

The Hague, 10 December 2020

Judge Carmel Agius, President
International Residual Mechanism for Criminal Tribunals
Remarks for the 100th anniversary of PCIJ Statute: “The Statute
and the future of international adjudication”
10 December 2020

President Yusuf,

Excellencies,

Ladies and Gentlemen,

Dear Friends,

Thank you for the invitation to commemorate the centennial of the Statute of the Permanent Court of International Justice (PCIJ). It is my pleasure and privilege to join this distinguished panel.

When thinking about today’s topic and contemplating the future of international adjudication I was reminded of Lord Byron’s saying that "The best prophet of the future is the past". I shall endeavour, therefore, to extract from the history of international adjudication, starting from the PCIJ, some reflections about its possible future.

The first aspect that I would like to discuss, and possibly the most crucial for the existence of international adjudication, is the commitment of States to international rule of law and their support for international judicial processes. Indeed, the creation and development of such judicial mechanisms is dependent upon the interest of the international community to promote the rule of law in international legal fora. An interest that has grown in the last century and exponentially in recent decades. Already during the first half of the twentieth century an increasing number of States chose to settle disputes peacefully with the assistance of international mechanisms such as the Permanent Court of Arbitration, the PCIJ and, its successor, the International Court of Justice (ICJ).

Interestingly, already in the transition from the PCIJ to the ICJ there was a small but perceptible change in the approach to international judicial institutions. While the PCIJ was envisaged in the Covenant of the League of Nations, the ICJ was established as part of the United Nations with its Statute as an integral part of the UN Charter. Furthermore, all members of the UN are *ipso facto* a party to the Statute of the ICJ.

Other judicial institutions appeared during the second half of the last century; institutions which States entrusted with ensuring their own compliance with international obligations, whether at the regional level, such as the European or the Inter-American courts of Human Rights, or later, at the international level, as in the case of the International Tribunal for the Law of the Sea (ITLOS).

In the 1990s the international community was ripe for taking international legal mechanisms a step further, leading to the creation of several international and hybrid courts empowered with criminal jurisdiction over individuals – including states’ own officials. This important tool to combat impunity was missing from the international arena since the Tokyo and Nuremberg tribunals. It was ushered in

with the establishment of the ICTY, followed by the creation of the ICTR, SCSL and STL (to name a few), and culminated in the establishment of the ICC.

The support of States is not only measured in the creation of international judicial institutions or in the scores of contentious cases brought before the ICJ, but also in their actions behind the scenes. States have been proving their support, for example, by enforcing the sentences of the individuals convicted by the ICTY, the ICTR or the Mechanism. Thanks to the assistance of States, all persons indicted by the ICTY for international crimes were brought to justice, and we have recently witnessed a global endeavour, supported by many States, resulting in the apprehension in France of the 22-year long fugitive Félicien Kabuga and in his transfer to the custody of the Mechanism, for international crimes allegedly committed during the genocide in Rwanda.

Another yardstick for evaluating the future of international adjudication, which is a corollary of States' support, is the growing scope of jurisdiction. In line with the sacrosanct principle of States' sovereignty and equality, international adjudication between States is consensual in nature. As stated by the PCIJ, its jurisdiction "exists in so far as [the] consent has been given".¹ Equally, while States may accept the jurisdiction of the ICJ to be compulsory, it is the prerogative of States to grant the ICJ such jurisdiction over its international disputes. The creation of the ICTY and ICTR, via the vessel of Chapter VII of the UN Charter, has reintroduced international criminal jurisdiction, endowed with primacy over national jurisdiction. A jurisdiction for international crimes committed during armed conflicts or in times of peace by any individual, including high state officials who were the personification of the State at the relevant time. While the jurisdiction of the *ad hoc* international criminal tribunals was of limited temporal and territorial scope, the ICC was established as a permanent institution with jurisdiction over future situations as well. The ICC enjoys the commitment of over 120 member-states who have waived the immunity that their leaders may enjoy in criminal proceedings before the Court. The acceptance of such international jurisdiction by States over their internal and external affairs cannot be overstated.

This is not to say that international judicial mechanisms enjoy unconditional States' support. The last century has seen the level of States' support fluctuate – not all ICJ judgements were complied with, two arrest warrants issued by the ICTY in a contempt case are yet to be executed, six persons indicted by the ICTR for international crimes are still at large and it remains to be seen how the case of Omar Al-Bashir will unfold. However, the backing of States is generally consistent. The increased recourse to international legal fora and the evolving scope and types of jurisdictions are a testament to the growing confidence of States in international judicial mechanisms. It does not mean that international courts will not, or should not, be subject to scrutiny and constructive criticism, indeed, it is required for international institutions to evolve and progress.

If the past is any indication about the future, I am confident that the unwavering commitment, of most States, to international judicial mechanisms and rule of law will remain resolute and constitute the bedrock of international adjudication in the future as well. My hope is that the commitment of States to the international rule of law will be transformed into a customary obligation to resort to adjudication, so that international courts will gain jurisdiction upon a request of one State, without the precondition of the other State's consent.

Now, it is important to keep in mind that while international adjudication may be limited by the scope of jurisdiction and confined to specific disputes and parties, the interpretation of international law within a judgement knows no boundaries and has international ramifications. This is the next topic I would like to discuss.

First, we need to take note of the important role that Statutes play in the advancement of international law. Legal institutions may metamorphose with time, the PCIJ was succeeded by the ICJ and the Mechanism has stepped into the shoes of the ICTY and the ICTR, but the essence of their Statutes

persists and becomes an important part in the development of international law. The Statute of the PCIJ was created as a new mould and introduced the highly cited Article 38 regarding the sources of international law. Similarly, the creation of the ICTY by the Security Council was innovative in and of itself and its Statute developed the criminalisation of international humanitarian law violations, based, *inter alia*, on the foundations laid by the Nuremberg Tribunal. Several years later, we witnessed the contribution of the ICC Statute to the formulation of Crimes Against Humanity and to the criminalisation of the Crime of Aggression.

Time constraints prevent me from delving into the immeasurable and vital contribution of these and similar institutions to international law. Suffice to say that any future international adjudication will be based on the pioneering jurisprudence of previous tribunals and courts that paved the way forward. Notwithstanding, I will limit myself to two observations, first, with regard to the diversity in international adjudication. The ICJ, for example, had to grapple with varied fields of international law, including International Humanitarian Law and International Environmental Law. The expansion of the subject-matter will require international adjudication to specialise in the relevant field and might bring about the creation of other more specialised legal venues. ITLOS and the special chambers within are an interesting development in that regard. This also means that, with the expansion of international law, the area of the *domaine réservé* of States contracts. I believe that the subject-matter of international adjudication will continue to evolve and affect almost every aspect of life.

Furthermore, it should be recognised that the exponential progress of international law in recent decades is directly linked to the proliferation of international judicial mechanisms. The establishment of such institutions, fusing different legal disciplines and schools of thought, provided international law with a fertile soil and a constructive environment to thrive. In the early stages, some perceived divergence of opinions among non-hierarchical institutions as fragmentation of international law, as an echo of its fragility; but time proved that it is precisely the vibrant legal dialogue, the grafting of different positions in international law, which made it robust and allowed it to grow in changing times. The cross-pollination between international judicial institutions assisted international law. Notably, international courts and tribunals contributed to the development of international criminal law, and their jurisprudence on core international crimes nourished decisions of human rights institutions on such issues. In turn, the case law of human rights institutions was instructive in the decision-making of international criminal tribunals. As eloquently put by Judge Higgins, in discussing the difference of opinions between the ICJ and ICTY, we are “working in parallel in harmony to achieve our respective tasks”.ⁱⁱ Let us remember that plurality is moderated and counterbalanced by the institutions themselves or by their mandate. Even when the last of the *ad hoc* international or hybrid criminal tribunals will come to its natural end, passing on the torch to the ICC as the principal guarantor for the development and promotion of international criminal law, plurality will continue to be acknowledged and channeled via the principle of complementarity. In other words, the diversity of international judicial institutions is not a by-product of international adjudication, but rather it is, and will remain, an essential component thereof.

Finally, I would like to share some thoughts on international adjudication as an important contributor to the peaceful settlement of disputes. Certainly, this is the main *raison d'être* of international judicial mechanisms – the PCIJ was created with the experience of the First World War in mind, which the ICJ succeeded in the aftermath of Second World War, and the ICTY was established, in the midst of the armed conflicts in the Balkans, with the conviction that it would contribute to the restoration and maintenance of peace.

The contribution of these international institutions to resolving disputes is not limited to pronouncing on contentious legal questions or on the accountability of States or individuals, it is also about setting the record straight. The historical record assists in commemorating past atrocities, without which we

are condemned to relive them – to paraphrase an old saying. This requires probative evidence that is sufficiently convincing to fulfil the standard of proof. In this respect, facts proven by other international tribunals, reports of independent fact-finding missions and other independent investigative mechanisms, such as the ones for Syria or Myanmar, shall be, as we all know, instrumental in future international adjudication.

To conclude, as I mentioned at the outset, we can and we must learn from our past about the future. On this basis, we can cautiously predict a vibrant, robust, interesting as well as challenging international adjudication in the future. However, I say “cautiously” because, as the current times have proven us yet again, it is difficult to anticipate unprecedented events that may change the game altogether. Yet, whatever path States will take for resolving disputes it will surely lead to The Hague, metaphorically speaking.

Thank you for your attention, please stay safe and optimistic.

ⁱ Mavrommatis Concessions (Jurisdiction), Judgement No. 2, 30 August 1924, PCIJ A 2, para. 30.

ⁱⁱ Judge Rosalyn Higgins, Speech at the Meeting of Legal Advisers of the Ministries of Foreign Affairs, 29 October 2007, available at: <https://www.icj-cij.org/public/files/press-releases/7/14097.pdf>