DECLARATION OF JUDGE VAN DEN WYNGAERT

Arrest warrant — Enforcement in third States — War crimes — Genocide — Crimes against humanity — Universal jurisdiction — International criminal court — National prosecutions — Customary international (criminal) law — Immunities — Victims seising courts in third States — State of origin unwilling or unable to prosecute — Importance of decision on the merits: International Court of Justice revisiting the 1927 "Lotus" *precedent of the Permanent Court of International Justice.*

1. I fully support the Court's decision to dismiss the applicant State's request for the indication of provisional measures. There is no irreparable prejudice to the rights which are the subject of the dispute, and the measures requested (immediate discharge of disputed arrest warrant) are not justified by urgency.

2. At the outset I wish to clarify that the disputed arrest warrant is a *national* arrest warrant, not an "international arrest warrant"[1] that can be enforced automatically in third countries. There is always a need for validation by the authorities of the State where the person named in the warrant has been found, even in the case where a red notice has been issued by Interpol[2], which has not happened in the case of Mr. Yerodia Ndombasi.

3. I agree with the statement in paragraph 76 of the Order that a decision on the Congo's Application should be reached *with all expedition.* The dispute between the two countries concerns an important question that may be crucial to the further development of modern international criminal law. The basic question that it raises is how far States are allowed (or are obliged) to go when implementing and enforcing norms of international criminal law. As more and more States are adopting legislation to this effect, problems similar to the ones that gave rise to the dispute between the Congo and Belgium are likely to arise in the future.

[1] See the nature of the claim in the Application of the Congo, reproduced in paragraph 3 of the present Order.

[2] Interpol, Secretariat général, *Rapport sur la valeur juridique des notices rouges*, ICPO — Interpol — General Assembly, 66th Session, New Delhi, 15-21 October 1997, AGN/66/RAP/8, No. 8 Red Notices, as amended pursuant to Resolution No. AGN/66/RES/7.

4. The international community undoubtedly agrees in principle with the proposition that the "core crimes" of international criminal law (war crimes, genocide and crimes against humanity) should not remain unpunished[3]. However, *how* this should be realized in practice is still the subject of much discussion and debate.

5. Ideally, such crimes should be prosecuted before international criminal courts such as the permanent international criminal court (Rome Statute for the International Criminal Court (1998)[4]) or the *ad hoc* international criminal tribunals (International Criminal Tribunal for the Former Yugoslavia (1993)[5], International Criminal Tribunal for Rwanda (1994)[6] or the (future) Sierra Leone Special Court[7]. It is clear, however, that not *all* cases will be justiciable before these courts. The principle of complementarity in the Rome Statute confers primary responsibility for prosecution of core crimes on States, not on the International Criminal Court, except in the cases where States are unwilling or unable to prosecute (Art. 17). Moreover, this court will only have jurisdiction in respect of crimes committed after the entry into force of the statute (Art. 11).

6. In the absence of supranational enforcement mechanisms, national criminal prosecution before domestic courts is the only means to enforce international criminal law. States have not only a moral but also a legal obligation under international law to ensure that they are able to prosecute international core crimes domestically. This flows

[3] See, for example, Principles of International Co-Operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, General Assembly resolution 3074 (XXVIII), 28 United Nations, *Official Records of the General Assembly, Supplement No. 30A*, at p. 78, United Nations doc. A/9030/Add.1 (1973); Security Council resolution 978, 27 February 1995, United Nations doc. S/RES/978 (1995); Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, resolution 1995/4 on the Prevention of Incitement to Hatred and Genocide, particularly by the Media, 18 August 1995, United Nations doc. E/CN.4.Sub.2/RES/1995/4, 23 October 1997; Security Council resolution 1234, 9 April 1999, United Nations doc. S/RES/1234 (1999); Security Council resolution 1291 of 24 February 2000, United Nations doc. S/RES/1291 (2000); Security Council resolution 1304, 16 June 2000, United Nations doc. S/RES/1304 (2000).

[4] Rome Statute of the International Criminal Court, *ILM*, 1998, p. 999.

[5] Security Council resolution 827 (1993) on Establishing the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, *ILM*, 1993, p. 1192 (text statute) and p. 1203 (text resolution) (as amended by Security Council resolution 1166 of 13 May 1998).

[6] Security Council resolution 955 establishing the International Tribunal for Rwanda, *ILM*, 1994, p. 1598.

[7] Security Council resolution 1315, 14 August 2000, United Nations doc. S/RES/1315 (2000); Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, United Nations doc. S/2000/915 (2000).

from a wide range of conventions that lay down the principle *aut dedere aut judicare*[8].

7. The idea that traditional limitations on criminal prosecution (territorial jurisdiction, immunities) cannot be applied to international core crimes is gaining support. Numerous international criminal law instruments (ranging from the Nuremberg principles[9] through the various subsequent codifications of international criminal law[10] to the Rome Statute for an International Criminal Court) have, in different ways, laid down the principles of universal jurisdiction[11], the non-applicability of traditional immunities[12] and the non-applicability of statutory limita-

[8] See, for example, Arts. 49 (I), 50 (II), 129 (III) and 146 (IV), Geneva Conventions 1949 (*infra*, footnote 10); Art. 7, Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970, *ILM*, 1971, p. 133); Art. 7, Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971, *ILM*, 1971, p. 1151); Art. 7, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973, *ILM*, 1974, p. 41); Art. 7, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984, *ILM*, 1984, p. 1027); Art. 14, Inter-American Convention to Prevent and Punish Torture (Cartagena de Indias, 12 September 1985, *OAS Treaty Series*, No. 67); Art. 7, European Convention on the Suppression of Terrorism (Strasbourg, 27 January 1977, *ETS*, No. 90); Art. 8, International Convention for the Suppression of Terrorist Bombings (New York, 12 January 1998, *ILM*, 1998, p. 249). See also Art. 15, paras. 3 and 4, and Art. 16, para. 10, United Nations Convention against Transnational Organized Crime, adopted by the United Nations General Assembly on 15 November 2000 (United Nations doc. A/55/383) and to be opened for signature from 12 December 2000 in Palermo, Italy (http://www.un.cjin.org/Documents/documents.html).

[9] Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, United Nations, *Official Records of the General Assembly, Fifth Session, Supplement No. 12*, doc. A/1316 (1950).

[10] See, for example, Convention on the Prevention and Suppression of the Crime of Genocide, Paris, 9 December 1948, *UNTS*, Vol. 78, p. 277; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, *UNTS*, Vol. 75, p. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, *UNTS*, Vol. 75, p. 85; Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, *UNTS*, Vol. 75, p. 135; Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, *UNTS*, Vol. 75, p. 287) and their Additional Protocols (1977) (Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, United Nations, *Official Records of the General Assembly*, doc. A/32/144, 15 August 1977; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Geneva, 8 June 1977, United Nations, *Official Records of the General Assembly*, doc. A/32/144, 15 August 1977).

[11] See, for example, Arts. 49 (I), 50 (II), 129 (III), 146 (IV), Geneva Conventions, *supra* footnote 10.

[12] See, for example, Art. IV, Genocide Convention, *supra* footnote 10.

tions[13]. There is a growing opinion in legal doctrine supporting the view that these principles are applicable to the international "core crimes" because these crimes are now prohibited under customary international law[14]. Some argue that there is a right and even a duty on States to prosecute such crimes. Several decisions of the *ad hoc* International Criminal Tribunals tend to support this view[15].

8. However, uncertainty prevails as to the implications of this proposition for *national* prosecution of international core crimes, in particular regarding the question as to whether the principles described above apply to prosecutions before national courts in the same way as they do before international courts. Increasingly victims or non-governmental organizations representing such victims call upon *third* States to prosecute persons suspected of international core crimes, because the State where these crimes occurred is unwilling or unable to prosecute. Some legal systems (e.g., the civil law systems that apply the *partie civile* system) actually allow victims to trigger criminal proceedings and do not distinguish between national and foreign victims for that purpose[16]. Often, such victims claim refugee status in the State in which they bring their complaint. In certain cases, they acquire the nationality of the State to which they have fled. It can be expected that cases of this nature will grow in number.

9. States engaging in the domestic prosecution of such crimes as well as States called upon to co-operate with these States in extradition proceedings are confronted with applying norms of international criminal-

[13] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, New York, 26 November 1968, *ILM*, 1969, p. 68, and European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, Strasbourg, 25 January 1974, *ETS*, No. 82.

[14] See, for example, American Law Institute, *Restatement of the Law (Third). The Foreign Relations Law of the United States*, 1987, para. 404, Reporters' Notes, p. 257. See also International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind* (1996), text adopted by the Commission at its forty-eighth session, 1996, *Yearbook of the International Law Commission*, 1996, Vol. II (2), doc. A/51/10; http:// www.un.org/law/ilc/texts/dcodefra.htm.

[15] See, for example, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, *Tadić*, para. 134 (Common Art. 3, Geneva Conventions); ICTY, Judgment, 10 December 1998, *Furundžija*, para. 153 (Torture); ICTR, Judgment, 2 September 1998, *Akayesu*, paras. 495 (Genocide) and 608 (Common Art. 3, Geneva Conventions); ICTR, Judgment, 21 May 1999, *Kayishema and Ruzindana*, para. 88 (Genocide).

[16] For a survey of national criminal procedure systems in Europe, see C. Van den Wyngaert (ed.), *Criminal Procedure Systems in the European Community*, 1993.

law. Increasingly, domestic courts are called upon to tackle difficult technical notions of public international law such as *jus cogens*, *erga omnes* obligations and the question what norms qualify as norms of *customary* international (criminal) law. The various *Pinochet* decisions (in Spain[17], Belgium[18], France[19] and the United Kingdom[20]) and the Dutch *Bouterse* case[21] are examples of a growing number of national judicial decisions[22] dealing with (different aspects) of the issues of international criminal law that are now before the International Court of Justice.

10. The case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)* is the first modern case which confronts two States on the issues of extraterritorial jurisdiction and immunity arising from the application of a domestic statute *implementing* international core crimes. Times have changed since the Permanent Court of International Justice decided the *"Lotus"* case in 1927[23]. International law now calls upon States to prosecute and punish international core crimes, but leaves some uncertainty as to the practical implications of this proposition as far as the *enforcement* of domestic implementation laws is concerned. For the sake of legal certainty, it is important that the International Court of Justice decides on the merits of the present case with expedition.

(Signed) Christine VAN DEN WYNGAERT.

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[17] *Audiencia Nacional, Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena*, 5 November 1998, http://www.derechos.org/nizkor/chile/juicio/audi.html. See also *AJIL*, 1999, pp. 690-969.

[18] Investigating Judge, Tribunal of first instance, Brussels, 6 November 1998, *Revue de droit pénal et de criminologie*, 1999, p. 278; *Journal des Tribunaux*, 1999, p. 308.

[19] Investigating Judge, *Tribunal de Grande Instance*, Paris, 2 and 12 November 1998, *AJIL*, 1999, pp. 696-700.

[20] *R.* v. *Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ungarte*, 25 November 1998, All ER (1998), p. 897; *R.* v. *Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ungarte*, 24 March 1999, All ER (1999), p. 97.

[21] Court Amsterdam, Order of 20 November 2000, http://www.gerechtshof-amsterdam.nl/uitspraken/art12/Bouterse/bes_bouterse.htm. See also Court Amsterdam, Order of 3 March 2000, *Nederlandse Jurisprudentie*, 2000, pp. 1795-1800.

[22] See also Bundesgerichtshof, 30 April 1999, *Neue Zeitschrift für Strafrecht*, 1999, pp. 396-404; Bundesgerichtshof, Ermittlungsrichter, 13 February 1994, *Neue Zeitschrift für Strafrecht*, 1994, pp. 232-233; Bundesgerichtshof, 11 December 1998, *Neue Zeitschrift für Strafrecht*, p. 236; Cour de cassation (fr.), 6 janvier 1998, *Bull. Crim.*, 1998, pp. 3-8; Federal Court of Australia, 1 September 1999, *Nulyarimma* v. *Thompson, FCA*, 1192.

[23] Permanent Court of International Justice, the case of the S.S. *"Lotus" (France/Turkey)*, 7 September 1927, *P.C.I.J., Series A, No. 10.*