

THE POSITION OF THE GREAT POWERS IN INTERNATIONAL JUDICIARY

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INTRODUCTION

Professor Wolfke's outstanding expertise did not only rely on his insightful studies on international customary law¹. He established his reputation as a great international lawyer even at the very beginning of his academic career when examining the structure of international society, which was a PhD project prepared under supervision of Professor Stanisław Hubert². This outstanding *début* was followed by several further analyses of the said topic³. Despite the passing of time, the validity of Professor Wolfke's insightful conclusions remain intact. They still provide a valuable background for scrutinizing the influence of the Great Powers on international courts, as is to be demonstrated below.

In this study, we analyse the position of the Great Powers from the perspective of international judiciary. At first sight, there is an inevitable controversy or even a contradiction in such a setting. In this regard, one is simply tempted to repeat after Max Huber that, in the case of a judicial body it must be assumed that the influence of power is entirely eliminated⁴. In a similar vein, G. Schwarzenberger in his famous study on the structure of world society while identifying an international oligarchy is adamantly clear that '[i]f States agree to the judicial settlement of a dispute, the parties,

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¹ See in particular the seminal study: K Wolfke, *Custom in Present International Law* (1st ed 1964, 2nd ed 1993). Further references refer to the second edition.

² K Wolfke, *Great and Small Powers in International Law from 1814 to 1920 (From the Pre-history of the United Nations)* (1961).

³ K Wolfke, 'Wielkie i małe państwa na Kongresie Wiedeńskim' (1949) 4 Państwo i Prawo; K Wolfke, 'The Privileged Position of the Great Powers in the International Court of Justice' (1961) 56 Die Friedens-Warte, Bd. 56; K Wolfke, 'Stanowisko wielkich mocarstw w Międzynarodowym Trybunale Sprawiedliwości' (1961) 34 Zeszyty Naukowe Uniwersytetu Wrocławskiego, Seria A, Prawo VIII.

⁴ M Huber, 'Die Gleichheit der Staaten', in F Berolzheimer (ed), *Rechtswissenschaftliche Beiträge. Juristische Festgabe des Auslandes zu Josef Kohlers 60. Geburtstag. 9. März 1909* (1909) 111.

whether great Powers or small States, come before the tribunal or Court of their choice on a footing of perfect equality'⁵.

However, any examination of such matters needs to give way to reality, which shows at least two potential avenues of influence over international courts and tribunals to be exercised by the Great Powers: domination with regard to their composition and the intervention in the proceedings conducted in front of them. Both areas of such influence are scrutinized below.

Of course, there exists no single model of international judiciary, each court or tribunal having normally some own specific features. Despite such differences and bearing in mind the difficulties in generalizations, the present paper intends to offer a more general perspective on the position of the Great Powers in present international courts and tribunals.

I. GREAT POWERS

For our examination, it is crucial to first define Great Powers. They have been traditionally referred to as *puissances à intérêts généraux*, since they have been conducting actions in all possible respects, even those not necessarily connected with their own interests⁶. The formula used by R. Albrecht-Carrié, a diplomacy historian, is also similar, as he speaks of them having "automatically a voice in all affairs, by contrast with a Power of lower rank, or Power with limited interests"⁷. In this regard, there have also been other designations, like *puissance principale*, *grande puissance*, *puissance de premier ordre*, *puissance de premier rang*. They all, however, are not as popular as the former term.

There might be different conditions for qualifying the superior position of a State. Most frequently Great Powers would rely on their contribution in a victory over the common enemy, or simply on their power and the duties and responsibilities allegedly connected with it⁸. One may of course, also offer other grounds for differing rights and obligations⁹, as e.g. culture or ideology¹⁰. No standing of that kind may be easily measured. Thus, e.g. according to H. Mosler it is the ability to take an active part in world politics¹¹. It is definitely impossible to rely on the strict criteria characterizing Great Powers. A very telling observation in this regard was made by Philip

⁵ G Scharzenberger, *Power Politics: A Study of World Society* (3rd ed 1964) 109.

⁶ H Mosler, *Die Grossmachtstellung im Völkerrecht* (1949) 22ff. and A Randelzhofer, *Great Powers*, in R Bernhardt (ed) 2 *EPIL* (1995) 621.

⁷ R Albrecht-Carrié, *A Diplomatic History of Europe Since the Congress of Vienna* (1958) 21-22.

⁸ See K Wolfke (n 2) 126.

⁹ See S Yee, 'Sovereign Equality of States and the Legitimacy of "Leader States"', in RStJ Macdonald, D Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005) 753.

¹⁰ G Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004) 67, (fn. 16).

¹¹ H Mosler (n 6) 21.

Jessup, who noted that "Great powers have power because they are great and not because a skillful draftsman has invented an ingenious formula"¹².

Nowadays special attention needs to be paid also to institutional developments. Professor Wolfke is of course right when underlining that in consequence of changes in the structure of international society and of the creation of the United Nations, the position of smaller nations has altered – as the possibility of the big powers openly imposing rules on minor nations has considerably diminished¹³. Nevertheless, this does not mean that the role of those big powers is today the same as that of other states¹⁴. Crucial in this regard is especially the United Nations Security Council, which may be regarded by some scholars as "international government of the Great Powers"¹⁵. For the present examination it would be of particular importance to look at its influence on the judicial proceedings, as is scrutinized in part 4 of the present contribution.

II. COMPOSITION

None of the instruments establishing and governing any international court or a tribunal would explicitly reserve seats for particular states¹⁶. However, there has been some important practice developed in that direction. A typical example, in addition to the courts analysed below, is the Appellate Body within the framework of the World Trade Organization's dispute settlement, which has always comprised the US and the European Union.

In general, equality of States and their shared rights and duties may be considered essential for success of international judicial settlement¹⁷. But it may also appear that the Great Powers do not consider and value the equality in the same manner as small states. On the other hand, one may rely on thoughtful considerations by E.D. Dickinson, according to whom

"Insistence upon complete political equality in the constitution and functioning of an international [...] tribunal [...] is simply another way of denying the possibility of effective international organization"¹⁸.

¹² Ph Jessup, *The Equality of States as Dogma and Reality*, (1945) 60 *Political Science Quarterly* 530.

¹³ K Wolfke (n 1) 78.

¹⁴ K Wolfke (n 1) 78. In a similar vein, also in the context of customary law G. Schwarzenberger holds: "Power in itself is no title-deed to [...] preferential treatment. There are, however, intrinsic reasons why more attention may legitimately be paid to the practice of some States than to that of others. Taking for granted the same degree of respect for law, world Powers have to take into account a multitude of factors which makes them inclined to view any topic more comprehensively than it is likely to be viewed by a small State. (G Scharzenberger, 1 *International law as applied by international courts and tribunals* (3rd ed. 1957) 35-36).

¹⁵ H Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (1949) 381.

¹⁶ R Mackenzie, 'The Selection of International Judges' in CPR. Romano, KJ Alter, Y Shany (eds), *The Oxford Handbook of International Adjudication* (2015) 744.

¹⁷ JH Ralston, *The law and procedure of international tribunals; being a résumé of the views of arbitrators upon questions arising under the law of nations and of the procedure and practice of international courts* (1926) 175.

¹⁸ ED Dickinson, *The Equality of States in International Law* (1920) 336.

Interesting observations might be made in light of the attempts made to create an international judiciary at the 1907 Hague Conference. The provisions of the statutes concerning the election of judges proved to be the most problematic to formulate. It was due to the problem of election that the efforts at the 1907 Hague Conference to establish the Court of Arbitral Justice were thwarted¹⁹. Out of many respective proposals made during the Hague Conference, one mentioned the American draft, consulted with the British and the German, according to which the projected Court would be composed of the permanent judges appointed by the Great Powers and also judges from other (smaller) States, elected in rotation, the term of their office being proportional to such factors as population, territory, industrialization and trade²⁰. Due to the surrounding controversies it was no possible to finish the preparatory work.

Some (limited) progress was made with the International Prize Court. Its statute, however, also contained a solution not easily acceptable to all states. Accordingly, the International Prize Court was to consist of 15 judges, with a possibility for them to be replaced by deputy judges, in case of the former being absent or prevented from sitting²¹. According to Article 15 of the XII Hague Convention of 1907, the judges appointed by eight contracting parties, namely: Germany, the United States of America, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia, were to be always summoned to sit. On the other hand, the judges and deputy judges appointed by the other contracting parties were to sit by rotation. Eventually, the plans to establish the Prize Court ended with a failure as its statute did not enter into force.

The reasons for the two failed attempts to bring about international courts were skillfully summarized by O.M. Hudson, who emphasized the difficulty in reconciling the demands of the more powerful States for certain representation and the insistence of other States on the principle of equality²².

Luckily enough, the difficulties in establishing another court, i.e. the Permanent Court of International Justice (PCIJ) were overcome. Professor Wolfke was certainly right in his assessment that the success in creating the PCIJ was only possible through concessions made to extra-judicial requirements, mainly caused by the mistrust and prestige of the Great Powers²³. The problems of composition and the methods of electing judges were the most difficult issues during the negotiations. To avoid the causes of failure in 1907, it was necessary to give them permanent judges in a way acceptable to other States²⁴.

The respective privileged position for Great Powers could be justified on several grounds, e.g. relying on the extent of territory, population, industry and trade. Other reasons, newly put forward, could be the potential

¹⁹ MO Hudson, *The Permanent Court of International Justice 1920-1942. A Treatise* (1943) 241.

²⁰ K Wolfke, 'The Privileged Position' (n 3) 157.

²¹ Convention (XII) relative to the Creation of an International Prize Court. The Hague, 18 October 1907, Article 14.

²² MO Hudson (n 19) 241.

²³ K Wolfke, 'The Privileged Position' (n 3) 156.

²⁴ K Wolfke, 'The Privileged Position' (n 3) 156.

impracticability of the Court without judges from the Great Powers²⁵. According to Hans Wehberg, the only influence which at first sight could be decisive in favour of allotting a larger number of judges to the Great Powers would perhaps be the fact that the Great Powers resort to the Court more frequently²⁶. But the whole hitherto practice (of the PCIJ and then of the ICJ) has shown the constant reluctance of the Great Powers in that respect.

The Chairman of the Advisory Committee of Jurists, Baron Descamps, was well aware that without concessions to the Great Powers the Court would not come into being and therefore considered that “one should reconcile the principle of juridical equality with certain guarantees which should be given to the Great Powers”²⁷. The proposal of Descamps, accompanied by the whole surrounding discussion, clearly showed that the only true aim of Article 9 was to ensure that the Great Powers would have permanent seats on the Court²⁸. In the Protocols of the Committee one may find the following summary: “The President thought the clause which he proposed with reference to the representation of civilizations and legal systems would ensure in so far as humanly possible the desired result, that is the representation of the great Powers”²⁹. This goes in line with the argument by Hans Kelsen:

“Since any great power represents a main form of civilization and one of the principal legal systems of the world, the effect of this provision is that in fact each great power has a political claim to be represented in the Court by a judge of its nationality. This claim has been carefully respected by the League of Nations. It is hardly compatible with the principle that an independent judge is no representative of a state, or of a civilization, or of a legal system, and it is certainly not in harmony with the principle that the judges should be elected ‘regardless of their nationality’”.³⁰

Be that as it may, from the very beginning the representation of all Great Powers has been identified with representation of legal systems³¹.

It was not, of course, the one and only mechanism aimed at securing the permanent seats for the Great Powers. Another device serving the same purpose was the system of double election, i.e. simultaneous elections of judges by the Assembly and the Council of the League of Nations³². The

²⁵ PCIJ, Advisory Committee of Jurists, *Proces Verbaux of the Proceedings of the Committee* (1920) 120, 365.

²⁶ H Wehberg, *Das Problem eines Staatengerichtshofes* (1911) 76.

²⁷ PCIJ (n 25) 28.

²⁸ K Wolfke, ‘The Privileged Position’ (n 3) 159.

²⁹ See PCIJ (n 25) 371, fn.22.

³⁰ H Kelsen, *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems* (Fourth Printing, 1964) 473.

³¹ See H Mosler, ‘“Nationale” Richter in internationalen Gerichten’, in U Beyerlin *et al* (Hrsg), *Recht zwischen Umbruch und Bewahrung. Völkerrecht – Europarecht – Staatsrecht. Festschrift für Rudolf Bernhardt* (1995) 719.

³² One may again refer in this regard to the Report of the Committee: “It[...] became necessary to find a system which would ensure that the great Powers would be represented by judges, with the free consent of the other Powers, as their great civilizing influence and juridical progress entitles them to be, even though no weight were attached to the fact that it would be greatly to the interest of the Court to include them on the Bench, to increase the

double election was also designed to protect the interests of the Great Powers, which were assumed to predominate in the smaller electoral organ and therefore to be in a position to exert influence over the larger and more representative electoral organ³³.

The model of selection for the PCIJ was largely and simply followed by the drafters of the Statute of the International Court of Justice. However, any privileged position of the Great Powers on the Court was generally criticized at the San Francisco Conference. In the discussions in the Committee IV/1 three groups of views on the election of the members of the Court were formulated. According to the first view, supported by the smaller States, the election should be limited only to the General Assembly, considering such a method to be more democratic, while the system of double election would give the Great Powers greater influence and a double vote in violation of the principle of equality³⁴. Finally, there were proposals to discard the differences between permanent and non-permanent members of the Security Council for the election of members of the Court. The third view eventually prevailed and thus the only concession that had been made concerned no distinction to be made between permanent and non-permanent members of the Council³⁵. This exception may have resulted from the willingness to guarantee impartiality in the election of judges by removing any differences of status between members of the Security Council in this respect³⁶. It is also important to note that the election of judges is the only instance under the Charter of the United Nations where the Council reaches its decision by an absolute majority vote.

Generally speaking, the effect of Article 9 was to postulate the political factor in the distribution of places in the Court³⁷. When considering the reality that the permanent members of the Security Council each always have a judge on the Court, Kolb speaks of “an unwritten rule of the Charter and the Statute”³⁸. According to Rosenne, it has always been accepted as essential to ensure proper Great Power representation on the Court³⁹. In view

respect for its sentences, which could not be put into execution without the all-important support of their military, economic and financial powers. The system of election was the only practical one. P. 700-701 (fn. 24)

³³ Sh Rosenne, *The Law and Practice of the International Court 1920-2005* (Fourth Edition 2006) 384.

³⁴ 13 UNCIO 180.

³⁵ As explicitly provided for in Article 10(2) *in fine*: “Any vote of the Security Council, whether for the election of judges or for the appointment of members of the conference envisaged in Article 12, shall be taken without any distinction between permanent and non-permanent members of the Security Council”. According to Rule 40 of the Security Council Provisional Rules of Procedure, the voting in the Security Council shall be in accordance with the relevant Articles of the Charter and of the Statute of the International Court of Justice.

³⁶ B Broms, *The doctrine of equality of states as applied in international organizations* (1959) 331.

³⁷ Sh Rosenne (n 33) 360. The quoted author holds that “Apart from guaranteeing the election of the nationals of the permanent members, which is essential to the general effectiveness of the Court, the political value of the dual elections does not appear to be great” (at 385).

³⁸ R Kolb, *The International Court of Justice* (2013) 114.

³⁹ Sh Rosenne (n 33) 21. On a different occasion the quoted author concludes in the following way: It is also generally accepted that a candidate who is a national of any one of the five permanent members of the Security Council should be elected to the Court (361).

of B. Broms, the attitude towards the election under Article 9 should be considered reasonable, because “that solution adopted is likely to strengthen the position of the Court”⁴⁰.

One may note that despite the Cold War tensions all permanent members of the Security Council managed to retain their permanency without any serious challenge. The only exception was China, which had a special status for that. However, one needs to note that between February 1967 when Judge Koo ended his term to February 1985 when Judge Ni was elected, there was no judge of Chinese nationality. This period lasted for 18 years, thus marking an important (first) exception to the “rules of the game”⁴¹, (i.e. the otherwise permanent presence of the Great Powers - the Permanent Members of the Security Council) on the bench.

An empirical study on the selection of international judges reveals the perception of “the apparent sense of entitlement” of the Great Powers on one hand, and the respectively provoked annoyance on the other⁴². It is quite telling that when Judge Donoghue was elected to fill in the empty seat at the bench of the International Court of Justice due to resignation by Judge Thomas Buergenthal, the Iranian delegation in strong words expressed the dissatisfaction toward the privileged situation of the “permanent US seat” underlining that

“articles 2 and 9 of the Court’s Statute provide the only criteria for electing qualified candidates to the post, and any practice or precedent to the contrary that may imply or bring in other elements other than geographical distribution and that could grant a special privilege or privileged treatment to certain States is not acceptable”⁴³.

A more pragmatic view, attempting at reconciling both provisions has been recently offered by Georges Abi Saab, whose idea was “not to eliminate politics from the elections, which is a contradiction in terms, but to improve and widen the range of nominations so that political choice can be exercised from among a sufficient number of highly qualified candidates”⁴⁴.

The struggle for the professional qualifications has had a long history, to mention only the deliberations within the *Institut de droit international* which led to the adoption of the resolution on the composition of the International Court of Justice at the Siena session in 1952⁴⁵ and on amending

⁴⁰ According to the quoted author, “it gives a guarantee that different legal systems of the world have their representatives within the Court which fact is liable to produce confidence in the work of the Court even in those countries, which, due to the limited number of judges, only rarely see that their nationals are elected to the Court, except as ad hoc judges” Sh Rosenne (n 33) 332.

⁴¹ E McWhinney, ‘Law, Politics and “Regionalism” in the Nomination and Election of World Court Judges’ (1986) 13 *Syracuse Journal of International Law and Commerce* 17. One may, however, also note some “mild surprises”, i.e. relatively low voting rates in the 1978 triennial elections (17).

⁴² See R Mackenzie et al., *Selecting International Judges: Principle, Process, and Politics* (2010) 38.

⁴³ UN Doc A/64/PV.118, 2.

⁴⁴ G Abi-Saab, ‘Ensuring the Best Bench: Ways of Selecting Judges’, in C Peck, RS Lee (eds), *Increasing the Effectiveness of the International Court of Justice* (1997) 184.

⁴⁵ IDI, Session de Sienna – 1952, La composition de la Cour internationale de Justice (Rapporteur: J Gustave Guerrero).

its Statute at the subsequent session in Aix-en-Provence in 1954. Professor Wolfke highly appreciated the suggestions contained therein, in particular putting more emphasis on the criteria as set forth in Article 2 of the ICJ Statute, frankly at the cost of requirements provided for in Article 9 of the Statute⁴⁶. In a recent (2011) resolution of the *Institut*, adequate geographical representation within international courts and tribunals was mentioned with regard to selection of judges to international courts and tribunals. However, the resolution underlined that “The ability to exercise high jurisdictional functions shall nonetheless remain the paramount criterion for the selection of judges, as pointed out by the Institute in its 1954 Resolution”⁴⁷. The reference to the preceding 1954 resolution comes as no surprise.

Nowadays, with the inclusion of other legal systems represented on the bench as the result of the loss of a predominantly European character, the Court has become less homogeneous. There are also other factors influencing the election process. Mackenzie is right in attributing the success of judicial candidates not only to their personal and professional qualities but also to the regional power of the state in question, its contribution to the budget of the court, the determination and the experience in that regard⁴⁸. Such remarks are now partly undermined by the surprising non-election of the UK candidate in late 2017, which would thus mark a second exception to the P5s’ general ‘presence on the Bench’.

The validity of the conclusions drawn with regard to the ICJ might be, at least to some extent, extrapolated onto other international tribunals. The International Tribunal for the Law of the Sea (ITLOS) also relies on “the representation of the principal legal systems of the world and equitable geographical distribution”⁴⁹. The former part of the quotation has been taken from Article 9 of the ICJ Statute, but in all other respects this provision differs fundamentally from Art. 9, since the principle of geographical distribution is referred to in Art. 3(2) of the ITLOS Statute and the nominations and elections in Art. 4, respectively⁵⁰.

However, it is also to be remarked that the British candidate for the first election to the ITLOS in 1996 (David Anderson) was only elected on the eighth ballot⁵¹. In the election of 2005 the very same person was replaced by the national of a land-locked State. Since then, the Hamburg Tribunal has been without any national from the UK, despite his mother country being traditionally considered the Queen of the Seas.

⁴⁶ See Point 1 of the Resolution adopted at Session d'Aix-en-Provence in 1954 on Etude des amendements à apporter au Statut de la Cour internationale de Justice (Rapporteur: Max Huber), defining the respective criteria of selecting judges to the ICJ: “Sans préjudice de la nécessité d'assurer une certaine représentation géographique au sein de la Cour internationale de Justice comme prévue à l'article 9 du Statut, les juges à la Cour doivent être élus avant tout en fonction de leurs qualités individuelles en conformité avec l'article 2. A cet effet une précision en ce sens pourrait, en cas de révision du Statut, être utilement apportée à l'article 9”.

⁴⁷ IDI, Session de Rhodes – 2011, 9 September 2011, Position of the International Judge (Rapporteur: Gilbert Guillaume), Article 1.

⁴⁸ R Mackenzie (n 16) 745.

⁴⁹ Statute, art 2(2).

⁵⁰ M Nordquist, 5 *ITLOS Commentary* (1989) 342, A.VI.24.

⁵¹ Rosenne (n 33) 386.

It is also interesting to shed some light on the respective developments in international criminal justice. Its origins, i.e. International Military Tribunals, relied exclusively on the victory in the World War II. The Nuremberg Tribunal was merely composed, according to Art. 2 of the Statute, of four members, each with an alternate, appointed by each of the Signatories. In its turn, the Tokyo Tribunal was to “consist of not less than five, nor more than nine Members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the Signatories to the Instrument of Surrender”. In the Statutes of International Military Tribunals no qualifications of any kind were specified.

A different model was adopted in the 1990s for the International Criminal Tribunals established by the Security Council as the latter’s subsidiary organs. Their statutes contain certain requirements for the judges. Both Yugoslavian and Rwandan Tribunals are to be composed of independent judges, no two of whom may be nationals of the same State⁵². The judges must be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices⁵³. The inclusion of such requirements marks a significant difference in comparison with the IMTs being often considered instruments of victors’ justice. Contrary to the practice of appointing judges by the victorious states, for the two *ad hoc* Tribunals judges were to be elected by the General Assembly from a list submitted by the Security Council. Still, however, also with regard to the *ad hoc* tribunals established in 90s. one may again notice some overrepresentation of the powerful states⁵⁴. As noted by A. Danner and E. Voeten, the major NATO member states had been *de facto* guaranteed judgeships and the same was generally true for the P5, with the Russian candidate, Valentin Kisilev, for the first election in 1993 as the only exception⁵⁵.

Judges of the permanent International Criminal Court (ICC) are appointed in a different manner. They are elected by the Assembly of State Parties, also on the basis of equitable geographical representation. The candidates must all be nationals of States-Parties, but they may be nominated by a State other than that of their nationality. According to Article 36(3)(a) of the Rome Statute, the judges are to be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices. In addition to this well-established classic formula, every candidate for election to the Court should either have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to

⁵² ICTY Statute, Art. 12.

⁵³ ICTY Statute, Art. 13.

⁵⁴ R Mackenzie (n 16) 745.

⁵⁵ A Danner, E Voeten, ‘Who is running the international criminal justice system?’ in DD Avant, M Finnemore, SK Sell (eds), *Who Governs the Globe?* (2010) 49. The quoted authors refer to Russia’s lack impartiality as for Yugoslav conflict but at the same time note that Russia was the only P5 state having its national on ICTR.

the judicial work of the Court⁵⁶. Under paragraph 8(a) of the same Article, the States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: (i) The representation of the principal legal systems of the world; (ii) Equitable geographical representation; and (iii) A fair representation of female and male judges. The introduction of gender equality is indeed a new factor, thus making the whole procedure of composing the bench more objective and professional. The newly introduced system was considered to work relatively successfully, even if the elections provided for some overrepresentation of the Western Europe and Other Governments Group over other regions⁵⁷.

Such constant improvements in composing the international criminal law courts and tribunals go hand in hand with the developments in the discipline, marking at the same time its own peculiarities given the differences to traditional international judiciary. In general, however, after the analysis of the practice of the international courts and tribunals mentioned above, one is tempted to again rely on the position of Max Huber, which is quite telling and worthy of being reproducing *in extenso*:

“The only interest which is really entitled to be decisive in the constitution of permanent courts concerns the excellence of the personnel of the court. If the lesser powers, by reason of their smaller share in the appointment of judges, cannot have complete confidence in the court, the objection must be met by directing attention to a suitable method of selecting the judges and to a comprehensive regulation of their qualifications, not by taking into account in the composition of the court an influence which, in the last instance, rests only upon political power entirely foreign to the idea of justice”⁵⁸.

The ultimate goal, in other words, would be, to borrow from Sir Robert Jennings, the courts to be perceived as “being bigger than any particular bloc or ideological or political or economic interest, and as being truly representative of a law of ‘ecumenical validity’” (in the latter case borrowing from Lord Asquith)⁵⁹. The analysis above proves this true.

III. INTERVENTION IN THE PROCEEDINGS

Bearing in mind the nature of international judiciary, at least in its traditional sense, a Great Power could only have influence over the proceedings, in which it is a party to. But when standing before an international court a Great Power would lose the advantages it normally enjoyed.

In general, Great Powers are relatively reluctant towards international courts (as best manifested in the US’ position towards the compulsory

⁵⁶ Rome Statute, Art. 36(3)(b)(i) and (ii).

⁵⁷ See J O’Donohue, ‘The ICC and the ASP’, in C Stahn (ed), *The Law and Practice of the International Criminal Court* (2015) 127ff.

⁵⁸ As quoted by Wehberg (n 26) 75f.

⁵⁹ R Jennings, ‘The Collegiate Responsibility and Authority of the International Court of Justice’ in Y Dinstein (ed), *International Law at a Time of Perplexity* (1989) 344.

jurisdiction of the ICJ) and are rather seldom parties to the proceedings (cf. the Chinese approach). The attitude is, of course, individual and not a subject to all-too-easy generalizations (as exemplified by Russian reluctance towards the ICJ and – at the very same time – a more “open” approach towards the Hamburg Tribunal).

But states may also be interested in intervening in the proceedings. To give an example, any state may intervene in the proceedings in the sense of Articles 62 and 63 of the ICJ Statute. Taking such a role, a Great Power (as any other state), whose legal interest might be affected by a possible decision of the Court, would be enabled to participate in the main case in order to protect that interest⁶⁰. The reasons for enabling intervention were perfectly identified by Judge Weeramantry in the *Sovereignty over Pulau Ligitan and Pulau Sipadan* case⁶¹. In a similar vein, intervention has been also foreseen in the Statute of the International Tribunal for the Law of the Sea (although with some deviations from the original model, in particular with regard to the Tribunal’s decision also being binding upon the intervener⁶²)⁶³.

There is, however, also some potential for the intervention of Great Powers acting in concert, in particular *via* an action by the United Nations Security Council. Here, again, the position might be a different one, when considering the Great Powers as a corporate entity, and not as an individual subject of action. What is meant here is a scenario of competing competences between the Security Council and an international tribunal.

With regard to the ICJ, it might be argued that parallel exercise of their functions, by the Court and the Council respectively, is incompatible with the primary responsibility of the Security Council⁶⁴, and that the Court should accordingly abstain from adjudication when the Council is seized with the matter in question. Judge Alvarez in *Anglo-Iranian Oil* considered a similar scenario, accepting the predominance of the Security Council:

“If a case submitted to the Court should constitute a threat to world peace, the Security Council may seize itself of the case and put an end to the Court’s jurisdiction. The competence of the Council results from the nature of the international organization established by the Charter and from the powers of the Council”⁶⁵.

⁶⁰ *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (Judgment of 4 May 2011, Application by Honduras for Permission to Intervene) [2011] ICJ Rep 436, § 46

⁶¹ Intervention procedure both in domestic and international law is based, inter alia, on the need for the avoidance of repetitive litigation as well as the need for harmony of principle, for a multiplicity of cases involving the same subject-matter could result in contradictory determinations which obscure rather than clarify the applicable law. (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*) (Judgment of 23 October 2001, Application by the Philippines for Permission to Intervene, Separate opinion of Judge ad hoc Weeramantry) [2001] ICJ Rep 636, § 17).

⁶² See art. 31(3) of the ITLOS Statute.

⁶³ See R Wolfrum, ‘Intervention in the proceedings before the International Court of Justice and the International Tribunal for the Law of the Sea’ in P Chandrasekhara Rao; Rahmatullah Khan (eds), *The International Tribunal for the Law of the Sea: law and practice* (2001) 170 ff.

⁶⁴ Article 24 of the UN Charter.

⁶⁵ *Anglo-Iranian Oil Co. case (jurisdiction)* (Judgment, Dissenting Opinion of Judge Alvarez (translation)) [1952] ICJ Rep 134.

Such a position is also represented on the doctrinal plane. According to L. Delbez, the Council would enjoy complete discretion to remove a case from the Court's docket⁶⁶. It has, furthermore, been suggested that when the Security Council considers that the discharge of its primary jurisdiction is obstructed by a parallel procedure before the International Court, the Council could on the basis of Article 24(1) of the UN Charter, request the Court to suspend its proceedings pending the proceedings in the Council as well as order the disputing parties to refrain from going to the International Court⁶⁷. Such proposals do not reflect the actual reality.

Complementarity of the respective roles of the ICJ and the Council has been stressed by the International Court of Justice on various other occasions, the *Nicaragua* case being probably the most open exposition on that⁶⁸. In the merits phase of the same case, Judge Nagendra Singh alluded that "[t]he Court as the principal judicial organ of the United Nations has to promote peace, and cannot refrain from moving in that direction"⁶⁹.

A somewhat different and naturally more dangerous situation refers to the standing of the *ad hoc* tribunals. Both the Yugoslavian and Rwandan Tribunals were created by the Security Council as the latter's subsidiary organs⁷⁰. The subsidiary character of an organ does not, however, necessarily imply any presumption as to a measure of control that the principal organ may exercise over the subsidiary organ it has established, or as to the measure of autonomy such a subsidiary organ may enjoy vis-à-vis the principal organ (nor is it related to the respective subordinate character)⁷¹. More specifically, as D. Sarooshi contends, the exercise by the Tribunal of a judicial function which the Council does not itself possess is of crucial importance in ascribing to the Tribunal a degree of independence which prohibits interference by the Security Council in the conduct of individual cases⁷². On several occasions

⁶⁶ L Delbez, *Les principes generaux du contentieux international* (1962) 43

⁶⁷ TJH. Elsen, *Litispence between the International Court of Justice and the Security Council* (1986) 71. Having admitted that the Court would probably be not legally bound to adhere to the Council's request, the quoted author accepted in a footnote that the deferral by the Court to the Council may acquire a mandatory character pursuant to Article 24 (1) of the Charter: "it could be argued that the Court is required to recognize the Council's order pursuant to article 24(1) of the Charter", 71, and 115 (fn 9).

⁶⁸ "The [Security] Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events" *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility, Judgment) [1984] ICJ Rep 435 (§ 95 *in fine*).

⁶⁹ *Military and Paramilitary Activities in und against Nicaragua (Nicaragua v United States of America)* (Merits, Judgment, Separate opinion of President Nagendra Singh) [1986] ICJ Rep 153.

⁷⁰ See art. 29 of the Charter.

⁷¹ G Jaenicke, 'Article 7', in B Simma (ed), 1 *The Charter of the United Nations. A Commentary* (Second Ed, 2002) 218.

⁷² D Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (1999) 103. In strong terms the independence of the *ad hoc* tribunals was underlined by RS Lee ('The Rwanda' Tribunal, (1996) 9 *Leiden Journal of International Law* 45): "Like the Yugoslavia Tribunal, the Rwanda Tribunal is a subsidiary organ of the Security Council within the meaning of Article 29 of the UN Charter. It has independent judicial status, and is to function in accordance with the Statute and its Rules of Procedure and Evidence. Even though a subsidiary organ, not even its parent organ, the Security Council, may instruct the Tribunal so far as its work is

the judges confirmed such independence. E.g. in *The Prosecutor versus Joseph Kanyabashi*, Case No. ICTR-96-15-T, the Rwandan Tribunal underlined that

“the Judges of the Tribunal exercise their judicial duties independently and freely and are under oath to act honourably, faithfully, impartially and conscientiously (...). Judges do not account to the Security Council for their judicial functions”⁷³.

Autonomy and independence of the judicial institution was also stressed by the ICTY in *Prosecutor v. Tihomir Blaskić* Decision of 18 July 1997:

As a subsidiary organ of a judicial nature, it cannot be overemphasized that a fundamental prerequisite for its fair and effective functioning is its capacity to act autonomously. The Security Council does not perform judicial functions, although it has the authority to establish a judicial body. This serves to illustrate that a subsidiary organ is not an integral part of its creator but rather a satellite of it, complete and of independent character⁷⁴.

On another occasion the judges of the ICTY paid attention to a particular dependence on the Security Council holding that “the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its “judicial character””. This relation was perhaps best characterized in the Report of the Secretary General pursuant to paragraph 5 of the Security Council resolution 955 (1994):

“The International Tribunal for Rwanda is a subsidiary organ of the Security Council within the meaning of Article 29 of the Charter. As such, it is dependent in administrative and financial matters on various United Nations organs; as a judicial body, however, it is independent of any one particular State or group of States, including its parent body, the Security Council”⁷⁵.

Having established the evidence for the independence of both *ad hoc* tribunals there remains still the question of the exercise of the standard. Such an issue is especially controversial in light of the position taken by the Prosecutor of the ICTY towards the NATO air strikes of 1999. Facing the

concerned”. In a similar vein see KJ Partsch, ‘Der Sicherheitsrat als Gerichtsgründer: Zur Entstehung des besonderen internationalen Strafgerichts für Jugoslawien’ (1994) Vereinte Nationen 13.

⁷³ *The Prosecutor versus Joseph Kanyabashi*, Case No. ICTR-96-15-T, § 41. In even stronger terms the judges of the Appeals Chamber of the Yugoslavian Tribunal referred to independence in *Tadić* case: “15. To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council “intended” to entrust it with, is to envisage the International Tribunal exclusively as a “subsidiary organ” of the Security Council (see United Nations Charter, Arts. 7(2) & 29), a “creation” totally fashioned to the smallest detail by its “creator” and remaining totally in its power and at its mercy. But the Security Council not only decided to establish a subsidiary organ (the only legal means available to it for setting up such a body), it also clearly intended to establish a special kind of “subsidiary organ”: a tribunal”⁷³.

⁷⁴ *Prosecutor v Tihomir Blaskić*, Decision on the Objection of the Republic of Croatia to the Issuance of subpoena duces tecum, IT-95-14-PT, 18.07.1997, para 23

⁷⁵ UN Doc S/1995/134, para 8

problem Prosecutor Carla del Ponte concluded “that there [was] no basis for opening an investigation into any of the allegations or into other incidents related to the NATO air campaign”⁷⁶. This decision generated strong criticism by many commentators⁷⁷.

The above considerations on the *ad hoc* tribunals relied on the fact that the two organs belong to the same international organization. Tremendous differences may, however, be noticed with regard to the permanent ICC, which is independent in relationship with the United Nations system but bound by the Purposes and Principles of the Charter of the United Nations⁷⁸. Under Article 2(1) of the Relationship Agreement (2004), the United Nations recognizes the Court as an independent permanent judicial institution which has an international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

Of course, those of the permanent members of the Security Council that are party to the Rome Statute do not have any privileged position in the Assembly of State Parties. However, given the lack of ratifications of the Rome Statute from the majority of P5, the more important mechanism for impacting the Court is the power to defer proceedings under Article 16 which may be regarded as the vehicle for resolving conflicts between the requirements of peace and justice where, in the view of the Security Council, the peace efforts need to prevail over international criminal justice⁷⁹. According to the said provision,

“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions”.

Article 16 may be regarded as one of the most dangerous and sensitive provisions in the ICC Statute⁸⁰, but it is the application of the said provision in practice that merits special scrutiny. The initially adopted resolutions 1422 and 1487 suspended the jurisdiction of the Court to the members of peacekeeping troops. This was done under the explicit threat of the US withdrawal from peacekeeping missions. In the meantime, the Security Council went beyond the statutory framework of suspension and even excluded, for an undefined period of time, the jurisdiction of the ICC⁸¹. It is beyond the scope of the present analysis to consider the issue in greater detail. Suffice to mention that the hitherto practice shows that instead of immunizing

⁷⁶ Press Release, Office of the Prosecutor for the Int'l Criminal Tribunal for the Former Yugo., Prosecutor's Report on the NATO Bombing Campaign (June 13, 2000).

⁷⁷ P Tavernier, ‘Responsabilité pénale? L’action du Tribunal pénal international pour l’ex-Yugoslavie’ in Ch Tomuschat (ed), *Kosovo and the international community: a legal assessment* (2002) 161.

⁷⁸ See Preamble of the Rome Statute, paras 7 and 9.

⁷⁹ M Bergsmo, J Pelić, ‘Article 16’ in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (1999) 378.

⁸⁰ M El Zeidy, ‘The United States dropped the atomic bomb on Article 16 of the Rome Statute’ (2002) 35 Vanderbilt Journal of Transnational Law 1509.

⁸¹ SCRs 1497, 1593, 1970.

individual leaders, the Security Council has chosen to offer general deferral, which goes in line with the interest of the most powerful states.

The subsequent requests from the African Union and African states to apply Article 16 have, however, been left unanswered⁸². It is quite telling that during a debate on Peace and Security in Africa, Rwanda expressed the opinion that the said Article “seems to have been conceived as an additional tool for the big Powers to protect themselves and protect their own [interests]”⁸³.

Finally, one needs to mention the controversies surrounding the amendment of Article 16 of the Rome Statute. The controversies around the arrest warrant for the President of Sudan stirred up a proposal by African states to amend this provision which relied on the disputable *Uniting for Peace* formula. Accordingly, where the UN Security Council fails to decide on the request by the state with jurisdiction over a situation before the Court within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council’s responsibility⁸⁴. Such a proposal is yet another reflection of the competition between the “exclusive” club dominated by the Great Powers on one hand and the definitely more democratic and egalitarian General Assembly on the other.

The chances for adopting the proposed amendment seem limited. Still, it is to be expected that Article 16 remains one of the most problematic provisions. All in all, while the preceding conclusion on the composition was very promising in the field of international criminal justice, the position of intervention is less positive.

CONCLUDING REMARKS

It is quite difficult to offer a better conclusion than that provided by the late Professor Wolfke over a half of century ago. He mentioned the Great Powers to be mainly responsible for the future of international judiciary. Then he concentrated on the World Court⁸⁵ but the validity of such a position may be easily extrapolated to other international courts. Definitely, the Great Powers have a significant future role, as may perhaps be most obviously seen with regard to the ICC, especially when introducing the institutional action taken by the Security Council, and the latter’s deferral powers. Still, even when paying attention to such developments one is again tempted to borrow from a learned authority that “[e]very gesture on the [Great Powers’] part would

⁸² In this regard, one may note the unsuccessful attempts to defer the ICC investigation into the situation in Darfur (by the African Union), Kenya’s request that the Security Council defer the Court’s investigations into the 2007-8 post-election violence.

⁸³ UN Doc. S/PV.7060, 11.

⁸⁴ ICC-ASP/10/32. Annex V.

⁸⁵ In fact, in the light of the practice of the Court and, in general, of the whole international reality, which is rather hostile to any privileges, the arguments for the privileged position of the great Powers on the Court sound still less convincing than forty years ago. K Wolfke ‘The Privileged Position’ (n 3) 164.

constitute an important precedent strengthening the authority of the [international] Court[s and tribunals]”⁸⁶.

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⁸⁶ K Wolfke, ‘The Privileged Position’ (n 3) 164.

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