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THE INFLUENCE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE IN THE WORK OF THE INTERNATIONAL CRIMINAL COURT

Remarks on the occasion of an event at the International Court of Justice, to mark the 100th Anniversary of the Statute of the Permanent Court of International Justice.

I'm grateful for this opportunity to participate in this deserving celebration of the 100th Anniversary of the Statute of the Permanent Court of International Justice (PCIJ). The occasion invites us all to reflect on how the pioneering work of that international court and its Statute have continued to influence, in our own time, the administration of justice at the international stage.

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Unsurprisingly, one of the most influential provisions of the PCIJ Statute is article 38, which was copied into the same provision of the Statute of the International Court of Justice (ICJ) with no change in the substance. Article 38 of the PCIJ Statute provides as follows:

The Court shall apply:

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

2. International custom, as evidence of a general practice accepted as law;

3. The general principles of law recognized by civilized nations;

4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

One of the first things taught in the introductory curriculum of international law—and in every text book on the subject—is that article 38 of the ICJ Statute, reprising article 38 of PCIJ Statute—is the traditional expression of the sources of international law.

Notably, the provision is essentially captured in article 21 of the Rome Statute, which requires the International Criminal Court (ICC) to apply, as appropriate, 'applicable treaties and the principles and rules of international law'.

This is one obvious way in which the Statute of the PCIJ would have influenced the legal framework of the ICC.

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But, beyond the provisions of the ICC's legal framework, the substance of the work of the PCIJ has also continued to inspire our work in the substance of our jurisprudence. Significantly, we have accepted at the ICC that those 'principles and rules of international law' that we are required to apply, as appropriate, include what is indicated in article 38(4) of the PCIJ Statute—reprised in article 38(1)(d) of the ICJ Statute. And those are 'judicial

decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

And the need to consider judicial decisions, as a source of international law, has led us back to the jurisprudence of the PCIJ as one of those international courts whose decisions may be examined for persuasive approaches to solving the legal problem presented to us.

In that connection, it goes without saying that one constant problem that an international court must solve is the problem of interpreting its own Statute. For the ICC, this is a particularly crucial function, given the detailed contents of our Statute; which is a treaty, a criminal code and a criminal procedure code—all at once.

In interpreting the Rome Statute, ICC judges are constantly confronted with the question of how to construe words and phrases in that Statute as a treaty. In that regard, we have often had occasion to draw inspiration from the jurisprudence of the PCIJ. One such jurisprudence was the cardinal pronouncement of the PCIJ in *Competence of the ILO to Regulate Agricultural Labour*. There, the PCIJ made the following pronouncement:

In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.[1]

It is obvious that pronouncements like those express the principle, to the same effect, codified in article 31 of the Vienna Convention on the Law of Treaties. The dictum in the *ILO Competence* Case has been invoked in a number of ICC decisions, including in the *Ruto & Sang* Case[2] and in the *Bemba* Case.[3]

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Perhaps, one of the more memorable cases, where the ICC Appeals Chamber drew inspiration from the jurisprudence of the PCIJ was in the recent appeal in the *Jordan Referral (re Al-Bashir)* Case.[4] Briefly stated, the essential facts of the case were that Omar Al-Bashir was, at all materials times, the President of Sudan and under an ICC arrest warrant, which the States parties to the Rome Statute were obligated to execute. Jordan was (and remains) a State Party to the Rome Statute. As President of Sudan, Mr Al-Bashir attended a meeting of the League of Arab States in Amman, Jordan, in March 2017. Jordan failed to arrest him. And Jordan's reason for that failure was that there was a rule of customary

[1] *Competence of the ILO to Regulate Agricultural Labour*, PCIJ (1922), Series B, Nos 2 and 3, p 23.
[2] See *Prosecutor v Ruto and Sang (Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial)* dated 18 June 2013 at p 16 [ICC Trial Chamber V(A)].
[3] See *Prosecutor v Bemba (Judgment)* dated 8 June 2018 [ICC Appeals Chamber] Concurring Separate Opinion of Judge Eboe-Osuji, at p 41.
[4] *Prosecutor v Al-Bashir (Jordan Referral re-Al-Bashir)* dated 6 May 2019 [ICC Appeals Chamber].

international law that shrouded Mr Al-Bashir with head of State immunity from Jordan's arrest.

Jordan's argument was supported by the principle expressed in the Latin maxim: *par in parem non habet imperium*. It means that the principle of equality of States prevented any State from exercising jurisdiction over the sovereign of another State.

Thus, the central question for determination was whether the *par in parem* principle truly prevented Jordan from arresting Mr Bashir at the request of the ICC.

In the assessment of Jordan's argument, the Appeals Chamber drew inspiration from the pronouncements of the PCIJ in the *Case of the SS 'Lotus'* (1927), which examined the objections of France against Turkey's exercise of criminal jurisdiction over Lieutenant Demons, a French citizen, for the collision of two boats of both nations on the high seas.

In their adjudication, the PCIJ considered that the case cast in relief the 'very nature and existing conditions of international law.'[5] In that regard, the PCIJ held, amongst other things, that there is

> the necessity of ascertaining whether or not under international law there is *a principle* which would have prohibited Turkey, *in the circumstances of the case before the Court*, from prosecuting Lieutenant Demons.[6]

In ascertaining whether or not such a general principle existed as such, the PCIJ insisted that

> *this must be ascertained by examining precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle applicable to the particular case may appear*. … The Court therefore *must*, in any event, ascertain whether or not there exists a rule of international law limiting the freedom of States to extend the criminal jurisdiction of their courts to *a situation uniting the circumstances of the present case*.[7]

In other words, the PCIJ is saying that claims about the existence of a 'general principle' of international law must be made on a very careful basis. Lemons are not tangerines. The applicability of a 'principle' of international law from one case to another—as precedent authority—requires 'a close analogy' between the precedent case and 'the case under consideration.' In other words, is there 'a rule of international law' that is applicable to a 'situation uniting the circumstances' of the case at bar.

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[5] *The Case of the SS 'Lotus'* [1927] PCIJ Judgment, Series A, No 10, p 18.
[6] *Ibid*, p 21, emphasis added.
[7] *Ibid*, emphases added.

In the *Al-Bashir* Case, the Appeals Chamber was thus required to consider with care the *par in parem* principle that Jordan was invoking. It is generally accepted that the *par in parem* principle famously traces its origins to *The Schooner Exchange* Case,[8] decided by the US Supreme Court in 1812. The facts of that case were these. During a voyage from Baltimore, Maryland to San Sebastián, Spain, the *Schooner Exchange* was, on 30 December 1810, seized by order of the French Emperor Napoleon Bonaparte, and commissioned as a French warship, under the name of *Balaou*. When the vessel later docked in Philadelphia the following year, in August 1811, because of storm damage, John McFaddon and William Greetham, its original American owners, commenced legal proceedings in the US District Court to reclaim the vessel, on grounds that it had been seized illegally by France. The District Court declined to exercise jurisdiction. The Court of Appeal reversed the District Court. On further appeal to the US Supreme Court, Marshall CJ reversed the Court of Appeal and restored the judgment of the District Court that had declined to exercise jurisdiction. In the process, Marshall CJ issued the classic pronouncements that are nowadays encapsulated in the *par in parem* principle.

So, following the PCIJ's reasoning in the *Lotus* Case, the question before the ICC Appeals Chamber in *Al-Bashir* was whether *The Schooner Exchange* Case offered 'a close analogy' to the *Al-Bashir* Case.

The question inescapably compelled a negative answer, for the following reasons:

- Notably, when the *The Schooner Exchange* Case was decided in 1812, international law operated almost exclusively in the bilateral order of relations between nations. The multilateral dimension was largely non-existent
- *The Schooner Exchange* Case concerned the sovereign immunity of States in the context of such a bilateral relationship
- And, concretely, the *par in parem* principle derived from that case barred a US Federal Court from considering claims of prior ownership asserted by two US citizens over a vessel that had been commandeered by France and turned into its national war ship. The case prohibited a national court of the US from exercising jurisdiction over France.

For the foregoing reasons, the ICC Appeals Chamber concluded in the *Al-Bashir* case that the *par in parem* principle that derived from the *Schooner Exchange* Case, as a general principle of international law, did not afford accurate precedent against prosecuting a sovereign Head of State before an *international adjudicatory body* for individual criminal responsibility under international law. Thus, it did not offer a 'close analogy' to the case under consideration before the ICC, where the arrest and surrender of a Head of State was sought in a vertical relationship with an international criminal court. Therefore, there was

[8] *The Schooner Exchange v McFaddon and Others*, 11 US (7 Cranch) 116 (1812) [US Supreme Court] (hereinafter '*The Schooner Exchange* case').

no 'rule of international law' from the *Schooner Exchange* that 'unit[ed] the circumstances' of the case that the ICC Appeals Chamber had to decide in *Al-Bashir.*

Another persuasive approach derived from the jurisprudence of the PCIJ concerned how to interpret a treaty that may have the effect of placing limitations on national sovereignty. In the *Al-Bashir* case, the Appeals Chamber was urged to interpret the Rome Statute in a restrictive manner, in deference to national sovereignty. But judges of the Appeals Chamber invoked the PCIJ judgment in the *SS Wimbledon* Case, where the Court was urged to adopt a restrictive approach to the interpretation of a treaty that placed limitation on sovereignty. The PCIJ accepted that such a restrictive approach would be warranted in case of doubt that the treaty in question had intended limitation on national sovereignty. However, held the PCIJ, the restrictive approach to treaty interpretation would not be followed where it is reasonably clear that the treaty intended to create an international obligation the necessary effect of which is to place a restriction upon sovereignty, by requiring sovereignty to be exercised in a certain way.[9]

CONCLUSION

There are other ways in which the jurisprudence of the PCIJ inspired the judgment of the Appeals Chamber in the *Al-Bashir* Case, and in other cases. But, the foregoing brief discussion hopefully assists in showing how the PCIJ has helped to guide not only the legal instruments that direct the work of the ICC, but also the substantive jurisprudence of the Court itself.

[9] See *The SS Wimbledon* [1923] PCIJ (ser A) No 1, at para 35; recalled in *Prosecutor v Al-Bashir (Jordan Referral re-Al-Bashir)* dated 6 May 2019 [ICC Appeals Chamber], Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, at p 175.