent Court was built before the

war is not shared by these peoples to any great extent. A justification which builds on this culture alone must be interpreted by the elite for the wider public—not only linguistically but also conceptually. If the judgment includes no familiar concepts whatever, that is naturally very difficult. What is more, the professional juristic concepts are possessed by an even smaller elite: the novelty of an institutionalised legal system in many states means that even other non-legally trained members of the elite are not familiar with such concepts. The situation is therefore quite other than, eg, in England where even in the lower levels of society the concepts "Magna Carta" and "Habeas Corpus" are quite widely known and members of the public can attach some idea to them.

In communicating with laymen in third world countries one must ask whether ICJ-judges from third world countries have contributed very much. The legal traditions of the Western world are so deeply ingrained in them that they probably feel themselves to be more familiar with the culture of a western social system than of their country of origin.[33] Third world judges to date have all been very deeply involved in at least one western legal system. Their intellectual property has been invested in it. Although certain political axes can be found, there is hardly any agreement between non-European judges as to juristic methods. The utterances of the earlier Asian members of the Court are hardly to be differentiated from those of the Western lawyers on the bench. With the possible exception of his judgment in the *Temple Case*, Wellington Koo's individual opinions could equally well have been written by a European judge. Tanaka showed a very broad knowledge of Western legal systems, and their writers: Japanese law and writers from this legal culture were only very seldom referred to.

Style in Judgment

What sort of reasoning is appropriate for the new audience of the international Court?

To further the dialogue with the new audience, it should be accepted that the tradition of "logical" reasoning which has dominated Europe for the last three hundred years, which has never been a precise description of legal reasoning and has never been used as the best method of reasoning in practice, is not the only or even the best method for the International Court. Noda[34] refers to an aversion for logical rigidity and its conceptual categories in the Japanese way of thinking—such precision seems unreal because it tries to separate A from non-A too rigidly. To the Japanese, reality is mingled and blurred and things cannot be decisively distinguished and remain true to nature. Such a mentality, Noda says, finds it difficult to adapt to European juristic argument which requires stringent logical argument.

To an audience of this way of thinking, not only does strictly logical reasoning have little force of persuasion, but it can in fact alienate.

Not many theorists[35] have occupied themselves with the theory of styles of judgment in international law, although the style of a judgment can have a decisive influence on its substance.

In many countries the art of the judgment is taught according to a tradition which leaves little place for variation. In Germany, for example, there are textbooks which regulate every detail.[36] This leads to a fairly uniform style in all courts. In Common Law countries, there are many more variations,

eg because of the practice of dissenting opinions. In finding a style which is appropriate for the International Court an understanding of the various possible styles in private law could be of interest.

At the German *Bundesgerichtshof* the tradition excludes evidence of individual personalities; no judge writes in the first person. The Court writes as a collegiate body:

"The judgment is an act of State. The judge speaks as an organ of the State when he pronounces the sentence. This means that the language must be simple and clear, dignified, strong and appropriate in its expression." [37] (my translation)

Such a view can only be based on the actual dominance of the State power. A court which relies on this authority can afford to worry less about the various methods of persuasion. According to Sattelmacher, the leading German authority on the writing of judgments,

". . . the judgment requires the most intense concentration of thought; all avoidable expressions, all circularities are to be excluded. All utterances must be dominated by a single thought which comes to expression in that phrase."[38] (my translation)

The French tradition is similar in this respect. Juret, for example, regrets the introduction of diverse arguments in the judgments of the International Court:

"La motivation de la sentence semble beaucoup plus être une juxtaposition de raisonnements parfois sans aucun enchainement."[39]

Yet, as we have seen, it is typical of the "rhetorical" mode of reasoning to use such an assortment of arguments as Juret deplores.

The Common Law tradition sees no disadvantage in the use of all sorts of arguments and in their presentation in the most various ways. The former American judge, Cardozo, for example, named six different styles of judgment; the "magisterial or imperative", the "laconic or sententious", the "conventional or homely", the "refined or artificial", the "demonstrative or persuasive", and the "tonsorial or agglutinative".[40]

The first named "magisterial" style would seem to be closest to the Continental "act of State" style. Examples can be found in the jurisprudence of the International Court. A good example is the statement of Sir Arnold McNair in the *South West Africa Advisory Opinion 1950*:

"What is the duty of an international tribunal when confronted with a new legal institution the object and terminology of which are reminiscent of the rules and institutions of private law? To what extent is it useful or necessary to examine what may at first sight appear to be relevant analogies in private law systems and draw help and inspiration from? International law has recruited and continues to recruit many of its rules and institutions from private systems of law. Article (i) (c) of the Statute of the Court bears witness that this process is still active and it will be noted that this article authorizes the Court to apply . . . (c) the general principles of law recognized by civilized nations. The way in which international law borrows from this source is not by means of importing private law institutions 'lock, stock and barrel' readymade and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of the 'general principles of law'. In my opinion, the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles than as directly importing these rules and institutions."[41]

Sir Percy Spender used this style a great deal:

"In my opinion the reservation is a vital and unseverable part of the Declaration of Acceptance. If it is bad, neither it nor any part of it can be severed from the whole. If it is invalid, as in my opinion it is, the whole declaration is null and void.

In my opinion this concludes the matter. The Court is without jurisdiction."[42]

The noticeable feature of this style is an earnest, self-confident conviction which knows no doubt. Its successful use depends greatly on the prestige of the judge.

Hambro has criticized excessive laconicism in the collective judgments of the International Court[43] but its pronouncements are in general barren of the telling aphorism or pithy phrase which Cardozo so much admired in the English judges and in his own compatriot, Holmes,[44] and which MacMillan particularly admired in the Scottish judges.[45] The "laconic or sententious" style is characterized by the use of the maxim, the epigram or the telling illustration.[46] We may take two examples:

". . . one cannot understand or analyse the proceedings of a great international conference like those at Paris or San Francisco if one regards it as essentially the same as a meeting between John Doe and Richard Roe for the purpose of signing a contract for the sale of bricks."[47]

"Every State is owner and sovereign in respect of its territorial waters, their bed and subsoil, whether the ruler has read the works of Bynkershoek or not."[48]

This dry and pithy style is particularly well-suited to the more conversational style of Common Law judgments. It is not surprising that there are few examples in the decisions of Continental judges, to whom such a style possibly seems flippant and lacking in the necessary solemnity for the "Staatsakt" which the judgment is considered to be.[49] But consider the more laboured approach of Counsel for Bulgaria (as set out by the Israeli ad hoc judge Goitein) which has some affinities to this style. The question concerned the survival of the Bulgarian declaration as to submission to the Court's jurisdiction after the dissolution of the League:

"The Bulgarian representative repeated over and over again that once the tree was felled the branches died with the tree. The tree, of course, was the Permanent Court and the Bulgarian Declaration was the branch."

Judge Goitein then repeated Counsel's reference to

". . . la fameuse jugement de Roland, qui elle aussi avait toutes les qualités, mais, par malheur, elle était morte. Et aucun historien n'a jamais prétendu qu'après ce petit accident elle était encore en vie!"

"Nothing could revive the dead branch, just as nothing could revive the dead horse"[50]

This style shades into the conversational style which is again not often seen in the International Court although the following somewhat resembles this style:

". . . you cannot have two coachmen in the driver's seat."[51]

". . . otherwise one would have come to the long condemned formula: 'The ends justify the means'."[52]

"In the Anglo-Saxon legal tradition there is a well-known saying that 'hard cases make bad law', which might be paraphrased to the effect that the end however good in itself does not justify the means, considered as legal means, when they are such a character as to be inadmissible."[53]

It is doubtful whether this style alone is appropriate to the highest international tribunal.

An example of the refined or artificial style is to be seen in the majority judgment in the *South West Africa Case 1966*. The dissatisfaction of almost all commentators with the formalism of this judgment suggests (as had already been perceived by Wetter in relation to Swedish Law[54]) that such a style is not appropriate to basic problems of a moral and humanitarian nature.

By "tonsorial and agglutinative" style Cardozo meant the ugly practice of citing a whole row of opinions by various authorities one after the other, a procedure which makes the judgment look as if it has been cut out and stuck together. This exaggerated use of the argument from authority diminishes its persuasive force. It is usually avoided in the International Court but is to be found in certain dissenting opinions.[55]

The "demonstrative or persuasive" style is preferred by Cardozo and is characterised by a "spirit of cautious seeking."[56] The authoritative style can be very effective: the confident pronouncements of a great judge are widely accepted because of their force, clarity and precision, but this style loses its force when the question is a very controversial one and when other judges express the contrary view equally authoritatively. The persuasive style seeks actively to draw the addressee into an atmosphere of reason: it is also the style which seems highly appropriate to difficult moral and humanitarian issues and deep controversies. Lauterpacht was a master of this style:

"It is impossible for the Court to base its decision on the shifting sands of the proposition that a contention advanced by a party is plausible, or at least that it may be given the benefit of being held plausible, although it is in law wholly untenable. I find it juridically repugnant to acquiesce in the suggestion that in deciding whether a matter is essentially in the jurisdiction of a State the court must be guided not by the substance of the issue involved in a particular case but by a presumption—by a leaning in favour of the rightfulness of the determination made by the Government responsible for the automatic reservation. Any such suggestion conveys a maxim of policy, not of law. Moreover the very existence, if admitted, of any such presumption in favour of the State relying upon its automatic reservation would make particularly odious and offensive a finding of the Court, to the effect that, notwithstanding that presumption, the reservation has been invoked unreasonably and in bad faith. Any such construction of the function of the Court which is calculated to put the Court in the invidious position of having to make pronouncements of that kind in the matter of its own jurisdiction is for that additional reason, open to objection."[57]

Wetter has illustrated by numerous examples how the style of a judgment varies from legal system to legal system: the short strictly syllogistic formulation of a decision of the *Cour de Cassation* is directed to professional colleagues, the practitioners in this particular legal system; the more extensive utterances of German courts include in their audience theorists and litigants; the English decision is written in sober but more common language, which the judge seeks to make generally comprehensible.[58] Each style is adapted to the position of the court in the social system as a whole and in the national culture.

The development of a style depends greatly on the organisation of the legal system. In France, for example, the *Cour de Cassation* has jurisdiction only to revise the sentences of lower courts as to matters of law ("cassation"): that its style addresses professional colleagues is a natural result. The International Court is a court of the first and last instance: the adoption of such a style is not appropriate to its special functions.

Style of Judgment in the International Court

What style of judgment is best for the International Court? The International Court is not a court of revision nor of appeal. Its decision cannot be an act of State as the German tradition teaches, nor a correction of a lower court as is the case of the *Cour de Cassation.* Its style can however conform to Wetter's description of the English style:

". . . a continuous discussion, which in all but superficial or detailed respects resembles any discussion among educated, informed and reasonable men."[59]

Both international courts established by experience that the strict "Attendu que . . ." form of judgment is not suitable for its pronouncements. Such a style does not allow the accumulation of diverse arguments of several types. Responding to the arguments of dissenting judges would also be impossible; a factor which the majority cannot leave out of consideration. Because of the length of most decisions the style would become cumbrous. This style would also alienate many readers. Theorists agree that a more fluid style serves the purposes of the International Court better.[60]

Elsewhere[61] I have set out in detail the principles which might serve as criteria for good style in the International Court of Justice. Here only a sketch list can be made of the basic requirements.

The judgment must contain the elements prescribed in Article (79) of the Rules of Court; in particular the claims of the parties, a statement of the facts and the submissions of the parties. The International Court does not always follow the practice, recommended by MacMillan, of the judges making an agreed statement of facts.[62] The way the facts are stated may be decisive for the result: it is therefore significant to note the care which the Court bestows on this part of the judgment: in both the *South West Africa Cases* and in all the *South West Africa Advisory Opinions* the facts are restated extensively on each occasion. Of course, where a judge is in dissent he often finds it necessary to restate the facts in his own way: a clear example of this is the dissenting opinion of Jessup in the *South West Africa Case 1966.*

The judgments should be complete and thorough. An excessively laconic statement of reasons, perhaps made necessary by the elimination of some arguments in favour of the decision which are not accepted by one or more of the individual judges making up the majority, may result in the majority judgment appearing to be less fully and cogently argued that a minority judgment which is articulate, detailed and builds on many supporting arguments.[63]

Clarity is also a necessary aim of the drafting committee, but once again the need to find an agreed formula may limit the precision possible.[64]

But thoroughness and clarity may not themselves suffice to make a good judgment. The handing down of a judgment is a communication process, and to communicate persuasively, as we have seen, involves considering the particular qualities of the audience. If a judgment employs a conceptual framework and a mode of reasoning alien to some of the audience, it can hardly be expected that the judgment will appear convincing to those persons. An ICJ-judgment which does not convince western lawyers or does not convince a large part of the Third World audience can hardly be regarded as satisfactory.

The use of different arguments is not a sign of bad style, not, at any rate, at the International Court. A piece of reasoning which persuades most lawyers or most reasonable men of one country, or even of the Western World, can no doubt best be made by European judges because of their intimate knowledge of that audience; but the International Court must go further and use arguments which will convince other members of the Court's audience. To give examples of what is meant here the *Continental Shelf Case* and the *Temple Case* should be mentioned. The *Continental Shelf Case* must be

regarded as embodying the finest traditions of Western judicial reasoning. The Court not only very carefully weighs the converse claims of the parties employing every available rhetorical technique in the course of its argument, but also in keeping with the general tradition of Western reasoning, makes use of the terminology of logic or pseudo-logic, such as "validity", "inference" and so on. Examples occur in almost every paragraph, although there is no attempt to place the whole decision in a strict logical form or to suggest that the Court is only "applying" a principle of law. On the contrary, the last paragraph expresses the situation very realistically:

"As the Court has recalled in the first part of its Judgment, it was the Truman Proclamation of 28 September, 1945 which was at the origin of the theory, whose special features reflect that origin. It would therefore not be in harmony with this history to oversystematize a pragmatic construct the developments of which have occurred within a relatively short space of time."[65]

The *Temple Case*[66] on the other hand was to arouse interest in an Afro-Asian audience. The majority judgment based its reasoning on technical rules of legal interpretation of the text of a treaty signed by Thailand and Cambodia, at that time under French colonial rule, and the map annexed to it. Both parties brought forward historical and cultural evidence which was dismissed by the Court in a single sentence as not being "decisive".[67] Two dissenting judges, Spender[68] and Wellington Koo,[69] mentioned the question of colonial pressure on Siam (an argument to which an Asian audience would naturally be receptive). Thailand's failure to assert sovereignty, they suggest, could not be held to estop her from asserting it once that form of intimidation ceased. How much more impressive is this argument compared to the cold analysis and interpretation of behaviour suggested by the majority!

Yet it would not have been necessary in this case to completely renounce the traditional ways of thought of the International Court, and yet provide a more persuasive judgment. It was still possible to justify the decision by using more flexible methods of justification, introducing sociological, historical and cultural arguments which would have been much more acceptable to the Asian way of thinking than the narrowly juristic justification which was used. A strict reliance on European methods of legal interpretation could not really satisfy either party for it is no doubt difficult for any Indo-Chinese audience to accept that the right to an ancient Indo-Chinese temple should depend solely on such considerations, especially since more flexible methods of reasoning are in use in Western legal systems and would have proved more acceptable to an Asian audience.

Conclusion

From what has been said it should now emerge that judicial justification of decisions is vital to the acceptability of a court. By its judgments the Court strives to persuade its audience that it is properly performing its function, and in this process the techniques of rhetorical reasoning are basic.

A really well written judicial opinion has a functional beauty, appropriateness and completeness which is only achieved by art.[70] In its best work, the International Court reaches a degree of balance and art which at least equals the best cases in private law. Even if one cannot accept the conclusion adopted by the Court, a Western jurist must be impressed by the meticulous argumentation and persuasiveness achieved by the majority judgments in

the *Barcelona Traction* and *Continental Shelf Cases*, which show that the Court has considered every argument tendered and has supported its own view thoroughly. Similarly impressive among individual judgments are those of Tanaka.[71] Their courtesy and measured style in dissent, consciousness of sociological and historical factors and acquaintance with the modes of thinking of various legal systems give evidence of the leading principles of good style for an ICJ-judge.

But the *Barcelona Traction* and *Continental Shelf Cases* concerned Western European countries, and the convincingness of their argumentation must be measured against the audience for which the International Court of Justice traditionally designs its arguments. The new audience of the Court, particularly the Afro-Asian nations, are not responsive to formal, logical, technical legal arguments which might impress Western jurists; they are far more impressed by reasoning which is based on social policy, history, culture and so on. The arguments adduced by these countries in cases such as the *Temple Case*,[72] *Rights of Passage Case*[73] and *South West Africa Cases* make this clear. Their subsequent dissatisfaction with the judgment in, eg, the *South West Africa Case 1966*[74] is only too understandable. An over-emphasis on formalism and pseudo-logic will alienate some of those assessing the Court's activity and will certainly hinder their whole-hearted acceptance of its function. A more flexible approach, designed to add to the repertoire of accepted techniques those which would appeal to a new audience, and to avoid in particular a restriction to the narrow syllogistic formulations which are the epitome of good style in the courts of certain Western nations, can only win greater adherence for the Court without diminishing the high regard in which Western jurists have always held it.

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1 This article is a preliminary version of more detailed analysis of the work of the International Court of Justice published in German by Duncker & Humblot, Berlin, as "Der Internationale Richter und seine Entscheidung im Spannungsfeld zwischen Rechtskulturen." It will appear in English shortly as "The Influence of Culture and the International Judge."

2 *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, 1956; *Vorverständnis und Methodenwahl in der Rechtsfindung*, 1970.

3 *Topik und Jurisprudenz*, 1953.

4 Perelman and Olbrechts-Tyteca, *La Nouvelle Rhétorique: Traité de l'Argumentation* 1958, transl by Wilkinson and Weaver as *The New Rhetoric, A Treatise on Argumentation*, 1969.

5 *Id*, 14-35.

6 See eg Stone, *Legal System and Lawyer's Reasonings*, 1964, 325-337.

7 Wisdom, "Gods" in 1944 *Proceedings of the Aristotelian Society*, 157.

8 Perelman, *The Idea of Justice and the Problem of Argument* 1963, 109.

9 Tanaka, *Barcelona Traction (Preliminary Objections) Case*, 1964 ICJ Reports, Separate Opinion, 65.

10 *North Sea Continental Sheif Case*, 1969 ICJ Reports, 3.

11 *Advisory Opinion on Namibia*, 1971 ICJ Reports, 42.

12 Fitzmaurice, *Barcelona Traction Case* 1970 ICJ Reports, Separate Opinion, 91.

13 Mbanefo, *South West Africa Case (Second Phase)* 1966 ICJ Reports, Dissenting Opinion, 491-493.

14 Wellington Koo, *South West Africa Case (Second Phase)*, 1966, Dissenting Opinion, 226.

15 Fitzmaurice, *Barcelona Traction Case*, 1970 ICJ Reports, Separate Opinion, 99.

16 Wellington Koo, *Barcelona Traction (Preliminary Objections) Case*, 1964 ICJ Reports, Separate Opinion, 62-63.

17 Reut-Nicolussi, *Unparteilichkeit im Völkerrecht*, 1940, 216-217.
18 Perelman & Olbrechts-Tyteca, *op cit* n4, 21.
19 *Id*, 19.
20 Lauterpacht, "The so-called Anglo-American and Continental Schools of Thought in International Law" in 12 BYIL (1931), 31.
21 Such as were later made by Wigmore, Seagle and David.
22 *Certain German Interests in Polish Upper Silesia*, 1925 PCIJ Reports, Series A, No 7, 38-39.
23 *Interpretation of Article* 3, *Paragraph* 2, *of the Treaty of Lausanne, Advisory Opinion*, 1926 PCIJ Reports, Series B, No 12, 29.
24 MacMillan, "The Writing of Judgments" in 26 *Canadian Bar Review* (1948) 494, 497.
25 1928 PCIJ Reports, Series B, No 15, 26-27.
26 1923 PCIJ Reports, Series A, No 1, 24.
27 It might be thought that the Russian experience would have been the harder to digest, but the education under the pre-Revolutionary legal system of the first Russian judge on the ICJ-Bench, and the continuance of the Code structure of Russian law (whatever differences of content and methods of interpretation may have been introduced) minimized the innovation which Krylov's appointment to the Bench might have been expected to produce. See Zile, "Soviet contribution to International Adjudication: Professor Krylov's jurisprudential legacy" in 58 AJIL (1964) 349; David, *Major Legal Systems in the World Today*, 1968, 206-207; Günther, *Die Sondervoten sowjetischer Richter in dem Internationalen Gerichtshof*, 1966, *passim*.
28 Rosenne, *The Law and Practice of the International Court* 1965, 186.
29 Green, "United Nations, South-West Africa and the World Court", in 7 *Indian Journal of International Law* (1967), 521.
30 See, for example, the speeches of state representatives after the South West Africa decision was handed down in 1966, UNGA Debates, 21st Session, Item 66 (Provisional Agenda).
31 So described by the representative of Finland in the Security Council. UN Security Council, 1550th meeting, 29/7/1970, para 42.
32 Lauterpacht, *The Development of Law by the International Court of Justice* 1958, 39.
33 A conclusion reached by Galtung in respect of westernized elites generally in his article "A Structural Theory of Imperialism" in 1971 *Journal of Peace Research* 108.
34 Noda, "La Conception du Droit des Japonais" in *Collection pour J de la Morandiere* 1964, 421, 430.
35 See Hambro, "The Reasons behind the Decisions of the International Court of Justice" in 7 *Current Legal Problems* (1954), 12; and a quite detailed treatment by Juret, "Observations sur la motivation des décisions juridictionnelles internationales" in 1960 Revue générale de droit international public, 516, which, however, is strongly influenced by the writer's familiarity with the French style of judgment.
36 E G Sattelmacher, *Bericht, Gutachten und Urteil*, 25th edn 1968.
37 *Id*, 202.
38 *Id*, 200-201.
39 Juret, art cit n 35, 375.
40 Cardozo, "Law and Literature" in *Selected Writings of Benjamin Nathan Cardozo* edited by Hall and Patterson, 1947, 342-352.
41 McNair, *Advisory Opinion on International Status of South West Africa*, 1950 ICJ Reports, Separate Opinion, 148.
42 Spender, *Interhandel Case*, 1959 ICJ Reports, Separate Opinion, 54-57.
43 Hambro, art cit n 35, 222-225.
44 Cardozo, op cit n 40, 347.
45 MacMillan, op cit n 24, 494.
46 Cardozo, op cit n 40, 346.
47 Jessup, *South West Africa Case*, 1966 ICJ Reports, Dissenting Opinion 351.
48 Ld Asquith of Bishopstone, *Abu Dhabi Arbitration*, 1 ICLQ (1952), 251.
49 Sattelmacher, op cit n 36, 202.
50 Goitein, *Aerial Incident of* 27 *July* 1955 (*Israel v Bulgaria*), 1959 ICJ Reports, 264
51 Koretsky, *Advisory Opinion on Certain Expenses of the United Nations*, 1962 ICJ Reports, Dissenting Opinion, 272.
52 Koretsky, op and loc cit.

53 Fitzmaurice and Spender, *South West Africa Case*, 1962 Reports, Joint Dissenting Opinion, 468.
54 Wetter, *The Styles of Appellate Judicial Opinions*, 1960, 24.
55 Eg Van Wyk, *South West Africa Case*, 1962 ICJ Reports, Dissenting Opinion, passim.
56 Cardozo, op cit n 40, 345.
57 Lauterpacht, *Interhandel Case* 1959 ICJ Reports, Dissenting Opinion 117.
58 Wetter, op cit n 54, 70 ff.
59 *Id*, 32.
60 Eg Lauterpacht, op cit n 32, 39; Juret, op cit n 35, 558, 568.
61 See forthcoming books noted in n1.
62 MacMillan, art cit n 24, 499.
63 Hambro, op cit n 34, 222-225.
64 Juret, op cit n 35, 569.
65 *North Sea Continental Shelf Case*, 1969 ICJ Reports, 53.
66 1962 ICJ Reports, 6.
67 *Temple Case*, cited n 66, 15.
68 Spender, *Temple Case*, cited n 66, Dissenting Opinion, 128-129.
69 Wellington Koo, *Temple Case* cited n 66, Dissenting Opinion, 90-91.
70 Wetter, op cit n 54, 191.
71 Eg Dissenting Opinions in the *South West Africa Case* (*Second Phase*), 1966 ICJ Reports, 248 and *North Sea Continental Shelf Cases*, 1969 ICJ Reports, 172 and the Separate Opinion in the *Barcelona Traction Case* 1970 ICJ Reports, 115.
72 Cited n 66.
73 1960 ICJ Reports, 6.
74 1966 ICJ Reports, 6.