SEPARATE OPINION OF PRESIDENT GUILLAUME

[English Original Text]

Criminal jurisdiction of national courts — Place of commission of the offence — Other criteria of connection — Universal jurisdiction — Absence of.

1. I fully subscribe to the Judgment rendered by the Court. I believe it useful however to set out my position on one question which the Judgment has not addressed: whether the Belgian judge had jurisdiction to issue an international arrest warrant against Mr. Yerodia Ndombasi on 11 April 2000.

This question was raised in the Democratic Republic of the Congo's Application instituting proceedings. The Congo maintained that the arrest warrant violated not only Mr. Yerodia's immunity as Minister for Foreign Affairs but also "the principle that a State may not exercise its authority on the territory of another State". It accordingly concluded that the universal jurisdiction which the Belgian State had conferred upon itself pursuant to Article 7 of the Law of 16 June 1993, as amended on 10 February 1999, was in breach of international law and that the same was therefore true of the disputed arrest warrant.

The Congo did not elaborate on this line of argument during the oral proceedings and did not include it in its final submissions. Thus, the Court could not rule on this point in the operative part of its Judgment. It could, however, have addressed certain aspects of the question of universal jurisdiction in the reasoning for its decision (see Judgment, para. 43).

That would have been a logical approach; a court's jurisdiction is a question which it must decide before considering the immunity of those before it. In other words, there can only be immunity from jurisdiction where there is jurisdiction. Moreover, this is an important and controversial issue, clarification of which would have been in the interest of all States, including Belgium in particular. I believe it worthwhile to provide such clarification here.

2. The Belgian Law of 16 June 1993, as amended by the Law of 10 February 1999, aims at punishing serious violations of international humanitarian law. It covers certain violations of the Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 additional to those Conventions. It also extends to crimes against humanity, which it defines in the terms used in the Rome Convention of 17 July 1998. Article 7 of the Law adds that "[t]he Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed".

3. The disputed arrest warrant accuses Mr. Yerodia of grave breaches of the Geneva Conventions and of crimes against humanity. It states that under Article 7 of the Law of 16 June 1993, as amended, perpetrators of those offences "fall under the jurisdiction of the Belgian courts, regardless of their nationality or that of the victims". It adds that "the Belgian courts have jurisdiction even if the accused (Belgian or foreign) is not found in Belgium". It states that "[i]n the matter of humanitarian law, the lawmaker's intention was thus to derogate from the principle of the territorial character of criminal law, in keeping with the provisions of the four Geneva Conventions and of Protocol I". It notes that

> "the Convention of 10 December 1984 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [is] to be viewed in the same way, recognizing the legitimacy of extra-territorial jurisdiction in the area and enshrining the principle of *aut dedere aut judicare*".

It concludes on these bases that the Belgian courts have jurisdiction.

4. In order to assess the validity of this reasoning, the fundamental principles of international law governing States' exercise of their criminal jurisdiction should first be reviewed.

The primary aim of the criminal law is to enable punishment in each country of offences committed in the national territory. That territory is where evidence of the offence can most often be gathered. That is where the offence generally produces its effects. Finally, that is where the punishment imposed can most naturally serve as an example. Thus, the Permanent Court of International Justice observed as far back as 1927 that "in all systems of law the principle of the territorial character of criminal law is fundamental"[1].

The question has, however, always remained open whether States other than the territorial State have concurrent jurisdiction to prosecute offenders. A wide debate on this subject began as early as the foundation in Europe of the major modern States. Some writers, like Covarruvias and Grotius, pointed out that the presence on the territory of a State of a foreign criminal peacefully enjoying the fruits of his crimes was intolerable. They therefore maintained that it should be possible to prosecute perpetrators of certain particularly serious crimes not only in the State on whose territory the crime was committed but also in the country where they sought refuge. In their view, that country was under an obligation to arrest, followed by extradition or prosecution, in accordance with the maxim *aut dedere aut judicare*[2].

Beginning in the eighteenth century however, this school of thought

[1] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 20.

[2] Covarruvias, *Practicarum quaestionum*, Chap. II, No. 7; Grotius, *De jure belli ac pacis*, Book II, Chap. XXI, para. 4; see also Book I, Chap. V.

favouring universal punishment was challenged by another body of opinion, one opposed to such punishment and exemplified notably by Montesquieu, Voltaire and Jean-Jacques Rousseau[3]. Their views found expression in terms of criminal law in the works of Beccaria, who stated in 1764 that "judges are not the avengers of humankind in general . . . A crime is punishable only in the country where it was committed."[4]

Enlightenment philosophy inspired the lawmakers of the Revolution and nineteenth-century law. Some went so far as to push the underlying logic to its conclusion, and in 1831 Martens could assert that "the lawmaker's power [extends] over all persons and property present in the State" and that "the law does not extend over other States and their subjects"[5]. A century later, Max Huber echoed that assertion when he stated in 1928, in the Award in the *Island of Palmas* case, that a State has "exclusive competence in regard to its own territory"[6].

In practice, the principle of territorial sovereignty did not permit of any exception in respect of coercive action, but that was not the case in regard to legislative and judicial jurisdiction. In particular, classic international law does not exclude a State's power in some cases to exercise its judicial jurisdiction over offences committed abroad. But as the Permanent Court stated, once again in the *"Lotus"* case, the exercise of that jurisdiction is not without its limits[7]. Under the law as classically formulated, a State normally has jurisdiction over an offence committed abroad only if the offender, or at the very least the victim, has the nationality of that State or if the crime threatens its internal or external security. Ordinarily, States are without jurisdiction over crimes committed abroad as between foreigners.

5. Traditionally, customary international law did, however, recognize one case of universal jurisdiction, that of piracy. In more recent times, Article 19 of the Geneva Convention on the High Seas of 29 April 1958 and Article 105 of the Montego Bay Convention of 10 December 1982 have provided:

> "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft . . . and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed."

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[3] Montesquieu, *L'esprit des lois*, Book 26, Chaps. 16 and 21; Voltaire, *Dictionnaire philosophique*, heading "Crimes et délits de temps et de lieu"; Rousseau, *Du contrat social*, Book II, Chap. 12, and Book III, Chap. 18.

[4] Beccaria, *Traité des délits et des peines*, para. 21.

[5] G. F. de Martens, *Précis du droit des gens modernes de l'Europe fondé sur les traités et l'usage*, 1831, Vol. I, paras. 85 and 86 (see also para. 100)

[6] United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. II, Award of 4 April 1928, p. 838.

[7] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 19.

Thus, under these conventions, universal jurisdiction is accepted in cases of piracy because piracy is carried out on the high seas, outside all State territory. However, even on the high seas, classic international law is highly restrictive, for it recognizes universal jurisdiction only in cases of piracy and not of other comparable crimes which might also be committed outside the jurisdiction of coastal States, such as trafficking in slaves[8] or in narcotic drugs or psychotropic substances[9].

6. The drawbacks of this approach became clear at the beginning of the twentieth century in respect of currency counterfeiting, and the Convention of 20 April 1929, prepared within the League of Nations, marked a certain development in this regard. That Convention enabled States to extend their criminal legislation to counterfeiting crimes involving foreign currency. It added that "[f]oreigners who have committed abroad" any offence referred to in the Convention "and who are in the territory of a country whose internal legislation recognises as a general rule the principle of the prosecution of offences committed abroad, should be punishable in the same way as if the offence had been committed in the territory of that country". But it made that obligation subject to various conditions[10].

A similar approach was taken by the Single Convention on Narcotic Drugs of 30 March 1961[11] and by the United Nations Convention on Psychotropic Substances of 21 February 1971[12], both of which make certain provisions subject to "the constitutional limitations of a Party, its legal system and domestic law". There is no provision governing the jurisdiction of national courts in any of these conventions, or for that matter in the Geneva Conventions of 1949.

7. A further step was taken in this direction beginning in 1970 in connection with the fight against international terrorism. To that end, States established a novel mechanism: compulsory, albeit subsidiary, universal jurisdiction.

This fundamental innovation was effected by the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970[13]. The Convention places an obligation on the State in whose territory the perpetrator of the crime takes refuge to extradite or

[8] See the Geneva Slavery Convention of 25 September 1926 and the United Nations Supplementary Convention of 7 September 1956 (French texts in de Martens, *Nouveau recueil général des traités*, 3rd Series, Vol. XIX, p. 303, and Colliard and Manin, *Droit international et histoire diplomatique*, Vol. 1, p. 220).

[9] Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed at Vienna on 20 December 1988, deals with illicit traffic on the seas. It reserves the jurisdiction of the flag State (French text in *Revue générale de droit international public*, 1989/3, p. 720).

[10] League of Nations, *Treaty Series (LNTS)*, Vol. 112, p. 371.

[11] United Nations, *Treaty Series (UNTS)*, Vol. 520, p. 151.

[12] *UNTS*, Vol. 1019, p. 175.

[13] *UNTS*, Vol. 860, p. 105.

prosecute him. But this would have been insufficient if the Convention had not at the same time placed the States parties under an obligation to establish their jurisdiction for that purpose. Thus, Article 4, paragraph 2, of the Convention provides:

> "Each Contracting State shall . . . take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to [the Convention]."

This provision marked a turning point, of which the Hague Conference was moreover conscious[14]. From then on, the obligation to prosecute was no longer conditional on the existence of jurisdiction, but rather jurisdiction itself had to be established in order to make prosecution possible.

8. The system as thus adopted was repeated with some minor variations in a large number of conventions: the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971; the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December 1973; the New York Convention against the Taking of Hostages of 17 December 1979; the Vienna Convention on the Physical Protection of Nuclear Materials of 3 March 1980; the New York Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984; the Montreal Protocol of 24 February 1988 concerning acts of violence at airports; the Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988; the Protocol of the same date concerning the safety of platforms located on the continental shelf; the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988; the New York Convention for the Suppression of Terrorist Bombings of 15 December 1997; and finally the New York Convention for the Suppression of the Financing of Terrorism of 9 December 1999.

9. Thus, a system corresponding to the doctrines espoused long ago by Grotius was set up by treaty. Whenever the perpetrator of any of the offences covered by these conventions is found in the territory of a State, that State is under an obligation to arrest him, and then extradite or prosecute. It must have first conferred jurisdiction on its courts to try him if he is not extradited. Thus, universal punishment of the offences in question is assured, as the perpetrators are denied refuge in all States.

By contrast, none of these texts has contemplated establishing jurisdic-

[14] The Diplomatic Conference at The Hague supplemented the ICAO Legal Committee draft on this point by providing for a new jurisdiction. That solution was adopted on Spain's proposal by a vote of 34 to 17, with 12 abstentions (see *Annuaire français de droit international*, 1970, p. 49).

tion over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question. Universal jurisdiction *in absentia* is unknown to international conventional law.

10. Thus, in the absence of conventional provisions, Belgium, both in its written Memorial and in oral argument, relies essentially on this point on international customary law.

11. In this connection, Belgium cites the development of international criminal courts. But this development was precisely in order to provide a remedy for the deficiencies of national courts, and the rules governing the jurisdiction of international courts as laid down by treaty or by the Security Council of course have no effect upon the jurisdiction of national courts.

12. Hence, Belgium essentially seeks to justify its position by relying on the practice of States and their *opinio juris*. However, the national legislation and jurisprudence cited in the case file do not support the Belgian argument, and I will give some topical examples of this.

In France, Article 689-I of the Code of Criminal Procedure provides:

> "Pursuant to the international conventions referred to in the following articles[15], any person, if present in France, may be prosecuted and tried by the French courts if that person has committed outside the territory of the Republic one of the offences specified in those articles."

Two Laws, of 2 January 1995 and 22 May 1996, concerning certain crimes committed in the former Yugoslavia and in Rwanda extended the jurisdiction of the French courts to such crimes where, again, the presumed author of the offence is found in French territory[16]. Moreover, the French Court of Cassation has interpreted Article 689-I restrictively, holding that, "in the absence of any direct effect of the four Geneva Conventions in regard to search and prosecution of the perpetrators of grave breaches, Article 689 of the Code of Criminal Procedure cannot be applied" in relation to the perpetrators of grave breaches of those Conventions found on French territory[17].

In Germany, the Criminal Code (Strafgesetzbuch) contains in Section 6, paragraphs 1 and 9, and in Section 7, paragraph 2, provisions permitting the prosecution in certain circumstances of crimes committed abroad. And indeed in a case of genocide *(Tadić)* the German Federal Supreme Court (Bundesgerichtshof) recalled that: "German criminal law is applicable pursuant to section 6, paragraph 1, to an act of genocide committed abroad independently of the law of the territorial State (principle of so-called

[15] Namely the international conventions mentioned in paragraphs 7 and 8 of the present opinion to which France is party.

[16] For the application of this latter Law, see Court of Cassation, Criminal Chamber, 6 January 1998, *Munyeshyaka*.

[17] Court of Cassation, Criminal Chamber, 26 March 1996, No. 132, *Javor*.

universal jurisdiction)". The Court added, however, that "a condition precedent is that international law does not prohibit such action"; it is only, moreover, where there exists in the case in question a "link" legitimizing prosecution in Germany "that it is possible to apply German criminal law to the conduct of a foreigner abroad. In the absence of such a link with the forum State, prosecution would violate the principle of non-interference, under which every State is required to respect the sovereignty of other States."[18] In that case, the Federal Court held that there was such a link by reason of the fact that the accused had been voluntarily residing for some months in Germany, that he had established his centre of interests there and that he had been arrested on German territory.

The Netherlands Supreme Court (Hoge Raad) was faced with comparable problems in the *Bouterse* case. It noted that the Dutch legislation adopted to implement the Hague and Montreal Conventions of 1970 and 1971 only gave the Dutch courts jurisdiction in respect of offences committed abroad if "the accused was found in the Netherlands". It concluded from this that the same applied in the case of the 1984 Convention against Torture, even though no such specific provision had been included in the legislation implementing that Convention. It accordingly held that prosecution in the Netherlands for acts of torture committed abroad was possible only

> "if one of the conditions of connection provided for in that Convention for the establishment of jurisdiction was satisfied, for example if the accused or the victim was Dutch or fell to be regarded as such, or if the accused was on Dutch territory at the time of his arrest"[19].

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[18] Bundesgerichtshof, 13 February 1994, 1 BGs 100.94, in *Neue Zeitschrift für Strafrecht*, 1994, pp. 232-233. The original German text reads as follows:

> "4 *a)* Nach § 6 Nr. 1 StGB gilt deutsches Strafrecht für ein im Ausland begangenes Verbrechen des Völkermordes (§ 220a StGB), und zwar unabhängig vom Recht des Tatorts (sog. Weltrechtsprinzip). Vorraussetzung ist allerdings — über den Wortlaut der Vorschrift hinaus —, daß ein völkerrechtliches Verbot nicht entgegensteht und außerdem ein legitimierender Anknüpfungspunkt im Einzelfall einen unmittelbaren Bezug der Strafverfolgung zum Inland herstellt; nur dann ist die Anwendung innerstaatlicher (deutscher) Strafgewalt auf die Auslandstat eines Ausländers gerechtfertigt. Fehlt ein derartiger Inlandsbezug, so verstößt die Strafverfolgung gegen das sog. Nichteinmischungsprinzip, das die Achtung der Souveränität fremder Staaten gebietet (BGHSt 27, 30 und 34, 334; Oehler JR 1977, 424; Holzhausen NStZ 1992, 268)."

Similarly, Düsseldorf Oberlandesgericht, 26 September 1997. Bundesgerichtshof, 30 April 1999, *Jorgić*; Düsseldorf Oberlandesgericht, 29 November 1999, Bundesgerichtshof, 21 February 2001, *Sokolvić*.

[19] Hoge Raad, 18 September 2001, *Bouterse*, para. 8.5. The original Dutch text reads as follows:

> "indien daartoe een in dat Verdrag genoemd aankopingspunt voor de vestiging van rechtsmacht aanwezig is, bijvoorbeeld omdat de vermoedelijke dader dan wel het slachtoffer Nederlander is of daarmee gelijkgesteld moet worden, of omdat de vermoedelijke dader zich ten tijde van zijn aanhouding in Nederland bevindt".

Numbers of other examples could be given, and the only country whose legislation and jurisprudence appear clearly to go the other way is the State of Israel, which in this field obviously constitutes a very special case.

To conclude, I cannot do better than quote what Lord Slynn of Hadley had to say on this point in the first *Pinochet* case:

> "It does not seem . . . that it has been shown that there is any State practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in National Courts on the basis of the universality of jurisdiction . . . That international law crimes should be tried before international tribunals or in the perpetrator's own state is one thing; that they should be impleaded without regard to a long established customary international law rule in the Courts of other states is another . . . The fact even that an act is recognised as a crime under international law does not mean that the Courts of all States have jurisdiction to try it . . . There is no universality of jurisdiction for crimes against international law . . ."[20]

In other words, international law knows only one true case of universal jurisdiction: piracy. Further, a number of international conventions provide for the establishment of subsidiary universal jurisdiction for purposes of the trial of certain offenders arrested on national territory and not extradited to a foreign country. Universal jurisdiction *in absentia* as applied in the present case is unknown to international law.

13. Having found that neither treaty law nor international customary law provide a State with the possibility of conferring universal jurisdiction on its courts where the author of the offence is not present on its territory, Belgium contends lastly that, even in the absence of any treaty or custom to this effect, it enjoyed total freedom of action. To this end it cites from the Judgment of the Permanent Court of International Justice in the *"Lotus"* case:

> "Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules . . ."[21]

[20] House of Lords, 25 November 1998, *R.* v. *Bartle*; ex parte *Pinochet*.
[21] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 19.

Hence, so Belgium claimed, in the absence of any prohibitive rule it was entitled to confer upon itself a universal jurisdiction *in absentia*.

14. This argument is hardly persuasive. Indeed the Permanent Court itself, having laid down the general principle cited by Belgium, then asked itself "whether the foregoing considerations really apply as regards criminal jurisdiction"[22]. It held that either this might be the case, or alternatively, that: "the exclusively territorial character of law relating to this domain constitutes a principle which, except as otherwise expressly provided, would, *ipso facto*, prevent States from extending the criminal jurisdiction of their courts beyond their frontiers"[23]. In the particular case before it, the Permanent Court took the view that it was unnecessary to decide the point. Given that the case involved the collision of a French vessel with a Turkish vessel, the Court confined itself to noting that the effects of the offence in question had made themselves felt on Turkish territory, and that consequently a criminal prosecution might "be justified from the point of view of this so-called territorial principle"[24].

15. The absence of a decision by the Permanent Court on the point was understandable in 1927, given the sparse treaty law at that time. The situation is different today, it seems to me — totally different. The adoption of the United Nations Charter proclaiming the sovereign equality of States, and the appearance on the international scene of new States, born of decolonization, have strengthened the territorial principle. International criminal law has itself undergone considerable development and constitutes today an impressive legal *corpus*. It recognizes in many situations the possibility, or indeed the obligation, for a State other than that on whose territory the offence was committed to confer jurisdiction on its courts to prosecute the authors of certain crimes where they are present on its territory. International criminal courts have been created. But at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. To do this would, moreover, risk creating total judicial chaos. It would also be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined "international community". Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward.

16. States primarily exercise their criminal jurisdiction on their own territory. In classic international law, they normally have jurisdiction in respect of an offence committed abroad only if the offender, or at least

[22] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 20.
[23] *Ibid.*
[24] *Ibid.*, p. 23.

the victim, is of their nationality, or if the crime threatens their internal or external security. Additionally, they may exercise jurisdiction in cases of piracy and in the situations of subsidiary universal jurisdiction provided for by various conventions if the offender is present on their territory. But apart from these cases, international law does not accept universal jurisdiction; still less does it accept universal jurisdiction *in absentia*.

17. Passing now to the specific case before us I would observe that Mr. Yerodia Ndombasi is accused of two types of offence, namely serious war crimes, punishable under the Geneva Conventions, and crimes against humanity.

As regards the first count, I note that, under Article 49 of the First Geneva Convention, Article 50 of the Second Convention, Article 129 of the Third Convention and Article 146 of the Fourth Convention:

> "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, [certain] grave breaches [of the Convention], and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned . . ."

This provision requires each contracting party to search out alleged offenders and bring them before its courts (unless it prefers to hand them over to another party). However, the Geneva Conventions do not contain any provision on jurisdiction comparable, for example, to Article 4 of the Hague Convention already cited. What is more, they do not create any obligation of search, arrest or prosecution in cases where the offenders are not present on the territory of the State concerned. They accordingly cannot in any event found a universal jurisdiction *in absentia*. Thus Belgium could not confer such jurisdiction on its courts on the basis of these Conventions, and the proceedings instituted in this case against Mr. Yerodia Ndombasi on account of war crimes were brought by a judge who was not competent to do so in the eyes of international law.

The same applies as regards the proceedings for crimes against humanity. No international convention, apart from the Rome Convention of 17 July 1998, which is not in force, deals with the prosecution of such crimes. Thus the Belgian judge, no doubt aware of this problem, felt himself entitled in his warrant to cite the Convention against Torture of 10 December 1984. But it is not permissible in criminal proceedings to reason by analogy, as the Permanent Court of International Justice indeed pointed out in its Advisory Opinion of 4 December 1935 concerning the *Consistency of Certain Danzig Legislative Decrees with the Con-*

stitution of the Free City[25]. There too, proceedings were instituted by a judge not competent in the eyes of international law.

If the Court had addressed these questions, it seems to me that it ought therefore to have found that the Belgian judge was wrong in holding himself competent to prosecute Mr. Yerodia Ndombasi by relying on a universal jurisdiction incompatible with international law.

(Signed) Gilbert GUILLAUME.

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[25] *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Advisory Opinion, 1935, P.C.I.J., Series A/B, No. 65,* pp. 41 *et seq.*