

# THE ROLE OF THE JUDGE OF THE INTERNATIONAL COURT OF JUSTICE \*

by

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One of the most intriguing questions for observers of the International Court of Justice concerns the way the Court's activity is influenced by the variety of the judges' training. Setting quite aside the problem of conscious partiality, one would be naturally interested to know in what way a judge's conception of his role is derived and how far that conception moulds his work on the Court. But this difficulty of examining these question in any kind of scientific way and an understandable desire to avoid the hazards of guesswork has led to a general reluctance to study them.

Yet studies of human patterns of action this century have led to the development of a whole new frame of reference. By using the tools of sociology we are in a position to research in a scientific way aspects of human activity which were not easily amenable to traditional methods of research. One concept of sociological theory which could be of value in looking at the questions mentioned, and indeed in many other respects in relation to the International Court of Justice, is that of the « role ».

## 1. « Role » — *theory in Sociology.*

For the sociological description and analysis of human action certain writers take as their starting point the « position » of the actor (who may be a person

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or a group of persons) in a social system<sup>2</sup>. A « position » in a social system consists of a role and a status. A role is the sum of expectations which are directed to the occupant of a position. His status is the sum of expectations which he, as occupant of that position, directs to other members of that social system<sup>3</sup>. Both aspects are important because all human action is interaction and because every bundle of expectations modifies under the influence of the actions and expectations of others<sup>4</sup>.

A judge plays a role : Expectations are made of him by the Chief Justice of his Court, by his fellow judges, by the members of the legal profession and by the parties<sup>5</sup>. To a certain extent an actor not only recognizes and meets the expectations made of him by others, he adopts them as his personal standard of behaviour : he takes over the behavioural standards and values of his profession and « internalizes » them.

An actor has more than one role to play : He is at the same time a judge, a member of a particular chamber, a member of a church, the father of a family, etc. He is according to Parsons, a « bundle » of statuses and roles<sup>6</sup>. The other members of the various groups to which he belongs (i.e. the various systems of human interaction in which he is an actor) might be called his role-partners. Their expectations of the actor in his position help define his role, since he forms his own conception of his role from the expectations they direct to him. In this way they could also be called « transmitters » of his role<sup>7</sup>.

### 1.1. *Role Conflict.*

It often happens that the actor is involved in an *inter-role conflict*, i.e. he has roles to play which are in some respects incompatible e.g. he is a communist and at the same time a Catholic. Such conflicts create stress for the actor and result in a deviation from established patterns of expectations : some expectations will be disappointed (in a compromise, expectations in respect of both roles)<sup>8</sup>. Another stress situation arises not from inconsistent expectations made of the actor because of different roles but because of inconsistent expectations of various role-partners in respect of a single role : e.g. political groups, students and professors have different expectations of the role of an academic (*inter-transmitter conflict*).

<sup>2</sup> The general outline of role theory is that of Talcott Parsons. An easy description for non-sociologists to follow is that by Devereux in Black (ed.) *The Social Theories of Talcott Parsons* (1961).

<sup>3</sup> PARSONS, *The Social System*, (1952), 25.

<sup>4</sup> *Ibid.*

<sup>5</sup> LAUTMANN, *Soziologie vor den Toren der Jurisprudenz* (1971), 45.

<sup>6</sup> PARSONS, *The Social System* (1952), 26.

<sup>7</sup> This terminology is adapted from the German terminology used by LAUTMANN, *op. cit.*, *supra*, n. 5.

<sup>8</sup> JOHNSON, *Sociology : A Systematic Introduction* (1961), 35.

Yet another case of conflict occurs where the actor does not realise what is expected of him because there is a lack of communication or because the role itself has changed.

The ability of the actor to react quickly and decisively will largely depend on how deeply the ideals and standards, the « expectations » of his role-transmitters are internalized : whether they have already become an essential part of his personal motivation.

## 1.2. *Advantages of the Role Theory.*

The role theory helps explain constancies of behaviour in a society despite the multitude of its members, the apparent chaos of constituent elements in their relations and the fact of constantly changing membership<sup>9</sup>. The role of the judge in a society and the expectations of others involved in the social system have become institutionalized, have acquired a normative character and can be generalised across many social systems<sup>10</sup>.

One of the problems of the International Court of Justice is that by the very use of the words « judge », « court » and so on, expectations have been directed towards the judges and the court, deriving from the roles institutionalized under these names in Western societies (other societies hardly came into question when the Permanent Court of International Justice was created in 1919). One thing which enabled the judges to play such a novel role was the fact that the first member of the Permanent Court and each succeeding appointee, came to office with some pattern of action in mind that he regarded as « appropriate » to that role.

Use of the role theory may enable us to see just how widely the role expectations and indeed the whole structure of the International Court and its reference groups<sup>11</sup> are at variance.

## 2. *The Judicial Role and Role Conflict.*

The legal system is one of the subsystems which function to reduce tensions and resolve the conflicts inevitably produced in the pursuit of common goals<sup>12</sup>

<sup>9</sup> STONE, *Social Dimensions of Law and Justice* (1966), 14.

<sup>10</sup> DEVEREUX, *op. cit.*, *supra*, n. 2, 28.

<sup>11</sup> The concept of the « reference group » is explained in § 6.4., *infra*.

<sup>12</sup> On the inevitability of conflict in the framework of Parson's theory see DEVEREUX, *op. cit.*, 33; JOHNSON, *op. cit.*, and cf. the « conflict » sociologists such as i.a. Dahrendorf and Mills.

<sup>13</sup> These words are used in the sociologists' sense. A process or circumstance is functional when it contributes to the maintenance or development of the social system; dis-functional when it detracts from the integration, effectiveness etc. of the system. PARSONS, *Essays in Sociological Theory* (1959), 218; JOHNSON, *op. cit.*, 77.

and which are disfunctional for the society<sup>13</sup>. The essential function of courts in national legal systems is the resolution of conflict; contemporary sociologists recognise this function as an inevitable necessity of every stable society in the smallest or the largest group.

So many collisions of interest and disturbances occur, however, that a good way of dealing quickly with such disturbances is to refer to a settled body of rules which have been generalised from past experience in resolving conflicts. If these are applied consistently, the work of the lawyer and the judge is made easier : a solution can be found quickly, the litigants' conflict is resolved, they are returned to the community ready for their other roles and the energies of the lawyer and judge are freed for other tasks. But to enable this shortcutting through out-of-court settlement and speedier court decisions, this body of rules must be consistently applied. This is what the sociologist would call a « technical imperative » arising from the very situation which the judge occupies<sup>14</sup>.

But the judge must also follow another imperative : he must do what is « just » by the standards of his society which he himself has internalized. Yet because the environment is constantly changing, he cannot always be consistent. If the judge's actions continually affront the feeling of justice of his role partners, the object of minimising conflict in the social system will not be promoted : it may indeed be seriously endangered. So that within the role of « judge » two further roles are included, that of « rule-applier » and « rule-adjuster ». There is thus a conflict inherent in the judge's role<sup>15</sup>.

In his analysis of the legal profession, Parsons mentioned three observed forms of deviance to which the lawyer is subject : yielding to expediency (i.e. giving in to the demands of the client), identification with the clients' claims, and legal formalism<sup>16</sup>. From the first of these forms of deviance the judge is to some extent protected by the impersonal and adversary nature of courtroom procedure. The most serious threat is the possibility of exaggerated legal formalism :

« the tendency to insist on what is conceived to be " the letter " of the law without regard to a " reasonable " balance of considerations<sup>17</sup>. »

Another possibility is an aggressive reaction on the part of the judge, sometimes seen in his remarks to counsel or even to a witness. Lautmann<sup>18</sup> refers to judicial aggressiveness to the press and the public<sup>19</sup>.

<sup>14</sup> DEVEREUX, *op. cit.*, 46.

<sup>15</sup> The tensions present in the role of the lawyer are recognised by PARSONS, « A Sociologist looks at the Legal Profession », *op. cit.*, *supra*, n. 13, 376.

<sup>16</sup> PARSONS, article cited, *supra*, n. 15, 377.

<sup>17</sup> *Ibid.*

<sup>18</sup> LAUTMANN, *op. cit.*, 59-61.

<sup>19</sup> These forms of deviation correspond precisely to PARSONS' analysis of deviation in Chapter VII, *The Social System* (1952). Cf. also *op. et loc. cit. supra*, n. 16.

### 2.1. *Protective Mechanisms.*

The strong inter-transmitter and inter-role conflicts and the conflict inherent in the judicial role are relieved by a variety of mechanisms which are highly developed in all Western legal systems.

First of all the judge is isolated as far as possible from conflict derived from multiple roles (inter-role conflict) : he is not allowed to have another occupational role and must dissociate himself from any case in which he might have an interest. His remuneration is high so that there will be no tension with his role of « family provider ».

From pressure of inter-transmitter conflict he is protected by several mechanisms : his appointment for life, his high remuneration, and his immunity from suit for anything done in his official capacity, even out the power struggles between his role transmitters. He is physically and psychologically cut off from the public by the raised bench, his separate entrance and by court officers<sup>20</sup>. In Western democracies he is consciously shielded from personal criticism. Finally the political system ensures that the power struggle should be resolved into one intelligible message by legislation : that is the role-transmitter to whom he must listen; the most powerful, and the one whose authority is sanctioned by the norms of the community. Where legislation truly reflects strongly held community ideals and not merely sectional interests, sanctions will be brought against the judge if he ignores this role-transmitter. Examples are provided in threats or attempts to « pack » a Court e.g. Roosevelt's threat to the U.S. Supreme Court which had refused certain « New Deal » laws despite the unambiguous endorsement of this policy by the electorate. A similar case occurred for the Australian High Court which had held certain important laws similar to the « New Deal » legislation to be invalid, although it had done so by only a narrow majority. Thereafter two new and known to be « progressive » judges were nominated who helped to build a new majority for these laws<sup>21</sup>. Such cases occur only seldom but they show that the judge in times of social upheaval cannot ignore the unambiguous demand of the legislator, i.e. the role transmission of an important role-partner.

The obvious disinclination of the court to give a decision on the merits when the decision would encourage real political problems which could disturb the functioning of the court, permits an interesting comparison with the refusal of the International Court to give a judgment on the merits in the South West Africa Case of 1966. In this case the judges refused to give a decision on the substance, although the question of jurisdiction had already apparently been answered in 1962 in favour of the Court taking jurisdiction. The subtle influence of the opinions of role-transmitters on the Court was noted by Higgins in the following words :

<sup>20</sup> SAWER, *Law in Society* (1965), 93.

<sup>21</sup> SAWER, *op. cit.*, 101.

« The Court can hardly have relished the prospect of becoming embroiled in the South West African controversy; and those who contributed to that lack of confidence in the compliance of nations with its judgments and opinions should feel some embarrassment in chastising the Court so roundly in the *South West Africa Case*... Even those nations which have been comparatively well-disposed towards the concept of the judicial settlement of disputes, have made it fairly clear by their international conduct that a decision on the merits of the *South West Africa Case* would be highly embarrassing to them politically. If men send up smoke-signals, they must not be surprised if they are read<sup>22</sup>. »

Other factors which control deviance from the judicial role are criticism by the legal profession and the wider audience, e.g. by the responsible sections of the press.

A certain degree of control occurs in national legal systems through the hierarchy of appeal courts. These superior courts, which can (or at least should) better withstand pressure because of their high authority and long experience in role conflict situations, are entrusted with the supervision of lower courts. The ultimate control is, of course, always the possibility of correction by the legislature which can make very significant changes in the method of administration of justice. In Sweden, for example, the legislator moved decisively against the strict formalism of the traditional judgment and provided new rules as to its style<sup>23</sup>.

The judge is protected by two mechanisms from the inherent role conflict. The first is his authority which is emphasised by means of symbols : the raised judge's chair, the special clothing of his office, the formal and traditional forms of speech — and in England, of course, by the Crown under which he sits, as the Queen's representative. These symbols, like the similar symbols of the doctor (the white professional jacket and the framed diplomas, the formality of the appointment procedure)<sup>24</sup> influence judge and public and limit the likely divergencies from expectations. The very ritual concerned reinforces the role — all these symbols have come to mean that the person in this position will « act like a judge » : he will apply rules consistently, observe certain procedural formulae and so on. A further very special mechanism protects the judge from the stress created by his inherently dual role : this is the process of fiction and rationalisation by which a judge is able to represent a decision, not basically consistent, as one that is. According to Eckhoff :

« The technique of judicial argumentation which gives the decisions the appearance of being the products of knowledge and logic, and not of evaluation and choice is a significant means of protecting the judge from criticism and strengthening belief in his impartiality<sup>25</sup>. »

<sup>22</sup> HIGGINS, « The International Court and South West Africa : the Implications of the Judgment », 42, *International Affairs*, 589.

<sup>23</sup> WETTER, *The Styles of Appellate Judicial Opinions* (1970), 34.

<sup>24</sup> DEVEREUX, *op. cit.*, 48.

<sup>25</sup> ECKHOFF, « The Mediator, the Judge and the Administrator in Conflict Resolution », 10, *Acta Sociologica* (1968), 179.

The judges are also drawn from among those who are known to be « strong » characters, i.e. likely to withstand pressure and personalities in themselves so well integrated as to be able to cope with a role of continuing or recurrent stress.

In addition, judges are organised in a tight professional body which will strongly resist any attempt to increase pressure on them. It must be conceded that the very close professional groupings of the legal profession in England (all are members of the Inns of Court and, in contrast to the universities, this membership remains a vital one throughout their whole lives, even for the judges), is a special case; perhaps this is why English jurisprudence can tolerate the relatively more open system of individual judgments and « dissenting opinions ». The division between courts, academics and practising lawyers in continental legal systems has brought greater weaknesses with it. The English system greatly strengthens group morale and its absence in certain other legal systems, e.g. in the Weimar Republic left the judge more susceptible to pressure from various and especially from political sectors of society<sup>26</sup>.

## 2.2. *Institutionalized Expectations of the Judicial Role.*

The difficult role of the judge has become institutionalized in Western democracies to such an extent that it is possible to describe the net of relationships between judges and their role-transmitters as a social system.

There are of course some differences in the role of the judge between these national legal systems : e.g. the English judge provides not only resolution of the dispute in hand, but very often accommodates the decision in the structural system of law. In Germany the courts provide dispute resolution, but only occasionally have the final word as to how the decision is to be fitted into the existing pattern of law. This task is overwhelmingly left to the academic lawyers, or rather assumed by them as part of the functions naturally appertaining to their roles. In France there is yet another variation of the judge/academic lawyer pair of roles. The academic commentator acts as a kind of publicist or apologist for the judge : without his account of the very facts of the case reported (which in the French style of judgment used in the Cour de Cassation are omitted) the case would be largely unintelligible to lawyers unless they had actually taken part in the case, and quite incomprehensible to the public<sup>27</sup>. In the role-partnership between judge and academic lawyer we can thus recognise certain differences between national legal systems and hence variations in the reciprocal expectations of comparable role-pairs.

<sup>26</sup> LAUTMANN, « Rolle und Entscheidung des Richters — ein soziologischer Problemerkatalog in LAUTMANN, MAIHOFFER and SCHELSKY (eds.) *Die Funktion des Rechts in der modernen Gesellschaft* (1970), 382, 393.

<sup>27</sup> WETTER, *op. cit.*, 29-30.

But by and large the institutionalized roles of members of the higher courts in Western democracies show such striking similarities that it is possible to speak of a Western legal culture. The following norms can be isolated pertaining to the judicial role :

The judge must be impartial; he must not have any personal interest in the case before him; corruption is forbidden.

He must act with impersonal dignity; he should show no emotion, sympathy or revulsion; he must act with earnestness and decision. He must not act in a flippant or humorous manner : as a famous British judge has written,

« ... a judgment is not the appropriate vehicle for wit and pleasantry at large. To the parties concerned a litigation is no laughing matter and they may well complain if the judge gives the impression of treating their case too lightly<sup>28</sup>. »

The judge's speech and behaviour should be those of the elite of his society.

He will be loyal to his Court and to his colleagues, especially in a case where an opinion is overruled by a higher court. In the case of a dissenting opinion he will express himself with courtesy without personal or sharp criticism. The English practice of judges referring to their colleagues as « my learned brother » or « my brethren » is a good example of this special courtesy. The judge should not criticise the Bench, e.g. through literary publications or even statements to the press. He must keep private conversations with his colleagues concerning matters coming before the court.

The judge must propose a solution of the present case; and he may not show resentment or obstruction where his proposal is not accepted.

There are certain other basic principles and maxims applying but these are sufficient to indicate what is clearly accepted and uncontroversial in his role.

### 2.3. *Status of the Judge.*

As an actor, the judge himself directs certain expectations to his role-transmitters (his status). He expects a certain degree of authority over other members of the system (the parties, barristers, personnel of the court, etc.) which he exercises in the courtroom by his discretion as to the disposal of the case and in other ways too : in common law countries, for example, over the admission of barristers to the Bar. He expects remuneration, the privileges and immunities mentioned above, and a certain degree of prestige and deference, not only from those he deals with in the courtroom but also from the wider society which has entrusted him with power<sup>29</sup>. The judge can also confidently

<sup>28</sup> MACMILLAN, « The Writing of Judgments », 26, *Canadian Bar Review* (1948), 491-499.

<sup>29</sup> JOHNSON, *op. cit.*, 19 names authority, remuneration, privileges and immunities as the hallmarks of a status.



expect the implementation of all the protective processes which have just been discussed.

### 3. *The International Court of Justice : Role-transmitters and Role Conflict.*

These generalised remarks about the judicial role provide an interesting starting-point when one comes to examine the role of the judge of the International Court of Justice. Immediately significant differences emerge.

#### 3.1. *Role-transmitters.*

The role-transmitter for the judge of the International Court of Justice are many and even more varied than those of the judge of a national legal system. They naturally include the judge's colleagues, the legal profession and the parties. The legal profession can be further broken down into smaller groups of role-transmitters : the legal « elite » of the judge's own country, which look upon him in some way as the representative and promoter of their legal culture, the juristic elite from societies which have the same legal culture and the juristic elite of the international social system. This consists of legal advisers and delegates from other countries which the judge has met and worked with at international conferences, academics of international reputation, specialist bodies like the International Commission of Jurists, International Law Association and so on. Other non-juristic elites are also important role-transmitters. The professional elite of the international society (administrative officials of international organisations, diplomats of the judge's own and other countries, who have been or will be, his working colleagues) and the governing elite of his own country which has worked for his nomination; the alert public in all countries (the size of this group and degree of its interest varies dramatically from country to country). That this latter group is in the mind of the judge, is illustrated by the following statement of Basdevant :

« The role which the principal judicial organ of the United Nations will play... depends upon the decisions which Governments and the political organs of the United Nations may take to bring a case before the Court in order to settle their disputes by judgments, or to obtain opinions on legal questions. At the same time it is for public opinion to bring its influence to bear upon Governments in this connection<sup>30</sup>. »

Apart from individuals, who have their own views as to what the role of an international judge consists of, the views of the secretariats and the assemblies of international organisations must be considered and different views may be held by the United Nations General Assembly, the Secretary-General of the body, the Security Council, individual Governments represented in these bodies, and by the individuals involved in all these groups. Different expectations of the role may be expressed by national Governments when

<sup>30</sup> BASDEVANT, « The Judiciary in the International Sphere », 7, *United Nations Bulletin*, No. 9 (1949), 503.

speaking at home and when speaking in the United Nations General Assembly. The views of national governments have always had a very strong influence on all the roles involved in international adjudication and when these views change (e.g. those of the U.S.A. and U.S.S.R. in 1945) it will affect these roles. It should be remembered that national governments not only hold views as members of the international society in general, but also as prospective litigants. The prospective litigants of an international court take a much closer interest in proceedings than in national courts, where a large part of the public, i.e. prospective litigants, could be said to be indifferent to proceedings not immediately involving them. Other role-transmitters for the judge are his compatriots, his co-religionists, the drafters of requests for advisory opinions and the Rules of Court and Statute. National courts and other international tribunals are not so much role-transmitters as reference groups for the I.C.J.-judge<sup>31</sup>.

It can happen that the role-transmitters have such varied concepts of the role that whatever he does, the actor must disappoint certain expectations<sup>32</sup>. Günther<sup>33</sup> and Zile<sup>34</sup> speak in this sense, of the position of the Soviet judge. The Statute and Rules of the International Court have, these authors say, the search for truth for their objective but Soviet judges who are all members of the Communist Party, are surely required to give ideology a place above it.

### 3.2. *Role Conflict and Deviance.*

It is clear that the network of role expectations directed to the Judge of the International Court of Justice, is even more complicated than the significant diversity noted by observers of national legal systems. It follows that the judge is under even more stress than his national counterpart. There is likely to be intertransmitter conflict and inter-role conflict to an even sharper degree and the number of cases where the inherent conflict of the judicial role is severe, is even greater, because the number of cases which can be solved by reference to already developed rules, forms a smaller proportion of the court's work. A tendency to deviation is established, and examples of its occurrence in the forms already described are not lacking in the jurisprudence of the international court.

#### 3.2.1. *Expediency.*

There are fewer examples here because in a bench of such a size, the usual differences of opinions have a tendency to balance one another out, but there are

<sup>31</sup> The use of this concept is explained in § 6.4., *infra*.

<sup>32</sup> JOHNSON, *op. cit.*, 38.

<sup>33</sup> ZILE, « A Soviet Contribution to International Adjudication : Professor Krylov's Jurisprudential Legacy », 58 *American Journal of International Law* (1964), 359, 387.

<sup>34</sup> GÜNTHER, *Die Sondervoten sowjetischer Richter in dem Internationalen Gerichtshof* (1966), 111.

some traces to be seen with those judges who suffer greatest from role conflict, the *ad hoc* judges. The *ad hoc* judge, Van Wyk, in the South West Africa Case 1966, e.g. tried in his separate opinion, which took up more than 150 pages, to reject every claim of Liberia and Ethiopia, although the majority strove to limit themselves exclusively to a « preliminary » non-substantive question (« legal interest ») and many judges of the minority found against South Africa. Similarly the *ad hoc* judge, Riphagen, in the Barcelona Case, was the only judge to accept Belgium's claim while the other fifteen judges decided against Belgium on various grounds<sup>35</sup>. The *ad hoc* judge, Chagla, in the Rights of Passage Case wrote :

« ... I think that the Judgment of the Court in the main vindicates the attitude taken up by India<sup>36</sup>. »

Such a stance of defence or justification (« vindication ») of the claims of one party is hardly consistent with the traditionally expected impartiality of the court.

### 3.2.2 Identification.

The *ad hoc* judge, Van Wyk, clearly illustrates this phenomenon : he valued the main policies of the South African Government positively in ten pages and by using the terminology of this government « white » and « non-white », which was not used by the other judges, he appeared to identify himself with the policies of his government.

« The Territory, vast, mostly undeveloped, and poor, needed White leadership and initiative... The only role the natives could initially play in the money economy was by providing unskilled labour<sup>37</sup>. »

Not only did he sympathise with one of the parties but he also showed himself to be antagonistic to the other.

« All I need say about these manoeuvres is that they are not attractive, either as to their merit or their timing, and that they do not advance the Applicant's cause : they have rather the opposite effect<sup>38</sup>. »

« I do not intend to deal with these arguments, which in my opinion are, to say the least, fanciful and baseless<sup>39</sup>. »

In the Corfu Case, Krylov described the British motivation as an attempt « to intimidate the Albanian authorities and to demonstrate the British naval power<sup>40</sup> ». Günther shows that Krylov also continually assessed the evidence

<sup>35</sup> RIPHAGEN, *Barcelona Traction Case*, I.C.J., Reports 1970, 3, Dissenting Opinion at 335.

<sup>36</sup> CHAGLA, *Right of Passage Case*, I.C.J. Reports 1960, 6, Dissenting Opinion at 118.

<sup>37</sup> VAN WYK, *South West Africa Case 1966*, I.C.J. Reports 1966, 6, Separate Opinion at 176.

<sup>38</sup> *Ibid*, 193.

<sup>39</sup> *Ibid*, 211.

<sup>40</sup> KRYLOV, *Corfu Channel Case*, I.C.J. Reports 1949, 4, Dissenting Opinion, 79.

in favour of Albania, e.g. he denied the possibility of hearing and seeing the mine-laying operation from the Albanian coast, in contradiction to the majority and to the report of the experts<sup>41</sup>. Concerning the suspicious behaviour of Albania, after the explosion, Krylov said :

« Il ne faut pas perdre de vue que le gouvernement albanais était en 1946 un gouvernement nouveau sans expérience dans la conduite des affaires internationales et ne disposant pas d'experts dans la question du droit international<sup>42</sup>. »

### 3.2.3. *Aggression.*

This reaction is to be found not only in the *ad hoc* judges. In the South West Africa Case, 1966, three of the minority judges disappointed the normal expectations as to judicial behaviour and sharply attacked the majority decision (the text is given in full in § 5.1.4). Even more remarkable is the aggressiveness of Van Wyk against the opinion of Jessup, in which he stated that he found « no cogency in the reasons »<sup>43</sup>, that the methods were « erroneous » and regretted that « the learned judge appears to have lost sight of the elementary principle<sup>44</sup>... »

### 3.2.4. *Withdrawal.*

This form of deviation, a refusal of active participation, which is seldom, it would seem, found in national courts, has occurred on several occasions in the International Court. It finds expression in a refusal to contribute any reasoned judgment : a judge may vote against the majority judgment but provides either no explanation of his vote or a simple declaration of three or four lines which leaves the precise basis of his decision unclear. Such a declaration was made by Bengson in the Continental Shelf Case :

« I regret my inability to concur with the main conclusions of the majority of the Court. I agree with my colleagues who maintain the view that Article 6 of the Geneva Convention is the applicable international law and that as between these Parties equidistance is the rule for delimitation, which rule may even be derived from the general principles of law<sup>45</sup>. »

A similar type of declaration was made by Kozevnikov in the Rights of Passage Case :

« Vu que la majorité s'est reconnue compétente pour juger cette affaire au fond, le juge Kozevnikov trouve nécessaire de déclarer qu'il ne peut pas non plus se rallier aux motifs et au dispositif de l'arrêt sur le 3<sup>e</sup> point, car à son avis le Portugal n'a pas possédé et ne possède pas de droits souverains sur Daura et Nagar-Aveli, et qu'il n'a pas eu et n'a pas de droit de passage sur le territoire indien vers ces régions et de l'une à l'autre<sup>46</sup>. »

<sup>41</sup> GÜNTHER, *op. cit.*, 118-121.

<sup>42</sup> KRYLOV, *Corfu Channel Case*, cited, *supra*, n. 40, 69.

<sup>43</sup> VAN WYK, *South West Africa Case*, cited, *supra*, n. 37, 79.

<sup>44</sup> *Ibid.*

<sup>45</sup> BENGSON, *Continental Shelf Case*, I.C.J. Reports 1969, 56

<sup>46</sup> *Right of Passage Case*, cited, *supra*, n. 36, 52.

A single instance of such a declaration should not lead to over-hasty criticism, but when a judge, as here, very seldom expresses the reason for his decision, one may ask whether it is not a case of withdrawal. Of course a judge may remain silent when the result or the reasons of the majority decision are not consistent with this own opinion of the law — this tradition is respected in the French and in other legal systems and is approved by the Rules of Court (Article 79 [2]), but Kozevnikov gave all his seven separate votes exclusively in the form of declarations. What is more, Soviet judges have always expressed themselves less than the other judges<sup>47</sup>. Silence may be a means of avoiding resolving a role conflict which one cannot resolve.

### 3.2.5. *Legal Formalism.*

This is perhaps the most common form of deviation in the International Court of Justice. Examples of it abound. De Visscher considered formalism to be « l'un des plus sérieux dangers auxquels reste exposée la doctrine du droit international »<sup>48</sup>, and Friedmann believed that in the South West Africa Case 1966,

« The damage done to the stature of the Court by the strained and escapist reasoning of the majority is almost certainly greater than any substantive decision could have caused<sup>49</sup>. »

One must, however, treat carefully here and note Parsons' remark that formalism can also be used as a technique<sup>50</sup>. But even noting this, there are examples of its use which seem to show an escape from too hard a duty. The best example would be the use of the artificial concept of « legal interest » to avoid pronouncing on the merits of the South West Africa Case 1966. The excessively involved reasoning of the majority judgment was criticised by a great many commentators as a means of avoiding the resolution of the real issues. Verzijl considered the introduction of the principle of « legal interest » to be

« nothing more than an after-wit thought or afterwit, having presented itself to the defeated minority of 1962 as the only possible remaining escape from the otherwise ineluctable obligation to adjudicate upon the *real* merits of the dispute...<sup>51</sup>. »

and Higgins considers it to be « an attempt to dodge uncomfortable questions<sup>52</sup> ». The judgment was everywhere criticised as being highly technical and formalistic.

<sup>47</sup> GÜNTHER, *op. cit.*, 118-121.

<sup>48</sup> DE VISSCHER, *Théories et Réalités en Droit International*, 4th ed. (1970), 170.

<sup>49</sup> FRIEDMANN, « The International Court of Justice and the Evolution of International Law », 14, *Archiv für Völkerrecht* (1970), 305.

<sup>50</sup> PARSONS, « A Sociologist looks at the Legal Profession », *op. cit.*, *supra*, n. 13, 377.

<sup>51</sup> VERZIJL, « The South West Africa Case (2nd Phase) », 3, *International Relations*, No. 2 (1966), 87.

<sup>52</sup> HIGGINS, art. cited, *supra*, n. 22, 593.

« A highly artificial juristic construction *ex post*<sup>53</sup>. »

« A judgment which distorted legal reasoning beyond the limits of generally accepted doubts of construction<sup>54</sup>. »

« Written in tortured prose, dwells upon hypertechnical elaborations of its basic conclusions, and seems utterly unconvincing in its main argument<sup>55</sup>. »

The unanimity of academic opinion permits one to consider the majority opinion as deviation from the performance of the normal role expectations.

### 3.3. *The Changing Role.*

One other source of serious strain for the I.C.J. - judge distinguishes him from the national judge. At times of social upheaval the judicial role itself is likely to change either because the power balance of the various role-transmitters has changed, or because the expectations (ideals, standards) of the existing role-transmitters have been drastically altered by the upheaval. It may happen that certain actors cannot adapt to the new expectations and have to be eliminated from among the role-partners. Failure to adjust to a changing role is in this case dangerous. Examples abound from national practice. In England the restoration of the Stuart kings led to a change of personnel on the High Court bench<sup>56</sup>. In Germany some judges resigned at the institution of the Weimar Republic and more after the Second World War<sup>57</sup>. The instances cited above of threats to change the balance on the court in the U.S.A. and Australia in times of social upheaval, also prove in point. The dissatisfaction with the South West Africa Case of 1966 led to the following views being expressed on the election of judges in the period immediately thereafter :

That a new method of election of the judges should be introduced ; that the number of judges should be increased so that a larger participation of Afro-Asian judges would be permitted; that the court should remain with only fifteen judges but that the proportion of Afro-Asian judges on the bench should be increased<sup>58</sup>.

In this context at least it is interesting to note that the retirement of five judges every three years is probably a mechanism functional for the adaptation of the court to social change. Since the last World War, the power, the interest

<sup>53</sup> VERZIJL, art. cited, *supra*, n. 51, 91.

<sup>54</sup> FRIEDMANN, « The Jurisprudential Implications of the South West Africa Case », 6, *Columbia Journal of Transnational Law* (1967), 14.

<sup>55</sup> FALK, « The Southwest Africa Cases », 21, *International Organization* (1967), 7.

<sup>56</sup> HOLDSWORTH, *A History of English Law* (1924, 2nd ed. 1932), Vol. VI, 499.

<sup>57</sup> BENDIX, *Zur Psychologie der Urteilsstätigkeit des Berufsrichters und andere Schriften*, ed. Weiss (1967), 28, and cf. 105-107.

<sup>58</sup> U.N. Debates, 21st Session, Item 66 (Provisional Agenda). In 1968 Dalfen was able to name 58 reform proposals : « World Court : reform or reappraisal ? », 6, *Canadian Yearbook of International Law* (1968), 212.

and probably also the ideals and standards of the existing role-transmitters has changed and the court has not adapted itself thereto.

#### 4. *Protective Mechanisms in the International Court.*

Institutionalized roles subject to strong pressure, such as those of the lawyer and doctor, develop special mechanisms to relieve the actor from stress which will lessen his efficiency in his role. These mechanisms are highly developed in the case of the national judge, but much weaker in the case of a judge of the International Court.

##### 4.1. *Inter-Role Conflict.*

The judge of the International Court of Justice is likely to hold more roles concurrently with his judicial one than a national judge. In some cases he must give the other roles up. The Statute of the International Court prescribes as follows :

Article 16 (1) : « No member of the court may exercise any political or administrative function, or engage in any other occupation of a professional nature. »

Certain private occupations are also excluded : at the suggestion of the President, Sir Percy Spender resigned from certain company directorships at the commencement of his period of office as judge<sup>60</sup>.

He is also excluded from holding certain other roles at the same time (e.g. representing his country in an international capacity, or acting as its legal adviser) and he may not sit in a case in which he has been active in another capacity<sup>60</sup>; it will be recalled that one of the judges, Sir Mahommed Zafrullah Khan, was excluded from sitting in the South West Africa Case 1966, because he had been active in the U.N. proceedings against South Africa. South Africa made application for the disqualification of a certain judge (not named in the Court Order) but the application was rejected<sup>61</sup>. Nevertheless Sir Zafrullah withdrew from the case although he did not in fact agree that he was disqualified :

« I never disqualified myself. There were no grounds for disqualifying me. The President of the Court (Sir Percy Spender) was of the view that it was improper for me to sit, as I had at one time been nominated Judge *ad hoc*... I disagreed entirely with that view and gave the President my reasons which I still consider were good reasons. But he told me that a large majority of the judges agreed with him that I should not sit. So I had no option<sup>62</sup>. »

<sup>60</sup> ROSENNE, *The World Court — What it is and how it works* (2nd ed. 1964), 62 and n. 11.

<sup>60</sup> *Statute*, Article 17.

<sup>61</sup> South West Africa, Order of 18 March, 1965, *I.C.J. Reports* 1965, 3.

<sup>62</sup> Statement of Zafrullah Khan to the London newspaper « The Observer », cited by Hidayatullah, *The South West Africa Case* (1967), 83.

A similar question arose in the proceedings concerning the Advisory Opinion on Namibia. A minority of judges did not in that case agree with the Court's refusal of an application to disqualify. Clearly the judges are not yet certain where the line between tolerable and impermissible role-conflicts is to be drawn.

A judge who is a permanent member of the Court may still sit in cases in which his own country is a party. It is easy to see that a conflict of roles may develop in this situation. The special position of an *ad hoc* judge whose freedom to disregard his role as a patriot is limited to the duration of the case, is even more serious. That a judge permanently appointed can overcome the conflicts which arise in cases concerning his own country is shown by the examples of McNair in the Corfu and Anglo-Iranian Oil cases and of Basdevant in the Minquiers and Ecrehos Case. Their performances in these cases show no great variation from that of other judges, i.e. there has been no over-identification with a party nor apparent over-severe reaction in the other direction. The role incompatibilities which arise for a judge in a case in which his own country is concerned are probably not avoidable by reorganisation of the Court : all countries (a fairly small number) are potential litigants and judges must come from one. To exclude judges from countries concerned in a case from hearing that particular case may deprive the bench of some of the best experience and ability on it and would also upset the delicate balance of relationships between group members. The only improvement that could be made would be by supporting protective mechanisms which shield the judge more from pressure of his « patriot » role-transmitters, and providing that his socialisation will ensure that he gives his role as I.C.J.-judge priority over others.

The fact that appointments are for nine year terms and not for life also means that the judge, though freed from immediate pressure as « family provider », may remain aware that his future performance in this role is dependent on the will of certain of his role-transmitters, the elite of his own country, for example, or that of the international community. From this pressure he is somewhat relieved by the high rate of pension accorded to him after he leaves the bench. Still the many roles which an I.C.J.-judge has already held and may yet hope to hold, may lessen his predisposition to ignore expectations of role-transmitters connected with past or potential other roles.

The exposed position of a judge who is elected for only a term and not for life, and is also not a member of a close-knit professional group, i.e. in a position very similar to that of the I.C.J.-judge, was described with sensitivity by a U.S. Supreme Court judge as follows :

« From our sheltered position, fortified by life tenure and other defenses to judicial independence, it is easy to say that this local judge ought to have shown more fortitude in the face of criticism. But he had no such protection. He was an elective judge who held a short term. I do not take it that an ambition of a judge to remain a judge is either unusual or dishonourable. Moreover, he was not a lawyer, and I regard this as a matter of some consequence. A lawyer



may gain courage to render a decision that is temporarily unpopular because he has confidence that his profession over the years will approve it, despite its unpopular reception, as has been the case with many great decisions. But this judge had no anchor in professional opinion<sup>63</sup>. »

#### 4.2. *Intertransmitter conflict.*

While the immunities and privileges of international judges are almost as developed as those of the national judge, they are not as effectual against his own country as against others : social pressure, e.g. sending to coventry or loss of prestige and refusal to renominate as candidate at the election of judges are only two of the possible methods of exercising pressure.

The protective mechanism which emphasises symbolically the essence of the judicial role in national legal systems were taken over and continued by the Permanent Court of International Justice and its successor. The judges at the Hague and also at a distance from the public and the arrangement of the courtroom preserves « distance » from other persons again by means of the raised bench, separate entrances, etc. The I.C.J.-judge is, however, only protected from personal criticism inside the courtroom; though most comment is restrained, some of it is not. One need only mention here the emotional outbreaks in the U.N. General Assembly<sup>64</sup> and in publications. Schwarzenberger, e.g. wrote about the judge Alvarez :

« ... issue must be joined with Judge Alvarez's somewhat peculiar interpretation of the facts of post-1945 international life. It appears to suffer from three minor deficiencies : a debatable historical perspective, a remarkable preoccupation with the ideologies of Lake Success as distinct from the realities of contemporary world politics, and a firm resolve to obliterate the distinction between " is " and " ought " <sup>65</sup>. »

In a sharp attack on the joint dissenting opinion of Spender and Fitzmaurice in the South West Africa Case 1962, Green wrote :

« that the two judges... show a willingness to make South Africa's Case for her <sup>66</sup>. »

and further said that the majority opinion in the South West Africa Case 1966

« ... almost suggests that the judges (were) visiting Wonderland <sup>67</sup>. »

Günther criticises the Soviet Judge Krylov :

« It is obvious that Krylov's theory of misuse of a legal right in no way

<sup>63</sup> JACKSON J., dissenting in *Craig v. Harney*, 331, U.S., 367 at 397; 67 S.Ct., 1249, 1264.

<sup>64</sup> e.g. U.N.G.A. Debates, 21st Session, Item 66 (Provisional Agenda).

<sup>65</sup> SCHWARZENBERGER, « Trends in the Practice of the World Court », 4, *Current Legal Problems*, (1951), 7.

<sup>66</sup> GREEN, « United Nations, South-West Africa and the World Court », 7, *Indian Journal of International Law* (1967), 491, 513.

<sup>67</sup> *Ibid.*

promotes the substantive justice of the case but is at best conducive of reliance on political fact-findings favourable to only one of the parties<sup>68</sup>. »

He also considers that the use of the principle of sovereignty by the Soviet judges operates to

« conceal desirable political interests, justify external political moves and lend them spurious legitimacy<sup>69</sup>. »

Judges of national courts, especially in matters such as criminal law, are also criticised, but rarely so pungently. The international judge is moreover not protected by the extensive anonymity which is the rule in most Continental legal systems : in most cases it is possible to establish how a judge has voted.

I.C.J.-judges are as sensitive to criticism of their behaviour as judges in national courts. In the Barcelona Traction Case criticism adverse to the prestige of the International Court was considered grave and was referred to in the majority opinion<sup>70</sup> as well as by Jessup<sup>71</sup> and Fitzmaurice. The latter referred to the lengthening of the proceedings which had been a ground for much criticism of the Court and explained that this had resulted from action taken by the parties themselves, and Fitzmaurice added on this point :

« Nor is this by any means the only way in which the Court has been misrepresented in a manner detrimental to the dignity and good order of its functioning as an independent judicial institution<sup>72</sup>. »

The effect that excessive criticism may have in distorting a judge's role performance was described by Frankfurter J. (in dissent) in the U.S. case previously referred to :

« ... a conscientious judge... may find himself in a dilemma when subjected to a barrage pressuring a particular result in a case immediately before him. He may not unnaturally be moved to do what is urged, or he may be impelled to display his independence and not give to the arguments on behalf of the motion for a new trial that serene and undisturbed consideration which often leads judges to grant such a motion. It has not been unknown that judges persist in error to avoid giving the appearance of weakness and vacillation. Thus, one or another of the litigants before the Court may have been denied that disinterested exercise of judgment which is of the essence of the judicial process. The demands found to have been made upon the judge by these papers may agitate even a conscientious judge. He may himself be unaware of the extent to which his powers of reason have not the sway they would otherwise have. Or a judge, proud of his independence, may unconsciously have his back stiffened, and thereby his mind, when hearing the motion for a new trial and passing on its validity. Judges are not merely the habitations of bloodless categories of the law which pursue their predestined ends<sup>73</sup>. »

<sup>68</sup> GÜNTHER, *op cit.*, 87.

<sup>69</sup> GÜNTHER, *op cit.*, 94.

<sup>70</sup> *Barcelona Traction Case*, cited, *supra*, n. 35, 30-31.

<sup>71</sup> JESSUP, *Barcelona Traction Case*, cited, *supra*, n. 35, Separate Opinion, 221, Note.

<sup>72</sup> FITZMAURICE, *Barcelona Traction Case*, cited, *supra*, n. 35, Separate Opinion, 113.

<sup>73</sup> *Craig v. Harney*, 331 U.S. 367 at 392-393; 67 S.Ct., 1249, 1262.

To such criticism the I.C.J.-judge is particularly exposed because he has not even the power of the national judge to punish unfair denigration of his personal performance as contempt. That I.C.J.-judges notice the criticism of academic lawyers, is illustrated by Koretsky's reference to the breadth of such criticism after the South West Africa Case 1962<sup>74</sup>.

The judges moreover lack the support of a professional pressure group which can assert their interests. The International Law Commission, for example, has studied the Court<sup>75</sup> but the political loyalties in that body are stronger than the professional ones and it is hard to think of a case where pressure on the Court would not be accompanied by pressure on this body. One can only hope for the development foreseen by the political scientist Galtung, that a unified professional organisation of international « peace specialists » will be called into life. This group would consist of experts who are subjected to severe pressure from the environment, especially when they resist national loyalties<sup>76</sup>.

The position of the Court in the Hague is a certain protection against inter-transmitter conflict; the I.C.J.-judge is less under the influence of his national society there, but he is in another environment; a specifically European environment which he may accept or against which he may react negatively. The relative isolation of this Netherlands city from the centres of international political work, e.g. New York and Geneva, is a further advantage; it has, however, the disadvantage that the court is cut off from the developments in the expectations of important role-transmitters. In this context it is interesting to observe the setting up in 1967 (directly after the South West Africa Case of 1966) of a « Committee on Relations ». The function of this committee is to be i.a. the development of relations with other organisations of the United Nations and other international organisations and groups<sup>77</sup>. The comparatively isolated position of the International Court (the superior courts in national legal systems are mostly situated in the capitals, being the most important for new social developments) hinders the judge from observing the number, the interest and the growing importance of new role-transmitters from Africa and Asia in the right proportions.

But one of the worst defects of the International Court is the lack of means of insulating the court from inter-transmitter conflicts until they have been resolved into one intelligible transmission. This is done in national systems through legislation. The Statute and Rules of Court of the International Court give only the vaguest outline and even they are sometimes subject to bitterly conflicting interpretations, e.g. over the priority of sources of law (Article 38).

<sup>74</sup> KORETSKY, *South West Africa Case 1966*, cited, *supra*, n. 37, Dissenting Opinion, 242

<sup>75</sup> ROSENNE, *The Law and Practice of the International Court* (1965), 189.

<sup>76</sup> GALTUNG, « On the Future of the International System », *Journal of Peace Research*, 1967, 316.

<sup>77</sup> I.C.J. *Yearbook*, 1971-1972, 99.

Other international « legislation » is scant and even where some measure of consent has been necessary, e.g. in the formulation of a request for an advisory opinion, the transmission may again not be clear, *cf.* the request for an advisory opinion on Namibia. The formulation of the application may be an unsatisfactory compromise. According to Rosenne the politicians sometimes only intend

« ... no more than to shelve the substantive issue for the time being, in the hope that the dispositif of the Advisory Opinion or perhaps some particularly articulate individual opinion) rather than the actual reasons, would lay the basis for the next steps. Experience in the United Nations shows many examples in which this was precisely the intention of the General Assembly <sup>78</sup>... »

A request for an advisory opinion, which comes to the Court in these circumstances, will hardly be a unified transmission. The question in the Namibia Case was set out as follows :

« What are the legal consequences for states of the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 (1970) <sup>79</sup> ? »

A controversial question in the United Nations was precisely whether the withdrawal of the mandate by this resolution was valid <sup>80</sup>. The formulation of the request left it doubtful whether the court should take a stance on this very basic question. For this reason the Court found itself in some difficulty.

#### 4.3. *Sanctions.*

The sanctions of the I.C.J.-role-transmitters can be quite severe. They can reduce the court to impotence by refusing to send any cases to it.

Against a judge of its own nationality various groups can exercise subtle but quite effective pressures, e.g. by refusal to renominate. This factor should not be over-emphasised because most judges do not have a second period of office in any case. This is perhaps the result of a certain tendency of international society to make possible the participation of as many states as is possible. De Visscher (Belgium) in 1949, Klaestad (Norway) in 1961 and Morelli (Italy) in 1970 were replaced by judges from other countries. Similar instances were named by Feld in the Court of the European Economic Community <sup>81</sup>. Nonetheless, renominations do occur in the International Court, e.g. Zafrullah Khan (1954-1972), Badawi (1946-1965), Forster (1964, newly elected in 1972). Renominations can also come into question when a judge enters his office in the

<sup>78</sup> ROSENNE, « Lauterpacht's Conception of the Task of the International Judge », *American Journal of International Law*, 1961, 859.

<sup>79</sup> I.C.J. Reports 1971, 6, 16.

<sup>80</sup> U.N. Security Council, 1550th Meeting, 29-7-1970 : speeches by the representatives of France and Great Britain.

<sup>81</sup> FELD, *The Court of the European Communities : New Dimension in International Adjudication* (1964), 19-21.

place of a colleague who has died during his period of office. This was the case with Fitzmaurice who continued the period of office of Lauterpacht (1960-1964) and was re-elected in 1964. It was also the case for Ammoun who continued Badawi's period of office in 1965-1967 and was re-elected in 1967. Threat to withdraw support for renomination can therefore be a sanction. But such manœuvres against a judge would be particularly difficult in countries with a strongly established national tradition of judicial independence and in which a judge who votes against the claims of his own country is, to a certain extent, the object of admiration, e.g. the approval of professional commentators of McNair for his decisions in the *Corfu* and *Anglo-Iranian Oil* cases and of Basdevant in the *Minquiers and Ecrehos* Case.

The sanctions against a judge of another nationality would have to be much more indirect, but that such manœuvres within the United Nations can be successful is shown by the defeat of the Australian nominee Sir Kenneth Bailey, who had been earlier considered a probable successor to the Australian judge Sir Percy Spender<sup>82</sup> as deliberate revenge for Spender's deciding vote in the *South West Africa* Case. This was admittedly an extreme case : usually such pressures would cancel each other out by the bargaining of bloc politics, whereby persons not acceptable to one bloc generally have to be accepted to ensure the election of the bloc's own candidates.

#### 4.4. *Inherent Conflict in the Judicial Role.*

From the inherent conflict of the judicial role the international judge is even less protected than the national judge. For the mechanism of « rationalisation » — presenting a decision as consistent with a principle already accepted — is far more difficult : firstly because fewer « principles » are agreed on by all the role-transmitters and secondly because they expect different forms of rationalisation. A judgment presented in a pseudo-syllogistic form which might be satisfying to the role-partners of the French *Cour de Cassation*, would certainly disappoint the expectations of all but a fraction of I.C.J.-role-partners. Though the Court in its efforts to devise its own style, has made some efforts in this direction, it has certainly not devised a solution to the problem.

The necessity of having men of the highest calibre who would have the ability to withstand these pressures, is recognised in the Court's Statute, requiring nominees « to be of the highest moral repute ». The selection process, however, allows national governments to choose someone who may not necessarily be so resistant to its pressure. Such a suspicion is voiced by Zile when he says :

« Can a Soviet judge of the International Court of Justice be an " independent " judge ? Can his solemn declarations to perform his duties as a judge impartially be taken seriously ?... By " independence " of a person we ordinarily mean that he

<sup>82</sup> GREEN, article cited, *supra*, n. 80, 521.

does not act on instructions from superior authorities, and that he is not accountable to them. We do not, of course, mean ideal independence, implying absence of any environmental influence. We should insist, however, that this influence stop short of destroying the individual's ability or willingness, or both, to search for facts, to question dogma, and to articulate his thoughts<sup>83</sup>. »

Examples have occurred of judges resisting pressure from their home governments to use their judicial power in a particular manner. Winiarski, who had been a member of the Permanent Court took office in the new Court and continued in it for 2 decades although the political system in his homeland Poland had completely changed. He did not introduce concepts of socialist systems of law and the decision of the Court in the South West Africa Case 1966, in which he concurred with the majority, was sharply criticized by the Polish government. Another known case of resistance to pressure was that of the German judge of the Permanent Court Schücking : after Germany's withdrawal from the League of Nations there were vain attempts from Berlin to induce him to resign from the Court, but he refused to do so and was lost to the Bench only by death in 1935. The German government did not then nominate another German judge<sup>84</sup>.

This is not to suggest that the judge gives way to these pressures, but that it is impossible to understand judicial behaviour without recognising the situation in which the judge is placed. That pressure does sometimes lead the judge to observable deviation can be seen from the examples given above. The difficult position of the I.C.J.-judge and the relative paucity of insulating mechanisms leads one to wonder how this role has managed to survive at all and whether indeed it can survive much longer without some drastic changes.

### 5. *The Position of the I.C.J.-Judge.*

Having analysed the difficulties of the I.C.J.-judge and the pressures working on him, we should now proceed to analyse the more settled features of his position.

#### 5.1. *Role : Institutionalised Expectations Directed at the I.C.J.-Judge.*

One can establish certain expectations in relation to the judges of the International Court which have become institutionalised. Some are the same as those expectations directed to the judge of a national court; others are not.

<sup>83</sup> ZILE, *op. cit.*, 381.

<sup>84</sup> DRÖGE, MÜNCH and VON PUTTKAMER (eds.) *Die Bundesrepublik Deutschland und die Vereinten Nationen* (1965), 127.

### 5.1.1. *Impartiality.*

The impartiality of the I.C.J.-judge is a significant theme of all important writers on the International Court, i.a. Lauterpacht<sup>85</sup>, Rosenne<sup>86</sup>. The anxiety of governments in this respect was an important motive for the claim of those states which, unlike the permanent members of the Security Council, did not have a permanent judge at the International Court, to be able to propose an *ad hoc* judge in cases in which they were parties. The judges themselves have also emphasised the necessity of this duty, e.g. Lauterpacht<sup>87</sup> and Tanaka<sup>88</sup>.

### 5.1.2. *Juristic Ability.*

The judge must be qualified by exceptional juristic ability. The statute only requires :

Art. 2 : « The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial office, or are jurisconsults of recognised competence in international law. »

The question is how this ability is to be measured. It may be established from a judge's writings (Lauterpacht, Fitzmaurice, Gros, Jimenez de Arechaga) or from earlier activity as an *ad hoc* judge (Nagendra Singh, *ad hoc* judge in the I.C.A.O. Council Case; De Castro, *ad hoc* judge in the Barcelona Case), or from activity at a national court (Onyeama, Forster) or from a university career (Bengson, Dillard). Two-thirds of all I.C.J.-judges have served their own country in an official capacity<sup>89</sup>. Some judges, e.g. Lachs, have experience in every area. Whether government experience alone is sufficient, seems doubtful. Some judges, although they have studied law early in their lives and later been active as a minister or ambassador for their government, have never especially concentrated on international law (Spender, Morozov, Bengson). In the latter cases the expectation is not fulfilled that an I.C.J.-judge should, at his nomination, already have an international reputation as an expert in international law.

### 5.1.3. *Dignified Behaviour.*

The I.C.J.-judge should behave in a dignified and serious manner. The members of the I.C.J. Bench follow the standards of the so-called professional elite and have done so since the establishment of the Permanent Court. The language of the Court's judgments is sober and restrained.

<sup>85</sup> LAUTERPACHT, *The Function of Law in the International Community* (1933), 202-241.

<sup>86</sup> ROSENNE, *op. cit.*, *supra*, n. 59, 61-62.

<sup>87</sup> LAUTERPACHT, *op. cit.*, 202-241.

<sup>88</sup> TANAKA, « The Character of World Law in the International Court of Justice », 15, *Japanese Annual of International Law* (1971), 1, 11-12.

<sup>89</sup> BECKMAN, « Judges of the International Court of Justice », 3, *International Lawyer* (1969), 593.

#### 5.1.4. *Loyalty to the Court.*

The judge must behave with loyalty to the Court. Zafrullah Khan was criticised for his interview with the London newspaper, « Observer », in which he gave the information about the contents of a private discussion with the President. In observance of this duty, judges who have written much about the Court before their election, e.g. Lauterpacht and Fitzmaurice, have not made statements on this theme during their period of office. Krylov was criticised for critical statements he made about the Court<sup>90</sup>. His use of a pen name was perhaps a certain recognition of this requirement of loyalty.

Until 1956, the dissenting opinions of the International Court were, with a few exceptions, reserved and courteous in respect of differences with the majority. Typical expressions were :

- « To my great regret, I am unable to concur in the Court's judgment<sup>91</sup>... »
- « In spite of my great respect for the Court, I am unable, to my deep regret, to share the views of the Court<sup>92</sup>... »
- « I regret I find myself unable... to agree with those conclusions and the motivation behind them... »
- I feel rather unhappy about the Court's analysis of the mandates system<sup>93</sup>. »

The some of a few isolated opinions was on the contrary not quite so courteous.

- « I cannot align myself with the opinion of the majority<sup>94</sup>. »

The tradition of a reticent expression of criticism in dissenting opinions underwent a serious setback from Jessup in 1966.

- « Having very great respect for the Court, it is for me a matter of profound regret to find it necessary to record the fact that I consider the Judgment which the Court has just rendered... completely unfounded in law<sup>95</sup>. »

Other minority judges follows this example :

- « I voted against the decision of the Court... to which I am in fundamental disagreement... The Court, in my view, has been able to do that from an unwarranted assumption of the presumed intentions of the framers of the Covenant and mandates system<sup>96</sup>. »
- « Si savamment motivé que puisse être l'arrêt rendu par la majorité de la Cour... je ne peux y souscrire<sup>97</sup>. »

<sup>90</sup> ZILE, *op. cit.*, 386.

<sup>91</sup> KORETSKY, *Continental Shelf Case*, cited, *supra*, n. 45, Dissenting Opinion, 155.

<sup>92</sup> TANAKA, *Continental Shelf Case*, cited, *supra*, n. 45, Dissenting Opinion, 172.

<sup>93</sup> MBANEFO, *South West Africa Case*, 1966, cited, *supra*, n. 37, Dissenting Opinion, 482, 488.

<sup>94</sup> KRYLOV, *Corfu Channel Case*, cited, *supra*, n. 40, 73.

<sup>95</sup> JESSUP, *South West Africa Case*, 1966, cited, *supra*, n. 37, Dissenting Opinion, 323.

<sup>96</sup> PADILLA NERVO, *South West Africa Case*, 1966, cited, *supra*, n. 37, Dissenting Opinion, 441.

<sup>97</sup> FORSTER, *South West Africa Case*, 1966, cited, *supra*, n. 37, Dissenting Opinion, 472.



Conversation with some of the judges in the Hague suggested that the retreat from these old standards of courtesy was regretted. Previously the President would endeavour to talk to a judge who wrote too sharp a criticism. The President's suggestions for a more conciliatory expression of opinion were usually adopted. This longing for the old days of courtesy could be seen in the statement of one judge about the attack by Jessup — « C'était un scandale ». Tanaka referred in a later case to the limits for a dissenting opinion as being « considerations of decency »<sup>98</sup>.

#### 5.1.5. *Priority of the Judicial Role.*

The judicial role must have priority above all the other roles which the judge concurrently plays, insofar as he is not already protected from a role conflict. In the context of the very modest participation of the Soviet judges, one can perhaps see an ambivalent attitude : perhaps it is here expected that the role of a member of the Communist Party elite should have priority. Such an attitude would explain Krylov's double role as a vicious critic of the court (under pen names) while at the same time acting as a member of it<sup>99</sup>.

#### 5.1.6. *Co-operation.*

The judge must act in a co-operative manner with the parties in a case. Without co-operation between the judges and parties, it would hardly be possible to solve any conflict satisfactorily. This has been clearly shown in recent years in the publicity achieved by litigants in two jurisdictions. In Germany in the « Demonstrator trials »<sup>100</sup> and in the U.S.A. in the Seale case<sup>101</sup>, the administration of justice and the confidence of the judges was undermined by the total refusal of the defendants to act in the defined role. The judge expects certain norms of conduct to be observed by the litigants.

On the other hand litigants expect that the judges will to some extent seek their agreement in the way a case is handled, e.g. that the judge will explain what questions it would like to have further argued. Fitzmaurice has expressed this expectation in the following manner :

« ... the parties must be able to feel that a court of law will not go off at a tangent and decide the case on some wholly new footing thought up by itself and not discussed in the course of the argument. This objection is justified in the sense that although the jurisprudence of the International Court firmly establishes its right to raise points, and decide on the basis of them *proprio motu*, it should at least raise them before deciding them, and this not merely in its private deliberations but at the public hearing, so that the parties may have an adequate opportunity of arguing them »<sup>102</sup>.

<sup>98</sup> TANAKA, *Barcelona Traction Case*, cited, *supra*, n. 35, Separate Opinion, 115.

<sup>99</sup> ZILE, *op. cit.*, 386.

<sup>100</sup> LAUTMANN, *op. cit.*, *supra*, n. 5, 84-92.

<sup>101</sup> *U.S. v. Seale*, 461 F. 2d 345 (1972).

<sup>102</sup> FITZMAURICE, « Judicial Innovation — its Uses and Perils », *Cambridge Essays in International Law in Honour of Ld. McNair* (1965), 26.

A repeated criticism of the majority opinion in the South West Africa Case, 1966, was that the question of « legal interest » on which the decision finally turned, had not been argued by the parties and not even referred to by the Court. This lack of good co-operation in the disposition of the case was referred to by Jessup<sup>103</sup> in his dissenting opinion and by various other commentators, e.g. Higgins<sup>104</sup>, Falk<sup>105</sup> and Friedmann<sup>106</sup>. This case raised particular annoyance because the Court, by its decision as to jurisdiction in 1962, had strengthened the expectation of a detailed decision on the substance of the case.

#### 5.1.7. *Efficient Solution of the Conflict.*

The judge must give a definitive solution of the case before him<sup>107</sup>. The reaction after the South West Africa Case, 1966, shows how deeply this expectation is rooted and how its disappointment can operate as the chief basis of criticism. According to Jessup's opinion, the court was

« not legally justified in stopping at the threshold of the case avoiding a decision on the fundamental question<sup>108...</sup> ».

This was also noted in the criticism of Higgins<sup>109</sup>, Falk<sup>110</sup> and Hidayatullah<sup>111</sup>.

#### 5.1.8. *Satisfactory Justification.*

The judge must give a rational justification of his decision. Lauterpacht wrote :

« In a tribunal which, by reason of the circumstances encompassing its activity, is exposed to imputations of influence of extraneous considerations, a system such as that actually adopted in the Statute of the Court in the matter of Dissenting Opinions and fully operative in the practice of the Court, constitutes a powerful safeguard. It precludes any charge of reliance on mere alignment of voting and lifts the pronouncements of the Court to the level of the inherent power of legal reason and reasoning<sup>112</sup>. »

<sup>103</sup> *South West Africa Case*, 1966, cited, *supra*, n. 37, 327-328.

This criticism was taken up by the representative of Ethiopia in the U.N. General Assembly *U.N.G.A. Debates*, 21st Session, Item 66 (Provisional Agenda), 1414.

<sup>104</sup> HIGGINS, article cited, *supra*, n. 22, 579.

<sup>105</sup> FALK, article cited, *supra*, n. 55, 6.

<sup>106</sup> FRIEDMANN, article cited, *supra*, n. 54, 10.

<sup>107</sup> ROSENNE, *op. cit.*, *supra*, n. 75, 98; FITZMAURICE, « Hersch Lauterpacht - the Scholar and a Judge », 37, *British Yearbook of International Law* (1961), 14-15.

<sup>108</sup> JESSUP, *South West Africa Case*, 1966, cited, *supra*, n. 37, Dissenting Opinion, 325

<sup>109</sup> HIGGINS, article cited, *supra*, n. 22, 593.

<sup>110</sup> FALK, article cited, *supra*, n. 55, 13.

<sup>111</sup> HIDAYATULLAH, *op. cit.*, *supra*, n. 62, 84-85.

<sup>112</sup> LAUTERPACHT, *The Development of Law by the International Court of Justice* (1958), 68-69.

The refusal of detailed justifications by the Soviet judges is criticised by Günther<sup>113</sup> and Zile<sup>114</sup>.

There are certain other expectations directed to the International Court which one cannot state to be institutionalised but which are held by an important section of role-transmitters.

#### 5.1.9. *Promoting the Political Goals of the International Community.*

According to some opinions the judge must make a decision which will carry out the « policies » of the international community. This view was, in particular, represented by Ammoun :

« ... les principes et les buts des Nations Unies s'imposent à tous les organes de celle-ci; à l'Assemblée, au Conseil de sécurité et, tout autant, à la Cour internationale de Justice, comme aussi à chacun des Etats membres<sup>115</sup>. »

Doeker refers to the functional concept of the Court in its capacity of a principal organ of the U.N.

« according to which the court ought to strive to give effect to the decisions of the other principal organs<sup>116</sup>. »

and he cites in support of this contention, the judgment in the Corfu Channel Case, in which he says the Court partly based its decision on jurisdiction on the necessity of ensuring the full effect of a Security Council resolution (the judgment could be interpreted along other lines also). Another commentator writes :

« In view of the fact that the Court is the principal judicial organ of the United Nations it might well be asked whether it is not incumbent upon the justice to give effect to the purposes of the U.N.<sup>117</sup>. »

A somewhat similar expectation was discernable in counsel's arguments on behalf of Ethiopia and Liberia to the Court and in criticisms of the judgment in the South West Africa Case 1966 that the International Court should carry out the policies of the international community (whatever these might be)<sup>118</sup>. This claim was firmly rejected by the majority judgment of 1966. Falk bases himself on the South West Africa Case 1966, to emphasise the duty of the court « as the judicial arm of the organised international community » to help in the achievement of the purposes of the international community<sup>119</sup>. The representative

<sup>113</sup> GÜNTHER, *op. cit.*, 137.

<sup>114</sup> ZILE, *op. cit.*, 384-385.

<sup>115</sup> AMMOUN, *Advisory Opinion on Namibia, I.C.J. Reports 1971*, Separate Opinion, 71.

<sup>116</sup> DOEKER, « International Politics and the I.C.J. », *Tulane Law Review*, 1960-1961, 774.

<sup>117</sup> GREEN, article cited, *supra*, n. 80, 512.

<sup>118</sup> *I.C.J. Pleadings, Oral Arguments, Documents 1966, South West Africa*, Vol. IX, esp. 64, 255, 328 and 353-354.

<sup>119</sup> FALK, article cited, *supra*, n. 68, 14.

of Ghana at the Eighth Conference of the Asian-African Legal Consultative Committee stated :

« It is the unspeakable irony of our time that an institution of the order of the International Court of Justice, forged out of contemporary norms and principles, should be used to frustrate and stultify the implementation and furtherance of these ideals <sup>120</sup>. »

This approach was sharply rejected by Judges Spender and Fitzmaurice in their joint dissenting opinion in the South West Africa Case 1962 :

« A number of... arguments we will not deal with, partly for reasons of space, but mainly because they do not seem to us to be legal arguments at all. They are no more than motives or reasons for urging that it is politically desirable that the Applicants should be allowed to invoke Article 7 and that the Court should assume jurisdiction. This feeling, understandable though it may be, cannot have any bearing on the legal issues involved, and these must be our sole concern <sup>121</sup>. »

Yet, although the case was overstated and in a form not acceptable to those nurtured in the traditions of legal positivism, there was some realism behind the claim and a degree of myopia in its rejection. Courts cannot afford to ignore, especially in times of dynamic social change or dislocation, the views of the wider society. If they do so, sanctions will be applied, as can be seen in the U.S. and Australian cases mentioned above. The courts have, as a matter of fact, taken account of these views, e.g. through the category of public policy. It is not accurate to say that these factors are not relevant to a judicial decision.

#### 5.1.10. *Representing the National Legal System.*

Others express the view that the judge should represent the values of his national legal system. They argue that this is implied by the provision for representation of the most important legal systems of the world (Statute Article 9). Several of the judges have taken this view. Anzilotti stated :

« What Lord Finley represented in this court, as it was his duty to do, was the legal system in which he was brought up <sup>122</sup>. »

In the Arbitral Award Case, the judge Moreno Quintanna referred to himself as

« a representative on this court of a Spanish-American legal system <sup>123</sup>. »

<sup>120</sup> *Report of the Eighth Session of the Asian-African Consultative Committee*, 1966, Bangkok, 85.

<sup>121</sup> *South West Africa Case (Preliminary Objections)*, I.C.J. Reports 1962, Joint Dissenting Opinion, 515.

<sup>122</sup> First Public Sitting of XVI (extraordinary) Session on May 15, 1929, P.C.I.J. Series E, No. 5, 22-23; cited by LAUTERPACHT, « The So-called Anglo-American and Continental Schools of Thought in International Law », 12, *British Yearbook of International Law* (1931), 31, 48.

<sup>123</sup> MORENO QUANTANA, *Arbitral Award Case*, I.C.J. Reports 1960, 192, Separate Opinion, 218.

Other authors, such as Rosenne emphasise that the judges must decide in accordance with international law, and that they should be selected as international lawyers and not as representatives of a national legal system<sup>124</sup>.

#### 5.1.11. *Reconciliation of Antinomies of Expectations.*

Another expectation addressed to the Court is that it will resolve conflicts between the role-transmitters. Instead of resolving the conflict of norms, as in national systems in a parliament and directing the Court what to do, in many cases the conflict is referred to the Court so that the Court should, by use of its great prestige, direct the international community what to do. A request for an advisory opinion may only be one way of getting extra ammunition for the battle : namely a decision from the Court as to what are the proper norms to apply.

« ... a judicial pronouncement in the setting of the *South West Africa Cases* would have been an important additional lever available to those countries seeking to mobilise political support for their objectives in South West Africa and elsewhere in Southern Africa<sup>125</sup>. »

But a conflict that deeply splits the international community, is likely to split the Court also, for the only additional integrating mechanism it has — a legal culture — is also a weak one. Against this view of the International Court it can be asserted that such a function is non-typical of a judicial role.

#### 5.2. *Status : The Expectations of the I.C.J.-Judge.*

Like the judge of a national court, the I.C.J.-judge directs certain expectations at the members of his role-set. He expects a certain degree of authority over parties, barristers and court personnel, certain immunities and privileges and much prestige. But it must be noted that the prestige of the individual I.C.J.-judges is extremely variable and depends greatly on their personal performance (also before their nomination). That can be seen in the evaluation of the judges by the commentators. The I.C.J.-judge also expects the performance of the protective processes described above.

It seems as though the I.C.J.-judge expects prestige and a good position in his national social system after the expiry of his period of office. His performance as a judge is one factor in his personal prestige and his publications are often greatly appreciated because of his special experience, e.g. the books of the former Belgian I.C.J.-judge the late Charles de Visscher. After their employment as judges, the judges return to their national elites with increased stature.

<sup>124</sup> ROSENNE, *op. cit.*, *supra*, n. 75, 167.

<sup>125</sup> FALK, article cited, *supra*, n. 55, 21.

## 6. *Learning the Role of the I.C.J.-judge.*

Roles are learnt over a long period of time during which the actor perceives what is expected of him and learns to expect sanctions if he does not meet these expectations. This learning process is called socialisation.

### 6.1. *Socialisation : The national Judge.*

Any actor learns his various roles by socialisation : one of the most important is that relating to his occupation. The professions have lengthy periods of socialisation. In all Western systems, the lawyer must perform at least four years of academic and one to two years of practical work. Socialisation also occurs in informal meetings with other academics and is often continued by this means. Especially notable in this respect is the English system of Inns of Court, according to which the whole of the legal profession is divided into four London schools of law. The members can, and the students must, eat a certain number of meals in their Inn, which acts as a meeting point for judges, academics, practising lawyers and students, and furthers personal friendship and professional co-operation. The importance of the Inns in socialisation has been explicitly noticed :

« There are some things... that are incommunicable even by word : they are taught by example and learnt by observation. For all these methods of communication, and particularly the last, what is needed is constant association. This association is the life of the Inn <sup>126</sup>. »

And apart from his socialisation as a «lawyer », there is a further socialisation for a judge among his colleagues after appointment to the Bench. For the judge in an upper court, there are also further years of socialisation through practical judicial work in lower jurisdictions.

### 6.2. *Socialisation : The I.C.J.-judge.*

The socialisation of the judge of the International Court of Justice is greatly inferior to that of a judge of a national court. The young lawyer who wishes to become a good international lawyer has no professional group with which he can identify himself : there are no « Inns of Court » in international law. Whether he continues his career in government service, at the university or in the diplomatic world, he is usually cut off from his international law colleagues : at the most he encounters them now and then at international congresses. One would like to think that better possibilities of socialisation occur at the specialised institutions for international law, such as the Institut Universitaire de Hautes Etudes Internationales in Geneva. That is, of course, true — but not one of the fifteen judges presently in the Hague has studied there. One can, nevertheless,

<sup>126</sup> LORD DEVLIN, quoted in F. COWPER, « Dining in Hall », *The Law Times*, Vol. 235 (1964), 133.

designate such schools as a very important factor for the cultivation of a common legal culture<sup>127</sup>.

In 1932 it had already been suggested that the creation of a permanent bar would be advantageous :

« If such a Bar could be created in connection with the Permanent Court, it would lead to a School of International Law, viz., International Law taught from an international standpoint and not — as it is at present — seen through national spectacles<sup>128</sup>. »

But, despite this hitherto inadequate socialisation many of the I.C.J.-judges have felt their role as an international lawyer (before their nomination as I.C.J.-judge) and their role as I.C.J.-judge thereafter as the role with highest priority of which most norms were deeply internalised. Lauterpacht serves as example here. For thirty years he had continually emphasised the functions of the international judge.

However, the most important part of the process of socialisation lies in the activity in the court itself. Just how important this further education is, I learnt in interviews with six judges in the Hague. All of them pointed out that their methods — when not their opinion of the substance of the law — had changed during this period. The examples they gave for this all lay in the direction of greater flexibility and the introduction of more marginal elements. One of the most experienced judges at the International Court (twelve years) said that at the beginning of his work in the Court he believed that the basic pattern of every case was known to him, because he had worked for years as the permanent legal adviser to his national government. But the longer he was at the International Court the more he learnt that a case could always have certain unexpected and surprising elements, which had not been perceived at the beginning. Another judge said that although he still believed it was not right to base oneself on sociological or economic grounds, that, after his work with the other judges at the Court, he realised these elements could not be ignored. A very experienced judge in the European Court of Human Rights said that one often saw remarkable development among the judges after their appointment, particularly among the younger judges.

### 6.3 *Internalisation.*

In the process of socialisation an actor not only learns what is expected of him in a particular role and what sanctions are likely to be applied if he does

<sup>127</sup> DUPUY, R., « Adaptation de la Cour internationale de Justice au Monde d'aujourd'hui », 2, *R.B.D.I.* (1966), 28, 42.

<sup>128</sup> Remark of Dr. BISSCHOP to the address of CALOYANNI, A., « The Judicial Policy for the Settlement of International Disputes », 17, *Transactions of the Grotius Society* (1932), 85, 99.

not fulfil them : he also comes to absorb some of these ideals and standards as part of his personal philosophy of life.

« From the point of view of the actor, his role is defined by the normative expectations of the group as formulated in its social traditions. The existence of these expectations among his fellows constitutes an essential feature of the situation in which any given actor is placed. His conformity with them of lack of it brings consequences to him, the sanctions of approval and reward, or of condemnation and punishment. But more than this, *they constitute part of his own personality. In the course of the process of socialisation he absorbs — to a greater or lesser degree — the standards and ideals of his group so that they become effective, motivating forces in his own conduct, independent of external sanctions*<sup>129</sup>. »

This point is crucial in understanding the attitudes of the I.C.J.-judges; their judicial philosophy cannot help but be deeply influenced by their training in a national legal system.

Instead of the long process of socialisation of the judge in a national legal system the judge is first socialised for the professional group in his own country, after that is only exceptionally socialised as « judge »; mostly only as an expert in international law. This further education can take place as Legal Adviser of the Government (Fitzmaurice, Gros, Lachs), as an academic (Winiarski, Tanaka, Dillard) or as diplomat (Wellington Koo, Spender, Badawi), but in all branches of the profession he is at the same time socialised as a member of a national elite, and this may hinder the internalization of certain norms which are appropriate to the international lawyer, but are not quite consistent with the norms of the elite, and it can also occur that his later socialisation in the new professional role takes place in an environment which lies very far from that of other international lawyers. This has occurred with the « diplomatic » career : Spender was a barrister for only fifteen years and then acted in the national political forum for twenty-seven years.

The judges of the International Court have learned their role very largely within the ambit of a national legal system. This training influences, for example, their views as to how much effort should be made to write a unitary judgment, whether dissent should be suppressed, how much individuality and how much collective spirit a judge may properly feel. This training induces what the German theorist Esser calls « Vorverständnis » — a kind of judicial « predisposition » or attitude with which a judge approaches every case<sup>130</sup>. The methods which a judge considers to be possible for the solution of a case, the style of the written judgment, the nature of remedies he considers to be available — all these have been to some extent programmed by his initial legal and professional training. It requires a conscious effort on the part of a judge to overcome this « legal ethnocentrism », a fact which is no doubt responsible for the long dominance of the European legal tradition at the International Court.

<sup>129</sup> PARSONS, *op. cit.*, *supra*, n. 13, 230-231, emphasis added.

<sup>130</sup> ESSER, *Vorverständnis und Methodenwahl in der Rechtsfindung* (1973).



This article is not the place for a detailed analysis of international jurisprudence showing such attitudes but one or two examples may be given. Methods of interpretation is a very obvious one. Teleological methods which Judge Tanaka, familiar with these methods from the German law, employed were rejected by the majority in the South West Africa Case of 1966. In that majority there was no judge from a legal system of the German tradition. It seems proper to ask whether the predisposition (in methods of interpretation) of influential members of the majority such as Gros, Fitzmaurice and Spender prevented the adoption of an entirely suitable and acceptable method of legal interpretation.

A second example is the judges' attitude to the style of a written judgment e.g. to whom does he think the judgment is addressed? The addressees of judgments of the Permanent Court of International Justice were those of Western European communities. The judges could rely on methods of reasoning traditional to them : e.g. a very strong emphasis on logic (even where, in legal reasoning, a continued use of logical terms conceals a more informal or « rhetorical » manner of reasoning<sup>131</sup>). But this emphasis on pseudo-logic is unconvincing to the new addressees of the Third World whose canons of traditional reasoning are different. A great deal of sheer impatience at the South West Africa decision of 1966 can be traced to the complete inadequacy, in the eyes of many of the concerned audience, of formalistic reasoning, such as the use of the concept « legal interest », as appropriate reasoning for the decision of such an issue.

#### 6.4. *Conscientious Role Performance.*

In fulfilling his role the judge therefore conforms to those norms which he has internalised and those expectations of his role-transmitters which he accepts. (This of course ignores the effect of role-conflict which may possibly inhibit role-performance.) But this building up of a body of norms controlling role performance is especially difficult for the I.C.J.-judge : firstly, the expectations made of him are so various and secondly, because the socialisation process is more erratic and less constant than that of the judge of a national court. He may frequently perceive conflicting expectations of him and have no internalised norm which would decide his proper course of action for him. Or there may be gaps : situations so new that no expectations have been raised and no experience of his seems to show him the proper course to follow.

What source does the judge draw on when this is the case?

In order to understand this phenomenon we must explore the sociological concept of the « reference group ». Another group is a reference group, if the

<sup>131</sup> The recognition of the large place of rhetorical reasoning in the law largely occurred through the revival of interest in this kind of reasoning among the philosophers. Cf. esp. VIEHWEG, *Topik und Jurisprudenz* (1952) and PERELMAN, *Traité de l'Argumentation* (1963).

members of the group appraise their own group or themselves by using the reference group or its members as a standard for comparison<sup>182</sup>. Reference to such a group and its norms may provide guidance for a group whose own roles are uncertain. The use of the word « court » and « judge » in drawing up the Statute of the Permanent Court of International Justice in 1920, immediately provided a reference group for the new and not yet institutionalized group; this reference group, or rather these reference groups, were the highest tribunals in the national states whose delegations participated in drawing up the Statute. That they were in mind is shown by the reference to the qualifications of the judge in the Statute (Article 2 : « highest judicial offices »).

Where gaps or conflicts occurred in the role transmission of the I.C.J.-judge he always had a reference group to which he could refer. The judges have not hesitated to refer to this sort of guidance, although they have probably done so unconsciously. Some judges were judges of the highest national court in their country before their accession to the I.C.J.-bench : Zafrullah Khan, Ammoun, Forster, Bengson, Petren, Onyeama. And for certain judicial functions no other model was readily available; methods of procedure, methods of drafting judgments and so on, had to be adapted from the various experiences of national tribunals until the new institution could build its own body of experience. But by then the working methods of the superior national courts had stamped the International Court deeply and they still remain a standard and point of comparison for the contemporary practice of the International Court even if the judge's reference to them is unconscious.

The role-transmitters of the International Court also look somewhat to their own national court as a reference group by which to measure the performance of the I.C.J.-judges, especially in Western societies where the very similarity of nomenclature obscures quite vital differences of function. The great differences between national courts in Western societies and those in Asian, African and Communist societies is one explanation why expectations addressed to the International Court of Justice based on these very different reference groups are so various.

## 7. *Conclusions.*

This paper has tried to apply some of the insights of « Role »-theory to the International Court of Justice. While it might be thought that this application has only restated things about the Court that we were already aware of, perhaps it does give a new perspective.

Firstly it is clear that the substantial role differences between the judicial role in the national and international system have led to the international

<sup>182</sup> JOHNSON, *op. cit.*, 40. This is only one sense of the concept « reference group » but is the basic one for the purpose of this analysis.

judge being exposed to an already difficult role with much less institutional support.

Secondly the lack of integration of the Court as a group and its lack of a professional body to support it lead to low morale on the members' part.

Thirdly these defects have a direct effect on role performance, in deviations recognizable as types known to sociologists as withdrawal, formalism and aggression and observable both in deviation in behaviour (e.g. criticism of fellow judges) and in the jurisprudence of the court.

Nevertheless we can perceive that the role is institutionalized to some extent because there are some expectations held by a substantial number of role-transmitters. However the present organisation of the Court is poorly adapted to allow I.C.J.-judges to perceive changes in these expectations.

The lack of a reasonably unified role-transmission provides a crucial difference from other roles regarded as « judicial » and places the role of the I.C.J.-judge on the very brink of that description as a case apart from all other judicial roles.

Finally, and most importantly of all, it is clear that the socialisation of international judges in that special role is haphazard and discontinuous. Not only does that reduce the priority given to the role in a case of role conflict, it leads to the most varying conceptions of the role by the judges themselves. Until they receive training in the role of an I.C.J.-judge at least equally intensive as that of other professional roles which require a high level of commitment and a strong team spirit, the role itself will continue to be subject to widely different interpretations.