

THE GOVERNANCE OF THE INTERNATIONAL COURT OF JUSTICE

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1. It is a great pleasure to address you today at the inaugural conference on the *Governance of International Courts and Tribunals: Ensuring Judicial Independence and Accountability*. I would like to thank the University of Leiden, and in particular Professor Blokker, for organizing a forum to discuss the important issues of governance of international courts and tribunals.

2. Out of this broad theme, I intend to address a narrower aspect. That is, the governance of the International Court of Justice (to which I will refer as the “ICJ” or “the Court”) and the principle of judicial independence.

I. Introductory remarks

3. Before I delve into the main theme, I will make some preliminary remarks on governance. What do we mean when we say “governance of international courts”?

4. In the early 1990s, a Commission on Global Governance was established and produced a report, titled *Our Global Neighbourhood*. This report defined “governance” as

“the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.”¹

5. I must say, I found this definition both too broad and too abstract.

6. What we most often hear in daily life with regard to governance is a reference either to “good governance” or “bad governance”, which means that governance is always qualified in terms of its potential outcome. We might therefore start from there. Those of you who may have seen Ambrogio Lorenzetti’s *Allegory of Good and Bad Government* in the Palazzo Pubblico of Siena, Italy, will remember that it is flanked by two other paintings, one showing the effects of good governance and the other, the effects of bad governance. In the first, people dance in the streets; there are well-tended fields that yield a plentiful harvest; and merchants exchange goods and make profits. It is a city ruled by Justice. In the second, there is a scene of violence, disease and decay. It is a city ruled by Tyranny.

¹ Commission on Global Governance, *Our Global Neighbourhood* (1995), Chapter 1, p. 2.

7. A second example which can also help us bring governance into perspective is the fact that good governance is one of the main indicators of Bhutan's Gross National Happiness. In other words, good governance may contribute to the happiness of the population of a country.

8. So, how does this apply to courts, since I am quite sure that when we say governance of international courts, what we have in mind is their "good governance"? We do not wish "bad governance" on international tribunals, which have to deliver the Justice that Ambrogio Lorenzetti admired so much in his depictions already in the 14th century city-State of Siena. There is indeed a text on the wall under the frescos, which reads as follows: "Turn your eyes to behold her, you who are governing, who is portrayed here, Justice, crowned on account of her excellence, who always renders to everyone his due."

9. The question is: what would "good governance" imply in the case of judicial institutions? What outcome should be associated with "good governance" in the case of courts? It is, in my view, first of all, the independence and impartiality of the institution and secondly, its ability to deliver justice without outside interference or influence.

10. Having this desirable outcome in mind, let me now take you to the nature and structure of the governance of the International Court of Justice as it has evolved over the years, so that we can assess whether it can result in the kind of outcome that we associate with "good governance" for an international court.

II. The governance of the PCIJ

11. The ICJ displays some historical and institutional peculiarities in terms of governance, since it is the successor to the Permanent Court of International Justice (the "PCIJ"). So, we have to start from there.

12. Strictly speaking, the PCIJ was not an organ of the League of Nations in the sense of Article 2 of the Covenant of the League; it was not created by the Covenant². Rather, it had a legal status separate and distinct from that of the League³. Pursuant to Article 14 of the Covenant⁴, the Council appointed an Advisory Committee of Jurists to prepare a draft Statute, which was then revised and approved by the Council on 28 October 1920⁵. After approval by the Assembly on 13 December 1920, the Statute was attached to a protocol dated 16 December 1920, which was opened for signature⁶.

13. The legal separation between the PCIJ and the League had some legal consequences. First of all, the Members of the League of Nations were not automatically parties to the PCIJ

² Vera Gowlland-Debbas, "Article 7 UN Charter" in Andreas Zimmermann and others (eds.), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2019, 2nd edition), pp. 93-94.

³ *Ibid.*

⁴ Article 14 of the Covenant of the League of Nations provided that the Council would "submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice".

⁵ Ole Spiermann, "Historical Introduction" in Andreas Zimmermann and others (eds.), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2019, 2nd edition), p. 52.

⁶ Protocol of Signature relating to the Statute of the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations. Geneva, 16 December 1920, League of Nations *Treaty Series*, 1921, Vol. 6 [hereinafter, "*PCIJ Statute*"], Article 4.

Statute, even though they were expected to contribute to its budget⁷. Secondly, Article 1 of the PCIJ Statute provided that the PCIJ was “*in addition to*” the Permanent Court of Arbitration and the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement. Thus, the PCIJ was not considered as the “principal judicial organ” of the League of Nations, but an addition to the existing dispute settlement bodies available to States.

III. The governance of the ICJ

14. Although the Statute is the same, the governance structure of the ICJ is quite different. Under Article 7 of the Charter, the Court was established as one of the “principal organs” of the United Nations (“UN”). Under Article 92, the Court’s Statute forms an “integral part” of the Charter. Thus, UN Members are automatically parties to the Court’s Statute.

15. The establishment of the Court under the Charter as one of the principal organs of the UN was meant to ensure that it would not be subordinate to any of the political organs of the UN. The drafters of the Charter sought to create a system of governance of the Court based on two pillars: judicial independence and administrative autonomy. While these two notions are closely linked, they serve different purposes. I will therefore address each of them in turn.

A. Judicial independence of the ICJ

16. The Charter and the Statute of the Court seek to ensure the judicial independence of the Court not only from States, but also from other organs of the United Nations. This is done in three main ways:

17. First and foremost, as pointed out above, the independence of the Court derives from its nature as the principal judicial organ of the UN. In its Advisory Opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations*, the Court pointed out that the principal organs of the UN are equal amongst themselves⁸.

18. This equality implies that the Court does not and cannot entertain political pressures from any other organ. Thus, in the *Namibia* Advisory Opinion, the Court rejected South Africa’s allegations of “political pressure” applied to it by the Security Council, noting that:

“the very nature of the Court as the principal judicial organ of the United Nations [is] an organ which, in that capacity, acts only on the basis of the law, independently of all outside influence or interventions whatsoever, in the exercise of the judicial function entrusted to it alone by the Charter and its Statute. A court functioning as a court of law can act in no other way.”⁹

⁷ Ole Spiermann, “Historical Introduction” in Andreas Zimmermann and others (eds.), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2019, 2nd edition), p. 58.

⁸ *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion of 3 March 1950, I.C.J. Reports 1950*, p. 8 (“The General Assembly and the Security Council are both principal organs of the United Nations. The Charter does not place the Security Council in a subordinate position”).

⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 23, para. 29.

19. Secondly, an essential component of the governance of the Court meant to ensure its judicial independence is the method for the election of its judges. This method is unique in the UN system. It does not rely on a single organ alone to elect judges. Instead, it spreads the election process among multiple actors at different stages. This is what I will describe as “polycentric governance”.

20. As you all know, the election of the judges is entrusted under the Statute to two organs of the UN acting independently of each other: the UN General Assembly and the UN Security Council. These two organs elect the judges on the basis of a list of persons nominated by the national groups of the Permanent Court of Arbitration (the “PCA”). Under Articles 8 and 10 of the Statute, successful candidates must obtain an absolute majority in both organs, which “shall proceed independently of one another to elect the members of the Court”. Moreover, the election procedure requires the General Assembly and the Security Council to take steps to prevent any communications passing between them before the announcement of the official results; this is “to ensure independence for the voting in the two organs which have to carry out the election of the judges simultaneously”¹⁰.

21. In order to understand this “polycentric” arrangement, we must go back to the process of elaboration of the Statute of the PCIJ. It is indeed an arrangement which was the fruit of considerable efforts to ensure the independent function of the PCIJ. At its origin is the “Root-Phillimore” proposal, intended to vest the power of electing the judges in the Assembly and the Council of the League¹¹, to ensure appropriate checks-and-balances between the small and great Powers of the time, by a simultaneous election. In the words of Mr. Root:

“The practical effect of the idea would be to assure to the small Powers the protection of their interests by the Assembly where they are in the majority and to the great Powers the protection of theirs by the activity of the Council where they are predominant.”¹²

22. To mitigate the involvement of the political organs in the process, even though they would be acting independently of each other, the Dutch jurist, Bernard Cornelis Johannes Loder, proposed the addition of a third layer to this arrangement: he suggested that the List of Candidates be proposed by the National Groups of the PCA¹³. The interposition of the PCA National Groups was meant to ensure that the candidates would not be *formally* nominated by States.

23. This complex election process provides a system of polycentric governance, with a view to safeguarding the judicial independence and integrity of the Court’s membership.

24. Thirdly, the internal governance system of the Court strengthens its judicial independence. It is an expression of its self-governance. Simply put, in the exercise of its judicial function, the Court is the master of itself. Its decisions are taken by the 15 Members, who ensure the orderly dispensation of justice. Under the Statute, the Members of the Court elect their

¹⁰ *Annuaire de l’Institut de Droit International*, Vol. 44 (1952-II), pp. 474-475, Resolution on “The Composition of the International Court of Justice”, para. 2.

¹¹ Advisory Committee of Jurists, *Procès-verbaux* of the Proceedings of the Committee, 16 June-24 July 1920, available [here](#), p. 109 (Root). According to Mr. Root, “[c]ourts derived their powers from the political power”; the solution could be found “by articulating the new organisation with the political organisation of the League”.

¹² *Ibid.*, pp. 108–109 (Root).

¹³ *Ibid.*, p. 163 (Loder).

President, their Vice-President, and the Registrar. They also establish the various committees that deal with different aspects of the work of the Court as a judicial organ. No State and no organ of the UN may interfere with the *interna corporis* of the Court, in a manner that would compromise its independence and judicial integrity.

B. Administrative autonomy

25. Let me now turn to my next point: the administrative autonomy of the Court. Although this administrative autonomy is not expressly stated in the Charter, it may be gleaned from the fact that the Court is *not* listed under Article 98 of the Charter, which provides that the UN Secretary-General shall act in the capacity of “chief administrative officer of the Organization” with regard to a number of organs, including the General Assembly, the Security Council or ECOSOC.

26. The administrative autonomy of the Court is also confirmed in Article 30 (1) of its Statute, which provides that the Court shall frame rules for carrying out its functions. To this end, Article 28 (4) of the Rules makes clear that the “[t]he staff of the Registry shall be subject to Staff Regulations drawn up by the Registrar”, as may be approved by the Court.

27. Nevertheless, even though the Court does not administratively come under the Secretariat of the United Nations, which gives it a certain measure of autonomy, a closer look at the UN Charter and the Court’s Statute reveals that the governance of the Court is based on a “polycentric” structure, which assigns certain administrative functions to various organs with regard to its budget, the salaries of the judges and their pensions.

28. This polycentric structure, in which various actors come into play in different aspects of the administrative and financial needs of the Court, helps safeguard to a large extent the judicial independence of the Court by instituting certain checks and balances amongst them to the advantage of the Court’s autonomy. Thus, when certain functions are out-sourced to other organs of the UN, in what could be described as “external governance functions”, the process of decision-making is not monopolized by a single organ, but benefits from the intervention of various organs.

(a) *With respect to the financing of the Court*

29. I will try to illustrate this with a couple of examples. First, with regard to the budget of the Court, Article 33 of the Statute provides that the United Nations shall bear the expenses of the Court in such a manner as shall be decided by the General Assembly. Thus, the Court’s budget appears as a chapter of the regular UN budget.

30. Article 33 is couched in mandatory terms, and does not give the UNGA a discretion in the provision of funding. As the former Registrar of the Court Philippe Couvreur has observed, “[t]he UN is thus under an *obligation* to finance the Court” (emphasis added)¹⁴.

¹⁴ Philippe Couvreur, “The Registrar of the International Court of Justice: status and functions” in Carlos Jiménez Piernas (ed.), *The Legal Practice in International Law and European Community Law: A Spanish Perspective* (Martinus Nijhoff, 2007), p. 20, fn. 49.

31. The budgetary process of the Court is carried out through the interaction of three main actors: the Court itself, the General Assembly, and the Secretary-General of the United Nations.

32. The Court is the main actor in the preparation of its budget. Under regulation 2.14 of the UN Financial Regulations and Rules, it is the Court that prepares its own budgetary requirements in consultation with the Secretary-General. After approval by the Court, the draft budget is forwarded to the UN Secretariat for incorporation into the draft budget of the UN.

33. The second key actor is the General Assembly, and the expert-bodies appointed by the Assembly. This includes, in particular, the ACABQ, which studies the budget proposal, directs questions to the Registrar of the Court, and submits a report to the Fifth Committee. The Fifth Committee examines the budget of the Court, which is ultimately adopted by the General Assembly in a plenary meeting.

34. The point I want to make here is that the interposition of the Secretary-General is meant to ensure the orderly administration of the financial governance of the Court. After having received the Court's proposals, the Secretary-General may add observations or recommendations to the Court's estimates. These observations provide valuable insight into the Court's financial needs. However, the Secretary-General cannot make amendments to the budget without the Court's approval¹⁵. In addition, the helpful role of the Secretary-General is that he can make recommendations on any measures proposed by the General Assembly, which may be found to be incompatible with the Court's Statute, and therefore defend the position and views of the Court on potentially derogatory proposals. Ultimately, this is meant to ensure the administrative autonomy and judicial independence of the Court, free from undue external interference.

(b) *With respect to the emoluments of judges*

35. This brings me to the second example: the emoluments of judges. The remuneration of judges is very important in so far as the security of tenure is concerned, and in order to ensure the unhindered exercise of the judicial function.

36. Article 32 (5) and (7) of the Statute provides that the salaries, allowances, compensation and retirement pensions of judges shall be fixed by the General Assembly.

37. This does not mean, however, that the General Assembly has a *carte blanche* to interfere with the emoluments of judges. In this regard, Article 32 (5) makes clear that these emoluments "may not be decreased during the term of office". Furthermore, Article 31 (6) of the Statute makes clear that judges *ad hoc* shall take part in the proceedings "on terms of complete equality with their colleagues".

38. In 2007, these provisions operated as an effective legal safeguard to ensure that the Court would not be exposed to influence from the General Assembly. The General Assembly had adopted resolution 61/262, which proposed, for the newly elected Members of the Court, a salary lower

¹⁵ Rosalyn Higgins and others, *Oppenheim's International Law: United Nations* (Oxford University Press, 2017), para. 29.216.

than the existing salary level of sitting judges¹⁶. As the Court explained in a detailed memorandum, this resolution would result in the unequal treatment of judges, including *ad hoc* judges; as a result, it could amount to a breach of Articles 31 (6) and 32 (5) of the Court's Statute¹⁷.

39. The UN Legal Counsel concurred with the Court that Article 32 (5) of the Statute and the principle of equality of judges made "it very difficult to reconcile these principles and requirements, specifically in the context of resolution 61/262, setting out the revised annual salary system"¹⁸. The UN Secretary-General agreed that the Court's remarks on its "particular status and administrative independence" were "justified"¹⁹. The interposition and role of the Secretary-General and his staff turned out to be decisive, in addition, of course, to that of the President of the Court.

40. Ultimately, the matter was resolved by decision 62/547 of 3 April 2008. This set the annual net base salary of the judges equally, without any reference to resolution 61/262. Thus, the idea that new judges should receive reduced salaries was abandoned, to ensure the equality of the judges and to conform to the provisions of the Statute.

C. Accountability in respect of administrative and budgetary matters

41. I hope that I have not given the impression in my brief remarks on administrative autonomy that there is no accountability with regard to the Court's administrative and budgetary processes. Quite the opposite, the Court can be held accountable as far as certain administrative and budgetary practices are concerned.

42. For example, the Court's accounts may be audited by the Board of Auditors, the Joint Inspection Unit, and the Office of Internal Oversight Services, following a request from the Court itself.

43. To give you an example, in 2008, the Joint Inspection Unit of the United Nations System published a report regarding the *Review of management and administration in the Registry of the*

¹⁶ Resolution 61/262 adopted by the General Assembly on 4 April 2007, *Conditions of service and compensation for officials other than Secretariat officials: members of the International Court of Justice and judges and ad litem judges of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, available [here](#).

¹⁷ C.f. Letter dated 3 April 2007 from the President of the International Court of Justice to the President of the General Assembly, UN doc. A/61/837 (2007), available [here](#). See also Report of the Secretary-General, *Conditions of service and compensation for officials other than Secretariat officials: members of the International Court of Justice and judges and ad litem judges of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, UN doc. A/62/538, Annex II, "Document transmitted by the President of the International Court of Justice to the Secretary-General on the implications of General Assembly resolution 61/262 in regard to certain provisions of the Statute of the Court", available [here](#), at p. 26. In her address to the General Assembly of 1 November 2007, the then President of the Court also referred to the problems raised by resolution A/61/262: Speech of President Rosalyn Higgins to the General Assembly, UN Headquarters, 1 November 2007.

¹⁸ Report of the Secretary-General, *Conditions of service and compensation for officials other than Secretariat officials: members of the International Court of Justice and judges and ad litem judges of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, UN doc. A/62/538, available [here](#), Annex I, "Memorandum dated 6 June 2007 from the Legal Counsel to the Office of Human Resources Management — Issues raised by the Registrar of the International Court of Justice concerning conditions of service and compensation for members of the Court", p. 23, para. 13.

¹⁹ *Ibid.*, paras. 10, 67 and 73.

*International Court of Justice*²⁰. The Joint Inspection Unit recommended that certain administrative practices of the Court needed to be reviewed, and suggested that certain others be modernized or amended.

44. Some of these changes have already been effected. The most recent one took place this year, when the Court decided to bring its staff regulations into full conformity with the UN internal justice system²¹. In addition to the previous acceptance of the jurisdiction of the UN Appeals Tribunal, this will allow the staff members of the Court to benefit from the *entire* justice system of the UN, on an equal footing with all other UN staff members.

IV. Conclusion

45. These remarks allow for some general conclusions: does the ICJ governance structure ensure its independence as a judicial institution? Does the current institutional framework ensure the “good governance” of the Court?

46. In principle, yes. The Court’s Statute follows closely the judicial independence and administrative autonomy of the PCIJ. Even though the composition of the Court is assigned to “external organs”, the relevant rules allow for a “polycentric governance” which ensures mutual checks-and-balances. The interposition of different organs is meant to neutralize the political impact of the process.

47. In terms of financial administration, the Court maintains a high degree of administrative autonomy. It is true that the General Assembly maintains some degree of leverage in financial terms. However, the financial governance of the Court is always bound by the provisions of the Statute and the Charter. Any decision on the Court’s budget cannot detract from the institutional independence of the Court. It must remain within the limits of the rule of law.

48. In order to ensure the good governance of an international court or tribunal and ensure its judicial independence, it is not prudent, in my view, that its external governance functions be centralized in a single organ. Because that organ might be tempted to interfere, or correct, the practices of that court or tribunal. When the external governance of a court is placed in the hands of a single organ, this poses a risk for the independence and impartiality of that court or tribunal. It is my view that a polycentric institutional framework fosters a more balanced system for judicial governance as far as the external governance functions are concerned.

²⁰ Joint Inspection Unit, Report on *Review of management and administration in the Registry of the International Court of Justice*, UN doc. JIU/REP/2000/8 (2000, Geneva), available [here](#).

²¹ Exchange of letters between the President of the International Court of Justice, H.E. Mr. Abdulqawi A. Yusuf, and the Secretary-General of the United Nations, H.E. Mr. António Guterres, dated 16 January 2019 and 17 December 2018. See also Speech by H.E. Mr. Abdulqawi A. Yusuf, President of the International Court of Justice, on the occasion of the Seventy-fourth Session of the United Nations General Assembly (30 October 2019), available [here](#), p. 8.