

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

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

²⁰House 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.

²²*Ibid.*, p. 20.

²³*Ibid.*, p. 20.

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 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

²⁴*Ibid.*, p. 23.

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 Constitution 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.

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.*