DECLARATION OF JUDGE RANJEVA

[Translation]

Effect of withdrawal of the Congo's original first submission — Exclusion of universal jurisdiction in absentia *from the subject-matter of the claims — Universal jurisdiction of national courts: Belgian legislation — Development of the régime of universal jurisdiction under international law — Maritime piracy and universal jurisdiction under customary law — Obligation to punish and jurisdiction of national courts —* Aut judicare aut dedere *— Seriousness of offences not a basis for universal jurisdiction — Interpretation of the* "Lotus" *case — No recognition yet under international law of universal jurisdiction* in absentia *in the absence of a connecting factor.*

1. I fully subscribe to the Judgment's conclusion that the issue and international circulation of the arrest warrant of 11 April 2000 constituted violations of an international obligation owed by Belgium to the Congo in that they failed to respect the immunity from criminal jurisdiction of the Congo's Minister for Foreign Affairs. I also approve of the Court's position in refraining, in the light of the Congo's submissions as finally stated, from raising and dealing with the issue whether the legality of the warrant was subject to challenge on account of universal jurisdiction as it was exercised by Belgium.

2. Logical considerations should have led the Court to address the question of universal jurisdiction, a topical issue on which a decision in the present case would have necessarily set a precedent. The Congo's withdrawal of its original first submission (see paragraphs 17 and 21 of the Judgment) was not sufficient *per se* to justify the Court's position. The first claim as originally formulated could reasonably have been deemed a false submission and construed as a ground advanced to serve as the basis for the main relief sought: a declaration that the arrest warrant was unlawful as constituting a violation of immunities from criminal jurisdiction. As a result of the amendment of the Congo's claim, the question of universal jurisdiction was transformed from a ground of claim into a defence for Belgium. Procedurally, however, the Court must rule on the submissions and the grounds of the claims, and do so regardless of the intrinsic interest presented by questions raised in the course of the proceedings. Given the submissions concerning the unlawfulness of the warrant, it became unnecessary, to my great regret, to address the second aspect of unlawfulness. One thing is certain: there is no basis for concluding from the text of the Judgment that the Court was indifferent to the question of universal jurisdiction. That remains an open legal issue.

3. The silence maintained by the Judgment on the question of universal jurisdiction places me in an awkward position. Expressing an opinion

on the subject would be an unusual exercise, because it would involve reasoning in the realm of hypothesis, whereas the problem is a real one, not only in the present case but also in the light of developments in international criminal law aimed at preventing and punishing heinous crimes violating human rights and dignity under international law. This declaration will accordingly address Belgium's interpretation of universal jurisdiction.

4. Acting pursuant to the Belgian Law of 16 June 1993, as amended on 10 February 1999, concerning the punishment of serious violations of international humanitarian law, an investigating judge of the Brussels Tribunal de première instance issued an international arrest warrant against Mr. Yerodia Ndombasi, the then Minister for Foreign Affairs of the Congo. Mr. Yerodia was accused of serious violations of humanitarian law and of crimes against humanity. Under Article 7 of that Law, perpetrators of such offences are "subject to the jurisdiction of the Belgian courts, irrespective of their nationality or that of the victims" (arrest warrant, para. 3.4). The interest presented by this decision lies in the fact that the case is truly one of first impression.

5. The Belgian legislation establishing universal jurisdiction *in absentia* for serious violations of international humanitarian law adopted the broadest possible interpretation of such jurisdiction. The ordinary courts of Belgium have been given jurisdiction over war crimes, crimes against humanity and genocide committed by non-Belgians outside Belgium, and the warrant issued against Mr. Yerodia is the first instance in which this radical approach has been applied. There would appear to be no other legislation which permits the exercise of criminal jurisdiction in the absence of a territorial or personal connecting factor, active or passive. The innovative nature of the Belgian statute lies in the possibility it affords for exercising universal jurisdiction in the absence of any connection between Belgium and the subject-matter of the offence, the alleged offender or the relevant territory. In the wake of the tragic events in Yugoslavia and Rwanda, several States have invoked universal jurisdiction to prosecute persons suspected of crimes under humanitarian law; unlike Mr. Yerodia, however, the individuals in question had first been the subject of some form of proceedings or had been arrested; in other words, there was already a territorial connection.

6. Under international law, the same requirement of a connection *ratione loci* again applies to the exercise of universal jurisdiction. Maritime piracy affords the sole traditional example where universal jurisdiction exists under customary law. Article 19 of the Geneva Convention of 29 April 1958 and Article 105 of the Montego Bay Convention of 10 December 1982[1] provide:

[1] United Nations Convention on the Law of the Sea.

"On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, 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 . . ."

Universal jurisdiction under those circumstances may be explained by the lack of any predetermined sovereignty over the high seas and by the régime of their freedom; thus, normally, the jurisdiction of the flag State serves as the mechanism which ensures respect for the law. But since piracy by definition involves the pirate's denial and evasion of the jurisdiction of any State system, the exercise of universal jurisdiction enables the legal order to be re-established. Thus, in this particular situation the conferring of universal jurisdiction on national courts to try pirates and acts of piracy is explained by the harm done to the international system of State jurisdiction. The inherent seriousness of the offence itself has, however, not been deemed sufficient *per se* to establish universal jurisdiction. Universal jurisdiction has not been established over any other offence committed on the high seas (see, for example: the Conventions of 18 May 1904 and 4 May 1910 (for the suppression of the white slave traffic); the Convention of 30 September 1921 (for the suppression of the traffic in women and children); the Conventions of 28 June 1930 (concerning forced labour) and of 25 June 1957 (abolishing forced labour)).

7. There has been a movement in treaty-based criminal law over the last few decades towards recognition of the obligation to punish and towards a new system of State jurisdiction in criminal matters. While the 1949 Geneva humanitarian law conventions do give rise to international legal obligations, they contain no provision concerning the jurisdiction of national courts to enforce those obligations by judicial means. The same is true of the 1948 Genocide Convention. It was not until an international régime was established to combat terrorist attacks on aircraft that provisions were adopted implying the exercise of universal jurisdiction: the Hague Convention of 16 December 1970 enshrined the principle *aut judicare aut dedere* in Article 4, paragraph 2, as follows: "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 . . ."[2] It is to be noted that application of the principle *aut judicare aut dedere* is conditional on the alleged offender having first been arrested. This provision dating from 1970 served as a model for the extension in various subsequent conventions of the criminal jurisdiction of national courts through the exercise of universal

[2] Convention for the Suppression of Unlawful Seizure of Aircraft.

jurisdiction. These legal developments did not result in the recognition of jurisdiction *in absentia.*

8. In support of its argument, Belgium invokes not only an international legal obligation to punish serious violations of humanitarian law but also a generally recognized discretion to enact legislation in this area. It is not worth commenting further on the lack of merit in the first limb of this argument, which mistakenly confuses the obligation to punish with the manner in which it is fulfilled: namely a claim that national criminal courts have jurisdiction *in absentia* notwithstanding the lack of any provision conferring such jurisdiction. Thus Belgium's assertion that "[a]s has already been addressed, pursuant to Belgian law, Belgium has the right to investigate grave breaches of international humanitarian law even when the presumptive perpetrator is not found on Belgian territory" (Counter-Memorial of Belgium, p. 89, para. 3.3.28) begs the question. The examples cited in support of this proposition are not persuasive: of the 125 States having national legislation concerning punishment of war crimes and crimes against humanity, only five provide that the presence of the accused in their territory is not required for initiating prosecution (see Counter-Memorial of Belgium, pp. 98-99, para. 3.3.57).

9. Belgium relies on the decision in the *"Lotus"* case to justify the scope of national legislative powers:

> "It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law . . . 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, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable." (*P.C.I.J., Series A, No. 10*, p. 19.)

That same Judgment states further on:

> "[A]ll that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; . . . The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty." (*Ibid.*, pp. 19-20.)

Doubtless, evolving opinion and political conditions in the contemporary world can be seen as favouring the retreat from the territory-based conception of jurisdiction and the emergence of a more functional approach in the service of higher common ends. Acknowledging such a trend cannot however justify the sacrifice of cardinal principles of law in the name of a particular kind of modernity. Territoriality as the basis of entitle-

ment to jurisdiction remains a given, the core of contemporary positive international law. Scholarly acceptance of the principle laid down in the *"Lotus"* case in the context of combating international crimes has not yet found expression in a consequential development of the positive law relating to criminal jurisdiction.

10. Finally, Belgium places particular reliance on the following passage from the *"Lotus"* Judgment in support of its interpretation of universal jurisdiction *in absentia*:

> "Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State." (*P.C.I.J., Series A, No. 10*, p. 20).

It cannot reasonably be inferred that this proposition establishes universal jurisdiction *in absentia*. To the contrary, the Permanent Court manifested great caution; it limited its realm of investigation to the case before it and sought close similarities with analogous situations. Any attempt to read into this the bases of universal jurisdiction *in absentia* is mere conjecture: the facts of the case were confined to the issue of the Turkish criminal courts' jurisdiction as a result of the arrest in Turkish territorial waters of Lieutenant Demons, the second-in-command of a vessel flying the French flag.

11. In sum, the issue of universal jurisdiction *in absentia* arises from the problem created by the possibility of extraterritorial criminal jurisdiction in the absence of any connection between the State claiming such jurisdiction and the territory in which the alleged offences took place — of any effective authority of that State over the suspected offenders. This problem stems from the nature of an instrument of criminal process: it is not a mere abstraction; it is enforceable, and, as such, requires a minimum material basis under international law. It follows that an explicit prohibition on the exercise, as construed by Belgium, of universal jurisdiction does not represent a sufficient basis.

12. In conclusion, notwithstanding the deep-seated sense of obligation to give effect to the requirement to prevent and punish crimes under international humanitarian law in order to promote peace and international security, and without there being any overriding consequential need to condemn the Belgian Law of 16 June 1993, as amended on 10 February 1999, it would have been difficult under contemporary positive law not to uphold the Democratic Republic of the Congo's original first submission.

(Signed) Raymond RANJEVA.